

# Can a party continue arbitration after assigning the claim?

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Arbitration & ADR, Poland

## 📌 Facts

## 📌 Decision

## 📌 Comment

Changes to the parties to an arbitration agreement or proceedings happen frequently in business practice. According to the prevailing view in Poland, the assignee is bound by an arbitration agreement (for further details please see "Supreme Court decides that assignee is bound by arbitration agreement"). A recent decision of the Warsaw Court of Appeals dealt with a different situation in which the assignor pursued the claim despite assigning it to a third party.<sup>(1)</sup> The court refrained from answering the question of whether the *res litigiosa* principle, according to which the assignment of the right which is the subject of the dispute during the proceedings does not affect the case, applies in arbitration.

## Facts

A claimant initiated arbitration against a respondent for payment. After the proceedings had been initiated, the claim was assigned to a third party. Among other things, the respondent motioned the arbitral tribunal to dismiss the claim for lack of *locus standi*.

The claimant invoked Article 192(3) of the Code of Civil Procedure (CCP), which states that, upon delivery of a statement of claim to a respondent, the sale of the things or rights that are the subject of the dispute during the proceedings will not affect the case. However, the buyer may substitute for the vendor with the consent of the other party.

The tribunal dismissed the claim. It argued that as per Article 1184(2) of the CCP, arbitral tribunals are not bound by Article 192(3) of the CCP. If this were the case, it would be expressly stated in Polish arbitration law. Also, in the case at hand, neither the arbitral rules nor the parties' agreement contained provisions to this effect. Thus, it was the assignee that was entitled to bring the claim, not the assignor.

The claimant motioned to have the award set aside. It argued that the tribunal had violated public policy, which encompasses the rule specified in Article 192(3) of the CCP – and that the assignment of a claim in the course of proceedings has – in principle – no effect on the claimant's *locus standi*.

## Decision

The Warsaw Court of Appeals agreed with the claimant and set aside the award. It noted that the assignment agreement contained a provision under which the assignor and the assignee had agreed that the assignor would continue the arbitration and that the assignee would be entitled to what was awarded in the proceedings.

While examining the merits of the claimant's arguments, the court followed the majority view of Polish case law that an assignee is bound by an arbitration agreement. However, the present case pertained to the position of the assignor. The court also found that the application of Article 192(3) leads to a rift between the substantive law position (ie, that a claim can be pursued by an assignee) and procedural law (ie, that a claim can be pursued by an assignor or an assignee – if the other party agrees). If the assignor continues the case, the court will disregard the assignment and can award the claim even if the assignor is not entitled thereto.

In the case at hand, the court referred to the assignment agreement and found that it specified the assignor as an indirect representative of the assignee (ie, the assignor would collect the claim awarded in arbitration and forward it to the assignee, which was the entitled party from a substantive law perspective. This differed from the role of a proxy, which would pursue a claim in the name of and on behalf of the assignee). This led the court to establish that the award violated the basic rules of the interpretation of contracts and thus public policy.

## Comment

The Warsaw Court of Appeals' decision may be correct, but some may question its reasoning.

The court was wrong in suggesting that the conclusion of the assignment agreement deprived the assignor of the possibility of concluding a settlement (which is a precondition for arbitrability). While the court was correct in stating that a settlement is inadmissible in cases in which a party cannot dispose of its subjective right or legal relationship, this rule pertains to the legal prohibition of disposal directed to any party and not a factual position of a particular party (eg, which is already assigned its right). This was stated by the court *obiter* but still deserves comment and clarification.

Some may disagree that the concept of an indirect representative was crucial in resolving the case. On the contrary, the court examined only a contractual basis of *locus standi* – namely, a provision in an assignment agreement under which the assignor could still pursue the claim in arbitration despite the assignment. Instead, the court should have answered whether the rules on *locus standi* (in particular, the *res litigiosa* principle, under which the assignment of the right which is the subject of the dispute during the proceedings does not affect the case) apply in arbitration at all and, if so, whether they form part of public policy. The court refrained from doing so and left this issue open and debatable. This issue remains unresolved in both case law and by scholars and thus exposes parties to legal uncertainty.

This case will have a significant impact on parties that are pursuing a claim in arbitration and want to assign it in the course of the proceedings. Such parties should be careful in making this decision and secure their position contractually.

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## Endnotes

(1) Warsaw Court of Appeals judgment of 30 September 2020, file ref VII AGa 2119/18, available here (in Polish).

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