



It is trite (but right) to say that no-one benefits from trade disputes

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Australian exporters of various commodities are suffering as a result of action by the Chinese Government, as are their Chinese counterparts.

At a macro-level, these issues will need to be resolved at a government and diplomatic level, or possibly at the WTO. But these can take time.

So where do risks lie under open contracts when imposts like tariffs are made? A recent decision of the Victorian Supreme Court provides some helpful guidance.

In *Full Joy Foods Pty Ltd v Australian Dairy Park Pty Ltd*¹ the Court was asked to decide on a challenge to an arbitration award pursuant to the *Commercial Arbitration Act 2011* (Vic).

At the centre of the dispute was an agreement dated 27 March 2017, between two Australian companies for the supply by Dairy Park (Seller) to Full Joy (Buyer) of infant milk products into China. The sale price was expressed to be "CIF USD". Most readers will know that 'CIF' is an abbreviation of 'Cost Insurance Freight'. This means that the sale price includes those three elements, so that the CIF Seller must also supply insurance and arrange carriage of the goods to their destination.

The Seller's obligations are generally discharged when it tenders the relevant commercial documents to the Buyer (usually a bill of lading, certificate of insurance and a commercial invoice).

'CIF' is also an 'Incoterm', which are standard definitions of trade terms (including CIF and FOB) published by the International Chamber of

Commerce. To the extent that it is relevant, the most recent version is 'INCOTERMS 2020' though again, to the extent it is relevant, its predecessor, INCOTERMS 2010 was the relevant version.

Relevantly, INCOTERMS also describes when risk is to pass. Its definition of CIF provides:

A4 Delivery [Seller's Obligation]

The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or with the agreed period and in the manner customary at the port.

A5 Transfer of risks [Seller's obligations]

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.

B5 Transfer of risks [Buyer's Obligations]

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4.

Curiously, as will emerge, the evidence was that the product was collected from the Seller by the Buyer's 'courier' and that the shipment was arranged by the Buyer.

Other relevant terms were:

5.2 The seller is responsible for the manufacture of the products and product quality; the seller will be

responsible for shipment from ADP to Tianjin Port according to CIF, but the buyer will take charge of the cost of health certificate and certificate of origin.

5.3 The testing fees must be paid by the buyer except the microbiology testing fees in Australia.

5.8 The Seller will ensure that the Products supplied to the Purchaser will conform to Import country standards, and be fit for human consumption.

A shipment of products (described as 'Step 1', 'Step 2' and 'Step 3' products) was made. Before export, the Seller had the products tested and obtained the necessary documents for export. The Buyer paid the purchase price.

When the goods arrived at Tianjin, the Chinese authorities also tested the goods and reported that one of the products ('Step 1 Product') was contaminated with bacterium. They denied entry to all of the products, which were eventually returned to Australia.

The Seller produced a new batch of Step 1 product, which was shipped to China and cleared Customs without incident.

Nevertheless, the Buyer refused to accept any more product under the contract on the basis of the default under the first shipment.

In due course, Full Joy commenced arbitration under the contract claiming damages and a refund of the purchase price in respect of the shipment of Step 2 and Step 3 product.

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Among other things, Full Joy alleged that under the contract

the respondent 'will ensure that the goods supplied to the Purchaser will conform to import country standards and be fit for human consumption.'

It appears that in their pleadings and at the hearing, neither party addressed the significance of the use of the term 'CIF' in the contract.

Following a hearing and exchange of written submissions, the arbitrator published his award finding in favour of the Seller. In summary, the arbitrator concluded that the Seller had complied with its CIF obligations, and title and risk in the product had passed on shipment or latest on negotiation of shipping documents.

The Buyer challenged the award. Readers will be aware that under Australia's arbitration legislation, modelled on the UNCITRAL Model Law, parties cannot 'appeal' an award on the basis that the arbitrator made an error of fact or law. Recourse against arbitration awards is limited (in summary) to misconduct by the Tribunal amounting to a denial of natural justice.

In this case, the Buyer alleged that under ss 34(2)(a)(ii) and 34(2)(b)(ii) of the Victorian *Commercial Arbitration Act* the arbitrator had relied on a matter not properly put in issue (that is, the significance of CIF) and the Buyer had not been afforded an opportunity to present its case, which was accordingly not in accordance with the public policy of the state, as a denial of natural justice.

The Buyer's principal grievance appears to have been an email sent by the arbitrator on 11 September 2019, following the hearing, providing directions as to the making of written submissions and stating:

Otherwise, as foreshadowed, I would be assisted if, in their respective closing submissions, the parties would address the following (this is by no means intended to be exhaustive, or even directive, as to the matters that the parties may wish to address in their submissions):

- *Were the step 2 and step 3 products in fact delivered, having regard to the applicable Incoterms (CIF) and paragraph 20 of Ms Shi's affidavit?*

In its closing submission, despite the arbitrator's request, the Buyer made no reference to the relevance of 'CIF' to the contract.

The Seller's submissions made reference to CIF, and the Buyer's submissions in reply again made no reference to CIF.

In his Award, the arbitrator focused on whether the product had been delivered in accordance with the contract.

In considering the nature of obligations under a contract designated CIF, the arbitrator assumed that the ICC definition was relevant, even though the contract does not appear to have so stipulated, and though it was not put in evidence by either party.

The arbitrator cited those parts of the ICC definition set out above, including transfer of risks.

In challenging the Award, one of the Buyer's grounds of complaint was that the arbitrator had assumed that the INCOTERMS definition of CIF was relevant (despite the fact that INCOTERMS were not referenced in the contract).

The judge found that 'it could have come as no surprise to the applicant that the arbitrator might treat the meaning of 'CIF' by reference to the Incoterms' and that to do so was 'by no means irrational or unlikely.'

Conclusion

This decision is informative on a number of levels. Leaving to one side aspects of the decision dealing with arbitration practice and procedure, it is a timely reminder of the importance of correct use of trade terms in contracts.

In the case of CIF contracts in particular, it is a reminder that the Buyer bears much of the risk once the goods are shipped (both as to risk of damage, and trade risk associated tariffs and phytosanitary matters), and the Seller bears little obligation to

ensure that the contracted goods are delivered at the contractual destination in the contracted condition.

This can be significant in the context of Trade disputes, particularly where import tariffs and duties are imposed. The risk associated with such imposts are (absent express terms in the contract such as 'Force Majeure') almost exclusively for the Buyer under CIF terms.

This can be contrasted with the term DDP, under which it is the Seller who has the obligation to deliver the goods at the destination and pay any duties associated with doing so.

That does not mean however that CIF Sellers should necessarily be quick to enforce their rights against defaulting Buyers. Those rights still need to be enforced, and attempts to enforce arbitration awards or judgments, particularly in some overseas jurisdictions can be problematic. ▲

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