

Peculiarities of GAFTA contracting in Ukraine

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GAFTA standard contracts are now the main instrument in terms of trade operations of Ukrainian agricultural companies in the international grain market. The GAFTA standard contracts allow grain sellers and buyers to simplify and catalyze contract execution.

However, precisely this simplification is the main cause of errors made while concluding the agreements by means of the GAFTA standard forms. This applies to the conclusion of agreements both via exchanging e-mails and in written form. To avoid such errors, as well as to comprehend their consequences, it is important to take into account the use patterns and features of the GAFTA standard contracts in Ukraine.

1. Contract negotiation

English law in general and the principles of application of the GAFTA standard contracts in particular are very focused on the current business practice. Foreign counterparties, which are active in the grain market, tend to the rapid negotiation of basic terms and conditions without relying much upon the written documents but on the partner's credibility. English law promotes that and it does not attach critical value to the written evidence of the expression of will, i.e. letters or agreements with signatures and seals, which are of utmost importance in Ukraine. Even greater importance is given to the content of communications between counterparties.

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When negotiating on the terms and conditions, it is important to pay attention not only to the basic commercial terms (price, product characteristics, a place of delivery, etc.) but also to other conditions (e.g., shipment instructions). The point is that the simplified procedure for executing agreements in English law may lead to the recognition of the conclusion of the contract, if the parties agree on the basic terms. Other conditions may be recognized by the arbitration as non-affecting the ability to execute the agreement. In this case, one will have to fulfill the obligations, even if such conditions have not been agreed upon by the

parties, and their performance will entail significant costs and losses.

The application of GAFTA standard contracts is primarily aimed at exempting the trading parties from the description in the contracts and agreeing on basic terms of trade (delivery basis, weighing conditions, extension of shipping period, consequences of the failure to meet commitment, notification procedure, force majeure). In the GAFTA standard contracts, the section on force majeure is referred to as "prevention of fulfillment", and the "force majeure" is used for the general definition of such cases ("Event of Force Majeure"). Such is time-saving, as the parties have to email only a table with the list of the essential terms, add a reference to the standard form number (for example, governing contract: GAFTA 78UA) and the transaction is deemed completed.

However, when concluding such agreements, please keep in mind that GAFTA standard contracts are not regulations and are subject to frequent changes. GAFTA closely monitors commercial turnover trends and aligns standard contracts with them. With the 2018 Guide in hand, you are likely to be wrong about the terms you agreed to. And as a general rule, it is the wording in force at the time of the conclusion of the contract that applies to the relationship between the parties to the contract.

2. Contract conclusion

The subordination of the GAFTA standard contracts allows the parties to a trading operation to avoid the exchange of signed and sealed paper copies of the contract. Typically, such trade operations are executed by exchanging letters that contain an offer and an acceptance. However, the content of such letters may seem arbitrary only at first glance.

As a matter of practice of the courts of England and Wales, in order to be legally binding, contracts, regardless of their form, shall contain the following elements:

- the intention of the parties to enter into legal relations;
- an offer from one party that may be accepted by another party;
- acceptance of such an offer by the other party;
- a mutual promise of the parties to provide each other with something of value to the other party ('consideration').

In practice, this means that in addition to the standard table form with the terms and references to the GAFTA standard form number, emails shall contain legal wording, which, in fact, turn the correspondence into a full-fledged contract.

For example, when sending the table form with the basic conditions by email, the seller shall indicate the following wording in the letter:

"Confirm our side and pls confirm your side following business agreed with you earlier. By accepting this offer Buyer/Seller confirmed all mentioned details and confirmed signature of contract (copy and original) within 10 days from date of this confirmation."

When responding to such a letter, the following nuance shall be taken into account: in order to confirm the conclusion of such an agreement, it is enough to respond to this letter showing consent by any of the means.

The agreement will not be concluded only in the case if the letter of response contains:

- the amended basic conditions;
- the direct warning that this letter is not a confirmation of the agreement.

On the one hand, this nuance shall be taken into account in order not to enter into an agreement "inadvertently". Usually, it is sufficient for the standard form of the letter to contain the wording "This letter is for reference only and it is neither an acceptance nor an offer and it cannot be considered as an intention to enter into a contract."

On the other hand, this nuance shall be taken into account from the opposite in order not to give the other party the opportunity to withdraw from the contract, referring to its non-conclusion. To do this, you need:

- to check the entire text of the letter from the counterparty (including the auto text, the text under the signature in small print) to ensure that it does not contain the abovementioned wording;
- to require unambiguous confirmation (e.g., the word 'confirmed').

3. Verification of the representatives' credentials

When concluding contracts in a simplified manner, it is important to have confirmation that the contract has been signed by an authorized representative of the counterparty. It often happens that the Seller (in Ukrainian practice it is less often the Buyer) is a separate unit of the company, which according to its position under Ukrainian law has no authority to enter into contracts on behalf of the parent company. Moreover, the company's constituent documents may impose restrictions on the conclusion of agreements (in terms of the type or amount of the contract) or a special procedure for corporate approval (decisions of the meeting of participants, supervisory board, collective executive body of the company, etc.).

Typically, such risks are covered by including the following wording in the text of the offer: "By accepting this offer you confirm that all necessary resolutions and decisions from the corporate body were adopted, with unconditional authorization of you to accept the following deal".

This wording will by all means be taken into account by the arbitrage when considering the dispute over the agreement. Still, it is advisable to pre-sign a framework agreement between the Seller and the Buyer, that will specify:

- email addresses to be used by the parties for legal notices;
- documentary evidence of the authorities of the party representatives who will be entitled to send such notices;
- guarantees that access to the email addresses used by the parties for sending and receiving legal notices will be granted exclusively to the authorized persons.

4. Dispute resolution

In the event of a dispute over the agreements with the application of GAFTA standard contracts, the parties have the right to apply to the Professional

Arbitrators Tribunal, which is formed and administered by GAFTA. The notice on the use of arbitration is included into all the GAFTA standard contracts. The arbitration procedure is governed by the rules which are established by GAFTA in effect at the time of the conclusion of the agreement, which is the subject of the dispute. The parties may amend the arbitration notice, but as a rule they do not.

The dispute is considered under English law. The GAFTA standard contracts contain a special stipulation that the relations of the parties to these contracts are not subject to the basic international legal acts that traditionally regulate relations under international private agreements.

The arbitrators are usually professional agro-traders rather than lawyers. Please take into account the following important nuance: although arbitrators have relevant knowledge in the field of law, the ground for decision-making lies in their experience in commercial practice.

Arbitration decisions may be disputed in the Board of Appeal, which is established for this purpose. The Board of Appeal reconsiders the case and has the right to sustain the decision of the arbitral tribunal of first instance, modify or cancel it.

The decision of the Board of Appeal may be disputed in English courts but this requires the dispute to be based on legal issues, as well as on significant violations (abuse of arbitration power, preconception of arbitrators, etc.).

The GAFTA arbitration awards may be enforced in Ukraine. This possibility is provided by Article 390 of the Civil Procedural Code of Ukraine in combination with the provisions of the New York Convention dated 10 June 1958, on the Recognition and Enforcement of Foreign Arbitral Awards.

However, from the international trade perspective, the defaulter posting mechanism used by GAFTA is more effective. This mechanism provides that in the event that a company refuses to comply with an arbitration award, GAFTA may publish a relevant notice on its website and send such information to GAFTA members. Given that the reputation and trust between the parties is the backbone of the simplified trade procedure, such information may significantly affect the trading operations of the company that ignores the GAFTA arbitration award.

5. Practical insights

All in all, several basic principles should be followed in order to avoid errors and their consequences when concluding agreements in the international grain market using the GAFTA standard contracts:

1) One should execute framework agreements with counterparties, which determine the rules for concluding current agreements using GAFTA standard contracts, in particular:

- the procedure for confirming the authority of the parties' representatives;
- the email usage mode, used for exchanging legally binding notices (authorization of the email address);
- legal wording that will indicate the intentions of the party: an approval, a new offer, withdrawal from the agreement, etc.;
- the notice mode on the change of representatives and their powers;

- the procedure and cases of exchange of written copies of agreements concluded by means of the exchanging emails;
- the mode and status of agreements concluded by exchanging emails prior to the moment of written copies exchange.

2) Before starting the procedure on the current conclusion of agreements in a simplified manner, one should obtain documentary evidence of the authority of representatives who will have access to the authorized email;

3) Prior to confirming agreements with the reference to a GAFTA standard contract, one should check its version at the time of confirmation;

4) One should ensure that letters not used to confirm agreements contain the wording "This letter is for reference only and it is neither an acceptance nor an offer and it cannot be considered as an intention to enter into a contract."

Reference: The GAFTA standard contract is a standard form of a trade contract developed by the International Grains and Feed Trade Association (GAFTA). These forms are derived on the basis of the current commercial practices in the grain market. The main criteria for their determination are the basis of supply, different methods of transportation of goods, region or country of origin (for example, the GAFTA standard contract 78UA has been developed for Ukraine), and the specifics of a particular type of agricultural products. The standard forms of the GAFTA contracts determine most of the technical terms of the agreements such as: conditions of goods weighing, vessels' nomination, extension of the shipment period, terms of delivery documents, insurance, unloading, breach of contract, force majeure, etc. More than 80% of grain contracts in the world are concluded on the basis of such contracts. The GAFTA standard contracts are governed by English law. Such forms may be used by the parties to the agreements regardless of their membership in GAFTA.