Time limits in arbitration agreements

December 17 2015 | Contributed by Kubas Kos Gałkowski

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Introduction

High thresholds for proceedings set in arbitration agreements, such as short time limits, can have serious consequences, including the loss of an agreement's legal effect. Further, parties must choose their arguments carefully, as they may be used against them at a later point. The role of arbitrators in overcoming procedural problems with the parties is also crucial to render an enforceable award.

These issues arose in a recent judgment issued in post-arbitral proceedings. The Warsaw Court of Appeal's June 18 2015 judgment dealt with the interpretation of arbitration agreements.(1)

Facts

In 1993 the respondent's legal predecessor (the state agency managing public agricultural real estate) concluded a lease agreement with the claimant (the 1993 agreement). The parties concluded another lease agreement pertaining to different land in 1994 (the 1994 agreement).

The 1994 agreement contained an arbitration clause, but the 1993 agreement did not. Section 17(3) of the 1994 agreement specified that "the arbitral tribunal is obligated to resolve the dispute no later than within two weeks as of filing of a statement of claim by any of the parties".

In 2006 the claimant initiated a dispute against the respondent. However, there were problems with the formation of the tribunal and the claimant did not file a statement of claim until February 2009. The claimant argued that the respondent had not effectively repudiated the 1994 agreement and requested the tribunal to award damages to the claimant under the 1993 agreement.

In March 2009 the tribunal served the statement of claim to the respondent, which filed a statement of defence in April 2009 claiming that the arbitration agreement had lost its legal effect as the two-week deadline for rendering an award as of the filing of a statement of claim had passed. The respondent therefore requested the tribunal to reject the statement of claim and allow a state court to decide the case, and also raised additional defences (eg, that the case had already been decided in another arbitral proceeding). It appears that the respondent did not refer to the lack of an arbitration clause in the 1993 agreement at this time.

During a hearing in May 2009, the tribunal rejected the respondent's arguments and found that it had jurisdiction to hear the dispute. The respondent asked the tribunal to draft a written substantiation of the decision, as it wanted the issue of the tribunal's jurisdiction to be decided by a state court, which is possible under Article 1180(3) of the Code of Civil Procedure – a direct counterpart of Article 16 (3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law. The tribunal drafted no such substantiation.

The case continued, further hearings took place in 2012 and one of the arbitrators unfortunately died

in the interim. On February 11 2013 the tribunal rendered an award in which it:

- rejected the statement of claim in part (agreeing with the respondent on the *res judicata* issue); and
- declared that the claim for damages under the 1993 agreement was founded in principle.

The respondent filed a motion to set aside the award. It claimed that the arbitration clause in the 1994 agreement had lost its legal effect and that the 1993 agreement contained no such clause.(2) The respondent also argued that the tribunal had failed to draft a separate decision on jurisdiction which prevented the respondent from filing a motion to the state court to decide on the issue. It also raised further arguments regarding the merits of the dispute, including public policy.

The claimant replied that the plea of no jurisdiction regarding the 1993 agreement should have been raised in the statement of defence, which the respondent had failed to do.

Regional court judgment

In its July 21 2014 judgment, the Warsaw Regional Court set aside the decision that the respondent was liable for damages under the 1993 agreement. The court agreed with the respondent that there was no arbitration clause in the 1993 agreement and underlined that the respondent did not have to raise the issue of jurisdiction in the statement of defence and therefore did not waive its right to object. However, it did not agree with the respondent that the arbitration clause from the 1994 agreement had lost its legal effect.

The court explained that an arbitration agreement's loss of legal effect is prescribed in Article 1168 of the Code of Civil Procedure and pertains to, for example, the inability of an arbitrator or arbitral institution to hear a case. The deadline for a tribunal to render an award does not involve serious legal consequences or the loss of effect of an arbitration agreement. The court also reiterated that the previous arbitration law from the 1930s contained a rule under which an arbitration agreement could lose its legal effect following the end of its time limit, but that the new law did not include this rule. The 1994 agreement's unrealistic two-week deadline served only to force the parties and arbitrators to resolve the dispute expeditiously. The regional court also clarified that the lack of a written decision on jurisdiction did not deprive the respondent of its legal rights; it could question the jurisdiction in setting-aside proceedings. Further, the court did not agree with the respondent's public policy agreements.

The respondent filed an appeal with the Warsaw Court of Appeal. It also sought to set aside the remaining part of the award. The respondent therefore focused on two issues: the loss of effect of the 1994 agreement's arbitration clause and public policy. The claimant also filed an appeal, but concentrated on the section of the judgment in which the regional court had set aside the award regarding the liability for damages claimed under the 1993 agreement. It argued that the arbitration clause from the 1994 agreement covered all of the claims that it had raised in the proceedings. It also underlined that the respondent had failed to raise the issue of the tribunal's jurisdiction regarding the claims under the 1993 agreement in its statement of defence, as prescribed in Article 1180(2) of the Code of Civil Procedure.(3)

Court of appeal judgment

The Warsaw Court of Appeal dismissed the claimant's appeal and allowed the respondent's, thereby setting aside the award. The court agreed that the 1994 agreement's arbitration clause had lost its legal effect due to the time limit. As there was no arbitration clause in the 1993 agreement, the case should have been heard by a state court in its entirety.

The court discussed the manner in which agreements are interpreted. It underlined that under Article 65(2) of the Civil Code, priority should be given to the intention of the parties, which must also take the text of the agreement into account. The court also noted that the parties had claimed that the tribunal was "obliged" to render an award within a specified timeframe. They did not agree with the claim that the tribunal "should" do so. Consequently, under the 1994 agreement, the tribunal had to render an award within two weeks of a statement of claim being filed. The lack of an award within that timeframe caused the arbitration agreement to lose its legal effect. This is possible

because Article 1168 of the Code of Civil Procedure lists only examples of reasons for the loss of legal effect of an arbitration clause (regarding arbitrators, tribunals and institutions); parties are free to agree on other reasons.

The court also noted that the respondent had referred to that issue throughout the proceedings and never agreed to extend the deadline. An agreement of the parties was the only way to save the arbitration agreement.

Further, the court noted that the claimant regarded the tribunal as being required to render an award within two weeks. However, the parties disagreed on whether this period started with the filing of the statement of claim (the respondent) or the statement of defence (the claimant). In a previous arbitration conducted under the same agreement, the claimant had agreed to extend the two-week deadline, but raised the issue of the timeframe in the post-arbitral proceedings. It appears that the court had not set aside the award rendered in this previous proceeding precisely because the parties had agreed on the extension of the timeframe prescribed in the 1994 agreement. This served to illustrate that the claimant also understood the arbitration agreement as imposing a firm obligation on the tribunal.

The court also underlined that even if the timeframe was unrealistic, the tribunal should have asked the parties to extend it. Regardless of this point, it held that arbitration agreements should be interpreted restrictively.

Comment

The general rules of the Civil Code should apply to the interpretation of arbitration agreements. However, arbitration agreements should not be interpreted restrictively. There is no basis for such a conclusion in the Code of Civil Practice. The end of a timeframe or the fulfilment of a subsequent condition can in principle be reasons for the loss of legal effect of an arbitration agreement.

If the claimant had not conceded that the tribunal was required to render the award within two weeks in the first arbitral case (decided on the basis of the arbitration agreement), the outcome of the second case might have been different. It could be argued that the two-week time limit was too short and could not trigger the arbitration agreement's loss of effect. Further, the court chose the most severe punishment for failing to meet the deadline to render the award (ie, the arbitration agreement's loss of legal effect). It is questionable whether in ordinary circumstances parties would agree that the end of a timeframe to render an award for the proceedings would result in such serious consequences. These consequences should be limited to a specific case and not affect the entire dispute resolution mechanism agreed between the parties (eg, the arbitrators' fees could be reduced or proceedings could be discontinued). It is unlikely that the parties would choose to put themselves in a position of uncertainty regarding the relevant forum for resolving their dispute just because the arbitrators were not expeditious enough in resolving a dispute.

The arbitral tribunal had to resolve this issue. It had two solutions:

- Contact the parties and obtain an extension or clarify that the end of the timeframe was not fatal for the arbitration agreement; or
- Organise the proceedings to render a judgment within two weeks, which was theoretically possible.

The tribunal was dealing with a sensitive issue and it seems that it was unable to render a separate jurisdictional decision to enable the respondent to refer the issue to court, as it would have been impossible to resolve the issue of jurisdiction before the end of the timeframe.

Consequently, parties should be careful when they draft arbitration agreements and should avoid creating an issue which could jeopardise proceedings later on. They should also determine whether an argument that they are relying upon could be used against them. Otherwise, they may encounter serious procedural problems in their dispute resolution mechanisms. The case discussed above should also serve as a warning for tribunals – their active involvement in the early assessment of a case is crucial, similar to their cooperation with the parties. If not, the tribunal may fail to fulfil its main obligation, which is to render an award that will be enforceable and not vulnerable to be set

aside.

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Endnotes

(1) As of November 2015, no cassation to the Supreme Court had been filed in this case. File ref I ACa 1822/14. See (in Polish) http://orzeczenia.waw.sa.gov.pl/content/$N/154500000000503_I_ACa_001822_2014_Uz_2015-06-18_001.

(2) Article 1206(1)(1) of the Code of Civil Procedure – the equivalent of Article 34(2)(a)(i) of the UNCITRAL Model Law.

(3) The equivalent of Article 16(2) of the UNCITRAL Model Law.
