Gafta - Promoting International Trade

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Gafta has recently published its arbitration statistics for the period October 2015 – September 2016, which make for interesting reading.

Amongst other things, the number of new cases referred to Gafta has significantly increased, by 62%, to 628.

Gafta provides a cost effective and efficient international arbitration service. In the period in question, the average cost of a first tier Gafta arbitration was, approximately, £9000 (excluding parties legal fees) and the average duration – from the opening of a file to the issuing of an Award – was, approximately, nine months. Gafta believes that this compares very favourably with other arbitral bodies.

Going to court is expensive and time consuming and the trend towards arbitration as an alternative form of dispute resolution - not just in the commodities trade but in other business sectors as well – is increasing.

As a barrister and, in my capacity as Gafta's General Counsel with responsibility for Gafta's arbitration service, I, perhaps, have a unique insight into why certain cases end up in arbitration.

In my experience, a surprisingly large amount disputes arise from issues which ought properly to have been clarified or thought through at a pre- contractual stage (ie during the negotiation of a trade).

I have summarised just a few of these below:

Gafta contracts are all subject to English law - which provides a 'tried and tested' means of resolving contractual disputes. English law presumes that the parties to a commercial contract have read, understood and have, therefore, expressly agreed to the terms of their contract.

In practice, however, many contractual disputes arise because the parties have either not read or, perhaps, have read but have misunderstood their contractual obligations. Occasionally, disputes can even turn on the precise meaning of a particular word or phrase. Contracts, therefore, must always be read carefully and any ambiguity raised and clarified (preferably in writing) prior to the contract being entered into.

Whilst it may appear uncontroversial, it is always important to check that the correct parties have been set out in the contract. Modern corporate structures can be complex and, in an international trading environment, many companies operate through subsidiaries.

Sometimes a dispute arises when, following an alleged default, a counterparty argues that it was not a party to the contract at all but that another subsidiary company within their group was. Worse still is that the subsidiary may be in another legal jurisdiction where the enforcement of an arbitration Award could be problematic. English law here is very unforgiving. Save for very limited exceptions (such as fraud or misrepresentation) once a contract has been entered into it is binding and the identity of the parties can only be changed with agreement.

Financial and counterparty risk is particularly important and is frequently over-looked. Proper assessment of counterparty risk is critical – more so when trading with a new company for the first time.

The areas of risk which need to be considered are very wide and include; the risk of non-delivery (is there a possibility that an event of force majeure or international sanctions could delay or prevent performance?), credit risk, payment terms (is there a need for a performance guarantee in the form of an upfront payment?), trade/ bank references, parent company guarantees (when dealing with a small subsidiary of a large company), insurance (does it adequately cover the risks / is it with a reputable insurer?) and jurisdiction (is the company based in a country which is a signatory to the New York Convention on the enforcement of arbitration Awards?). This list is not exhaustive and there are many more examples!

The above is simply a flavour of some of the issues which can arise in practice. Gafta will be running a short seminar at the forthcoming GPC conference in Vancouver at which these and other issues will be discussed during a presentation followed by a "Q and A session".