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## Supreme Court denies relitigation of issue of arbitral jurisdiction

**Kubas Kos Gałkowski | Arbitration & ADR - Poland**

MACIEJ DURBAS,  
ANGELIKA ZIARKO



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To say that the issue of arbitral jurisdiction is important would be an understatement. It is the foundation of arbitration and the power of a given tribunal to make a decision on each case. This is why any objections in this regard need to be made without undue delay. For example, if a party is discontent with the tribunal's positive ruling on jurisdiction and decides to take it to a state court, the court needs to decide swiftly to allow the arbitration to continue. The Supreme Court recently confirmed<sup>(1)</sup> that a state court's decision is final, and a party cannot relitigate the issue in the setting aside proceedings.

### **Facts**

A (a seller) and C (a buyer) entered into a share purchase agreement. The buyer was obligated to pay the purchase price in instalments. The agreement also contained an arbitration clause. Additionally, in the same year, F (a guarantor) and C entered into a guarantee agreement under which F promised that if C did not pay A the purchase price in part or in full, it would do so instead. The guarantee declaration contained an arbitration clause as well.

C failed to pay the last instalment of the purchase price to A. A pursued its claim for payment against C in arbitration. In 2011, the arbitral tribunal awarded A its claim. The Polish state court declared the award as enforceable against C. In 2013, the state court dismissed C's claim to remove the enforceability clause from the above arbitral award. C argued that A was barred from enforcing the arbitral award against it,

as A's claim ceased to exist due to the set-off made by C. The Polish courts did not share C's position and ultimately dismissed its claim in a final and binding manner.

Meanwhile, in 2011, A brought a claim against F before an arbitral tribunal. F objected to the arbitral tribunal's jurisdiction, alleging that there was no arbitration agreement between A and F. The arbitral tribunal dismissed F's objection. The arbitral tribunal found that the arbitration agreement concluded between A and C in the agreement was not effective between A and F. Still, a separate agreement came into effect between those parties.

F initiated the proceedings before a state court (based on the Polish regulation that implements article 16(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law and requested that the court resolve the issue of the arbitral tribunal's jurisdiction. In 2014, the court dismissed F's motion and confirmed that the arbitral tribunal had jurisdiction to hear the case. The court of second instance dismissed F's complaint.

In 2015, the arbitral tribunal awarded A's claim against F in full. In particular, the arbitral tribunal found that F's set-off, which was based on C's claims against A, was unsuccessful. The arbitral tribunal also stated that it was unnecessary to take evidence on the circumstances regarding the set-off because they were irrelevant to the case. Moreover, the arbitral tribunal found that A and F had effectively concluded a guarantee agreement and, therefore, had entered into an arbitration agreement as well.

F filed to set aside the arbitral award before the state courts. The courts of two instances dismissed F's application. The courts found that the state courts had already confirmed the arbitral tribunal's jurisdiction. The courts also stressed that these previous rulings were binding but found them correct nonetheless. Therefore, the courts decided that F was precluded from raising objections regarding the jurisdiction of the arbitral tribunal, as the state courts had decided this issue in a final manner during separate proceedings.

## **Decision**

The Supreme Court dismissed F's cassation complaint and, therefore, ultimately refused to set aside the arbitral award. The Supreme Court shared the views previously presented by the courts in the case.

The Supreme Court noted that if an arbitral tribunal dismisses an objection raised by a party to the tribunal's jurisdiction, a party might question this decision only before a state court in separate proceedings (based on article 16(3) of the UNCITRAL Model Law). The purpose of this procedure is to resolve the issue of the arbitral tribunal's jurisdiction as quickly as possible and not after the end of the arbitration. Therefore, this review mode precludes the possibility of successfully invoking such an objection to the jurisdiction (for the first time or repeating it) at the post-award stage. This is because the previous ruling binds the court reviewing such an application. The Supreme Court underlined that it would be irrational to allow the state courts to control the tribunal's jurisdiction first during the arbitral process and once again at the post-award stage.

Additionally, the Supreme Court found that, irrespective of whether the arbitral tribunal's dismissal of evidentiary requests made by F could be qualified at all as tantamount to depriving the party of the possibility to defend its rights, the arbitral tribunal's position on the effectiveness of the set-off had still been adopted after a thorough analysis and there was no justification for setting it aside on this basis. The arbitral tribunal had based its findings on the set-off, not only because F had not proven that the set-off was effective but also on the analysis and interpretation of the agreement between A and C. F had not formulated any new objections that would make it possible to assess and undermine this view. This, in turn, meant that F's argument in this regard was unsubstantiated.

## **Comment**

The Supreme Court's decision deserves applause. It is yet another warning for parties attempting to disrupt the arbitral process by constantly repeating their procedural objections at every stage of the proceedings or coming up with new ideas to challenge the jurisdiction. The Court reaffirmed that the law is clear and provides a time-bar for challenging jurisdiction, arguing that there was no arbitration agreement or that it was defective. A party should, therefore, raise any objection as to the jurisdiction promptly during the arbitral process. If they fail, there is a chance to bring this issue to the state court during the arbitration. The lack of success means that, in principle, the party cannot repeat such objections at the post-award stage.

*For further information on this topic please contact Maciej Durbas and Angelika Ziarko at Kubas Kos Gałkowski by telephone (+48 22 206 83 00) or email (maciej.durbas@kkg.pl or angelika.ziarko@kkg.pl). The Kubas Kos Gałkowski website can be accessed at <http://www.kkg.pl>*

### **Endnotes**

(1) Judgment of Supreme Court of 10 May 2021, file ref No. I CSKP 64/21. Further information is available here (in Polish).