

**Food Service v. Lutech,
Supreme Commercial Court of Ukraine, 903/1055/13 Case Date 29 January 2014**

Yaroslav Petrov, Anna Tkachova

Headnote

The Higher Commercial Court of Ukraine decided that an arbitration agreement in the main contract had not been transferred to the new creditor under the assignment agreement.

Summary

Facts of the case

On 3 June 2009 "Food Invest" LLC (seller) and "Lutech" PC (buyer) concluded the Supply Agreement. The Supply Agreement provides that the seller shall sell and the buyer shall buy meet products as specified in the order issued by the buyer.

The Supply Agreement contains an arbitration clause. Under the arbitration clause, if parties to the Supply Agreement are unable to resolve disputes between them amicably, the parties shall resort to arbitration consideration of the dispute by International Commercial Arbitration Court at the Chamber of Commerce and Industry of either a country of the buyer or a country of the seller.

On 14 December 2012 "Food Invest" LLC and "Food Service" LLC (a new creditor) entered into the Assignment Agreement, whereby "Food Invest" LLC assigned to "Food Service" LLC its claim to "Lutech" PC under the Supply Agreement, namely, claim of indebtedness for supplied products.

"Food Service" LLC filed a claim against "Lutech" PC with the Commercial Court of Volyn Oblast (a court of the first instance) seeking recovery of indebtedness under the Supply Agreement. The right to claim was based on the Assignment Agreement.

Question in Dispute

The court had to deal with the question of assignment of arbitration clause.

Arguments of the Parties

Responded argued that arbitration clause is binding upon new creditor (Claimant) since the arbitration clause is subject to assignment together with the debt. Claimant argued that it had acquired debt alone and it is not bound by initial contract dispute resolution procedure.

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Jurisdiction

- Ukraine

Court

- Supreme Commercial Court of Ukraine

Arbitration/Judges

- M.I. Ostapyuk, Chair
- P.A. Goncharuk, Judge
- L.V. Stratienko, Judge

Case date

- 29 January 2014

Case number

- 903/1055/13

Parties

- Claimant-Appellee, Limited Liability Company "Food Service"
- Defendant-Appellant, Private Company "Lutech"

Key words

- assignment agreement
- autonomy of arbitration agreement

Source

- and, **Limited Liability Company "Food Service" (Poland) v. Private Company "Lutech" (Ukraine) on recovery of indebtedness, Supreme Commercial Court of Ukraine, 903/1055/13 Case Date 29 January 2014**, A contribution by the ITA Board of Reporters, (© Kluwer Law International; Kluwer Law International)

Judgment of the Court

The court of the first instance (Commercial Court of Volyn Oblast) terminated the proceedings based on the finding that the dispute shall be subjected to commercial arbitration since the Supply Agreement contains an arbitration clause.

The court of appeal (Rivno Commercial Court of Appeal) reversed the first instance court ruling and held that the arbitration agreement cannot be invoked to submit the dispute to arbitration. The court of appeal decision was based on the findings that the first instance court's reference to arbitration clause in the Supply Agreement is not accurate since parties to the Supply Agreement are "Food Invest" LLC and "Lutech" PC, therefore arbitration clause cannot be extended to "Food Service" LLC, which is not a party to the Supply Agreement.

The court of appeal ruled that termination of court proceedings by the first instance court is tantamount to refusal to serve justice. "Food Service" LLC enjoys national regime and is entitled to file claims in the courts of Ukraine. Furthermore, the court of appeal held that there were legal questions of effectiveness of the Assignment Agreement in absence of debtor's consent thereto. Therefore there is a need to hand the dispute to first instance court for consideration on merits.

The court of cassation appeal (the Higher Commercial Court of Ukraine) upheld the decision of the appellate court.

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The summary of the case file and full text of summarized court decision are available on:
<http://www.kluwerarbitration.com/CommonUI/print.aspx?ids=KLI-KA-1414001>