

Translucent barriers that GAFTA award holders encounter when seeking to enforce them: the public policy exception as GAFTA's Achilles heel

Barreras translúcidas que se encuentra la parte vencedora de un laudo arbitral GAFTA cuando intenta ejecutarlo: la excepción de orden público como el talón de Aquiles de GAFTA

MÓNICA BENAVENTE NORZA*

*Lecturer on the Master's Degree in Lawyering and Procurement
Universitat Oberta de Catalunya
Legal Director at Keytrade AG*

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Abstract: Compared to awards from other arbitration bodies, obtaining a GAFTA award offers the prevailing party added value by increasing commercial pressure on the defaulters via the publication of unpaid award references and defaulters' names on a defaulter list. However, in cases in which a defaulter still refuses to honour their obligations under an award, the winning party has no option but to enforce the award under the umbrella of the New York Convention. In these cases, defaulters frequently raise the public policy exception in an attempt to hamper the execution of the award or to make it very expensive and time-consuming. This paper seeks to better comprehend the reasons behind this situation and proposes alternatives for improving it.

Keywords: Arbitration, GAFTA, New York Convention, Enforcement, Public Policy.

Resumen: En comparación con los laudos de otros órganos de arbitraje, la obtención de un laudo GAFTA ofrece a la parte vencedora un valor añadido al aumentar la presión comercial sobre los incumplidores mediante la publicación de las referencias de los laudos impagados y los nombres de los morosos en una lista de morosos. Sin embargo, en los casos en que un incumplidor sigue negándose a cumplir sus obligaciones en virtud de un laudo, la parte vencedora no tiene otra opción que ejecutar el laudo al amparo de la Convención de Nueva York. En estos casos, los incumplidores suelen alegar la excepción de orden público para intentar obstaculizar la ejecución del laudo o hacerla muy costosa y lenta. Este artículo trata de comprender mejor las razones que explican esta situación y propone alternativas para mejorarla.

Palabras clave: Arbitraje, GAFTA, Convención de Nueva York, Ejecución, Orden Público.

Summary: I. Introduction. II. Comparative analysis of the dispute resolution services offered by the major grain associations in trade disputes: special reference to GAFTA. III. The public policy exception under the New York Convention as GAFTA's Achilles heel. IV. Conclusions.

*Lecturer on the Master's Degree in Lawyering and Procurement. Universitat Oberta de Catalunya, Spain.
mbenavente@uoc.edu. Legal Director at Keytrade AG.

I. Introduction

1. The world is facing increasingly turbulent times. The COVID-19 outbreak, climate shocks and conflicts¹, including Russia's unjustified invasion of Ukraine, have aggravated the global food crisis,² creating a great deal of volatility in the grain market³ and a rise in the number of conflicts in this market.⁴

2. "The unrevised forecast for world grain trade in 2023-24 is around 466 million tonnes"⁵. The ratio of organizations whose aim is promoting and facilitating the performance of the supply chain for grain products is not high when compared to this amount. The most important are the Grain and Feed Trade Association ("GAFTA"), founded in 1896 and with over 1,900 members in 100 countries⁶; the National Grain and Feed Association ("NGFA"), also founded in 1896, with over 780 member companies⁷; the North American Export Grain Association ("NAEGA"), established in 1912⁸; the Corn Refiners Association (CRA), founded in 1913 and comprising seven member companies⁹; the South African Cereals and Oilseeds Trade Association ("SACOTA"), founded in 1930 and operating within South Africa and the SADC¹⁰ region¹¹; the National Corn Growers Association ("NCGA"), founded in 1957 and with 50 affiliated state organizations¹²; *Cámara de la Industria Aceitera de la República Argentina*, founded in 1980, and *Centro Exportador de Cereales*, founded in 1949 ("CIARA-CEC")¹³; *Comité du Commerce des céréales, aliments du bétail, oléagineux, huile d'olive, huiles et graisses et agrofournitures* ("COCERAL"), founded in 1958 and whose members represent some 3,000 companies¹⁴; the U.S. Grains Council ("USGC"), founded in 1960 and comprising over 140 organizations¹⁵; *Associação Nacional dos Exportadores de Cereais* ("ANEC"), formed in 1965 and with 40 associated companies¹⁶; the Canada Grains Council ("CGC"), formed in 1969¹⁷; Grain Trade Australia¹⁸ ("GTA"), formed in 1991

¹ See WORLD FOOD PROGRAMME, *A global food crisis*, accessed on 10 June 2024 (available at <http://www.wfp.org/global-hunger-crisis>).

² See EUROPEAN COUNCIL, COUNCIL OF THE EUROPEAN UNION, *Food security and affordability*, accessed on 10 June 2024 (available at <http://www.consilium.europa.eu/en/policies/food.security-and-affordability/>).

³ "Grains Price Index is at a current level of 116.05, down from 121.03 last month and down from 145.53 one year ago. This is a change of -4.12% from last month and -20.26% from one year ago." See YCHARTS, *Grains Price Index Monthly Insights: Commodity Markets Review*, accessed on 15 March 2024 (available at http://ycharts.com/indicators/grains_index_world_bank).

⁴ GAFTA recorded an average of 799 cases annually between 2014 and 2018. See 7KBW, *London leads in maritime arbitration*, accessed on 15 March 2024 (available at <http://7kbw.co.uk/london-leads-in-maritime-arbitration/>).

⁵ See C. LYDDON, "Global grain trade review" in *world-grain.com*, 11 July 2023, accessed on 24 May 2024 (available at <https://www.world-grain.com/articles/19242-global-grain-trade-review#:~:text=The%20unrevised%20forecast%20for%20world,foreseen%20for%20the%20Russian%20Federation%2C>).

⁶ See GAFTA, *Promoting international trade*, accessed on 26 May 2024 (available at <http://www.gafta.com/about>).

⁷ See NATIONAL GRAIN AND FEED ASSOCIATION (NGFA), accessed on 30 May 2024 (available at <http://www.ngfa.org>).

⁸ See NORTH AMERICAN EXPORT GRAIN ASSOCIATION (NAEGA), accessed on 30 May 2024 (available at <https://naega.org/>).

⁹ See CORN REFINERS ASSOCIATION (CRA), About CRA, accessed on 30 May 2024 (available at <http://corn.org/about-cra/>).

¹⁰ Southern African Development Community.

¹¹ See SOUTH AFRICAN CEREALS AND OILSEEDS TRADE ASSOCIATION (SACOTA), *About SACOTA*, accessed on 30 May 2024 (available at <http://www.sacota.co.za/about-us/>).

¹² See NATIONAL CORN GROWERS ASSOCIATION (NCGA), accessed on 30 May 2024 (available at <https://ncga.com/>).

¹³ See CÁMARA DE LA INDUSTRIA ACEITERA DE LA REPÚBLICA ARGENTINA, accessed on 30 May 2024 (available at <http://ciaracec.com.ar/ciara>).

¹⁴ See COMITÉ DU COMMERCE DES CÉRÉALES, ALIMENTS DU BÉTAIL, OLÉAGINEUX, HUILE D'OLIVE, HUILES ET GRAISSES ET AGROFOURNITURES (COCERAL), accessed on 30 May 2024 (available at <https://www.coceral.com>).

¹⁵ See U.S. GRAINS COUNCIL (USGC), *About USGC membership*, accessed on 2 June 2024 (available at <https://grains.org/membership/about-usgc-membership/>).

¹⁶ See ASSOCIAÇÃO NACIONAL DOS EXPORTADORES DE CEREAIS (ANEC), *Anec history*, accessed on 2 June 2024 (available at <https://anec.com.br/article/historia-anec>).

¹⁷ See CANADA GRAINS COUNCIL (CGC), accessed on 2 June 2024 (<https://canadagrainscouncil.ca>).

¹⁸ Formerly known as NATIONAL AGRICULTURAL COMMODITIES MARKETING ASSOCIATION ("NACMA"). "GTA Members are drawn from all sectors of the grain value chain from production to domestic end users and exporters." See GRAIN TRADE AUSTRALIA, *GTA Membership*, accessed on 2 June 2024 (available at <https://www.graintrade.org.au/membership>).

and with over 280 member organisations¹⁹; the Agricultural Retailers Association (“ARA”)²⁰, formed in 1992 and with 234 companies listed as members²¹; the China Grain Business Association (“CGBA”), established in 1994²²; the China National Association of Grain Sector (“CNAGS”), founded in 1996 and with 2,582 members²³, the Eastern Africa Grain Council (“EAGC”), registered in 2006 and with over 600 members²⁴ and the U.S. Soybean Export Council (“USSEC”), which was formed in 2006²⁵.

3. GAFTA is a worldwide organization promoting international trade in agricultural commodities, spices and general produce. Its members are fairly diverse and fall within the general categories of importers, exporters, brokers, dealers, manufacturers, processors of raw materials for human and animal consumption, millers, brewers, distillers, analysts, superintendents, fumigation operators, forwarding agents, arbitrators, banks and solicitors. The annual membership fee ranges from GBP 1,700 for trading principals in agricultural commodities and general produce to GBP 50 for students.²⁶ With the aim of facilitating trading, GAFTA provides a vast array of standard contracts for the delivery and trading of grains and general feedingstuffs²⁷. GAFTA provides its members with many services but is chiefly active

¹⁹ See GRAIN TRADE AUSTRALIA (GTA), *Submission Grain Trade Australia to Review of the National Freight & Supply Chain Strategy*, 7 September 2023, accessed on 10 June 2024 (available at <https://www.infrastructure.gov.au/sites/default/files/documents/nfscs--grain-trade-australia.pdf>). See also GRAIN TRADE AUSTRALIA, *Membership List* at 30 June 2021. See also GRAIN TRADE AUSTRALIA, *Membership List for website 30 June 2021.xlsx*, accessed on 2 June 2024 (available at <https://www.graintrade.org.au/sites/default/files/Membership/Membership%20List%20for%20website%2030%20June%202021.pdf>).

²⁰ See AGRICULTURAL RETAILERS ASSOCIATION (ARA), accessed on 2 June 2024 (available at <https://www.aradc.org>).

²¹ Between retailers, suppliers and affiliates. See AGRICULTURAL RETAILERS ASSOCIATION, ARA member, accessed on 5 June 2024 (available at <https://www.aradc.org/members>).

²² See CHINA GRAIN BUSINESS ASSOCIATION (CGBA), accessed on 5 June 2024 (available at www.chinagrains.org.cn/wzfcms/html/chinese/index.html).

²³ “It is a national social organization comprised of pillar grain and oil enterprises, public institutions and social groups.” See CHINA NATIONAL ASSOCIATION OF GRAIN SECTOR (CNAGS), *About CNAGS*, 13-15 May 2024, accessed on 10 June 2024 (available at <http://www.cigoex.com/gtexpo/f/cms/tocontent?contentid=6c53c6871f2e4e58b70bd0b6f487b08f>).

²⁴ See EASTERN AFRICA GRAIN COUNCIL (EAGC), *Membership*, accessed on 10 June 2024 (available at <http://eagc.org/membership>).

²⁵ See U.S. SOYBEAN EXPORT COUNCIL (USSEC), accessed on 10 June 2024 (available at <https://ussec.org>).

²⁶ See GAFTA, *MEMBERSHIP APPLICATION FORMS AND FEES*, accessed on 10 June 2024 (available at <https://www.gafta.com/join-gafta>). The annual fee is GBP 600 for trading principals in spices and general produce; GBP 900 for brokers who do not trade as principals; GBP 1300 for members who are superintendents and surveyors; GBP 150 for individuals engaged or who have been engaged in the trade (other than Qualified Arbitrators and Qualified Mediator Members); GBP 650 for analyst laboratories; GBP 900 for professional firms, agro supply and service companies who provide services to the trade; GBP 300 for members of branches (whose parent company is in the same country); GBP 800 for fumigators and GBP 150 for individuals not engaged in the trade.

²⁷ For the shipment of feeding stuffs. See GAFTA: *GAFTA Contract No. 1*, for Chinese goods. *GAFTA Contract No. 2*, for UK produced cakes and/or meals. *GAFTA Contract No. 4*, for pet food raw materials. *GAFTA Contract No. 5*, for pet food raw materials. *GAFTA Contract No. 6*, for locust beans. *GAFTA Contract No. 8*, for imported feeding meat meal/meat & bone meal. *GAFTA Contract No. 9*, for fish meal. *GAFTA Contract No. 10*, for imported feeding stuffs. *GAFTA Contract No. 15*, for goods from Australia. *GAFTA Contract No. 18*, for good from Australia. *GAFTA Contract No. 19*, for intra-Asia feedings stuffs. *GAFTA Contract No. 21*, for intra-Asia supply terms for feedingstuffs. *GAFTA Contract No. 23*, for pulses for human consumption. *GAFTA Contract No. 24*, for pulses for feed. *GAFTA Contract No. 25*, for Canadian & USA grain. *GAFTA Contract No. 27*, for Canadian and Unites States of America grain. *GAFTA Contract No. 30*, for Canadian and Unites States of America grain. *GAFTA Contract No. 31*, for grain from Argentina. *GAFTA Contract No. 38*, for feeding stuffs from Argentina. *GAFTA Contract No. 39*, for grain from Argentina/Uruguay. *GAFTA Contract No. 40*, for grain. *GAFTA Contract No. 41*, for South American offals. *GAFTA Contract No. 43*, for goods from Brazil. *GAFTA Contract No. 45*, for inland waterways terms. *GAFTA Contract No. 47*, for the shipment of goods from Central & Eastern Europe. *GAFTA Contract No. 48*, for delivery of goods Central and Eastern Europe. *GAFTA Contract No. 49*, for Baltic grain. *GAFTA Contract No. 54A*, for South African grain. *GAFTA Contract No. 59*, for South African grain. *GAFTA Contract No. 60*, for South African grain. *GAFTA Contract No. 61*, for the Mediterranean and Morocco cargoes. *GAFTA Contract No. 62*, for general grain. *GAFTA Contract No. 64*, insurance rules. *GAFTA Contract No. 72*, malting Barley terms. *GAFTA Contract No. 76*, goods by rail and/or road. *GAFTA Contract No. 78*, for goods by rail. *GAFTA Contract No. 78UA*, for UK and Ireland grain. *GAFTA Contract No. 79*, for United Kingdom and Ireland grain. *GAFTA Contract No. 79A*, EU grain. *GAFTA Contract No. 79B*, for EU grain. *GAFTA Contract No. 80*, for EU grain. *GAFTA Contract No. 80A*, for general goods. *GAFTA Contract No. 81*, general contract. *GAFTA Contract No. 82*, for transshipment/re-shipment of grain in bulk. *GAFTA Contract No. 83*, for transshipment. *GAFTA Contract No. 85*, for organic goods to the European Union. *GAFTA Contract No. 87*, for container terms. *GAFTA Contract No. 88*, for full container loads. *GAFTA Contract No. 89*, for full container loads. *GAFTA Contract No. 90*, for quality terms for feedingstuffs. *GAFTA Contract No. 93*, for arrival terms for

in four main areas: contracts and dispute resolution; trade policy and legislation issues, quality assurance codes of practice and training and education.

4. The GAFTA dispute resolution mechanism through arbitration works effectively and is widely accepted in the grain commodity market, as Section II of this paper shows. However, if a GAFTA award is not honoured by the non-prevailing party and the prevailing party needs to execute it in the non-prevailing party's country under the umbrella of the New York Convention, the public policy exception appears to be its Achilles heel, as Section III shows. Section IV contains conclusions regarding this scenario.

II. Comparative analysis of the dispute resolution services offered by the major grain associations in trade disputes: special reference to GAFTA

5. Only three of the most important grain trade organizations listed above provide an in-house arbitration system to solve disputes between parties: these are GAFTA, the NGFA and the GTA.

6. While the NGFA is North America's oldest industry-based arbitration system²⁸, over 80% of the international trade in grain is believed to be carried out according to the terms of GAFTA contracts.²⁹ While the NGFA has reported 3,127 arbitration cases in its 127 years of existence, 2,727 have been since 1946³⁰; the GTA reported 75 new cases within a 4-year period (2019-2022)³¹ and GAFTA reported 4,829 new cases and 463 appeals within a period of only 13 years (2010-2023)³².

7. All three organizations are open to arbitrating on all kinds of disputes (member-to-member, member-to-non-member, non-members-to-non-members). At the NGFA, it is compulsory for the resolution of disputes between active members,³³ and at GAFTA and the GTA it is also mandatory for parties with GAFTA or GTA contracts.³⁴

grain. *GAFTA Contract No. 94*, for the arrival of grain in bulk. *GAFTA Contract No. 94A*, for arrival terms for feedingstuffs. *GAFTA Contract No. 95*, for Tapioca, Manioc & Cassava. *GAFTA Contract No. 96*, for North American soybean meal/pellets. See *GAFTA Contract No. 97*, for shipment of North American soya bean meal and/or pellets. *GAFTA Contract No. 98*, for hipro soybean meal/pellets. *GAFTA Contract No. 99*, for feedingstuffs. *GAFTA Contract No. 100*, for shipment of feedingstuffs. *GAFTA Contract No. 100A*, for feedingstuffs – transshipment to UK. *GAFTA Contract No. 101*, for shipment of feedingstuffs. *GAFTA Contract No. 102*, for feedingstuffs to the UK. *GAFTA Contract No. 103*, for feeding fishmeal. *GAFTA Contract No. 104*, for transshipment FOB. *GAFTA Contract No. 106*, for feedingstuffs ex store/silo. *GAFTA Contract No. 109*, for grain ex store/silo. *GAFTA Contract No. 110*, for delivered at destination. *GAFTA Contract No. 111*, for feedingstuffs, free out alongside berth buyers, Denmark. *GAFTA Contract No. 112*, for UK produced marine & animal origin feedingstuffs. *GAFTA Contract No. 113*, for fertilizer. *GAFTA Contract No. 114*, for molasses. *GAFTA Contract No. 115*, for model computer. *GAFTA Contract No. 117*, for feeding fishmeal. *GAFTA Contract No. 118*, for Thai rice. *GAFTA Contract No. 119*, for feedingstuffs in full lash barges. *GAFTA Contract No. 120*, for rice. *GAFTA Contract No. 122*, for biomass products. *GAFTA Contract No. 202*, for biomass products. *GAFTA Contract No. 203*, for biomass products (available at <https://www.gafta.com/All-Contracts#:~:text=Gafta%20develops%20the%20standard%20forms,its%20contracts%20within%20the%20trade>).

²⁸ See NATIONAL GRAIN AND FEED ASSOCIATION (NGFA), *NGFA Arbitration*, accessed on 13 June 2024 (available at <https://www.ngfa.org/arbitration-overview/>).

²⁹ See GAFTA, *All contracts*, accessed on 13 June 2024 (available at <https://www.gafta.com/All-Contracts#:~:text=Gafta%20develops%20the%20standard%20forms,its%20contracts%20within%20the%20trade>).

³⁰ See NATIONAL GRAIN AND FEED ASSOCIATION, *Arbitration decisions*, accessed on 14 June 2024 (available at <https://www.ngfa.org/decisions/>).

³¹ See GRAIN TRADE AUSTRALIA, *Annual Report 2020-21*, accessed on 14 June 2024 (available at <https://www.graintrade.org.au/sites/default/files/Governance/GTA%20Report%202020-21%20Web%20version.pdf>).

³² See A. BUXO, GAFTA Arbitration statistics for 2022/2023 financial year, accessed on 3 July 2024 (available at <https://www.gafta.com/write/MediaUploads/Arbitration/GaftaArbitrationStatistics2023.pdf>).

³³ See NGFA, *NGFA Bylaws*, accessed on 3 July 2024 (available at <https://www.ngfa.org/wp-content/uploads/NGFA-By-laws-10-29-20.pdf>).

³⁴ Each Gafta standard form contract contains an arbitration clause. This clause stipulates that any disputes arising from the contract will be resolved through arbitration, following the Gafta Arbitration Rules and governed by English law. Each GTA standard form contract contains an arbitration clause which stipulates that any dispute arising out of such agreement will be referred to arbitration in accordance with the GTA Dispute Resolution Rules.

8. With regard to arbitration fees, while some trade associations charge a fixed filing fee, others charge a percentage of the amount involved in the dispute (usually with a floor and a cap), and while one imposes the same fee on members and non-members, others charge different (i.e., they are higher for non-members). At the NGFA, members and non-members are subject to the same fee schedule³⁵: the arbitration service fee is 1.5% of the amount of the plaintiff's claim, with the minimum arbitration fee being USD 1,500, and the maximum USD 25,000.³⁶ At the GTA, members and non-members are subject to different filing fees, which are fixed: if the claimant is a member/producer, the fee is USD 560, but if the claimant is a non-member the filing fee increases to USD 840³⁷. At GAFTA, members and non-members are also subject to different filing fees, and non-members have to pay a non-member fee of GBP 1,700, which varies between GBP 12,000 (when both parties are members) to GBP 15,000 when neither party is a member. In 2022-2023, the average GAFTA fee for obtaining an arbitration award under the 125 Rules was GBP 17,433, decreasing to GBP 8,463 under the 126 Rule and increasing to GBP 24,740 should there be an appeal.³⁸ These costs do not include lawyers' fees, which can vary widely depending on the law firm/lawyer representing a company and the seniority of the lawyer/solicitor, but the average fee is around GBP 546 per hour for a solicitor with eight years' experience³⁹. More specifically, in 2023 Hill Dickinson's hourly rates in London were GBP 600 plus VAT for a partner and USD 460 plus VAT for a legal director⁴⁰, while Freshfields Bruckhaus Deringers charged from GBP 315 to GBP 1,495 plus VAT⁴¹. Legal expenses in GAFTA arbitrations can only be recovered from the losing party if the contract between them expressly stipulates this.⁴²

9. The way of selecting and appointing arbitrators for specific cases also varies in these three organizations. While members of the NGFA Arbitration Committee are selected entirely by the NGFA Secretary from the Arbitration Appeals Panel, which is appointed following NGFA bylaws⁴³, at GAFTA and the GTA each party can appoint one arbitrator (in a tribunal of three) and the organization appoints the third⁴⁴.

10. The biggest difference among these three grain organizations is how they proceed, once an award is rendered, to try to protect the rights of the prevailing party, should the non-prevailing party decide not to honour the award and default. While the NGFA (beginning with case no. 1400 in 1946) and the GTA make arbitration decisions available without specifying whether the non-prevailing party defaulted on the award or not, and leaving party confidentiality and the subject of the dispute aside⁴⁵, GAFTA maintains complete confidentiality with regard to the parties in a dispute, the reason for the

³⁵ See Rule 5 NGFA Arbitration Rules, accessed on 3 July 2024 (available at <https://www.ngfa.org/wp-content/uploads/2023-Arbitration-Rules.pdf>).

³⁶ See Rule 2C NGFA Arbitration Rules, accessed on 3 July 2024 (available at <https://www.ngfa.org/wp-content/uploads/2023-Arbitration-Rules.pdf>).

³⁷ See GRAIN TRADE AUSTRALIA. *Schedule 1 – Grain Trade Australia Ltd (GTA) – Dispute Resolution Fees (exc. GST) – Effective 19th December 2022*, accessed on 3 July 2024 (available at https://www.graintrade.org.au/sites/default/files/DRS/GTA_Arbitration_Fees_Schedule_19Dec2022.pdf).

³⁸ See supra 29.

³⁹ See Gov.UK, *Solicitors' guideline hourly rates*, accessed on 3 July 2024 (available at <https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>).

⁴⁰ See HILL DICKINSON, *Private client: Pricing and service information*, accessed on 3 July 2024 (available at <https://www.hilldickinson.com/private-client-pricing-and-service-information>).

⁴¹ See FRESHFIELDS, *UK price transparency disclosure*, accessed on 3 July 2024 (available at <https://www.freshfields.com/en-gb/capabilities/services/employment-incentives-and-pensions/employment-disputes/pricing/#:~:text=The%20basis%20of%20our%20charges,1495%20per%20hour%20plus%20VAT.>).

⁴² See Section 17 of Gafta 125, accessed on 3 July 2024 (available at https://www.gafta.com/write/MediaUploads/Contracts/2023/Sept2023/125_SEPT_2023.pdf).

⁴³ See Rule 5B NGFA Arbitration Rules, accessed on 3 July 2024 (available at <https://www.ngfa.org/wp-content/uploads/2023-Arbitration-Rules.pdf>).

⁴⁴ See Rule 3.2 GAFTA Arbitration Rules No. 125 (available at https://www.gafta.com/write/MediaUploads/Contracts/2023/Sept2023/125_SEPT_2023.pdf).

⁴⁵ See NATIONAL GRAIN AND FEED ASSOCIATION, *Arbitration decisions directory*, accessed on 7 July 2024 (available at <https://www.ngfa.org/decisions/>).

dispute and the content of the award, unless the non-prevailing party defaults. In such cases GAFTA attempts to aid the prevailing party via the GAFTA defaulter process, which closes with the publication of a “Defaulters on Award of Arbitration” list on GAFTA’s website.⁴⁶ The list is only available to members, but GAFTA also publishes the names of the latest defaulters in its Arbitration News section, providing the general public with the bodies’ names and some additional details.⁴⁷

11. As the last measure to force GAFTA defaulters to comply with the terms of their awards, the prevailing party can enforce a GAFTA award in any of the 172 signatory countries of the New York

⁴⁶ “The Gafta defaulter process comprises of two standard form letters which are sent to the party apparently in default with copy to the reporting party. If no settlement is informed to Gafta after the first letter has been sent then a second letter will be sent 3-6 weeks later. If no settlement is made after the second letter then Gafta will request confirmation from the reporting party to bring the name of the party in default to the Gafta Council to seek their approval. Once Council has approved the posting a circular will be sent to all Gafta members informing them of the name and address of the party in default and the Gafta website will be updated to reflect the default.” See GAFTA, *Defaulters on Awards of Arbitration* (available at <https://www.gafta.com/Defaulters-on-Awards-of-Arbitration>). See also GAFTA, *Arbitration news* (available at <https://www.gafta.com/arbitration-news>).

⁴⁷ See GAFTA, *Arbitration news* (available at <https://www.gafta.com/arbitration-news>): Tooley Property Company Limited Langdale House 11 (GA-2024-21, 25 September 2024); Ayhan Sezer Yag Ve Gida End Tic Ltd Sti Kultur Mah. Ahmet Adnan (GA-2024-19, 11 September 2024); Shri Mittal Agritech Pvt Ltd 211 Milinda Manor, RNT Marg. (GA-2024-18), 3 September 2024); Eko Turka Tekstil Tarim Hayvancilik Tasimacilik Sanayi. (GA-2024-17, 22 August 2024); Rufahia Trading And Logistics Limited Office No. (GA-2024-16, 12 August 2024); Prometey Agri Fzco Dubai Silicon Oasis, Ddp, Building A2. (GA-2024-14, 18 July 2024); Euro Comm Limited 19 St. Mark Street Valleta, VLT136. (GA-2024-12, 16 July 2024); SOACAM SA & NANA BOUBA GROUP SA (Societe Alimentaire Du C. (GA-2024-12, 12 June 2024); Jianguo Coolnaal Food Co. Ltd Room 1510, No.6 Jiaye Fortune. (GA-2024-11, 10 June 2024); La Comminter s.r.l.s Piazza U Giordano 37 71121 Foggia I. (GA-2024-10, 21 May 2024); KULBERG TRADING SA Switzerland, 1006, Lausanne Rue du Simpl. (GA-2024-09, 15 May 2024); Cosmopolitan Trade and Development (GA-2024-07, 10 April 2024); Erser Grup Tarim Urunleri San. Ve Tic. (GA-2024-06, 18 March 2024); Nabil Feed Mills Limited (GA-2024-05, 4 March 2024); CRIST-VALG S.R.L. (GA-2024-02, 13 February 2024); TIS-ZERNO SERVICES LIMITED (GA-2024-01, 25 January 2024); SARL Complexe Agro Alimentaire El Kseur (GA-2023-23, 21 December 2023); Platinum Corporation FZE (GA-2023-22, 14 December 2023); Santa Siena Exports LLC (GA-2023-21, 22 November 2023); QAM7 DMCC (GA-2023-19, 26 October 2023); LLC ‘Rusich- Export’ (GA-2023-18, 6 October 2023); White Flour for Grain Grinding (GA-2023-17, 21 August 2023); LLC Concern Prometey (GA-2023-15, 26 July 2023); Sarl El Alf (GA-2023-12, 12 July 2023); Feedmix – Feed Industry Ltd (GA-2023-09, 15 May 2023); BELOR ROMANIA SA (GA-2023-07, 5 May 2023); Agrostudio Group Limited (GA-2023-06, 24 April 2023); Risoil Overseas LTD (GA-2023-05, 22 March 2023); Melike Unlu Gida Tekstil Ve Orman Urunleri Ith-Ihr (GA-2023-04, 21 February 2023); Prometey Swiss SA and / or LLC Concern Prometey (GA-2023-03, 23 January 2023); Moinho Canueis S.A (GA-2023-02, 4 January 2023); Dalian Shengfang Organic Food Co. Ltd (GA-2022-25, 16 December 2022); IDI Trading AG 5 (GA-2022-23, 4 November 2022); Saam International FZE (GA-2022-21, 1 November 2022); Asia & Africa General Trading LLC (GA-2022-20, 8 September 2022); Sugó-Gabona Kft (GA-2022-19, 1 September 2022); Ozalp Toros Gida San. Ve Tic Ltd. (GA-2022-18, 18 August 2022); Agrotex S.R.L. (GA-2022-17, 29 July 2022); Van Sanh Investment Development Corporation (GA-2022-15, 1 June 2022); Societe Difezi & Fils SARL - Import Export (GA-2022-13, 27 April 2022); Maxgrain International Limited (GA-2022-12, 11 April 2022); Sailor Exports Limited (GA-2022-10, 23 March 2022); Agrozan Tarim Gida Urunleri Ithlat Ihracat Sanayi Ve Ticaret Ltd. (GA-2022-09, 21 March 2022); Agritera OU (GA-2022-08, 16 February 2022); Semillas Y Productos De Mexico SA DE CV (GA-2022-07, 11 February 2022); Agrozan Tarim Gida Urunleri Ithlat Ihracat Sanayi Ve Ticaret Ltd (GA-2022-05, 7 February 2022); Maxgrain International Limited (GA-2022-04, 21 January 2022); Agrofeed Ltd (GA-2022-02, 14 January 2022); Nortrop Ventspils LDT SIA (GA-2022-02, 12 January 2022); AST Global Trading Limited (GA-2021-29, 24 December 2021); Aman Feed (GA-2021-27, 9 December 2021); RAJ GROWIMPEX LLP (GA-2021-26, 7 December 2021); AGROKHEM-PARTNER LLC (GA-2021-24, 30 September 2021); TB Fruit Polska z Organizacjona Odpowiedzialnoscia SKA (GA-2021-23, 20 September 2021); Eestivili AS (GA-2021-22, 16 September 2021); Nikhil Pulses Pvt Ltd (GA-2021-19, 6 September 2021); Asia & Africa General Trading LLC (GA-2021-17, 3 August 2021); Regina Food Industries S.A.E (GA-2021-15, 6 July 2021); Alfoldgabona Kft (GA-2021-14, 18 June 2021); Vietnam Agricultural Joint Stock Company (GA-2021-13, 10 June 2021); Mergen Commodities Trade SA (GA-2021-11, 19 May 2021); Bashan Tarimsal Urn Paz San Ve Dis Tic A.S (GA-2021-10, 10 May 2021); Ilta Agribusiness DMCC (GA-2021-09, 29 April 2021); Daneh Gostar Meshkat Co (GA-2021-08, 20 April 2021); Mergen Commodities Trade SA (GA-2021-07, 13 April 2021); Flashtune Kft (GA-2021-06, 26 March 2021); GCC s.r.l (GA-2021-05, 16 March 2021); ALTYN-BIDAI 2000 Ltd (GA-2021-03, 21 January 2021); Mahmut Yarim Gida Ith. Ihr. San. Ve Tic. (GA-2021-02, 14 January 2021); Nexus Trading Group (GA-2021-01, 8 January 2021); Tan Long Chemical (GA-2020-21, 8 December 2020); Nutrisud Sarl and Medimix Sarl (GA-2020-20, 10 November 2020); Aman Group Ltd (GA-2020-16, 10 September 2020); Sino state Farms Cereals and Oils Co Limited (GA-2020-15, 14 August 2020); Elsofy For Trade and Supplies (GA-2020-14, 5 August 2020); Spike Trade AG (GA-2020-13, 29 July 2020); Sherif Salem Ibrahim and Partners “Arabian Company for Export &... (GA-2020-12, 28 July 2020); Trading S.r.l (GA-2020-10, 22 July 2020); Eastmarket Grain LLP (GA-2020-09, 14 July 2020); OLEOS Trading Limited (GA-2020-07, 12 June 2020); Société de Distribution Nouvelle d’Afrique (Sodinaf) Sarl (FA-2019-15, 21 October 2019); Regina Food Industries SA (GA-2019-08, 28 May 2019).

Convention⁴⁸, which is also known as the “New York Arbitration Convention” and the “New York Convention” (NYC from now on).

12. To be more specific, from 28 May 2019 to 2 October 2024, GAFTA partially published available details of defaulters on GAFTA arbitrations, when the winning party requested this, in their online “News on Gafta arbitration” section. 100% of the defaulters are based in four continents - 47.13% in Asia⁴⁹, 40.23% in Europe⁵⁰, 8.04% in Africa⁵¹ and 4.6% in America⁵² - 100% are based in a country which is a signatory of the NYC and 6.9% are recidivists⁵³ (50% are based in Asia⁵⁴ and 50% in Europe⁵⁵). In the period from 1 October 2022 to 30 September 2023, GAFTA heard 337 cases and posted the names of 33 defaulters, which means that defaults occur in at least⁵⁶ 9.79% of cases.⁵⁷ These percentages show that the issue is a problem at global level and negatively impacts the winners’ efforts and the executing countries’ economies.

13. GAFTA also publishes the names of defaulters who finally settle their cases,⁵⁸ supplying the general public with the names and additional details about these bodies: between 28 February 2018 and 2 October 2024, 33 defaulters settled their disputes in an average of 1.72 years.⁵⁹

⁴⁸ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entry into force 7 June 1959) 330 UNTS 38.

⁴⁹ In Bangladesh, China, Egypt, India, Iran, Kazakhstan, Malaysia, Tunisia, Turkey, UAE and Vietnam.

⁵⁰ In Cyprus, Estonia, Greece, Hungary, Italy, Lithuania, Malta, Moldova, Poland, Rumania, Switzerland, Ukraine and the United Kingdom.

⁵¹ In Algeria, Benin, Cameroon and Zimbabwe.

⁵² In Argentina, California, the British Virgin Islands, Mexico and Miami.

⁵³ Agrozan Tarim Gida Urunleri Ithlat Ihracat Sanayi Ve Ticaret Ltd., Asia & Africa General Trading LLC; Regina Food Industries S.A.E.; Mergen Commodities Trade SA; Maxgrain International Limited and Concern Prometey LLC.

⁵⁴ In Dubai, Egypt and Turkey.

⁵⁵ In Switzerland and Ukraine.

⁵⁶ Not all defaulters in a GAFTA award are posted in their defaulters list.

⁵⁷ See supra 29.

⁵⁸ See GAFTA, *Arbitration news* (available at <https://www.gafta.com/arbitration-news>): Richfields Commodities Ltd (GA-2024-15, 23 July 2024, following the circular no. GA/2019/02); ITC Limited (GA-2024-08, 18 April 2024, following circular no. GA/2024/07); Pavlovi Trading Ltd. (GA-2024-04, 1 March 2024, following circular GA/2024/02); Unio Co. for Trade, Import &a. (GA-2024-03, 22 February 2024, following circular no. GA/2024/02); LLC “Rusisch-Export” House (GA-2023-20, 16 November 2023, following circular GA/2023/18); Petek Degirmencilik Sanayi Ve Ticar (GA-2023-14, 18 July 2023, following circular no. GA/2023/06); Belor Romania SA. (GA-2023-13, 14 July 2023, following circular no. GA/2023/07); Five Star Flour Mills SAE (GA-2023-10, 8 June 2023, following circular no. GA/2022/02); Prometey Swiss SA (GA-2023-08, 10 May 2023, following circular no. GA/2023/03); Sailor Exports Limited (GA-2022-11, 8 April 2022, following circular no. GA/2022/10); Bashan Tarimsal Urn Paz San Ve Dis Ti. (GA-2022-06, 10 February 2022, following notice no. GA/2021/10); Victoria Foods (Private) Limited (GA-2021-20, 6 September 2021, following notice GA/2016/05); Alfoldgabona Kft (GA-2021-18, 18 August 2021, following circular no. GA/2021/4); Altin Ates Kimya AS (GA-2021-12, 7 June 2021, following notice circular no. GA/2019/11); Sherif Salem Ibrahim and Partner (GA-2020-19, 28 October 2020, following circular no. GA/2020/12); Agrobland RR (GA-2020-18, 21 September 2020, following circular no. GA/2017/06); Graneles Switzerland SA (GA-2020-17, 15 September 2020, following circular no. GA/2019/15); Zar Macaron Industrial Group Co. (GA-2020-11, 27 July 2020, following circular no. GA/2017/13); Anhui BBKA International Freight Co. Ltd. (GA-2020-05, 13 May 2020, following circular no. GA/2016/05); Armada Gida Tic San A.S. (GA-2020-04, 21 April 2020, following circular GA/2020/01); Unknown (GA-2020-03, 13 March 2020, following circular no. GA/2017/06); Vietnam Livestock Corporation Joint Stock Company (VILICO) (GA-2019-16, 25 November 2019, following circular no. GA/2017/03); Hong Ha Nutrition Joint Stock Company (GA-2019-14, 15 August 2019, following circular no. GA/2016/05 and GA-2017-03); Xiamen C&D Agricultural Products Co. (GA-2019-13, 13 August 2019, following circular no. GA/2019/11); Unknown (GA-2019-12, 9 August 2019, following circular no. GA/2019/11); Unknown (GA-2019-10, 25 June 2019, following circular GA/2019/03); Unknown (GA-2019-07, 20 May 2019, following circular GA/2019/06); Alberta Corp (GA-2019-04, 3 April 2019, following circular no. GA/2019/03); Fedcominvest Europe Sarl (GA-2018-12, 14 June 2018, following notice GA/2018/10); Kusto Agro Trading LLC (GA-2018-09, 14 May 2018, following circular no. GA/2017/04); UkrFarm Funding Limited (GA-2018-04, 9 April 2018, following circular no. GA/2014/10); Mes Yag Sanayi Ve Ticaret Ltd (GA-2018-03, 27 March 2018, following circular no. GA/2017/014); Rossella Express Srl (GA-2018-02, 8 March 2018, following circular GA/2018/01).

⁵⁹ 70% (23) settled within a year; 6.06% (2) within 2 years, 12.12% (4) within 3 years, 6.06% (2) within 4 years and 6.06% (2) within 5 years.

III. The public policy exception under the New York Convention as GAFTA's Achilles heel

14. Enforcing a GAFTA award in any signatory country of the NYC involves overcoming several practical hurdles, the main ones being the following: the legal system and domestic legal framework of the defaulting party's country (which differs from that in the prevailing party's country and in England⁶⁰), including interpretation of the NYC articles (which may differ from country to country); the translating of all supporting documentation; the legal costs associated with the proceedings; cultural and language differences⁶¹; political and economic factors; potential court delays; delaying tactics (guerilla tactics) used by certain parties in court⁶², identifying the defaulting party's assets and the court's interpretation of the meaning of the public policy exception.

15. The analysis in this section is based on the public policy exception, which is referred to in Article V(2)(b) of the NYC and sets out that an arbitral award shall not be recognized or enforced if it could be contrary to public policy in the country where recognition and enforcement is sought⁶³. As academia has repeatedly highlighted, the question surrounding the application of this extremely controversial exception⁶⁴ is how to interpret it⁶⁵. The NYC provides no definition of what should be understood by public policy, but gives member states the freedom to define and apply this term.⁶⁶ As a result, public policy is not applied in the same way everywhere⁶⁷ and is a dynamic concept which varies in time and space depending on social and cultural values in each era.⁶⁸ While some well-established, arbitration-friendly jurisdictions adopt a stringent stance on public policy, in other countries it remains the last resort for dissatisfied parties that are challenging arbitral awards.⁶⁹ The public

⁶⁰ GAFTA contracts are governed by English law.

⁶¹ See S. I. STRONG, K. FACH GOMEZ and L.C. PIÑEIRO, *Comparative Law for Spanish-English Speaking Lawyers: Legal Cultures, Legal Terms and Legal Practices*, Edward Elgar Publishing, 2016, p. 17-19, 222, 449, 494-498.

⁶² See M. BENAVENTE NORZA (2023). "Translucent barriers that foreign award holders encounter when seeking to enforce the awards in India: navigating the Indian Judiciary", *Spanish Yearbook of International Law*, 27, 139 (available at <https://www.sybil.es/sybil/article/view/1943/2315>).

⁶³ "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country." See Article V(2)(b) 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards – "The New York Convention" (available at https://www.newyorkconvention.org/media/uploads/pdf/1/2/12_english-text-of-the-new-york-convention.pdf)

⁶⁴ See A. RAM, *The Recommended and Accepted Interpretation of the Public Policy Exception in International Commercial Arbitration: Is the Indian Stance Really Divergent?*, 17 September 2012. (available at <https://ssrn.com/abstract=2151390>).

⁶⁵ See A.G. MAURER, *Public Policy Exception Under The New York Convention: History, Interpretation, and Application-Revised Edition*. Juris Publishing, Inc. 2013, p. 53. See also N. C. SHENOY, "Public Policy under Article V (2)(b) of the New York Convention: Is there a Transnational Standard" in *Cardozo J. Conflict Resol.*, 2018, vol. 20, p. 77. See also J. D. FRY, "Désordre Public International under the New York Convention: wither truly international public policy" in *Chinese Journal of International Law*, 2009, vol. 8, no. 1, p. 81-134. See also R. A. COLE, "The public policy exception to the New York convention on the recognition and enforcement of arbitral awards" in *Ohio St. J. on Disp. Resol.*, 1985, vol. 1, p. 365. See also M. PAULSSON, *The 1958 New York convention in action*. Kluwer Law International BV. 2016. See also E. RAJAGUKGUK, "Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Grounds of Public Policy" in *Indonesian J. Int'l L.*, 2007, vol. 5, p. 186. See also A. J. VAN DEN BERG, "The New York Convention of 1958: An Overview" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London: Cameron May, 2008, pp. 39-68. See also G. B. BORN, "The New York Convention: A Self-Executing Treaty" in *Mich. J. int'l l.*, 2018, Vol. 40, p. 115.

⁶⁶ See R. WOLFF, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 19 June 1958 – Commentary*, Beck. Hart and Nomos, 2012, p. 494. See also A. Mogos, A, "A Reflection on Public Policy Exception in Private International Law under the New York Convention, European Union Instruments and Ethiopian Law" in *Bahir Dar UJL*, 2018, vol. 9, p.123.

⁶⁷ See P. HOLLANDER, "Report on the Public Policy Exception in the New York Convention" in *International Bar Association*, October 2015, p. 18. See B. HANOTIAU, "Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention Belgian and French Perspectives" in *Journal of International Arbitration*, 2008, vol. 25, p.6.

⁶⁸ See J. DOLINGER, "Arbitragem interna e internacional" in *Questões de doutrina e de prática*, 2003, pp. 129-170.

⁶⁹ See M. GEARING, and A. WELSH, "The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places?" in *Kluwer Arbitration Blog*, 17 March 2011 (available at <https://arbitrationblog.kluwerarbitration.com/2011/03/17/>)

policy exception is often described as an “unruly horse”⁷⁰ which may carry its rider to unpredictable destinations.⁷¹

16. Public policy objections arose in 44% of enforcement cases. While success rates were modest (19%), the significance of upheld public policy objections should not be overlooked.⁷² Independent arbitrator Dr ANTON G. MAURER analysed 850 arbitration enforcement decisions under the NYC and concluded that enforcement was refused in only 70 cases.⁷³ That is, the public policy exception is only upheld by the courts in 8.23% of the cases in which it is raised. In the other 91.76% of cases it was unduly raised, probably as a dilatory tactic to prevent award winners from obtaining what they are entitled to. This exception is said by practitioners to be “probably the most misused ground of all”.⁷⁴

17. Regardless of the fact that not all prevailing parties in GAFTA arbitrations opt for publishing the defaulting party’s details on the GAFTA defaulters list before deciding whether to enforce the GAFTA award in the defaulting party’s country⁷⁵, a consistent tendency on the part of the defaulting party can be observed in both cases, regardless of the country in which they are based. This is raising the public policy exception, which increases the costs of enforcing the award for the prevailing party and usually creates undue delays⁷⁶ with uncertain grounds. Below are some examples from different countries in which the public policy exception has been raised when the prevailing party in a GAFTA arbitration has resorted to the courts in the country in which the losing party is based in an effort to protect their rights by enforcing the award, and the amount of time that the courts needed to accept to or dismiss the petitions.

18. Brazil: *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financeira Inmobiliaria y Agropecuaria (Argentina) v. Moinho Paulista Ltda.* (Brazil).⁷⁷ An Argentinian company requested the recognition and enforcement of a GAFTA award obtained against a Brazilian company in 2000. Six years later the Brazilian tribunal ruled that the GAFTA award had been rendered in violation of Brazilian public policy and dismissed the application.

the-public-policy-exception-is-the-unruly-horse-being-tamed-in-the-most-unlikely-of-places-4/). See also See A.G. MAURER, *Public Policy Exception Under The New York Convention: History, Interpretation, and Application-Revised Edition*. Juris Publishing, Inc. 2013. See also K. M. CURTIN, “Redefining Public Policy in International Arbitration of Mandatory National Laws” in *Def. Counsel J.*, 1997, vol. 64, p. 271.

⁷⁰ England and Wales, Court of Common Pleas, 24 November 1825, All ER 258, 266, *Richardson v Mellish*.

⁷¹ See Y. TANG, “Charting a New Legal Order: ASEAN’s Arbitration Reform in Taming the ‘Unruly Horse’ of Public Policy Exception” in *Chinese (Taiwan) Yearbook of International Law and Affairs*, 2024, vol. 41.

⁷² See R.P. ALFORD, C. BALTAG, M.E.K HALL, and M. SASSON, “Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards” in *Journal of International Arbitration (Wolters Kluwer)*, 2022, v. 39, Issue 3, pp. 299-330. See also M. SASSON, “Public Policy in International Commercial Arbitration” in *Journal of International Arbitration (Wolters Kluwer)*, 2022, v. 39, Issue 3, pp. 411 – 432.

⁷³ See A.G. MAURER, *The Public Policy Exception under the New York Convention: History, Interpretation, and Application*, Juris, 2022.

⁷⁴ See PAULSSON, *The New York Convention in International Practice – Problems of Assimilation*, in M. Blessing (ed.), *The New York Convention of 1958* 100, 113 (ASA Spec. Series No. 9, 1996). See also T. L. HARRIS, “The ‘Public Policy’ Exception to Enforcement of International Arbitration Awards Under the New York Convention—With Particular Reference to Construction Disputes” in *Journal of international arbitration*, 2007, vol. 24, n. 1. See also B. VAN ZELST and N. MASUMY, “The Concept of Arbitrability under the New York Convention: The Quest for Comprehensive Reform” in *Journal of International Arbitration*, 2024, vol. 41, no. 3.

⁷⁵ The prevailing party should conduct a cost-benefit analysis to weigh the costs of enforcement against the potential benefits, because the award creditor can incur not-insignificant costs during this process. See M. BAKER, and D. NICHOLS, “Recovering Costs of Enforcement and Interest” in *International Law Office (ILO)*, September 2021, issue 16.

⁷⁶ See T. S. WEI, “Why egregious errors of law may yet justify a refusal of enforcement under the new york convention” in *Sing. J. Legal Stud.*, 2009, p. 592. See also C. L. BANSAL, and S. AGGARWAL, “Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS countries: a comparative analysis of legislative and judicial approach” in *International Journal of Law and Management*, 2017, vol. 59, n. 6, pp. 1279-1291.

⁷⁷ Superior Tribunal de Justiça. SEC n.º 866 - EX (2005/0034926-5). DJ 17.05.2006, pp. 9-10.

19. France: *Denis Coakley Limited (Ireland) v. Société Michel Reverdy* case (France)⁷⁸ concerned a dispute between an Irish and a French company regarding a supply contract that was concluded in 1978. In 1980 the dispute was resolved in the appeal court as per GAFTA rules in favour of the Irish company, which was forced to demonstrate to the French court that the award was not contrary to French international public policy after the defaulting company raised this exception. The award was upheld two years later in 1982.

20. Turkey: *Çimento San. ve Tic. A.Ş. (Turkey) v a Swiss company*⁷⁹. A Swiss seller and a Turkish buyer concluded a supply agreement in 2012. After a payment default, the seller won a GAFTA arbitration and the Swiss company had to enforce the award in Turkey. Despite the non-prevailing party's arguments that the GAFTA Award was contrary to public policy in Turkey, execution of the award was granted in 2020.

21. Ukraine: *China National Complete Engineering Corporation (China) v. PJSC State Food and Grain Corporation of Ukraine (Ukraine)*⁸⁰. In 2018, a Chinese company requested the enforcement and execution of a 2017 GAFTA award in Ukraine, following the concluding of a contract for the period from 25 May 2012 to 30 November 2013. In 2019 the Kiev Court of Appeal granted its execution after dismissing the public policy exception raised by the defaulting party.

22. Vietnam: *Toepfer (Germany) v. Sao Mai (Vietnam)*⁸¹. After many years the Appellate Court of the Supreme People's Court of Vietnam in Hanoi ruled that the GAFTA award was contrary to Vietnamese public policy.

23. India: *Shri Lal Mahal Ltd (Shri Lal) (India) v. Progetto Grano Spa (Progetto) (Italy)*⁸². A dispute arose between an Indian supplier and an Italian buyer over a supply contract concluded in 1994. In 1997 the dispute was resolved by a GAFTA arbitral tribunal in London (UK) in favour of Progetto, which sought to enforce it before the Delhi High Court with Shri Lal's opposition. The Delhi High Court ruled in favour of Progetto in 2012 and Shri Lal filed an appeal under the Supreme Court of India, which again ruled in favour of Progetto after dismissing Shri Lal's appeal, which had been filed on the ground that the award was contrary to Indian public policy. It took the Indian courts 15 years to uphold the enforcement.

24. India: *LMJ International Ltd (India) v Sleepwell Industries Co. Ltd. (Thailand)*⁸³. This case concerned a dispute that began in 2011 between a Thai supplier and an Indian buyer over a contract dated the same year. The dispute was resolved by the GAFTA arbitral body in 2013 and in the same year the award-holder filed an application for the enforcement of a foreign award in India, which was challenged by the Indian company on the basis that it was contrary to public policy in India. The dispute was resolved first by the Calcutta High Court in 2017⁸⁴ and afterwards by the Supreme Court of India in 2019⁸⁵, which dismissed the Indian company's petition and declared the enforceability of the foreign award.

25. India: *Kandla Export Corporation (India) v OCI Corporation (Korea)*⁸⁶. A Korean buyer began a GAFTA arbitration against an Indian seller arising from a supply contract signed in 2013. A

⁷⁸ Court of Appeal of Reims, France, 23 July 1981, *Denis Coakley Limited v. Société Michel Reverdy*.

⁷⁹ Court of Cassation 19th Civil Chamber in Turkey, case number 2018/3424 E, 2020/568 K.

⁸⁰ Court of Appeal on Kiev, case number, 824/256/2018.

⁸¹ Decision of the Appellate Court of the Supreme People's Court of Vietnam in Hanoi, 2011, *Toepfer v. Sao Mai*.

⁸² Supreme Court of India, 3 July 2013 (Civil Appeal No. 5085/2013), *Shri Lal Mahal Ltd v Progetto Grano Spa*.

⁸³ Supreme Court of India, 20 February 2019 (Special leave petition (civil) no. 540 of 2018, *LMJ International Ltd. v Sleepwell Industries Co. Ltd.*

⁸⁴ Calcutta High Court, 22 August 2017 (G.A. 3306 of 2016, E.C. No. 487 of 2013), *Sleepwell Industries Co. v LMJ International Ltd.*

⁸⁵ See supra. 67.

⁸⁶ India, Supreme Court, 7 February 2018 (civil appeal no. 1661-1663 of 2018), *Kandla Export Corporation v OCI Corporation*.

GAFTA award was rendered on 28 April 2014 in favour of OCI Corporation, which filed an application for execution before the District Court at Gandhidham in India. The Indian company claimed that the award was contrary to public policy in India in a futile attempt to make the Indian court review the merits of the dispute. In 2017 the District Court at Gandhidham⁸⁷ determined that the award's execution could not be denied on that basis. The Supreme Court of India ratified the decision in 2018.

26. Apart from the lengthy and costly process that the parties undergo during the execution of a GAFTA award when the defaulting party raises the public policy exception, they also need to navigate the uncertainty of the scope of the definition that a court will apply in their case. A clear example can be seen in India, where the evolution of the interpretation of public policy is notorious and has evolved from a narrow interpretation before the Arbitration and Conciliation Act was enacted in 1996 to a broader interpretation nowadays.⁸⁸

27. The above examples show that this is a generic problem, which creates uncertainty and affects all member states of the NYC equally when the winner in a GAFTA award has no other option has but to enforce the award in the country where the losing party is based or has assets.

Conclusions

28. In a comparative sense, GAFTA offers the winner of an award an extra tool with which to try to convince the defaulter to honour their obligations, which consists of including the defaulter's name and address on the GAFTA defaulters list. If the award holder does not achieve the desired result via this social pressure action, they have no option other than to attempt to enforce the award in the defaulter's country under the NYC umbrella.

29. While the provisions of Article V(2)(b) of the NYC protect state sovereignty when determining the definition and interpretation of what is to be understood as a public policy exception, they do not protect the arbitral sovereignty of the parties in conflict, but are instead an open door to the uncertainty and legal insecurity that arise from such situations. This creates an imbalance between public powers and private solutions in the event of a conflict which affects the proper functioning of international trade.

30. The lack of certainty as to whether a foreign award will be enforced on the basis of a public policy exception, linked to the fact that there is no unanimous definition of the concept, creates unease for award holders that are trying to enforce their awards. On this basis, the public policy exception is often abused by the losing party and is perceived as a negative factor which could hamper the winner's success, while at the same time sully arbitration's reputation as an effective dispute resolution system.

31. When the difficulties encountered by a prevailing party in a GAFTA award when trying to enforce the award in the other party's country under the NYC umbrella is compared with the hurdles encountered by a prevailing party when enforcing any foreign award not issued by GAFTA,⁸⁹ there are no appreciable differences. If *a priori* it is assumed that obtaining a GAFTA award (versus an award rendered by any other arbitral body) would allow the award holder a greater degree of success in enforcing it,⁹⁰ in practice there is no meaningful difference. The only added value that a GAFTA award gives the

⁸⁷ India, High Court of Gujarat, 8 August 2017, *OCI Corporation v. Kandla Export Corporation*.

⁸⁸ See M. Narayanan, "Arbitration and the public policy exception: necessary precaution or controversial impediment?" in *Centre for alternative dispute resolution*, 15 October 2023 (available at <https://www.rgnulcadr.in/post/arbitration-and-the-public-policy-exception-necessary-precaution-or-controversial-impediment>).

⁸⁹ See M. BENAVENTE NORZA, M., "Translucent barriers that foreign award holders encounter when seeking to enforce the awards in India: navigating the Indian Judiciary" in *Spanish Yearbook of International Law*, 2023, (27), 139 (available at <https://www.sybil.es/sybil/article/view/1943/2315>).

⁹⁰ See I. POLOVETS, M. SMITH, and B. Terry, "GAFTA Arbitration as the Most Appropriate Forum for Disputes Resolution in Grain Trade" in *Arizona Journal of International and Comparative Law*, 2013-2014, Vol. 30, No. 3.

prevailing party is the opportunity to increase commercial pressure on the defaulters via the publication of the unpaid award references and the defaulter's name on the defaulters list, which is available to all GAFTA members and by reference only to the general public. This has proved to be a very useful instrument in certain cases: however it has also proved to be insufficient when the losing party decides not to honour the award.

32. In view of the repeated practice among non-prevailing parties (regardless of the award's nature and the rendering body in any kind of award and any NYC signatory country) of claiming the public policy exception in order to try to delay/avoid the award's execution, which increases uncertainty, costs and the time need for the award to be executed for the winner as well as for the country in which the award is executed, the question which arises is this: what additional system could be implemented to help award holders, the arbitral body and all the countries in which the execution of awards is requested to be effective, more efficient and less costly (time and money) in their enforcing/rejecting of foreign arbitration awards within an adequate timeframe?

33. The enforcing of GAFTA and other awards rendered by different arbitral bodies could be expedited and less costly for all parties if the arbitral body hearing the case could enable the parties to add a tool based on the blockchain technique in cooperation with the countries of the arbitration parties and which could ensure that an award is rendered not only in compliance with the law and jurisdiction clauses of the contract, but also that it is aligned with the law and not in breach of the public policy of any of the countries in which the parties are based.

34. Being able to offer arbitration parties - before an award is rendered - the assurance that the award will be safeguarded from public policy exceptions under the NYC would be a priceless step forward for the future of the arbitration world.