

August 26 2021

MACIEJ DURBAS



Arbitration clause in lease agreement does not bind property buyer

Kubas Kos Gałkowski | Arbitration & ADR - Poland

- › **Introduction**
- › **Background**
- › **Decision**
- › **Comment**

Introduction

Third-party issues occur often in arbitration. This is because the reality of business relations is rarely clear cut and there are often more than two stakeholders in a dispute. This often happens in the real estate market when a commercial property for lease is acquired from developers by investment funds. Such sales usually happen after the first lease agreements have been concluded; these agreements often contain arbitration clauses. Stakeholders should carefully consider Supreme Court case law regarding whether an arbitration clause in such an agreement binds the buyer of the real estate.⁽¹⁾

Background

The decision on whether to invest in real estate and on what conditions often depends on the content of the lease agreements relating to the property in question. The rent rate, conditions of rent and security are the most important points on the investor's checklist. However, it is equally important to verify whether the dispute resolution mechanism from the agreement is effective.

Quite often parties opt for arbitration – specifically, the property's owner will include an arbitration clause in its model lease agreement. The property's buyer, which becomes a lessor, may assume that such

clauses would be binding in the event of a dispute. This is the case under German law. However, such an assumption is premature under Polish law.

Under article 678(1) of the Civil Code, if the object of the lease is sold during the lease period, the buyer replaces the seller in the lease. In the 1960s the Supreme Court found that this rule does not cover arbitration clauses from the lease agreements.⁽²⁾ The Court explained that the rule pertains only to "integral elements of the lease relationship" and not to ancillary agreements such as arbitration agreements. The Court went on to clarify that the arbitration agreement is "of exceptional nature" and should not bar parties from the court in a wider scope than agreed.

Decision

The Supreme Court recently invoked this decision when explaining that the legal implications established by article 678(1) of the Civil Code do not apply to the right of first refusal. The Court explained that the provision in question refers only to the lease relationship and not all legal relationships that may have arisen between the parties in connection with the lease agreement. In the Court's view, a relationship arising out of an arbitration agreement is an example of such an ancillary relationship that is not affected by the change of ownership to the property. Thus, the Court confirmed its position from the 1960s case law.

Comment

These two decisions of the Supreme Court are of paramount importance for parties to the sale of leased real estate. There is no automatism in the change of parties to the arbitration agreement. The parties' positions need to be secured contractually, as is the case with other important elements of the lease agreement taken over by the buyer (eg, certain claims or the transfer of claims for rent to the bank as a loan security).

Having said this, the 1960s Supreme Court decision was made in specific circumstances. In that case, the State Treasury was the acquirer of the real estate. The law of that time was mistrustful towards arbitration and prioritised state over private property. These two factors could have been decisive in the decision-making process.

Further, since that time, the Supreme Court has confirmed that an arbitration agreement binds the following parties, among others:

- legal successors;
- companies created after mergers or divisions;
- assignees of a debt (for further details please see "Supreme Court decides that assignee is bound by arbitration agreement");
- acquirers of a debt;
- acquirers of an enterprise; and
- insurers that covered the damage and have a recourse claim.

It is unclear why a party that contractually takes over a lease agreement (and that therefore is bound by the arbitration agreement) should be in a more convenient position than a buyer of the property (which is not bound by the arbitration agreement, according to the Supreme Court).

The Supreme Court case in 2019 did not pertain to arbitration at all. The Court made its comment obiter dicta and used an arbitration agreement merely as an example of an ancillary agreement that does not bind a real estate buyer. If arbitral jurisdiction was the main argument in the case, the Court's decision may have been different. Until the Supreme Court takes such a different approach and decides that the arbitration clause in a lease agreement binds the property buyer, parties must be cautious in their dealings to avoid unnecessary complications in their dispute resolution.

For further information on this topic please contact Maciej Durbas at Kubas Kos Gałkowski by telephone (+48 22 206 83 00) or email (maciej.durbas@kkg.pl). The Kubas Kos Gałkowski website can be accessed at www.kkg.pl.

Endnotes

(1) Supreme Court judgment of 5 April 2019, file ref I CSK 130/18.

(2) Resolution of the Supreme Court of 13 November 1962, file ref 1 Co 30/61.