

The GAFTA arbitration process

Pavani Reddy, of Zaiwalla & Co Solicitors, reviews the GAFTA arbitration process.

Arbitration is a process that provides a confidential alternative to open court for disputing parties. There are two types:

- (i) Ad hoc arbitrations, where the tribunals are appointed by parties according to a method that they determine by themselves;
- (ii) Administered arbitrations, which are administered by a professional arbitration institution, such as the ICC, LCIA, GAFTA, FOSFA etc. Arbitration institutions have their own rules and procedures, to which parties and the tribunal are required to adhere. The “arbitral tribunal” is the arbitrator or arbitrators sitting to determine the dispute.



The Grain and Feed Trade Association (GAFTA) is a dominant international arbitration institution and is held in high respect around the world. It began life out of the 1971 merger between the London Corn Trade Association (LCTA) and the Cattle Feed Trade Association (CFTA).

The main objective of GAFTA is to promote the international trade in grains, animal feeding stuffs, pulses and rice. GAFTA deals with disputes involving international trade, shipping, letters of credit and FOB and CIF contracts. Today, the majority of world trade in cereals and animal feed is carried out under GAFTA contracts and the institution has a range of about 80 standard-form contracts, adopted by trading companies when entering into contracts. These contracts refer disputes to GAFTA administered arbitrations under forms 125 and 126.

In addition to arbitration under GAFTA forms 125 and 126, alternative dispute resolution services offered by GAFTA include charter party arbitration under form 127 and mediation under form 128. GAFTA contracts are governed by English law and provide for England to be the venue of arbitration. These arbitration hearings usually take place at the registered offices of GAFTA in London, but can take place elsewhere so long as the parties agree in writing.

Legal representation

GAFTA restricts the involvement of lawyers in its arbitrations. Parties may engage lawyers to assist in drafting written submissions to the tribunal, but there is no legal representation at oral hearings unless both parties expressly agree it should be allowed, pursuant to Rule 16. Parties are however free to engage trade representatives to represent them at the hearings.

A GAFTA tribunal allows costs to be awarded to a successful party for legal representation only if costs are reasonable and there has been an agreement between the parties that legal representatives should take part in the proceedings. Despite these rules, international parties often instruct lawyers to ensure all legal issues are properly considered and argued in submissions.

GAFTA rule 125

A party (the claimant) can initiate the arbitration process by serving a notice of intention to refer a dispute to arbitration on the other party (the respondent), and by appointing an arbitrator. The dispute will then be heard and determined by a tribunal of three arbitrators (in accordance with rule 3:2) unless both parties agree to appoint a sole arbitrator (in accordance with clause 3:1). One exception is that disputes that relate to “Rye Terms” must be heard by three arbitrators.

The GAFTA Rules prescribe different time limits commencing arbitration in respect of disputes arising out of “Rye Terms”, CIF, CIP, C&F and FOB contracts. The most common time limit is that, in the case of CIF, FOB, CIP and C&F contracts, the arbitration must be initiated no later than one year after the expiry of the contract period of shipping.

Appointment of sole arbitrator

If a claimant desires a sole arbitrator to be appointed, they must, before the expiry of the time limit for claiming arbitration, serve a notice on the respondent seeking his agreement. The respondent then has nine days to either agree to the appointment of a sole arbitrator by GAFTA or, if they do not agree, to appoint an arbitrator to a tribunal of three arbitrators and tell the claimant that their arbitrator is so appointed.

If the respondent agrees to the appointment of a sole arbitrator, GAFTA will then appoint the arbitrator on receipt of a statement of claim, supported by evidence, from the claimant. The benefits of appointing a sole arbitrator are the speed and relatively low-cost of obtaining decisions.

Three arbitrators

In this case, before the expiry of the time limit for claiming arbitration, the claimant must notify the respondent of the GAFTA qualified arbitrator they have appointed.

The respondent then has nine days to notify the claimant of the arbitrator they appoint to the tribunal. Both parties then prepare their first submission, and on receipt GAFTA will independently appoint the third arbitrator, who will be the chairman.

If a party does not know who to appoint, then it can apply to the GAFTA Secretariat, asking them to appoint an arbitrator on its behalf. Similarly, if the respondent fails to appoint an arbitrator, GAFTA will appoint an arbitrator for the respondent.

The procedure

The first step sees the claimant serving a clear and concise statement of his case, with supporting evidence, to the tribunal and the respondent. The tribunal will then issue procedural directions, telling the respondent how long they have to serve their statement of defence, together with any supporting documents. The tribunal then directs that the claimant may submit further written comments and/or documents in reply to the defence.

The tribunal may however adopt procedures better suited to the particular case, to avoid unnecessary delay or expense, or to allow fair resolution of the matters in dispute.

After the appointment of the tribunal, if neither party submits any submissions or documentary evidence within one year of the date of the notice of claiming arbitration, then the claimant’s claim shall be deemed to have lapsed – unless the claim is renewed by a notice served by either party on the other or by the service of documentary evidence or submissions by either party. The claim may be renewed for successive periods of one

year, but cannot survive more than six years from the date of the first notice, after which time it must lapse regardless of whether it has been decided.

Tribunal's jurisdiction

GAFTA rules allow the tribunal to rule on its own jurisdiction, meaning the tribunal can determine whether there is a valid arbitration agreement, whether the tribunal is properly constituted and which matters have been submitted to the tribunal to decide in accordance with the arbitration agreement.

If the tribunal determines that it has no jurisdiction, for example if it finds that the arbitration agreement is actually invalid, GAFTA will notify the parties of the tribunal's decision. That decision will be final and binding on the parties, subject to any right of appeal to the board of appeal, which may uphold the decision. However if it reverses that decision then the dispute will be referred to arbitration afresh. The time limit for the parties to appoint a new tribunal will run from the date of the board of appeal's order.

If the first tribunal determines it does have the jurisdiction to hear the arbitration, then neither party may appeal that decision to the board of appeal.

Arbitration awards

Once parties have completed their exchange of submissions, the tribunal will then inform the parties that it will go ahead and publish an award. If a party wants an oral hearing of the issues, it may request such a hearing from GAFTA; if granted, the tribunal will seek confirmation from the other side and will fix hearing dates. After the oral hearing the tribunal will prepare its award and send it to GAFTA. The awards are published in writing and signed by the arbitrator(s). In the award, the tribunal will give summary of the dispute, the reasons for their decisions and their findings of fact.

Upon receipt of the signed award, GAFTA will notify the parties that the award is at their disposal upon payment of fees and expenses incurred by the tribunal and GAFTA. Once payment is received, GAFTA will date and issue the award to the parties. The tribunal's award shall be conclusive and binding, subject to any appeal to the board of appeal. If the losing party fails to make the award payment, GAFTA may inform its world-wide members by posting the non-paying party as a defaulter. This puts GAFTA's members on notice about the risks of dealing with that defaulting party in future and is intended to create a serious barrier to the future trade of a party who fails to pay.

As can be seen, two tiers exist within the GAFTA arbitration system: the first-tier arbitration tribunal and the appeal board. An unsatisfied party can appeal the first-tier tribunal's award to the appeal board. In GAFTA, unlike in the courts, appeals are not reviews of the first-tier tribunal's decision based only on what was said to the first court, but are fresh hearings of the claim in which parties can adduce new facts, issues and laws.

This is because international parties are often not well-versed in internal arbitration laws and may not have fully appreciated the implication of an arbitration claim and may have failed to obtain competent legal advice. Unsuccessful parties often only realise the importance of good legal advice when they receive an unfavourable award. In these circumstances the GAFTA appeal rules provide unprepared parties with a second chance.

Appeal to the court

GAFTA contracts provide for English law as the applicable law and the English courts have jurisdiction over the tribunal's awards. It is possible for an unsuccessful party to appeal an award to the court. Such an appeal is rare, however, because it can only be made on legal merits and the court will only grant leave to appeal in limited circumstances. The decision of the tribunal may also be challenged on the basis of serious irregularity on the part of the tribunal, which includes issues such as bias. The court may either confirm the tribunal's award, set it aside, vary it or remit it back to the arbitrators to decide again.

Conclusion

A GAFTA arbitration is a serious alternative to a court case: it is very important claimants and respondents give full consideration to the issues involved. This is especially true of international parties not familiar with the English legal system. It also must always be borne in mind that appeals to the courts after an arbitration award can only be on issues of law, not of facts.

The courts recognise that GAFTA's arbitrators have a personal knowledge of and considerable technical expertise of their sectors and rarely allow appeals. Parties are advised always to take full legal advice and assistance at the time of drafting their first submissions to the tribunal.

Pavani Reddy
Managing Partner