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Assignment of Benefits of Arbitral Awards: Problematic Enforcement in Ukraine

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Assignment of benefits of arbitral awards is a standard business practice worldwide, undertaken by companies involved in international trade and supported by credit insurers. However, this practice may face some obstacles in Ukraine considering contradictory and poorly developed court practice of granting leave for enforcement upon an application submitted by any person other than a person who was the party to arbitration. Courts are rather formalistic in deciding on that matter as Ukrainian laws do not directly envisage the possibility to an application for leave to enforce an international arbitration award to be submitted by any person other than a creditor (the meaning of this term is sometimes narrow, so that it is understood as a synonym to a party to arbitration). Actually, until recently there are not so many court cases, if any at all, in which the matter of assignment of benefits of arbitral award was clearly addressed.

Recent *Euler Hermes* case gave some reason to be worried. On 7 September 2011, FOSFA arbitration tribunal in London issued an award by which PJSC Odessa Fat and Oil Plant (Ukraine) was required to pay the debt to Pontus Trade S.A. (Switzerland). However, by a deed of assignment dated 27 November 2009, Pontus Trade S.A. assigned its claims against PJSC Odessa Fat and Oil Plant to Euler Hermes Services Schweiz AG (Switzerland) ('Euler Hermes'). Euler Hermes made an application to a competent court of Ukraine seeking leave to enforce FOSFA arbitration award. The court dismissed the application having reasoned the dismissal as follows:

> '…an application for leave to enforce foreign court judgment shall be submitted by the creditor (his representative), or according to an international treaty which was granted with mandatory legal force by Verkhovna Rada of Ukraine – by other person (his representative).
> In this case the term "creditor" cannot be interpreted broadly…
> Thus, the judge finds that the effective civil procedure legislation of Ukraine envisages in this case that only Pontus Trade S.A. as a creditor under FOSFA arbitration award No. 4219 dated 7 September 2011 can submit the respective application…' (Ruling of Prymorskyi District Court of Odessa City dated 20 March 2013, full text in Ukrainian available here).

The court of appeal supported that ruling (Ruling of the Court of Appeal of Odessa Region dated 5 June 2013, full text of the ruling in Ukrainian is available here). However the Court of Cassation –

High Specialized Court of Ukraine for Civil and Criminal Cases – set aside the ruling of the court of appeal as

> *'having mentioned that granting the leave for enforcement of an award which had been issued in favor of one person to a different person that had no right of claim under a contract (main obligation), would contradict public policy of Ukraine and could be harmful to a Ukrainian enterprise, the court of appeal did not invoke any legal reasoning for that finding'* (Ruling of the High Specialized Court of Ukraine for Civil and Criminal Cases dated 20 November 2013).

Formally, the Court of Cassation did not state that the assignee had the right to apply for enforcement, it only set aside the ruling of the court of appeal because of the wrongful interpretation of public policy, and returned the case for a new full hearing. The Court of Appeal of Odessa Region considered the case in a new hearing and ruled against Euler Hermes again. This time the court excluded findings related to public policy violation, and used only the core reasoning of the court of first instance (Ruling of the Court of Appeal of Odessa Region dated 22 January 2014, full text of the ruling in Ukrainian is available here).

It is worth mentioning that the courts in that case found that the contract between the debtor and the initial creditor (Pontus Trade S.A.) contained a non-assignment clause. Though this was a secondary argument taken into account by the courts, it is the only one which might be considered sound. **Ukrainian law and court practice clearly distinguish between substitution of a creditor in substantive (contractual) relations and procedural succession in arbitral or court proceedings, and the assignment of creditor's rights in substantive relations might be considered as a necessary condition for an application for enforcement to be filed by an assignee.**

According to Ukrainian civil law (Article 512 (1) of the Civil Code of Ukraine) the assignment of creditor's rights is one of the ways of substitution of a creditor in civil relations. The creditor's rights can be assigned unless otherwise is determined by the law or contract (Art.512 (3) of the Civil Code) or the relations are closely connected with the creditor's persona (e.g. in case of personal injury) (Art. 515 (1) of the Civil Code). Ukrainian law also requires the assignment to be done in the same form as the main obligation (i.e. if a contract was in writing an assignment deed must be in writing as well). Such kind of assignment is stable practice in Ukraine. Once assignment took place, it serves as a ground for procedural assignment which means that the assignee obtains the right to apply for enforcement of an arbitral award.

However, there was no ground for the courts to state that an assignee cannot apply for enforcement purely on procedural grounds. The procedure of granting the leave for enforcement being one of the civil court procedures should be considered as regulated by general rules of civil procedure, in particular by Article 37 of the Civil Procedural Code of Ukraine which allows legal succession and substitution of a party with its legal successor or, in case of assignment of rights in disputable relations, with an assignee. This rule is most certainly applicable to proceedings of recognition and enforcement of foreign and international arbitration awards. Hypothetically, if an application for leave for enforcement of an arbitral award was initially submitted by a party to arbitration that applicant could be substituted with the assignee upon a respective application and furnishing the court with evidence of assignment of rights in contractual or other relations which were subject of

arbitration proceedings. Thus, as substitution of an applicant is possible during the court proceedings, we do not see any legal obstacle to that substitution to take place before submission of an application for enforcement. At least Ukrainian procedural law does not prohibit that.

Although **in *Euler Hermes* case appellate courts repeatedly stated that only a creditor to whom an arbitration award had been issued should have the right to apply for its recognition and enforcement**, we shall emphasize the following:
– rulings of appellate courts as well as those of the High Specialized Court of Ukraine for Civil and Criminal Cases do not constitute law;
– those rulings do not constitute any kind of *jurisprudence constante* and cannot be considered as binding unified court practice by other courts in other proceedings;
– the High Specialized Court of Ukraine for Civil and Criminal Cases did not finally rule on the issue of assignment in this case;
– finally, the approach of the court of first instance and that of the appellate court was not consistent with the procedural rules.

Thus, although the main purpose of this article was to warn of possible obstacles which an assignee of benefits of an arbitral award may face while applying for its enforcement in Ukraine, we also want to point out that there is no purely procedural ground for refusing the leave for enforcement in that kind of cases.

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