Damages: The difference between the Gafta Default Clause and common law

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In an article published in the April 2016 issue of Gaftaworld (page 4), I highlighted that under the Default Clause regime of Gafta Contracts, the fact of "leaving a contract open for performance" meant according to the *Toprak** case, allowing either time for performance within the period notwithstanding the default, or a possible postponement of the "default date".

In this article I will endeavour to show the approach to be adopted by a trader following a default, in order to calculate damages, an approach which should rely exclusively on the rules laid down by the Commercial Court and the Court of Appeal in the *Toprak* case, and which *differ* from common law rules or the Sale of Goods Act.

The rationale of the Default Clause revolves first around a "date" (the default date) and then on a ''definition'', namely that made in *Toprak* for the word default. Default was defined as a "*failure to carry out the contract on the due date*" (Court of Appeal p99 column 1 of the Report referenced below). Many rules not found in common law were laid down by *Toprak* for calculating damages under the Default Clause. I will list some of them.

a) There is no waiver or estoppel after a default which can change the date of default (Court of Appeal p109 column 2, see also d). This makes perfect sense, since a date (the default date, which is established automatically when a default exists) cannot be waived. The modification of a date requires an agreement. I will say here that when one attaches more importance to the date concept of the Default Clause rather than to the default concept, the reasoning under this Clause becomes easier.

b) A repudiation even if it is *not* accepted is a default. It therefore enables to ascertain the default date (Toprak p109 column 1). This has recently been confirmed in Thai Maparn v. L.D.C. Asia.**

c) Once a default date is established, this date can be modified, and this only according to the strict rules set by the Court of Appeal (p.109 column 2). For such a modification to happen there must be either indulgence by the innocent party and reliance thereon by the defaulter in order for him to perform in the time available under the contract, or an offer to perform by the innocent party and an acceptance by the defaulter. No consideration other than these bilateral elements can enter into play for envisaging the modification of the default date.

d) The date of sending a default declaration to the defaulter is irrelevant for ascertaining the default date (Toprak pp108 and 109), such date should therefore be ignored.

It follows from the foregoing, that the reasoning of the trader who wants to ascertain the position as to the damages following a default, should consist of ascertaining the default date and *immediately* enquiring whether or not the facts warrant the application of the *Court of Appeal's principles* for a possible modification of the date found, as these are the only yardsticks for a possible modification of the default date.

As the Default Clause provides for a right to resell or cover, the default date is obviously equally important for ascertaining whether or not these contracts were concluded at a proper time.

* Toprak Mahsulleri Ofisi vs Finagrain Compagnie Commerciale Agricole Et Financiere S.A. [1979] 2 Lloyd's Rep. 98 Court of Appeal.
** Thai Maparn Trading Co Ltd v Louis Dreyfus Commodities Asia Pte Ltd ([2011] EWHC 2494).