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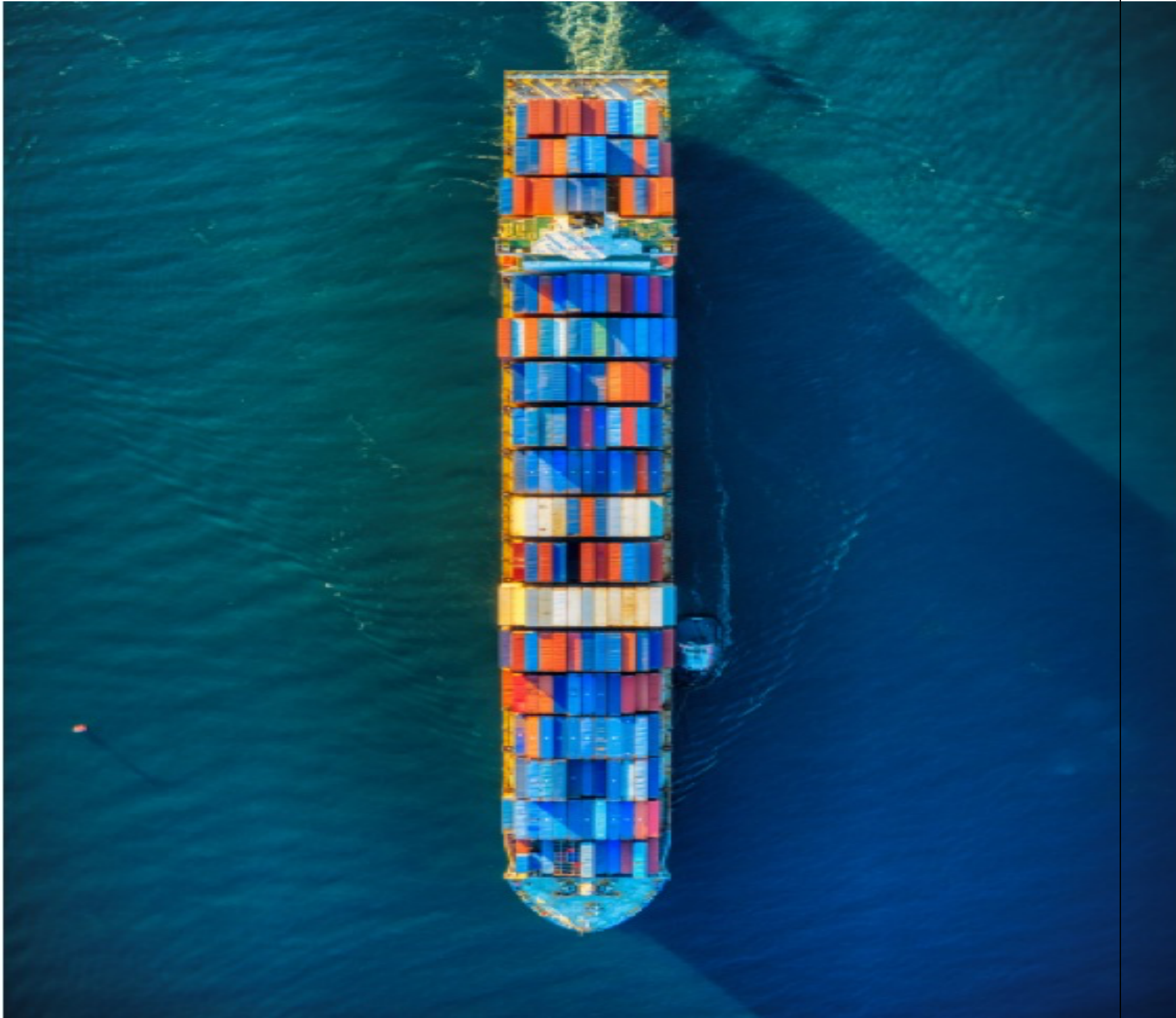

"Certificate final" clauses – in the pursuit of commercial certainty in commodity trading.

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Introduction

The courts would generally expect traders to faithfully follow the procedural machinery carefully deployed in a contract through negotiations and will disapprove of any unilateral attempt at upsetting the code that they agreed to adhere to. At the foot of this approach lies, primarily, the widespread need for commercial certainty in commodity trading where a chain of sales occurs through a set of negotiable documents that pass from hand to hand within a relatively short period of time. Neither the courts nor the parties up and down the chain will therefore be willing to support any efforts at derailing the intricately woven fabric of commercial arrangements jeopardising thereby a number of various business interests spread around the world. In certain circumstances, however, the courts may allow the parties to challenge the conclusiveness of a certificate in order to either uphold the sanctity of contract or protect the parties from fraud or a fundamental mistake affecting the contested certificate. Going beyond the tight frames of the common law exceptions would involve a substantial modification of the parties' rights and the risk of the opening of the floodgates to similar cases which would be calamitous to the commodity sector.

This paper is a brief overview of English case law in relation to "finality clauses". While there are occasional references to various arbitration rules, such as GAFTA or FOSFA, this paper does not purport to discuss these and is confined to judgments of the English courts.

Circumstances where a certificate remains final

"It must be remembered that numerous persons act on the faith of the certificate, such as the buyers, sub-buyers, bankers lending money and so forth. Good sense requires that the finality of the clause should be upheld by arbitrators and the courts in full." Denning LJ, *Alfred Toepfer v Continental Grain Co [1974] 1 Lloyd's Rep. 11*

Thus, if you have purchased a cargo of which quality/quantity is to be final at loading, this means exactly that: you buy a cargo of quality and quantity as certified at loading. If cargo deteriorates or is lost after loading, it is your risk and not seller's. This harsh rule works both ways: you lose today (as a buyer) but can win tomorrow (as a seller). Any bold attempt to overthrow a certificate of which conclusiveness the parties agreed to honour is unlikely to be tolerated by the courts.

Typically, a cargo will be tested twice: at loading and at the discharge port by a surveyor appointed by both parties in accordance with the contract. Frequently, a cargo at destination may be found to have a different quality from that certified at loading, or to be out of specification. In such circumstances, the contract would usually allow a further testing by an independent referee on the request of either party. If the certificate so issued is inaccurate, and possibly even due to negligence, it will continue to bind both parties provided the contract makes a provision for its finality, in the absence of fraud or manifest error.[1] If the certificate is not expressed to be final and binding, then the issue as to quality will probably

[1] The contact provided for the certificate to be "final and binding for both parties save for fraud or manifest error".

be resolved on a re-testing of the goods. Neither party will be allowed to carry out unsupervised internal review by a certifying company alone, without the consent of the other (*The Kriti Palm [2007] 1 Lloyd's Rep. 555).*

Alfred Toepfer v Continental Grain Co [1974] 1 Lloyd's Rep. 11
In that case the dispute revolved around a contract for the sale of No. 3 hard amber durum wheat. The contract provided for quality to be final at loading as per official inspection certificate. The wheat was certified as being in accordance with the contract, but in fact it was not (the percentage of hard vitreous kernels was too low and, therefore, it could not be certified as "hard"). The buyers claimed damages. The umpire and the Board of Appeal rejected the buyers' claim; so did the High Court. In the Court of Appeal, the main issue was whether the buyers were bound by a certificate which had been issued in error by a negligent inspector. It was held that they were.

"*The certificate in certifying that the wheat was No. 3 Hard Amber Durum Wheat was certifying the quality of the wheat; it was expressly agreed to be final and was binding on both buyer and seller. A mistake made by the certifier even when afterwards admitted by him to be a mistake did not invalidate the certificate. It remained binding as between seller and buyer*."

"*I am clearly of opinion that a mistake by a certifier even when afterwards admitted by him to be a mistake, does not invalidate the certificate. It remains binding as between seller and buyer and all down the chain. The Board of Appeal set out the commercial reasons which support this view: 'The commercial purpose of the provisions [for an official certificate to be final as to quality]... is to avoid disputes as to quality and to achieve finality in this respect once a proper certificate of inspection had been issued and tendered. A further reason... is that differences of opinion are otherwise to be expected among persons experienced in the grain trade … as to correct grading ... and such differences would otherwise give rise to numerous disputes.'*" Denning LJ

"*When parties enter into a contract in terms that the certificate of some independent person is to be binding as between them, it is important that the Court should not lightly relieve one of them from being bound by a certificate which was honestly obtained and not vitiated by fraud or fundamental mistake on the part of the certifier. When, for instance, as in this case, the certificate called for by the contract is one relating to the quality of goods sold, the business purpose is to avoid disputes about quality, and that purpose is defeated unless it is made difficult for a party to go behind a valid certificate.* Cairns LJ

The courts are unlikely to sympathise with those making a loss. Trading can be a game of chance and luck where one loses today but may win tomorrow. This is specifically true in relation to the issues of quality/condition and quantity. Upholding the sanctity of the contract is more important than mitigating the commercial hardship.

"It is another illustration of a case where the Court has to decide which of two innocent parties has to suffer for the mistake of a third… It is said that it is harsh that the buyers and not the sellers should suffer from the consequence of that mistake. I do not see why that follows... One might well get a case in which a mistake by the inspector operated the other way, for example, when he certified goods as being of a less good quality than they in fact were. In such a case the buyer, although he paid for the less good quality, would in fact get goods of a better quality. … Hardship can arise either way. What is more important than

hardship is to ensure that where parties use this language in their contract, the finality which the Court of Appeal recognised was the object of a clause of this kind is upheld…
it seems to me that on the present facts to allow this certificate to be re-opened would be to open the floodgates in this class of case". Roskill LJ

While it may seem exceedingly harsh for the buyers to be left without remedy as the result of a negligent certification, Denning LJ pointed out that this may not necessarily be the case. Although the buyers have no remedy against the seller, they may well have a remedy against the negligent certifier who, in principle, would be liable in damages to the party injured by his negligence.

In *The Kriti Palm [2007] 1 Lloyd's Rep. 555,* Rix LJ offered further guidelines as to how a wronged buyer and sub-buyers can be compensated:

"That dispute [as to quality] *may in practice be resolved by the agreed testing of loading samples; or simple negotiation; or the dispute may have to go to law... Toepfer is again authority for the proposition that in such circumstances, once a certificate has been given, the inspecting house, like a judge, is functus*[2]*. He is not like a solicitor, with that continuing obligation to advise his client and a continuing obligation of disclosure acknowledged in Williams.*

"*Where an invalid certificate is given, either party to the sale may have consequential losses which it will seek to recover from the certifier, in contract in the case of the client. Even a third party buyer in chain may have remedies against a negligent certifier, in tort rather than in contract. What the damages for such parties may be, whether clients of the certifier or not, will depend on the circumstances. Since, in the absence of fraud or manifest error, a valid certificate remains effective between the parties to a sale even if it is in fact inaccurate and possibly negligently so, the possibility of a third party suing the certifier for negligent misstatement or breach of a duty of care…"*

Although Rix LJ indicated that the negligent inspection company is not under legal duty to investigate the matter, he appealed to their "utility and morality" to ensure that certain steps are taken to mitigate the danger arising from an inaccurate certificate:

"A second possibility… is that utility and morality might combine to suggest that, when once any issue about a certificate has been identified, the certifier of a possibly inaccurate certificate owes a duty to investigate and report: not because the original certificate can be changed or substituted, but simply to throw further light on the question mark that has been raised. Even though the original certificate, if valid, cannot be withdrawn, amended or substituted, nevertheless the danger of inaccuracy or negligence requires the certifier at least to issue a sort of health warning about it, if he cannot confirm its accuracy in full measure. Since the investigation is required for the purpose of a further report, it follows that there must be disclosure of any investigation; indeed, there must be further investigation."

It is, however, unclear what the effect of such investigation will be. The courts will, generally, be unwilling to interfere with internal matters of inspection companies and will leave it to their management to scrutinise the procedure applied behind the erroneous certificate and the consequences arising therefrom. If a party who relied on such certificate

[2] With no further function to perform

would like to recover the loss incurred as a result of wrong certification, it will be able to do so by suing the surveyor either in contract or in tort.

The courts will generally preserve the unique status of the finality clause which are not subject to the ordinary rules of evidence.

Gill & Duffus S.A. v Berger & Co Inc [1983] 1 Lloyd's Rep. 622
The sellers sold Argentine Bolita beans, 1974 crop, c.i.f. Le Havre/Antwerp. Quality was to be "as per sample submitted to buyers and sealed by the General Superintendence Company". It also provided for "*Quality final at port of discharge as certificate of General Superintendence Co. Ltd. indicating that the quality of the lot is equal to one of the sealed samples*."
In relation to 445 tonnes of the goods (the goods were provided in two consignments), the sellers obtained an SGS certificate of quality which certified, inter alia, that "*the parcel of beans discharged .. is equal to the samples previously sealed...*" and contended that it is conclusive as to the quality of the goods. The buyers called upon the local court to appoint a surveyor. M. Trouplin, which was appointed to undertake a quality survey, found that the cargo included coloured pulses, weevil-affected pulses and waste matter (11.6% of the whole), whereas the buyers' sealed sample contained only 3.40% of the matter, and that the consignment bore no resemblance to the sealed sample. The buyers rejected the goods on the ground that they contained 1.8% of coloured beans (Bolita beans are white) and thus failed to comply with their description. The Court of Appeal ruled that the buyers could not invoke the presence of a small admixture of coloured beans for the purpose of claiming that the goods did not accord with the contract description without seeking to go behind the S.G.S. certificate in a manner which was not permitted by the contract. In any event, here quality and description were inseparable. Accordingly, the goods must be taken to have conformed to the contract description. The Court also agreed with the observations made by Lord Justice Cairns *in Toepfer v. Continental Grain Co. Ltd.,[1974] 1 Lloyd's Rep. 11* and indicated that when parties enter into a contract on terms that the certificate of some independent person is to be binding as between them, it is important for the Court not to lightly relieve one of them from being bound by a certificate which was honestly obtained and not vitiated by fraud or fundamental mistake on the part of the certifier. When for instance the certificate called for by the contract is one relating to the quality of goods sold, the business purpose is to avoid disputes about quality, and that purpose is defeated unless it is made difficult for a party to go behind a valid certificate.

"In the present case, the buyers do not dispute that the certificate was honestly obtained and that it is conclusive evidence against them in relation to those matters as to which the parties had previously agreed that the contemplated certificate should bind them. However, a "conclusive evidence" clause by its very nature, so far as it has any effect at all, operates so as wholly to exclude evidence which would otherwise be admissible in any dispute between buyer and seller, according to the ordinary rules of evidence. In my opinion, therefore, the first function of the Court, in any case where a clause of this nature is involved, must be carefully to analyse what are the particular matters in respect of which the parties have agreed that the contemplated certificate shall exclude evidence as to the true facts."

The court would expect traders who agreed to the binding nature of a certificate to honour their contractual commitment all the way through and will dismiss buyers' later complaints as to the quality of goods:

"On the true construction of this contract, and the conclusive evidence clause in particular, I think that the buyers must be treated as having agreed that the contemplated certificate … should wholly preclude them from subsequently complaining about characteristics of goods ultimately delivered to them pursuant to the contract, if such complaint would involve their giving evidence as to matters of fact which the parties, at the time of contracting, could reasonably have expected would be considered and taken into account by S.G.S. before giving a certificate as to quality of the nature specified in the contract.

In my opinion the parties to this contract, at the time of contracting, could reasonably have expected that the presence or absence of an admixture of coloured beans in a consignment would be considered and taken into account by S.G.S. before giving a certificate of the relevant nature." (Slade LJ)

Donaldson LJ indicated that the only matters that can be open to the courts are matters that fall outside the quality certificate:

"… there would have been no problem if the allegation had been that the beans were other than 1974 crop or of non-Argentinian origin, since neither fact would have affected their quality and so been relevant to the certificate. Equally there would have been no problem if the disconformity had been latent, since the quality certificate can only speak as to matters which are patent on such an inspection as is contemplated by the contract"

The case proceeded to the House of Lords which upheld the conclusiveness of the quality certificate (*Gill & Duffus S.A. v Berger & Co Inc [1984] 1 Lloyd's Rep. 227).*

If you are entitled under the contract to re-test the goods within a specified time limit, you should exercise this right to the fullest extent and carry out a further analysis. It allows you to have a second bite at the cherry. If a first surveyor proves to be incompetent and a certificate so issued is inaccurate, you will be able to trigger an additional testing procedure that is usually provided for in the contracts of this type.

The case of *Soules CAF v Louis Dreyfus Negoce S.A. [2000] 2 Lloyd's Rep. 307* goes on to show that sampling and analysing provisions are self-contained and form an exclusive, all-embracing code for determining disputes as to quality. If you go above and beyond the procedure encapsulated in the code to advance your claim against a seller, you are unlikely to succeed.

Soules CAF v Louis Dreyfus Negoce S.A. [2000] 2 Lloyd's Rep. 307
By a frame contract the sellers (Louis Dreyfus) sold to the buyers (Soules) 35,300 tonnes of Brazilian soya bean pellets c.i.f. free out one French port within a specified range. The sale contract contained a clause incorporating GAFTA 100 and specified varied prices with a provision for allowance against these prices if the combined protein and fat content of the pellet was less than 48%.

The GAFTA sampling provisions entitled both parties to require an analysis of samples at discharge and, if the variation between the two samples did not exceed 0.5%, the mean of the two analyses so obtained was to be final. If the variation exceeded 0.5%, either party was entitled to call for a third analysis in which case the mean of the two analyses nearest to each

other was to be final. If neither party called for a further analysis, the mean of the two original analyses was to be final.

Following discharge samples were sent for analysis to Salamon & Seaber (S&S) and to the Institut Européen de L'Environment de Bordeaux (IEEB) which issued analysis certificates on October 13 and 23 respectively. Although the variation between the combined samples was clearly in excess of the prescribed threshold of 0.5 % neither party called for a third analysis within 14 days (or at all) and the buyers invoiced the sellers for the appropriate allowance by reference to the two certificates that had been provided. On December 7 the sellers advised the buyers that they had been informed by S&S that an error had been found in their protein determination. S&S had accordingly reissued the original certificate with an amended figure of 45.91% protein. Despite the new certificate the buyers refused to issue a new invoice for allowances. The dispute was referred to arbitration. The GAFTA first tier arbitrators allowed the buyers' claim and the sellers appealed to the Board of Appeal. The board concluded that the original certificate was issued with an error which should have been, and was, corrected by S&S. The board further found that the corrected certificate was not the result of a further fresh analysis and that there was nothing in the GAFTA sampling rules No. 124 which precluded an analyst correcting a clerical error. The board dismissed the buyers' claim and the buyers appealed.

The sellers submitted that they were not relying on a *new* analysis but on a correction of the *original* erroneous certificate and that it was an underlying assumption of the parties that the certificates accurately reflected the outcome of the tests. The buyers, on the other hand, contended that the language of the standard form made it plain that in the absence of a call for a third analysis (which either party was permitted to request if the combined samples were in excess of the prescribed threshold of 0.5 %), the mean of the certificates was determinative. This was consistent with the needs of commercial certainty, particularly in chain contracts. The High Court based its decision on commercial common sense which dictated that "*in the field of international commodity sale contracts where a chain of sales is commonplace, it is desirable that the contractual machinery for resolving mistakes should not be vulnerable to challenge in the Courts*" and supported the buyers' contention that the parties have set up an all embracing code for determining disputes as to quality. In the absence of fraud or collusion, the parties were bound by the result of that code. Any error, whatever its source, could have been corrected by a third test within the 14-day period. Any different approach gives rise to uncertainties to the scope of permissible enquiries into the nature of the possible mistake, presumably without time limit, and this was held to be commercial nonsense in a chain contract situation.

Any attempt to challenge matters recorded in a conclusive certificate through seeking to rely on implied terms under the Sale of Goods Act 1979 is unlikely to be accepted by the courts. Such terms will usually be replaced or redefined by final determination clauses set out in the contract. In other words, any valiant efforts to hide behind the veil of the statutory implied terms as to quality with the aim of toppling a valid final certificate will rather be disapproved of by the courts.

KG Bominflot Bunkergesellschaft fur Mineralole MBH & Co v Petroplus Marketing AG (The Mercini Lady) [2011] 1 Lloyd's Rep 442
By a frame contract, the sellers (Petroplus Marketing) sold to the buyers (KG Bominflot) 38,500 mt gasoil fob Antwerp. The contract included a "Quality" clause (clause 4) which

stipulated properties of the gasoil, including "Total sediment" with a maximum value of 10 mg/litre as tested by D-2709/88 test. Quality and quantity were to be determined by independent inspection at loading which was to be final and binding for both parties, save for fraud or manifest error (clause 12). Risk and title were to pass on loading (clause 15). Clause 18 ("Other Conditions") contained an exclusion clause which stated that no guarantees, warranties or representations, express or implied, or [of] merchantability, fitness or suitability of the oil for any particular purpose are given. The gasoil was inspected at Antwerp prior to loading by an inspector from SGS which certified the sediment to be 6.4 mg/litre according to test method EN 12662 (which was not the contractual test method). Following arrival at El Ferrol the cargo was tested though various contractual test methods which showed that it was off-specification. Consequently, the buyers rejected the goods and contended that although the gasoil *was* delivered on-specification, the sellers were in breach of implied terms that the goods were "capable of remaining" of satisfactory quality and/or within specifications under the 1979 Act during the voyage and for a reasonable time thereafter. It is not entirely clear why the buyers did not seek to rely on *Veba Oil Supply and Trading GmbH v Petrograde Inc [2002] 1 Lloyd's Rep. 295* which allows a certificate to be challenged if a wrong testing method is used (the exception of manifest error or fraud; the court however did not suggest that there was either) but, instead, they chose to accept the certificate and to claim damages by virtue alone of the cargo being off-specification at arrival due to its alleged change of quality during the voyage.

The Court of Appeal ruled that the contract made it clear that the specification had to be met at the time of delivery, that the parties' intention was for the gasoil to be inspected by an independent inspector prior to loading, "basis shoretank" (i.e., not even on the basis of the gasoil in the ship's tanks), and for such inspector's determination to be conclusive (i.e., final and binding in the absence of fraud or manifest error). It was accepted that, even though the goods had been measured by the wrong test, they nevertheless *were* within the specification limits at the time of loading and delivery. Therefore, gasoil of the correct specification was delivered. The buyer's acceptance of that fact supplanted the want of a valid inspector's certificate.

Moreover, the intention of the parties was for the specification to be determined conclusively at loading. Therefore, it did not matter that things might change thereafter, or even, if a conclusive determination had been made, that things might not change but that a new test might show a different result which was outside specification limits. After delivery the buyer "assumed all risks pertaining thereto" (clause 15). That included the risk of transport and the risk of cargo instability. A clause for conclusive inspection and determination on loading replaced or redefined the implied terms as to quality *pro tanto*[3]. *A fortiori* it prevented any further implication that it was legitimate to take account of changes in the cargo's specification after delivery. The question might therefore arise as to the extent to which clauses 4 and 12 might impinge with respect to the statutory term in section 14(2). The court held that a matter of latent inherent vice which could not have been picked up by the quality inspection mandated by clauses 4 and/or 12 may possibly stand outside those clauses. If, however, the alleged vice was something for which the specification and conclusive determination clauses provided, there may be no room for an allegation of breach under the statutory implied term in relation to satisfactory quality or any similar term to be implied at common law. This was because such implied terms were simply not part of the intention of the parties to the contract and would not have been understood by reasonable merchants. To

[3] To that extent

say otherwise would render the final determination clauses pointless: the buyer could always say that although the goods were within specification on loading, they had nevertheless fallen out of specification during the voyage or within a reasonable time. All certainty in international sale of goods, which such inspection clauses are designed to provide, would be utterly broken. In Rix LJ's own words: "*Such clauses, plain and express as they are, would simply be a snare and a delusion, because they would always have to make way for the special additional term, even though it was merely implied and not express*."

On the other hand, however, Rix LJ suggested that the ruling might have been different if expert testimony were to show that gasoil may suffer the inherent vice of instability such that it can, within a few days, change the content of its sediment substantially. If so, the question would arise as to whether the nature of the test for sediment and/or any other of the specification tests was intended finally to determine the question of such possible instability, or whether this was a truly latent and separate vice which the specification tests would leave untouched and undiscovered.

In circumstances where the contract allows a second analysis, a dispute may arise as to which certificate is to be final. Usually, a contract will provide for two analyses and state, in more or less vague terms, that a certificate so produced will be final and binding as between the parties. In a typical case, a seller would insist on a certificate issued at loading to be final while a buyer would try to have the goods re-tested by a surveyor appointed on his/her behalf and to make that second analysis binding. In such circumstances, unsurprisingly, the outcome will depend on what is contemplated in the contract. If the contract confers a right on a buyer to call for a second analysis, it would usually mean that the first certificate final regime does not apply if the right to a second analysis has been exercised within the specified time limit.

R G Grain Trade LLP v Feed Factors International Ltd [2011] 2 Lloyd's Rep 432
By a contract on GAFTA 119 terms, the sellers sold to the buyers 1,500 mt of Ukrainian origin sunflower expeller f.o.b. Nikolayev sea port. The contract stated, by way of specification, "Protein min 32% Fiber max 23%" and provided for inspection provisions as follows:

"*Quality and condition to be final at time and place of loading as per certificate of first class superintendent approved by GAFTA at seller's choice and expense.*
The buyers have the right to appoint their own GAFTA approved supervisor at their expense. In this case the sampling to be done conjointly, as per GAFTA terms and conditions.
2nd analysis, if any, as per Salamon and Seaber, London."

"5.1.6 Buyers may accept Sellers' analysis but if required by Buyers, any one of the sealed samples together with instructions shall, within 14 consecutive days of sealing, be dispatched to Salamon & Seaber. In the event that this option is not decided at the time of arrival, the choice of analyst shall be that of the instructing party. This analysis shall be final (…)"

On loading, the buyers exercised their option to appoint their own supervisor, Control Union, which carried out sampling conjointly with Inspectorate Ukraine LLP. Inspectorate issued certificates which showed that all analysis results were in accordance with the contract specifications. However, whilst loading was still underway, the buyers informed the sellers that their analysis results in respect of the first loaded portion suggested that the cargo was off specification for protein and fibre content. Samples were sent to Salamon & Seaber for

analysis. That company produced a certificate stating that the protein content of the cargo was 26.8% (less than the minimum of 32% specified in the contract) and the fibre content - 26.57% (more than the maximum of 23% specified in the contract). The buyer rejected the goods and the documents.

The Board of Appeal held that it was the certificate from Salamon & Seaber rather than from Inspectorate that was final and binding, as the former had superseded the latter. Permission was given under section 69 of the Arbitration Act 1996 for an appeal on a point of law, namely whether, on a true construction of the contract, the certificates of quality and condition issued by the superintendent appointed by the sellers were final and binding.
The sellers contended that this conclusion was wrong and relied on the clause "Quality and condition to be final at time and place of loading as per certificate of first-class superintendent approved by GAFTA at Seller's choice and expense". They further submitted that as the certificates of Inspectorate showed that the cargo met the contract specifications, the Board should have awarded that that certificate conclusively determined, as between the parties, the quality of the goods.
The buyers supported the Board's conclusion and contended that the provision "second analysis, if any, as per Salamon and Seaber, London" indicates that the analysis certificate of the sellers' appointed supervisor will not be final and binding in all cases. If it were to be final and binding in all cases, there would be no scope for a second analysis, the only purpose of which would be to test the accuracy of the sellers' supervisor's certificate.

The High Court held that the Board were correct to conclude that the Salamon & Seaber analysis was final and binding and that the effect of conferring a right on the buyers to call for a second analysis necessarily meant that, where that right was exercised, the certificate final regime did not apply in relation to the first certificate. The only purpose for having a right to call for a "second analysis" was if doing so had some effect or consequence. If, however, quality was final as certified by the sellers' superintendent then there would be no purpose in doing so. Realistically the only circumstance in which a second analysis was likely to be called for was where the buyers were not satisfied with the analysis results recorded in the sellers' superintendent's certificate. In addition, the clear effect of rule 5.1.6 was to make the results of the second analysis "final".

If the contractual mechanism allows a second analysis, a question may arise as to whether the conclusiveness of a first certificate will continue to stand in the circumstances where, despite a request of one party, no re-testing takes place. Again, all will turn on the terms of the contract.

Mena Energy DMCC v Hascol Petroleum Ltd [2017] 1 Lloyd's Rep 607
One of the questions that arose before the Court was to determine what was the position if, despite a request by the supplier, no re-sampling was carried out by the buyer. At the heart of the dispute was the inspection clause which provided as follows:

"12. Inspection

(1) Governing quality shall be based on ship tanks composite sample at discharge port drawn by the mutually agreed independent inspector prior to commencement of discharge and tested in accordance with international sampling and testing procedure.

(2) The inspector will prepare report with reference to the test results of the composite sample(s) drawn from the vessel's tanks at discharge port in presence of HDIP representative(s) and that of composite sealed sample(s) of the product (load port samples) retained by the master. The samples will be tested in the inspector's laboratory and HDIP laboratory, Karachi, simultaneously. The test results by HDIP laboratory for the composite samples obtained from the vessel's tanks at discharge port shall be final and binding on both parties with regards to quality of cargo loaded on board. If the composite sample does not conform with the prescribed specifications at HDIP then the supplier may request the buyer to re-sample the cargo from vessel tanks and test at HDIP for quality verification in presence of independent inspectors or nominated representatives of seller and buyer after seeking necessary approvals. The acceptance of third party inspectors and approvals to witness shall not be unreasonably withheld. The re-test result of HDIP will be final and binding for both parties"

The buyers (Hascol) contended that if re-sampling was not carried out despite the supplier's request, the initial analysis result showing the cargo to be off-specification must stand and was final. The sellers (Mena) submitted that once a request for re-sampling was made, the initial certificate was no longer final and binding whether or not re-sampling actually took place. The Court rejected sellers' submissions that the clause imposed an obligation on Hascol to obtain any approvals necessary for re-sampling to take place. This would seek to read the words "after seeking necessary approvals" as if they read "after obtaining necessary approvals" and confirmed that the clause could not be read in this way simply because this was not what the clause said. It would also be inconsistent with the following sentence which contemplated that in some circumstances approval by third-party inspectors may be withheld reasonably (the buyers contented that re-sampling was not permitted by Pakistani law). However, the fact that Hascol was not obliged to obtain any necessary approvals did not mean that the initial (HDIP) certificate remained final. It did not. The clause provided that Mena had a right to "request" re-sampling and contemplated that it would do so armed with evidence that something had gone wrong with the HDIP analysis. It provided for load port samples to be retained and also for discharge ports samples to be analysed not only by HDIP but also by an independent inspector. This suggested that although it was the HDIP analysis which was to be final, re-sampling would be generally requested when either load port samples or discharge port samples gave grounds for believing that the HDIP analysis was in error. It would be anomalous in such circumstances if, despite this and despite a request for re-sampling, the HDIP analysis would nevertheless continue to be binding. Therefore, once Mena exercised its right to request re-sampling, the HDIP certificate was no longer final and binding.

A dispute may occasionally arise as to conclusiveness of a certificate in circumstances where a contract contains conflicting provisions in relation to the same matter with one clause providing for the finality of a certificate for all purposes and another clause confining its validity to specific purposes. The *Septo Trading Inc v Tintrade Ltd (The "Nounou")* shows that any such provisions will be approached practically, having regard to business common sense and international trade practice.

Septo Trading Inc v Tintrade Ltd (The "Nounou")-Court of Appeal [2021] EWCA Civ 718
This case concerned a dispute between the buyer (Septo) and seller (Tintro) of a cargo of fuel oil loaded on board the vessel Nounou at Ventspils in Latvia.

The "Determination of Quality and Quantity" clause in the Recap provided:

"*As ascertained at loadport by mutually acceptable first class independent inspector, or as ascertained by loadport authorities and witnessed by first class independent inspector... Such result to be binding on parties save fraud or manifest error…*"

The "General" clause provided:

"Where not in conflict with the above, BP 2007 General Terms and Conditions for fob sales to apply."

Section 1.2.1 of the BP terms provided:

"*Provided always the certificates of quantity and quality ... of the Product… are issued in accordance with sections 1.2.2 or 1.2.3 below then they shall, except in cases of manifest error or fraud, be conclusive and binding on both parties for invoicing purposes and the Buyer shall be obliged to make payment in full …".*

Section 26 of the BP terms excluded conditions and warranties as to the description, quality or fitness for purpose of the product and provided that any quality claim had to be brought within 45 days of completion of discharge.

The buyer provided SGS with instructions to ascertain the quality of the cargo based on representative composite sample drawn from shore tank(s) before commencement of loading. SGS issued a certificate which stated that the cargo was within the contractual specification. The cargo was then transported to Gibraltar and tested by Saybolt Spain which recorded that the cargo was off spec. The buyers brought proceedings against the sellers which, in turn, relied on the binding nature of the SGS quality certificate as per the Recap.

At first instance, Teare J held that clause 1.2.1 of the BP terms was not in conflict with the Recap but merely qualified the Recap and, thus, buyers' claim was not precluded by reason of SGS's certificate. On appeal, the sellers submitted that the clauses could not fairly and sensibly be read together; there was a fundamental conflict between them. While the Recap term provided that the determination of quality set out in the independent inspector's certificate would be binding for all purposes, the BP terms provided that the certificate would be binding only for the purpose of invoicing. The buyers contented that the two clauses could be read together with effect being given to both of them: the BP Terms did not deprive the Recap term of all meaning as the quality certificate remained binding for invoicing purposes, i.e., it was a "pay now, sue later' clause, which obliged the buyer to pay the price against a certificate (confirming that the cargo was on spec) while leaving it free to pursue a quality claim thereafter, but only within 45 days of completion of discharge. If no claim was brought within that time, the certificate would be binding for all purposes. The Court of Appeal held that the question of the nature of a printed term and a specially agreed term had to be approached practically, having regard to business common sense. The starting point was to consider the meaning of the "Determination of Quality and Quantity" clause in the Recap which then could be tested against other clauses of the contract. The Court concluded that the effect of the Recap term, considered on its own, was that the quality certificate was intended to be binding on both parties for all purposes. There was no reason to revise that provisional view when the construction of the Recap term was tested against other provisions of the contract, including section 1 of the BP Terms. Whether or not section 1 of the BP Terms qualified the Recap term, it did not change the meaning of the word "binding". When reading

the Recap term, nobody would think that the word "binding" meant "binding for invoicing purposes". The Court then considered the meaning of a quality certificate binding "for invoicing purposes" in section 1.2 of the BP Terms and rejected buyers' submission that section 1.2 was a "pay now, sue later" provision. This was inconsistent with the international trade practice where stipulated shipping documents, including a quality certificate, are presented to buyer's bank under a letter of credit which pays for the documents so presented if they are in order. It was therefore difficult to see that the provision for the quality certificate to be binding "for invoicing purposes" had any substantive content in that case. Accordingly, section 1.2 of the BP Terms was in conflict with the Recap term and they could not fairly and sensibly be read together. The printed term did not merely qualify or supplement the Recap term, but rather deprived it of all practical effect.

In limited circumstances, the courts may imply the attribute of finality of a certificate notwithstanding the absence of express provisions to this effect. In the case of *Apioil Ltd v Kuwait Petroleum Iatlia S.p.A. SAME v Sociedade Nacional de Combustiveis de Angola S.A***.** *[1995] 1 Lloyd's Rep. 124,* Colman J held that there was "*a very compelling commercial purpose*" requiring the implication of the finality for certain purposes despite the contract failing to provide for it expressly. This raises a crucial question as to how far the courts can go in implying terms into a contractual machinery that have been agreed and sealed between the parties. While writing into a contract the common law exceptions of fraud or fundamental mistake for which a certificate can be set aside is perfectly sensible, conferring upon a certificate the attribute of finality in the absence of an express term to this effect may seem too far-reaching. One may argue that in a business environment the parties are free to agree whatever they want to and if they choose not to include a certain term that is widely common in the sector, the courts should uphold that choice. Going above and beyond the contractual framework by giving effect to a term which is unmoored from the parties' intentions may be regarded as a deep intrusion into their contractual freedom to agree. This candid approach will however be welcome by those up and down the chain. Numerous business participants act on the faith of the certificate such as sub-buyers or banks and they will generally be interested in preserving its conclusiveness even though the contract fails to provide for it. The decision of the High Court in *Apiol* seems to support that view. It shows that the judicial decisions as to the finality of certificates are likely to be largely overshadowed by the commercial context even if it entails re-adjusting the wobbly wheels of contractual machinery to the tight frames of trading practice.

*Apioil Ltd v Kuwait Petroleum Iatlia S.p.A. SAME v Sociedade Nacional de Combustiveis de Angola S.A***.** *[1995] 1 Lloyd's Rep. 124*
By a contract, Sonangol agreed to sell to API straight run fuel oil designated E-4 fuel oil of Russian origin to be shipped at Odessa. ("Sonangol E-4 contract")

Sonangol E-4 contract provided:
*Determination of quality (*Sonangol cl 10*)*
As per certificate issued at loading port by shippers to be final and binding upon parties.

At about the same time API entered into a contract to sell the same cargo to Kuwait Petroleum (Kupit) on similar terms save for price and quality: ("Kupit E-4 contract")

Determination of quality Kupit cl 10)

..as per certificate issued at loading port by suppliers to be final and binding upon parties, unless it can be proved that testing and/or sampling was incorrectly performed (first proviso)

When the vessel arrived at Odessa, it emerged that the Russian suppliers to Sonangol had run out of E-4 fuel oil and were only able to load M-40 fuel oil (a blended product) which they did. API accepted M-40 at market price "in partial mitigation of damage". API offered the same cargo to Kupit (the Sonangol M-40 and the Kupit M-40 contracts respectively).

The Sonangol M-40 and the Kupit M-40 also contained the following term:
We have therefore arranged... for samples drawn by SOCES at Odessa to be handed over ex the vessel to SGS at Istanbul for hand-carrying to Holland to be tested there by SGS. (the sampling and analysis clause).

Sonangol M-40 contract also contained the following incorporation clause:
"Where not inconsistent with the above all other terms and conditions shall be as per the existing contract between Sonangol SA and Apioil"

The same term was included in the Kupit M-40 contract.
In addition, both Sonangol and Kupit M-40 contracts contained clauses that provided for price adjustment as well as the right to reject the goods by reference to quality.

The problem arose when SGS in Holland analysed the sample and arrived at 3.21 deg Engler which differed considerably from all other analyses results of other samples drawn at Odessa by SOGEX (with a viscosity in the range of 4 - 5.1 Engler).

API paid to Senangol the contract price in full on the basis of a viscosity of 3.91 Engler whereas Kupit made a substantial deduction on its payment to API on the basis of 5 Engler (the lower the viscosity the more the buyers were prepared to pay).

API sued Sonangol to recover money overpaid to Sonangol. Against Kupit, however, API claimed that it had been underpaid and sought to recover the balance of the price on the basis of a viscosity of 3.91. The essential issue between all three parties was therefore what viscosity analysis was determinative for the purpose of calculating the price payable by API and Kupit under their respective contracts.

As between API and Kupit the main underlying issue was whether the effect of the incorporation clause was, as contended by Kupit, to incorporate from cl. 10 of the Kupit E-4 contract a term that the certificate of quality was to be final and binding, thereby making the analysis issued by SGS final and binding as to a determination of the viscosity of the cargo, unless it could be proved that testing and sampling were incorrectly performed. Colman J held that the effect of the incorporation clause was to write into the Kupit M-40 contract all E-4 contract provisions that were not inconsistent with the express terms of the former. It was quite clear that the seller's obligation to provide a shipper's quality certificate and the parties' assent for *that document* to be final unless based on incorrectly performed sampling or testing could not have been incorporated by the incorporation clause into the Kupit M-40 contract because the determination of the cargo quality was to be achieved by quite different means, in particular sampling by SOGEX and analysis by SGS (as opposed to a shipper's certificate).

The incorporation clause did not transfer the attribute of finality from the shipper's certificate to the SGS quality analysis as one could not operate the incorporation clause to invest the

SGS analysis with finality in the absence of express provision to that effect, on the basis that a different document in the E-4 contract had that function. Could the finality of the SGS certificate be however achieved in a different way?

Colman J indicated that the Kupit M-40 provided for a detailed sampling and analysis procedure which was to be carried out by independent inspectors (SOGEX) and analysts (SGS) with fully representative sampling of the cargo, a requirement logically explicable only if the sampling and analysis results would otherwise be final and binding on the parties. He therefore concluded that the business sense of such provisions was clear: by implication the sampling and analysis was to be treated as final and binding unless the sampling was not fully representative of the whole cargo.

Circumstances where a certificate is not final

The courts will allow traders to challenge a certificate only in a very limited set of circumstances. This would usually involve certificates issued in breach of the contractual regime or as a result of fraud or a fundamental mistake. The principle of commercial certainty will therefore be compromised in order to protect parties from the unfortunate outcome of a defective certificate and to uphold the sanctity of a contract. The courts will protect parties from fraud which, in Lord Denning's words, will "*unravel all*".

(i) Certificate produced outside the contractual regime

Where a certificate agreed to be final is not issued in accordance with the "detailed code" or "routine" set out in the contract, the courts are prepared to loosen their grip on the rigidity of the finality clause and overthrow the certificate so issued.

In "*Agroexeport" Enterprise D'etat pour le commerce exterieur v N.V. Goorden Import CY S.A [1956] 1 Lloyd's Rep. 319* the sellers shipped 600 tonnes of linseed expeller c.i.f. Antwerp. intended for use as cattle food. The contract, which incorporated terms of L.C.F.T.A. set out a certain procedure for sampling and analysis of those samples that the parties were required to follow:

10. Sampling & Analysis
Samples…be drawn …in four portions jointly by sellers and buyers. If required by buyers... sample No.1 ..shall be submitted for test to the analyst of the London Cattle Food Trade Association (Inc.) to whom samples and instructions should be sent direct. Any claim under such analysis to be made within ten days of the date thereof... If then required by either party, not later than ten days after receipt of official copy of analysis and on notice given to the other party… sample No.2 shall be submitted for test to Dr. Bernard Dyer & Partners Ltd. The mean of the two analyses shall be accepted, but if the variation exceeds a half per cent... sample No.3 shall, at the request of either party, be made [within ten days] and on notice ... given to the other party, be... submitted for test to Dr Aug Volcker & Sons and the mean of the two analyses … shall be accepted as final and binding…"

In accordance with the contract four samples were taken on shipment and certificate was issued stating that the goods were in sound and dry condition. On January 20, 1955, Salamon & Seaber issued a certificate of the analysis of sample No.1 which showed that the cargo was within contractual specifications. On March 2, the buyers forwarded to the sellers a further S&S analysis certificate for purity of sample No. 1 which had been requested by the buyers a month earlier. The certificate stated that as a result of a microscopical examination, the sample contained circa 85% of linseed, the remainder consisting mainly of brassica type, some miscellaneous weed seeds and some cereal.

The buyers claimed arbitration. The umpire awarded that the buyers had no claim against the sellers but, on appeal by the buyers, the Board of Appeal awarded that the sellers should pay an allowance of 2.5% of the contract price.

The sellers then appealed, contending that the second certificate of analysis was inadmissible as it was not within the contract and had been obtained by irregular means by one party only

and on an unknown sample. The question thus was whether the Board were right in taking into account a certificate upon which they awarded the allowance in favour of the buyers. The sellers submitted that the buyers, without the knowledge of the former, had chosen not to rely on the contractual sampling provisions but to have a "second bite" at sample No.1 (instead of getting analyses of samples No. 2 or 3).
The court held that the relevant clauses (incl. clause 10) formed a comprehensive code for rejection, acceptance or allowance based on the certificates issued as prescribed in the contract. After the analysis of sample No 1, no claim was made by the buyers within 10 days or at all on that certificate. Had the claim been made, then either party could have required sample no.2 to be submitted for test. This was not done. The certificate was obtained (i) outside the timeframe set out in the contract and (ii) by a second test of sample No. 1 for which no provision was made in the contract. The certificate was also based on a microscopic examination which was not the prescribed method.

"In my judgment, the contract provides the methods by which goods supplied under it shall be examined and tested and the time for and manner of the investigation and claims thereunder, if any. The effect of the contract as a whole is that any defects not revealed by those methods of examination and analysis are the risk of the buyers and not the default of the sellers. The buyers departed from the contractual provisions in obtaining the second certificate of analysis of sample No. 1 (…) and that certificate was not in accordance with the contractual terms. It could not be relied on as evidence having regard to the terms on which the parties had contracted. It was therefore inadmissible (…)."

Buyers may however rely on a certificate issued *outside* the contractual regime if the matter certified by such certificate goes to the root of the contract. Clear wording will be required to modify the buyer's common-law rights in such matters.

In *Lindsay & Co v European Grain & Shipping Agency [1963] 1 Lloyd's Rep. 437* a certificate obtained in breach of the contractual procedure was held admissible in evidence in support of buyers' claim to reject goods upon the ground that they neither corresponded to the description nor were they of merchantable quality [under the Sale of Goods Act 1893].

The sampling and analysis clause was similar to the one set out in "*Agroexeport" Enterprise D'état pour le commerce extérieur v N.V. Goorden Import CY S.A [1956] 1 Lloyd's Rep. 319.* After arrival of the vessel at Glasgow, four samples of Indian groundnut extractions were drawn and one sample (No.1) was sent by the buyers to Salamon & Seaber for analysis. The analysts issued a certificate stating that the sample contained 0.008% of castor seed husk (which was in excess of the contractual 0.005%). The buyers informed the sellers about their intention to reject the goods but the latter responded that a second test is required and had instructed analysts (as per contract) to test sample No.2. The second analysis certified that the sample contained 0.038% of castor-oil seed husk. As a result of negotiations, the buyers agreed to accept an allowance of £3 per ton in respect of the castor seed content and waived all further claims that may arise from that shipment. After having distributed the goods to their sub-buyers, the buyers received complaints from them that their employees had been badly affected in handling the goods. The buyers requested Salamon& Seaber to make a microscopic test and a further certificate (outside the terms of the contract) was issued stating that sample No.1 contained circa 5% of extracted mowrah meal and that the goods could not be recommended for feeding to livestock. The buyers informed the sellers of that analysis and contended that the allowance of £3/ton was only in respect of castor seed content, any

deficiency in oil, albuminoids, excess of sand and silica, as required by the contract. The sellers responded that the allowance was in settlement of all claims and the agreement was conclusive. The buyers then claimed to reject the goods and nominated their arbitrator. The arbitrator found that mowrah meal was very injurious to livestock, that any appreciable amount of this material would make Indian groundnut extractions unfit for use for feeding livestock and that the goods containing an admixture of mowrah meal would not be Indian groundnut extractions of "fair average quality of the season" (as required by the contact).

Megaw J held that this case could not be distinguished from the *Agroexport* case and, therefore, the evidence as to the microscopic test was inadmissible.

The buyers appealed on the ground that they were entitled to reject the goods as they were contaminated with mowrah meal to such an extent that they did not correspond to the description nor were they of merchantable quality and in support they relied on a certificate issued *otherwise* than in accordance with the provisions of the contract. The Court of Appeal ruled that the disputed analysis *was* admissible and indicated that much clearer words than those used in the analysis and sampling clause would be required to modify the buyer's common-law rights in a matter which goes to the root of the contract, such as the unmerchantability of the goods or their description by which they were sold. [Although the decision was reached under the regime of the Sale of Goods Act 1893 which referred to the "merchantable quality", it is likely that the courts would arrive to the same conclusion under the current regime.]

In deciding whether a certificate is valid, the courts will construe a contract as a whole and give effect to the terms expressly agreed between both parties overriding those set out in prescribed forms. This will be so even if such a term is unusual or uncommon in the business sector the contract relates to.

Aston FFI (Suisse) SA v Louis Dreyfus Commodities Suisse SA [2015] 1 Lloyd's Rep. 413
By a contract the sellers (Louis Dreyfus) agreed to sell to the buyers (Aston) a cargo of Russian milling wheat. The contract, which incorporated the terms of GAFTA 49, provided for the following terms:

"*Quality as per GASC tender terms* (GTT*)* [a document issued by the Egyptian state wheat procurement body]

Inspection
Weight, quality and condition final at time and place of loading as per relevant GASC tender. Buyer's right to appoint a 1st class GAFTA approved surveyor. Should there be a major discrepancy between the two analysis results .., then a first class GAFTA approved 3rd surveyor (to be mutually agreed upon) should act as arbitrator."

The payment provision listed documents for presentation, including specific requirements as to what a superintending certificate should contain. The contract incorporated GAFTA Sampling Rules No 124 which provided for GAFTA-approved superintendents (Rule 1.2). Rule 10 of the Sampling Rules provided that "in the event of non-compliance with…these Rules... any quality... arbitration claim… shall be deemed to be waived and barred…"

The goods under this contract were purchased specifically to fulfil buyers' obligations under an on-sale contract ("sub-sale") which they concluded with GASC so to that extent the contracts were intended to be "back-to-back".

The buyers identified Comibassal as a superintending company which had been appointed by GASC under the terms of the sub-sale contract but which were not GAFTA-approved surveyors. On loading, GASC requested the buyers to suspend loading as Botras (buyers' surveyors) and Comibassal had detected defects in the cargo. Upon completion of loading, a report was issued which concluded that the cargo was not acceptable according to the contract between GASC and supplier. There was no indication in the report as to when and how samples had been taken nor of the analysis methods used. The buyers said that they were entitled to reject the cargo and to recover damages against the sellers. The Board of Appeal, in ruling in favour of the sellers, concluded that although the Comibassal nomination as between GASC and the buyers was contractually compliant, as between the buyers and sellers their nomination was not compliant as they were not GAFTA-approved surveyors. As a result, there was no contractually compliant quality certificate. The Board also held that its non-conformity with the contract was due to its failure, inter alia, to set out sampling methodology and method of inspection.

On appeal to the High Court, on the surveyor point, the buyers contended that the Board was wrong to conclude that Comibassal had to be GAFTA-approved. As to the certificate point, the buyers submitted that the Board was wrong to ignore the evidence bearing on the question whether the cargo was contractually compliant. The sellers contended that where a contract set out a mandatory procedure for inspection of the goods and provided for the results of such inspection to be final as to quality, the buyer could only reject the goods by relying on a contractually compliant certificate demonstrating a relevant disconformity. Further, the sellers indicated that the Board's conclusion that the buyers were not entitled to reject the goods because of the non-GAFTA approved inspector was to be understood as being based on preclusive effect of rule 10. They thus submitted that (i) the fact that Comibassal was not GAFTA-approved constituted a non-compliance with Rule 1.2 and (ii) by virtue of Rule 10, the effect of such non-compliance was that any quality and/or condition claims by buyers shall be deemed and barred.

The Court held that the Board was wrong to conclude that the nomination of Comibassal was not contractually compliant. The first sentence of the inspection clause made no reference to the first surveyor being GAFTA-approved. This is in sharp contrast to the subsequent sentences which referred to second and third surveyors as being GAFTA-approved. There was also nothing in GTT which would require the surveyor to be GAFTA-approved. It is therefore difficult to imply a requirement for the first surveyor to be GAFTA-approved. The Court also rejected sellers' submission that the award should be upheld on the basis of preclusive effect of GAFTA Sampling Rules No. 124 which provided for GAFTA-approved superintendents.

In the Court's view, GAFTA 49 was only incorporated in the contract to the extent that such terms were not in conflict with the terms of the body of the contract or the GTT (as incorporated in the contract) and, thus, GAFTA 124 was only incorporated to that extent.
As to the certificate point, there was no dispute about the Board's conclusion that the Comibassal certificate was "deficient and non-contractual". The Court further indicated that a compliant certificate was one of the documents which had to be presented by the sellers under the contract to obtain "cash". It necessarily followed that the absence of such a

compliant certificate prevented the sellers from obtaining "cash" under the contract. The f.o.b buyers were entitled to reject the goods under the contract absent a contractually compliant certificate.

A buyer may occasionally insist on relying upon a certificate which sets out specifications that have never been agreed with a seller. In such circumstances, buyers will be precluded from doing so simply because such specifications have never formed part of the sale contract.

In *Oleificio Zucchi S.p.A. v Northern Sales ltd [1965] 2 Lloyd's Rep. 496* the buyers insisted on relying on a guarantee allegedly given by the sellers in relation to free fatty acid which both the tribunal and the court found had never been part of the contract. Although the FFA content was discussed in the course of the parties' negotiations leading up to the contract, the sellers expressly stated that they were unwilling to guarantee FFA content despite a test having been carried out by an independent laboratory showing promising FFA content.

Where the parties have agreed that a specific method for the determination of quality is to be final and binding, a determination based on a different method will not be binding because this is not what the parties have agreed to.

Veba Oil involved a dispute between traders as to quality of the goods. The defendant had sold a cargo of gasoil on the basis of a certificate which was to be "*final and binding for both parties save fraud or manifest error*". The inspection company had however erred by testing a property (density) by the wrong test, being D4052 rather than D1298. It was common ground that the use of the wrong test was entirely irrelevant in practical terms. Although test method D4052 was more modern and accurate than D1298, having a margin of error of 0.0001% as opposed to 0.0007%, the High Court and the Court of Appeal held that the inspection company's error in using the wrong (albeit superior) test rendered that certificate uncontractual, invalid and ineffective. Their Lordships decided that, as the parties had instructed the inspector to use a particular test method, they must have done so for a particular reason and it was not for the Court to second-guess what that reason was. Any departure from the instructions would be material unless it could *'truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party'* (per Brown LJ). [Although Dyson LJ agreed that the certificate was not binding, he proposed his own test of immateriality: "*whether the parties would reasonably have regarded the departure as sufficient to invalidate the determination*"]

ii) Absence of "certificate final" clause

If parties failed to include a finality clause, the court would be reluctant to incorporate such a clause in the contract. This will be so even if the commercial context of a transaction calls for greater certainty or, to put it in Donaldson J's own words: "*where there will be no reason to treat as commercially unrealistic the suggestion that the parties intended the surveyor's certificate to be conclusive*". To allow the implication of such clauses would involve a very substantial modification of the parties' rights, in particular, buyers' right since they may be called upon to take goods of inferior standard for full price. No such clause will therefore be implied if it is simply not there. Had the parties intended to rely on such a provision, they would surely have included it. The presence of a finality clause of one kind, for instance as to

quantity, is unlikely to justify incorporation of a finality clause of different kind, such as conclusiveness as to quality.

Rolimpex Centrala Handlu Zagranicznego v Haji E. Dossa & Sons Ltd [1971] 1 Lloyd's Rep. 380
This case raised the question of the extent to which two certificates were conclusive of the facts therein certified.

The buyers agreed to buy from the sellers a quantity of cotton-seed extraction meal f.o.b. Karachi. The contract called for "*guaranteed decorticated and delinted, sound, merchantable goods, from fresh production, not rancid, free from foreign odour and noxious materials..*" and included clauses providing for surveyors to be appointed at the port of loading who were to draw five samples for analysis and to provide an "*analysis certificate…for each lot issued at sellers expense.. showing full analysis and stating that the goods are sound merchantable, from fresh production not rancid, free from foreign odour and noxious materials… are made from decorticated and delinted... cottonseeds and are fit for animal consumption*".

The local surveyors, appointed by the buyers, issued quality certificates stating that the goods were in accordance with the contract and fit for animal consumption. Although there was a finality clause as to quantity, there was no equivalent provision for quality.
The buyers were dissatisfied with the quality of the goods and contended (i) that they were not in accordance with the contract (ii) that the certificates were not conclusive and (iii) that in any event they were not in the form required by the contract. The sellers submitted that the goods were in accordance with the contract and that the certificates were conclusive.
The dispute was referred to arbitration. The arbitrators were unable to agree and the umpire whom they appointed held that the certificates were conclusive in favour of the sellers.
On appeal, although the Board of Appeal of the Cattle Food Trade Association (Inc.) was satisfied that the goods were mouldy and unsuitable for animal consumption (experts for both parties agreed that on the basis of an analysis carried out by Salamon & Seaber this was the case), it held, subject to the opinion of the Court, that the certificates were conclusive.
On the special case stated, the question for the court was whether on the true construction of the contracts the buyers are entitled to recover damages in respect of the condition of the goods on the shipment notwithstanding the terms of the certificates. The High Court ruled (i) that the certificates were not conclusive and (ii) that they were not in the form required by the contract. Donaldson J indicated that had the parties intended the analytical certificate to be final, they would surely have included an equivalent provision in relation to that certificate, but they had not done so. He also pointed out that such a provision would require precise terms in order to render it conclusive. In addition, a multiple number of individual certificates, their separation and delay in their production as well as surveyors' doubts as to what they were expected to certify did not help the sellers' case.

"*The contract called for a certificate that the goods were in fact of a certain description. In deciding whether or not to issue such certificate the surveyors had, of course, to take into account of the local analysis and of what they knew and believed. In addition, they had to form an opinion based upon their skill and judgment. However, having done so, they had to make up their minds and either certify that the goods in fact complied with the description or refrain from doing so. The certificates, in the form in which they were issued, were much less positive documents and did not comply with the contractual requirement.*"

iii) Fundamental mistake or fraud

Where parties enter into a contract which contemplates that a certificate issued by an independent surveyor shall be final as between them, the courts should not lightly relieve them from being bound by that certificate save for fraud or fundamental mistake on the part of a certifier. *(Alfred Toepfer v Continental Grain Co [1974] 1 Lloyd's Rep. 11)*

Fraud vitiates a fraudulently produced certificate irrespective of whether it affected the result: "Fraud or collusion unravels everything" (Denning LJ in *Campbell v Edwards*, followed in *Veba Oil*).

While the courts do not offer much guidance as to what exactly would constitute a fundamental mistake in the context of commodity trading, the case law shows that the bar for proving such mistake is set high. The courts will not permit a certificate to be re-opened just because *some* mistake has been made.

In *Alfred Toepfer v Continental Grain Co [1974] 1 Lloyd's Rep. 11,* an admitted mistake of a superintendent in determining the trait of the goods which formed part of their quality as well as their description was held to be non-fundamental. However, a mistake consisting of an interchange of testing results where the cargo described and tonnages did not match was ruled to be fundamental enough to vitiate the agreement reached on the basis of such results (*Grains & Fourrages S.A. v Huyton [1997] 1 Lloyd's Rep. 628).*

Grains & Fourrages S.A. v Huyton [1997] 1 Lloyd's Rep. 628
By contracts the sellers (Huyton) supplied to the buyers (Grain & Fourrages) 10,000 and 1983 tonnes respectively of Chinese cotton expellers. Both contracts incorporated GAFTA 100 and 125 and provided for quality to be final on representative samples drawn at discharge and analysed as per GAFTA No.100. They also provided for finalisation latest 15 days after receipt of report of discharge and final results of analysis.

The contracts were fulfilled by shipments to Izmir of 12,815.62 tonnes of expellers (for which the outturn quantity was 12,717.710 tonnes) and10,149.374 tonnes of cotton extractions (for which the outturn quantity was 10,012.390 tonnes). At Izmir joint superintendents (Salaman & Seaber) were appointed to weight and sample both cargoes as a result of which two certificates of analysis were issued which read as follows:
"Chinese cottonseed exp., Mark: 10,012.390 (with oil content 5.81%)" and "Chinese cottonseed ext., Mark:12,770.710 (with oil content 1.27%)"
After a recheck of the certificates sellers informed the buyers that there appeared to have been a typing error which meant that the results had been interchanged (the tonnages referred to in the certificates did not correspond to the commodity certified on each certificate) and requested the superintendents to issue amended certificates. Salaman & Seaber replied that the results were correct and opined that there may have been an interchange of labels when the superintendents drew and sealed the samples. The buyers then wrote to the sellers proposing that the results would be rectified by the buyers themselves and asked the sellers for their confirmation. The sellers accepted that proposal and requested the buyers to finalise the contracts accordingly. Buyers also issued invoices as per that proposal. A few months later the buyers sought to reopen the matter of allowances, on the basis that both parties had overlooked the fact that it was technically impossible for expellers to have as low an oil content as that stated in the certificate in relation to extractions. Sellers considered the matter closed. The matter went to arbitration, where the Board of Appeal accepted buyers'

contention that each certificate related to the cargo actually named in it, the only mistake being that the tonnages had been transposed. Buyers submitted that the agreement to settle allowances by treating the results in each certificate as applying to the cargo named in the other certificate had been entered into as a result of a fundamental mistake of fact shared by both parties and was therefore null and void. The Board rejected the buyers' case and held that they were bound by accepting the "compromising solution".

The buyers appealed to the High Court which set aside the award and held that the agreement reached to apply the certificates as if the named cargoes had been transposed was based on a common and fundamental mistake and, thus, it was not binding on the parties. The Court pointed out that at the time when the parties had agreed to settle the issue, both parties had believed that the analysis results had been in some way transposed. Thus, the solution which the buyers proposed was designed to give effect to both parties' belief that, whatever the cause, the analysis results had been interchanged. There was no dispute or doubt in the parties' minds about the right result. The question was simply how to achieve that result, and so to rectify what both parties saw at the time as an "obvious" error consisting in the transposition of results in relation to the cargoes named in the two certificates. But both parties were mistaken. The actual error did not relate to the transposition of results or named cargo, but simply of tonnages. The parties were misconceived, both in belief which they held and in the step which they took as a result, and that misconception was fundamental to their agreement and thus the agreement reached to apply the certificates as if the named cargoes had been transposed was based on a common and fundamental mistake and was not binding on the parties. To hold the parties to an agreement which they made on the basis that it would rectify a fundamental error in the certificates, when it then became clear that they were mistaken and that the agreement in fact created the very error which they thought they were rectifying, would run contrary to the spirit of that agreement. The position would however been different if the buyers in their proposal had accepted the risk that the facts might turn out differently (which they did not). In such case, they would not be allowed to reopen the matter. Further, the parties' extensive sources of information such as their own superintendent's reports and buyer's responsibility for the instructions could not outweigh the significance of the parties' actual beliefs and of the terms in which they actually expressed themselves in reaching their agreement. The agreement reflected the parties' common belief that they knew what the correct position was. But for that belief, they would never have taken the step which they did.

iv) Manifest mistake

More guidance has been offered by the courts as to the meaning of "a manifest mistake", an exception to the finality clause commonly incorporated by traders in sale contracts. This should not be confused with the common law exception of fundamental mistake. The defence of a manifest error will only be available to a party if a contract explicitly provides for it. It will usually be worded as an exception to the finality of a certificate in a quality and/or quantity and/or condition clause and will be included in a contract to circumvent the rigidity of the certificate final clauses.

In *Galaxy Energy International Ltd v Eurobunker S.p.A [2001] 1 Lloyd's Rep. 725,* where the contract provided for the certificate to be final [except for, inert alia, pour point] at loading save fraud or manifest error, Thomas J pointed out that although the term "manifest error" was not infrequently used in clauses relation to certification, there was no decided authority

on the meaning of the term.[4] He further indicated that the exception of manifest error should be construed in the commercial context. "Manifest" meant in ordinary language "plain and obvious" and thus the manifest error must relate to the certificate or the procedure that led to the issuance of a certificate. By way of example, it would be a manifest error if a plain and obvious error had been made in testing or in sampling or in mixing the samples. In deciding whether there was a manifest error the court should take into account the technical knowledge that the parties would have about the testing procedure.
In this case, several tests were carried out at discharge and the buyers argued that, when comparing all the tests together, they demonstrated that there had been a plain and obvious error in the sampling or in the certificates and thus they were not bound by the certificate. The judge rejected the buyers' submission and found that although the differences may be explained by an error in the sampling or testing, the mere possibility of an error was not enough. The error had to be "plain and obvious", in other words, "manifest". He further referred to an expert fuel oil analyst report which stated that the testing method in question involved heating a small sample of oil and then cooling it at a specific rate while examining it at the 3 degree C internals for flow characteristics. Although tests for pour point did not necessarily produce exactly the same results, there were well recognised parameters within which tests could be compared. These were "repeatability" and "reproducibility". The test in question had a repeatability of + 3 degrees C and reproducibility of +6 degrees C. As -3 degrees C had been specified at the loading port, the specification had to allow for a variation in the pour point of +6 degrees C and so gave a maximum value at the discharge port of +3 degrees. The expert also believed that the most likely explanation for the difference in test results was due to a blending problem; it was possible that the fuel in the tank at loading was a blend of more than one parcel each with a different pour point. If the parcel was not properly blended, then there could be layers of fuel with different pour points within the total parcel. If the court were to consider the repeatability and reproducibility, the tests of a sample of the cargo taken at discharge port (sample A) which was then re-tested a few months later, were plainly within the range of repeatability. There was no error evidenced by the re-test, let alone any plain and obvious error. All the tests at the discharge port were within the reproducibility range of sample A and thus no error could be inferred from such tests. Further, the court pointed out that there had been no contemporaneous protest by the buyers about the certificate in question. If the differing results as showed on that certificate had given rise to a plain and obvious error, the buyers would have raised that point. But they said nothing at the time and thus it was difficult to see how there could be a plain and obvious error when nothing was expressed about it at the time the certificate was issued.

Further guidance was provided by Simon Brown LJ in *Veba Oil.*

Simon Brown LJ defined a manifest error as "*oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion*". He explained that if parties wish to contract on the basis that they would not be held to mistakes made by a surveyor in the course of carrying out his instructions, they would need to include a term with regard to manifest error. However, even if they do so it does not mean that a complaining party would be able to rely on an obvious mistake to avoid quality determination irrespective of whether it affects the outcome.

[4] The case was decided a year before Simon Brown LJ's guidance set out in *Veba Oil*.

v) Material departure from instructions

In a surprising move, the Court of Appeal in *Veba Oil* opened the door to one more course of action to challenge the certificate significantly upsetting the well-established principle of the rigidity of finality clauses. Under the *Veba Oil* test it suffices for a complaining party to show that a certifier materially departed from instructions. There is no need to show what effect the departure had on the determination. Once proved, a certificate simply ceases to be binding on the parties. The principle underpinning this approach is that inspectors should be astute to comply with their instructions and, if they depart from them, there should not then be much scope for dispute and litigation as to whether their determination is nevertheless binding (as per Brown LJ).

Simon Brown LJ held that the quality certificate was not binding due to the inspectors' material departure from their instructions and explained the difference between a departure from instructions and manifest error. If an error was made in carrying out instructions, the error was only relevant if it was material in the sense of actually affecting the ultimate result, and the question would then be whether the error was "manifest". In the case of a departure from instructions, however, only an immaterial departure from instructions, such as one that could not even potentially affect the scientific or commercial process, would be irrelevant. Once a material departure from instructions was established, the court was not concerned with its effect on the result: This position was accurately stated in *Shell UK v Enterprise Oil* where Lloyd J held that the determination in those circumstances was simply not binding on the parties. A material departure vitiated the determination, whether or not it affected the result. Any departure would be material unless it could truly be characterised as trivial or *de minimis* in the sense of being obvious that it could make no possible difference to either party.

Tuckey LJ and Dyson LJ agreed with Brown LJ however Dyson LJ proposed his own test of immateriality of departure, namely "whether the parties would reasonably have regarded the departure as sufficient to invalidate the determination".

Veba Oil was followed in *The Kriti Palm*.

vi) Limited scope of a clause

In circumstances where a trade is made on the basis of two sets of contracts, namely a trading confirmation with expressly agreed terms and a printed form such as GAFTA or FOSFA, it is not uncommon for both documents to contain clauses of which the scope substantially overlaps. A question may then arise as to the extent to which provisions set out in a prescribed form apply to the expressly agreed terms. As a general rule, the latter displaces the former. However, the identification of the width to which such a clause is overridden will usually involve a tedious exercise of establishing the purpose it serves, restrictions it is subject to and the scope it intends to cover.

Cefetra B.V. v Alfred Toepfer International G.m.b.H. [1994] 1 Lloyd's Rep. 93
The issue raised on this appeal was whether the buyers (Cefetra) under two contracts for the sale of corn feed pellets c.i.f. Rotterdam/Amsterdam were entitled to recover from the sellers (Alfred Toepfer) the costs of appointment of an independent superintendent for taking samples at the discharge port where the contract terms expressly provided for the Sellers to

declare their option for a specific analysis on tender. The typescript contract incorporated the provisions of GAFTA 100 and provided inter alia:

Quality: protein and fat.. Fibre..
US/London/Comite analysis according to EEC Directive in *Seller's option to be declared on tender*. *BUFOC clause [*the analysis option*]* ("the analysis option").

Gafta 100 … with standing-in-clause.
GAFTA Form No. 100 included the following provisions:
*Quality-…. Warranted to contain [*specifications in relation to oil, protein, sand and/or silica, castor seed/castor seed husk followed*]*
[18]
Sampling and Analysis –(a) Samples... shall be drawn... on or before removal from the ship or quay... sealed jointly by Sellers and Buyers or their representatives. If one of the parties refuses to draw and or seal samples or is not represented the other party shall... call in…[an] *organisation... for the appointment of an independent superintendent to act on behalf of the defaulting party…. Extra expenses incurred in this connection shall be borne by the defaulting party"*

Prior to vessel's arrival at Amsterdam, the buyers notified the sellers that they would require "a normal standing-in-sealing as per GAFTA No. 100 resp. sampling Rules 121" in respect of the shipment and asked for the sellers' consent. The buyers explained that the reasons behind their request to seal samples were Dutch customs regulations (the customs' request was later withdrawn). The sellers refused. The buyers then nominated an independent superintendent on the sellers' behalf and claimed from them all costs of such appointment. When the sellers rejected the claim, the buyers started arbitration. The first-tier arbitrators found in favour of the buyers and the sellers appealed to the Board of Appeal which rejected the buyers' claim and concluded that the sellers had exercised their option to declare U.S. analysis final, which meant that the goods were to be analysed at the load port. It further stated that the buyers required samples to be drawn at discharge to protect them from claims other than specific contractual warranties against the sellers and as these claims did not materialise, the cost of the appointment of the superintendent could not be recovered from the sellers. The buyers appealed. On appeal to the High Court, they contended that under clause 18(a) of GAFTA 100 they were entitled to call for samples to be drawn jointly with the sellers at the discharge port and claimed extra expenses in relation thereto. The sellers, on the other hand, submitted that the analysis option superseded and replaced clause 18(a) and that the loading port analysis carried out in the U.S. was final evidence of the quality of the goods and that the sellers were under no obligation to contribute to the costs incurred in relation to the appointment. In response, the buyers contended that the analysis option and clause 18(a) worked in parallel. The loading port analysis only referred to the quality specifications set out the typescript contract (protein, fat and fibre) and did not refer to castor seed or castor seed husk. Accordingly, notwithstanding the load port analysis, clause 18(a) continued to exercise its function. The purpose of this clause was also to provide evidence as to whether the goods complied with the description or whether they were fit for purpose or of merchantable quality.

Colman J pointed out that the analysis option was intended to provide for an analysis of the goods shipped which would be binding for the purposes of the determination of those attributes which had been analysed. When the sellers exercised an option for U.S. analysis, there was therefore written into the contract a term to the effect that the loading port analysis

would be biding in the sense that it would be determinative of the attributes of the goods for which the analysis had been carried out. The striking feature of the analysis option was that it gave no indication of the specifications of the goods of which the analysis was to be conducted. It failed to tell the reader whether it was intended to cover all the quality warranties in GAFTA 100 cl. 5 – oil and protein, sand and silica, castor, seed and castor seed husk- as well as the fibre specified in the typescript clause, or only some of them. In the courts' view there was nothing on the wording of the analysis option to indicate whether the analysis tendered by the sellers was to cover all the applicable quality requirements. The correct construction was that if the sellers opted for and tendered a U.S. loadport analysis, that analysis displaced cl. 18 to the extent that the loading port analysis coverd the quality characteristics to which cl. 18 analysis would be applicable. In other words, there could only be one contractual analysis for castor seed and castor seed husk. If the loadport analysis covered that quality specification, then there could not in addition be a cl.18(a) discharging port sampling and subsequent analysis covering that specification. Accordingly, where the U.S. loadport option was exercised it would be necessary to look at what was covered by the actual analysis in order to ascertain what remaining function the cl. 18 may have. The main function of cl.18 was to provide machinery for determining whether the cl. 5 quality warranties were complied with. If that main function was wholly performed instead by the U.S. loading port analysis, the compulsory sampling procedure remained in place for the ancillary purpose of providing an analysis to enable the parties to have evidence in relation to disputes other than those relating to express quality warranties (protein, fat, fibre). The U.S. loading port analysis was concerned with compliance with the express contractual quality warranties and so the residual function of cl.18 for a discharge ports sample remained. That residual function was to provide for analysis as to compliance with description, fitness for purpose and merchantable quality in so far as not covered by the U.S. loading port analysis. As the loading port analysis did not perform the residual function of a cl.18 sample, the cl. 18 sampling procedure was not displaced and, thus, the buyers were entitled to set up the joint sampling of the goods despite their purpose being unrelated to any disputes as to compliance with the quality warranties. The Sellers were therefore in default in dismissing the buyers' request to appoint their surveyor at discharge port.

Finality as to what?

The scope of the finality of a certificate will depend on the language used in a contract as well as in a certificate itself. The parties are free to stretch the scope of a certificate as far as they want to having regard to their business interests and bargaining power. However, even if every effort is made to carefully demarcate the boundaries of a finality clause, a question may still arise as to an exact scope that the certificate intends to cover. In a typical case, traders will agree on conclusiveness as to quantity, quality and condition of the goods and would expect certificates to be final to that extent. Such term will not however be construed in vacuum: the nature of the goods and the relation between their quality and description will have a bearing and may upset the agreed scope of a finality clause. If the quality and description cannot be separated, finality as to the former will often mean finality as to the latter. The scope of the conclusiveness of such certificates cannot be therefore defined in complete isolation and one must look to the nature of the goods as well as to the contract as a whole to identify precise quality specifications in relation to which the certificate is to be conclusive.

In *Alfred Toepfer v Continental Grain Co [1974] 1 Lloyd's Rep. 11*, the buyers, who had been sold "Amber Durum wheat" instead of contracted "*Hard* Amber Durum wheat" contended that the certificate was only final as to "quality", not as to the "description" of the goods since "hard" was part of the description of the goods. The Court of Appeal rejected that argument. It was held that on the facts of this case the quality and description could not be separated. The hardness related to both. Denning LJ indicated that the description of the goods often includes a statement of their quality and that "quality" is often part of the description. He thus concluded that the word "hard" is a word both of quality and description so if a certificate was final as to the quality "hard" it would be final as to that description also.

Alfred Toepfer v Continental Grain Co was distinguished in The Bow Cedar where Lloyd J ruled that the certificates were final as to the matters covered only by the quality clause, being specifications as to FFA, moisture and impurities, and not as to the commodity itself.

N.V. Bunge v Compagnie Noga d'importation et d'exportation S.A. (The "Bow Cedar") [1980] 2 Lloyd's Rep. 601
The sellers sold to the buyers f.o.b. 500 tonnes of Brazilian crude groundnut oil FFA basis 2% max 3%. Maxim ½% moisture and impurities in bulk. The confirmation of sale provided: "*Weight and quality final at loading as per certificate of independent surveyors nominated by sellers"*.

The contract incorporated FOSFA 53 which provided as follows:
1.Quality. The oil shall be of good merchantable quality at time of shipment
3.Sampling and analysis: Analysis final at time of shipment..
Representative samples drawn and sealed by Sellers' representatives...to be sent for analysis to Federation laboratory.. whose decision shall be final.

The independent surveyors (Thionville) issued certificates confirming that "Brazilian groundnut oil loaded on board "Bow Cedar" is within specifications. The goods at the time of shipment consisted of 250 tonnes of groundnut oil and 250 tonnes of soya bean oil. However, by reason of admixture with soya bean oil, the goods appropriated to the contract could not have properly been described as crude groundnut oil.

The buyers claimed damages. The sellers denied liability contending that not only did the certificates given on shipment certify the percentage of FFA moisture and impurities, but they also evidenced that the goods were Brazilian crude oil and they were final and conclusive in this respect. The Board of Appeal upheld the umpire's award in favour of the buyers. Lloyd J held that there was nothing in the certificates to support the suggestion that the surveyors were also certifying that the goods were crude groundnut oil and that it was clear from the form and layout of the certificates that what was certified was the result of their chemical analysis, not the commodity which they had been analysing.

Even if, however, the certificates did certify the commodity as well as the chemical analysis it was plain on the ordinary meaning of the words that the certificates were to be final as to the sort of matters that were covered by the quality clause i.e. the FFA, moisture and impurities and not as to the commodity itself: "*If the surveyors were certifying the commodity as well as the chemical analysis, one would expect a reference to that fact in the certificate itself but there is no such reference*."
The sellers relied on *Toepfer v Continental Grain Co* where the Court of Appeal held that on the facts of that case the quality and description could not be separated. Lloyd J disagreed and

concluded that in the case before him the presence of soya bean oil did not affect the quality of the oil in any way. The quality was excellent but the goods were not the contract goods: "*It is as if in the Toepfer case the sellers, instead of delivering wheat of less than the contractual hardness had delivered barley*". There was nothing to suggest that in those circumstances the certificates would have been binding.

A fair proportion of commodity contracts falls into a broader trading pattern with sellers seeking to widen the scope of a certificate and buyers frantically attempting to limit it. Sellers would usually insist on making a certificate as impregnable as possible in relation to both, description *as well as* quality, whereas buyers would try to separate the two and to confine it to a hermetically defined set of quality specifications thereby leaving the door open for rejection of goods in case of their non-compliance with description.

Ch. Daudruy van Cauwenberghe & Fils S.A. v Tropical Products Sales S.A. Tropical Products Sales S.A. v Saudi Sabah Palm Oil Corporation S.N.D. B.H.D. [1986] 1 Lloyd's Rep. 535
By contract, which incorporated FOSFA 53, the original sellers (Saudi Sabah) sold to the intermediate sellers (Tropical Products) 500 tonnes of Malaysian palm fatty acid distillate in sound second-hand drums. The intermediate sellers then sold the goods to the buyers (C.h. Daudruy). Both contracts provided under the heading "Quality":

"TSM [total Saponifiable matter] 9.5%; M & I [Moisture and impurities] max 3%; FFA [free fatty acid] min 70%."

So far as the Daudruy contract was concerned, under the heading "Merchandise" both the description "Malaysian Palm Fatty Acid Distillate" and the final on shipment requirements for TSM, moisture and impurities and FFA were all combined under one heading. Under "Conditions Particuliers", the contract provided for "*shipped weight and quality to be final as per certificate of independent surveyor like… SGS".*

So far as the contract between the intermediate sellers and the original sellers was concerned, it separated the commodity palm fatty acid distillate from quality where the same TSM, moisture & impurity and FFA requirements were laid down and then under "Conditions" it provided for "*Confirmed Shipped Quality/Shipped Weight final*".

On loading, SGS Malaysia issued a certificate of weight and quality which contained a certificate showing that the analysed sample was within the limitations provided by the contracts. On arrival at the discharge port, the buyers carried out a further inspection which showed that the goods were off specification and did not meet the contractual description. The buyers rejected the goods as not compliant with description and referred the dispute to arbitration. The umpire's award concluded that the goods did not correspond with the description (which was Malaysian palm fatty acid distillate), that therefore there was a breach of the conditions of the sale implied under s 13 of the Sale of Goods Act 1893 and the sellers were liable to the buyers. On appeal, the Board of Appeal of FOSFA reversed the umpire's decision and stated that the SGS certificates in respect of weight and quality were final. On appeal to the High Court, the buyers invited the court to follow *The Bow Cedar* whereas the intermediate sellers submitted that the case in question should be placed in the *Toepfer* class since there was some aspect of quality combined in the same clause as description. The ultimate sellers accepted that the certificate did not explicitly make any statements as to the

nature or description of the goods and invited the court to uphold the Board of Appeal award. In relation to the contract between the buyer and intermediate seller, Hirst J rejected the analogy with the *Toepfer* case and concluded that the case is "on all-fours" with *The Bow Cedar* case. The SGS certificate, just as in *The Bow Cedar*, certified the results of their chemical analysis and not the nature of the commodity itself. Furthermore, as a matter of construction, the finality of the certificate referred to the matters covered by the quality clause, i.e., FSM, M&I and FFA, and not to the commodity itself.

Where a quality and/or condition is/are referred to in both a supply contract and a prescribed form, any inconsistencies in relation to these within this double-layered contract may easily be exploited by a party seeking to challenge a certificate.

Cerealmangimi S.p.A. v Toepfer (The "Eurometal") [1965] 1 Lloyd's Rep. 337
A dispute between the parties arose out of a contract for sale of 10,000 tonnes of Spanish barley c.i.f. one safe port Italy. The contract provided for "*quality and condition final as per tender-terms, "por Sociedad de Control Solvente" for sellers' account."* It also contained a clause whereby the quality and condition of the goods were to be *"final at shipment"*.
Upon arrival of the vessel to La Spezia, the buyers refused to take delivery on the ground that the cargo was infested with live weevils. The buyers insisted on fumigation to take place before the acceptance of delivery and there was a dispute as to who should cover its costs. When the buyers declined to accept the goods, the sellers claimed arbitration. Although the buyers accepted that the certificate as to condition would cover such matters as the presence of live weevils, they submitted that the supply contract ("tender terms") did not make the certificate conclusive as to condition; in fact, under the supply contract the certificate did not cover condition at all. Instead, it covered such matters as the percentage of moisture and the presence of impurities (which would not include weevils) and split or damaged grains. Since under the sale contract the certificate was to be "as per tender-terms", it was submitted that, the finality of the certificate was confined to the matters set out in the supply contract.
The High Court decided against the buyers (just as the umpire and the Board of Appeal did) and concluded that the reference to "tender-terms" was a reference to the provision in the supply contract whereby weight and quality certificates were to be issued by Supercontrol in accordance with the usual procedure at Spanish ports. The certificate of quality and condition was issued in the form usual in the trade so, on the true construction of the contract, the certificate of quality was final as to condition as well as quality.

Under the pre-1979 Sale of Goods Act regime, the condition of goods was part of their "merchantable quality". While s.14 of the SOGA 1979 does not require quality to be "merchantable" but "satisfactory", the condition continues to form part of the quality [s. 14(2b) of the 1979 Act expressly provides that the quality of goods includes their state and condition].

In *Oleificio Zucchi S.p.A. v Northern Sales ltd [1965] 2 Lloyd's Rep. 496* where the buyers sought to challenge the finality of a certificate as to condition, the court concluded that although under a c.i.f. contract it was the sellers' obligation to put the goods on board in such condition that it would stand the ordinary conditions of the contemplated voyage, the clause *"Official inspection certificate final as to quality"* provided, in effect, that the official inspection certificate was final and conclusive evidence that this obligation had been fulfilled. This is subject to the question whether the word "quality" in that clause included "condition".

McNair J ruled that, in the light of s.14(2) of the Sale of Goods Act 1893 which referred to “merchantable quality”, “quality” did include “condition”; it also coincided with the ordinary grammatical meaning of the word “quality” and was in line with the position of the grain inspector who had confirmed that the reference to quality in the certificate included condition.

Dealing with finality clauses

The list below highlights a number of key points that you should consider when negotiating finality clauses. Although your ability to shape the scope of such clauses will largely depend on the market conditions and your bargaining power, there are several crucial issues that should not be lightly dismissed during negotiations.

- In relation to what would you like to achieve finality? Quality, condition or both? Bear in mind that in some cases description may overlap with quality. Finality as to quality would then necessarily mean finality as to that description.

- How bulletproof would you like to make a finality clause? As a buyer, you may want to leave the clause open to challenge in certain circumstances such as an immaterial mistake or procedural irregularities in sampling and/or analysis. As a seller you would generally be interested in keeping it as watertight as possible and to limit buyers’ rights to contest it. Although you will generally be allowed to challenge a certificate in the event of fraud or a fundamental mistake, some traders may not be aware of that common law exception. It may therefore often be more commercially reasonable to include these defences in the finality clause to avoid any futile dispute in the future.

- Apply common sense when relaxing the rigidity of a finality clause. Opening it up too widely may undermine the certainty of a transaction up and down the chain often resulting in costly and lengthy litigation for parties involved.

- Ensure that the wording of a certificate final clause is clear and unambiguous and both parties have the same understanding of the rights and obligations derived therefrom.

- Ensure that instructions issued to surveyors are clear and that they will be followed at all times. Any deviation from the contractually agreed instructions should be brought to the attention of your counterparty and their consent should be obtained. Similarly, make sure that the agreed sampling and testing procedure is adhered to at all times. If the inspection company of your choice fails to stick to the agreed code, the other party may willingly pick on that procedural defect and challenge the determination result in order to negotiate a better price.

- If you sell back-to-back, ensure that you actually achieve a back-to-back contract when selling down the chain. Finality clauses should ideally remain the same in both contracts. If you confer to sub-buyers rights that you are deprived of under your contract with the seller up the chain, you risk to end up incurring additional costs that you are unlikely to recover from your seller.

- If you are contractually entitled to re-test the goods, exercise this right fully and enthusiastically. Ensure you do so within a specified time limit. If a certificate

happens to be uncontractual for whatever reason, you will be able to trigger an additional testing procedure.

- Check the contract for any inconsistent provisions. A dispute may occasionally arise as to conclusiveness of a certificate where, for instance, a contract contains two provisions in relation to the same matter with one clause providing for the finality of a certificate for *all* purposes and another clause confining it to *specific* purposes.

- No clause can be read on its own. Read the contract as a whole. For instance, if the finality clause fails to refer to a specific testing method but it is mentioned elsewhere in the contract, the parties would generally be expected to follow that method.

- Inspect each certificate for any inconsistencies. Ensure that there is no misunderstanding as to the scope of a certificate. Frequently, a certificate not only records quality parameters such as FFA, moisture, impurity etc but also states that goods were shipped in good condition. In such circumstances, if a contract provides for a quality certificate to be final at a certain cut-off point, both quality and condition are likely to be regarded as final at that point.