



Arbitration and Mediation

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Lawyer Magazine Hot 100 2015

M&A Alternative Dispute Resolution 2020

M&A Alternative Dispute Resolution Adviser of the Year 2021

Global Advisory Experts Arbitration Advisory Expert of the Year U.K. 2020

Global Law Experts Arbitration Expert of the Year UK 2021

Leaders in Law 2021 winner

Global 100 Best Mediator 2021

M&A Today Best Mediator 2021

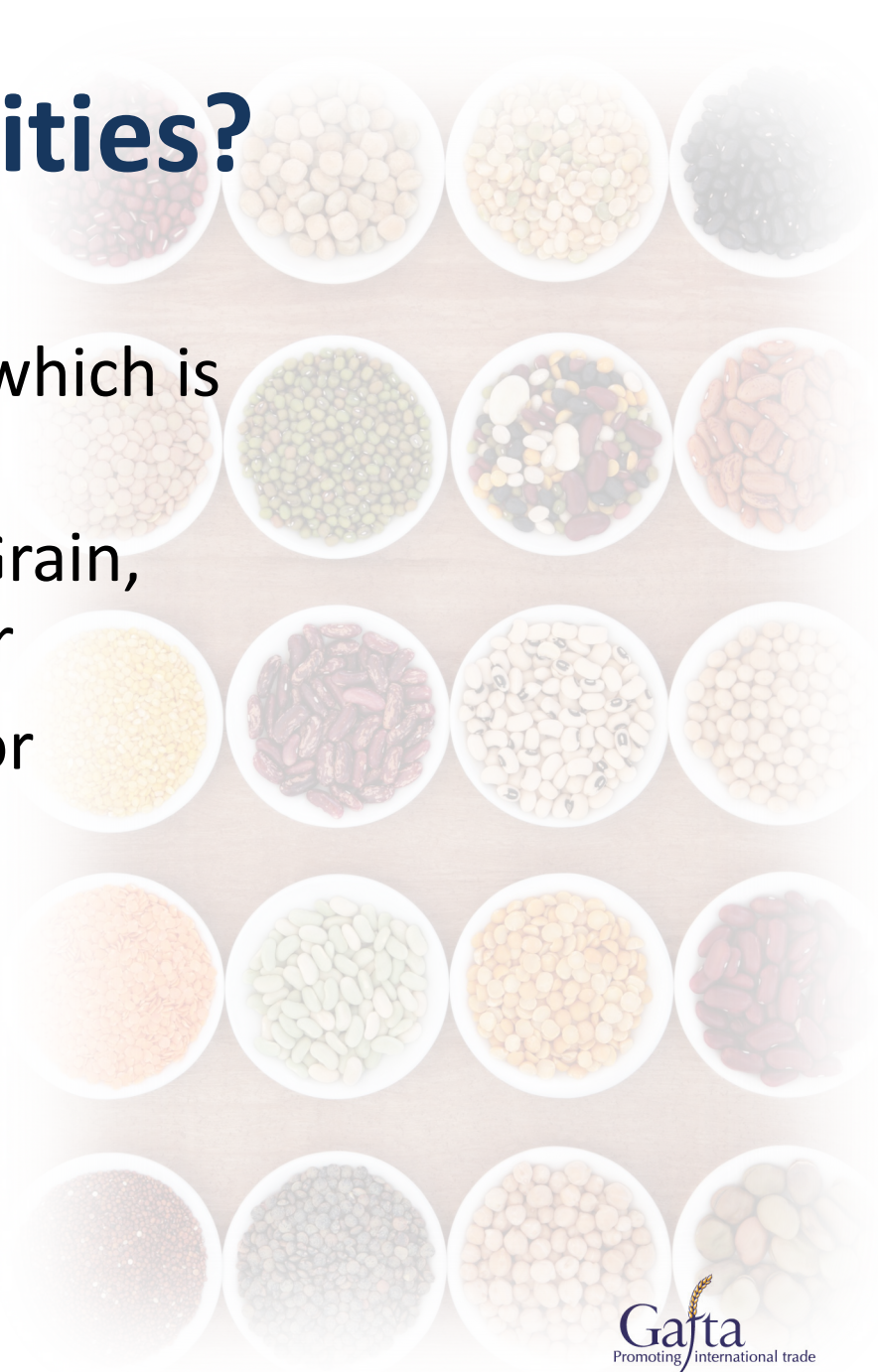
Lawyer International Best Mediator and Barrister 2021

Corporate America Best Mediator and Barrister 2021

Corporate INTL Arbitration Expert of the Year UK 2021

What are Commodities?

- Raw material/agricultural product which is bought and sold
- FCA: Cocoa, Coffee, Cotton, Feed/Grain, Pulses, Oilseeds/fats, Rubber, Sugar
- Current challenges within the sector
 - Force Majeure and sanctions
 - Defaults



Introducing Gafta



Gafta is an international trade association representing organisations trading globally in agri-commodities including grain, rice, animal feed, pulses, general produce and spices



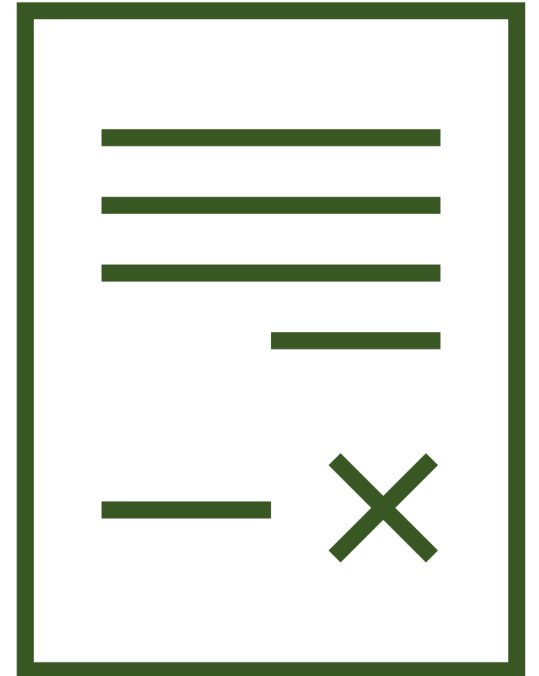
Gafta has **over 1900** member companies in **100** countries around the world.



There are various categories of membership including traders, brokers, superintendents, fumigators, arbitrators, individuals, analysts and professional services

Gafta Standard Form Contracts

- Over 80
- Reflect commodity, geographical location (Black Sea), method of transport (road, rail, shipping), FOB/CIF (and variations)
- Domicile Clause
- Why English law?
- Arbitration Clause
- Role of ICC



Dispute Resolution

Methods of solving disputes:

- Discussion and Negotiation
- Mediation by a neutral third party
- Arbitration
- Courts (litigation)



What is Trade Arbitration?

- Resolution of a dispute outside the courts in private
- Parties agree to refer dispute to a panel of one or more arbitrators
- Parties agree to be contractually bound by decision of the arbitrators which is legally binding
- Courts reluctant to intervene
- Award is enforceable. NYC 1958
- Why trade Arbitration and not the Courts?

Arbitration

Advantages

- Trade specific - expertise
- Confidential
- Cost-effective
- Quick
- Flexible
- Enforceable

Limitations

- Confidentiality (adverse press may be an advantage!)
- Complexity (may not always lead to cost-effectiveness/speed)
- May not be allowed to use lawyers at hearing (may also be an advantage!)
- Hinders precedent?



Examples of Disputes

- Breach of contract (was there a contract?)
- ‘Battle of the forms’
- Failure to ship
- Failure to pay
- Quality, condition, description of goods (**SoGA 1979**)
- Assessment of damages
- Force Majeure
 - NB: Force Majeure v Frustration



Arbitration in the current climate: the challenge of the Ukrainian crisis

- Importance of Ukraine to world food supply chain
- Current disruption to international trade
- Force Majeure and Sanctions
- Export bans and blockade
- Impact on arbitration
- Impact on arbitrators - possible compromise to the right to a fair hearing?
- Impact on Trade Associations?

Arbitration Agreement

- Gafta Standard Form contracts – 80+
- GPC contract number 1
- Incorporation and disputes

23. ARBITRATION

(a) Any and all disputes arising out of or under this contract or any claim regarding the interpretation or execution of this contract shall be determined by arbitration in accordance with the GAFTA Arbitration Rules, No 125, in the edition current at the date of this contract; such Rules are incorporated into and form part of this Contract and both parties hereto shall be deemed to be fully cognisant of and to have expressly agreed to the application of such Rules.

(b) Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against the other in respect of any such dispute, or claim until such dispute or claim shall first have been heard and determined by the arbitrator(s) or a board of appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of an award from the arbitrator(s) or board of appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any persons claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute or claim.

(c) Nothing contained under this Arbitration Clause shall prevent the parties from seeking to obtain security in respect of their claim or counterclaim via legal proceedings in any jurisdiction, provided such legal proceedings shall be limited to applying for and/or obtaining security for a claim or counterclaim, it being understood and agreed that the substantive merits of any dispute or claim shall be determined solely by arbitration in accordance with the GAFTA Arbitration Rules, No 125



Preliminary Issues

- Issues arising in practice:
 - Relevant law – Amendments to Gafta Standard Form Contracts
 - Jurisdiction
 - Non-participation?

Form 125

Two-tier system

Arbitration

Appeal

First Tier Hearing

- Sole arbitrator, or
- Panel of 3
- 262 new cases in 2022 (decrease of 18% from previous year)
- Cases 'follow the market' – Russia/Ukraine. FM? Covid 19
- Cases are becoming more complex, factually and legally
- Largest single award value: \$52.8.M
- Lawyers tend to be used 'pre-hearing'
- Right of appeal
- Appeals in practice



125: Process (1)

- **Rule 2:** Claimant serves notice on Respondent
 - Email/mutually recognised electronic method of rapid communication
- **Rule 2:** must do so within prescribed time limits (generally one year)
- **Rule 3:** panel of 3 arbitrators appointed (or sole, if parties agree)
- All arbitrators **must be neutral**
- 'Justice to be seen to be done'
- **How does neutrality work in practice? Challenges?**
- Generally:
 - Claimant appoints arbitrator
 - Respondent appoints arbitrator
 - Gafta appoint chair

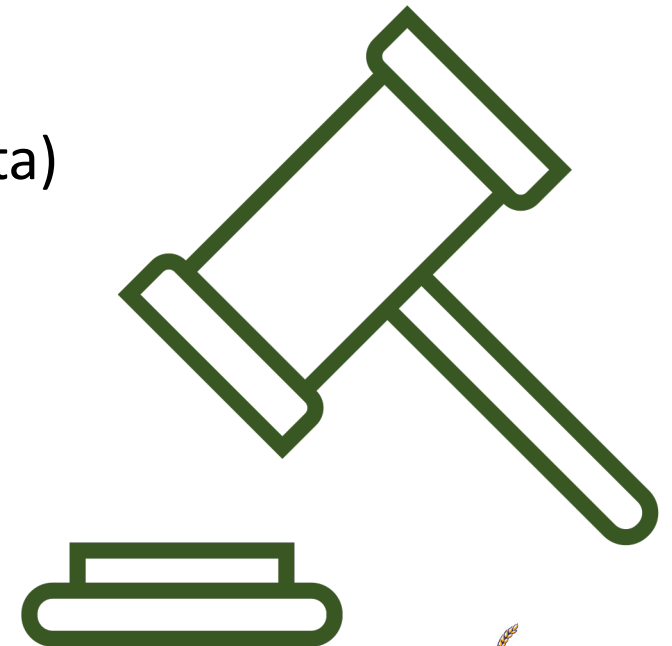
125: Process (2)

- **Rule 4: Procedure**

- Claimant makes submission and pays a deposit
- Respondent submits defence
- Claimant has option to reply
- Tribunal determines timetable/case management
- Generally, paper based
- Lapse of claim after 1 year
- Limitation period
- Hearing if requested. Legal representation not allowed (unless parties agree)
- Why are lawyers discouraged?

125: Process (3)

- **Rule 8:** Tribunal decides if it has jurisdiction
- **Rule 9:** Awards (Judgement)
 - In writing
 - Sets out decision and reasons for it including remedies and costs
 - Gafta sends to parties (after payment of fees/expenses incurred by tribunal and Gafta)



Remedies

- **Damages – Gafta Default Clause**
 - Interest
 - Costs
 - Loss of profit claims?
 - The importance of proper quantification
- **Non-monetary awards:** (very rare)
 - Rectification
 - Specific performance
 - Declaration
 - Terms of Contract
 - Default

Appeals

- **Rule 10: Right of Appeal**
- Lodging an Appeal:
 - Within 30 days of date of award
 - Appellants pay a deposit
- **Rule 11: Appointment of Board of Appeal**
- Oral hearings (may be granted on request of either party. Again, no legal representation before the Board unless the parties agree)
- Appeal takes form of new hearing. New arguments can be raised
- Board can confirm, amend, set aside Award
- Tactical considerations?

Appeals

Rule 24:

- Gafta defaulters procedure – posting on Gafta website/circular to members ('name and shame')
- Suspension/Termination of membership
- Application to the Courts
- New York Convention
- Problem countries?



Access to the Courts

- Arbitration Act 1996
- Challenge jurisdiction (**S67**)
- Serious irregularity (**S68**)
 - Exceeds powers
 - Failure to deal with issues
 - Irregularity in conduct
- Point of Law (**S69**) **BUNGE V NIDERA**
- Reality: very little change of a successful Appeal against any Arbitration Award



Bunge v Nidera

Issues to be considered

- Gafta Contract – Gafta 49
- Interpretation of Clause 18 – Default
- Gafta Arbitration: First Tier and Appeal
- Role of the Courts
- Assessment of Damages

Background

- Gafta Contract: English Law
- Presumption: Parties bound by what they agree
- Damages: “compensatory principle”/mitigation
- Default Clause:
 - Provides certainty
 - Mechanism for calculating damages
 - Clear guidelines
 - Ease of application by arbitrators
 - Cost effective enquiry
- Common in other sectors too e.g. ‘the parties acknowledge that it is difficult to quantify damages and have agreed that X shall levy a cancellation fee against Y as liquidated damages and not as a penalty’
- Penalty clauses
 - A clause penalising / deterring a party from breaching contract. Damages are out of proportion to any potential loss
 - Generally not enforceable

Bunge v Nidera

- B sold 25,000 MT Russian Milling Wheat to N
- **Delivery 23-30 August 2010**
- Contract Incorporated Gafta 49
- **5 August 2010:** Russian Government – Temporary ban of Wheat export 15 August – 31 December (*i.e. would take effect during delivery period*)
- **9 August 2010:** B prematurely cancelled contract – Prohibition Clause (*now replaced by Prevention of Shipment*)
- **Premature: should have waited to see if the ban remained in place**
- **11 August 2010:** N treated cancellation as breach of contract (*no evidence that ban would definitely come into existence and, if it did, that it would last for that period*)
- **12 August 2010:** B offered to reinstate the contract on same terms. N rejected this.
- N brought arbitration claim – damages of \$3m based on the Default Clause. Difference between contract and market price on 11 August 2010



Expedited Disputes – Rule No. 126

- Sole Arbitrator
- Fixed Timetable
- No Appeal
- Implications of no Appeal
- GPC Contracts

Issues arising in practice

- Speed of market/language/Brokers/Lack of understanding of English Law/WhatsApp emoji's
- Does an arbitrator have a duty to elicit additional information?
- Inquisitorial v adversarial approach?
- Failure to evidence loss
- Challenges to arbitration process – Gafta Defaulters Circular and reputational damage in the market
- Change of Domicile
- Failure to consider mediation – GPC1
- English Law – Force Majeure – “Strike”
- Challenges to Arbitrator Appointment
- General Right of Removal (Rule 11-2)

The Concept of Mediation

- What is mediation?
- How does mediation work?
- What are the advantages of mediation?
- What is the role of the mediator and what skills are needed?



What is Mediation?

- Managed negotiation
- Without prejudice/confidential
- **Voluntary** participation
- No judgment or other decision
- Designed to lead to a binding settlement agreement
- The mediator is the key to the process, but **does not decide the outcome**
- **Flexible** options for settlement, including new business
- Can also be used to set terms, e.g. pricing under a long term contract

Role and Skills of the Mediator (1)

- The mediator is **NOT** a judge
- Independent
- Suitable qualifications/experience. Perhaps a lawyer, or a commercial person (or both)
- Controls the procedure: Open sessions and separate meetings
- Will listen to what both parties say about:
 - Their views of the dispute
 - Their commercial interests
- The mediator will not repeat everything one party says to the other party – they will only pass on what he is asked to

Role and Skills of the Mediator (2)

To make the parties see reality:

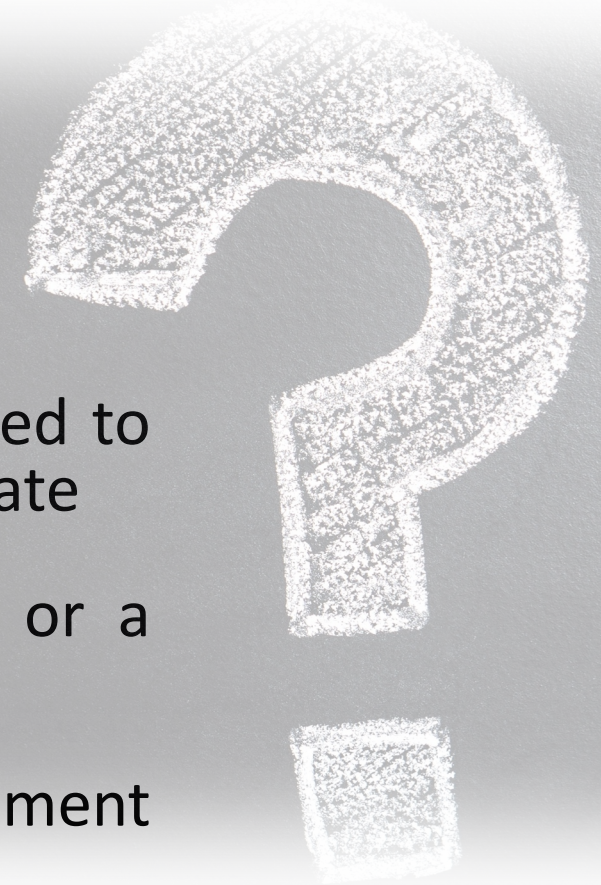
- Comment on strengths and weaknesses of both parties' cases.
- Convey an impression of the way in which the arbitrators might see certain aspects of the case on both sides.
- Cut through emotion to get to the issues.

To bring a new dynamic to the negotiations:

- Fresh impetus to settle.
- Perhaps get around obstructive lawyers or other advisers.

What can mediators not do?

- **Decide the case** for the parties
- **Provide legal advice** to the parties
- **Force a settlement** on the parties
- **Stop a time bar** from expiring – you may need to commence Gafta arbitration before you mediate
- Cannot **make orders**, e.g. a freezing order or a disclosure order
- Cannot **give publicity** to an outcome. Settlement will be private



GAFTA Mediation Rules 128

- At any time
- With parties agreement
- Process completed within 45 days
- Parties submit written opening statement (5 days in advance)
- Legal representation allowed
- Confidential/without prejudice
- Cost: £950
- Mediator: Gafta General Counsel, Jonathan Waters

