

Ukrainian Court Enforces Arbitral Awards Set Aside in the UK

On 3 August 2012 the Court of Appeal of the Odessa Region upheld its lower court's ruling [granting](#) requests for the enforcement of twelve FOSFA arbitral awards in Ukraine.

Six of these awards had previously been set aside in the UK. The Ukrainian court did not give any effect to the respective English court judgments, stating that the English courts do not recognise Ukrainian court judgments.

The case raises a number of interesting procedural issues particularly in relation to the consolidation of the recognition and enforcement proceedings, assignment of the arbitral awards and application of the relatively new [provisions](#) of Ukrainian law governing the application of interim measures during enforcement proceedings.

The Requests for Recognition and Enforcements

A Cypriot company, F.F. Engels Investments Ltd (“**Engels**”), filed twelve separate requests for the recognition and enforcement of four first- and eight second-tier arbitral awards rendered according to the Arbitration Rules of the Federation of Oils, Seeds and Fats Associations (FOSFA) in 2010 and 2011. The awards debtor was a Malaysian company, Pacific Inter-Link SDN BHD (“**Pacific**”).

Engels asserted that Pacific was the owner of certain palm oil products in question which had been delivered to a Ukrainian sea port and later unloaded to the customs warehouse of a Ukrainian company in the Odessa Region. Engels also requested the court to order several interim measures, namely: attachment of the palm oil products as well as injunctions against the destruction or removal of these products by the Ukrainian company from its warehouse and against the transfer of the proceeds of these products to Pacific.

Recognition of Award Set Aside and Reciprocity

The Ukrainian court established that six FOSFA Appeal awards rendered in favour of a Russian company, EFKO Food Ingredients Ltd, an assignor of Engels, had been set aside in the UK in April 2011 (see [2011] EWHC 923 (Comm)).

The ruling does not contain any references to Pacific's objections, if any, to the recognition and enforcement of these arbitral awards in Ukraine. Presumably, the lack of any such objections was the reason why the Ukrainian court did not apply Article V(1)(e) of the New York Convention. This provision if invoked by a party allows a court to refuse recognition and enforcement of an arbitral award set aside by a competent authority in the seat of arbitration.

Instead, the Ukrainian court decided to establish the effect of the English court judgment on the basis of general provisions of the Civil Procedural Code of Ukraine governing the recognition of foreign court judgments. Given that there is no applicable international treaty providing for the recognition of court judgments between the UK and Ukraine, the court focused only on the principle of reciprocity.

It held that the English court judgment in question shall not have any prejudicial or pre-determined effect in relation to the recognition and enforcement of the arbitral awards in Ukraine, in view of the lack of reciprocity between Ukraine and the UK with respect to the recognition of court judgments. This finding clashes with a recently [reported](#) case, where another Ukrainian court came to the opposite conclusion. Interestingly enough, both Ukrainian courts referred to the same English case to reach their respective findings about reciprocity.

The case concerned the recognition of the judgments of the Higher Commercial Court of Ukraine (**the “HCCU”**) in a dispute between the Ukrainian state-owned company Naftogaz Ukrayiny and Merchant International Company Ltd. The [HCCU judgment of 2006](#) against Naftogaz Ukrayiny was successfully recognised in the UK in 2011. Later the Ukrainian courts reconsidered the case in view of newly discovered circumstances and in 2011 the HCCU set aside its own judgment of 2006.

However, the English court refused to give effect to the 2011 HCCU judgment with reference to the principle of legal certainty (see [2011] EWHC 1820 (Comm)). Therefore, notwithstanding the fact that the Ukrainian courts eventually [dismissed](#) the claims of Merchant International Company Ltd., the HCCU judgment of 2006 ordering Naftogaz Ukrayiny to pay over US\$24 million to the claimant remains effective in the UK.

Ultimately, the Ukrainian court found that all twelve awards met the requirement of Article V of the New York Convention and granted their recognition and enforcement in Ukraine.

The Procedural Issues

Jurisdiction. The court established its jurisdiction to consider the requests on the basis of Pacific’s title to the palm oil products located at the time in the Odessa Region. Pacific’s title was evidenced by bills of lading submitted by Engels.

Assignment of awards. The court confirmed that all twelve awards had been duly assigned to Engels by three initial awards creditors under respective assignment agreements.

Consolidation. The court consolidated all twelve proceedings into a single one. This is quite unusual for such cases as there are no procedural rules expressly permitting consolidation. The final court ruling does not contain any reasoning for the consolidation.

However, the most obvious arguments in favour of consolidation could have been:

(i) the fact that the parties were the same in all of the proceedings; (ii) that, arguably, all twelve comprised similar arbitral awards and arbitration clauses; (iii) that all twelve comprised the same arbitration rules and law governing the arbitral proceedings, and (iv) the feasibility of ordering interim measures with regard to the whole volume of the palm oil products.

Interim Measures

The court granted the interim measures requested by Engels (i.e. attached palm oil products and issued requested injunctions). However, the injunction was [quashed](#) on 10 August 2012. Among other reasons the court held that the interim measures should be terminated after entry into force of the court ruling granting enforcement of the FOSFA arbitral awards (i.e. after 3 August 2012 when their enforcement was upheld by the Court of Appeal).

This approach corresponds to the general case-law relating to the termination of interim measures in regular litigation. Still, in the context of the enforcement of arbitral awards, this decision provides important guidance for foreign creditors with respect to time limits to the effectiveness of interim measures.

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