



GAFTA and the Legal Profession

By David Hacking

My appointment in 2000 as a member of the GAFTA Appeal Committee was unusual and – I am told – controversial. While I had conducted arbitrations as Counsel for some years, was a Chartered Arbitrator and had been a partner at Richards Butler, I had had no direct experience of the grain and feed trade. As, I think, the first person outside the trade to be admitted as a GAFTA arbitrator, there has been some responsibility on me to make it work! Well, has it?

In the past six years I have had the pleasure of sitting on a number of GAFTA Appeal Boards and have chaired a number of GAFTA First Tier Arbitrations. Points of English Law have regularly arisen – usually contained in written submissions citing law cases and extracts from Chitty on Contracts – where I think I have been able to assist my co-arbitrators. On my side I have been introduced to trade practices and have been well guided by my co-arbitrators. Although sometimes puzzled, I have learned to interpret the abbreviations used by traders. Above all I can record very cordial relations with my co-arbitrators and, as long as we have listened to one another, we have been united in the endeavour to get the law and the facts right and to prepare well drafted Awards. On the one occasion when we did not listen to one another, the parties twice took our Board of Appeal, under Sections 68 and 69 of the Arbitration Act 1996, to the Commercial Court, who twice remitted our Award back to us for re-consideration – an unhappy experience!

However my journey as an arbitrator in GAFTA arbitrations is, I believe, part of a larger journey in which GAFTA has been travelling with the legal profession. The ranks of GAFTA arbitrators have now been swelled by two more English qualified lawyers making a total, I believe, of four English law qualified members on GAFTA's Appeal Committee to which should be added lawyers qualified in other jurisdictions, for example in Switzerland and Germany, who are also members of GAFTA's Appeal Committee.

Traditionally GAFTA arbitrations and - before the formation of GAFTA in 1971 – arbitrations conducted under the London Cattle Food Trade and the London Corn Trade Associations, were mostly directed to decide 'quality' issues on the products being bought and sold. This required the physical examination of samples of the goods by members of the trade who, through long experience, could judge whether the goods matched the prescribed quality agreed between the parties. This was not, and is not a skill, possessed by lawyers! It is, therefore, not surprising when looking at the earlier editions (after the formation of GAFTA in 1971) of the GAFTA No. 125 Arbitration Rules to find that arbitrators (and umpires) appointed under these Rules had to be "either a Member

of the Association or an employee of a Member" and also had to be "a person engaged or who has been engaged in the trade". So strictly was this principle applied that the former Director General of GAFTA can recall a very distinguished Member, who - while working all his life in the trade - had been qualified at the start of his career as a lawyer, being challenged as not a proper person to be appointed as an Arbitrator on the basis that he may have an unfair advantage!

However, over the years the trade has changed. It appears that with modern chemical and mechanical testing 'quality' arbitrations are very rare and 'technical' arbitrations (being arbitrations involving contractual issues) have become, in the increasing complexity of trading, much more frequent. Certainly it has been my experience that all sorts of contractual issues can be raised in GAFTA arbitrations.

Another interesting development occurred in the 1960s and 1970s when there was an increasing number of requests to GAFTA (or its predecessors) Appeal Boards to state a Special Case "for the decision of the High Court". This was a very heavy reliance on the legal profession to support the First Tier Tribunals and Appeal Boards when applying this (now abolished) process – including the provision of the draft for the proposed Special Case. For that purpose, there is to be found in the GAFTA Arbitration Rules No. 125 in the 1970s an express right for the parties "to be represented at the [GAFTA] hearing by a solicitor or barrister or other legally qualified advocate".

The question is, therefore, what should now be the right relationship between GAFTA and the legal profession – both in the appointment of lawyers as Members of GAFTA Tribunals and in the rights of the parties to have lawyers involved in the presentation of their cases. In the former, I believe the right balance is being achieved and in the latter not.

Thus I have to state that my serious difficulty, as a GAFTA arbitrator, has been dealing with points of law which have been placed in, or

arisen out of, written submissions when some representatives before us at the oral hearing have no comprehension of the legal issues nor any ability to help us over them. I recognise the rightful concern in the GAFTA membership to avoid GAFTA arbitrations, fuelled by over-active lawyers, blowing up into lengthy and costly disputes but I wonder how real this concern is. In the nature of grain and feed trading, there is the fullest record, in exchanges of faxes, letters and emails, of what actually occurred in the formation and 'breakdown' of the contract. Moreover since these documents are, in the main, in the possession of both parties and their brokers, serious discovery issues seldom arise. Indeed, despite legal counsel drafting many of the written submissions which have come before me, I can only rarely recall discovery issues arising. Similarly since the documents created between the parties largely speak for themselves the need for witness statements is low. Of course lawyers can cause problems – sometimes rightly and sometimes wrongly – but with sound and firm GAFTA Tribunals they can be controlled!

Time and time again, in my experience, GAFTA Tribunals have to decide what were the terms of the contract, what parties breached them and what damages follow from such breaches. It is an exercise which an experienced and well balanced tribunal can easily handle without the arbitration running out of control.

While there are now more lawyers sitting as GAFTA arbitrators and, I hope, enhancing the process, it is concerning that there has been a steady move, in changes made to the GAFTA Arbitration Rules, against the participation of lawyers in parties presenting their cases before GAFTA Tribunals. Since the formation of GAFTA in 1971 (and presumably before in the arbitration rules of the trade associations out of which GAFTA was formed) there has been a prohibition in GAFTA Appeal arbitrations against a party's representative at the oral hearing being a lawyer in private practice (variously described in successive editions of the GAFTA Arbitration Rules as "counsel" or "barrister" or "solicitor" or "other legally qualified advocate" "engaged in private practice") unless express permission has been given by the tribunal. This remains the position right up to the latest edition (effective for contracts after 1st January 2006) of the GAFTA No. 125 Arbitration Rules. However since the 31st January 1997 edition of these GAFTA Arbitration Rules, the right for a GAFTA Appeal Board to give "special leave" for a "solicitor or barrister or other legally qualified advocate" to appear at the oral hearing has been removed. In its place there was introduced the provision that, while parties were free to "engage legal representatives to represent them in the written proceedings", they could not do so in oral hearings (either at First Tier or Appeal) unless all parties had "expressly" agreed to allow such legal representation. Parallel to this, there have also been changes in the GAFTA Arbitration Rules relating to the power of GAFTA Arbitral Tribunals to award costs arising out of legal representation. Up to the change in the GAFTA Arbitration Rules, effective for contracts after 31st January 1997, the costs of engaging legal representatives were not separately identified. For contracts dated after 31st January 1997, costs of engaging legal representatives were separately identified and the rule was that they were not recoverable "unless the Tribunal [considered] that such costs were reasonably incurred". This change was followed by another, for contracts dated after 1st January 2003, which made costs of engaging legal representatives as "not [being] recoverable".

I am not comfortable with the prohibition on legal representation when the Appeal Board has no power to give leave for legal

representation if the parties cannot agree upon it because it is the basic right of a party, in any dispute, to be represented by a person of its choice. When parties are limited in using the English language and have no knowledge of English Law they are, as I have witnessed, at a disadvantage in conducting a GAFTA arbitration. While arbitrations conducted consensually within a trade association, fall outside the ambit of the human right legislation, the principles of those rights do not.

It can well be asked, why parties, both being represented by lawyers, cannot agree to each side employing legal representatives at oral hearings of GAFTA arbitrations. However the plain fact is that such agreements are extremely rare and it is also the plain fact that this prohibition on legal representatives is part of a tactical strategy employed in GAFTA arbitrations – the party who believes the law not being on its side being the party opposed to legal representation!

I would like to suggest, therefore, that a fresh look is taken at the provisions in GAFTA Arbitration Rules which ban (except when the parties expressly agree otherwise) legal representation at oral hearings before GAFTA Tribunals. The absolute prohibition (except when the parties have agreed otherwise) on the recovery of the costs of legal representation in GAFTA Arbitrations, must put a brake on the use of lawyers in GAFTA Arbitrations. If a party knows that it is not going to recover its legal costs and knows that these legal costs are likely to be disproportionate to the sum being claimed, then, in all good sense, that party does not employ lawyers. Thus it is only sensible for a party in a GAFTA arbitration to employ lawyers when the cost of their employment is proportionate to the amount of monies in dispute. Hence with that brake in place on the employment of lawyers in GAFTA arbitrations, it seems that the absolute prohibition (except when the parties agree otherwise) on the employment of legal representatives before GAFTA Tribunals could and should be lifted. In a GAFTA Appeal Arbitration of about two years ago, an Indian lawyer, in the manifest interests of his client and in the GAFTA Appeal Board having the assistance it needed, sought to appear before us and, but for a last minute change of mind by the Respondent, was being prevented doing so. It seemed to our Appeal Board this was wrong and put in danger the enforceability of the Award in India. Following the change of mind by the Respondent, as encouraged by the Appeal Board, we were enormously assisted by the presence of legal counsel on both sides which greatly helped us in writing our Award.

From my perspective – as I hope from the perspective of my co-arbitrators – the increased and carefully selected presence of lawyers sitting in GAFTA Tribunals has improved the arbitration process! I also believe, without exposing GAFTA arbitrations to damage caused by over active lawyers, a modest adjustment again to allow the presence of lawyers, when needed, before GAFTA Tribunals should further work for the benefit of the GAFTA arbitration process.

The author, as Lord Hacking, played a leading role in the House of Lords in the reform of English Arbitration Law culminating with the 1996 Act. He has been a GAFTA Arbitrator since 2000 and is a Member of Littleton Chambers in the Temple.