

## What you Should Know when Enforcing GAFTA and FOSFA Awards in Ukraine



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**W**ithout any modesty, we can confirm that Ukraine is one of the major global exporters of agrarian commodities. In particular, sunflower oil and seeds, grain and barley are distinctly Ukrainian. Thus, the share of disputes at arbitrations of GAFTA (The Grain and Feed Trade Association) and FOSFA (Federation of Oils, Seeds and Fats Associations) related to Ukraine is quite substantial.

Here we will analyze the ways in which international arbitral awards can be enforced in Ukraine.

### TENDENCIES

#### 1. Ukrainian courts adhere to the New York Convention

There were 11 cases submitted for recognition and enforcement of GAFTA/FOSFA awards.

Given that optimism will save the world, we will start from the good news. All cases were resolved without any violations of the *New York Convention*. In other words, awards that had to be enforced were enforced.

It takes time...

It means that statistically one award is passed through 7 court hearings at different instances (including procedural orders) in order to be recognized in Ukraine. Formally, it may be recognized after one court hearing. In some cases it takes a long time to find the only right solution. Let's resort to the State Registry of Court decisions of Ukraine.

E-mail communication is acceptable.

It is widely believed that Ukrainian court and legislation is rather formal and does not take into account new means of communication. However, cases on recog-

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nition and enforcement of GAFTA/FOSFA awards prove this is not so.

Ukrainian courts deliver justified decisions in this regard. For instance, if the arbitral agreement as well as the main contract was concluded via e-mail or some arbitration notice was sent by e-mail, Courts have recognized and enforced an arbitral award. Notably, in the MILLWILL Ltd (Broker) vs. Ukrainian Agrarian Investments LLC (Seller) case on recognition and enforcement of GAFTA Award of 19 November 2012, the defendant tried to prove that the award must not be recognized, because the parties did not sign and stamp the contract. The court rightfully held that it was not necessary due to the rules of the governing (English) law.

#### 2. Capacity of the party claiming enforcement

Almost 20% of the claims for recognition and enforcement of the awards were rejected because they were filed by an improper claimant. That is, the person that did not have a right to file such a claim.

In particular, in the Budtechimport LLC vs. Prodexim LLC case on recognition and enforcement of GAFTA Award No.14-476 between *Feed Factors LTD and Prodexim LLC* (debtor) the court logically rejected the claim since it was filed by the guarantor, not by the creditor. Obviously, the person that was not the party to the arbitral proceedings or did not obtain the right to file a claim on the recognition of the award is not entitled to file a claim with a Ukrainian court (Article 393 of the *Civil Procedure Code of Ukraine* and Article 4 of the *New York Convention*).

In another case, Euler Hermes Services Schweiz AG filed a claim against Odessa oil-fat combine PJSC on recognition and enforcement of FOSFA Award No. 4219 as of 7 September 2011 in the matter between Pontus Trade LLC and Odessa oil-fat combine PJSC, Euler Hermes Services AG obtained the right to claim for enforcement due to assignment agreement.

The company Euler Hermes Services Schweiz AG, which filed the claim on recognition and enforcement of FOSFA award did not have the right to submit such a claim, because the party to the assignment agreement was the other company – Euler Hermes Services AG.

There was no evidence that Euler Hermes Services Schweiz AG is the legal successor of Euler Hermes Services AG.

Thus, the Ukrainian court acted in accordance with international and Ukrainian law. As a result, both arbitral awards had no chance of being enforced.

#### 3. The court enforces the award if the debtor is registered or has a property within the territory of Ukraine

It is important that such property or registration must belong only and strictly

to the debtor as opposed to related companies, beneficiaries of the debtor, etc.

Notably, in the *Nibulon S.A. vs. BSC GmbH* case on recognition and enforcement of GAFTA award No. 4301 of 5 February 2013, the defendant, an Austrian company, was not registered in Ukraine. Moreover, it did not have property in Ukraine, which disabled a Ukrainian court from handling the case (Article 394 of the *Civil Procedure Code of Ukraine*). It is interesting that *Nibulon S.A.* provided the court with the supposed address of the debtor that appeared to be the office of *Nova Capital LLC*. It arose that the debtor had never been registered there and did not have any connection with the *Nova Capital LLC*. At least formally...

The second case was *F.F. ENGELS INVESTMENTS LTD vs. PACIFIC INTER-LINK SDN BHD* on recognition and enforcement of numerous FOSFA Awards.

Debtor was not registered in Ukraine. However, it was supposed to have property in Ukraine, namely goods in a warehouse. The property was arrested by the means of interim relief, while awards were recognized. However, the higher Court cancelled the decision and concluded: the owner of the goods is not a debtor under the contract and the party to arbitral proceedings. In fact, the awards were enforced against the company with a similar name, but not similar to the debtor's name. It is worth noting that *Pacific Oils & Fats Industry SDN* was mentioned as a debtor, while the real debtor was *PACIFIC INTER-LINK SDN BHD*.

Therefore, since the claimant did not prove that the property belongs to the debtor, the awards were not recognized.

#### 4. The claimant may ask for interim relief in cases for recognition and enforcement of arbitral award

Securing a claim is allowed at any stage of proceedings (even before filing a claim), if the failure to secure such a claim may complicate or prevent the enforcement of the award.

The creditor may seek for enforcement in Ukraine, provided that the debtor is registered and has assets or cargo allocated in Ukraine.

If at least one prerequisite is met, the creditor may file a claim with a Ukrainian court for arrest of such cargo or any other property as interim relief. Afterwards, it is necessary to file a claim on recognition and enforcement of the award within 3 days from the date of the court order on arrest of the property.

## The practice of enforcing of GAFTA and FOSFA awards in Ukraine is dynamic, though still optimistic

However, there are two points to take into account in this regard:

1. If the claim is considered by the third instance (Higher Court/Supreme Court), the court is not empowered to grant an interim relief.

2. It should be a good arguable case to ask the court for interim relief. Should the court find the debtor's property arrest was unlawful, the defendant is entitled for compensation of all damages incurred. For instance, in the case of property arrest: storage costs, demurrage of containers or the vessel, handling costs, losses associated with damage or delayed delivery of cargo and other additional costs.

Thus, the claimant should be very cautious in such cases in order to avoid increasing his losses.

#### 5. The practice of compound interest enforcement is not univocal

There is no univocal practice on whether the compound interest prescribed by the award must be compensated. The question is what to do if the arbitral award contains the formula on its calculation, but not the sum presented by the figures.

GAFTA and FOSFA arbitration awards on compensation of damages usually contain the debtor's obligation to compensate the creditor for damages along with compound interest in the amount of 4%-5% from the date prescribed by the award till the date of payment. In most cases, the starting point is the date of default (i.e. a serious breach of a contract that resulted in termination thereof). The tribunal prescribes the basis sum from which the inter-

est should be calculated and the relevant period for it.

Ukrainian courts enforced such awards for many years. However, the recent decision of the Supreme Court of 26 October 2016 in case No.6-1197uc16 may change the approach. It paid attention to the fact that under Ukrainian law neither the court nor the State Enforcement Service are empowered to calculate interest even if the arbitral decision contains a clear formula.

The court rejected the entire claim for recognition and enforcement of the award. Notably, the Kyiv Court of Appeal held in the Order of 23 February 2017 in case number 759/16206/14-II, that:

"... when a foreign arbitration award containing an obligation of the debtor to compensate compound interest, the precise amount of which is not defined, then there are no legal grounds to enforce the decision. Given that the claimant demands to compensate such interest and the absence of the power of the court or other authority to change the claimant's demand, there is no possibility for partial enforcement of the decision. Otherwise, it would contradict subparagraph b of paragraph 2, Article V of the *New York Convention* and paragraph 6 of Article 396 of *Civil Procedure Code of Ukraine*"

At this point of time, the decision is waiting another revision at the higher court.

Therefore, the issue of enforcement of GAFTA/FOSFA awards in the part on compound interest is now open. While previously it was clear, now the tendency is that the award is to contain a precise sum depicted in figures (not the formula) that should be paid by the debtor. Otherwise, there is a risk that the court will reject enforcement of the entire award.

We will keep our readers informed on further developments of the practice in this regard. However, it would be the matter of a separate post.

## IN WHAT WAYS CAN CLAIMANTS ENHANCE THE CHANCES OF ENFORCEMENT OF GAFTA/ FOSFA AWARDS?

Knowledge of the outlined tendencies leads us to conclusions on how to avoid mistakes and receive an enforced decision. We have prepared 7 tips in this regard.

1. The claim must be filed by the company that is pointed out in the award, or the company that obtained this right under an assignment agreement. Preferably, that assignment agreement is concluded after the date of the arbitral award.

# ARGUMENT

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2. Special attention should be paid to the evidence that the arbitral award came into force. It may be an extract from GAFTA/FOSFA arbitration rules or List of defaulters, or a letter from arbitration that this particular award has come into force.

3. The debtor must be registered or have a property within the jurisdiction of the court to which the claim is filed.

4. If the creditor is certain that the case is a good arguable one and there is a risk of dissipation of the assets, it makes sense to ask the court for interim measures. Ukrainian courts are not reluctant to grant such measures. However, it should be noted that if the interim measure were to be considered as illegal later, the claimant must pay compensation for all damages incurred.

5. The claimant should be prepared for long-lasting procedures since there is a risk that the case will pass through all instances several times. The whole process may take 1.5 – 2 years.

6. It is better to send an arbitral agreement and notices via the same e-mail as the previous correspondence. It would be a plus

if the debtor answered any letter from this e-mail address.

7. The claim and the award should comply with the New York Convention. We can make the case that after all procedures, its requirements will be observed by Ukrainian courts.

## CONCLUSION

Overall, Ukrainian practice on recognition and enforcement of GAFTA/FOSFA awards complies with the *New York Convention*. The approach of Ukrainian Courts may be characterized as a pro-arbitration one.

At the same time, there are not many cases for recognition and enforcement of such awards in Ukrainian courts. The reasons for the noted results may be different: GAFTA/FOSFA awards against Ukrainian companies are enforced voluntarily; debtors with Ukrainian roots are registered in other jurisdictions; creditors do not start proceedings because they do not believe that it may bring fruits due to prior dissipation of a debtor's assets or corruption in Ukrainian courts.

Then again, statistics are quite optimistic: 50% of awards were enforced by means of court procedures against 50% that were not enforced. One more case is still in progress (*Nibulon vs. Rise*). That particular case relates to the obligation to pay compound interest. At this point in time, it is hard to predict the outcome of the proceedings. The mentioned statistics relate only to compulsory enforcement (by means of court procedures) and do not take into account the awards that were enforced voluntarily. Should we count them too, the statistics would be much more optimistic.

However, if the court upholds the decision of the previous instance, the practice on recognition and enforcement of the GAFTA/FOSFA awards will change dramatically. Once the final decision on the case is delivered, we will provide analysis of it for our readers.

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