GAFTA ARBITRATION AS THE MOST APPROPRIATE FORUM FOR DISPUTES RESOLUTION IN GRAIN TRADE

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I. INTRODUCTION

Resolution of conflicts arising from business transactions is one of the most important considerations in drafting commercial contracts. Disputes stemming from commercial transactions can be resolved under different fora. They can be brought to national courts of one of the contracting parties, submitted for arbitration, or settled by means of alternative dispute resolution, such as mediation or conciliation. These methods of dispute resolution are not interchangeable. They differ depending on such factors as time limits, costs of procedures, finality, and enforceability of decisions or awards. Most often, disputing parties do not want to grant the "home court advantage" to the other party and prefer to seek adjudication from a neutral forum.[1] Such neutrality, combined with flexibility and confidentiality of procedures, and finality and enforceability of awards, has made arbitration the most oft-used mechanism for settling international commercial disputes, and in words of the Honorable Justice Kerr, "something of a forensic industry all over the world."[2]

Disputes arising from international commercial transactions are most frequently submitted to such arbitral institutions as the International Chamber of Commerce (ICC) International Court of Arbitration,[3] the American Arbitration

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[1] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1 (2012).

[2] Richard J. Graving, *The International Commercial Arbitration Institutions: How Good A Job Are They Doing?*, 4 AM. U. INT'L L. REV. 319, 320 n.3 (1989) (quoting Michael Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164, 164).

[3] The ICC International Court of Arbitration has administered more than 19,000 disputes since its creation in 1923. *Statistics*, ICC, http://www.iccwbo.org/ Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/ Statistics/ (last visited Sept. 11, 2013).

Association's (AAA) International Centre for Dispute Resolution (ICDR),[4] the Stockholm Chamber of Commerce (SCC),[5] the London Court of International Arbitration (LCIA),[6] and Swiss Chambers of Commerce.

In addition to the institutions that deal with disputes arising from virtually any type of commercial contracts, there are several specialized arbitral mechanisms adjusted for the demands of a particular industry. Such arbitral institutions are known as "commodity arbitrations." They are provided by trade associations located in big port hubs, specifically in London. London is home to such industry specific institutions as the Refined Sugar Association (RSA), the Federation of Oils, Seeds and Fats Association (FOSFA), the London Metal Exchange (LME), the London Maritime Arbitration Association (LMAA), London Rice Brokers Association (LRBA), the Cocoa Association of London Limited (CAL), and the Grain and Feed Trade Association (GAFTA). The dispute resolution mechanisms developed under the auspices of such associations are adjusted for the requirements of a particular type of trade. Given the tight deadlines and the existence of the appellate review stage intrinsic to many industry specific rules of arbitration (e.g., FOSFA, GAFTA), some scholars characterize commodity arbitrations of trade associations as "the most sophisticated organization of arbitral proceedings known today."[7] Due to their efficiency, swiftness, and industry-based expertise, commodity arbitrations have built trust and credibility among traders. By way of illustration, it has been estimated that GAFTA and FOSFA arbitrations cover over 70% of annual commodity arbitrations in London.[8]

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[4] The ICDR has envisaged a consistent increase in the caseload. In 2011, case filings with the ICDR increased to 994, a jump of nearly 12% from cases filed in 2010. Press Release, Int'l Centre for Dispute Resolution Achieves Significant Caseload Increase for 2011 (Mar. 1, 2012), *available at* http://www.adr.org/aaa/ShowProperty?NodeId=/UCM/ADRSTG_014036&revision=latestreleased. The number of cases filed with the ICDR in 2010 was 888, a 6% increase over 2009 and a 26% increase over 2008. MOSES, *supra* note 1, at 6.

[5] A total of 177 cases were filed to the SCC in 2012. *The SCC in Numbers*, ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, http://www.sccinstitute.com/hem-3/statistik-2.aspx (last visited Sept. 11, 2013).

[6] Two hundred and twenty-four new disputes were brought to the LCIA for arbitration in 2011. The nature of the contracts out of which the disputes arose included agreements relating to catering franchises; emissions trading; the sale and purchase of aircraft; construction and engineering; the sponsorship of sporting events; IT; insurance; loan and other financial arrangements; oil exploration; management services; the sale and purchase of shares; and the sale and purchase of commodities. Adrian Winstanley, *Director General's Report 2011*, LONDON CT. INT'L ARB., http://www.lcia.org/LCIA/Casework_Report.aspx (last visited Sept. 17, 2013).

[7] CLIVE M. SCHMITTHOFF & KENNETH R. SIMMONDS, INTERNATIONAL ECONOMIC AND TRADE LAW: UNIVERSAL AND REGIONAL INTEGRATION (1976), *reprinted in* CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 620, 626 (Chia-Jui Cheng ed., 1988).

[8] Jacques Covo, *Commodities, Arbitration and Equitable Considerations*, 10 ASA BULL. 133, 135 (1992) [hereinafter Covo, *Commodities, Arbitration*].

The main focus of this study is the arbitral mechanism established under GAFTA, the international association dealing with trade in grain, animal feedstuffs, pulses, rice, and other soft commodities. The article first provides a general overview of several GAFTA standard clauses, such as domicile, default, and exclusion of international conventions. It then briefly explores what type of arbitrations GAFTA offers. The article proceeds elaborating on GAFTA Arbitration Rules Form No. 125, which governs the resolution of disputes arising virtually from all GAFTA contracts. It highlights the salient features of the Rules that distinguish GAFTA from other commercial arbitration tribunals and make it the most appropriate forum for resolving disputes arising in grain trade. Finally, the article explores GAFTA's approach to inducing compliance with arbitral awards via "public shaming" on GAFTA's website and through the judicial enforcement of arbitral awards under the New York Convention.

II. GAFTA: A GENERAL OVERVIEW

The Grain and Feed Trade Association (GAFTA) was established in 1971 on the basis of the Cattle Food Trade Association (LCFTA) and London Corn Trade Association (LCTA). The LCTA was founded in 1878 by corn traders. The association adopted a number of standard contracts and provided arbitration services to its members. In 1906, a group of traders hived off the LCFTA and founded the LCTA, an institution specializing in animal feedstuff trade. As a result of the merger of the two organizations, GAFTA—a new body, dealing with both grain and animal feeding trade—was established.[9]

The Association has flourished over the years. Presently, GAFTA contracts cover "[m]ore than 80% of the world's trade in cereals and a significant proportion of trade in animal feeds."[10] It comprises of more than 1,400 members in 83 countries and aims at promoting international trade in grain, animal feed materials, and pulses.[11] Among GAFTA members are grain and feedstuff producers and traders, agents, shipbrokers and ship-owners, surveyors, market analysts, law firms, and other companies. Although GAFTA was founded and continues to be based in London, its influence is very much present at the international level. The organization is represented at the European Union, the World Trade Organization, the Food and Agricultural Organization, and the

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[9] *About Us,* GAFTA, http://www.gafta.com/about-us (last visited Sept. 11, 2013).

[10] Emily Wilson, *GAFTA: Acronym for Success: A Look at the History, Purpose and Future of the Grain and Feed Trade Association,* WORLD-GRAIN.COM (Mar. 1, 2000), http://www.world-grain.com/News/Archive/GAFTA%20Acronym%20for%20success.aspx?p=1&cck=1.

[11] *See* GAFTA, http://www.gafta.com (last visited Sept. 11, 2013).

International Grain Trade Association.[12] GAFTA currently has offices in London, England; Beijing, China; Geneva, Switzerland; and Kiev, Ukraine.[13]

As previously mentioned, GAFTA seeks to represent market participants at all stages of the grain and feed trade. In fact, it encourages "[a]ny company involved in the agricultural commodities and general produce business, trading in grains, pulses, rice, general produce, spices, and feedingstuffs or any company providing services to those companies" to be a member.[14] To become a member, an applicant must send a completed application to GAFTA's headquarters in London and pay the corresponding annual fee.[15] These annual fees range from £1,500.00 (approximately U.S. $2,430.00) to £115.00 (approximately U.S. $186.00), depending on the membership type.[16]

Members enjoy much more than representation on the world stage. Members receive regular trade policy updates, professional development training, access to superintendent and analyst registers (i.e., contact information to access superintendents or analysts), and dispute resolution services.[17] Most importantly, however, members are given full access to all of GAFTA's standard form contracts.[18]

GAFTA has developed a range of standard contracts and rules aimed at ensuring consistency and uniformity in grain and feed transactions. There are more than eight standard GAFTA contracts tailored depending on the type of good (e.g., general feedingstuffs, general grain, feeding fishmeal), the product's origin (e.g., Australian grain, Canadian and USA Grain, South African Grain), type of grain handling (bulk or bags), and terms of shipment (mostly, CIF or FOB).[19] GAFTA contracts cover the whole spectrum of issues related to import-export transactions in grain, particularly, force majeure, strike and prohibition clauses, quality and price allowance clauses envisaging price reductions in case of the goods' deficiency, default clauses for resale, and cover. It is difficult to overestimate the role of such standard contracts as they are almost invariably used by the lion's share of grain traders. The ultimate function of standard contracts is to ensure uniformity and facilitate commercial transactions in grain and feed trade practices.

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[12] *Become a Member*, GAFTA, http://www.gafta.com/become-member (last visited Sept. 11, 2013).

[13] *Contact Us*, GAFTA, http://www.gafta.com/contact-us (last visited Sept. 11, 2013).

[14] *Become a Member*, GAFTA, *supra* note 12.

[15] *Id.*

[16] *Membership Rates*, GAFTA, http://www.gafta.com/membership-rates (last visited Sept. 11, 2013).

[17] *Become a Member*, GAFTA, *supra* note 12.

[18] *Id.*

[19] *See The Grain and Feed Association List of Contracts and Rules*, HOTGRAIN.COM, http://bit.ly/11AGX1F (last visited Sept. 11, 2013).

III. CONTRACT TERMS: EXCLUSION OF INTERNATIONAL CONVENTIONS

Like any standardized contract, GAFTA contracts contain a number of "boilerplate" terms. Three general types of GAFTA clauses exist: first, commercial terms covering issues, such as goods quality and quantity, price and time of shipments; second, terms relation to the performance of contracts, for instance, discharge, weighing, sampling and analysis, duties and taxes; and, finally, clauses relating problems with the contract execution, such as Extension of Shipment, Prohibition, Force Majeure, Default, and Arbitration.[20]

Some of GAFTA provisions, however, do more than cover minute details; they portray the association's confidence in its ability to handle disputes, as well as its desire to exclude other laws and forums. This is most evident in the clause entitled, "International Conventions."

A. International Conventions

GAFTA excludes a surprisingly high number of international conventions from applying to its contracts. For example, the final provision in GAFTA contract number 49 (Contract for the delivery of goods from central and Eastern Europe in bulk or bags FOB terms) reads as follows:

> INTERNATIONAL CONVENTIONS-
>
> The following shall not apply to this contract: -
>
> (a) The Uniform Law on Sales and the Uniform Law on Formation to which effect is given by the Uniform Laws on International Sales Act 1967;
> (b) The United Nations Convention on Contracts for the International Sale of Goods of 1980; and

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[20] Jacques Covo, Presentation on GAFTA/FOSFA Contracts & Arbitrations in Agricultural Commodity Trading at Feeds and Grain Istanbul International Conference, Istanbul, Turkey (Oct. 18, 2012) [hereinafter Covo, Presentation on GAFTA/FOSFA Contracts] (transcript available at http://www.jurist-jacquescovo.ch/admin/resources/jacques-covoen.pdf).[21] GAFTA, *Contract for the Delivery of Goods from Central and Eastern Europe in Bulk or Bags* provision 25, GAFTA No. 49 (Jan. 1, 2006), *available at* http://www.gtradesystem.com/Commodities_Files/GAFTA%2049.pdf; *see also* GAFTA, *Contract for the Shipment of Feedingstuffs in Bulk* provision 26, GAFTA No. 100A (Jan. 1, 2007), *available at* http://www.gtradesystem.com/Commodities_Files/GAFTA%20100a.pdf; GAFTA, *Contract for Full Container Loads (F.C.L.s) Feedingstuffs* provision 18, GAFTA No. 107 (Jan. 1, 2007), *available at* http://www.gtradesystem.com/Commodities_Files/GAFTA%20107.pdf.

> (c) The United Nations Convention on Prescription (Limitation) in the International Sale of Goods of 1974 and amending Protocol of 1980.
> (d) Incoterms.
> (e) Unless the contract contains any statement expressly to the contrary, a person who is not a party to this contract has no right under the Contract (Rights of Third Parties) Act 1999 to enforce any term of it.[21]

Essentially, GAFTA seeks to exclude every major body of applicable law from applying to its contracts. Even when the contract name includes the term "FOB," as GAFTA Contract Number 49 does, the association still seeks to exclude Incoterms from applying to the contract. More than anything else, this provision displays both the association's confidence in handling disputes and its desire to have exclusive control in resolving disputes.

While it may seem strange that GAFTA would choose to exclude prominent international conventions, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), the exclusion of these laws engenders predictability. The United Nations CISG, for example, permits reservations and declarations by ratifying countries.[22] Because of the international nature of the modern grain and feed trade, allowing conventions like the United Nations CISG could present issues where two countries have ratified the convention, but have different reservations. To avoid this type of conflict, GAFTA prefers to exclude this and other conventions entirely.

Similarly, GAFTA chooses to exclude the use of Incoterms while at the same time invoking terms, such as FOB and CIF, in its contract titles.[23] These terms indicate to the parties of the contract the details of the shipment (e.g., insurance, carriage, taxes), but the GAFTA provision clearly excludes any legal implications other than those used by GAFTA itself.

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[21] GAFTA, *Contract for the Delivery of Goods from Central and Eastern Europe in Bulk or Bags* provision 25, GAFTA No. 49 (Jan. 1, 2006), *available at* http://www.gtradesystem.com/Commodities_Files/GAFTA%2049.pdf; *see also* GAFTA, *Contract for the Shipment of Feedingstuffs in Bulk* provision 26, GAFTA No. 100A (Jan. 1, 2007), *available at* http://www.gtradesystem.com/Commodities_Files/GAFTA%20100a.pdf; GAFTA, *Contract for Full Container Loads (F.C.L.s) Feedingstuffs* provision 18, GAFTA No. 107 (Jan. 1, 2007), *available at* http://www.gtradesystem.com/Commodities_Files/GAFTA%20107.pdf.

[22] United Nations Convention on Contracts for the International Sale of Goods arts. 89–101, Apr. 11, 1980, 1489 U.N.T.S. 3 (providing that certain reservations and declarations are allowed by ratifying States).

[23] *See* GAFTA No. 49, *supra* note 21 (using the term FOB in the contract title); *see also* GAFTA No. 100A, *supra* note 21 (using the term CIF in the contract title).

B. Domicile

Another provision that GAFTA includes in all of its standard form contracts involves the location in which the contract is said to be made. With its foundations in London, it is no surprise that all of the association's contracts are deemed to have been made in England. The relevant part of the provision states: "This contract shall be deemed to have been made in England and to be performed in England, notwithstanding any contrary provision, and this contract shall be construed and take effect in accordance with the laws of England."[24] Of course, the same provision jealously guards GAFTA's arbitral powers over any disputes.

The only part of the provision that allows for non-English court involvement is for the enforcement of an arbitral award.[25] A party to a contract may therefore seek enforcement of an arbitral award in a court outside of England. Because almost all disputes are resolved through arbitration, civil cases dealing with the enforcement of arbitral awards are the most common type of GAFTA related issues heard in U.S. and other national courts and will be discussed later.

C. Default

Given GAFTA's origins and headquarters being London, England, it is no surprise that English common-law principles have had a major influence on its contractual provisions. However, not all of the association's contractual provisions mirror common-law principles. One principle in which GAFTA contracts and English common-law diverge is the "duty to mitigate" losses.

At common-law, when a party breached a contract, the non-breaching party was expected to take steps to minimize its loss. If the non-breaching party failed to minimize, or mitigate, its losses, then that party would not be able to recover the full extent of its damages. This concept applies to anticipatory breaches, as well as breaches that occur once performance have begun. The Restatement Second on Contracts explains this common-law doctrine as follows:

> *Effect of failure to make efforts to mitigate damages.*
>
> As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts. Once a party has reason to know that performance by the other party will not be forthcoming, he is ordinarily expected to stop his own performance to avoid further expenditure . . . . Furthermore, he

[24] GAFTA No. 49, *supra* note 21, provision 23; GAFTA No. 100A, *supra* note 21, provision 24.

[25] GAFTA No. 49, *supra* note 21, provision 23; GAFTA No. 100A, *supra* note 22, provision 24 (both stating "[e]xcept for the purpose of enforcing any award made in pursuance of the Arbitration Clause of this contract, the Courts of England shall have exclusive jurisdiction to determine any application for ancillary relief . . . .").

> is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise.[26]

The obligation of the non-breaching party is made clear: if the party desires to recover the full value of the contract, it must take reasonable steps to mitigate the total amount of damages.

This doctrine is commonly referred to as the non-breaching party's duty to mitigate. However, the fact that a party breached a contract does not necessary impose a *duty* on the non-breaching party. The non-breaching party, once it learns of the breach, may wish to do nothing. The non-breaching party would simply not be able to recover the full amount of its loss because it did not actively try to reduce that loss. Again, the Restatement accurately phases this concept:

> It is sometimes said that it is the "duty" of the aggrieved party to mitigate damages, but this is misleading because he incurs no liability for his failure to act. The amount of loss that he could reasonably have avoided by stopping performance, making substitute arrangements or otherwise is simply subtracted from the amount that would otherwise have been recoverable as damages.[27]

Whether it is said that an actual duty to mitigate arises when a party breaches a contract or that no duty arises because no liability is incurred by the non-breaching party, the underlying doctrine is the same: if a non-breaching party desires to gain the full value of what it bargained for, then it must take reasonable steps to mitigate its damages once it learns of a breach. Because few businesses desire to gain less than the full value of a contract, it becomes obvious that almost all non-breaching parties will take steps to mitigate their damages.

When this common-law doctrine is juxtaposed with GAFTA's contractual provisions dealing with default, stark contrasts arise. Under GAFTA contracts, a non-breaching party is not obligated to mitigate its damages, but may choose to do so at its discretion.[28] If the non-breaching party *does* choose to mitigate its damages, however, then it will recover any loss in value of the contract from the breaching party. Essentially, when a party chooses to mitigate its damages under a GAFTA contract, the same formula for damages will be used as in the common-law. As the GAFTA provisions state, a non-breaching party is *not* obligated to do so: in default of fulfillment of contract by either party, the following provisions shall apply:

> (a) The party other than the defaulter shall, *at their discretion have the right*, after serving notice on the defaulter, to sell or

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[26] RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1981).

[27] *Id.*

[28] GAFTA No. 49, *supra* note 21, provision 20.

> purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.
>
> (b) If either party be dissatisfied with such default price or if the right at (a) above is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.
>
> (c) The damages payable shall be based on, but not limited to, the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods on the date of default established under (b) above.[29]

As section (a) states, the non-breaching party has the choice as to whether it will mitigate its damages. Section (c) reiterates that damages will be assessed by calculating the difference between the contract price and the default price, thus leaving the breaching party responsible for the difference. But section (a) makes it clear that non-breaching parties are not obligated to mitigate their damages. Whether an arbitrator would still award the non-breaching party with the full contract value in such a scenario is difficult to determine, given the fact that GAFTA arbitrations are not made public.

One reason that GAFTA may not require that a party mitigate its damages is the non-perishable nature of grain and feed. In situations where the goods involved are highly perishable, such as fruits and vegetables, a failure to mitigate damages may result in the total loss of a shipment of such goods. The potential for total loss creates an impetus for non-breaching parties to mitigate their damages quickly because failing to act immediately may mean that their behavior was not reasonable.

While GAFTA traders may not be as concerned about the perishable nature of their goods, they may need to focus on the fluctuation in price of their goods in the event of a breach. Grains and feed are subject to price fluctuations,[30] and if breaching parties can potentially be liable for the entire loss of the non-breaching party, even if the non-breaching party decides not to mitigate its damages, then the damages could be enormous.

Another way that GAFTA differs from the English common-law is in its award of damages when the non-breaching party suffers a loss of profits. The most famous common law case involving a breaching party's liability for loss of

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[29] *Id.* (emphasis added).

[30] Brian D. Wright, *Recent Agricultural Price Volatility and the Price of Grain Stocks*, INT'L FOOD & AGRIC. TRADE POLICY COUNCIL, http://www.agritrade.org/events/documents/wright_000.pdf (last visited Sept. 16, 2013).

profits is *Hadley v. Baxendale*.[31] In that case, the court established that a breaching party could not be liable for lost profits when it was unaware that the non-breaching party was losing profits in the first place.[32]

Over time, this doctrine has been shaped to include two separate scenarios in which a breaching party is liable for lost profits: when the lost profits occur in the ordinary course of business, or when the breaching party had reason to know that the lost profits would result. The Restatement (Second) of Contracts states:

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
> (a) in the ordinary course of events, or
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.[33]

Thus, a breaching party is only liable for loss of profits under two circumstances: when the loss of profit results in the "ordinary course of events" and when the breaching party has "reason to know" that such losses will occur.[34]

In contrast, GAFTA contracts provide that breaching parties are *never* liable for lost profits, except for when the arbitrator believes that it is appropriate. The GAFTA provision contains the following:

> (d) In all cases the damages shall, in addition, include any proven additional expenses which would directly and naturally result in the ordinary course of events from the defaulter's breach of contract, *but shall in no case include loss of profit* on any sub-contracts made by the party defaulted against or others unless the arbitrator(s) or board of appeal, having regard to special circumstances, shall in his/their sole and absolute discretion think fit.[35]

Provision (d) clearly indicates that the common-law doctrine of breaching parties being liable for lost profits does not apply. The provision

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[31] *Hadley v. Baxendale—Case Brief Summary*, LAWNIX.COM, http://www.lawnix.com/cases/hadley-baxendale.html (last visited Sept. 16, 2013); *see also* Hadley v. Baxendale, [1854] 156 Eng. Rep. 341.

[32] *Id*.

[33] RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

[34] *Id*.

[35] GAFTA No. 49, *supra* note 21, provision 20 (emphasis added).

assumes that the breaching party will almost never be liable for lost profits. Only when an arbitrator or the board of appeal feels it is appropriate to award lost profits, and only when "special circumstances" arise, is the breaching party responsible for lost profits. Such strong language against an award for lost profits makes it likely that such awards are rare.

The only costs for which a breaching party is liable are those resulting from the additional expenses stemming from the breach. These costs may include additional shipping charges or insurance coverage, but may also include the cost to mitigate the damages. Additionally, these costs must result from the ordinary course of business. The use of the phrase "ordinary course of business" must not be confused with similar language in the Restatement addressing recovery of lost profits. The GAFTA provision uses the phase in strict relation to *additional* expenses and not lost profits.

An interesting picture is presented when these two contractual provisions are viewed together. The lack of a duty to mitigate appears to favor non-breaching parties since no additional liability is imposed on that party. Moreover, the provision stating that a breaching party will only be liable for lost profits in "special circumstances" appears to favor breaching parties since the breaching party will rarely be obligated to pay for lost profits. If a non-breaching party knows that it is highly unlikely that it will receive lost profits in an arbitration award against the breaching party, it is also highly unlikely that the non-breaching party allow itself to incur such losses. In other words, although GAFTA contracts do not require a non-breaching party to mitigate its damages, the fact that it will probably not recover lost profits will compel it to take measures to limit its lost profits. When these two provisions are viewed in concert, they encourage non-breaching parties to act quickly and efficiently, so as not to run the risk of putting themselves in a position to incur a loss in profits.

IV. GAFTA ARBITRATION

In addition to establishing the standard contract forms, GAFTA sets up several mechanisms for resolving disputes arising from such contracts. Arbitration under GAFTA Rules belongs to the rubric of commodity arbitrations. A salient feature of commodity arbitrations is that the parties to a contract seek an expert opinion on issues arising from their contracts from a third party, who is not necessarily an arbitration or legal professional. This peculiarity has lead some commentators to the conclusion that the word "arbitration" is not appropriate for the characterization of this mechanism because the opinion given by the third party does not have a nature of an award. In fact, the function of the third party expert in commodity arbitrations may often be broader than that of a conventional arbitrator, particularly, in cases where he has to decide whether there should be a price reduction or whether the supplier should settle the damage resulting from the goods' poor quality. Additionally, commodity arbitrations are characterized by prompt, informal, and confidential procedures of resolving conflicts between the

contractual parties.[36] Due to the high efficiency of proceedings, commodity arbitrations are sometimes referred to as "fast-track arbitrations."[37]

A. Dispute Resolution Mechanisms

1. Arbitration Under Rules No. 125

GAFTA Arbitration Rules No. 125 cover disputes arising from issues related to the quality and condition of goods, as well as any other disputes stemming from GAFTA standard contracts,[38] the so-called "technical arbitration."[39] Most often disputes arise from issues relating to the contract formation, prohibitions on export/import of commodities, force majeure, and contract interpretation. A hallmark of GAFTA Arbitration under Rules No. 125 is its two-tier structure: unlike the vast majority of other arbitral rules, GAFTA arbitration provides the parties to arbitration with an opportunity to challenge the decision of the first-tier arbitrators before the Board of Appeal. The Arbitration Rules are not static; they undergo changes from time to time, which keep them up-to-date with developments in grain trade practices. The latest version of the Rules came into effect on April 1, 2012.[40] The current edition of the Rules at the date of the parties' contract applies for settling the dispute.[41]

2. Simple Dispute Resolution Under Rules No. 126

In addition to the Arbitration Rules No. 125, which are used most frequently, parties can agree to arbitrate their disputes under GAFTA Simple Dispute Resolution Rules Form No. 126. Rules No. 126 provide a simplified alternative dispute resolution procedure for unsophisticated disputes. Unlike Rules No. 125, Simple Dispute Arbitration Rules do not envision an appellate review stage. Another salient feature of the simplified procedure is that the parties may have to resort to it after the dispute has arisen. They may opt out from Rules No. 125 by signing the Arbitration Agreement attached to Rules No. 126 and

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[36] JEAN FRANCOIS PAUDRET, SEBASTIEN BESSON & STEPHEN BIRTI, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 19 (2007).

[37] MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 550 (2001).

[38] *See* Covo, *Commodities, Arbitration*, *supra* note 8, at 141.

[39] *See* Kirby P. Johnson, *The Grain and Feed Trade Association Quality Arbitrations on Raw Materials*, *in* ICCA CONGRESS SERIES NO. 1 (Pieter Sanders ed., 1983).

[40] *Arbitration*, GAFTA, http://www.gafta.com/arbitration (last visited Sept. 16, 2013).

[41] GAFTA, *Arbitration Code of Practice* ch. 1, at 3 (Jan. 1, 2006).

submitting it to the GAFTA Secretariat. Under Rules Form No. 126, cases are decided by a sole arbitrator[42] within strict time limits.[43]

3. Maritime Arbitration Rules No. 127

GAFTA also offers arbitration services for issues arising from GAFTA Charter Party, which is a standard agreement for the carriage of goods between the ship-owner and the charterer, who is typically the owner of the merchandise. GAFTA Arbitration Rules No. 127 set out the procedure for resolving disputes arising from charter parties and other forms of maritime transport.[44]

4. Mediation

Finally, GAFTA provides mediation services to its members. Mediation is a non-binding procedure that helps disputants reach a common ground with the help of a third party. GAFTA mediation procedure is elaborated in Rules No. 128. The principal difference between mediation and arbitration is that it does not result in a formal award. The outcome of mediation greatly depends on will of the parties to negotiate and communicate whereas in arbitration it is contingent upon the applicable law. Thus, the mediation procedure has a less formal and amicable spirit and is interest—rather than rights-based.[45] In case the parties fail to reach a solution to the conflict via mediation, they have the right to revert to arbitration. Importantly, all the documents and information disclosed in the course of mediation remains confidential and is not used in arbitration unless the parties resubmit it.[46]

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[42] *See* GAFTA, *Simple Dispute Arbitration Rule*s art. 3.2, GAFTA No. 126 (Jan. 1, 2006), *available at* http://www.gtradesystem.com/Commodities_Files/GAFTA%20126.pdf.

[43] *Id.* arts. 4.1 to .3. (stating that Simple Dispute Arbitration Rules establish a time limit of seven days for each party to submit its arguments and rebut the arguments of the other party).

[44] *See* GAFTA, *Arbitration Rules for Use with Charter Parties or Other Forms of Maritime Transport*, GAFTA No. 127 (Jan. 1, 2006), *available at* http://www.gtrade system.com/Commodities_Files/GAFTA%20127.pdf.

[45] MOSES, *supra* note 1, at 15.

[46] Asma Benelmouffok, *Mediation: A Win-Win Solution to Resolve Your Disputes*, GAFTAWORLD, http://www.medialegeneve.ch/gafta_no_171.pdf (last visited Sept. 16, 2013).

B. GAFTA Arbitration Clause

When entering into an agreement based on GAFTA standard contract, parties automatically undertake the duty to arbitrate any potential disputes under GAFTA Arbitration Rules Form No. 125. Each of GAFTA contracts contains an arbitration clause making the agreement subject to GAFTA Arbitration incorporated in GAFTA Arbitration Rules Form No. 125. The language of the arbitration clause is almost identical in every standard GAFTA contract. For instance, the relevant part of GAFTA Contract No. 64 (General Contract for Grain in Bulk, FOB Terms) reads:

> 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 Arbitration Rules, No. 125, 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 fully cognizant of and to have expressly agreed to the application of such Rules.[47]

In case the parties have their own house contract forms, the reference to the relevant GAFTA standard in such forms should be sufficient and clear. The GAFTA Arbitration Code of Practice explains that sometimes house contract forms contain vague and insufficient links to GAFTA contracts and arbitration rules, for instance, "the appropriate GAFTA contract form applies" or "relevant contract and arbitration rules apply."[48] Instead, house contract forms shall contain an express name and number of the relevant contract. Another important caveat in this regard is that the parties should agree to GAFTA arbitration in writing, otherwise, the jurisdiction of a GAFTA tribunal cannot be established.

In addition to the arbitration clause, all GAFTA contracts contain a domicile clause providing an exclusive jurisdiction of English courts for application of ancillary reliefs.[49] Furthermore, standard forms incorporate the so-called "Scott-Avery clause,"[50] which prohibits parties from bringing any legal action or proceeding to any other forum until the dispute has been heard and determined by the arbitrator(s), or a board of appeal in accordance with the Arbitration Rules. This clause is considered a deficiency of the system and is criticized by GAFTA practitioners. The Scott-Avery clause combined with the Domicile clause, in the opinion of some commentators, leads to the situation when

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[47] GAFTA, *General Contract for Grain in Bulk* provision 25, GAFTA No. 64 (Jan. 1, 2006), http://www.gtradesystem.com/Commodities_Files/GAFTA%2064.pdf.

[48] GAFTA, *Arbitration Code of Practice*, chs. 1, 3.

[49] GAFTA No. 64, *supra* note 47, provision 24.

[50] Richard Black, *United Kingdom: Should Security Be Available Outside England For GAFTA Arbitration? – The Trade Must Decide*, MONDAQ (May 19, 2005), http://www.mondaq.com/article.asp?article_id=32611&signup=true.

the claimant can apply for an ancillary relief to English courts and is precluded from the possibility of doing the same abroad.[51] As a result, in case the respondent does not have any assets in England, the complaining party cannot obtain a security for its claim.

C. GAFTA Rules No. 125 First Tier Arbitral Mechanism

GAFTA Arbitration Rules No. 125 set out a two-tier mechanism for resolving disputes arising from GAFTA standard contracts. The arbitration procedure commences by an aggrieved party sending a notice about its intention to start the proceeding to the respondent.[52] The notification usually contains the name of an arbitrator suggested by the claimant. The respondent appoints another arbitrator, while the third arbitrator is appointed by GAFTA.[53] Alternatively, the parties can agree to refer the dispute to a sole arbitrator to be appointed by GAFTA, in accordance with Article 3.1 of the Rules.

GAFTA Arbitration Rules ensure that only a person sufficiently qualified and versed in the specificities of grain trade can be appointed as a GAFTA Arbitrator. Pursuant to Article 3.7 of the Rules, only GAFTA Qualified Arbitrators can be appointed as an arbitrator. GAFTA Arbitration Code of Practice elaborates that GAFTA Qualified Arbitrators must comply with the Continuing Professional Development Programme (CPDP) and be familiar with the mechanics of the commodity markets and basic principles of contracts and tort law; understand the legal principles underlying commodity sale contracts; understand his/her responsibilities as arbitrator; deal efficiently with the documents provided in the course of arbitration; and write in a clear manner.[54] Both traders and lawyers can qualify to be a GAFTA Arbitrator. However, in practice most disputants give preference to merchants over legal practitioners in order to ensure sufficient expertise to deal with the mechanics of grain and feedstuffs trade. Interestingly, as Jacques Covo, a GAFTA practitioner, notes, usually disputants use in arbitration proceedings advisory services or active arbitrators who have no connection with the case at stake.[55]

Except for disputes over goods' quality (the so-called "technical arbitration"), GAFTA provides significant freedom to the arbitrators and does not set out strict time limits, apart from the requirement that submissions should be exchanged without delay.[56] In practice, the entire time-span of a dispute rarely takes more than six months. In the disputes concerning the quality and condition of goods, Article 2.1 of the Rules provides that the claim must be made no later

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[51] *Id.*

[52] GAFTA, *Arbitration Rules* art. 2, GAFTA No. 125 (Jan. 1, 2006), http://www.iccontrol.ru/images/news/89/125%20Arbitration%20Rules%202006.pdf.

[53] *Id.* art. 3.

[54] GAFTA, *Arbitration Code of Practice*, ch. 3.

[55] Covo, Presentation on GAFTA/FOSFA Contracts, *supra* note 20.

[56] *See* GAFTA, *Arbitration Rules*, art. 3.3.

than twenty-one consecutive days from the date of the receipt of the final certificate of analysis by the claimant.

The proceedings may take place either in written form by exchanging claims, other documents, and evidence, or in the form of an oral hearing. Most often, parties prefer the written procedure to an oral one, as it is less costly for several reasons. First, there is no need to retain lawyers for the oral hearings. Second, there is no need for the tribunal to meet in person and the discussion of the case can take place by exchanging emails and/or post. Third, since the oral hearings are conducted at the GAFTA office in London, the parties may opt for the written proceeding in order to avoid significant travel expenses. It is noteworthy that in the first-tier arbitration, awards are usually rendered on the basis of the written statement of cases and other evidence submitted by disputants.[57]

String arbitrations are another attribute of the GAFTA Rules. String trading occurs where commodities are not sold directly from the seller to the buyer, but rather are covered by a link of contracts that contain identical terms. Nevertheless, strings are viewed as an integrated whole.[58] Some commentators refer to string contracts as being "speculative" trading due to the fact that they involve the buying and selling of negotiable documents, rather than the actual trade in goods.[59]

Usually, the problem of multiparty arbitration is resolved by allowing joined or consolidated arbitral proceedings. Under joinder, a third party who is not a signatory to the arbitration agreement is allowed to participate in arbitration. The rules of some standing arbitral tribunals contain clauses allowing joinder.[60] GAFTA Rules deal with the issue of multiparty arbitration differently. Article 7.1 of Rules No. 125 provides single arbitration between the first seller and the last buyer for string contracts. This option, obviously, disencumbers the parties from the expenses and complexities of multiparty arbitration.

Another advantage of GAFTA arbitrations is that they are confidential, and their results rarely lapse into public domain. This is an advantage of the process because the parties to arbitration may not be willing to disclose its results due to the threat of reputational damages an adverse arbitral decision could cause.

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[57] *See supra* note 33 and accompany text.

[58] For an explanation of the string trading see Michael G. Bridge, *The Bifocal World of International Sales*, *in* ROY GOODE, ROSS CRANSTON & BORIS KOZOLCHYK, MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE 279-82 (Ross Cranston ed., 1997).

[59] Bruno Zeller, *Commodity Sales and the CISG*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY (Camilla B. Anderson & Ulrich G. Schroeder eds., 2008).

[60] For instance, Article 7 of the ICC Rules of Arbitration allows joinder of additional parties without distinguishing between signatories and non-signatories. Article 22.1(h) grants the arbitral tribunal the power to allow third persons to be joined provided that the third party and the applicant agree to the joinder. Article 4.2 of the Swiss Rules of International Arbitration allow the arbitral tribunal to grant joinder after consulting with all of the parties.

The scope of confidentiality extends not only to the arbitral award, but also to all the documents and information obtained in the course of arbitration. The parties may agree to the award being made public and release it to the GAFTA members. However, even in that case, the GAFTA Secretariat cannot disclose the names of the parties and shall publish the award anonymously.[61]

Overall, the arbitration mechanism is flexible and provides parties and arbitrators with significant leeway. The procedure and deadlines can be adjusted to the needs of a particular dispute.

D. Participation of Lawyers in GAFTA Arbitration

Historically, traders have pushed lawyers out of commodity arbitrations. Prior to GAFTA's establishment, resolution of disputes between traders was conducted under the auspices of the Cattle Food Trade Association and the London Corn Trade Association. These disputes, as well as early GAFTA arbitrations, were focused mainly on issues of the goods' quality. Since only traders possessed the skills necessary for accessing the quality of the goods, the role of lawyers in such procedures was negligible.[62] Dezalay and Garth explain that the industry groups shaped the dispute resolution systems to keep barristers out of the proceedings, but retain the possibility to resort to their help for an expert advice on key legal issues.[63] This helped traders retain some control over arbitration. In the early days of commodity arbitrations, it was next to impossible to obtain permission to be represented by lawyers both at the stage of the initial arbitration and during the appellate review. Appeal Boards were less reluctant to allow lawyers in only when matters involved serious issues of law and were likely to go to the court.[64] The situation has not changed significantly. Nowadays lawyers are actively involved in the preparation of cases, but it is mostly traders who present cases in front of arbitrators.

With regard to GAFTA Arbitration, this contention finds support in the memoirs of Lord David Hacking,[65] a prominent international arbitrator and mediator, who was appointed as a member of the GAFTA Appeal Board in 2000. As Lord Hacking noted, his appointment as a GAFTA Arbitrator was "unusual"

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[61] GAFTA, *Arbitration Code of Practice*, ch. 6.

[62] David Hackings, *GAFTA and the Legal Profession*, GAFTAWORLD, http://www.lordhacking.com/Documentation/DDH%20Article%20on%20'GAFTA%20and%20the%20Legal%20Profession'.pdf (last visited Sept. 22, 2013).

[63] YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 133 (1996).

[64] *Id.* at 133 n.6.

[65] David Hacking is a Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators in London. For the last forty years, practicing as a Barrister at Law and a Solicitor of the Supreme Court, he has undertaken numerous commercial litigation and arbitration cases. *See* LORD DAVID HACKING, http://www.lordhacking.com/index.html (last visited Sept. 16, 2013).

and "controversial" due to the absence of experience in the grain and feed trade.[66] He also stressed that while in recent times lawyers have been appointed as GAFTA arbitrators more frequently, a balance between GAFTA and the legal profession in terms of legal representation had not yet been achieved.[67] GAFTA Rules explicitly ban legal representation in oral hearings unless the parties agree otherwise.[68] Such an agreement is difficult to achieve, as it requires a consensus on the part of both parties. Usually, the party who knows the law is not on its side and expects an adverse decision blocks the agreement on legal representation. One of the previous editions of GAFTA Rules provided GAFTA Appeal Boards with a right to give "a special leave" for lawyers to appear in oral hearings, however, as of January 31, 1997 that provision was abolished.[69]

Nevertheless, under Article 16.2 of the Rules, even in the absence of an explicit agreement, lawyers can still be allowed to represent traders in the written proceedings, but not in the oral hearings. Lawyers' participation in the procedures adds to the cost of the arbitration, which is not recoverable even if claimed. This certainly restrains companies in their willingness to be represented by lawyers. Nonetheless, the restrictions on legal representation seem to be obsolete. Since GAFTA's establishment in 1971, the nature and conditions of international business transactions have changed. As a result, with the expansion of the international trade regulation, more and more questions of law arise in the course of GAFTA arbitrations. In such circumstances, hiring lawyers for representing companies in commodity arbitrations should become a rule, rather than an exception. The presence of lawyers in the oral hearings, as well as their participation in the written proceedings, may facilitate the task of arbitrators and contribute to the clarity and efficiency of the procedures. This contention, however, cannot extend equally to disputes over quality as opposed to other categories of disputes (for instance, those over payment or delivery of goods) since quality disputes are highly technical; thus, the added value of lawyers in such procedures seems to be limited.

With that in mind, the provisions on lawyers' participation in GAFTA dispute resolution procedures should be given a fresh look. The potential positive effect from granting parties more freedom in retaining lawyers will not only be better representation of traders' interests, but also improvement of the mechanism as such.

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[66] *Id.*

[67] *Id.*

[68] GAFTA No. 125, *supra* note 52, art. 16.

[69] *See* HACKING, *supra* note 65.

E. Appellate Review of Arbitral Awards

One of the main differences of GAFTA Arbitration from other institutional commercial arbitrations is the possibility to appeal the award of the tribunal. Few arbitral mechanisms contain the appellate review rules. Even those institutional providers of arbitration who have adopted certain provisions on the scrutiny of awards cannot offer a full-fledged appellate review procedure. By way of illustration, the ICC Rules of Arbitration provide the approval scrutiny of the award by the Court.[70] China International Economic and Trade Arbitration Commission (CIETAC) and the International Chamber of Commerce, Judicial Arbitration & Mediation Services, Inc. (JAMS) require arbitral tribunals to submit draft awards to review committees for scrutiny.[71] The availability of a full-fledged appeal mechanism is more intrinsic to state-to-state dispute resolution mechanisms. For instance, the Appellate Body of the World Trade Organization, which deals with trade disputes on an inter-state scale, reviews the questions of law that have been dealt with by WTO panels.[72] Arguably, the absence of an appellate review stage in the majority of arbitration tribunals has an adverse effect on international commercial arbitration. It undermines the public confidence in

[70] Article 33 states:

> Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

ICC, *Arbitration Rules* art. 33 (Jan. 1, 2012), *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_33.

[71] CIETAC Arbitration Rules, Article 49, states, "The arbitral tribunal shall submit its draft award to the CIETAC for scrutiny before signing the award. The CIETAC may remind the arbitral tribunal of issues in the award on condition that the arbitral tribunal's independence in rendering the award is not affected." China Int'l Econ. & Trade Arbitration Comm'n, *Arbitration Rules* art. 49, *available at* http://www.cietac.org/index/rules.cms (last visited Sept. 9, 2013). JAMS Int'l Arbitration Rules, Article 32.3, provides, "Before signing any Award, the Tribunal will submit it in draft to JAMS. JAMS may suggest modifications as to the form of the Award and may also draw the Tribunal's attention to points of substance. No Award will be rendered by the Tribunal until it has been approved by JAMS as to its form." Judicial Arbitration & Mediation Services Found., *International Arbitration Rules* art. 32.3, *available at* http://www.jamsadr.com/files/uploads/documents/jams-rules/jams-international-arbitration-rules.pdf (last visited Sept. 19, 2013).

[72] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 ("[A]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").

the procedures and questions the legitimacy of arbitration.[73] In this regard, GAFTA Arbitration Rules stand out from the available pool of international commercial arbitration mechanisms.

Similarly to some other commodity and maritime arbitral mechanisms, GAFTA Arbitration Rules provide a possibility of an "internal" challenge to an award.[74] A party who is dissatisfied with the award has a right to challenge it before the GAFTA Board of Appeal. The appellant should lodge a complaint with the Board of Appeal within thirty days after the date on which the award was made.[75] Boards of Appeal comprise three arbitrators where the initial award was made by the sole arbitrator or five arbitrators, if the first tier award was rendered by a three-person arbitral panel.[76]

GAFTA time limits requires that a notice of appeal must be given no later than noon on the 30th consecutive day after the day on which the award was made. The Board of Appeal consists of three members of the Association where one arbitrator made the first-tier award and five members where three arbitrators made it.[77] After submission of written statements and evidence (which may include new evidence) a date is set for the hearing of the appeal.[78]

The scope of the appellate review is very broad. An appeal constitutes a *de novo* hearing of the dispute. The evidence or information produced at the arbitration is not available to the Board of Appeal and should be re-submitted by the parties. Only a copy of the first-tier award is provided to the Board of Appeal by the GAFTA Secretariat.[79] Moreover, GAFTA Rules do not preclude disputants from adducing new evidence at the appeal stage. The Board of Appeal may confirm, vary, amend, or set aside the award of the first tier tribunal.[80] The Award of the Board of Appeal replaces that of the first tier tribunal.

Noteworthy, members of trade associations do not resort to the appellate review procedures often. Knull and Rubins estimate that only in 15-20% of cases parties invoke appeal procedures, which demonstrates the credibility and confidence of the parties in the system.[81]

However, one of the most important functions of the GAFTA appellate review is that it provides more certainty and ensures greater consistency in the

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[73] Erin Gleason, *International Arbitral Appeals: What Are We so Afraid of?*, 7 PEPP. DISP. RESOL. L.J. 269, 271–72 (2007).

[74] ALAN REDFERN & MARTIN HUNTER WITH NIGEL BLACKABY & CONSTANTINE PARTASIDES, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 406–07 (2004).

[75] GAFTA No. 125, *supra* note 52, art. 10.1(a).

[76] *Id.* art. 11.1.

[77] *Id.*

[78] *Id.* arts. 12.1 to .3.

[79] GAFTA, *Arbitration Code of Practice*, ch. 5.

[80] GAFTA No. 125, *supra* note 52, art. 12.4.

[81] William H. Knull, III & Noah Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 558 (2000) (citing Communication with Peter Brown, of Peter Brown Associates, London, Jan. 31, 2001).

decisions of arbitrators involving complicated legal issues. The role of the appellate review for cases related to technical issues, such as quality or condition of goods, however, is less obvious. It is doubtful that a Board of Appeal would be able to resolve a dispute involving such issues more accurately than the first-tier arbitrator. On the other hand, the internal appeal is more time and cost efficient than the judicial review that most of the arbitral rules provide for. In general, the internal challenge of the award is important for such narrowly specialized fields as grain and feedstuffs trade: unlike the judicial review, the institutional appeal process can ensure that the award will be reviewed by arbitrators who are experts in the specifics of the grain commodities trade.

V. ENFORCEMENT OF GAFTA ARBITRAL AWARDS BY "PUBLIC SHAMING"

GAFTA Rules No. 125 prescribe a unique enforcement procedure coercing the losing party to comply with the adverse decision of arbitrators. Enforcement is arguably the most important stage of the arbitral procedure, that is, absence of compliance with the award on behalf of the losing party, the whole enterprise appears meaningless. The compliance is more likely if the parties to the dispute have ongoing commercial relations with more than one contract and mutual commitments involved. However, in case the dispute arises from a onetime transaction and the winning party has limited leverage over the losing one, it may be difficult to achieve compliance in the absence of an effective enforcement mechanism.

Various fora adopt different approaches to inciting compliance. The majority of arbitration rules necessitate the resort to national courts for enforcing arbitral tribunals' awards. Some, however, establish alternative coercive mechanisms. For instance, the International Centre for Settlement of Investment Disputes (ICSID), which resolves investor-state conflicts, assists successful claimants in enforcing awards by exerting pressure on non-compliant states via sending reminders about the importance of fulfilling the obligation to pay the award or conducting post-award settlement discussions.[82] Even though these mechanisms of inducing compliance are not expressly envisaged in the ICSID Convention, they prove to be efficient. Such instruments are not employed often, however, they turn out to be particularly useful in facilitating compliance in problematic cases. According to Parra, ICSID post-award settlement discussions require an active involvement of the ICSID Secretariat and the Secretary General who both act "as a catalyst in achieving the negotiated settlement."[83]

Similarly to ICSID, GAFTA foresees a compliance mechanism that exerts pressure on the non-prevailing recalcitrant party. GAFTA Rules No. 125 make non-compliance with the award on the part of the losing party public. Article 22.1 of the Rules provides:

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[82] ANTONIO R. PARRA, THE HISTORY OF ICSID 194 (2012).
[83] *Id.*

> In the event of any party to an arbitration or an appeal held under these Rules neglecting or refusing to carry out or abide by a final award of the tribunal or board of appeal made under these Rules, the Council of GAFTA may post on the GAFTA Notice Board, Web-site, and/or circulate amongst Members in any way thought fit notification to that effect. The parties to any such arbitration or appeal shall be deemed to have consented to the Council taking such action as aforesaid.[84]

Analogously, the GAFTA Council may resort to adverse publicity in case the losing party defaults to pay GAFTA arbitration fees.[85] After the non-prevailing party complies with the award, GAFTA circulates a new notice informing its members that the company should no longer be considered a defaulter.

Previous editions of the Rules also contained a provision obliging GAFTA to communicate with the defaulter before circulating the notice to other members. The purpose of such communication to the party neglecting the award was to establish whether it wished to inform GAFTA about any issues pertaining to the default, such as an outstanding balance due on the part of the successful party.[86] Even though the current edition of the rules no longer contains such a provision, the warning mechanism still works in practice. Such signaling to the company about a potential website publication may incite compliance.

In commodities trade, the value of good reputation can hardly be overestimated since traders are usually repeat players. Not surprisingly, the principle of adverse publicity contributes to the enforcement of GAFTA awards. Since trade associations and their arbitral mechanisms have more legitimacy than separate companies, they facilitate the creditor's efforts to obtain the payment from the debtor and add credence to the winner's claims.[87] The number of defaulters on arbitral awards is relatively small. In 2012, eight notices informing about twenty-eight defaulters were published on the GAFTA website.[88] Public shaming puts peer pressure on the party refusing to honor the award and poses a threat if the reluctance on the part of the business partners to enter into future transactions with such a company. Moreover, this mechanism of enforcement contributes to the settlement of a dispute and does not provide an incentive for the conflict escalation to the parties.[89]

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[84] GAFTA No. 125, *supra* note 52, art. 22.1.

[85] *See* GAFTA, *Defaulters on Awards of Arbitration*, GAFTA Notice AM/2012/361 (Dec. 17, 2013), *available at* https://www.gafta.com/sites/gafta/files/am2012361.pdf.

[86] JORGE VIÑUALES & DOLORES BENTOLILA, THE USE OF ALTERNATIVE (NON-JUDICIAL MEANS) TO ENFORCE INVESTMENT AWARDS AGAINST STATES, *in* DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 247 (Laurence Boisson de Chazournes, Marcelo G. Kohen & Jorge E. Viñuales eds., 2012).

[87] *Id.*

[88] *See News*, GAFTA, http://www.gafta.com/news (last visited Sept. 22, 2013).

[89] Nicolas Ulmer, *Reflections on a very Specialized Tribunal*, KLUWER ARB. BLOG (Oct. 11, 2012), http://kluwerarbitrationblog.com/blog/2012/10/11/reflections-on-a-very-specialized-tribunal/.

In case the losing party fails to comply with the award even after the website publication, the successful party may resort to the judicial enforcement in the country where the recalcitrant party has its assets. If both parties are from England, the award is enforced by the High Court. If the losing party has its domicile in a country other than England, most likely the award will be enforced via the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 1958,[90] which was adopted by 145 states. The New York Convention applies to the recognition and enforcement of awards made in the territory of a State other than the State where the recognition and enforcement are sought.

VI. JUDICIAL ENFORCEMENT OF GAFTA AWARDS

At the beginning of the twentieth century, the nascent field of international commercial arbitration relied solely upon domestic arbitration laws.[91] Many countries did not yet look upon arbitration favorably and arbitration laws were "generally antiquated."[92] However, after World War I, the use of international commercial arbitration increased, leading the International Chamber of Commerce (ICC) to encourage an international convention to validate arbitration clauses.[93] Although progress ensued, the laws governing international commercial arbitration remained inadequate after World War II.[94] The ICC aimed at altering the landscape by changing the governing law of arbitration from national law to an international convention.[95] After some back and forth between the ICC and the United Nations Economic and Social Council (ECOSOC), the ECOSOC decided to convene the Conference on International Commercial Arbitration.[96] The twenty-one day conference resulted in what is commonly referred to as the New York Convention of 1958.[97]

The New York Convention quickly gained support, garnering signatures from twenty-five countries in 1958 alone.[98] However, many common law

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[90] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[91] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 6 (1981).

[92] *Id.*

[93] *Id.*

[94] *Id.* at 7.

[95] *Id.*

[96] VAN DEN BERG, *supra* note 91, at 7–8.

[97] *Id.* at 8; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention], *available* at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[98] *List of Contracting States*, NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/contracting-states/list-of-contracting-states (last visited Sept. 23, 2013).

countries were much more reluctant to accede.[99] For example, although the United States did not sign until 1971, its accession practically made it a pioneer among common law jurisdictions.[100] The large initial group of signatories along with steady growth since its adoption has allowed membership in the New York Convention to grow to include 149 countries in 2013.[101] Such widespread acceptance of international commercial arbitration by means of recognizing foreign arbitration awards has no doubt helped to increase the appeal of the mandatory arbitration rules found in every GAFTA standard form contract.

The New York Convention applies to the "recognition and enforcement of arbitral awards made in the territory of a state other than the state whether the recognition and enforcement of such awards are sought . . . ."[102] It is not applicable where the award arises out of a dispute between parties of the same country, unless the dispute involves foreign property, foreign enforcement, or some other reasonable relation with a foreign country.[103] Where applicable, Article III clearly states: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."[104] The party seeking enforcement must submit "[t]he duly authenticated original award or a duly certified copy thereof," and it must be translated in the language of the country in which the party is seeking enforcement.[105]

Courts in which enforcement is sought generally review awards *de novo* and only seek to determine whether the party against whom the award enforcement is sought established a defense under the New York Convention.[106] Article V contains the defenses that can be asserted against enforcement, including the following:

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[99] Richard W. Hulbert, *Shades of Yesteryear: A Note on the 1958 U.S. Delegation Report on the New York Convention*, 19 AM. REV. INT'L ARB. 121, 121 (2008). Interestingly, the original U.S. Delegation "recommend[ed] strongly that the United States not sign or adhere to the convention" because of "compelling legal and policy objections . . . ." *Id.* The Delegation had four objections: (1) it would confer no meaningful advantages; (2) it would override the arbitration laws of a substantial number of states and require changes to state and federal court procedures; (3) the lack of sufficient domestic legal basis; and (4) it embodied undesirable principles of arbitration. *Id.*

[100] Other notable common law countries waited even longer to accede: Australia (1975), Canada (1987), and the United Kingdom (1975). *List of Contracting States*, *supra* note 98.

[101] *Contracting States*, NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/contracting-states (last visited Oct. 24, 2013).

[102] New York Convention, *supra* note 97, art. I, ¶ 1. Arbitral awards "shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted." *Id.* art. I, ¶ 2.

[103] 23 No. 3 INT'L QUARTERLY Art. 1, § 2 (2011) [hereinafter Application of Convention].

[104] New York Convention, *supra* note 97, art. III.

[105] *Id.* art. IV, ¶¶ 1–2.

[106] Application of Convention, *supra* note 103, § 1.

(1) Lack of notice to the party against whom the award is invoked;
(2) The award deals with an issue not falling within the arbitration or contains decisions on issues beyond the scope of the arbitration, except that enforceable portions can be severed;
(3) Composition of arbitral authority was not in accordance with the law of the country where the arbitration took place; and
(4) The award has not yet become binding on the parties or has been set aside or suspended by authority of the country where award was made.[107]

Additionally, the court may refuse to enforce the award if it finds: "(a) The subject matter of the difference is not capable of settlement or arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."[108]

Although additional discussion of the New York Convention is certainly possible, it is beyond the scope of this article. Also beyond the scope of this article is the enforcement of GAFTA arbitration awards in jurisdictions that have not signed the New York Convention. Latter parts of this article will discuss cases involving GAFTA contracts and the enforcement of GAFTA arbitration awards as made possible by the New York Convention. In sum, the New York Convention has greatly facilitated the enforcement of foreign arbitration awards because it allows the parties to avoid the peculiarities and surprises of local law.[109] It provides a dependable body of rules that allows parties to consistently enforce international foreign arbitral awards without regard to the place of arbitration or the nationality of the parties involved in the arbitration process.[110]

A. Enforcement of GAFTA Arbitration Awards in the United States

A long, well-developed line of case law dealing with GAFTA enforcement in the district courts of the United States does not exist. Instead, enforcement has been largely limited to cases involving maritime attachment, over which jurisdiction has been exercised in a very limited nature.[111] There is,

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[107] New York Convention, *supra* note 97, art. V, ¶¶ 1(b)–(e).
[108] *Id.* art. V, ¶¶ 2(a)–(b).
[109] Application of Convention, *supra* note 103, § 2.
[110] *Id.*
[111] *See, e.g.*, Aston Agro-Industrial AG v. Star Grain Ltd., 2006 WL 3755156 (S.D.N.Y. 2006); J.K. Int'l, Pty., Ltd. v. Agriko S.A.S., 2007 WL 485435 (S.D.N.Y. 2007); Gedimex, S.A. v. Nidera, Inc., 290 F. App'x. 311 (11th Cir. 2008); Kulberg Finances, Inc. v. Spark Trading D.M.C.C., 628 F. Supp. 2d 510 (S.D.N.Y. 2009); CHS Europe S.A. v. El

however, an exception outside the realm of maritime attachment where the Eleventh Circuit Court of Appeals displayed a willingness to exercise jurisdiction over a foreign sovereign and enforce the GAFTA arbitration award in favor of a United States corporation under the New York Convention.[112] The rules and processes pertaining to maritime attachment and the jurisdiction of United States courts will be discussed followed by a summary of *S & Davis International, Inc. v. Republic of Yemen*.

1. Maritime Attachment

Federal district courts have original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction . . . ."[113] However, district courts do not automatically exercise jurisdiction over all maritime contracts.[114] In determining whether maritime jurisdiction is proper, courts look to "the nature and character of the contract" and "whether it has reference to maritime service or maritime transactions."[115] The general rule is that maritime jurisdiction in a contract case is proper only when the subject matter of the contract at issue is "purely or wholly maritime in nature."[116] Mixed contracts involving obligations for both sea and land transportation do not fall within a federal court's admiralty jurisdiction.[117] Accordingly, GAFTA contracts generally do not result in the successful invocation of admiralty jurisdiction because the contracts are primarily for the sale of grain, not transportation, as illustrated in the discussion that follows.

If, however, the district court has jurisdiction, a party may apply for maritime attachment under Supplemental Admiralty Rule B, which states:

Attal, 2010 WL 3000059 (S.D.N.Y. 2010); Alphamate Commodity GMBH v. CHS Europe SA, 627 F.3d 183 (5th Cir. 2010).

[112] *See* S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292 (11th Cir. 2000).

[113] 28 U.S.C. § 1333(*1*) (2012).

[114] Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961) ("The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw."); Folksamerica Reinsurance Co. v. Clean Water of New York, Inc., 413 F.3d 307, 311 (2d Cir. 2005) ("Unfortunately there are few 'clean lines between maritime and non-maritime contracts.'" (citing Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23 (2004)).

[115] *Kirby*, 543 U.S. at 24; *see also* North Pacific S.S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co., 249 U.S. 119, 125 (1919).

[116] Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 555 (2d Cir. 2000) (citing Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 109 (2d Cir. 1997)).

[117] *Hartford*, 230 F.3d at 555. There are two exceptions to the general rule regarding mixed contracts where jurisdiction may be exercised: (1) "if the claim arises from a breach of maritime obligations that are severable from the non-maritime obligations of the contract"; and (2) "where the non-maritime elements of a contract are 'merely incidental' to the maritime ones." *Folksamerica*, 413 F.3d at 314.

> If a defendant is not found within a the district . . . a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property-up to the amount sued for-in the hands of garnishees named in the process . . . . The court must review the complaint and affidavit and, if the conditions of the Rule B appear to exists, enter an order so stating and authorizing process of attachment and garnishment.[118]

Rule B therefore allows for attachment when the defendant cannot be found in the district but has property there that can be attached in the amount of an arbitral award. However, Rule E(4)(f) allows the party whose property has been attached pursuant to Rule B the opportunity to appear before a district court to contest the attachment:

> Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief consistent with these rules.[119]

The burden is on the plaintiff to show that an attachment was properly ordered and complied with the requirements of Rules B and E.[120] Rule E is particularly important in GAFTA disputes because it gives the defendant the opportunity to challenge attachment. In cases involving Rule B attachment resulting from GAFTA contracts, the defendant is likely to prevail on a challenge, and any previous attachment will be vacated by the court. Attachment is often vacated by courts on the grounds that the courts lack admiralty jurisdiction for the reason discussed above; namely, the GAFTA contracts are not maritime contracts, as apparent by the cases discussed below.

In *Aston Agro-Industrial AG v. Star Grain Ltd.*,[121] the district court determined it lacked jurisdiction over two GAFTA contracts because their primary objective was the sale of wheat. The court so found, despite the fact that the dispute arose out of a seller's attempt to be compensated by the buyer for demurrage costs that were caused by the buyer's refusal to discharge damaged cargo until receiving a cash payment in the full amount of the damage to the cargo

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[118] FED. R. CIV. P. SUPP. R. B(1)(a)–(b).

[119] FED. R. CIV. P. SUPP. R. E(4)(f).

[120] Aqua Stoli Shipping Ltd. v. Gardner Smith Pty. Ltd., 460 F.3d 434, 445 n.5 (2d Cir. 2006). To prevail on a challenge, the plaintiff must show that it has met the filing and service requirements of Rules B and E, and (1) it has a valid prima facie admiralty claim against the defendant; (2) the defendant cannot be found within the district; (3) the defendant's property may be found within the district; and (4) there is no statutory or maritime law bar to the attachment. *Id.* at 445.

[121] *Aston*, 2006 WL 3755156, at *3.

from the ship owners with whom the seller had contracted to ship the goods.[122] Although it chose not to exercise jurisdiction, the court discussed the GAFTA arbitration award in detail, explaining that the appeal board found in favor of the seller not because the seller was actually liable for the demurrage costs, but simply because the contracts were on C.I.F. Free Out terms.[123] In its discussion of the GAFTA opinion, the court gave complete deference to the appeal panel and relied upon the panel's experience in its determination that industry custom allowed for the buyer to be held liable to the seller for demurrage costs.[124]

Similarly, the Fifth Circuit Court of Appeals decided it lacked admiralty jurisdiction over a GAFTA contract dispute concurrently involved in GAFTA arbitration proceedings in *Alphamate Commodity GMBH v. CHS Europe SA*.[125] The plaintiff sought maritime attachment against a shipment of corn that was being sold to the defendant by a third party.[126] The district court vacated the previously issued attachment because it found that the title to the corn had not yet passed to the defendants at the time of the attachment under English law, citing to both custom and usage in making its determination.[127] On appeal, although the plaintiff argued that the contracts were "mixed," containing both maritime and non-maritime obligations, the court emphasized that the plaintiff must "demonstrate an independent, severable obligation" for a demurrage claim to lead to admiralty jurisdiction.[128] The court found that the plaintiff's demurrage charges were instead "thoroughly intertwined with the non-maritime breach of contract claims and most likely stand or fall with the broader default claims."[129] Absent severability, the court of appeals held that the district court lacked jurisdiction and attachment was therefore not available to the plaintiff.[130]

In *Kulberg Finances, Inc. v. Spark Trading D.M.C.C.*, even though the plaintiff established subject matter jurisdiction, the maritime attachment was vacated because the plaintiff failed to state a valid maritime claim under English law.[131] The contract between the parties included the standard GAFTA arbitration clause, making Arbitration Rules No. 125 applicable to any disputes between them.[132] The plaintiff in the case sought demurrage sums from the defendant and instituted arbitration proceedings through GAFTA, as well as an action in federal

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[122] *Id.* at *1.

[123] *Id.* at *4. The court explained that when a contract is on C.I.F. terms, the risk of loss passes to the buyer at the point of shipment. *Id.* Therefore, the buyer assumed all the risk of shipping damages and delay once the wheat was in the carrier's custody and was liable to the seller even though the contract did not so expressly provide and the seller never paid the demurrage charges to the carrier. *Id.*

[124] *Id.*

[125] *Alphamate Commodity GMBH*, 627 F.3d at 188.

[126] *Id.* at 185.

[127] *Id.*

[128] *Id.* at 188.

[129] *Id.*

[130] *Alphamate Commodity GMBH*, 627 F.3d at 188.

[131] *Kulberg Fins.*, 628 F. Supp. 2d at 512.

[132] *Id.* at 514.

court seeking an order of maritime attachment.[133] The court noted that demurrage claims "are classic maritime claims that fall within the Court's admiralty jurisdiction" that were severable from the "non-maritime portions" of the contract.[134] The court specifically distinguished *Aston* and found jurisdiction because the contracts at issue in the case assigned the obligation of demurrage charges to the buyer, whereas the demurrage charges in *Aston* could be resolved by ordinary contract interpretation.[135] The court then held that since English law governed and did not recognize admiralty jurisdiction for the resolution of the dispute, the Rule B attachment had to be vacated.[136] Importantly, the court explained that the fact that the parties had agreed to GAFTA arbitration, instead of arbitration under the London Maritime Arbitration Association, led to the finding under English law, not that the claim was not "maritime."[137]

Kulberg Finances seems to effectively foreclose the possibility of pursuing maritime attachment under a GAFTA contract. For jurisdiction to be proper, the plaintiff must first be able to establish a prima facie admiralty claim under United States law. The existence of such a claim, however, turns on the applicable substantive law. GAFTA standard form contracts often include a choice of law provision requiring that the contracts "be construed and take effect in accordance with the laws of England."[138] Under the laws of England, the choice of GAFTA as the arbitrating body, as is the case with every GAFTA standard form contract, would then lead to the court determining that the claim would not be viewed as maritime.

Moreover, the District Court for the Southern District of New York vacated a maritime attachment in *J.K. International Ltd. v. Agriko S.A.S.*, even though parties had chosen to pursue arbitration before the London Maritime Arbitration Association (LMAA), instead of GAFTA arbitration.[139] Although the parties used GAFTA 49, which included the GAFTA arbitration clause, the parties agreed to commence arbitration before the LMAA.[140] In vacating the attachment, the court limited its discussion to the ripeness of the issues raised by the plaintiff.[141] The complaint only stated a claim for indemnification against the defendant, but the plaintiff had not yet incurred any liability at the time of the suit.[142] Similarly, the plaintiff's claims submitted for arbitration in London were

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[133] *Id.*
[134] *Id.* at 517.
[135] *Id.* at 518.
[136] *Kulberg Fins.*, 628 F. Supp. 2d at 519.
[137] *Id.* ("Moreover, the parties' agreement that disputes arising under the Contract were to be arbitrated by GAFTA, and not the London Maritime Arbitration Association ('LMAA') as is customary for true maritime claims, is consistent with an understanding that English law does not view the present claim as 'maritime.'") In supporting this statement, however, the court cites only United States case law. *Id.*
[138] *Id.* at 514.
[139] *J.K. Int'l*, 2007 WL 485435, at *1–2.
[140] *Id.* at *2.
[141] *Id.* at *3.
[142] *Id.*

based solely on indemnification.[143] Moreover, the plaintiff did not present any evidence to lead to a conclusion that the vessel owners intended to file suit to recover demurrage charges.[144] Without any such evidence to support future liability, the court found the plaintiff's claims to be premature and granted the motion to vacate the attachment.[145]

In *Gedimex, S.A. v. Nidera, Inc.*, the Court of Appeals for the Eleventh Circuit declined to compel the parties to arbitrate under GAFTA Arbitration Rules to resolve a dispute arising from an oral contract.[146] The parties had a long-standing contractual relationship that began through the use of standard form GAFTA contracts for large shipments of bulk rice.[147] In all, the parties completed fifty transactions, with each shipment being covered by a written contract mandating arbitration under the GAFTA Arbitration Rules No. 125.[148] However, the dispute at issue in the case was a separate oral contract for the supply of empty bags at cost to facilitate the shipment of the rice.[149] Interestingly, the court determined that the GAFTA arbitration clause found in each of the contracts did not apply to the separate oral agreement between the parties and stated, "We will not *compel* arbitration of a dispute arising out of one contract on the basis of an arbitration clause in a separate and distinct contract where the arbitration clause is limited to disputes arising out of the first contract."[150] Ultimately, the court decided that the arbitration clause did not apply to the oral agreement, and therefore denied the defendant's motion to dismiss or stay the proceedings to allow for GAFTA arbitration.

Although the outcome appears to be justified under the circumstances, the *Gedimex* court walked a fine line in determining that GAFTA Arbitration Rules No. 125 did not apply to the contract at issue. Although the case involved the later oral contract, the court provided the parties with a partial interpretation of a GAFTA standard form contract and determined whether GAFTA arbitration was applicable to the dispute. That is a determination that GAFTA and the contracting parties would likely prefer to be made by GAFTA arbitrators, instead of the courts of any particular jurisdiction. Allowing such interpretation to go any further than it did in this case could quickly lead to the erosion of the predictability and uniformity that GAFTA arbitration proceedings provide.

Yet, another limitation to maritime jurisdiction was presented in *CHS Europe S.A. v. El Attal*, where the court granted the defendant's motion to dismiss

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[143] *Id.*

[144] *J.K. Int'l*, 2007 WL 485435, at *4

[145] The difference between the result here and that in *Aston* is the fact that the contracts in *Aston* included C.I.F. shipping terms that were dispositive of the dispute. *See supra* note 123 and accompanying text. This distinction was also important in the court's decision in *Kulberg Finances* and resulted in the difference in opinions found in the two cases. *See supra* note 135 and accompanying text.

[146] *Gedimex*, 290 F. App'x. at 313.

[147] *Id.* at 311.

[148] *Id.*

[149] *Id.* at 312.

[150] *Id.* at 313 (emphasis added).

on grounds of *forum non conveniens*.[151] The plaintiff commenced GAFTA arbitration proceedings and a maritime attachment action in the district court, asking that the court retain jurisdiction for future attachment or enforcement after a GAFTA arbitration award was given.[152] The court refused to exercise jurisdiction because none of the parties were physically present in New York, nor did any party have any connection with the jurisdiction besides the lawsuit.[153] Furthermore, the court emphasized that not only did an adequate alternate forum exist, "[t]he adequacy of the courts of England is too well established to require extended discussion or citation of authority."[154] Accordingly, the court found that the dispute would be better resolved by the courts of England and dismissed the action.

As made abundantly clear from the foregoing discussion, maritime attachment is not an effective means of enforcement for GAFTA contracts. Out of the six cases examined, four resulted in courts vacating previously granted maritime attachments.[155] Of the other two cases, one was resolved by a dismissal for *forum non conveniens*,[156] and the remaining case by a determination that the dispute was not governed by GAFTA, but rather consisted of an ordinary contract dispute regarding an oral agreement.[157] Therefore, it is not a viable enforcement mechanism for a plaintiff seeking to enforce a GAFTA arbitration award or to obtain attachment while awaiting a decision from GAFTA arbitrators. Surprisingly, however, maritime attachment continues to be practically the sole area of law in which GAFTA arbitration award enforcement is present in the federal courts of the United States.

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[151] CHS Europe S.A. v. El Attal, No. 09 Civ. 2619(LAK), 2010 WL 3000059, at *3 (S.D.N.Y. July 22, 2010).

[152] *Id.* at *1.

[153] *Id.* at *2.

[154] *Id.*

[155] *Aston*, 2006 WL 3755156, at *3; *J.K. Int'l*, 2007 WL 485435, at *1; *Kulberg Fins.*, 628 F. Supp. 2d at 512; *Alphamate Commodity GMBH*, 627 F.3d at 185.

[156] *CHS Europe S.A.*, 2010 WL 3000059, at *3.

[157] *Gedimex*, 290 F. App'x. at 312.

2. *S & Davis International, Inc. v. Republic of Yemen*[158]

a. Facts

The General Corporation for Foreign Trade and Grains of Yemen (General Corporation) entered into a contract with S & Davis International, Inc. (S & Davis) to purchase 300,000 metric tons of wheat.[159] The contract was prepared "according to the instructions of the Minister of Supply & Trade" of Yemen and signed by him.[160] Although signed in Yemen, the contract contained a GAFTA arbitration clause.[161] S & Davis informed General Corporation of the bank where the letter of credit was to be opened, but General Corporation, as a result of the Central Bank of Yemen being unwilling to do so, was never able to obtain a letter of credit as required by the contract.[162] S & Davis declared General Corporation in breach of contract and initiated GAFTA arbitration, seeking damages against the General Corporation and the Ministry of Supply and Trade, arguing that the Ministry was a principal in the transaction.[163] S & Davis further asserted that the General Corporation was wholly owned by the government and under its control.[164]

b. GAFTA Arbitration

The GAFTA panel found that General Corporation breached the contract, but determined that S & Davis had not shown damages resulting from the breach.[165] The panel additionally held that the General Corporation was an independent entity and the Ministry of Supply and Trade was therefore not liable.[166] On appeal, S & Davis was awarded U.S. $17 million in damages against the General Corporation.[167] S & Davis subsequently initiated a suit in federal district court to enforce the arbitration award against General Corporation as well as the Republic of Yemen under the New York Convention.[168] S & Davis also filed an alternative claim for tortious interference with contractual relations against the Ministry of Supply & Trade. The Ministry filed a motion to dismiss for lack of jurisdiction and service of process.[169]

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[158] 218 F.3d 1292 (11th Cir. 2000).
[159] *Id.* at 1295.
[160] *Id.*
[161] *Id.* at 1295–96.
[162] *Id.* at 1296.
[163] *S & Davis Int'l*, 218 F.3d at 1296.
[164] *Id.* at 1296–97.
[165] *Id.* at 1297.
[166] *Id.*
[167] *Id.*
[168] *S & Davis Int'l*, 218 F.3d at 1296.
[169] The Ministry also claimed immunity under the Foreign Sovereign Immunity Act as a political subdivision of the Republic of Yemen. *Id.*

c. Holding

The court found that the Ministry was "not entitled to sovereign immunity and that there [was] both subject matter and personal jurisdiction under the FSIA . . . ."[170] Additionally, the court determined that the General Corporation was not a separate, independent entity because the Ministry did not produce any evidence to support such a status.[171] Although it did not include a discussion about the GAFTA arbitration award, the case is an important illustration of how a federal district court in the United States deals with the enforcement of foreign arbitration awards. The court was noticeably more willing to exercise jurisdiction in this case to allow the plaintiff to enforce the GAFTA arbitration award, than the other courts involved in the maritime attachment cases previously discussed.[172] Such a difference demonstrates the effectiveness of the New York Convention in enforcing a GAFTA arbitration award in federal district court. The court merely discussed the history of the award, but did not concern itself with the merits of the dispute, instead focusing entirely on whether or not it had jurisdiction to enforce the award. The result represents exactly what GAFTA seeks to achieve with the support of the New York Convention: the ability to enforce a GAFTA award in a foreign jurisdiction without the hindrance of the peculiarities of local law.

B. Enforcement and Interpretation of GAFTA Arbitration Awards in England

1. *Concordia Trading B.V. v. Richco International Ltd.*[173]

a. Facts

Concordia Trading B.V. (Concordia) contracted to sell 26,250 tons of Argentine soya beans to Richco International Ltd. (Richco) pursuant to the provisions of the standard form contract GAFTA 64.[174] The contract, one in a string of contracts, included FOB terms, under which Richco was obligated to provide a vessel ready to load between certain specified dates.[175] It did not, however, specify the time when Concordia was obligated to present the bills of lading, as well as other documents, and when Richco was obligated to pay against such documents.[176] The beans were shipped on July 25th and 29th and were ultimately accepted and paid for on September 28th. They were then discharged

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[170] *Id.* at 1298.
[171] *Id.* at 1299–1300.
[172] *See supra* Part VI(A).
[173] [1991] 1 Lloyd's Rep. 475 (QBD) (Eng.).
[174] *Id.*
[175] *Id.*
[176] *Id.*

from the vessel the next day.[177] During that time, Concordia failed to present the documents, and Richco claimed damages for Concordia's failure to tender the documents, arguing that the date of default was September 29th.[178] Concordia conceded that it had breached the contract, but argued that its default occurred much earlier, around August 5th or shortly thereafter, because the duty of an FOB seller was to forward the shipping documents promptly after shipment of the goods.[179] Concordia made this argument because the price of the goods on August 5th was substantially lower than the contract price, which would only permit nominal damages to Richco.[180]

b. GAFTA Arbitration

The dispute was submitted to GAFTA arbitration to determine the correct date of default.[181] The Board of Appeal agreed with Richco that the date of default was September 29th because Concordia was not in default "until the day it was no longer possible for them to purchase the documents for the goods in order to fulfill the Contract, which was 28th September 1987," the day the goods were accepted.[182] The Board of Appeal reasoned that since the contract did not specify a date for delivery of the documents, determining September 29th as the date of default represented a reasonable time in which the Concordia could perform its obligations.[183] The Board of Appeal awarded Richco U.S. $341,250 in damages, representing the difference between the contract price of soy beans and the price on September 29th, the determined date of default.[184] Concordia appealed the Board of Appeal decision to the Queen's Bench Division to determine whether the court had erred in deciding that September 29th was the date of default.[185]

c. Holding

The court found that an FOB seller is obligated to tender the documents in the same manner as a c.i.f. seller, that is, with "reasonable dispatch" when the contract is silent on the matter.[186] Additionally, the court held that the seller's duty remains the same, even where the contract is part of a string of contracts, as

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177 *Id.*
178 *Concordia Trading B.V.*, [1991] 1 Lloyd's Rep. at 475.
179 *Id.*
180 *Id.*
181 *Id.* at 476.
182 *Id.* at 477.
183 *Concordia Trading B.V.*, [1991] 1 Lloyd's Rep. at 477.
184 *Id.* at 476.
185 *Id.*
186 *Id.* at 479.

was the case with the contract at issue.[187] The court further held that Concordia's duty to tender the documents should have been performed on, or shortly after, August 5th, but ultimately deferred to the Board of Appeal by stating, "'[T]he date of default' was the day after the expiration of whatever period the board finds was properly required for that purpose."[188] In deferring to the Board of Appeal's decision, the court recognized that the Board's decision was influenced by factors such as the marketability of the documents and the receivers' ability to present them to the ship.[189]

This case illustrates the appellate court's unwillingness to overturn the award of the Board of Appeal and instead allow it to determine a date of default when based upon the circumstances of the case and not on the language of the contract. By discussing the factors involved in the Board of Appeal's decisions, the court demonstrated its belief that the GAFTA Board understands the industry and is well equipped to make decisions regarding reasonableness within the industry. This shows the court's faith in GAFTA arbitration and demonstrates that the arbitration process is effective, not only in providing a resolution of disputes, but at reaching decisions influenced and supported by commercial practices in the grain and feed trade industry.

2. *Soules Caf v. P.T. Transap of Indonesia*[190]

a. Facts

P.T. Transap of Indonesia (Transap) entered into a contract to sell 7,500 tons of Java tapioca chips and 2,500 Java tapioca pellets to Soules Caf (Soules) under two GAFTA form No. 100 contracts.[191] The contracts included c.i.f. terms where payment was to be net cash against the presentation of the documents byTransap.[192] On June 9th, Transap informed Soules that the vessel carrying the goods had passed Suez on June 8th and requested that Soules inform them of final port of discharge by return telex.[193] Receiving no port of discharge, Transap declared Soules to be in default of the tapioca chips contract.[194] On June 10th, Soules rejected Transap's remarks regarding the contract because Soules believed that Transap did not have the documents in order for the pellets contract.[195]

187 *Id.* at 480.

188 *Concordia Trading B.V.*, [1991] 1 Lloyd's Rep. at 481.

189 *Id.* In discussing its ability to determine the default date, the court went as far as to say "that is for the Board of Appeal to decide, and I do not think I can usefully say more with regard to the criteria which they should apply [when determining the default date]." *Id.* at 480.

190 [1999] 1 Lloyd's Rep. 917 (Comm).

191 *Id.* at 917.

192 *Id.*

193 *Id.* at 919.

194 *Id.*

195 *Soules Caf*, [1999] 1 Lloyd's Rep. at 919.

Transap explained to Soules that it "had provided guarantees in the customary way," but Soules had failed to declare the port of discharge.[196] Soules contended that the documents were defective, and Transap's guarantee did not cure the defective documents, but only covered missing documents.[197] Transap, however, believed it was a "perfectly normal custom and practice to provide letters of guarantee to a buyer to cover any missing documents or discrepancies, in order that there should be no interruption to the procedure which calls for payment against documents."[198]

b. GAFTA Arbitration

The award of the panel was in favor of Soules, resulting in an appeal by Transap.[199] On appeal, the Board of Appeal found that the documents were in fact discrepant for the reasons Soules had submitted.[200] However, the Board of Appeal determined that Transap's letters of guarantee covered Soules against discrepancies in the documents and that in commodities trade, using such letters of guarantee to do so is an accepted and customary practice.[201] Consequently, the Board of Appeal held that Soules breached the contract by rejecting the documents and that Transap was justified in holding Soules in default of both contracts for not declaring a discharge port when requested to do so.[202] Accordingly, the Board of Appeal reversed the first tier of arbitrators and awarded Transap U.S. $354,788 in damages for Soules' default.[203] Soules appealed the award to the Queen's Bench Division.[204]

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[196] *Id.* at 918.

[197] *Id.* at 919. Soules believed the bills of lading were defective for several reasons: (1) they did not provide for carriage of the goods to the destinations that were found in the contract; and (2) the bills provided for "freight payable as per charterparty," giving Transap the option of requiring payment before the release of the bills, which introduced uncertainty for Soules because it did not know if delivery would be refused because the freight had not been paid. *Id.* at 919–20.

[198] *Id.* at 920.

[199] *Soules Caf*, [1999] 1 Lloyd's Rep. at 918.

[200] *Id.* at 920. The court noted that there was no other explanation for the Board of Appeal to find that the guarantees covered the discrepancies. *Id.*

[201] *Id.*

[202] *Id.*

[203] *Soules Caf*, [1999] 1 Lloyd's Rep. at 918.

[204] *Id.*

c. Holding

The court agreed with the Board of Appeal that the documents were discrepant.[205] However, the court disagreed with the Board of Appeal and found that Soules was not obliged to accept the discrepant documents because of Transap's guarantees.[206] The court explained that the customary practice was simply for personal guarantees "to be provided" and that it fell short of requiring a buyer to accept them.[207] The court further reasoned that such a practice could not be relied upon as custom because it was "inconsistent with the fundamental nature of a c.i.f. contract . . . ."[208] Were the custom accepted, it would "replace a remedy against the carrier a further promise from the seller and thus destroy[] the whole notion of documentary protection . . . ."[209] Accordingly, Soules was not in breach of contract for rejecting the documents and not declaring a port of discharge.[210] Therefore, the court found the Board of Appeal to be wrong in law and set aside the award in favor of Transap to render the award in favor of Soules.[211]

This case demonstrates that appellate courts will not automatically defer to the Board of Appeal, even when the award turns on whether a documentary practice is customary. Although surprising in some respects, the decision makes sense when considering the impact it would have in the law of documentary practices. The court rightly emphasized that upholding the award would be recognizing a custom that does away with established law and erodes documentary protection. However, even the court's reasoning has its limitations. What if the practice at issue has become customary but the law has not evolved to recognize it? Or, what if the practice, although not customary in other industries,

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[205] *Id.* at 921. The court discussed how the bills of lading in the case provided a much wider range of discharge ports than the four French ports that appeared in the contract. *Id.* In fact, the bills of lading could have resulted in the goods being discharged as far away from those four ports as England or Spain. *Id.* As for the payment of freight, the court explained that the "freight payable as per charterparty" left open the possibility that the shipowners would demand payment of freight at the discharge port, which is exactly what Soules argued. *Soules Caf*, [1999] 1 Lloyd's Rep. at 921; *see also supra* note 197 (describing Soules' arguments before the Board of Appeal).

[206] *Soules Caf*, [1999] 1 Lloyd's Rep. at 921. In overturning the award, the court stressed:

> Normally, of course, a finding of custom by trade arbitrators would be difficult for an appellant to dislodge. However, in this case the finding is simply that it is customary practice for such documents "to be provided." This falls short of a finding that there is a custom that buyers are *obliged to accept* such guarantees.

Id. (emphasis added).

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Soules Caf*, [1999] 1 Lloyd's Rep. at 921.

[211] *Id.* at 921–22.

has become customary in a particular industry (e.g., grain and feed trade) and an arbitration panel is willing to recognize it as custom? Such situations could necessitate the recognition of developed customs in whole or in part. For the role of courts should be to provide predictability in commercial transactions, whether that predictability stems upon statutory law, case law, or developing customs.

3. *Bunge S.A. v. Nidera B.V.*[212]

a. Facts

Bunge S.A. (Bunge) entered into a contract to sell 25,000 mt of Russian wheat to Nidera B.V. (Nidera) using the GAFTA 49 contract form with a standard set of f.o.b. terms used for the delivery of goods in bulk or bags from Central and Eastern Europe.[213] The sales contract was concluded on June 10, 2010 with the delivery period for the wheat to be from August 23, 2010 and August 30, 2010.[214] The contract contained a Prohibition clause and a Default clause.[215] The prohibition clause provided as follows:

> In the case of export, blockade or hostilities or in case of *any executive or legislative act done by or on behalf of the government of the country of origin* of the goods, or of the country from which the goods are to be shipped, *restricting export*, whether partially or otherwise, *any such restriction shall be deemed by both parties to apply to this contract* and to the extent of such total or partial restriction to prevent fulfillment whether by shipment or by any other means whatsoever and to that extent *this contract or any unfulfilled portion thereof shall be cancelled*. Sellers shall advise Buyers without delay with the reasons therefore and, if required, Sellers must produce proof to justify the cancellation.[216]

On August 5, 2010, the Russian government announced a ban on wheat exports that was scheduled to be in effect from August 15, 2010 to December 31, 2010.[217] On August 9, 2010, Bunge notified Nidera of the prohibition and sought to cancel the contract pursuant to the Prohibition clause.[218] Nidera rejected the cancellation of the contract and initiated arbitration proceedings through GAFTA.

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212 [2013] EWHC 84 (Comm) (Eng.).
213 *Id.* ¶ 2.
214 *Id.* ¶¶ 2, 6.
215 *Id.* ¶ 1.
216 *Id.* ¶ 8 (emphasis added).
217 *Bunge*, [2013] EWHC 84, ¶ 6.
218 *Id.* ¶ 34.

b. GAFTA Arbitration

Bunge argued before the panel that the Prohibition clause automatically cancelled the contract once the government announced the exportation ban.[219] On the other hand, Nidera asserted that at the time that Bunge sought to cancel the contract on August 9, 2010, the ban had not yet, in fact, prohibited Bunge from performing the contract, and therefore, Bunge was in repudiatory breach of the sales contract.[220] The panel found in favor of Nidera and awarded substantial damages for the wrongful repudiation of Bunge.[221] The GAFTA Board of Appeal upheld the panel's decision, stating, "[I]t is necessary for the seller to show that the prohibition prevents the seller from performing."[222] The board further explained that at the time that Bunge sought to cancel the contract, "it could not be said that there was a prohibition restricting such export."[223] Because Bunge acted before the restriction would prevent performance under the contract, its claim for cancellation was repudiatory.[224] Bunge appealed the Board of Appeal's decision to the High Court of Justice of England.

c. High Court of Justice

Justice Hamblen divided the decision into three issues as addressed by the parties: (1) the wording; (2) the authorities; and (3) the commercial considerations. Bunge made five arguments based on the wording of the Prohibition clause, which essentially boiled down to the Prohibition clause being applicable to the contract, and the Russian government announced the cancellation occurring at the time the prohibition.[225] Nidera contended that Bunge needed to show that the prohibition was "restricting export" and could only do so, if the prohibition on exportation did, in fact, restrict export as contemplated by the contract.[226] In the authorities section, two cases were discussed that supported the theory that a causal connection in relation to the Prohibition clause had to be shown before a seller could invoke cancellation.[227] Bunge's attempt to distinguish the facts of those cases from its own was unpersuasive to the court.

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[219] *Id.* ¶ 7.
[220] *Id.* ¶ 34.
[221] *Id.* ¶ 2.
[222] *Bunge*, [2013] EWHC 84, ¶ 9.
[223] *Id.* ¶ 34.
[224] *Id.* ¶ 10.
[225] *Id.* ¶ 15.
[226] *Id.* ¶ 16.
[227] *See* Sanday v. Cox, McEuen & Co., 10 L1, L.R. 459 (1922); Pancommerce v. Veecheema, [1983] 2 Lloyd's Rep. 304. Referring to the argument that the GAFTA Prohibition Clause "is designed to make it unnecessary to enquire into whether the governmental restriction in fact had any effect upon the seller's ability to deliver," the *Pancommerce* court stated:

The commercial considerations portion of the opinion is noteworthy because one of the central objectives of the commercial arbitration, especially the particularized process employed by GAFTA, is to provide a dispute process that recognizes the customs and practices that make sense to the parties involved in the transactions. Bunge believed it was much better for buyers to "have the certainty of a cancelled contract immediately upon the announcement than having to wait and see whether the ban remains at the time of performance."[228] The court responded to that argument by reasoning that there are many situations in which the contractual parties must continue to act as if the contract will be performed in the future, despite the possibility or likelihood that it will not happen.[229] Nidera further asserted that it was "improbable that the parties would intend the contract to be cancelled in respect of a ban, which has no impact on performance."[230] Finally, the buyers explained that if a ban without specific duration was to be announced, all contracts would be automatically cancelled regardless of how far in the future the transactions were to be performed.[231]

The court ultimately found that a causal connection has to be proven before cancellation pursuant to the Prohibition Clause and found that Bunge repudiatorily breached the contract by seeking cancellation before there was in fact a restriction on export pursuant to the delivery dates of the contract.[232] The court decided that the injustice that would result from an export ban being revoked before the end of the delivery period outweighed the certainty of automatic cancellation. In support of its conclusion, the court also explained, "Although the Board's reasoning was succinct, they, as the trade tribunal, clearly regarded it as axiomatic that the Prohibition Clause requires proof of a causal connection, as apparently had the first tier arbitrators."[233] This statement shows a certain level of deference by the court to the decision of the GAFTA Board of Appeal. This deference, which supported a conclusion that the GAFTA Board of Appeal thought was an obvious interpretation, is an indicator that GAFTA's arbitration structure, and arbitrators are reaching the very goals the organization set out to

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> It is an interesting argument, but one which I find wholly unconvincing. As Mr. Justice Bingham pointed out, the commercial consequences would be startling in the extreme. Prohibitions of export are a seller's nightmare, but the clause, so construed, would convert them into a seller's dream. Possessed of goods which they had contracted to sell and a license for a sufficient quantity to export them all, sellers would be able to re-negotiate the price to reflect the effect of the prohibition of export not withstanding that they could honor their contracts without let or hindrance.

[1983] 2 Lloyd's Rep. at 306–07.

228 *Bunge*, [2013] EWHC 84, ¶ 28.
229 *Id.*
230 *Id.* ¶ 29.
231 *Id.* ¶ 31.
232 *Id.* ¶ 33.
233 *Bunge*, [2013] EWHC 84, ¶ 37(7).

achieve, which is to provide an efficient dispute resolution process led by qualified arbitrators whom understand the grain and feed trade.[234]

C. Enforcement of GAFTA Arbitration Awards in Other Jurisdictions

1. *Romak S.A. (Switzerland) v. Republic of Uzbekistan*[235]

Romak S.A. (Romak), a Swiss company, contracted with Uzkhleboproduct, a fifty-one percent state-owned body charged with grain production and distribution in Uzbekistan, to sell 50,000 tons of wheat to be delivered on or before December 31, 1996.[236] Under the contract, Uzkhleboproduct was named as principal and Uzdon, one of Uzkhleboproduct's corporate members, was named as commission agent.[237] Pursuant to the contract, Romak delivered nearly 40,600 tons of wheat between July 1996 and January 1997, but never received payment.[238] Romak initiated GAFTA arbitration proceedings against Uzdon seeking damages in the amount of the unpaid wheat.[239] The GAFTA panel sided with Romak and ordered Uzdon to pay Romak damages in the amount of U.S. $10,510,629.12.[240] Uzdon appealed the award to the Board of Appeals, but failed to do so in a timely matter, resulting in its rejection.[241] Uzdon then sought to appeal the award to the High Court of Justice in London, but it, too, refused to vacate the award.[242]

Romak attempted to enforce the GAFTA arbitration award in both Uzbekistan and France without any success.[243] The Uzbek government argued, "[T]he decision was biased and had been rendered against the wrong party, as Obil [another privately held Uzbek company] was in fact responsible for paying Romak."[244] Additionally, when Romak applied to have the award enforced in the commercial court of Uzbekistan, Romak did not provide a translation of the award in Uzbek, the language of the court where enforcement was sought, as required by

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[234] *Arbitration*, GAFTA, http://www.gafta.com/arbitration (last visited Sept. 23, 2013).

[235] Romak S.A. (Switzerland) v. Republic of Uzbekistan, PCA Case No. AA280, ¶¶ 2–3 (Perm. Ct. Arb. 2009).

[236] Yulia Andreeva et al., *International Courts*, 45 INT'L LAW. 125, 135 (2011).

[237] *Id.*

[238] *Id.*

[239] W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 5, 40 (2010).

[240] Andreeva et al., *supra* note 236, at 135.

[241] Reisman & Iravani, *supra* note 239, at 40.

[242] *Id.*

[243] Andreeva et al., *supra* note 236, at 135.

[244] Reisman & Iravani, *supra* note 239, at 40; *Romak S.A.*, PCA Case No. AA280, ¶ 62.

Article VI of the New York Convention.[245] Moreover, the court pointed out that Romak had failed to submit evidence that Uzdon had been notified of the appointment of arbitrators pursuant to Article V(1)(b) of the New York Convention.[246] Romak appealed the decision of the commercial court, but to no avail as the Appellate Jurisdiction of the Commercial Court of Tashkent affirmed it.[247]

Romak then initiated arbitration against Uzbekistan in the Permanent Court of Arbitration under Article 9 of the Switzerland-Uzbekistan Bilateral Investment Treaty (BIT).[248] Uzbekistan contested the jurisdiction of the Permanent Court of Arbitration and argued that the BIT did not apply to the GAFTA award or the sale of goods.[249] The Permanent Court of Arbitration ultimately agreed with Uzbekistan and Romak was left without recourse.[250] This case demonstrates that GAFTA arbitration does not always result in the effective resolution of a dispute between contracting parties. Even though Uzbekistan was a party to the New York Convention, the courts were able to find exceptions under which they could refuse to enforce the award. Although the ultimate motive behind refusing to enforce the award likely evolved from Uzbekistan's distaste of the GAFTA arbitration proceedings and the English courts' refusal to overturn the award, Romak gave the court some discretion by not complying with the procedures for enforcement. Therefore, in order for GAFTA arbitration to be entirely effective, contracting parties must be cognizant of the requirements of the New York Convention and comply with them entirely so as to leave courts in foreign jurisdictions with no option but to enforce the award.[251]

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[245] *Id.*; New York Convention, *supra* note 97, art. IV, ¶ 2 ("If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."). One of Romak's arguments before the Permanent Court of Arbitration was that Article V of the New York Convention sets out the exclusive grounds for refusal of enforcement and that a claimant "should be allowed to complete the conditions for such a request during the proceedings." *Romak S.A.*, PCA Case No. AA280, ¶ 134.

[246] Reisman & Iravani, *supra* note 239, at 40; New York Convention, *supra* note 97, art. V, ¶ 1(b); *see also supra* note 21 and accompanying text.

[247] Reisman & Iravani, *supra* note 239, at 40.

[248] *Id.*

[249] Andreeva et al., *supra* note 236, at 135.

[250] *Id.*

[251] See *supra* Part VI, for discussion of the New York Convention and requirements.

2. *Oleaginosa Moreno Hermanos Sociedad Anonima Comercial Industrial Financeira Inmobiliaria y Agropecuaria (Oleaginosa) v. Moinho Paulista Ltda*[252]

Oleaginosa, an Argentinian company, entered into four contracts to sell Argentinian wheat to MoinhoPaulistaLtda (Moinho), a Brazilian company.[253] Although the contracts were concluded by phone, the confirmation telexes contained a clause indicating that the arbitration of disputes would be done through GAFTA.[254] When a dispute resulted between the parties, Oleaginosa initiated GAFTA arbitration.[255] The GAFTA arbitration tribunal issued an award in favor of Oleaginosa, which was affirmed by the GAFTA Board of Appeal.[256] Oleaginosa then sought to enforce the award in the Superior Court of Justice in Brazil.[257]

Arguing against enforcement, Moinho made two arguments: (1) its broker lacked authority to enter into the contracts; and (2) GAFTA lacked jurisdiction because there was no valid written arbitration agreement between the parties.[258] The court dismissed the first argument because it could not review the merits of the award.[259] As for the second argument, the court explained that the New York Convention allows arbitration agreements to be made orally so long as it is contained in a separate document or exchange in correspondence.[260] However, the telexes containing the GAFTA arbitration clauses were sent unilaterally by Oleaginosa, and no evidence was submitted to show Moinho had agreed to arbitrate under GAFTA.[261] Therefore, the GAFTA award violated Brazilian public policy and the court refused to enforce it.[262] The court so held, despite the fact that Moinho participated in the arbitration, determining that its participation did not constitute consent to jurisdiction.

This case demonstrates the unpredictability introduced into GAFTA arbitration award enforcement when contracting parties enter into oral contracts with unilateral confirmation of arbitration clauses. The result is especially disconcerting due to Moinho's participation in the arbitration without contesting jurisdiction. Although a harsh result for Oleaginosa, this deficiency could easily have been avoided by using GAFTA standard form contracts, which are designed to promote predictability and ensure that remedies may be sought and enforced by the disputing parties.

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[252] INT'L COUNCIL FOR COMMERCIAL ARBITRATION, XXXIII YEARBOOK COMMERCIAL ARBITRATION 371, 371 (Albert Jan Van Den Berg ed., 2008).
[253] *Id.*
[254] *Id.* at 371–72.
[255] *Id.* at 372.
[256] *Id.*
[257] INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 252, at 372.
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.* at 372–73.
[262] INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 252, at 373.

VII. CONCLUSION

While most of the general public has probably never heard of the Grain and Feed Trade Association, the influence of this organization is ubiquitous. While GAFTA has a long history of protecting its interests and the interests of its members, it does so in a clandestine fashion, focusing on the principals of contract and arbitration, rather than public campaigns to sway public opinion. Because the association chooses to keep all of its arbitrations private, empirical studies and evaluations on the efficiency of the outcomes are extremely difficult. However, businesses continue to rely on GAFTA's experience by using standard form contracts and by resolving disputes through GAFTA's arbitration mechanism.

GAFTA can fairly be referred to as the most appropriate and effective forum for settling disputes arising from trade in grain and feedstuffs. The preference of grain traders to vest their cases into the hands of GAFTA arbitrators, rather than to any other forum dealing with resolving international commercial disputes, can be explained by several factors. Firstly and mainly, GAFTA is a narrowly specialized institution that was created by and for traders. It embraces the whole spectrum of issues relating to international trade in grains. As a natural result of this niche specialization, the arbitral mechanism of GAFTA is crafted and adjusted exclusively for this type of trade. GAFTA Arbitration time limits take account of the nature of this type of trade, where even an insignificant delay may cause significant damages. Additionally, when submitting their case for GAFTA Arbitration, the parties can make no doubt that their matter will be adjudicated by arbitrators who are highly professional and well-versed, not only in questions of law and process, but also in particularities of trade. No other arbitral institution dealing with commercial disputes can boast of such a level of expertise in the area of grain trade.

The confidence of GAFTA members in the system and the arbitrators' professionalism is illustrated by a small number of appeals and cases that reach the High Court. At the same time, the mere presence of the possibility to appeal the decision one deems ungrounded and/or unjust, adds further credence to the trustworthiness of the system. In the similar vein, the guarantee of the procedures' confidentiality contributes to the businesses willingness to bring their disputes to GAFTA. However, this is not to say that the system is completely flawless. One of the issues that need to be reconsidered is the restriction on legal representation in the course of GAFTA proceedings. Additionally, the substitution of a *de novo* appellate review with an appellate mechanism, which does not require resubmission of all the documents and information scrutinized by the initial tribunal, could save the disputants a good deal of time and resources.

Enforcement is greatly facilitated by the international acceptance of the New York Convention, as well as the clear requirements it gives to parties seeking enforcement. Enforcement of GAFTA arbitration does not regularly happen within the U.S., and cases involving GAFTA are generally limited to maritime attachment issues, in which federal district courts are extremely reluctant to exercise jurisdiction. This lack of enforcement in United States' courts is a sign

of GAFTA's effectiveness, as less enforcement efforts likely means that parties are reaching resolution without the assistance of domestic courts. Enforcement and interpretation of GAFTA awards in the courts of England demonstrate the courts' willingness to defer to the decisions made by the Board of Appeals, making GAFTA arbitration particularly efficient. Although cases involving GAFTA awards in other jurisdictions presents some ineffectiveness in enforcement, the cases may have been decided differently if the parties had met the requirements of the New York Convention. Therefore, GAFTA arbitration provides disputing parties with the efficiency, predictability, and commercial reasonableness required with international commercial transactions.