

ARBITRATION IN INTERNATIONAL SEEDS AND OIL TRADE: FOSFA

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I. INTRODUCTION

Russia and Ukraine are the world's largest producers of sunflower oil, accounting for 73% of the global supply according to the Council of Palm Oil Producing Countries.¹ Turkey, the world's largest sunflower importer, imports mainly from Ukraine and Russia. According to the data of the Agricultural Economy Research Institute of the Ministry of Agriculture and Forestry, in the 2020-2021 season, Turkey realized 32.4% of the world's sunflower imports. The EU ranks second after Turkey with 27.8%. Unfortunately, the tension between Ukraine and Russia is affecting crude oil imports in a negative way to a large extent. Under such circumstances disputes become inevitable.

Federation of Oils, Seeds and Fats Associations (“**FOSFA**”) had crucial importance in concern with international seeds and oil trade since this organization was established in 1863 in London with the sole purpose of protecting and promoting the oil, seed, and fats trade in the world. FOSFA consists of three bodies that affect the international trade world: first of all, it focuses on protecting the business, secondly, it drafts standard pro forma contracts and lastly, it administers arbitrations and arbitration appeals for resolving disputes arising out of contracts for the trade in oilseeds, oils, and fats and edible nuts.

¹ <https://www.just-food.com/special-focus/ukraine-crisis/russia-imposes-export-quota-on-sunflower-oil-bans-seedshipments/#:~:text=Russia%20and%20Ukraine%20are%20the,organisation%20based%20in%20Jakarta%2C%20Indonesia.>

Many of international commodity disputes are subject to FOSFA, thus this paper aims to bring light to the features of arbitration under FOSFA rules.

II. ARBITRATION TERMS

2.1. Arbitration Clause

As mentioned above FOSFA drafts pro-forma contracts for international seeds, oil and fats trade in the world. Currently, there are more than 50 types of contracts that focus on different commodities and delivery terms. According to FOSFA, 85% of trades are made under these contracts.² For instance, Contract no. 53 is a draft for the sale of vegetable and marine oil based on FOB terms while Contract no. 54 focuses on the same commodity but on CIF terms.³

FOSFA contracts already provide that any possible dispute between parties will be resolved under FOSFA Rules of Arbitration and Appeal (“**FOSFA Rules**”). This type of FOSFA arbitration procedure is also known as mandatory arbitration. The second type of FOSFA arbitration is voluntary where parties can opt for FOSFA arbitration voluntarily.

FOSFA arbitration clause provides that disputes are governed by English law and the permanent seat of arbitration is England. The arbitration is subject to FOSFA Rules by nature however it should be noted that there are several versions of the rules. The latest update was on 1 April 2021 but the dispute will be resolved according to the rules at the time of the contract date but not at the time of the dispute. Furthermore, FOSFA provides alternative rules for Small Claims Single Tier Rules of Arbitration, and Rules of Arbitration for Brokerage Commission and Interest.

2.2. Time Limits

In FOSFA Rules, there are two types of claims which constitute the base for determining a time limit within which a party must commence the arbitration procedure.

If the dispute is arising out of the quality and/or condition of goods (Article 1/a), the time limit is no later than 90 consecutive days from completion of discharge of the goods in CIF, CIPFO, C&F, and similar contracts or completion of delivery in FOB, Ex-tank, Ex-mill, and Ex-store contracts.

If the dispute is related to monies due or other reasons than quality and/or condition (Article 1/b) the time limit is no later than one year after the expiry of the contract period of shipment or of the date of completion of final discharge of the goods whichever period shall last expire and not later than one year after the last day of the contractual delivery period on any other terms.

2.3. Two-Tier System

Similar to the arbitration system of the Grain and Feed Trade Association (“**GAFTA**”), FOSFA also provides a two-tier arbitration facility. According to Article 7/a, each party may lodge a notice of appeal to FOSFA within 28 days from the date of the first instance award was made. Within 21 days of lodging the appeal, the appellant shall provide its reasons for the appeal. In contrast with the first tier, the Appeal Panel consisting of 5 members is appointed by the Federation (Article 8/a). Furthermore,

² <https://www.fosfa.org/contracts/>

³ <https://www.fosfa.org/wp-content/uploads/2022/06/Contracts-List-April-2021-with-links.pdf>

during the appeal procedure parties may only be represented by a listed representative of FOSFA and shall not be represented by someone who is engaged in legal practice unless the Board of Appeal decides otherwise (Article 9/a). It should be noted that an appeal includes a full review of the case and parties are allowed to submit new evidence.⁴

Since FOSFA contracts provide that the applicable law shall be English law, English courts also have jurisdiction in relation to FOSFA arbitral awards. Thus, even after the appeal of the arbitral award before the Board of Appeal in FOSFA parties may still apply for an appeal to the courts of England and Wales under the English Arbitration Act 1996. However, an award may be only challenged before the English courts on limited grounds such as lack of substantive jurisdiction (Act, section 67) or serious irregularity (Act, section 68). These provisions are mandatory and cannot be excluded by the agreement of the parties (Act, section 4/1). Under the Act, any challenge to an arbitral award must be filed within 28 days of the date of award or within 28 days of the parties being notified of the outcome of any arbitral appeal, review, or correction to the award or an additional award (Act, section 70/3). It should be noted that such an appeal is very rare and the grounds can only be related to matters of law.

2.4. Costs

FOSFA arbitration is relatively cheaper than other commercial arbitrations in England. The claimant pays a deposit of a maximum £5,000 towards the arbitration costs upon filing the claim. The first-tier arbitral award costs depend on several factors such as the basic charge of the award, the pages of the award, and also the hourly rate of the arbitrators. In the second tier, the deposit shall be a maximum £10,000. This fee schedule is not prescribed based on the quantum of the dispute like other international arbitration institutions which renders FOSFA arbitration rather cheap even for complex and highly valued disputes. The costs of the arbitration procedure are borne by the losing party. In contrast with the GAFTA Arbitration, FOSFA does not prohibit recovering legal costs from the losing party. Thus, recovery of legal costs is possible based on several factors such as the conduct of the parties and the proportionality of the costs to the claim.

III. ENFORCEMENT OF ARBITRAL AWARDS

Generally, FOSFA arbitral awards are abided by the parties voluntarily. However, in case of non-compliance by a party, the Federation has the right to notify all members throughout the world that that party refuses to execute the award (Article 11/d). This is an effective measure where the reputation of the companies is rather important. Thus, in practice, a trade member will have a more difficult time in the business world if such dishonorable conduct becomes known to others.

The arbitral award may be enforced at the place of incorporation of a company or at the location of its assets. This procedure is simplified in particular by the New York Convention which applies to the recognition and enforcement of foreign arbitral awards. The Convention allows that an arbitration award rendered in one of the signatory countries to the Convention may be enforced and executed in any other country that ratified the Convention which includes 156 countries at the moment. In case of a FOSFA award, the United Kingdom is a signatory of the Convention and English arbitral awards are enforced accordingly. Thus, it is clear that a FOSFA award will be prima facie enforceable in most jurisdictions.

In conclusion, the enforcement measures of FOSFA along with international conventions on legal enforcement ensure a very high level of compliance with FOSFA awards which is estimated around 95% by experts.⁵

⁴ <https://danihrstich.com/en/fosfa-arbitration-general-guide/>

⁵ <http://palmoilis.mpob.gov.my/publications/OPIEJ/opiejv2n2-16.pdf>

IV. ADVANTAGES OF FOSFA

FOSFA arbitration is a complex multi-level system and is well-known as a forum for dispute resolution worldwide for grain, oils, seeds, fats, and other similar commodities. Hence opting for FOSFA contracts and arbitration has its own advantages such as:

- FOSFA has its own list of arbitrators who have experience in handling commodity trade and familiarity with the maritime community which guarantees high-quality dispute resolution and arbitral awards.
- As mentioned above the costs of the dispute are much less than other arbitration institutions or even state courts.
- Generally, a dispute resolution at FOSFA is relatively faster than at other non-specialized arbitrations and court proceedings which makes the procedure more efficient.
- FOSFA contracts are subject to English law which provides an arbitration-friendly perspective based on the legislation and courts' practice.
- There is a limited right of appeal in FOSFA arbitration which makes the enforcement process quicker and easier than other arbitral procedures.
- As a result of the nature of arbitration the procedure is confidential for both parties.

V. CONCLUSION

To summarize, the FOSFA arbitration system is an effective and affordable forum for dispute resolution in relation to worldwide trade in commodities. However, companies that wish to incorporate a FOSFA arbitration clause into their contracts must be fully aware of all the aspects of the regulatory processes and the relevant English law.

Gonen Law Office has special expertise in arbitral proceedings under international arbitration institutions such as FOSFA both as counsels and as arbitrators. For more information, please contact: info@gonen.com.tr.