HOUSE OF LORDS before Lord Wilberforce; Lord Fraser of Tullybelton; Lord Scarman; Lord Lowry; Lord Roskill. 25th February 1981.

Upon Report from the Appellate Committee to whom was referred the Cause Bunge Corporation, New York against Tradax Export S.A., Panama, *et e contra,* That the Committee had heard Counsel as well on Monday the 23rd as on Tuesday the 24th, Wednesday the 25th and Thursday the 26th days of February last upon the Petition and Appeal of Bunge Corporation of 1, Chase Manhattan Plaza, New York 10005, United States of America praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 14th day of December 1979 so far as therein stated to be appealed against might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order so far as aforesaid might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also upon the Petition and Cross-Appeal of Tradax Export S.A. of P.O. Box CH-1211 Geneva 12, Switzerland praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 14th day of December 1979 so far as therein stated to be appealed against might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order so far as aforesaid might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also the Case of Tradax Export S.A. and also upon the Case of Bunge Corporation lodged in answer to the said Original and Cross Appeals; and due consideration had this day of what was offered on either side in this Cause:

It is *Ordered* and *Adjudged,* by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 14th day of December 1979 in part complained of in the said Original and Cross Appeals be, and the same is hereby, **Affirmed** and that the said Petitions and Appeals be, and the same are hereby, dismissed this House: And it is further *Ordered,* That the Original Appellants do pay or cause to be paid to the said Original Respondents the Costs incurred by them in respect of the said Original Appeal, and that the Cross Appellants do pay or cause to be paid to the said Cross Respondents the Costs incurred by them in respect of the said Cross Appeal, the amount of such Costs to be certified by the Clerk of the Parliaments if not agreed between the parties.

Lord Wilberforce My Lords,
I have had the advantage of reading in advance the speech to be delivered by my noble and learned friend, Lord Roskill. I agree entirely with it and desire only to add a few observations on some general aspects of the case.

The appeal depends upon the construction to be placed upon clause 7 of GAFTA form 119 as completed by the special contract. It is not expressed as a " condition " and the question is whether, in its context and in the circumstances it should be read as such.

Apart from arguments on construction which have been fully dealt with by my noble and learned friend, the main contention of Mr. Buckley Q.C. for the appellant was based on the decision of the Court of Appeal in ***Hong Kong Fir Shipping Co., Ltd. v. Kawasaki Kisen Kaisha Ltd.*** [1962] 2 Q.B. 26, as it might be applied to clause 7. Diplock L.J., as he then was, in his seminal judgment illuminated the existence in contracts of terms which were neither, necessarily, conditions nor warranties, but, in terminology which has since been applied to them, intermediate or innominate terms capable of operating, according to the gravity of the breach, as either conditions or warranties. Relying on this, Mr. Buckley's submission was that the buyer's obligation under the clause, *to "give at least [15] consecutive days' notice of probable readiness of vessel(s) and of the approximate quantity required to be loaded ",* is of this character. A breach of it, both generally and in relation to this particular case, might be, to use Mr. Buckley's expression, " inconsequential ", i.e. not such as to make performance of the seller's obligation impossible. If this were so it would be wrong to treat it as a breach of condition: ***Hong Kong Fir*** would require it to be treated as a warranty.

This argument, in my opinion, is based upon a dangerous misunderstanding, or misapplication, of what was decided and said in ***Hong Kong Fir.*** That case was concerned with an obligation of seaworthiness, breaches of which had occurred during the course of the voyage. The decision of the Court of Appeal was that this obligation was not a condition, a breach of which entitled the charterer to repudiate. It was pointed out that, as could be seen in advance the breaches, which might occur of it, were various. They might be extremely trivial, the omission of a nail; they might be extremely grave, a serious defect in the hull or in the machinery; they might be of serious but not fatal gravity, incompetence or incapacity of the crew. The decision, and the judgments of the Court of Appeal, drew from these facts the inescapable conclusion that it was impossible to ascribe to the obligation, in advance, the character of a condition.

Diplock L.J. then generalised this particular consequence into the analysis which has since become classical. The fundamental fallacy of the appellant's argument lies in attempting to apply this analysis to a time clause such as the present in a mercantile contract, which is totally different in character. As to such a clause there is only one kind of breach possible, namely, to be late, and the questions which have to be asked are, first, what importance have the parties expressly ascribed to this consequence, and secondly, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole.

The test suggested by the appellants was a different one. One must consider, they said, the breach actually committed and then decide whether that default would deprive the party not in default of substantially the whole benefit of the contract. They invoked even certain passages in the judgment of Diplock L.J. in *Hong Kong Fir* to support it. One may observe in the first place that the introduction of a test of this kind would be commercially most undesirable. It would expose the parties, after a breach of one, two, three, seven and other numbers of days to an argument whether this

delay would have left time for the seller to provide the goods. It would make it, at the time, at least difficult, and sometimes impossible, for the supplier to know whether he could do so. It would fatally remove from a vital provision in the contract that certainty which is the most indispensable quality of mercantile contracts, and lead to a large increase in arbitrations. It would confine the seller - perhaps after arbitration and reference through the courts - to a remedy in damages which might be extremely difficult to quantify. These are all serious objections in practice. But I am clear that the submission is unacceptable in law. The judgment of Diplock L.J. does not give any support and ought not to give any encouragement to any such proposition; for beyond doubt it recognises that it is open to the parties to agree that, as regards a particular obligation, any breach shall entitle the party not in default to treat the contract as repudiated. Indeed, if he were not doing so he would, in a passage which does not profess to be more than clarificatory, be discrediting a long and uniform series of cases - at least from ***Bowes v. Shand*** (1877) 2 App. Cas. 455 onwards which have been referred to by my noble and learned friend. Lord Roskill. It remains true, as Lord Roskill has pointed out in ***Cehave N.V. v. Bremer Handelsgesellschaft m.b.**H.* [1976] 1 Q.B. 44, that the courts should not be too ready to interpret contractual clauses as conditions. And I have myself commended, and continue to commend, the greater flexibility in the law of contracts to which *Hong Kong Fir* points the way (***Reardon Smith Line Ltd. v. Hansen-Tangen*** [1976] 1 W.L.R. 989, 998). But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts. To such cases the "gravity" of the breach " approach of ***Hong Kong Fir*** would be unsuitable. I need only add on this point that the word " expressly " used by Diplock L.J. at p.70 of his judgment in *Hong Kong Fir* should not be read as requiring the actual use of the word " condition ": any term or terms of the contract, which, fairly read, have the effect indicated, are sufficient. Lord Diplock himself has given recognition to this in this House (***Photo Production Ltd. v. Securicor Transport Ltd.*** [I980] A.C. 827, 849). I therefore reject that part of the appellant's argument which was based upon it, and I must disagree with the judgment of the learned trial judge in so far as he accepted it. I respectfully endorse, on the other hand, the full and learned treatment of this issue in the judgment of Megaw L.J. in the Court of Appeal.

I would add that the argument above applies equally to the use which the appellant endeavoured to make of certain observations in ***United Scientific Holdings Ltd. v. Burnley Borough Council*** [1978] A.C. 904, a case on which I do not need to comment on this occasion.

In conclusion, the statement of the law in Halsbury's *Laws of England,* 4th Ed. Vol. 9 (Contract) paragraphs 481-2, including the footnotes to paragraph 482 (generally approved in the House in the ***United Scientific Holdings*** case), appears to me to be correct, in particular in asserting (1) that the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and (2) that broadly speaking time will be considered of the essence in " mercantile" contracts—with footnote reference to authorities which I have mentioned.

The relevant clause falls squarely within these principles, and such authority as there is supports its status as a condition - see ***Bremer Handelsgesellschaft v. J. H. Rayner & Co. Ltd.*** [1978] 2 Lloyd's Rep. 73 and cp. ***Turnbull & Co. (Pty) Ltd. v. Mundas Trading Co. (Pty) Ltd.*** [1954] 2 Lloyd's Rep. 198 (H.C. of A.). In this present context it is clearly essential that both buyer and seller (who may change roles in the next series of contracts, or even in the same chain of contracts) should know precisely what their obligations are, most especially because the ability of the seller to fulfil his obligation may well be totally dependent on punctual performance by the buyer.

I would dismiss the appeal, and for the reasons given by my noble and learned friend, Lord Roskill, the cross-appeal.

Lord Fraser of Tullybelton My Lords,
I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Wilberforce and Lord Roskill, and I agree with them. For the reasons stated by them I would dismiss the appeal and cross-appeal.

Lord Scarman My Lords,
I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Wilberforce and Lord Roskill. I agree with both of them, and would, therefore, dismiss the appeal and the cross-appeal.

I wish, however, to make a few observations upon the topic of "innominate" terms in our contract law. In ***Hong Kong Fir Shipping Co. Ltd. v. Kawasaki K.K. Ltd.*** [1962] 2 Q.B. 26, the Court of Appeal rediscovered and reaffirmed that English law recognises contractual terms which, upon a true construction of the contract of which they are part, are neither conditions nor warranties but are, to quote my noble and learned friend Lord Wilberforce's words in ***Bremer v. Vanden*** [1978] 2 Lloyd's Rep. 109 at p. 113, "intermediate". A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach. In the ***Hong Kong Fir*** case the term in question provided for the obligation of seaworthiness, breach of which it is well known may be trivial (e.g., one defective rivet) or very serious (e.g., a hole in the bottom of the ship). It is inconceivable that parties when including such a term in their contract could have contemplated or intended (unless they expressly say so) that one defective rivet would entitle the charterer to end the contract or that a hole in the bottom of the ship would not. I read the ***Hong Kong Fir*** case as being concerned as much with the construction of the contract as with the consequences and effect of breach. The first question is always, therefore, whether, upon the true construction of a stipulation and the contract of which it is part, it is a condition, an innominate term, or only a warranty. If the stipulation is one, which upon the true construction of the contract the parties have not made a condition, and breach of which may be attended by trivial, minor, or very grave consequences, it is innominate, and the court (or an arbitrator)

will, in the event of dispute, have the task of deciding whether the breach that has arisen is such as the parties would have said, had they been asked at the time they made their contract: - *" it goes without saying that, if that happens, the contract is at an end."*

Where, therefore, as commonly happens, the parties do not identify a stipulation as a condition, innominate term, or warranty, the court will approach the problem of construction in the way outlined by Upjohn L.J., at pp.63 and 64 of the report. As the Lord Justice put it, *"Where, however, upon the true construction of the contract, the parties have not made a particular stipulation a condition, it would in my judgment be unsound and misleading to conclude that, being a warranty, damages is necessarily a sufficient remedy."*

Unless the contract makes it clear, either by express provision or by necessary implication arising from its nature, purpose, and circumstances ("*the factual matrix* " as spelt out, for example, by Lord Wilberforce in his speech in the ***Reardon Smith*** case [1976] 1 W.L.R. 989, at pp.995E-997D), that a particular stipulation is a condition or only a warranty, it is an innominate term, the remedy for a breach of which depends upon the nature, consequences, and effect of the breach.

When the Court of Appeal had taken the logical step of declaring that the *Hong Kong Fir* analysis applied to contracts generally (**the *Hansa Nord*** case [1976] 1 Q.B. 44), the law was back where it had been left by Lord Mansfield in ***Boone v. Eyre*** (1777) 1 Hy. Bl. 273 and the judgment of Bramwell B. in ***Jackson v. Union Marine Insurance Co. Ltd.*** L.R. 10 C.P. 125. Section 11(1) (b) of the Sale of Goods Act 1893 can now be seen to be no more than a statutory guide to the use of the terms "condition" and "warranty" in that Act. It is not to be treated as an indication that the law knows no terms other than conditions and warranties. This fallacy was exposed in the *Hong Kong Fir* case. To read the subsection as a guide to a comprehensive classification of contractual terms is to convert it into a will-o'-the-wisp leading the unwary away from the true path of the law.

The difficulty in the present case is, as Mr. Buckley's excellent argument for the appellants revealed, to determine what is the true construction of the completed clause 7 of GAFTA form 119, which the parties incorporated in their contract. After some hesitation, I have concluded that the clause was intended as a term, the *buyer's* performance of which was the necessary condition to performance by the seller of his obligations. The contract, when made, was, to use the idiom of Diplock L.J. (***Hong Kong Fir*** p.65) and ***Demosthenes*** (Oratt. Attici. Reiske 867.11), "synallagmatic", i.e. a contract of mutual engagements to be performed in the future, or, in the more familiar English/Latin idiom, an "executory" contract. The seller needed sufficient notice to enable him to choose the loading port: the parties were agreed that the notice to be given him was 15 days: this was a mercantile contract in which the parties required to know where they stood not merely later with hindsight but at once as events occurred. Because it makes commercial sense to treat the clause in the context and circumstances of this contract as a condition to be performed before the seller takes his steps to comply with bargain, I would hold it to be not an innominate term but a condition.

Lord Lowry My Lords,
I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Wilberforce and Lord Scarman, as well as the comprehensive review of the facts and the relevant law contained in the speech about to be delivered by my noble and learned friend Lord Roskill. I respectfully agree with their opinions, which taken together leave little of value to be said.

If I venture to add a few words of my own (which gives me an opportunity to acknowledge the excellent arguments on both sides), it is because I wish to refer to two points of general interest and then to state shortly why I would hold the term breached by the buyers to have been a condition.

As your Lordships have observed, the appellants based themselves on ***Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Shipping Ltd.*** [1962] 2 Q.B. 26, but they sought from that case a degree of support which it could not give them by citing it for the proposition that a term of a contract is not a condition unless a breach of it is seen to have deprived the party not in default of substantially the whole benefit which he was intended to obtain from the contract. By this argument the appellants were saying that in ***Hong Kong Fir*** Diplock L.J., as he then was, had adopted a new criterion for deciding by means of hindsight whether a term was a condition or not.

This was wrong. In the first place, the term in question in ***Hong Kong Fir*** was one relating to seaworthiness, and the entire court agreed that it was not a condition but a term the remedy for a breach of which might be rescission (with or without damages) or merely damages for the breach. Secondly, at p.70 Diplock L.J. introduces the discussion by saying that there are many contractual undertakings of a more complex character which cannot be categorised as being conditions or warranties. And the description which has since been applied to this kind of term provides a conclusive answer to the appellants' contention. It is "intermediate" because it lies in the middle *between* a condition and a warranty (just as the remedy for its breach lies somewhere between the remedies for breach of a condition and breach of a warranty), and it is " innominate " because it is not *called* a condition or a warranty but assumes the character of each in turn.

It is by construing a contract (which can be done as soon as the contract is made) that one decides whether a term is, either expressly or by necessary implication, a condition, and not by considering the gravity of the breach of that term (which cannot be done until the breach is imminent or has occurred). The latter process is not an aid to construing the contract, but indicates whether rescission or merely damages is the proper remedy for a breach for which the innocent party might be recompensed in one way or the other according to its gravity. The approach of Diplock L.J. at pp.69-70 of ***Hong Kong Fir*** is absolutely consistent with the classic statement of Bowen L.J. in ***Bentsen v. Taylor*** [1893] 2 Q.B. 274, 281 which Sellers L.J. cited at p.60.

The "wait and see" method, or, as my noble and learned friend Lord Wilberforce has put it, the "gravity of the breach" approach, is not the way to identify a condition in a contract. This is done by construing the contract in the light of the surrounding circumstances. By his illuminating analysis Diplock L.J. shed a new light on old and accepted principles: he did not purport to establish new ones.

The second general point which I desire to mention concerns stipulations as to time in mercantile contracts, in regard to which it has been said that, broadly speaking, time will be considered to be of the essence. To treat time limits thus means treating them as conditions, and he who would do so must pay respect to the principle enunciated by Roskill L.J., as he then was, in the ***Hansa Nord*** case [1976] Q.B. 44, 71A, that contracts are made to be performed and not to be avoided.

The treatment of time limits as conditions in mercantile contracts does not appear to me to be justifiable by any presumption of fact or rule of law, but rather to be a practical expedient founded on and dictated by the experience of businessmen, just the kind of thing which Bowen L.J. could have had in mind when framing his classic observations on the implied term in ***The Moorcock*** (1889) 14 P.D. 64 at p.68:- *" Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties of covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what " the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances. Now what did each party in a case like this know? For if we are examining into their presumed intention we must examine into their minds as to what the transaction was."*

This passage has stood the test of time and I commend it to all lawyers who undertake to advise their clients on mercantile affairs.

In order to identify an implied term (concerning which both parties to the contract, being men of business, would say, *"of course; it goes without saying"* one must construe the contract in the light of the surrounding circumstances and, to understand how that is done, we cannot do better than read the passage from Lord Wilberforce's speech in the ***Reardon Smith*** case [1976] 1 W.L.R. 989 at pp 995E-997C to which my noble and learned friend, Lord Scarman, has already referred your Lordships.

The law having been established, why should we regard the term here in question as a condition. I start by expressing my full agreement with the reasons given in your Lordships' speeches. Among the points which have weighed with me are the following: -

1. There are enormous practical advantages in certainty, not least in regard to string contracts where today's buyer may be tomorrow's seller.
2. Most members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions.
3. Decisions would be too difficult if the term were innominate, litigation would be rife and years might elapse before the results were known.
4. The difficulty of assessing damages is an indication in favour of condition: ***McDougall v. Aeromarine of Emsworth Ltd.*** [1958] 1 W.L.R. 1126, 1133.
5. One can at least say that recent litigation has provided indications that the term is a condition. Parties to similar contracts should (failing a strong contra-indication) be able to rely on this: ***The Mihalis Angelos*** [1971] 1 Q.B. 164, 199F per Edmund-Davies L.J.
6. To make "total loss" the only test of a condition is contrary to authority and experience, when one recalls that terms as to the date of sailing, deviation from a voyage and the date of delivery are regarded as conditions, but that failure to comply with them does not always have serious consequences.
7. Nor need an implied condition pass the total loss test: see 6 above.
8. If the consequences of breach of condition turn out to be slight, the innocent party may treat the condition as an innominate term or a warranty.
9. While the sellers could have made time of the essence, if it were not so already, this would require reasonable notice, which might well not be practical either in a string contract or at all.
10. In ***Tarrabochia v. Hickie*** 1 H. & N. 183; 156 E.R. 1168, upon which the appellants strongly relied, Bramwell B. said: *" No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves, it is necessary for those who construe the instrument to see whether they intend to do it. Since, however, they could have done it, those who construe the instrument should be chary in doing for them that which they might, but have not done for themselves."*

But in that very case both Pollock C. B. and Bramwell B., without the benefit of any express term, said that, where the agreement was that a ship should sail on a particular day, that was a condition precedent.

11. To accept the argument that conditions ought not to be *implied "because the parties themselves know how to describe a term"* would logically condemn the entire doctrine of implied terms.
12. Arbitrators and courts might, if the term were innominate, give different answers concerning the effect of a breach in very similar transactions, and parties could never learn by experience what was likely to happen in a given situation. So-called string contracts are not made, or adjudicated on, in strings.

The only arguments against treating the term as a condition appear to me to be based on generalities, whereas the considerations which are peculiar to this contract and similar contracts tell in favour of its being a condition.

For these reasons, and for the reasons given by my noble and learned friends, I would concur in dismissing both the appeal and the cross-appeal.

Lord Roskill My Lords,
The appellants (Bunge Corporation, New York) were the buyers and the respondents (Tradax Export S.A., Panama) the sellers under a contract concluded on 30th January 1974 through their respective brokers in Antwerp and Rotterdam for the sale and purchase of 15,000 long tons, 5% more or less in vessel's option, of United States soyabean meal, shipment of 5,000 long tons in each of May, June and July 1975 at a price of U.S. dollars 199-50 per metric ton, F.O.B. one United States Gulf port at sellers' option. The respondents through their associated German company issued a contract note bearing that date for 5,000 long tons, 5% more or less for May 1975 shipment and the present appeal arises out of that May 1975 shipment. The appellants' brokers in Antwerp issued a single contract note for the entire quantity of 15,000 tons already referred to. The two contract notes were not in identical terms but nothing now depends upon the differences.

The contract incorporated the terms and conditions of GAFTA form 119. The relevant extracts from the two contract notes are as follows.

The respondents' Contract Note.

" *Quantity* 5,000 (five thousand) tons of 2,240 lbs, 5% more or less in vessel's option at contract price, to be declared latest when nominating the vessel.

Shipment May, 1975—buyers to give sellers 15 days loading notice F.o.b. one Gulf port at seller's option, stowed/trimmed."

The appellants' Contract Note.

" *Quantity* 15,000 L.T. of 1.016 kilos, 5% more or less at vessel's option at contract price, quantity to be declared latest when nominating vessel. . . .

Other Conditions. . . . Buyers to give 15 days preadvice of readiness of steamer."

The most relevant clauses in form 119 are as follows:

"7. Period of Delivery. During....................................at Buyers' call. Buyers shall give at least...................................consecutive days' notice of probable readiness of vessel(s), and of the approximate quantity required to be loaded. Buyers shall keep Sellers informed of any changes in the date of probable readiness of vessel(s).

"8. Extension of Delivery. The contract period of delivery shall, if desired by Buyers, be extended by an additional period of one calendar month, provided that Buyers give notice in accordance with the Notices Clause not later than the next business day following the last day of the delivery period. In this event Sellers shall carry the goods at Buyers account and all charges for storage, interest, insurance and other such normal carrying expenses shall be for Buyers' account. Should Buyers not have taken delivery by the end of this extension period, Sellers shall have the option of declaring the Buyers to be in default or shall be entitled to demand payment at contract price plus such charges as stated above, less current f.o.b. charges against warehouse warrants and such tender of warehouse receipts shall be considered complete performance of the contract on the part of the Sellers." . . .

"20. Notices. Any Notices received after 1600 hours on a business day shall be deemed to have been received on the business day following. A Notice to the Broker or Agent shall be deemed a Notice under this contract. All Notices given under this contract shall be given by letter or by telegram or by telex or by other method of rapid written communication. In case of resales all Notices shall be passed on without delay by Buyers to their respective Sellers or vice versa." . . .

"22. Default. In default of fulfilment of contract by either party, the other, at his discretion shall, after giving notice by letter, telegram or telex, have the right to sell or purchase, as the case may be, against the defaulter and the defaulter shall make good the loss, if any, on such purchase or sale on demand. If the party liable to pay be dissatisfied with the price of such sale or purchase or if the above right is not exercised and damages cannot be mutually agreed, any damages, payable by the party in default, shall be settled by arbitration. In the event of default by Sellers entitling Buyers to damages, such damages shall be based upon the actual or estimated value of the goods on date of default, to be fixed by arbitration unless mutually agreed, and nothing contained in or implied under this contract shall entitle Buyers to recover any damages in respect of loss of profit upon any sub-contracts made by themselves or others unless the Arbitrators or Board of Appeal, having regard to any special circumstances, shall in their sole and absolute discretion award such damages. In the event of default in shipment or delivery, damages, if any, shall be computed upon the mean contract quantity."

My Lords, since it was agreed that there was no material difference between the two important clauses regarding the giving of the 15 days' notice to which those clauses refer, it is clear that the two blanks in clause 7 of form 119 have to be treated as completed with the words " during May 1975 " in the first blank and the figures " 15 " in the second blank, so that clause 7 thus completed reads: *" Period of delivery—during May 1975 at Buyers' call. Buyers shall give at least 15 consecutive days' notice of probable readiness of vessel(s) and of the approximate quantity required to be loaded. Buyers shall keep Sellers informed of any changes in the date of probable readiness of the vessel(s)."*

It was found by the Board of Appeal of GAFTA, in paragraph 6 of the special case, that extensions were claimed under clause 8 of form 119 so that the relevant delivery period became June 1975. The Board of Appeal also found in paragraph 11 of the special case, that the appellants' nomination of the vessel concerned to load what had thus become a June shipment was given to the respondents at 0846 on 17th June 1975 when it was received by the respondents' brokers in Rotterdam, less than 15 consecutive days before the end of the extended shipment period. It is not necessary to detail the passing on of this notice until it reached the respondents on 18th June 1975. On 20th June 1975 the respondents claimed default because of the alleged lateness of the appellants' notice. The relevant details will be found in paragraphs 12, 13, and 14 of the special case. As is found in paragraph 19 of the special case, the market price had by then fallen by over U.S. $60 per metric ton. The respondents claimed damages from the appellants. The dispute was referred to arbitration in accordance with clause 26 of form 119. The umpire awarded the respondents U.S. $317.500 as damages, this figure being based on the mean contract quantity of 5,000 long tons together with certain other sums not now immediately relevant. The appellants appealed to the Board of Appeal of GAFTA and that Board consisting of five members dismissed their appeal in all respects but stated a special case for the decision of the court. Upon the hearing of that special case by Parker J., that learned judge reversed the decision of the Board of Appeal and upheld their alternative award. The respondents thereupon appealed to the Court of Appeal (Megaw, Browne and Brightman L.JJ.) who restored the award of the Board of Appeal on liability but varied the quantum of damages holding that these should be measured by the minimum quantity the appellants would have been obliged to take. Leave to appeal to your Lordships' House was granted by the Court of Appeal.

My Lords, your Lordships' House is the fifth tribunal before whom this dispute has been heard. I understand all your Lordships are agreed that the appeal and also the cross-appeal on quantum fail in substance for the reasons given by Megaw L.J. in, if I may respectfully say so, a powerful and closely reasoned judgment in the Court of Appeal. It follows that the same view upon the main issue involved in this dispute has been formed by six members of GAFTA, three learned Lords Justices and five members of your Lordships' House, a total of fourteen with only the learned judge taking the opposite view on that main issue. My Lords, I intend no disrespect to the learned judge in pointing this out. I do so merely for the purpose of expressing regret that, notwithstanding repeated adverse comments in your Lordships' House, in a simple case of this kind there should be a succession of no less than four appeals from the decision of an umpire well versed in disputes of this kind and that this is still possible. I derive some comfort however, from the fact that with the passing of the Arbitration Act 1979 this multiplicity of appeals should soon be a thing of the past.

My Lords, the central question in this appeal is whether the appellants' obligation under clause 7 completed as I have completed it, are of such a character that a breach of them by the appellants such as, in my view, undoubtedly took place, entitled the respondents forthwith to rescind and claim damages. Put into lawyers' language - is the appellants' obligation to give the required 15 days' notice a condition or not? If it is, this appeal fails. If it is not, this appeal must succeed. As already stated, at all stages of these proceedings, save one, this obligation has been held to be a condition. The learned judge not only held that it was not a condition but also held that there was no breach by the appellants of clause 7. The Court of Appeal disagreed and this latter submission which found favour with the learned judge was not - rightly in my view - pursued in argument before your Lordships' House.

My Lords, the relevant phrase "give at least 15 consecutive days' notice" consists only of six words and two digits. But the able arguments of which your Lordships have had the benefit have extended over 3 full days. The appellants' arguments may be summarised thus. They submitted that this term was not a condition but was what has come to be described since the ***Hong Kong Fir*** case [1962] 2 Q.B. 26, as an " innominate " obligation - neither a condition nor a warranty, and that when a term is an innominate obligation the question whether or not a breach gives the innocent party the right to rescind depends upon whether the innocent party was thereby deprived " of substantially the whole benefit which it was intended he should obtain " from the contract ". This last quotation is from the judgment of Diplock L.J. (as he then was) in the ***Hong Kong Fir*** case at page 70 of the report. It was further argued that since the respondents accepted that they could not show the now admitted breach by the appellants in giving a late notice had deprived them of substantially the whole benefit which it was intended they should obtain from the contract, the respondent had no right to rescind on account of that late notice. Much reliance was also placed by Mr. Roger Buckley, Q.C. for the appellants upon the ensuing passage in the learned Lord Justice's judgment, also at page 70 of the report: " and the legal " consequences of a breach of such an undertaking, *unless provided for " expressly in the contract* [my emphasis], depend upon the nature of the event "*to which the breach gives rise*". There was, Mr. Buckley argued, no such "*express"* provision in this contract. Mr. Buckley also placed reliance upon the application of the principle enunciated in the ***Hong Kong Fir*** case, which was a case of a time charterparty relating to an unseaworthy ship, to contracts for the sale of goods, such as the present, by the Court of Appeal in **the *Hansa Nord*** case, [1976] Q.B. 44, a decision approved in your Lordships' House in the *Reardon Smith* case, [1976] 1 W.L.R. 989. The principles enunciated in the first two cases mentioned were, he said, of general application and pointed the way to a new and now correct approach to the question how a term in a contract alleged on the one hand to be a condition and on the other hand to be an " innominate term " should be approached.

My Lords, it is beyond question that there are many cases in the books where terms, the breach of which do not deprive the innocent party of substantially the whole of the benefit which he was intended to receive from the contract, were

nonetheless held to be conditions any breach of which entitled the innocent party to rescind. Perhaps the most famous is ***Bowes v. Shand*** (1877) 2 App. Cas. 455. ***Reuter v. Sala*** (1879) 4 C.P.D. 239, is another such case. Both these cases were decided before the Sale of Goods Act 1893 was enacted. But that Act only codified the relevant common law. I think Mr. Buckley was entitled to say that these two, and other similar cases, largely turned upon the fact that the breach complained of was part of the description of the goods in question and that would therefore today be a statutory condition under section 13 of the Sale of Goods Act. But there are many other cases, modern and less modern, where terms in contracts for the sale of goods have been held to be conditions any breach of which will give rise to a right to rescind. Though section 10 (1) of the Sale of Goods Act provides that, unless a different intention appears, terms as to the time of payment are not deemed to be of the essence of a contract of sale, there are many cases, notably those in connection with the opening of bankers credits and the payment against documents, where the relevant obligations have been held to be a condition a breach of which will entitle the innocent party to rescind. No useful purpose will be served by listing all those cases cited in argument on either side. Many are usefully collected in the judgment of Diplock J. (as he then was) in ***Ian Stach Limited v. Baker Bosley Ltd.*** [1958] 2 Q.B. 130 at pages 139-144, and I would emphasize in this connection the need for certainty in this type of transaction to which that learned judge referred at pages 143 and 144 of his judgment. Parties to commercial transactions should be entitled to know their rights at once and should not, when possible, be required to wait upon events before those rights can be determined. Of course, in many cases of alleged frustration or of alleged repudiatory delay it may be necessary to await events upon the happening or non-happening of which rights may well crystallise. But your Lordships' House has recently reiterated in a series of cases arising from the withdrawal of ships on time charter for non-payment of hire the need for certainty where punctual payment of hire is required and has held that the right to rescind automatically follows a breach of any such condition.

My Lords, I find nothing in the judgment of Diplock L.J. in the *Hong Kong Fir* case which suggests any departure from the basic and long standing rules for determining whether a particular term in a contract is or is not a condition and there is much in the judgment of Sellers LJ. with which Upjohn L.J. (as he then was) expressly agreed, to show that those rules are still good law and should be maintained. They are enshrined in the oft quoted judgment of Bowen L.J. (as he then was) in ***Bentsen v. Taylor*** [1893] 2 Q.B. 274 at 281. " There is no way of deciding " that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability." That well-known passage will be found quoted by Sellers LJ. at page 60 of the report in the ***Hong Kong Fir*** case. I would add a reference in this connection to the judgment of Scrutton L.J. in ***Comptoir Commercial Anversois v. Power*** [1920] 1 K.B. 868 at 899, where that learned Lord Justice added to the statements of the same principle in the Exchequer Chamber in ***Behn v. Burness*** (1863) 3 B. & S. 751 and in ***Oppenheim v. Fraser*** (1876) 34 L.T. 524, his own great authority.

My Lords, the judgment of Diplock L.J. in the ***Hong Kong Fir*** case is, if I may respectfully say so, a landmark in the development of one part of our law of contract in the latter part of this century. The learned Lord Justice showed by reference to detailed historical analysis, contrary to what had often been thought previously, that there was no complete dichotomy between conditions and warranties and that there was a third class of term, the innominate term. But I do not believe the learned Lord Justice ever intended his judgment to afford an easy escape route from the normal consequences of rescission to a contract breaker who had broken what was, upon its true construction, clearly a condition of the contract by claiming that he had only broken an innominate term. Of course when considering whether a particular term is or is not a condition it is relevant to consider to what other class or category that term, if not a condition, might belong. But to say that is not to accept that the question whether or not a term is a condition has to be determined solely by reference to what has to be proved before rescission can be claimed for breach of a term which has already been shown not to be a condition but an innominate term. Once it is appreciated that the whole of the passages on pages 69 and 70 of the learned Lord Justice's judgment are directed to the consequences of a term which is not a condition but an innominate term and not to the question of whether or not a particular term is a condition, the difficulties mentioned by Megaw L.J. in his judgment if the passages in question are read too literally, and as the appellants invite your Lordships to read them, disappear. The only criticism I would respectfully venture of these passages is the use of the adverb " expressly "in the passage I have already quoted from the middle of the full paragraph on page 70. Surely the same result must follow whether the legal consequences of the breach are also " impliedly " provided for in the contract upon that contract's true construction? In venturing this amend- ment to what the learned Lord Justice said, I derive comfort from the fact that my noble and learned friend, Lord Diplock himself in ***Photo Production Ltd. v. Securicor Transport Ltd.*** [1980] AC 827 at page 849, speaks of the case where the contracting parties have agreed " *whether by " express words or by implication of law"* (my emphasis) that " *any* " (Lord Diplock's emphasis) *" failure by one party to perform a particular primary obligation (' condition ' in the nomenclature of the Sale of Goods Act 1893), irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed "*. Thus I think it legitimate to suggest an amendment to the passage in [1962] 2 Q.B. at page 70 either by deleting the word " *expressly* " or by adding the words *" or by necessary implication* ".

My Lords, your Lordships' House had to consider a similar problem in relation to a different clause (clause 21) in a different GAFTA contract in ***Bremer v. Vanden*** [1978] 2 Lloyd's Rep. 109. In passing I would observe the text of that clause is inaccurately quoted in the headnote of the report but will be found correctly quoted in the speech of Viscount Dilhorne at page 121. My noble and learned friend Lord Wilberforce said at page 113: *" Automatic and invariable treatment of a clause such as this runs counter to the approach, which modern authorities recognise, of treating such a provision as having the force of a condition (giving rise to rescission or invalidity), or of a contractual term (giving rise to damages only) according to the nature and gravity of the breach. The clause is then categorised as an innominate term. This doctrine emerged very clearly in the* ***Hong Kong Fir*** *case in relation to the obligation of seaworthiness, and was as applied to*

a contract for sale of goods made on GAFTA form 100 in the ***Hansa Nord****, a decision itself approved by this House in the Reardon Smith case. In my opinion, the clause may vary appropriately and should be regarded as such an intermediate term: to do so would recognise that while in many, possibly most, instances, breach of it can adequately be sanctioned by damages, cases may exist in which, in fairness to the buyer, it would be proper to treat the cancellation as not having effect. On the other hand, always so to treat it may be often be unfair to the seller, and unnecessarily rigid."*

The passage I have just quoted was directed to clause 21 of the contract there in question. All members of your Lordships' House were of the opinion that that clause was not a condition because it was insufficiently definitive or precise - see the speeches of my noble and learned friends, Lord Salmon at page 128, and Lord Russell of Killowen at page 130. But it is important to observe that your Lordships' House had also to consider clause 22 of that contract. All members of your Lordships' House held that clause 22 was a condition - see the speeches of my noble and learned friends, Lord Wilberforce at page 116, and Lord Salmon at page 128. I venture to emphasise the statement in the former passage that accurate compliance with the stipulation in question was essential to avoid commercial confusion in view of the possibility of long string contracts being involved, a point of especial importance in the present case.

In short, while recognising the modern approach and not being over- ready to construe terms of conditions unless the contract clearly requires the court so to do, none the less the basic principles of construction for determining whether or not a particular term is a condition remain as as before, always bearing in mind on the one hand the need for certainty and on the other the desirability of not, when legitimate, allowing rescission where the breach complained of is highly technical and where damages would clearly be an adequate remedy. It is therefore in my opinion wrong to use the language employed by Diplock L.J. in the ***Hong Kong Fir*** case as directed to the determination of the question which terms of a particular contract are conditions and which are only innominate terms. I respectfully agree with what Megaw L.J. said in the passage in his judgment in the instant case at [1980] 1 Lloyd's Rep. 294 at pages 307, 308. The explanation of the passage which he quotes is that which I have just given.

My Lords, Mr. Buckley founded much of this part of his argument upon the decision of your Lordships' House in ***United Scientific Holdings v. Burnley Borough Council*** [1978] A.C. 904 when your Lordships' House, unanimously reversing two separate decisions of the Court of Appeal, held that the time table specified in rent review clauses for the completion of the various steps for determining the rent payable in respect of the period following the review was not of the essence. Naturally, Mr. Buckley relied upon a passage in the speech of my noble and learned friend. Lord Diplock, at page 928. I quote the passage in full. *" My Lords, I will not take up time repeating here what I myself said in the* ***Hong Kong Fir*** *case, except to point out that by 1873:*

(1) Stipulations as to the time at which a party was to perform a promise on his part were among the contractual stipulations which were not regarded as 'conditions precedent' if his failure to perform that promise punctually did not deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract;

(2) When the delay by one party in performing a particular promise punctually had become so prolonged as to deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract it did discharge that other party from the obligation to continue to perform any of his own promises which as yet were unperformed;

(3) Similar principles were applicable to determine whether the parties' duties to one another to continue to perform their mutual obligations were discharged by frustration of the adventure that was the object of the contract. A party's ability to perform his promise might depend upon the prior occurrence of an event which neither he nor the other party had promised would occur. The question whether a stipulation as to the time at which the event should occur was of the essence of the contract depended upon whether even a brief postponement of it would deprive one or other of the parties of substantially the whole benefit that it was intended that he should obtain from the contract."

Read literally, the passage might be thought to be of universal application and to suggest that by 1873 terms in contract as to time, whatever their character, were not to be construed as conditions any breach of which would give rise to a right to rescind unless the several prerequisites specified in this passage were fulfilled. My Lords, I do not think that my noble and learned friend can possibly have intended this passage to be so read. In the immediately preceding pages he had been dealing with the manner in which the courts of Chancery had been developing the equitable principles which he describes and explaining how contemporaneously the courts of common law were reaching the same result though by a different route. But to read the passage I have just quoted as of universal application and in particular as of application to to stipulations as to time in mercantile contracts would be to misread it, for it would be quite inconsistent with many earlier authorities such as ***Behn v. Burness*** as well as later authorities such as ***Bowes v. Shand, Reuter v. Sala*** and ***Bentsen v. Taylor*** to which I have already referred. That this is so is strongly reinforced by the fact that Mr. Hugh Francis Q.C., whose argument for the appellants was unanimously accepted by your Lordships' House, expressly conceded that the doctrine that my noble and learned friend, Lord Diplock, ultimately so clearly expounded at pages 926 to 928 did not apply in three classes of case of which the second was " where the courts may infer from the nature of the contract or the surrounding circumstances that the parties regard time stipulations as of the essence of their bargains; mercantile contracts . . ." - see page 908 of the report, a concession which I think was clearly rightly made.

In reply to this part of Mr. Buckley's argument Mr. Staughton drew your Lordships' attention to Halsbury's Laws of England (4th Edition, 1974) Volume 9, paragraphs 481 and 482. He was able to show that the penultimate full paragraph in paragraph 481 had been expressly approved by no less than three of your Lordships in the ***United Scientific Holdings*** case, by Viscount Dilhorne at page 937, Lord Simon of Glaisdale at pages 941 and 944, and by Lord Fraser of Tullybelton at page 958, while Lord Salmon at page 950 stated the law in virtually identical terms though

without an express reference to this particular passage in Halsbury. The passage in question reads thus: *"The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence."*

The relevant passage in paragraph 482 reads thus: *" Apart from express agreement or notice making time of the essence, the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties. Broadly speaking, time will be considered of the essence in ' mercantile ' contracts and in other cases where the nature of the contract or of the subject matter or the circumstances of the case require precise compliance."*

A footnote, No. 3, refers among other cases to ***Reuter v. Sala*** and to ***Bowes v. Shand***. My Lords, I agree with Mr. Staughton that the express approval of the passage in paragraph 481 cannot be taken as involving implied disapproval of the passage I have just quoted from paragraph 482.

My Lords, I venture to doubt whether much help is necessarily to be derived in determining whether a particular term is to be construed as a condition or as an innominate term by attaching a particular label to the contract. Plainly there are terms in a mercantile contract, as your Lordships' House pointed out in ***Bremer v. Vanden***, which are not to be considered as conditions. But the need for certainty in mercantile contracts is often of great importance and sometimes may well be a determining factor in deciding the true construction of a particular term in such a contract.

To my mind the most important single factor in favour of Mr. Staughton's submission is that until the requirement of the 15 day consecutive notice was fulfilled, the respondents could not nominate the "*one Gulf port*" as the loading port, which under the instant contract it was their sole right to do. I agree with Mr. Staughton that in a mercantile contract when a term has to be performed by one party as a condition precedent to the ability of the other party to perform another term, especially an essential term such as the nomination of a single loading port, the term as to time for the performance of the former obligation will in general fall to be treated as a condition. Until the 15 consecutive days' notice had been given, the respondents could not know for certain which loading port they should nominate so as to ensure that the contract goods would be available for loading on the ship's arrival at that port before the end of the shipment period.

It follows that in my opinion the umpire, the Board of Appeal and the Court of Appeal all reached the correct conclusion and for the reasons I have given I would dismiss the appellants' appeal. It will have been observed that I have reached this conclusion as a matter of the construction of the relevant clause. I have thus far paid no regard to the finding in paragraph 5 of the special case that "*This term in an FOB contract is regarded in the trade as of such great and fundamental importance that any breach thereof goes to the root of the contract.*" Naturally, though the crucial question of construction is a matter of law for the court, the court will give much weight to the view of the trade tribunal concerned. Though I question whether on the argument of a special case it is permissible to look outside the findings of fact in that special case to findings of fact in other special cases, Mr. Buckley was able to point to a contrary finding of fact by a different Board of Appeal of the same association in ***Bremer v. Rayner*** [1978] 2 Lloyd's Rep. 73 at page 81 *" Failure of an fob buyer to indicate to his seller the demurrage/despatch rate with the nomination of a vessel or at any time is not [my emphasis] customarily treated by the trade as being a term of great or fundamental importance to the contract such as to give a seller the right to reject the nomination or to refuse to ship the goods."*

The relevant clause 7 in that case will be found at page 85 of the report in the judgment of Mocatta J.

"7. Nomination of Vessel. Buyer to give nomination of vessel to seller, in writing, in time for seller to receive with minimum 15 days' notice of earliest readiness of tonnage at first or sole port of loading."

The learned judge held at page 89 of his judgment that the finding which I have just quoted did not preclude his reaching the conclusion that that clause was a matter of construction a condition, a breach of which entitled the innocent party to rescind. The learned judge's decision was reversed on appeal on a different point - see [1979] 2 Lloyd's Rep. 216. But Bridge L.J. (as he then was) at page 234 was at pains to say that as then advised he was not persuaded that on this question the learned judge had reached the wrong conclusion. See also the judgment of Megaw L.J. at page 229. With respect, I think that Mocatta J. was plainly correct in his conclusion on this question.

Mr. Staughton also relied upon a number of cases where the argument presently urged by Mr. Buckley might have been but was not advanced. They included ***Turnbull v. Mundas*** [1954] 2 Lloyd's Rep. 198, (a decision of the High Court of Australia which included Sir Owen Dixon C.J.) and ***Carapanayoti v. Andre*** [1972] 1 Lloyd's Rep. 139 - a decision of the Court of Appeal). With respect I doubt whether past omissions, whether for good or bad reasons, greatly advance the solution of the present problem.

My Lords, I would only add in conclusion that it seems clear from the argument and indeed from the judgment of Parker J. in the present case that certain passages in the judgment of Diplock L.J. in the *Hong Kong Fir* case and in the speech of my noble and learned friend Lord Diplock in ***United Scientific Holdings v. Burnley Borough Council*** have been read out of context and thus misunderstood. An excellent illustration of this misunderstanding is shown by the argument advanced and unanimously rejected in ***Toepfer v. Lenersan*** [1978] 2 Lloyd's Rep. 555 (Donaldson J. as he then was) and [1980] 1 Lloyd's Rep. 143 (Court of Appeal). There the sellers attempted on the strength of the decision in the *Hong Kong Fir* case to argue that the sellers' obligations regarding time for presentation of the documents against which the buyers had to pay not later than 20 days after the bill of lading date was not a condition a breach of which entitled the buyers to

rescind but was only an innominate term. I find myself in complete agreement with the observations of Donaldson J. pointing out how the ***Hong Kong Fir*** case had been misunderstood. I would, therefore, dismiss this appeal with costs.

My Lords, I turn to deal briefly with the respondents' cross-appeal. Both the umpire and the Board of Appeal awarded the respondents damages on the basis of the mean contract quantity of 5,000 long tons. They clearly reached this conclusion on the strength of the last sentence of clause 22 of GAFTA form 119. The Court of Appeal reduced the damages payable to the respondents by assessing them by reference not to 5,000 long tons but to 4,750 long tons being 5% less than the mean contract quantity, this being the minimum quantity the appellants would have been obliged to take. As a result of the Court of Appeal decision, the Board of Appeal subsequently made a supplementary award in the respondents' favour for a lesser amount based upon the figure of 4,750 long tons.

It was common ground that the reference in the contract "at vessel's option" meant "at buyers' option". My Lords it was also common ground that the Court of Appeal was bound to reach this conclusion by reason of an earlier decision of that court, ***Toprak v. Finagrain*** [1979] 2 Lloyd's Rep. 98 to which I was a party. In that case the court held that the relevant sentence in the contract applied only to default of shipment by the seller or default of delivery by the seller and not to default by the buyer. In the latter case damages fell to be assessed on ordinary principles.

My Lords the respondents urged that in this context " default" bore its primary dictionary meaning of "failure" or "want" or "absence" and that since there had been a "failure" or "want" or "absence" of shipment by the sellers that was sufficient to enable the last sentence of clause 22 to be invoked so as to require the respondents' damages to be assessed on the mean contract quantity.

My Lords, no doubt in some contexts the word "default" may bear this particular dictionary meaning. But in determining the meaning of the word in any case, the context in which the word in used is of crucial importance. One has only to see the number of times that the word "default" or "defaulter" is used in clause 22 to see that the context is one of a breach of contract sounding in damages and not of non-performance without breach. My Lords, I am clearly of the view that "default" in the last sentence of clause 22 means default by the sellers in breach of their contractual obligations. That sentence has no application to the present case. Accordingly with all respect to the umpire and the Board of Appeal in the present case I think that ***Toprak v. Finagrain*** was correctly decided. If the trade wishes to have the same result where the relevant default is by the buyer and not by the seller the terms of GAFTA form 119 and other similar terms will require to be altered. For these reasons I would dismiss the cross-appeal with costs.