

Appeals courts confirm procedural public policy violations



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Introduction

A violation of public policy is grounds to refuse the enforcement or recognition of an arbitral award (Article V(2)(b) of the New York Convention) and set it aside (Article 1206(2)(2) of the Code of Civil Procedure (CCP)). Public policy encompasses the basic principles of both substantive and procedural law. The Polish courts rarely confirm violations of the latter. In two cases before the Gdansk⁽¹⁾ and Warsaw⁽²⁾ Courts of Appeal, the courts found that procedural errors in arbitration were grave enough to justify setting aside the awards in question.

Warsaw case

Facts

The claimant initiated a case before an arbitration tribunal specialised in internet domain claims. The claimant argued that the respondent's registration of certain domains violated its trademark.

The arbitral tribunal dismissed the claim. It clarified that its competence was limited to verifying whether, on the date of closing the proceedings, the respondent had infringed the plaintiff's trademark. When the proceedings were concluded, the domains in question were not connected to any website. Arbitrators found that the mere registration of a domain does not amount to unfair competition and is not, in itself, illegal. Moreover, the tribunal found no violation of good faith as the domains had been registered when the respondent was distributing the claimant's goods and it had had the claimant's consent to use the domains.

The claimant disagreed with the award and motioned to have it set aside.

Decision

The Warsaw Court of Appeals agreed with the claimant and set aside the award. It found that there was no basis for the tribunal's decision to limit its jurisdiction to evaluate the facts of the case only at the closing of the proceedings; rather, it does not matter whether a violation took place at the time of filing a request for arbitration and is continuous, periodic or even a one off.

This was labelled by the court as a violation of basic principles of procedure (Article 1206(1)(4) of the CCP, which codifies similar grounds as Article V(1)(d) of the New York Convention).

However, the court went further. It found that by limiting the case to an assessment of the facts at the closing of proceedings, the tribunal; had violated not only the basic principles of public policy (ie, the principle of property protection), but also the principle of a fair trial and a comprehensive examination of the case. In the court's view, the submission of a dispute to arbitration does not mean that the parties waive their right to fair and insightful proceedings, ensuring the possibility of satisfying their legal interest. The court concluded by underlining that the right to a fair trial is a pillar of a democratic state ruled by law and, for these reasons, its violation justifies a conclusion that a violation of public policy has occurred.

Gdansk case

Facts

Claimants and subcontractors commenced arbitration before an arbitral tribunal at a Polish Bar association against a respondent and a contractor, claiming remuneration for works completed. The respondent argued that the claim was unfounded as the works had not been completed and the remuneration for the work performed had been paid in full. It also filed a counterclaim for reimbursement of the costs of substitute performance which it had incurred due to the claimant's failure to perform.

The tribunal dismissed both the main claim and the counterclaim. This award was disputed by the claimants and the state court set aside the award in part, dismissing the main claim.

The claimants initiated another arbitration and repeated their claim; they also offered similar arguments to their original arguments, as did the respondent. The second arbitral tribunal awarded the claim in one (large) part and dismissed it in the other.

The tribunal did not follow the parties' arguments. It disagreed that the contract between the parties was a subcontracting agreement. Consequently, it awarded the claim not as remuneration for work, but rather as damages. Once more, the claimants disagreed with the part of the award which dismissed a portion of their claim.

Decision

The claimants succeeded again as the Gdansk Court of Appeals set aside the award. The court found that awarding a claim on a different legal basis is possible but only if a court or tribunal gives the parties a chance to comment on this issue. Otherwise, the parties may be surprised by the case's outcome and the court or tribunal will have decided *ultra petita*. In such a case, the judgment or award cannot stand.

The court based its decision on the violation of basic principles of procedure. However, it did not explicitly state that Polish public policy had been violated (Article 1206(2)(2) of the CCP). At the same time, it clarified that deciding *ultra petita* violates, among other things, the adversarial principle (ie, the principle of party control) and the principle of equality of the parties. Both principles are fundamental in arbitration, with the latter explicitly codified in Polish law.

Comment

These cases are interesting, especially from the perspective of arbitrators. Arguably, the view of the Warsaw court (and many authors) that the grounds listed in Article V(1) of the New York Convention (and the corresponding provision on setting aside) examined on a party's motion, in principle, confirm a violation of public policy. Having said that, it must be admitted that the border between the basic rules of procedure and procedural public policy is sometimes thin.

Further, it is not necessarily justifiable to use the words 'jurisdiction' or 'competence' with reference to the application of procedural law. The arbitral tribunal did not violate rules on deciding upon its jurisdiction. It might have – if one agreed with the Warsaw Court of Appeals – violated a procedural rule specifying on what date the court verified the violation of the claimant's rights. However, this is not a jurisdictional or competence question, but rather a question of the appropriate application of procedural rules.

There is one common denominator in both cases. Both courts were adamant in clarifying that the courts must examine a case as it is presented by the claimant. Nothing more (as in the Gdansk case), but also nothing less (as in the Warsaw case). Arbitrators must be careful in verifying whether they have ruled on a case exactly as it was brought before them. The consequences of a mistake in this respect can be grave, as illustrated by these cases.

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Endnotes

- (1) Judgment of the Gdansk Court of Appeal, 16 September 2020, V ACa 162/20, available in Polish [here](#).
- (2) Judgment of the Warsaw Court of Appeal, 12 December 2019, VII AGa 1503/18, available in Polish [here](#).

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