Unofficial translation

Case No. 2521/930/2012

2-к/746/1/2013

ORDER

IN THE NAME OF UKRAINE

24 January 2013

The Sribnyansky District Court of Chernihiv Region sitting as a panel of judges composed of:

Presiding Judge – N. A. Tsyhura,

Secretary I. A. Zhmaka,

Having considered, in an open hearing held in the premises of the Sribne urban-type village, the application for the recognition and enforcement of arbitral award No. 14-283 A of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011 and the issuing of a writ of execution,-

E S T A B L I S H E D :

The court received an application from the claimant, NIBULON SA, seeking the recognition and enforcement of an award rendered in a foreign country against the debtor, Nasinnia – Agrokhim, Limited Liability Company, requesting the recognition and enforcement of arbitral award No. 14-283 A of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011 granting NIBULON SA recovery of monies plus interest assessed quarterly at the rate of 5% per annum, at the amount USD 3,664,946.90 from Nasinnia – Agrokhim, Limited Liability Company.

At the hearing, counsel for NIBULON SA fully affirmed the application for the recognition and enforcement of arbitral award No. 14-283 A of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011, referring to the grounds for its enforcement as laid down in the appeal.

At the hearing, counsel for Nasinnia – Agrokhim, Limited Liability Company, objected to the granting of NIBULON SA's appeal for the recognition and enforcement of arbitral award No. 14-283 A of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011 and the issuance of a writ of execution arguing that Nasinnia – Agrokhim, Limited Liability Company, was not given proper notice of the hearing and, thus, had no opportunity to participate in the arbitration proceedings.

The company referred to the following circumstances: actions from the state authorities that rendered it incapable and thus amounted to force majeure; the invalidity of the contract given the contract price exceeded UAH 1,000,000 and the company's general meeting of members did not approve the conclusion of the contract; the fact that the contents of the international arbitral awards and other documents submitted to the court were not certified.

After having heard the parties and examined the case documents, the court considers that the application for the recognition and enforcement of the award rendered in a foreign country must be granted based on the following grounds.

The recognition and enforcement of a foreign judgment spreads the force of that judgment over the territory of Ukraine and grants enforcement as provided for by the Ukrainian Code of Civil Procedure.

Subject to Article 390(1) of the Ukrainian Code of Civil Procedure, foreign judgments (decisions of international arbitrations) shall be recognized and enforced in Ukraine if their recognition and enforcement are provided for in an international treaty approved by the Verkhovna Rada of Ukraine [Ukrainian Parliament] or according to the principle of reciprocity.

Subject to the content of Articles 391 and 392 of the Ukrainian Code of Civil Procedure, the recognition and enforcement of a foreign judgment may be requested in Ukraine within three years of its entry into effect except that, as regards a judgment granting recovery of periodic payments, the recognition and enforcement of such a judgment may be requested throughout the entire recovery period. The application for the recognition and enforcement of a foreign judgment shall be heard by the court at the debtor's place of residence or his business location.

Considering that the place of business of Nasinnia – Agrokhim, Limited Liability Company, is within the territory of Ukraine, the court deems it necessary to grant the application and allow the enforcement of arbitral award No. 14-283 A of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011 within the territory of Ukraine.

In particular, the basic principle of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10 June 1958 to which Ukraine has been a party since 8 January 1961 is that each Contracting state shall recognize foreign arbitral awards as binding and enforce them.

Presuming the binding nature of an arbitral award, the New York Convention provides for an exhaustive list of grounds, not subject to broad interpretation, under which the competent court may refuse the recognition and enforcement of an arbitral award.

The said list is contained in Article V of the New York Convention, and the grounds are also listed in Article 396(2) of the Ukrainian Code of Civil Procedure. Since the binding and enforceable nature of an arbitral award is presumed by international and national law, the burden of proof of the existence of such grounds is imposed upon the party objecting to the recognition and enforcement of an arbitral award (Article 5(1) of the New York Convention).

Subject to Article 35 of the Ukrainian Law on International Commercial Arbitration, an arbitral award, regardless of the country in which such award was made, is to be recognized as binding and, upon written application filed with a competent court, enforced subject to this Article and Article 36 of the said Law.

The court has established that, in connection with the respondent's failure to perform its obligations under the contract dated 27 August 2009 between Nasinnia – Agrokhim, LLC and NIBULON SA, the arbitral award No. 14-283 A of the Grain and Feed Trade Association (GAFTA) rendered in London on 23 December 2011 granted NIBULON SA recovery of monies plus interest assessed quarterly at the rate of 5% per annum at the amount of USD 3,664,946.90 which equals to UAH 29,293,920.57 subject to the exchange rate of the National Bank of Ukraine.

The application of NIBULON SA for the recognition and enforcement of the arbitral award of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011 complies in form and content with the statutory requirements and contains grounds for the recognition and enforcement of the arbitral award. The court does not verify if the arbitral award is correct on the merits because that would violate the sovereignty of the country whose authority has rendered the award.

The arguments of the counsel for Nasinnia – Agrokhim, LLC that the respondent was not duly notified of the hearing of the case and was, thus, unable to participate in the proceedings are refuted by the proof furnished by the counsel for the claimant, NIBULON SA. In particular, the contract executed by the parties on 27 August 2009 contained an arbitration clause according to which any dispute arising out of or under this contract shall be determined by arbitration in accordance with the GAFTA Arbitration Rules No. [49], in the edition current at the date of this contract. These Rules are an integral part of this contract and the parties confirm that they are fully cognizant of these Rules. The seat of arbitration shall be London, England. Subject to Clause 24 of the GAFTA Arbitration Rules No. [49] in the edition current at the date of this contract, any and all disputes arising out of or under this contract shall be determined by arbitration in accordance with the GAFTA Arbitration Rules No. 125. In accordance with Clause 20.1 of GAFTA Rules No. 125, all notices to be served on the parties pursuant to these GAFTA Rules No. 125 shall be served by letter, fax, E-mail, or other electronic means. For the purposes of time limits, the date of dispatch shall, unless otherwise stated, be deemed to be the date of service. The provisions of Clause 16 of GAFTA No. 49[1] provide that all notices required to be served on the parties pursuant to this contract shall be communicated rapidly in legible form. Methods of rapid communication for the purposes of this clause shall be either telex, or letter if delivered by hand, or telefax, or E-mail. On 7 October 2010, counsel for the Claimant sent a Notice of Arbitration to the respondent's e-mail address designated as contractual according to the contract dated 27 August 2009.

[1] *Id.*

On 26 October 2010, the Grain and Feed Trade Association (GAFTA) notified NIBULON SA and Nasinnia – Agrokhim, LLC by a letter sent via e-mail and regular mail stating that since Nasinnia-Agrokhim, LLC had failed to appoint an arbitrator within 9 calendar days of receipt of the notice of appointment of T. Nels, G. Valentine was appointed as the second arbitrator and that, as a result, the arbitration proceedings were duly commenced. On 15 December 2010, counsel for the claimant sent a statement of claim to Nasinnia – Agrokhim, LLC's address which is evidenced by air waybill No. 6291894195 received by the counsel for the respondent on 17 December 2010 which is evidenced by the return receipt. The said statement of claim was also sent by e-mail. On 7 January 2011, the Grain and Feed Trade Association (GAFTA) sent a letter to the respondent by regular mail and e-mail confirming the Claimant's payment of the deposit and providing notification of the arbitral hearing schedule whereby Nasinnia – Agrokhim, LLC was notified of the opportunity to file its applications and documents refuting the claimant's case stated in the statement of claim within 28 days.

Subject to Article V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

Subject to the Convention, the recognition and enforcement of a foreign arbitral award may be refused due to a failure to notify a party of the appointment of the arbitrator and of the time of arbitration proceedings, provided that the party resisting enforcement has furnished proof that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. It follows from the explanations provided by counsel for the respondent, Nasinnia-Agrokhim, LLC, that the statement of claim was received and the respondent served its formal defense submissions in response to the statement of claim.

This court cannot accept the argument advanced by counsel for Nasinnia-Agrokhim, LLC, who submitted that the ground for refusing recognition and enforcement of the arbitral award was that one of the parties to the arbitration agreement was incapable of acting and that the agreement was invalid under the law to which the parties subjected it. The counsel for the respondent submits that at the time of execution of the contract dated 27 August 2009, the Director of Nasinnia-Agrokhim, LLC had insufficient authority to sign such contract because, according to the Charter (Articles of Association), contracts exceeding UAH 1,000,000 are to be signed only upon their prior approval by the General Meeting of Nasinnia-Agrokhim, LLC. However, Article 36 of the Ukrainian Law on International Commercial Arbitration refers to the parties' inability to act in the execution of an arbitration agreement, but not of a foreign trade contract.

In accordance with Article 7 of the aforesaid Law, an arbitration agreement is an agreement between the parties to refer to arbitration all or certain disputes that have arisen or may arise between them in connection with any specific legal relations, whether contractual or not. An arbitration agreement may be executed either as an arbitration clause in a contract or as a separate agreement. Therefore, this court finds that the argument advanced by counsel for Nasinnia-Agrokhim, LLC as a ground for refusal of recognition and enforcement of the arbitral award – namely, that due to force majeure Nasinnia-Agrokhim, LLC was unable to perform its obligations under the contract –is erroneous and is not based on the provisions of law. At the same time, counsel failed to prove that the parties were unable to act at the time of execution of their arbitration agreement.

The statements made by counsel for Nasinnia-Agrokhim, LLC that the concluded contract was invalid because the contract price exceeded UAH 1,000,000 and no prior approval for its conclusion was granted by the general meeting of the company's shareholders is refuted by paragraph 5 of GAFTA's Arbitral Award No. 14-283 A of 23 December 2011 which found that the Contract had been validly concluded.

The argument advanced by counsel for Nasinnia-Agrokhim, LLC that the content of the award of the international tribunal, as well as the content of other documents submitted to the court, were not certified is beneath notice and is refuted by the duly certified copies of the award of the international tribunal, the recognition and enforcement of which is sought, and other documents.

Given that the arbitral award of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011 specifies the amount to be collected in a foreign currency, the moneys to be collected in favour of the award creditor are to be converted into the national currency of Ukraine in accordance with Article 395(8) of the Ukrainian Code of Civil Procedure and subject to the exchange rate set by the National Bank of Ukraine on the date of this order, i.e. USD 3,664,946.90 (bearing in mind the USD 100/UAH 799.3000 exchange rate set by the National Bank of Ukraine on 24 January 2013) is equivalent to: USD 3,664,946.90 x UAH 7.993 = UAH 29,293,920.57.

In reliance on Articles 390-398 of the Ukrainian Code of Civil Procedure, the court -

O R D E R E D :

The application of NIBULON SA for the recognition and enforcement of arbitral award No. 14-283 A of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011 shall be granted.

That the recognition and enforcement of arbitral award No. 14-283 A of the Grain and Feed Trade Association (GAFTA) rendered in London on 23 December 2011 awarding recovery from Nasinnia – Agrokhim, Limited Liability Company (51 Nezalezhnosti St, 17311 Kaliuzhnytsi Village, Sribnyansky District, Chernihiv Region) in favour of NIBULON SA (2067, Avenue de la Gare 49, CH-2001 Neuchâtel, Switzerland. VAT No. 652155. Registration number 02129/2006/. Federal No. CH-645-41001762-3. Tax payer's

identification number 38092) of the monies plus interest assessed quarterly at the rate of 5% per annum, at the amount of USD 3,664,946.90 which equals to UAH 29,293,920.57 subject to the exchange rate of the National Bank of Ukraine as of 24 January 2013 in connection with the respondent's failure to perform its obligations under the contract dated 27 August 2009 between Nasinnia – Agrokhim, LLC and NIBULON SA shall be granted within the territory of Ukraine.

That Nasinnia – Agrokhim, LLC is obliged to compensate NIBULON SA the amount of UAH 107.30 for court fees.

An appeal against this court order may be filed within five days of its announcement to the Court of Appeal of Chernihiv Region via the Sribnyansky District Court of Chernihiv Region. Should the order be rendered in the appellant's absence, the appeal may be filed within five days of the receipt of a copy of this order.