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Assignment of an Arbitration Clause – Is Debtor’s Consent Required? The Bulgarian Supreme Court of Cassation Has Made Its Final Decision

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In an [interpretative judgment](#) rendered on 21 February 2024 (“Interpretative Judgment”), the highest court of Bulgaria had the occasion to decide whether, in case of an assignment of rights under a contract, the arbitration agreement contained in the contract is transferred automatically to the assignee so that such arbitration agreement becomes effective and binding in the relationship between the assignee and the debtor. The court adopted the widely recognized principle of automatic transfer of the arbitration agreement along with the rights under the main contract, settling the matter conclusively.

The Contradictory Case Law and the Need for an Interpretative Judgment

As [discussed in a previous post](#), in a 2018 judgment, the Bulgarian Supreme Court of Cassation (“BSCC”) made a ruling on whether an assignment of contractual receivables transfers the rights under the arbitration clause included in the same contract and under what circumstances. The BSCC disagreed with the principle of automatic transfer of the arbitration agreement and instead held that the assignment of contractual receivables does not transfer the rights under the arbitration agreement unless the debtor explicitly agrees to the assignment of the arbitration clause. Although this decision confirmed the previous BSCC case law, it contradicted other judgments of the court where it followed the automatic transfer rule, stating that the arbitration agreement is an accessory to the underlying contract that should follow the latter.

Due to this inconsistent case law, a request was made to the BSCC to render an interpretative judgement revisiting the issue and providing a final and binding decision. Under Bulgarian law, when there is a contradictory or incorrect application of the law, the BSCC can issue an interpretative judgment. These judgments do not resolve disputes between parties but rather ensure that the same legal provisions are applied consistently by all courts in the country. The instructions provided in such interpretative judgments are mandatory for all courts to follow.

BSCC’s Interpretative Judgement

The BSCC began its analysis by assessing the legal nature of the arbitration agreement, which is an institute of both substantive and procedural law. It must meet the legal requirements for the validity of a contract while also having procedural consequences.

The BSCC proceeded to evaluate the characteristics of the assignment of receivables under the Bulgarian Obligations and Contracts Act (“BOCA”). According to BOCA, the assigned substantive right passes to the assignee, together with its accessory rights, obligations, collaterals, etc., unless otherwise agreed upon.

When a substantive right is assigned, the assignee acquires not only the receivables, privileges, collaterals, etc., but also the right to protect that right. Even though the Bulgarian Civil Procedural Code declares the autonomy of the arbitration agreement, the latter is still dependent on the transferred right it is meant to safeguard.

The BSCC further noted that, for an arbitration agreement to be concluded, there must be a pre-existing legal relationship that has resulted or may result in a dispute. Unlike the underlying contract, the arbitration agreement does not create, terminate, supplement or modify a legal relationship. Its sole purpose is to provide the jurisdiction of an arbitral tribunal in a dispute arising from the substantive legal relationship. Despite its relative independence, the arbitration agreement is considered as an accessory to the transferred substantive right.

The BSCC continued its analysis, confirming that there are no legal provisions under Bulgarian law that impose any restrictions or require the assignment of an arbitration agreement to follow specific rules that are different from those applicable to assignment in general. On the contrary, the BSCC pointed out that the accessories to the receivables are transferred freely unless there is an agreement to the contrary.

The BSCC held that the principle that a contract concluded between two persons can neither benefit nor harm a third party (*res inter alios acta*) is not a valid argument to deny the character of the arbitration clause as an accessory to the transferable substantive right. According to the BSCC, arbitration agreements are rarely concluded with regard to the creditor’s personality (*intuitu personae*), but rather with regard to both parties’ trust in arbitration as a method of resolving disputes and in the chosen arbitral institution in particular. Furthermore, the BSCC held that it was not uncommon for an assignee to agree to an assignment of a contract solely because of the existence of an arbitration clause and the benefits of arbitration over state-court litigation.

The BSCC found that the change of the creditor would not put the debtor in a worse position regarding the substantive relationship. In fact, transferring the arbitration agreement concluded between the original parties to the assignee provides the debtor with the foreseeability that any disputes related to the main contract will be decided through arbitration. If the arbitration agreement was not to be automatically transferred along with the assigned contractual receivables, the initial creditor could unilaterally, through a transfer of the contractual receivables, derogate from the arbitration clause despite the will of the debtor.

Conclusion

The Interpretative Judgment puts an end to a long-standing contradictory case law rendered by various panels of the BSCC, clarifying the issue once and for all.

By adopting the contemporary view that the arbitration agreement automatically transfers together with the assigned contractual receivables, the BSCC made it clear that the debtor's consent will not be required for the transfer of the arbitration agreement in case of assignment of the receivables under the main contract. As the Interpretative Judgement is mandatory for all courts, parties can have confidence that an arbitral award will no longer be at risk of being set aside due to the debtor's lack of explicit consent for the transfer of the arbitration clause. This step is a welcome development as it brings legal certainty to the parties involved in arbitration proceedings in Bulgaria.


Moreover, the modern arbitral and court practice of various jurisdictions supports the view that the arbitration agreement automatically travels together with the assigned contractual receivables. Therefore, the BSCC's approach is in line with the prevailing practices of today.

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