

Seven Trends and Seven Tips for Enforcing GAFTA and FOSFA Awards in Ukraine

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The analysis of Ukrainian court practice enables us to share our thoughts on trends regarding the recognition and enforcement of GAFTA/FOSFA awards in Ukraine, and to provide tips that may help to enforce this type of awards in the future.

Seven Trends on the Recognition and Enforcement of GAFTA/FOSFA Awards in Ukraine

1. *Ukrainian courts adhere to the [New York Convention](#).*

But it takes time...

Statistically, an award is passed through seven court hearings at different instances before being recognized in Ukraine, despite Ukrainian legislation, which allows to recognize an award at the first instance hearing.

E-mail communication is acceptable.

Courts recognized and enforced an arbitral award even when an arbitral agreement as well as a main contract were [concluded via e-mail](#), or when an arbitration notice was [sent by e-mail](#).

2. *Ukrainian courts tend not to interfere in the merits of awards.*

Our research showed that only once a lower court's decision [analyzed the merits in an award](#). The decision was subsequently cancelled by a higher court, finding it to be in contradiction to the New York Convention and Ukrainian legislation.

3. *The cases on recognition and enforcement of GAFTA/FOSFA awards are frequently revised by higher courts.*

Out of about 80 court decisions in 11 cases on the recognition and enforcement analyzed in the research, 63% of them were revised by higher courts. In most cases, a decision was changed or the case was remitted to the first instance for revision.

4. *The standing of a party claiming enforcement is regularly assessed by courts.*

Almost 20% of the claims for the recognition and enforcement of arbitral awards were rejected because they were filed by a claimant who did not have standing before an arbitral tribunal. For

instance, recognition and enforcement was sought by a person that is not a party to an arbitration agreement (Budtechimport LLC vs Prodexim LLC) or to an assignment agreement (Euler Hermes Services Schweiz AG filed a claim against Odessa oil-fat combine PJSC).

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

In the case Nibulon S.A. vs BSC CmbH, the defendant was not a registered entity in Ukraine, but an Austrian company. It did not have any property in Ukraine, and hence the Ukrainian court refused to decide the case. Interestingly, Nibulon S.A. provided the court with an alleged address of the debtor that appeared to be the office of Nova Capital LLC, registered in Ukraine. It arose that debtor had never been registered there (and in Ukraine as well) and did not have any connections with Nova Capital LLC. Therefore, since the claimant did not prove that the property belongs to the debtor, awards were not recognized.

6. The claimant may seek an interim relief in the proceedings for recognition and enforcement of an 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. As mentioned above, the creditor may seek enforcement in Ukraine provided that the debtor is registered, has assets, or cargo in Ukraine. However, it should be noted that when a claim is considered by the third instance court, i.e. Higher Court/Supreme Court, the court is not empowered to grant an interim relief.

7. The practice on compound interest enforcement is not uniform.

There is no uniform practice on whether a compound interest prescribed by an award must be compensated, although for already some time, Ukrainian courts have been enforcing arbitral decisions awarding compound interest.

Examples of decisions enforcing such awards are as follows:

- a) a court decision in the case № 4c-410/2563/12 stated that it “[a]llow[s] to enforce the arbitration award of GAFTA dated July 21, 2011 №14-329”, without any details provided as to a particular sum of interest;
- b) a court decision in the case № 127/4348/13-ц enforcing the original award, followed by the claimant asking the court to define a particular amount of interest. The court defined the amount then in an additional decision, rendered as an integral part of the recognition and enforcement decision;
- c) a court decision in the case № 2521/930/2012 citing the resolution of an award with the following words added: “that constitutes [money equivalent of the compound interest at the date of the decision]”. In particular, the court inserted into its decision the precise sum of compound interest, calculated on the date of making the decision by applying the formula of compensation prescribed by the award.

However, the approach may be changed.

Notably, the Kyiv Court of Appeal held in the Order dated 23.02.2017., based on the recent decision of the Supreme Court dated 26 October 2016, stated that:

“[...] when a foreign arbitral 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 claimant requests such interest and in the absence of the court's or other authority's power to change the claimant's request, there is no possibility for a partial enforcement of a decision. Otherwise, it would contradict subpara. b of para 2, Art. 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 for another revision of the higher court. Therefore, the issue of enforcement of GAFTA/FOSFA awards containing compound interest is currently left open.

Seven Tips: In What Way May Claimants Enhance Their Chances of Enforcement of GAFTA/FOSFA Awards?

The above outlined trends underline seven tips regarding how to avoid obstacles and successfully enforce arbitral decisions:

1. A claim must be filed by a company mentioned in the recital of an award, or a company that obtained this right under an assignment agreement. Preferably, an assignment agreement would be concluded after the date of the arbitral award. Otherwise, the court may refuse the claimant in recognition since "the assignment agreement precedes the award".
2. Special attention should be paid to the evidence that the arbitral award came into force, i.e. that it is valid and final. In terms of such evidence, the extract from GAFTA/FOSFA arbitration rules or a letter from an arbitration institution that this particular award came into force would assist.
3. The debtor must be registered or have property within the jurisdiction of the court before which the enforcement claim is brought.
4. If there is a strong indication that the claim will be successful and there is a risk of dissipating the assets on the debtor's side, 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 shall the interim measure be found as exercised without sufficient legal grounds, the claimant must afterwards compensate for all damages to the other party caused by a granted measure. In such a case, the court decision on interim measures is to be cancelled by the higher court.
5. A claimant should be prepared for long-lasting procedures since there is a risk that the case will pass through all instances. The whole process may last from one and a half up to two years depending on the number of hearings, appeals, and new trials.
6. It is advisable to send an arbitral agreement and notices via the same e-mail.
7. A claim for enforcement and an arbitral award are to be in compliance with the New York Convention.

Conclusion

Overall, the approach of Ukrainian courts may be characterized to be pro-arbitration and in accordance with the international practice.

At the same time, there are not so many cases for the recognition and enforcement of GAFTA/FOSFA awards in Ukrainian courts. The reasons for noted results may be different: GAFTA/FOSFA awards against Ukrainian companies are enforced voluntarily; debtors that have Ukrainian beneficiaries and staff are incorporated in other jurisdictions; creditors do not start the proceedings because they do not believe that they will be successful due to the dissipation of debtor's assets, or corruption in Ukrainian courts.

Then again, statistics are speaking for themselves: 50% of arbitral awards were enforced by means of court procedures during the last seven years. One more case is still in progress (Nibulon vs Rise), which concerns the obligation to pay compound interest. At this point in time, it is hard to predict the outcome of the proceedings.

To sum up, if the trends in Ukrainian justice on recognition and enforcement were synonymous to the fashion ones, we would recommend claimants to: choose the classic style, but keep an eye on the new winds of changes.

