

## GAFTA/FOSFA Contracts & Arbitrations in Agricultural Commodity Trading Istanbul 18.10.2102

1. My sincere greetings to you all. I am very pleased to be here in Istanbul with you. I would like to thank Mr Fail Genç again for inviting me to be a speaker at this conference. Although legal principles and general rules are the same in all advanced legal systems, I should mention that my speech will be within the framework of English law governing these standard form contracts.

2. The clauses of the standard form FOSFA and GAFTA contracts may be divided into 3 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 Governing Law and finally Arbitration.

3 Among these clauses I have determined four that are significant in terms of Turkish Trade – our time is limited but if you have questions about other matters or points please ask. These matters are **1) The Extension of Shipment 2)"Final at loading" 3) Default and Damages and 4) Laytime and Demurrage.**

4 In order for an extension to be made in accordance with the Extension 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 shipment time at the latest. Otherwise these Sellers may not use their right to an extension.

a) 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 the extension proposal is accepted the shipment time will be extended thanks to a new agreement, then when such an agreement is made, if no mention of discount is made there will be no discount in favour of Buyers.

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

## 6 “Certificate Final at loading” Clauses

a) 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.

b) 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.

7 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**

8 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. This test of date of default is NOT the test of English Law; in fact it is an exclusive to the “Default Clauses” of commodity trade contracts (FOSFA / GAFTA).

9 If you declare your counter-party to be in default at a wrong date, say too early, then this may amount to a serious breach of contract called – because it arises before time of performance - anticipatory breach under English law. This gives your counter-party the right (to accept your “anticipatory breach” or repudiation and thereby) to bring the contract to an end. This could give him the right to sue for damages, if these can be proved. A classic example of an anticipatory breach would arise where there is a CIF sale with shipment by the end of say August. You are the buyer and you know that your seller has not shipped any cargo during August. It would be an anticipatory breach if you declared the seller in breach on the 1<sup>st</sup> September because a CIF seller can always perform his contractual obligations by buying goods afloat with August B/L and give a notice of appropriation in time (depending on the time provided by the contract). Also, or he may in a back-to-back situation “in chain” of contracts, and thus may await, during the time available for Thus, and as long as the time for giving such notice has not expired there is no default on his part

10 For these reasons 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 GAFTA contracts contain a specific date of default in the Default

Clause, which takes into consideration the “time” for passing notices back to back “in string” and adds to this time, a theoretical period, and then fixes the default date as the first business day thereafter. Putting in default before this deadline may amount to a repudiation of contract.

### **Amount of damages**

11 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.*”

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

13 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.

14 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.

15 He can do this by putting in evidence before the arbitrators evidence Statements from Brokers about the market price ruling on the day 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.

16 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.

17 In contracts concluded on the basis of FOSFA or GAFTA standard forms, the 4<sup>th</sup> important provision within the frame of the Turkish Trade is **Laytime and Demurrage**

18 The only purpose of a clause providing for 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).

19 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**

20 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).

21 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 because 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.

22 Two systems are used in the appointment of arbitrators in GAFTA or FOSFA and 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 claimants must give notice to the defendants that they will be applying to the Organisation for such an appointment of arbitrator.

23 I had mentioned 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 defend their own views in front of the third arbitrator. Then the arbitration decision will be made by the third arbitrator alone, it is an “Umpire’s Award”.

24 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 attorneys may represent the parties with only their written agreement.

25 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.

26 The appeal arbitration that I mentioned a little earlier is a completely new hearing compared to the initial arbitration. A now retired London Arbitrator friend of mine said one day: “the sole actual hearing in the appeal hearing”. For example, new arguments, new evidence and new witnesses can be brought into 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 are based implicitly on rules of equity and justice.

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

28 The actual responsibility of each of the parties for the arbitration fees is established in the award of arbitration.

29 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 these types of decisions but it is possible to lodge an appeal under the FOSFA Rules of Arbitration and Appeal.

Thank you

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