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Recovery Advisers

Credit Insurance Claims Management & Recovery Services



Transfer of Rights to PH receivables to the ECA

Aman Union Third Technical Training
Beirut, 27 April 2013

Learning Outcome

- Evaluate the options available to transfer the policy holders' rights to the ECA.
- Evaluate the advantages and disadvantages of each option to transfer the rights of the policy holder to the ECA.
- Plan for the optimal option of rights transfer considering a host of variables (jurisdiction, PH engagement, etc.)

Outline

- I. Transfer of Rights to Receivables in International Trade.
- II. Overview of Possible Options.
- III. Details of Possible Options.
 - a. Subrogation.
 - b. Assignment.
 - c. Action via Policy Holders.
- IV. Planning for The Transfer of Rights.
- V. Direct Action Brought by an ECA – A Case Study.



Challenges

TRANSFER OF RIGHTS TO RECEIVABLES IN INT. TRADE.

Transfer of Rights to Receivables in Int. Trade

- Multiple complex laws regulating transfer of rights.
- Lack of international standards for formal and material validity of transfer of rights.
- Wide variations in formal and material requirements across jurisdictions.
- Courts and lawyers' unfamiliarity with credit insurance and export finance cycles.
- Local and cross-jurisdiction conflict of laws.
 - Commercial laws.
 - International trade laws and conventions.
 - Insurance laws.
- Insufficient planning for transfer of rights and / or formal action.



Transfer of Rights to the ECA

OVERVIEW OF POSSIBLE OPTIONS

Summary of Available Options

Formal Action

Direct by ECA

- Subrogation
- Assignment

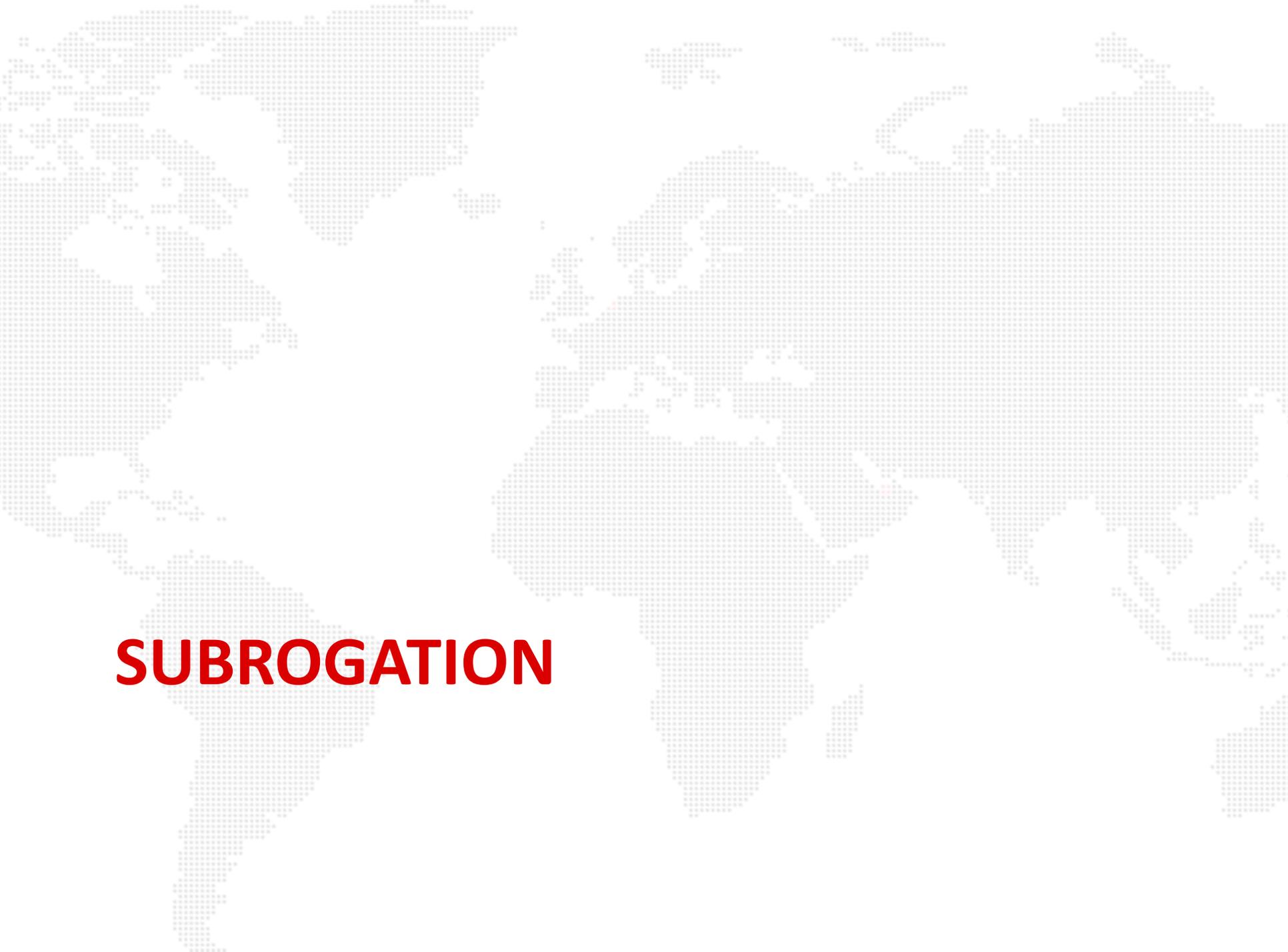
Via PH

- Action by PH



Transfer of Rights to the ECA

DETAILS OF POSSIBLE OPTIONS



SUBROGATION

Concept of Subrogation

- Subrogation arises as a consequence of the *indemnity principle*.
- Subrogation refers to the right of an insurer, who has paid to the full extent of the liability under an indemnity policy, to pursue the wrongdoer that caused the loss in the name of the insured.
- Subrogation enables liability for loss to be fixed to the wrongdoer without allowing the insured to recover from both that wrongdoer and insurer. (unjust enrichment).
- Subrogation (in some contexts / jurisdictions) entitles the insurer to “step into the shoes of the insured” becoming entitled to claim full compensation from the wrongdoer.

Arising of Subrogation

- Subrogation automatically and by operation of law arises when the insurers have fully discharged their liability to the insured.
- Examples of laws regulating subrogation.
 - UAE civil law Article 1030.
 - Moroccan Insurance Law Art. 47
 - Dutch Civil Code 7:962.
 - German Insurance Contract Act. 2008.
 - US / UK – Ample precedent / case law.
- Subrogation does not arise if...
 - The insured is unable to bring action against the wrongdoer.
 - Void insurance contract.

Pros and Contras of Subrogation

Advantages

- Most reflective of actual situation between ECA, PH, and Debtor.
- Automatically arises as per most insurance laws.
- Minimal requirement for active PH involvement in legal action.
-
- PH retains the right to sue debtor for other / future related claims.

Disadvantages

- Potentially complex to evidence or support in some courts and cross-jurisdiction litigation (particularly for export credit insurance).
- Varying and complex formal and material requirements for successful action.
- Formal action may be limited to indemnity amount only. (varies per jurisdiction)



ASSIGNMENT

Definition of Assignment

- “ ‘Assignment’ means the transfer by agreement from one person(‘assignor’) to another person (‘assignee’) of all or part of or an undivided interest in the assignor’s contractual right to payment of a monetary sum (‘receivable’) from a third person (‘the debtor’). ”
(United Nations Convention on the Assignment of Receivables in International Trade)
- Examples of laws regulating assignment.
 - Egyptian Civil Law, Chapter 4 , Articles 303 – 314.
 - France Civil Code.
 - UAE Civil Transactions Law.

Transfer of Rights by Assignment

- Assignment takes place when the assignor and the assignee agree to the transfer of rights.
- Requirements for formal validity vary depending on:
 - Nature of assignor and assignee.
 - Nature of assets and rights transferred.
 - Jurisdiction and applicable laws.
- Requirements for notifying the debtor vary per jurisdiction.
 - French Civil Code Art. 1690 requires serving of assignment notification to the debtor by bailiff acting for the assignee.
 - Egyptian Civil Law Art. 305 has the additional requirement of officially registering the assignment date for it to be affective against others.

Pros and Contrasts of Assignment

Advantages

- Insurer receives legal title to all claims, including the exclusive right to sue under those claims.
- A contractual agreement between two parties.

Disadvantages

- From the PH's perspective, assignment for the whole cause of action entitled the insurer to recover losses beyond the extent of the policy
- Varying and complex formal and material requirements for successful action.
- More complex regulations compared to subrogation.

Assignment vs. Subrogation

Assignment

- Insurer receives legal title to all claims, including the exclusive right to sue under those claims.
- A contractual agreement between two parties.
- Applicable laws vary widely.
- Subject to statutory or contractual prohibition / exclusion.

Subrogation

- The insured party retains legal title to the claims and the exclusive right to sue, although by paying the insured, the insurer has a right to seek the proceeds of the claim from the insured.
- Laws of most jurisdictions address subrogation in a “somewhat” similar manner.

A world map composed of a grid of small grey dots, with the text "ACTION VIA POLICY HOLDERS" overlaid in red.

ACTION VIA POLICY HOLDERS

Definition of Action via Policy Holders

- Formal action (litigation or arbitration) is commenced under the name of the Policy Holder.
- The ECA manages and finances the processes of formal action.
- The ECA remains entirely invisible to courts or arbitral tribunals.
- Policy holder directly empowers recovery agency and / or litigation lawyer.

Initiating Action via Policy Holders

- Standard Power of Attorney directly from the Policy Holder is required.
- Super-legalization (chain authentication) is required where Apostille Convention (The Hague Convention) is not applicable.
- Court claim (or application for arbitration) is filed on behalf of the Policy Holder.
- No mention of the ECA or related insurance policy is made.

Action via Policy Holder vs. Action Based on Subrogated / Assigned Rights

Action via PH

- PoA from PH is required.
- Transaction documents required to evidence / support claim.

Subrogated / Assigned Rights

- PoA from ECA is required.
- Transaction documents required to evidence / support claim.
- Insurance policy required to evidence link between PH and ECA.
- Proof of risk materialization.
- Proof of indemnification.
- Proof of agreement to assign rights (assignment only).

Pros and Contrasts of Action via Policy Holder

Advantages

- Simplicity.
- Courts focus on the merits of the dispute (details of the transaction); not on the capacity of the parties, or formal and material validity of their claim.
- Lower procedural / formal risks.

Disadvantages

- Requires the involvement of Policy Holders.
- Policy Holders are occasionally reluctant to empower ECA's lawyers / recovery agents.
- Recovering verdict / award amounts from policy holders presents credit risk.
- Rights to the debt could be seen by liquidators / bankruptcy managers as remaining with Policy Holders.



PLANNING FOR TRANSFER OF RIGHTS

Points to Consider when Planning for Transfer of Rights

- Policy Holder engagement.
- Policy Holder's financial standing or credit risk.
- Debtor's jurisdiction's requirement for formal and / or material requirements for a valid subrogation.
- Debtor's jurisdiction's requirement for formal and / or material requirements for a valid assignment.
- Inquire with your recovery agency / lawyer on the specifics of the debtor's jurisdiction.



Case Study

DIRECT ACTION BROUGHT BY THE ECA

Case Background

- Claim amount: ≈ USD 6m
- Composed of three claims from unrelated Policy Holders:
 - Claim 1: ≈ USD 2.9m
 - Claim 2: ≈ USD 1.2m
 - Claim 3: ≈ USD 1.9m
- Industry: Heavy Machinery.
- Jurisdiction: UAE Federal Courts.
- Date of oldest invoice: May 2008
- Debtor in full default and not willing to consider amicable settlement.

Challenges

- Challenges for action via policy holders.
 - Policy holders not cooperating with each other or ECA.
 - Power of attorney from policy holders was taking long.
 - Original claim documents were not readily available.
 - Risk of statutes of limitations affecting action based on bills of exchange. (3yrs in UAE)
- Challenges for direct action by ECA.
 - Local courts may not recognize relationship between ECA and debtor.
 - Insurance contract and letter of assignment between ECA and policy holders concluded under laws foreign to the UAE.
 - Notice of assignment was not served (or communicated at all) to the debtor.

Court of First Instance Decision

- Defence lawyers challenged our claim on the following grounds.
 - No relationship between ECA and debtor could be established.
 - Assignment of rights to ECA was not in compliance with UAE requirements and are is therefore invalid.
- Court of First Instance rejected the claim on grounds that no relationship between the ECA and debtor existed.

Revised Strategy during Appeal

- Highlighted the relationship between ECA and debtor through local insurance laws.
- Requested the appointment of an insurance expert.
- Emphasized the difference between validity of subrogation vs. assignment in local laws. (subrogation was valid in this context).
- Substantiated the relationship between all parties through following additional documents:
 - Insurance contract between ECA and PH evidencing covered credit risk.
 - Notices of loss presented by PH to ECA.
 - Proof of processing and paying of indemnity to PH.
- Court of Appeals overturned decision of the court of first instance and ruled in our favor.

Decision of the UAE Federal Supreme Court

- Debtor petitioned UAE Federal Supreme Court to review the application of the UAE laws on the assignment of the policy holders' rights to the ECA.
- Debtor maintained that the assignment of rights to ECA lacked both formal and material validity.
- After acceptance and review of the petition, The UAE Federal Supreme Court held that there no irregularities in the application of laws and upheld the decision of The Court of Appeals.
- The Federal Supreme Court's decision set a precedent .

Lessons Learned

- The same Arabic technical term is used for both Assignment and subrogation.
- Despite sharing the same technical term, assignment and subrogation are regulated through different statutes in the UAE.
- The Court of Appeal rejected our request to apply interest from the date of indemnifying the policy holders.



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Thank You

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