

# **Bulgaria: Assignment of an Arbitration Clause - Is Debtor's Consent Required?**

## **Kluwer Arbitration Blog**

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Velislava Hristova (Djingov, Gouginski, Kyutchukov & Velichkov)

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The assignment of contractual rights is a common business practice. An important question concerning the assignment of rights under a contract is the fate of the arbitration agreement related to those rights and whether it is transferred automatically to the assignee so that such arbitration agreement becomes effective and binding in the relationship between the assignee and the debtor.

In a recent judgment, the Bulgarian highest court had the occasion to decide whether and under what circumstances an assignment of contractual receivables transfers the rights under the arbitration clause incorporated in the same contract.[fn]M.S.D. v. Credo Consult 55 OOD, Supreme Court of Cassation, Judgment No. 261 from 1 August 2018 under commercial case No. 624/2017.[/fn] The court departed from the widely recognised principle of automatic transfer of the arbitration agreement and held that the assignment of contractual receivables does not transfer the rights under the arbitration clause contained in the same contract unless the debtor explicitly agrees to the assignment of the arbitration clause.

### **Facts of the Case**

M.S.D., as a lessee, and B.M., as a landlord, concluded a Rental Agreement containing an arbitration clause referring all disputes to be settled by a sole arbitrator in an *ad hoc* arbitration. The landlord assigned his receivables against M.S.D. under the Rental Agreement to a third party, Credo Consult 55 OOD. The assignee raised the assigned claims for payment of the rental price against the lessee in arbitration they commenced on the basis of the arbitration clause incorporated in the Rental Agreement.

The sole arbitrator declared herself competent to hear the dispute with the argument that the assignment of the rights under the Rental Agreement included the transfer of the arbitration agreement to the assignee and granted the claims of Credo Consult 55 OOD.

M.S.D. initiated court proceedings under Article 47 of the International Commercial Arbitration Act ("**ICAA**") before the Bulgarian Supreme Court of Cassation ("**BSCC**") for setting aside of the arbitral award claiming, among other grounds, lack of a valid arbitration agreement between her and Credo Consult 55 OOD. According to M.S.D., the assignee Credo Consult 55 OOD was not a party to the arbitration clause because she has never explicitly consented the arbitration clause to be transferred and the transfer of the receivables under the Rental agreement did not result in the assignee stepping

into the arbitration clause.

## **BSCC's Findings**

The BSCC set aside the arbitral award on the ground that there was no valid arbitration agreement between the assignee and the debtor. It held that the arbitration agreement is autonomous from the underlying contract in which it is incorporated, is subject to a separable legal regulation and is not an accessory to the legal relationship between the parties under the main contract. The BSCC reasoned that the substantive rights and obligations under the underlying contract differ from the rights and obligations under the arbitration agreement. According to the BSCC, the mere notification of the debtor as regards the assignment is irrelevant to the transfer of the arbitration agreement. It is relevant only for assessing whether the transfer of the receivables under the underlying contract between the assignee and the assignor has had an effect *vis-à-vis* the debtor. Therefore, the arbitration agreement cannot be transferred to the assignee together with the assignment of receivables under the underlying contract, unless the debtor explicitly consents in writing to its transfer.

## **Comment**

The judgment under consideration has reaffirmed the practice of the BSCC first expressed in its Judgment No. 70 of 15 June 2012 under commercial case No.112/2012. The BSCC has since then rendered several judgments discussing whether the arbitration agreement is transferred automatically through the assignment of rights under the main contract.

In two judgments, the BSCC has adopted the so-called automatic transfer rule deciding that the arbitration agreement is an accessory to the underlying contract that should follow the latter.[fn]B. O. v. Company, Supreme Court of Cassation, Judgment No. 51 from 23 September 2013 under commercial case No. 610/2012; I. D. I. v. Company, Supreme Court of Cassation, Judgment No. 203 from 20 January 2015 under commercial case No. 1300/2014.[/fn]This view is in line with the predominant practice of arbitral tribunals seated in Bulgaria.[fn]Arbitral award of 16 May 2005 of the Arbitration Court at the Bulgarian Industrial Association under arbitration case No. 4/2004; Arbitral award of 27 September 2007 under Internal Arbitration Case 2011/2006.[/fn] However, according to the subsequent case law of the BSCC, such an approach should not be followed and should be treated as isolated practice.

The general position of the BSCC, expressed by different judges from the BSCC, who had to decide on the matter, is that the assignment of rights under a contract does not automatically entail the assignment of the arbitration clause contained therein due to the distinct nature of the latter and its autonomy from the rest of the contractual provisions.[fn]Company v. A. G. Corporate and S., Supreme Court of Cassation, Judgment No. 71 from 9 July 2015 under commercial case No. 3506/2014.[/fn] Another argument against the automatic transfer of the arbitration agreement raised by the BSCC in the available case law is related to the obligations attributed to it. An arbitration agreement gives rise not only to rights but also to obligations. While rights can freely be assigned, it is not possible to assign obligations. As a consequence, the explicit consent of the debtor of the receivables is required in order for the assignee to be constituted as a party to the arbitration agreement.[fn]E. S. S. v. Company, Supreme Court of Cassation, Judgment No. 44 from 29 June 2016 under commercial case No. 971/2015.[/fn] With the judgement under consideration, this position has been acknowledged by the BSCC as the constant practice and as such is expected to be followed by the court in subsequent

cases.

The BSCC has decided the issue in a manner similar to the resolution adopted by Russian courts long ago, deciding that the assignee is not bound by the arbitration agreement unless the debtor explicitly consents to the assignment of the arbitration agreement.[fn]Russian Federation No. 8, IMP Group (Cyprus) Ltd. v. Aeroimp, Moscow District Court (Civil Department), Not Indicated, 21 April 1997, in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 1998 – Volume XXIII, Yearbook Commercial Arbitration, Volume 23 (Kluwer Law International; ICCA & Kluwer Law International 1998) p. 748.[/fn] It seems that at present such an approach has lost most of its supporters.

The requirement for the debtor's consent is understandable in exceptional cases, such as *intuitu personae* claims or where the assignor and the debtor have explicitly excluded the transfer of all or part of the rights and/or obligations under the main contract. However, in general, since the debtor already consented to the arbitration agreement at the time of its conclusion with the assignor, subsequent repetition of the debtor's consent is not required for the transfer of the arbitration agreement.

The contemporary view that the arbitration agreement automatically travels together with the assigned contractual receivables has received significant support in the modern arbitral and court practice of various jurisdictions, such as France, the United Kingdom, Switzerland and Germany. Therefore, the recent approach of the BSCC seems to be in contrast with the prevailing present-day practice.

## **Conclusion**

While the two decisions in which the BSCC has adopted the automatic transfer rule appeared to open the door to case law favouring the transfer of the arbitration agreement along with the rights under the main contract, the BSCC has now once again made it clear that it will not easily accept the automatic assignment of the arbitration agreement.

In light of the case law of the BSCC, the arbitration agreement contained in the contract is not transferred to the assignee, unless the debtor has explicitly agreed to its assignment. It would seem that this approach will be followed by the BSCC in future cases and should be taken into account by arbitrators and parties involved in arbitration proceedings in Bulgaria.

The key takeaway for a party wishing to seek the protection of assigned contractual rights in arbitration proceedings is to obtain explicit consent from the debtor for the transfer of the arbitration agreement contained in the contract. Otherwise, the assignee incurs the risk of not being able to invoke the arbitration agreement and to find itself before a state court rather than an arbitral tribunal. Even if the latter finds itself competent to hear the dispute, the arbitral award is likely to be set aside by the BSCC on the ground that there is no valid arbitration agreement between the assignee and the debtor, due to the lack of consent of the debtor.

*The views and opinions expressed herein are those of the author and do not necessarily reflect those of Djingov, Gouginski, Kyutchukov & Velichkov or its employees.*

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*NB: The links for the texts of the decisions of the Bulgarian Supreme Court of Cassation cited in this post lead to the case webpages. There, you can click on the icon located next to the phrase "Пълен текст". In case you see more than one icon, please click on the one whose date corresponds to the*

*date of the decision.*