

# Ready, set, off: Warsaw Court of Appeals confirms tribunal's jurisdiction over set-off claims

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**Facts**  
**Decision**  
**Comment**

The issue of an arbitral tribunal's jurisdiction over set-off claims that are not covered by an arbitration agreement is controversial, with the rules differing from jurisdiction to jurisdiction. In a recent judgment, the Warsaw Court of Appeals held that even if a set-off claim is based on an agreement that is outside the scope of an arbitration agreement, the tribunal must determine the set-off's effects on the main claim raised in the proceedings.<sup>(1)</sup>

## Facts

During arbitral proceedings before one of Poland's permanent arbitration courts, the defendant argued that the claim in question no longer existed as it had been set-off before the proceedings were initiated. The defendant based its argument on the claim that had allegedly arisen out of a different agreement that the parties had concluded previously. The arbitration tribunal denied jurisdiction to hear the arguments on the set-off as they concerned a claim that was not covered by the arbitration agreement (which was the basis of the claim invoked by the claimant).

In separate proceedings before a state court, the defendant asked the court to declare that the set-off in question was effective. However, the claim was dismissed by way of a final judgment in 2017.

The arbitral tribunal refused to stay its proceedings until the state court case was concluded and awarded the claim.

The defendant challenged the arbitral award, claiming, among other things, that it violated public policy as the arbitral tribunal had disregarded the defendant's arguments concerning the set-off.

## Decision

The Warsaw Court of Appeals set aside the arbitral award due to a violation of the fundamental principles of public policy (ie, the principles of legal certainty, security of trade, right to a fair and comprehensive hearing of a case and due process). The court based this decision on the tribunal's failure to consider the effects of the set-off (more precisely, the non-existence of the claim as a result of the set-off before the proceedings had been initiated). The court stated that the tribunal had unjustifiably denied its jurisdiction to hear the arguments on the defendant's set-off.

The Warsaw Court of Appeals assumed that set-off is a subjective right of a debtor, which cannot be limited. By invoking a set-off, a defendant does not bring its claim. Rather, setting off a claim has the same effect as making a payment – namely, a set-off declaration is of a constitutive nature and takes effect the moment that it is made. If effective, it results in the expiration of a given obligation. Therefore, a court or tribunal should verify whether a set-off was effective because, if so, the main claim brought before a certain forum should be dismissed in whole or in part. It is thus irrelevant whether a debtor sets off a claim that falls within the jurisdiction of a tribunal or not – in both cases, the tribunal should hear the issue of the set-off.

The Warsaw Court of Appeals stated that the arbitral tribunal's refusal to hear the set-off and its decision to award the claim violated the defendant's rights as it may be forced to pay a claim that had already expired.

Therefore, the court held that a tribunal may not only consider a claim that is based on an agreement which is not covered by an arbitration agreement, but is actually obliged to do so. Otherwise, its judgment will violate public policy.

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## Comment

### ***Different approaches to hearing set-off arguments***

There are at least three approaches to hearing set-off arguments which relate to a claim that is not covered by an arbitration agreement.

The first approach is that a set-off is an element of a case's factual background and, as such, the determination of its effectiveness is within a tribunal's power. This view is based on the assumption that by raising a plea of set-off, a defendant is not pursuing its own claims, but is merely raising the plea as a defence on the merits of the claimant's claim. Therefore, raising a plea of set-off does not have similar effects as invoking a claim (eg, the interruption of a limitation period, *lis pendens* or *res judicata*) and should be heard by the tribunal, irrespective of its jurisdiction. The Warsaw Court of Appeals shared this view in the case at hand.

Another approach is that invoking a set-off does not differ from bringing a claim. This is based on the reasoning that in order to determine whether a set-off was effective, the tribunal would need to examine the legal and factual details of the defendant's set-off claim. Therefore, a claim must remain within the scope of an arbitration agreement for a tribunal to be competent to hear it. If a claim is not covered by an arbitration agreement, the tribunal would not make a procedural decision, but simply award the claim and explain in the award's reasoning that it did not hear the set-off for lack of jurisdiction.

The third approach is similar to the second but provides that if invoking a set-off is similar to bringing a claim and if one party brings a claim and the other invokes the tribunal's lack of jurisdiction, the tribunal should render a formal decision and declare itself incompetent to hear the case. This position was taken by the arbitral tribunal in the case at hand.

### ***Issues with Warsaw Court of Appeals decision***

The Warsaw Court of Appeals opted for the first approach. However, there are numerous arguments as to why this decision was defective.

First, the defendant decided not to bring a claim and declare a set-off, although there were no obstacles stopping it from doing so. It could have brought a claim before a proper forum and had its day in court.

Second, the defendant initiated a case before a state court for a ruling that the set-off declarations were effective. If it succeeded, it could have argued that the judgment was binding on the arbitral tribunal and allowed the defendant to prevail in arbitration. Its rights were not infringed.

Third, Polish case law clarifies that the issue of whether a set-off was effective does not form part of Polish public policy and therefore cannot be re-examined in post-arbitral proceedings.<sup>(2)</sup> Therefore, if a tribunal heard a set-off and declared it to be ineffective, the defendant's recourse against the award would likely fail. It is difficult to agree that the defendant's situation should be improved if a tribunal declares itself incompetent, therefore allowing the defendant to immediately seek justice in a different and proper forum.

Finally, the position allowing a tribunal to hear set-off arguments irrespective of its jurisdiction over a given claim allegedly helps to concentrate the case in one forum and avoid conflicting judgments. But is this really so? If a defendant pursues its claim in litigation (or a different arbitration) instead of invoking a set-off, this aim would not be achieved. The pursuit of a one-stop-shop forum for the hearing of all claims should not be a goal in itself. There is always a risk of conflicting judgments and multiple proceedings pending on different forums. However, this challenge can be overcome by the skilful use of procedural instruments (eg, the staying of proceedings and *res judicata*).

Which approach to set-off prevails remains unclear. What is certain is that parties which are planning to invoke a set-off should be extremely careful in planning their case strategy, especially if arbitration comes into play.

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## Endnotes

(1) Warsaw Court of Appeals, 18 November 2019, File Ref VII Aga 804/19, available in Polish [here](#).

(2) Warsaw Court of Appeals, 15 January 2014, File Ref VI Aca 663/13 and Krakow Court of Appeals, 3 October 2012, File Ref I ACa 863/12.

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