

Nibulon SA v. Public Joint Stock Company "Rise" (enforcement of a GAFTA award with compound interest), Supreme Court of Ukraine, Case No. 759/16206/14-у (Proceeding No. 6-1197уc16), 26 October 2016

A contribution by the ITA Board of Reporters

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Headnote

The Supreme Court of Ukraine opined on recognition and enforcement of the arbitral award with compound interest formula.

Summary

Facts of the case

On 23 May 2014, an Appeal Board of Arbitration under the Grain and Feed Trade Association issued award ('Award') in favour of "Nibulon SA" ('Nibulon') against Public Joint Stock Company "Company "Rise" ('Rise') on recovery of damages in the amount of US\$ 17,5 million plus a 4% compound interest accrued quarterly from the date of non-performance (i.e., 11 January 2011) until the date of full payment of compensation, as well as recovery of costs incurred in connection with the arbitration.

On 23 September 2014, Nibulon applied to the Ukrainian courts for recognition and enforcement of the Award. Nibulon sought (as amended) to recognise and obtain permission to enforce the Award in full in relation to the sum of main debt and arbitration expenses, as well as 4 % compound interest calculated up to 29 January 2015 (all in UAH equivalent as at 29 January 2015).

On 30 January 2015 Sviatoshynskiy District Court of Kyiv (court of first instance) allowed Nibulon's application in full (30 January 2015 Order). On 5 March 2015 the Kyiv City Court of Appeal upheld the 30 January 2015 order (5 March 2015 Order). On 23 September 2015 the High Specialised Court for Civil and Criminal Cases, court of cassation appeal, cancelled the 5 March 2015 Order and remanded the case to the court of appeal (23 September 2015 Order).

Court of Appeal and Cassation Appeal (retrial):

Rise appealed the 30 January 2015 Order on the grounds that: (i) the Award was not final given Rise's appeal to the Commercial Court of the Queen's Bench Division of the High Court of Justice; and (ii) the Sviatoshynskiy District Court of Kyiv committed violation of the procedural rules, since the first instance court had changed the Award by calculating the compound interest. Nibulon disagreed with Rise's arguments.

On 14 January 2016 the Kyiv City Court of Appeal (Appeal Court) cancelled the 30 January 2015 Order and adopted a new decision on partial granting of Nibulon's application.

The Appeal Court rejected the first argument of Rise with reference to Article 12.6 of GAFTA Arbitration Rules No. 125 and based on evidence furnished by Nibulon on final and binding nature of the Award that was not set aside or suspended from enforcement (e.g., special certificate issued by GAFTA and certificate evidencing final nature of the arbitral award for enforcement abroad issued by the clerk of the High Court of England and Wales).

At the same time, the Appeal Court concluded that Ukrainian courts are not entitled to consider the foreign arbitral awards on merits or change the awards in any way. It further opined that while recognising and granting permission for enforcement of the foreign arbitral awards the courts should recite the award without changes (except for the calculation of the UAH equivalent of the

awarded sum). Thus, the Appeal Court agreed with Rise's second argument that the first instance court had violated the procedural rules while calculating the compound interest to be recovered from Rise.

In the aftermath, on 14 January 2016 the Appeal Court ordered to recognise and enforce the Award: the principal damages and arbitral costs in UAH equivalent as at 14 January 2016 (date of the Appeal Court's order) together with compound interest to be calculated as per formula provided in the Award (14 January 2016 Order).

The court of cassation appeal, the High Specialized Court of Ukraine for Civil and Criminal Cases, agreed with the 14 January 2016 Order and rejected Rise's cassation appeal (27 April 2016 Order).

Judgment of the Court

The Supreme Court of Ukraine

Rise, disagreeing with the 27 April 2016 Order, applied to the Supreme Court of Ukraine (SCU) seeking cancellation of the decision of the cassation court based on its different application of procedural laws. On 26 October 2016 the SCU partially allowed the Rise's application and remanded the case to the Appeal Court (26 October 2016 Resolution).

The SCU reasoned that the courts should consider the applications for recognition and enforcement of foreign arbitral awards within the scope requested by the applicants. Such approach is in line with the principle of the free exercise of material and procedural rights by the parties to legal proceedings (as enshrined in Article 11 of the Civil Procedural Code of Ukraine). The SCU noted that Nibulon requested to recognise and enforce the Award in part of awarded damages in its UAH equivalent as at 29 January 2015, as well as the calculated compound interest in UAH equivalent.

The SCU further pointed out that the courts having allowed the enforcement of the Award with compound interest formula failed to evaluate whether such Award would violate Ukraine's public policy. At that the SCU referenced to constitutional principle that agencies of state power and the officials thereof can operate only on the basis of and within the limits of powers and by the means which have been provided for by the Constitution and laws of Ukraine (Article 19 of the Constitution of Ukraine) and mentioned that the Law of Ukraine "On Enforcement Proceedings" (regulating the enforcement of the court decisions, including court orders on recognition and enforcement of foreign arbitral awards) did not provide for the powers of the officers of the state enforcement service (bailiff) to calculate the amount to be recovered. Thus, according to the SCU the enforcement of the recognised award would have required the bailiff to exceed his/her powers.

The SCU was silent on the conclusions of the lower instances courts on equating calculation of the awarded interest as a form of amendment of the arbitral award.

Dissenting opinion of SCU's judges V.I. Humeniuk and V.M. Simonenko

The SCU's judges V.I. Humeniuk and V.M. Simonenko disagreed with the SCU's 26 October 2016 Resolution and issued a dissenting opinion. The judges supported reasoning of the Appeal Court in the 14 January 2016 Order (as upheld by the 27 April 2016 Order of the cassation court). Furthermore, in their opinion, the calculation of the compound interest is a simple mathematical operation and bailiff could and should calculate the amount of the compound interest to be recovered from the debtor.

The judges are of the view that the Appeal Court did not surpass its authority by recognizing the Award as it is (i.e., reciting its resolution parts including the formula for calculation of the compound interest).

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The summary of the case file and full text of summarized court decision are available on:
<https://www.kluwerarbitration.com/document/kli-ka-ons-17-3-001?jurisdiction=Ukraine&type=Court%20Decisions>