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Binding Non-Signatories: Ukrainian Supreme Court Adopts a More Liberal Approach

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On 1 November 2023, the Grand Chamber of the Ukrainian Supreme Court – the highest judicial body in the country – opined on the extension of the arbitration clause to non-signatories in its judgement in case No. 910/3208/22 (*Berezan Processing Plant v Grain Power*, hereinafter '*Berezan* case').

This judgement is a landmark one because it takes a liberal approach to the controversial topic of extending the arbitration clause to non-signatories. Before that, although the possibility of extension of the arbitration agreement to non-signatories, including based on succession, alter ego and "piercing the corporate veil" doctrines, was recognised by Ukrainian scholars,[1)] Ukrainian courts had been reluctant to extend arbitration clauses to non-signatories, grounding their conclusions predominantly on the privity of contracts.

Below, the post will first outline the state of case law prior to the *Berezan* case. Then, a background of the *Berezan* case will be briefly outlined before analysing the Grand Chamber's reasoning. After that, several issues, not directly related to non-signatories but important for developing the pro-arbitral approach of Ukrainian courts, will be elucidated before proceeding to conclusions.

Case Law Prior to the *Berezan* Case

The judgement of the Civil Court of Cassation of the Supreme Court dated 21 May 2020 in case No. 824/181/19 (*New Alternative Oak v Galicia Distillery*) was seen as the leading authority. In this case, Galicia Distillery failed to pay an advance payment under the contract with a company called Litco Lumber. A company called New Alternative Oak, which was not a party to the respective sale and purchase contract, paid an advance payment to Litco Lumber instead of Galicia Distillery and signed an additional agreement to the contract between Galicia Distillery and Litco Lumber, under which Galicia Distillery acknowledged that it owed money to New Alternative Oak. The original contract (to which New Alternative Oak was not a party) included an arbitration clause providing for the application of ICDR arbitration rules, but the additional agreement did not.

Following that, New Alternative Oak initiated an arbitration against Galicia Distillery, won, and applied to enforce the award in Ukraine. The Supreme Court determined that New Alternative Oak

had not succeeded in any way Litco Lumber's rights and obligations, and hence, there was no valid arbitration agreement between Galicia Distillery and New Alternative Oak. The Supreme Court refused to enforce the award based on this argument.

Background of the *Berezan* Case

A Ukrainian agricultural company, Berezan Processing Plant LLC (Seller), concluded a wheat supply contract with a Swiss commodities trader, Orsett Trading SA (Buyer), under a sale and purchase agreement (Contract), as per which the Seller undertook to supply the wheat, and the Buyer undertook to pay the price of the delivered wheat. The Contract contained an arbitration clause providing that any disputes arising out of or within the scope thereof shall be subject to arbitration in accordance with the arbitration rules of the Grain and Feed Trade Association, with London as the seat of arbitration and English as a language of proceedings (GAFTA Arbitration Rules No. 125).

Two weeks later, the Buyer and Grain Power LLC (Guarantor) – another Ukrainian agricultural company – entered into an additional agreement to the Contract under the terms as per which the Guarantor assumed all obligations of the Buyer arising from the Contract (Additional Agreement). The Additional Agreement contained no arbitration clause.

After receiving the goods under the Contract, the Buyer failed to pay the price. Subsequently, the Seller filed a Statement of Claim with the Commercial Court of Kyiv, requesting the court to collect the indebtedness under the Contract from the Guarantor. The court left the Seller's claim without consideration on merits and referred the parties to arbitration.

However, later, the Northern Commercial Court of Appeal (NCCA) reversed the judgement of the Commercial Court of Kyiv, concluding that the Guarantor is not bound by the arbitration clause contained in the Contract, and referred the dispute for further consideration by the local commercial court.

The Guarantor submitted a request for the annulment of the NCCA's judgement to the Commercial Court of Cassation of the Supreme Court. The Commercial Court of Cassation transferred the case to the Grand Chamber for its consideration of "an exceptional legal problem," which was whether non-signatories could be bound by an arbitration agreement.

Grand Chamber's Reasoning

The Grand Chamber concluded that non-signatories, in principle, can be bound by the arbitration clause in the agreement they had not signed. As noted by the Grand Chamber in para 32 of its judgement,

> the inclusion of an arbitration clause by the parties in the contract has the effect of extending the effect of this arbitration clause to the legal relations under this contract with the participation of another person who entered into these legal relations as a party, assumed the respective rights and obligations of the party to this contract, and

> at the same time the parties did not terminate the arbitration agreement, did not exclude a certain dispute from its scope, did not deprive it of binding force for such a party, and the arbitration agreement did not lose its validity due to other circumstances.

The Grand Chamber explained why it came to this conclusion, which deviated from the Supreme Court's previous practice, by referring to significant changes in law, namely, the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine. These codes were significantly amended at the end of 2017 and now oblige the courts to adopt a pro-arbitration approach to the resolution of issues concerning the validity and enforceability of the arbitration agreement.

However, it should be noted that this conclusion was made with regard to a particular situation when a legal entity, which has not been a party to a contract containing the arbitration clause, nonetheless became bound by it by assuming the rights and obligations of the Buyer as a guarantor. The Grand Chamber's reasoning is predominantly based on the notion that the Guarantor was familiar with the terms of the Contract, including the arbitration clause contained therein (the Guarantor made the respective representations in the Additional Agreement), and that after the Buyer's default, the Guarantor acquired its contractual obligations.

While transferring the case for consideration by the Grand Chamber, the Commercial Court of Cassation made the following observations:

> [T]he effect of the arbitration clause may extend to persons who are directly involved in the performance of the [main] contract […]. […] in some cases, third parties who did not actually sign the arbitration agreement may be bound by it and be able to directly invoke it (for example, but not limited to, succession, including singular, the "group of companies" doctrine, the "alter ego" doctrine, the doctrine of "piercing the corporate veil".

However, the Grand Chamber avoided mentioning these doctrines and limited itself to a conclusion on the possibility of extending the arbitration clause to non-signatories only in a specific disputed situation without drawing more general conclusions.

Other Important Findings of the Grand Chamber

The decision is also noteworthy with respect to at least three other aspects demonstrating the pro-arbitration shift in the Supreme Court's practice.

First, the Grand Chamber concluded that courts should not rule on the merits of a dispute referred to them and refer the parties to arbitration even if both parties are Ukrainian legal entities, but the contractual relations between them contain a foreign element. Prior to that, courts could question the applicability of the New York Convention, concluding that certain disputes between Ukrainian legal entities fall under the notion of domestic arbitration, which is subject to different regulations.

Second, in relying on the ICCA's Guide to the Interpretation of the New York Convention: A

Handbook for Judges, the decision suggested that arbitral awards could be considered 'delocalised,' which could be interpreted to support the autonomous nature of international arbitration, which is advocated by some prominent scholars, including Emmanuel Gaillard.

Third, it was the first time that the Ukrainian Supreme Court asked the Ukrainian Arbitration Association (UAA), as the leading Ukrainian non-commercial organisation uniting international arbitration practitioners and scholars, and the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at UCCI), as the sole Ukrainian arbitration institution, to provide *amicus curiae* briefs. Prior to that, UAA had already submitted such briefs to the Supreme Court in several notable cases but did so on its own initiative. This development demonstrates the increasing trust of the Ukrainian Supreme Court in the local international arbitration community and its willingness to cooperate with it in order to make Ukraine a more arbitration-friendly jurisdiction.

It is worth noting that the *amicus curiae* submitted by the UAA and *amicus curiae* submitted by ICAC at UCCI did not address the issue of extension of the arbitration clause to non-signatories, focusing only on such issues as whether an arbitration clause contained in a contract concluded by two Ukrainian parties is valid from the standpoint of the New York Convention and Ukrainian law.

Conclusion

Although there is no system of binding judicial precedent in Ukraine as is the case in common law jurisdictions, as a matter of practice, judgements issued by the Grand Chamber carry the greatest weight and are *de facto* binding. Thus, the judgement in the *Berezan* case will guide Ukrainian courts in similar cases, thereby significantly changing the approach to non-signatories issues.

However, one should be careful with applying the Grand Chamber's conclusions in the *Berezan* case in a broad fashion and outside the context of succession and assignment of rights and obligations of the party to a contract containing an arbitration clause. Even in this context, the Grand Chamber's reasoning indicates that any decision would likely be fact-specific, requiring evidence of the successor/assignee's knowledge of the underlying contract with the arbitration clause.

It is yet unclear if the Ukrainian courts will adopt similar reasoning in more complicated cases calling for the application of the estoppel, alter ego and other doctrines that are still under development in Ukrainian law or some more controversial doctrines that are currently foreign to Ukrainian law, such as the group of companies.

References

?1 *See* Markiyan Malskyi, "Arbitration Agreement: Issues of Theory and Practice," Doctoral Dissertation.

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