International Arbitration

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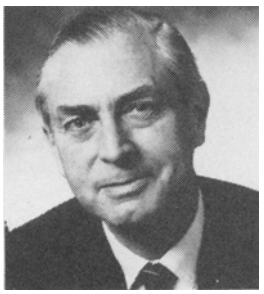

ABSTRACT

The English arbitration procedures in GAFTA and FOSFA have been developed over 125 years, during which time contracts and procedures have been continuously revised. They have stood the test of time and, in the author's view, work well. It would be unfortunate to have to change the procedures radically, and indeed this action might seriously impair their efficiency. While it would be ideal to achieve international uniformity, there would appear to be almost insuperable obstacles in the way at the present time.

INTRODUCTION

As world population increases and average standards of living improve, so has the world production of grains and oils and fats increased and has indeed so far kept pace with the ever growing demand.

This in turn has meant that the actual tonnage of goods being moved from one part of the world to another has also increased substantially. However, the patterns of trade and price movements are subject to very large variations, brought about not only by climatic conditions causing unusual surpluses or deficiencies, but also by governments altering duty structures for one reason or another. The pattern of trade is also changing, particularly in the oilseeds and vegetable oils trade, in that more and more seeds are being processed at origin, and the resultant oil and meal, being processed at origin, and the resultant oil and meal, instead of the seed itself, are being shipped abroad. At the same soybeans in the U.S. and Brazil and of rapeseed in Canada and Europe, which has enabled the processing industry in Europe to remain in a healthy condition.

Another disruptive influence has been the increasing business involvement of governments and large multinational trading groups. This has tended to accentuate the violent price movements which we have witnessed as purchases and sales have become more sporadic and many large scale negotiations have become more like games of poker than like normal commercial transactions. Also governments, either for political or economic reasons, have disrupted the regular flow of goods by imposing export bans, export duties, or import duties, or indeed by removing them, usually without warning. If trades were concluded in smaller units through regular commercial channels, violent price movements would be ironed out, and this would certainly reduce the number of disputes and arbitrations which take place today.

ROLE OF TRADE ASSOCIATIONS

The existence of trade associations is essential to ensure the orderly marketing and distribution of grains, oilseeds, oils, and their by-products. Trade associations appear to fall into two main categories. There are many national trade associations, which are concerned chiefly with the production and distribution of products within their own national boundaries, and there are international associations, which are concerned with the movement of goods from far and wide and which draw their membership from all over the world—from producers and shippers, from merchants and brokers, and from refiners and consumers. The functions of the international associations can be summarized as follows:

1. Provide, and keep up-to-date by constant revision, contract forms which will enable the international trade in grains and in oil, oilseeds, and fats to be carried on smoothly
2. Provide the machinery to settle, by arbitration and appeal, disputes that may arise between contracting parties
3. Provide a laboratory service so that samples of commodities, traded on the association's contracts, can be analyzed
4. Develop standard methods of analysis of commodities with which members are concerned
5. Represent the interest of members to governments
6. Communicate to members all that their association is doing for them.

Undoubtedly the two most important international associations are GAFTA and FOSFA. About 50-60% of all international trades in grains and proteins are concluded on GAFTA contract terms, with an annual value of over 100 thousand million U.S. dollars, and about 80% of all international trades in oilseeds, oils, and fats are concluded on FOSFA contract terms, with an annual value of 40 thousand million U.S. dollars.

Het Comite van Graanhandelaren and the Nederlands Oils Fats and Oilseeds Trade Association (NOFOTA) also play a very important part in the international trade in grains, proteins, oilseeds, and oils. I shall later examine the different procedures adopted by these various associations for settling disputes.

ARBITRATION PROCEDURES

All arbitrations based on contracts drawn up by United Kingdom associations are subject to English law, which has a supervisory role, whereas in most other associations the law is involved from the start. For example, in Holland in most cases a solicitor is present throughout the arbitration. I take the view that what the trade requires is machinery which enables disputes to be settled informally, cheaply, and speedily by those people who are most suited to do so—that is to say, those with current experience in the trade. With few exceptions, the arbitrations fulfill these requirements; furthermore, the associations themselves do much to make arbitration unnecessary by the careful drafting and constant revision of contracts which are undertaken by special committees comprised of men engaged in the trade, who give a great deal of time on a voluntary basis. The associations thereby provide a vehicle for trading without dictating terms. Their success in this field is demonstrated by the fact that only a very small percentage of contracts entered into on regular trade association terms result in disputes leading to arbitration.

Arbitrations conducted in the U.K., or under the rules of the U.K. associations, are either Ad Hoc or Institutional. Ad Hoc arbitrations are confined mostly to maritime disputes—these arbitrations are not bound by any rules or regulations, but adhere strictly to the edicts of the Arbitration Act of 1950. An arbitration can be conducted by one or three arbitrators and, in cases of extreme urgency which occur from time to time when ships are involved, can be

issued on the same day as the arbitrator or arbitrators were appointed. In such cases, Mr. Cedric Barclay recently described an Ad Hoc arbitrator as being like a salvage tug waiting patiently at the harbor mouth ready to spring to the rescue should the need arise. Apart from this advantage, I believe firmly that the Institutional system is superior. Time limits are specified, procedures are laid down, and the form and wording of awards is checked by the association's permanent staff. Consequently, Institutional awards tend to carry more weight internationally and also with the courts, should that be necessary.

In GAFTA and FOSFA, each party to a dispute has the right to appoint his own arbitrator who, where necessary, helps his principal to prepare his case but who nevertheless acts as a judge with the other arbitrator. They only agree to appoint an umpire if they are unable to agree on an award. If, however, an umpire is appointed, they become advocates, each arguing their principal's case before the umpire. This method may seem strange and even schizophrenic to those who have had no experience in how it works but, strange as it may seem, it has many advantages and works well. In the first place, it ensures that those who deal with the dispute have a sound knowledge of the problem. Secondly, it enables the arbitrator to help and guide any company in a remote part of the world which becomes involved in a dispute but which has no experience in preparing its case or may also have language problems which the arbitrator can surmount. The success of this method is proved by the fact that, in 65% of all disputes in GAFTA, the two arbitrators issue an agreed award, and in FOSFA the figure is 80%. In GAFTA and in FOSFA, only 25% of the awards issued are appealed, and in only 6% of those cases is the award in the form of a special case. Here I must just mention that recently in GAFTA the number of awards appealed has risen to 50%, but this increase is entirely due to disputes on soy meal contracts resulting from the unfortunate ban on exports from the U.S. This has created serious delays, but steps are being taken to enable these disputes to be dealt with largely "en masse," which should quickly restore the situation to normal.

Either party to a dispute may appeal against the arbitration award, in which event an appeal board consisting of five members is elected and appointed to hear the case. New evidence may be submitted to the appeal board, which is a new hearing.

The law does not become involved in arbitrations or appeals unless there is a point of law involved. If either party considers that there is a point of law at issue, he may ask for the award in the form of a special case, in which case legal representation is permitted. If the board does not grant the request for a special case, it will give either party time (usually 21 days) to apply to the courts for an order that the board state its award in that form. It is only at this point that the law can become involved, and then only if there is a clear point of law at issue. As long as the law does not become involved, the English system of arbitration and appeal is cheap and swift and undoubtedly performs an invaluable service to the trade.

It is, however, essential for the law to be present in its supervisory role. It is illegal to contract out of the law in England, and inevitably there are a certain number of disputes which involve points of law which may either be making case history or be subject to previous case history. Once that situation has been arrived at, then both parties must have the right to go to appeal or even to the House of Lords. While this ensures full protection, it can cause very serious delays and be very expensive. It is, therefore, fortunate that the number of disputes which require special cases is very limited indeed.

DIFFERENCES AND SIMILARITIES BETWEEN ENGLISH AND CONTINENTAL PRACTICES

1. In some European countries, for example Belgium, France, or Portugal, the parties to a dispute may waive their right to go to a court of law. In such cases, arbitrators are expected to arrive at a friendly settlement.
2. In certain European countries, the parties have to sign an arbitration agreement before being able to proceed with arbitration, irrespective of whether there was a valid arbitration clause in the contract. This would seem to give either of the parties the opportunity to refuse to arbitrate and, if that is the case, it would seem to be unfortunate, to say the least.
3. Generally speaking, Continental arbitrators have to act within the rules of law, but the arbitration agreement can permit them to decide as "good men in equity."
4. The Dutch law expressly prohibits the nomination of two arbitrators only. There must be an odd number; in theory this makes sense but ignores the fact that, in practice, the U.K. system of two arbitrators works extremely well.
5. Both on the Continent and in the U.K., arbitrators must have jurisdiction.
6. On the Continent, in most cases the arbitration is attended by a solicitor who also guides the arbitrators and assists in drawing up the award, whereas, in the U.K., solicitors are expressly excluded and can only take part if there is a point of law at issue. In other words, on the Continent the law is involved from the start. In the U.K., arbitrations tend to be much more informal. I believe they are, therefore, better suited to achieve the objective of commercial men trying to resolve differences between other commercial men.
7. While under the English arbitration system the law only becomes involved in the event of a case being stated, the supervisory role of the law means that the arbitrator must always act within the law, and it is therefore the duty of the arbitrator to decide the case in accordance with the law. This is a point where English arbitrations differ from the foreign systems. One of the advantages is that it ensures some consistency. Another advantage is that a useful body of law and practice has developed from arbitrations about such things as the meaning and effect of standard contract clauses in GAFTA and FOSFA. The fact that disputes on these clauses have been decided in accordance with the law helps to preserve the integrity of the contracts. Another effect of the court's power of supervision means that, if a party has a complaint about the manner in which the arbitration has been conducted, he may apply to the courts to have it set aside on the grounds of "misconduct" by the arbitrator. I must emphasize that it is extremely rare for such action to be taken, but where arbitrations are conducted on an informal basis without the presence of a solicitor, some ultimate safeguard is essential.

The operation and working of the "special case" is not always understood and is therefore frequently the subject of criticism. I therefore quote from a paper read by Mr. Robert Goff QC at the Conference on Commercial Arbitration held in London on June 24, 1975:

> Finally the court is the ultimate arbiter on the law to be applied to the arbitration. If a substantial question of law arises, either party may ask the arbitrators or the appeal board to state the award in the form of a special case for the opinion of the court. An award in the form of a special case is one in which the arbitrators or appeal board find the relevant facts and then pose the question of law upon which the resolution of the dispute depends. The arbitrators or appeal board set out their opinion as to how the question should be answered, and the court will give considerable weight to that opinion,

especially when it is expressed by a body such as the Board of Appeal of GAFTA or FOSFA and relates to one of their own standard contract forms with which they are very familiar. But ultimately the question of law is made by the court. The court which makes the decision will ordinarily be the Commercial Court, which is presided over by judges of great experience in commercial matters, but their decision can be taken to appeal.

The special case procedure has the advantage that it ensures that the consistent and very wide ranging body of legal decisions on points of commercial law, and in particular on the construction of standard forms of contract, is available for the guidance of all those who trade under contracts governed by English Law, and is also available to their legal advisers and the arbitrators who decide their disputes; and it also means that on points of law, many of which are not easy and may affect other disputes, the decision will be made by those who are trained and equipped to do so, while giving full weight to the opinion of the arbitrator.

8. On the Continent, arbitrators are expected to give detailed reasons for their awards which are drawn up in a very complete manner. In the U.K., awards give much less information but, on request, arbitrators will nearly always give full information in a separate letter which, however, expressly states that it does not form part of the award. The reason for this is that the arbitrator may have come to the correct decision, but some of his reasoning could be challenged on legal grounds.
9. In the U.K., arbitration awards are not published and remain confidential to the parties involved. For reasons of jurisprudence, awards on the Continent are published.
10. Some Continental systems allow the parties each to select an arbitrator from a panel, while a third is appointed by the association, and others appoint all the arbitrators from a panel. These two methods are, I believe, inferior in practice to the English method. The arbitration becomes more formal and the man from overseas loses that close contact with his arbitrator who, in the English system, is also his friend and helper. It can also happen that appointed arbitrators have little knowledge of the dispute in question.
11. NOFOTA goes some way towards meeting this disadvantage. It has an Appointment Committee which appoints arbitrators in each individual case. This ensures appointment of arbitrators with the necessary expertise in the products and disputes involved.

ENFORCEMENT OF AWARDS

We are indeed fortunate that business ethics in our trades are still very high when compared with most other trades. The motto of the Baltic Exchange is "Our Word Is Our Bond," and with very few exceptions that principle is applied to this trade. Indeed, were it not so, international trade would become impossible. Deals are struck on the telephone frequently to the value of millions of dollars, and in times of intense activity it can be weeks before contracts are exchanged, but it is almost unheard of for the substance of such deals to be disputed. However, in spite of the continuous amendments to contract terms undertaken by the various trade associations, in order to cater to ever changing situations, some disputes do occur. It is most important, therefore, that awards should be enforceable on an international basis, and indeed Dr. Dietrich Mankowski at the recent Arbitration Conference in London described this as a crucial point in international arbitration. Most states have now signed the so-called "New York Convention" adopted by the United Nations Conference on June 10, 1958. Great Britain has also ratified this Convention, and the Arbitration Act of 1975 has been passed by Parliament. The enforcement of arbitration awards on a wide scale is now possible:

1. This means, for example, that an award made in London is enforceable in the territory of signatories to the Convention, irrespective of the nationality of the parties to the award. This is always assuming that the award is based on English Law, or the law of the state where the award is to be enforced.
2. The New York Convention applies only to awards which are based on an arbitration agreement in writing. This includes either an arbitration clause in the contract or a separate arbitration agreement.
3. However, Article V (6) of the New York Convention stipulates that a defendant is only able to present his case when the following conditions are fulfilled: (a) proper notice of the hearing, (b) the service of all documents which have been filed by the plaintiff, (c) a period of at least 14 days between receipt of summons and pleadings, including all enclosures, and (d) each party has the right to present his case through a lawyer without having to obtain special permission.
4. Arbitrators must be independent judges.

It will be seen that the procedure required is very different from that currently adopted by GAFTA and FOSFA. In my view, the GAFTA and FOSFA methods have very considerable advantages. They are much more informal, which means that it is much easier for the arbitrators to agree based on commercial principles and knowledge of the custom of the trade. They are much quicker, because the involvement of a lawyer or even of a third party causes delay. They are much cheaper because fewer people are involved. If the procedures required by the New York Convention were adopted, an enormous backlog would soon build up. This in turn would lead to an establishment of permanent arbitrators, which would add enormously to the cost and change the whole nature of arbitrations.

Finally, I understand that awards signed by two arbitrators could not be enforced in Holland. This is absurd. I have already given figures to show that the vast majority of disputes are settled by the two arbitrators (65% in GAFTA, 80% in FOSFA), and if the two arbitrators agree, what would be the purpose in calling in a third arbitrator? Even if he disagreed, he would be overruled by a 2:1 majority.