



# Arbitration Information

Jonathan Waters, LLB, LLM, MClarb,  
Certified Mediator, General Counsel, Gafta

International Arbitration Expert of The Year (Global Advisory Experts); 2020, 2021, 2022, 2023

ADR Civil Mediation Award (Lawyer) 2023

Leaders in Law Award 2021, 2023

Finance Monthly Award 2021, 2022

Arbitration Expert of The Year (Corporate INTL) 2021, 2022, 2023, 2024

ADR – Adviser of The Year (Global FM) 2023 Best Mediator (Global 100) 2021, 2022

International Arbitration Expert of The Year (IE 100) 2022

Best Mediator and Barrister (M&A Today) 2020, 2021, 2022, 2023

Best Mediator and Barrister (Corporate America) 2021, 2023

Best Mediator (Lawyer International) 2021

Legal 500

Lawyer Magazine 'Hot 100'

Faculty Member, London International Arbitration School

LSM Accredited Mediator/

# What is Arbitration?

- Private/confidential resolution of a dispute
- Contractually binding

# Why Arbitrate?

- Confidential
- Cost effective
- Time efficient
- Specialist adjudication: trade knowledge
- Flexible
- Legally binding – NYC



# GPC and Gafta Arbitration

- GPC 1
- Gafta 126
- Mediation

## GPC 1 Arbitration Clause

(a) Both parties shall first consider resolving any dispute through Gafta Mediation in accordance with GAFTA Mediation Rules 128

(b) If either party declines mediation, it is hereby agreed that 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 Simple Disputes Arbitration Rules 126**, 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.

(c) 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, which shall be heard and determined by the arbitrator, in accordance with **GAFTA Simple Disputes Arbitration Rules 126** which shall be final and binding on the parties. There is no right of appeal to Gafta or the Courts. (The role of the Courts shall be restricted to enforcement, if required, of an Award of Arbitration)

(d) 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 GAFTA Simple Disputes Arbitration Rules 126.

### (e) **DEFAULT OF ARBITRATION**

In the event that any party to a GAFTA Arbitration (a) neglects or refuses to carry out or abide by an Award of Arbitration within 21 days of the issue of that Award by GAFTA or (b) fails to pay any costs, fees or expenses of the Arbitration within 21 days of being called upon by GAFTA to do so, both parties expressly agree that GAFTA shall notify GPC in writing of any such default. GPC shall then, at its absolute discretion, have the right to take disciplinary action against the defaulting party (whether a member of GPC or not) in accordance with the GPC Code of Ethics of which both parties acknowledge awareness. Disciplinary action shall include, but shall not be limited to, suspension from GPC membership or recommendation of suspension from any GPC affiliates, on such terms and for such duration as GPC shall determine (including a prohibition on attending any GPC convention or event and written notification of defaulter to GPC membership - whether the defaulter is a member of GPC or not).

# Gafta 126

Averages	126
Full Duration (months)	4
Proceedings (months)	3
Award Drafting (months)	1

Averages	126 Rules
Association Fees	£1,165
Arbitrator Fees	£5,716
Total Fees (plus non-member charges)	£8,751

- Brief overview of process
- Paper based: saves time and costs

# How to avoid arbitration?

- Avoid contractual disputes!

# How to avoid disputes?

- Counterparty risk
- How to assess counterparty risk
- Red flags and how to spot them
- Country specific risk
- Use GPC 1 – advantages
- Read and understand GPC1
- Know your GPC contract





# What disputes may be unavoidable?

- Force Majeure – meaning and consequences
- ‘Game playing’
- Geo-political risks
- Import and export duties
- Insolvency of counterparty – Retention of Title (advantages and disadvantages)



# GPC 1 FM Clause

## 18. 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 situated, 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) fire, or (h) ice, or (i) Act of God, or (j) unforeseeable and unavoidable impediments to transportation or navigation, or (k) any other event comprehended in the term "force majeure".


Should Sellers' or Buyers' 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 claimant shall have served a notice on respondent 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 respondents have the option to cancel the unfulfilled part of the contract by serving a notice on claimants 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, claimant shall notify respondent 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 claimant and the parties shall have no liability to each other for delay and/or non-fulfilment under this clause, provided that claimant shall have provided to respondent, if required, satisfactory evidence justifying the delay or non-fulfilment.



# Once in arbitration, how to manage risk and costs

- Importance of clear submissions
- Focus on damages – evidence and how quantified
- Explain arbitrator's role – onus on Claimant to make out their case, not for arbitrator to find it!
- Importance of mitigation (recent case law)



# Some examples from Gafta Arbitration

- ▲ Viber messages exchanged between 2 individuals **typed** on 20 sides of A4
  - ▲ No screenshots
  - ▲ No explanation of individuals and/or their roles
  - ▲ Communications related to other transactions
- ▲ No **attempt to explain basis of damages** claimed

# Held

*“Although we...have considerable sympathy for the Claimants...it would be wrong to award them damages without the support of even the most basic and simple supporting evidence...”*

**Should the Tribunal ask for missing evidence?**

**Does it matter that the Respondent did not participate?**



# 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” Default Clause:
  - Provides certainty
  - Mechanism for calculating damages
  - Clear guidelines
  - Ease of application by arbitrators
  - Cost effective enquiry

# 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



# The Results

## Arbitration

### First Tier

- B in Default
- No damages. Why?
- Contract would have been cancelled anyway (after 15 August 2010 when ban took effect), so no loss

### Appeal Board

- B in Default
- N entitled to damages
- \$3m – difference between contract and market price as per Default Clause

### Application to Courts

(Arbitration Act 1996)

- High Court
- Court of Appeal

**Courts Upheld  
Appeal Board**

**Case Referred to  
Supreme Court**



# The Result

## The Supreme Court

- Default Clause not a 'complete code' for assessing damages: **Court could not overlook the fact that contract could never have been performed**
- Default Clause: mechanism for determining market price for assessing damages **but did not deal with effect of subsequent events**
- Agreed with First Tier. There was no loss
- Compensatory Principle
  - **No damages if no loss**

# Other Gafta Training

If you're interested in hearing more from Jonathan or learning about upcoming events related to Gafta, take a look at our events page.



Commodity Shipping (GPD Course) | 1-2 April 2025 | Barcelona

Barcelona

Sponsored by Arzón Abogados S.L.P. An in-depth course covering aspects of shipping in the commodities sector.



Gafta Annual Dinner 2025 | 11 June 2025 | London UK

London

The networking event of the year! Join Gafta and 500 guests for an evening of good food and even better company.



Trade Foundation Course (GPD Course) | 9 - 12 September 2025 | Istanbul

Istanbul

A four-day training course designed to give attendees a broad understanding of contracts and the legal aspects of commodity trading.



Commodity Dispute Resolution (GPD Course) | 23 - 24 September 2025 | Vienna

Austria, Vienna

Sponsored by HFW. An extensive look at how to handle disputes and guide to Gafta arbitration.



Commodity Contracts (GPD Course) | 22 - 23 October 2025 | Buenos Aires

Buenos Aires

Sponsored by Hill Dickinson. An in-depth course covering contracts in the commodities sector.





**Any questions?**

