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4, Boulevard du Théâtre, P.O.Box 5429, CH-1204 Geneva, Tel.: ++41 22 310 74 30,  
Fax: ++41 22 310 37 31; E-mail: [info@arbitration-ch.org](mailto:info@arbitration-ch.org), [www.arbitration-ch.org](http://www.arbitration-ch.org)

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### Correspondence

Please send all correspondence regarding the Bulletin to the following address rather than to the Secretariat of ASA:

### ASA Bulletin

Prof. Pierre Lalive, Matthias Scherer  
Rue de la Mairie 35, CP 6569, CH-1211 Genève 6  
Tel: +41 22 319 87 00 – Fax: +41 22 319 87 60  
Emails: [plalive@lalive.ch](mailto:plalive@lalive.ch) & [mscherer@lalive.ch](mailto:mscherer@lalive.ch)  
(For address changes please contact  
[info@arbitration-ch.org](mailto:info@arbitration-ch.org)/tel +41 22 310 74 30)

# FOSFA and GAFTA Standard Form Contracts and their Arbitration Systems

JACQUES COVO\*

The clauses of the standard form FOSFA and GAFTA contracts may be divided into three categories:

- a. The Commercial terms, such as those relating to the Goods, Quantity, Price, Quality, Weight, Time of Shipment, Sales by named vessels.
- b. The Terms concerning the performance of the contracts such as: (Notice of) Appropriation, Payment, Interest, Shipping Documents, Duties and Taxes, Discharge, Weighting, Sampling and Analysis, Shipment and Classification (of the vessel).
- c. Clauses advising the parties in the event of a problem in the future. Extension of Shipment, Insurance, Prohibition, Force majeure, Notices, Non Business Days, Default, Insolvency, “Domicile” or the governing law provision and finally Arbitration.

Among these clauses four are particularly significant in everyday commodity trading operations. These are **1) The Extension of Shipment** **2) “Final at loading”** **3) Default and Damages** and **4) Laytime and Demurrage**.

## Extension of Shipment Time

In all GAFTA CIF contracts the seller has the right to an extension of 8 day by virtue of the Extension of Shipment Clause. In FOSFA No 54 CIF, which is the most important contract in the vegetable oils export trade, there is an optional extension clause, meaning that if the parties did not cross-reference the optional extension clause to be part of their contract, no extension may be made pursuant to the contract.

In order for an extension to be made in accordance with the Extension of Shipment Clause that is in the contract, the CIF Sellers must send a declaration that they will be using this right. This declaration must be submitted by the business day following the end of the shipment period. Otherwise these Sellers may not use their right to an extension.

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\* Member of the Boards of Appeal of FOSFA and GAFTA, Jurist in Geneva

When this right is thus exercised, the Seller must give the Buyer a discount of 0.50% for a 4 day extension, 1% for a 5 or 6 day extension and 1.5% for a 7 or 8 day extension. Sometimes, in order to avoid having to give these discounts, Sellers will present an extension proposal. If this proposal is accepted the shipment time will be extended by a new agreement, then if no mention of discount is made at time of this agreement, there will be no discount in favour of Buyers.

If the Sellers do not ship the goods after the extension is claimed in accordance with the Extension of Shipment Clause, the contract price will be decreased by 1.5% and the damages for default in shipment will be calculated according to this new price.

### **“Certificate Final at Loading” Clauses**

Many of the contracts have in them a “certificate final” clause. These clauses raise a number of issues: The purpose of the “certificate final” clause is to avoid any liability for what would otherwise be a breach of the seller’s physical duty to ship good of the contract description.

This is done through a clause inserted to the contract which in effect changes a physical duty to ship goods of the contract description or quality into a purely documentary duty. The buyer must pay if the seller tenders a document stating that the seller has shipped goods of the contract description or quality, whether or not he has so shipped.

It is difficult to trade nowadays without “certificate final” clauses. A clause which might help Buyers would be the following but difficult to be accepted by Sellers: «Quality as per certificate issued at load port by shippers to be final and binding upon both parties, *unless it can be proved that testing and/or sampling was incorrectly performed.*»

### **The Default Clause and calculation of damages in FOSFA & GAFTA Contracts**

In FOSFA GAFTA and other standard form contracts is the date of default which is relevant when assessing damages, therefore care must be taken when considering how the date of default is to be established or calculated. The test of “date of default” is not the test of English Law; it is a concept proper to the “Default Clauses” of commodity trade contracts (FOSFA / GAFTA but also other London Trade Associations).

If a party declare its counter-party to be in default at a wrong date, say too early, then this may amount to a serious breach of contract called anticipatory breach under English law. This gives the counter-party the right (to accept the “anticipatory breach” or repudiation and thereby) to bring the contract to an end. This could give him the right to sue for damages, depending on the market level at time of the breach. A classic example of an anticipatory breach would arise where there is a CIF sale with shipment by the end of say August. If the buyer knows that the seller has not shipped any cargo during August, it would be an anticipatory breach for the buyer to declare the seller in breach on the 1<sup>st</sup> September because a CIF seller can always, in this example, buy the goods afloat and give a notice of appropriation in time. Also, he may in a back-to-back situation “in chain” of contracts, and thus may receive a notice of appropriation for a contractual bill of lading and retransmit it in time. Thus, and as long as the time for giving such a notice has not expired, there is no default on his part

Thus in FOSFA contracts as long as the time for tendering the goods has not elapsed, putting in default the Seller may amount to a repudiation of contract. The Default Clause of GAFTA Contracts contain a *specific date of default*, which takes into consideration the contractual time for giving notice of shipment or of appropriation, and adds an hypothetical time for passing such a notice back to back “in chain” or “in string” and then fixes the default date as the first business day thereafter, when the “innocent” party can cover or resell. Putting in default before this deadline may amount to a repudiation of contract.

Regarding the amount of damages, the FOSFA default clause provides that “*The damages awarded against the defaulter shall be limited to the difference between the contract price and the actual or estimated market price on the day of default.*”

The GAFTA default clause does not say “*limited to*” but that damages shall be “*based*” on the actual or estimated market price.

The actual market price for the cargo is the actual price of a cargo which is either bought in against a defaulter or sold against a defaulter. This price should ideally be achieved by buying a substitute cargo or selling the actual cargo *on or as near to* the “default date” as practical.

If a party does not buy against or sell against a defaulter, and therefore has not established an “actual market price”, then he is entitled to claim the *estimated* market price for the goods, under the Default Clause of the contracts.

He can do this by putting in evidence before the arbitrators Statements from Brokers about the market price ruling on the “date of default” or copies

of contracts for similar goods with similar quality specifications for the same shipment period that have been entered into on or about the date of default.

In the event the goods are not identical quality wise, evidence must be obtained as to the rebate or premium that such other goods command for establishing the “default price”.

## Laytime and Demurrage

The only purpose of a clause providing for vessel’s laytime in a sale contract is to *transfer the risk* of demurrage of the Charterer as CIF Seller (or FOB Buyer), to respectively the CIF Buyer (or FOB Seller).

By including such a clause or by cross-referencing the terms of a charter-party concerning the calculations of laytime and despatch/demurrage, the CIF Seller thus steps into the foot of Shipowners, and the CIF Buyer shares the position that a Charterer would have had in a charter-party.

## Arbitration

In the foreign trade of vegetable oils and grains Arbitration is a system in which prominent merchants of the sector serve as Arbitrators within the framework of the Trade Organisations that were established very far back. In this way it is an arbitration that is done by experts (of the Trade).

The GAFTA and FOSFA arbitrations are based on a two-tier system. If one of the parties is not satisfied they may appeal to a second arbitration instance, called the Board of Appeal. This Board provides an important service as it ensures that difficult cases are examined in detail by 5 experienced arbitrators that are appointed by FOSFA or GAFTA and who can make sure that the mistakes made in the first arbitration are corrected.

Two different systems are used in the appointment of arbitrators in GAFTA and FOSFA and their Arbitration Rules provide that in the event that the defendant does not appoint an arbitrator, the Organisation will appoint him. In order for a second arbitrator to be thus appointed, the Claimant must give notice to the Respondent that he will be applying to the Organisation for such an appointment of arbitrator.

I had mentioned earlier that there were two systems in the appointment of arbitrators. In the first system the parties will each appoint an arbitrator and the Chairman will be appointed by the Organisation. This is the GAFTA system. In the second system each party appoints an arbitrator, the arbitrators both decide together however if they do not share the same view about the case then they will appoint a third arbitrator (“Umpire”) and they will submit



their own views to him. Then the decision will be made by the third arbitrator alone; the award is said to be an Umpire's award.

Generally in FOSFA and GAFTA arbitrations the parties will use the services of an active arbitrator who has no connection with the case, as their adviser. At FOSFA, local or foreign lawyers cannot represent the parties without the permission of the arbitrators or the Board of Appeal. In GAFTA lawyers may represent the parties with only their written agreement.

Generally in the first arbitration the awards are rendered on the basis of the Statement of Cases and documents or evidence submitted by the parties.

The appeal arbitration is a completely new hearing compared to the initial arbitration. A now retired London Arbitrator friend of mine said one day: "the only actual hearing which matters is the appeal hearing". For example, new arguments, new evidence and new witnesses can be brought at the "appeal arbitration".

Since it is the request of traders, there are definite short periods of limitations in FOSFA and GAFTA arbitration Rules. Cases not being started within the stipulated time period may result in the rejection of the case. I am not saying they will result in this way but only that they may result, because arbitrators have discretionary authority to extend time based implicitly on rules of equity and natural justice.

In GAFTA and FOSFA Rules of Arbitration, if the defendant does not wilfully carry out the award of arbitration, the Claimant may ask the Organisation that the name of the defaulting party is circulated to the whole Trade. Also, if the arbitration expenses are not paid by the parties to the Organisation, the Organisation may, on its own initiative, circulate the name of the defaulting party in the same way.

In FOSFA and GAFTA arbitrations, the arbitrators may issue awards about their own jurisdiction; however under GAFTA Arbitration Rules there is no "appeal arbitration" for awards finding jurisdiction, such appeal is possible under the FOSFA Rules of Arbitration and Appeal.

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### Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

### Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce (“Swiss Rules”)
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

### Books and Journals for Review

Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).