Recent Supreme Court case law on enforcement of arbitral awards

INTRODUCTION

In a recently published judgment, the Supreme Court addressed the issue of enforcement of foreign arbitral awards in Poland. The party applied for enforcement in Poland of an ICC award issued in 2018 between a German and a Polish company. The Court of Appeal refused to enforce the award on the grounds that the applicant had not submitted the original arbitration agreement or a duly certified copy thereof, but rather a scanned copy of the agreement. The Court of Appeal found this to be insufficient and refused enforcement on this basis. Interestingly, the Supreme Court took the opposite view and reversed the decision of the Court of Appeal.

This article summarises the position adopted by the Supreme Court and provides the authors' comments on the arguments presented therein.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN POLAND

The legal system in Poland follows a civil law tradition (continental legal system) and there is an established and binding hierarchy of laws prescribed by the Constitution. Polish law follows the principle of lex superior derogat legi inferiori (a higher rule prevails over a lower rule). Therefore, if the Constitution or a ratified international treaty regulates certain issues, they take precedence over statutes or regulations.

This is important because both Polish domestic law and international instruments, namely the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (to which Poland is a party), would apply to the enforcement of foreign arbitral awards in Poland.

Under Article IV(1) of the New York Convention, to obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

a) the duly authenticated original award or a duly certified copy thereof;
b) the original arbitration agreement or a duly certified copy thereof.

Under Art. 1213 § 1 of the Polish Code of Civil Procedure, which regulates enforcement of arbitral awards, a party is obliged to attach to the request for enforcement: the original or a copy certified by the arbitration court of the award or the settlement reached before it, as well as the original of the arbitration agreement or an officially certified copy thereof. If the award of the arbitration court or the settlement reached before it or the arbitration clause are not in Polish, the party is obliged to attach a certified translation thereof into Polish.

WRITTEN FORM OF THE ARBITRATION AGREEMENT

Under Article II(2) of the New York Convention, the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Polish law regulates the matter in an alike manner. Under art. 1162 § 1 of the Polish Code of Civil Procedure, the arbitration clause should be in writing, whereas under art. 1162 § 2 - the requirement concerning the form of the arbitration clause is also met if the clause is included in the letters exchanged between the parties or in statements made by means of remote communication which make it possible to record their contents. Reference in a contract to a document containing a provision to submit

a dispute to arbitration satisfies the requirements concerning the form of an arbitration clause if the contract is in writing and this reference is of such a nature as to make the clause part of the contract.

FACTUAL CIRCUMSTANCES OF THE CASE

In this case, the arbitration agreement formed part of the "main" agreement between the parties. It was concluded in the following way. The debtor sent the creditor (applicant) by e-mail a scanned copy of the agreement, signed by the debtor's representative, and asked the creditor (applicant) to return it signed and stamped. During the proceedings, the creditor submitted to the court a copy of the above-mentioned copy of the agreement, i.e. a scanned copy of the agreement signed by the debtor's representative. The claimant did not submit a copy of the agreement signed by his representative.

On this basis, the Court of Appeal refused to enforce the award. The Court of Appeal held that the copy submitted by the claimant was not sufficient to satisfy the requirement of "written form of the arbitration agreement" and thus the requirement to submit the original arbitration agreement or a duly certified copy thereof.

RATIONALE PRESENTED BY THE SUPREME COURT

The Supreme Court based its position largely on issues relating to the principle of procedural fairness. The Supreme Court found that the Court of Appeal had breached this principle in the present case. This is because the Court of Appeal never informed the plaintiff that the agreement it submitted did not comply with the requirements of the New York Convention and the Polish Code of Civil Procedure. The absence of such an unequivocal communication from the court could have misleadingly led the claimant to believe that it had acted correctly.

In addition, the Supreme Court found that the Court of Appeal had failed to make sufficient findings as to whether the arbitration agreement existed and had been concluded by the parties, and whether the debtor had raised any objections to the jurisdiction of the arbitral tribunal during the arbitration proceedings.

A final and correct determination of these questions would require a clear position from the claimant as to the manner in which the parties had concluded the arbitration agreement, and then an assessment of whether the certified copy of the agreement sent in the course of the proceedings had been drawn up on the basis of the original agreement drafted in the manner claimed by the claimant. Only then could the formal requirements of Article II(2) of the New York Convention be assessed.

Finally, the Supreme Court held that the prerequisite for the enforcement of an arbitral award is the existence of an arbitration agreement and not the submission of a document confirming its conclusion. Therefore, the applicant's failure to produce the agreement referred to in Article IV of the New York Convention does not preclude the possibility of granting the application if the existence of the foreign arbitral award is undisputed or proven.

COMMENT

The authors agree with the views expressed by the Supreme Court. It should be emphasised that the Supreme Court rightly held that the existence of an arbitration agreement is decisive, and not the submission of a document confirming its conclusion, if this is not disputed by the parties. Overall, the Supreme Court's ruling is a step in the right direction and another pebble in the development of Polish arbitration doctrine.

The authors believe that even further conclusions can be drawn. The inability of a party to produce an "original arbitration agreement" in writing should not be a ground for refusing to enforce. This situation could arise, inter alia

a) where an arbitration agreement has been concluded in a form other than in writing
b) and if no arbitration agreement has been concluded and the arbitral tribunal had jurisdiction in view of the defendant's entry into the dispute.

In such a case, the existence of an arbitration agreement under Article IV(1)(b) NYC and the jurisdiction of the arbitral tribunal (where the applicable law permits arbitration notwithstanding the absence of a written arbitration agreement between the parties) may be proved by any means, and not only by the production of the said arbitration agreement. Then, "the original arbitration agreement"s could be understood as "evidence of the jurisdiction of the arbitral tribunal".

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