

# Complexities of International Trading Contracts

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## About



Worked with large trading houses for 25 years.



Spent 30 years in Trading various commodities - Soya, Grains, Pulses, Sugar, Rice, Oil Seeds, Meals, Coffee etc



Qualified as GAFTA Arbitrator, FOSFA panel Arbitrator & Associate Chartered Institute of Arbitrators, London.



Part of various Arbitration tribunals at GAFTA & FOSFA.



Advisory in Trade process, Dispute resolution, Arbitration process based on English law, Claim/Defence submissions.



## Outline of Presentation



- ▶ Introduction to Contracts -
  - ▶ When are you bound by a contract?
  - ▶ Key Elements of a contract?
  - ▶ Important terms 'not to be excluded'.
- ▶ Governing Contract and Jurisdiction
  - ▶ Identify relevant GAFTA/FOSFA contract.
  - ▶ Important clauses in GAFTA/FOSFA contract.
  - ▶ Jurisdiction, Arbitration & Domicile.
- ▶ What to do if dispute arises?
  - ▶ Dispute Resolution mechanism.
  - ▶ Default Declaration.
  - ▶ Arbitration Process.

## Introduction to Contracts - When are you Bound by a contract?

- ▶ English Law is the basis of more than 80% of International Contracts.
- ▶ It is not necessary to have paper recording of the agreement, although in practice all contracts are recorded.
- ▶ Contract formation - Offer, Acceptance and Consideration.
- ▶ Counteroffer is NOT acceptance.
- ▶ Silence is NOT acceptance; Acceptance needs to be communicated.
- ▶ Acceptance through Brokers, Open Offer - Unattended Mails?



## Introduction to Contracts - Key Elements of a Contract

- ▶ Date, Name of Parties, Cargo Description (& Condition), Origin, Quality & Quantity (when?), Allowance.
- ▶ Price, Delivery, Payment, Documents required, Amendments to contract only through written consent.
- ▶ Incorporate standard GAFTA/FOSFA contract - covers 'standard performance' and 'what if' clauses.



## Introduction to Contracts - Important terms 'not to be excluded'

- ▶ Description is a 'Condition' of the contract - Cargo not as per description may give rise to right of rejection by the buyer.
- ▶ Make 'Time of the Essence' - Ensure timelines are clearly defined applicable to various clauses.
- ▶ Ensure correct GAFTA/FOSFA form is identified and incorporated instead of vague terms like 'relevant GAFTA/FOSFA contract' or 'GAFTA terms to apply'.
- ▶ Ensure Jurisdiction is clear and unambiguous. Have come across many contracts with multiple jurisdictions leading to complications.
- ▶ Arbitration clauses - Understand clearly before incorporating.
- ▶ Know what you are incorporating - specify clause numbers instead of General statements
- ▶ Prevention of Shipment Clause: Specific reference to COVID-19
- ▶ Prevention of Shipment/Delivery distinct from 'Force Majeure'



Prevention  
of Shipment  
Clause

## Governing Contract & Jurisdiction: Identify relevant GAFTA/FOSFA Contract

- ▶ Make a choice of governing contract - GAFTA, FOSFA, GPC etc.
- ▶ Identify Contract Number - Soybeans in Containers can be on GAFTA 88 or FOSFA 11. Visit GAFTA or FOSFA website to make an informed choice.
- ▶ Ensure GAFTA Weighment rules 123, Sampling rules 124 & Register of Analysis methods 130 are incorporated.
- ▶ Choose between Arbitration Rules 125 & Expedited Arbitration Rules 126.
- ▶ Option of Mediation Rules 128.
- ▶ All GAFTA/FOSFA governed contracts are necessarily as per English Law with seat of Arbitration being London - 80% of Global contracts are performed.
- ▶ Domicile - The contracts are treated as Made and Performed in England



## Governing Contract and Jurisdiction Identify relevant GAFTA/FOSFA Contract Important to Remember (Last Clause of GAFTA contracts)

### INTERNATIONAL CONVENTIONS

The following shall not apply to this contract: -

- a. The Uniform Law on Sales and the Uniform Law on Formation to which effect is given by the Uniform Laws on International Sales Act 1967.
- b. The United Nations Convention on Contracts for the International Sale of Goods of 1980.
- c. The United Nations Convention on Prescription (Limitation) in the International Sale of Goods of 1974 and the amending Protocol of 1980.
- d. Incoterms.
- e. Unless the contract contains any statement expressly to the contrary, a person who is not a party to this contract has no right under the Contract (Rights of Third Parties) Act 1999 to enforce any term of it.



## Governing Contract and Jurisdiction

Avoid Additional clauses in contracts like

- Subject to Mumbai Jurisdiction
- Subject to Arbitration as per ICC or SIAC or DIAC or any other body
- Subject to Incoterms
- Subject to Indian Arbitration
- Subject to USA courts
- Contracts become contradictory and GAFTA arbitration is very difficult even if mentioned.

English law and London is widely accepted as Centre for Arbitration.

English law - Sale of Goods Act 1979 & Arbitration Act 1996 are automatically incorporated



- ▶ Read your contract and governing GAFTA/FOSFA thoroughly - understand all clauses.
- ▶ Have you followed contract correctly? Extensions, Notices, Appropriations, Payments ..
- ▶ Have you made 'time of the essence'?
- ▶ Check for failures in your obligations.
- ▶ Are you within timelines?
- ▶ Always remember, your counter party has access to legal advice.
- ▶ Choice of Arbitration or Mediation.
- ▶ Get your case evaluated by experts & your Claims team.



What to do if  
Dispute Arises?  
Dispute Resolution  
Mechanism

- ▶ Default Declaration is very critical in the Arbitration process.
- ▶ Do not rush into 'declaring default', you could fall in a trap and get into 'Anticipatory Repudiation' yourself.
- ▶ Look for all notices that have served.
- ▶ Was Shipment extension sought? 14 days in GAFTA 88
- ▶ Time for Notice of Appropriation - 10 days in GAFTA 88
- ▶ Default Date in case shipment extension was sought and notice was not served can be only after 24 days.
- ▶ Default may be declared by Sellers at any time after expiry of the contract period, and the default date shall then be the first business day after the date of Sellers' advice to their Buyers.

## What to do if Dispute Arises? Default Declaration

Default  
Clause

- ▶ Both GAFTA and FOSFA provides for two tier Arbitration - Arbitration & Appeal.
- ▶ Read and Understand GAFTA Arbitration Rules 125 & 126
- ▶ Read and Understand FOSFA Arbitration Rules, Guide & Code of Practice.
- ▶ Pay specific attention to Timelines, Appointment of Arbitrators, Deposits, Fees & Costs, Oral hearing etc.
- ▶ Usually, a Tribunal of 3 Arbitrators
  - ▶ Appointed by Claimant.
  - ▶ Appointed by Respondent.
  - ▶ Chairman appointed by GAFTA/FOSFA.
- ▶ Role of Arbitrators as per Arbitration Act 1996, completely Neutral. There is no 'my Arbitrator or your Arbitrator'
- ▶ Arbitrators have to strictly follow 'code of conduct'
- ▶ Advisable to consult Arbitration Trained lawyer or Trade Representative (can be a Qualified Arbitrator).
- ▶ Process of Claim and Defense Submissions - oral hearing only on party's request which is rare.

## What to do 'if Dispute Arises'? - Arbitration Process

- ▶ The Tribunal upon completion of submission proceeds with an award which is available to Claimants on payment of dues.
- ▶ The awards are subject to appeal if any of the parties wish, for which procedures are available on GAFTA/FOSFA websites.
- ▶ Award of Appeal can only be challenged in an English Court of Appeal.
- ▶ GAFTA/FOSFA awards are automatically recognized and enforceable as per 'UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), known as the "New York Convention" of which there are currently 165 Countries including India.
- ▶ Parties are free to get award locally enforced if losing party fails to pay.
- ▶ GAFTA/FOSFA regularly updates 'List of Defaulters' to Arbitration awards which is used by many to assess risk profile of counter parties.



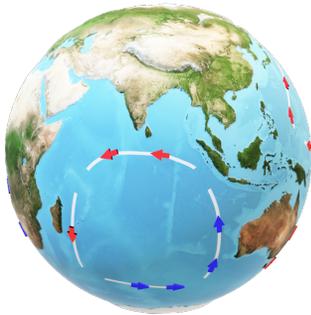
## What to do 'if Dispute Arises'?

- Arbitration Awards

- ▶ Choose an Arbitrator from the panel of Arbitrators available of GAFTA/FOSFA websites.
- ▶ Currently there are about 80 Qualified Arbitrators in GAFTA and about 40 in FOSFA, worldwide.
- ▶ Take consent of Arbitrator prior to nomination.
- ▶ Arbitrators are free to act as 'Trade Representatives' in arbitration and can guide in Procedures, Submissions & Oral hearings.
- ▶ Practicing lawyers can assist you in Procedures, Submission etc but are barred from Oral hearings.
- ▶ Arbitration costs are usually on losing party but at the discretion of tribunal.



## Appointment of Arbitrators & Trade Representatives/ Lawyers



Thank you for your attention!



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BACKUP

#### PREVENTION OF SHIPMENT

"Event of Force Majeure" means (a) prohibition of export or other executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports named herein is/are situate, restricting export, whether partially or otherwise, or (b) blockade, or (c) acts of terrorism, or (d) hostilities, or (e) strike, lockout or combination of workmen, or (f) riot or civil commotion, or (g) breakdown of machinery, or (h) fire, or (i) ice, or (j) Act of God, or (k) unforeseeable and unavoidable impediments to transportation or navigation, or (l) any other event comprehended in the term "force majeure".

Should Sellers' performance of this contract be prevented, whether partially or otherwise, by an Event of Force Majeure, the performance of this contract shall be suspended for the duration of the Event of Force Majeure, provided that Sellers shall have served a notice on Buyers within 7 consecutive days of the occurrence or not later than 21 consecutive days before commencement of the shipment period, whichever is later, with the reasons therefor.

If the Event of Force Majeure continues for 21 consecutive days after the end of the shipment period, then Buyers have the option to cancel the unfulfilled part of the contract by serving a notice on Sellers not later than the first business day after expiry of the 21-day period.

If this option to cancel is not exercised then the contract shall remain in force for an additional period of 14 consecutive days, after which, if the Event of Force Majeure has not ceased, any unfulfilled part of the contract shall be automatically cancelled.

If the Event of Force Majeure ceases before the contract or any unfulfilled part thereof can be cancelled, Sellers shall notify Buyers without delay that the Event of Force Majeure has ceased. Sellers shall be entitled, from the cessation, to as much time as was left for shipment under the contract prior to the occurrence of the Event of Force Majeure. If the time that was left for shipment under the contract is 14 days or less, a period of 14 consecutive days shall be allowed.

The burden of proof lies upon Sellers and the parties shall have no liability to each other for delay and/or non-fulfilment under this clause, provided that Sellers shall have provided to Buyers, if required, satisfactory evidence justifying the delay or non-fulfilment.



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#### DEFAULT

In default of fulfilment of contract by either party, the following provisions shall apply:

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

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

(c) The damages payable shall be based on, but not limited to, the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods, on the date of default, established under (b) above.

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

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

(f) Default may be declared by Sellers at any time after expiry of the contract period, and the default date shall then be the first business day after the date of Sellers' advice to their Buyers. If default has not already been declared then (notwithstanding the provisions stated in the Appropriation Clause) if notice of appropriation has not been served by the 10th consecutive day after the last day for appropriation laid down in the contract, the Seller shall be deemed to be in default and the default date shall then be the first business day thereafter.



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