Ukrainian Themis: Looking up to the West or the Wild, Wild East?

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It is sad but inevitable that times of changes and challenges prompt people to leave Ukraine and search for a better destiny abroad. But what makes Ukrainian lawyers, who are self-sufficient pillars of the rule of law, look for other destinations? The answer may well be found in the below story of a dispute between two Ukrainian agriculture heavyweights, PC Rise (sellers) and Nibulon (buyers) that culminated in a recently reported English High Court ruling in *Public Company Rise v Nibulon SA (2015)*[1].

Contracts and background facts

The dispute arose out of three separate contracts for the sale of 158,000 mt of Ukrainian feed corn CPT Nikolayev with delivery periods from September to December 2010 (Contracts). Each contract obliged the sellers to obtain "at his own risk and expenses any export license [sic] or any other official document" (Clause 11.3) and incorporated the terms of GAFTA 78, where such terms were not in contradiction with the above. In turn, GAFTA 78 included the so-called GAFTA Prohibition Clause (Clause 17) whereby the contract could be deemed as cancelled in case of "any executive or legislative act done by or on behalf of the government *[...]* restricting export" provided that such restriction prevented performance of the contract. Customarily for all GAFTA contracts, the contract was subject to English law and GAFTA arbitration in London.

Most grain industry players in Ukraine remember late 2010 well, when the Ukrainian Government introduced grain export quotas and subjected grain export to licencing. The quota allocation rules and procedures were changing on a daily basis, often at the last minute and in a very impracticable for business manner. As a result, only a few companies were able to obtain export licences; the majority, including most international trading houses, were unable to do so and could not perform their contractual obligations, which led to a wave of terminations and cancellations of contracts. Unfortunately, sellers fell under the unsuccessful category and aimed to cancel the contracts pursuant to Clause 17. The buyers treated the sellers' actions as a repudiation of contract, held the sellers in default and referred the case to GAFTA arbitration in London claiming some USD 26 million in damages.

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Arbitration awards and issues for the court

The first-tier GAFTA Tribunal found that the events of Ukraine did fall under Clause 17 and sellers could potentially be relieved from liability for non-performance; however, on the facts, the Tribunal had not seen evidence of sellers' reasonable efforts to perform the Contracts and eventually found for the buyers.

The sellers appealed and took that opportunity to furnish the previously omitted evidence of their best efforts in performing the Contracts to the GAFTA Appeal Board. Consequently, from the Appeal Award issued on 23 April 2014 (Award) it followed that the Board of Appeal was obviously satisfied with the sellers' evidence of their efforts but made some quite surprising findings on law and construction of the respective contractual clauses. Consequently, the Board found for the buyers again, but reduced the sellers' liability to about USD 17.5 million.

Firstly, in the Board's view, the sellers' obligation to obtain export licences under Clause 11.3 was absolute, and Clause 11.3 overrode Clause 17, except in the event of a total ban; on the facts, there was no such ban. In support of its conclusion, the Board relied on the case of *Pagnan v Tradax* (1987),[2] where the factual matrix was substantially similar to the present case.

Secondly, the sellers could not rely on Clause 17 since they were not "prevented" but were merely "restricted" in making the shipments to the buyers.

Thirdly, having reached the above conclusions, the Board nevertheless recognised the extreme difficulties, under which the sellers were operating, and stated that if the Board was to have decided whether the sellers had discharged their duties of best or reasonable endeavours in obtaining export licences, the Board would have unhesitatingly decided that the sellers had.

Naturally, the sellers disagreed with the Board's findings on law and in May 2014 sought permission to appeal from the High Court in respect of the following questions of law:

(1) whether Clause 11.3 overrode Clause 17 or was qualified by the same;

(2) whether Clause 17 applied exclusively in circumstances of a "total ban"; and

(3) whether the sellers could rely on Clause 17 if they were merely "restricted" rather than "prevented" from shipment.

On 25 September 2014 the permission to appeal was duly granted in respect of all three sellers' questions with the court agreeing that "the Award was open to serious doubt" and the main hearing of sellers' appeal was subsequently fixed for 4 March 2015.

The judgment

The matter was heard by Mr. Justice Hamblen, who, by coincidence, also appeared as a counsel for the winning party in *Pagnan v Tradax*, the authority at the core of the appeal from the sellers.

As to question (1), the buyers' main argument was that the two clauses were inconsistent as Clause 17 contradicted the specially agreed terms of Clause 11.3. Hamblen J disagreed. According to the normal principles of contractual construction under English law, there is no inconsistency between the contractual clauses unless they cannot be sensibly read together. Pagnan was directly relevant because the Court of Appeal had to deal with the same question of consistency between the two clauses, and found that the GAFTA clause simply qualified the obligation to provide an export licence. Moreover, in the judge's view, the proviso "at their own risk" did not mean the clause could not be qualified by the other contractual terms. Consequently, the judge concluded that Clause 17 qualified Clause 11.3, but was not overridden by it.

As to question (2), the judge pointed out several references to "partial restriction" in the wording of Clause 17, and found that it plainly applied to a qualifying event "partially restricting" export and, as such, to a partial prohibition or other qualifying event which had a like effect. He also referred to the case of *Bunge v Nidera*[3] where the Court of Appeal made exactly the same observation and concluded that the relieving effect of Clause 17 was not limited by circumstances of a "total ban".

As to question (3), and in line with previously decided authorities, Hamblen J emphasised that the Prohibition Clause requires both proof of a qualifying event (i.e., "an executive or legislative act done by or on behalf of the Government" which had the effect of "restricting export, whether partially or otherwise") and evidence of its restricting effect on the seller's total or partial ability to perform. On the specific point of prevention versus restriction, the judge made the following observation: "In so far as the Appeal Board are... saying that it is necessary to establish a qualifying event which prevents export that is not correct. What needs to be established is a qualifying event which restricts export. The word "prevent" appears as part of the deeming provision in the clause. It is not part of the definition of the relevant qualifying event. However, if the Appeal Board are saying that it is necessary to show that the qualifying event prevented performance in the sense that it caused inability to perform then that would be a correct approach."

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Finally, in the view of the judge, the Board had not specifically addressed the critical causation question (i.e., whether the export restrictions in fact prevented the sellers from performing), and, on the basis of the findings in the Award, the judge could not confidently conclude what the Board's answer to that question was. Consequently, he remitted the matter to the Appeal Board for further consideration and the parties are currently awaiting the revised arbitration award from the Appeal Board.

Ukrainian side of the coin

In the meantime, the real drama was unfolding in a totally different place. On 18 September 2014, just a few days short of the sellers' permission to appeal, the buyers filed an application for recognition and enforcement of the Award to the Svyatoshyn district court in Kiev. On 13 November 2014 the sellers provided their objections emphasizing, in particular, that the High Court in London allowed the sellers' appeal and considered the Award to be open to serious doubt. However, on 30 January 2013 the Kiev district court decided to satisfy the buyers' application for enforcement and issued respective order. Apparently, the Kiev district court was unimpressed by the fact that the high specialized court (Commercial Court of the HCJ) in the most impartial dispute resolution jurisdiction (England), which was the only judicial body statutorily authorized to consider appeals from arbitration awards (akin to the Ukrainian concept of a cassation instance), unequivocally recognized that the Award had a flaw and required reconsideration.

Naturally, the sellers immediately challenged the first instance court decision and appealed to the Kiev Court of Appeal, hoping for a more reasonable approach of the appeal judges. Yet, within just over a month, on 5 March 2015, the Kiev Court of Appeal re-confirmed the decision made by the court of first instance. The appeal court was very brief in its analysis of Mr Justice Hamblen's findings relating to the Award being open to "serious doubt" and effectively ignored the point, calling the sellers' arguments to that effect "unfounded". One can only speculate as to the reasons why this matter received such speedy consideration and why the decision coincided almost to the day with the hearing of the sellers' appeal by the High Court, which, for technical reasons, was shifted from 4 March to 6 March 2015. However, from the conduct of the proceedings by the judge at the hearing one could already sensibly see that the sellers' position appeared to be more persuasive. At the end, judge Hamblen promised to deliver his judgment within the "next week or two"; and, at it happened, the proximity of the final decision in this matter had a magical effect on the speed, at which further developments unfolded.

To prevent the decision of the Kiev Court of Appeal from becoming final and enforceable, on 10 March 2015 the sellers applied to the last resort — the High Specialized Court of Ukraine (HSCU), which had statutory powers to stay enforcement proceedings commenced pursuant to decisions of lower courts. Indeed, on 17 March the HSCU ordered such a stay. One

can just imagine the surprise of the sellers when, three days later and with no trace of compliance with the HSCU's order, on 20 March 2015 the Kiev district court issued a writ of execution allowing collection of the full amount of USD 17.5 million against the sellers' funds and assets.

At the same time, on 24 March 2015, judge Hamblen finally announced his judgment and answered all questions of law in the sellers' favor, as described above. From that moment the Award was formally remitted for reconsideration to the Board and could no longer be enforceable against the sellers. All would be well if not for a minor detail: on the same day, 24 March 2015, just as the judgment of Judge Hamblen was being announced, the State Execution Service (Bailiffs) was arresting all sellers' bank accounts and assets pursuant to the execution proceedings initiated on the same day, 24 March 2015.

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Eventually, the execution proceedings were suspended as per the HSCU's order of 17 March 2015 until the HSCU's final determination in this matter. However the sellers' funds remain attached to date, irrespective of the fact that (1) the actual Award is currently being reconsidered; and (b) there is a clear order within the Ukrainian judicial system to stay any and all execution proceedings that might have been commenced to date.

Conclusion

The story is notable in three respects. First of all, it shows how (still) remarkably different are the approaches of English and Ukrainian courts when it comes to the administration of justice and dealing with specific issues in the same matter and factual scenario. Secondly, it flags the problem of "selectivity" in the Ukrainian system of justice, which picks only favourable or suitable legal principles to justify certain decisions and completely ignores the obviously relevant concepts, simply because they do not fit the required position. Thirdly, and most importantly, it raises the question as to whether it is worth seeking justice in jurisdictions with strong rule of law, if one is bounced back to the system described by one renowned English commercial QC as the "Wild, Wild East"? It is, of course, our choice as both members of the legal profession and users of the system on whether to keep it as is, run from it or reshape its future. However, it is at least hoped that with the current wind of changes stories like this will slowly but inevitably sink into oblivion. As they should.

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