

Court says no to anti-arbitration injunctions in Poland

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Facts

Decision

Comment

Anti-suit and anti-arbitration injunctions are useful instruments for enabling efficient dispute resolution and preventing forum shopping. However, these instruments – not free from criticism – are not favoured in some legal systems. Poland is one of the jurisdictions that was said to exclude the use of anti-suit and anti-arbitration injunctions. On November 22 2016 the Krakow Court of Appeals (I ACz 1997/16) confirmed that Polish courts cannot prohibit a party from initiating or continuing arbitration.

Facts

The claimant filed with a state court to declare that its set-off declarations were effective and that therefore, the defendant's claims were extinguished. In the course of the dispute the claimant also filed to secure its claims, asking the court to, among other things:

- order the defendant to file for the staying of parallel arbitration proceedings or face a PLN200,000 fine; and
- prohibit the defendant from filing a motion to enforce an award that would be rendered in the arbitration proceedings or face a PLN200,000 fine.

The claimant argued that it had asked the court to declare that its set-off declarations were effective, which would be impaired by the conclusion of parallel arbitration proceedings. The defendant had initiated the arbitration in which it made certain claims. These claims – according to the claimant – had already been extinguished due to the set-off. However, the arbitral tribunal found itself incompetent to hear the claimant's (in litigation) motion to determine whether the set-off was effective. The claimant therefore pleaded that only the issuance of an order prohibiting the arbitration from continuing and concluding would satisfy its rights in the litigation and prevent the tribunal from awarding claims that had ceased to exist.

In its June 29 2016 decision (IX GC 605/16) the Krakow Regional Court granted the motion. The court found that the claimant had established the prerequisites necessary to secure a claim under Article 730¹(1) of the Code of Civil Procedure – that is, it had made the claim probable and showed that it had legal interest in securing the claim (ie, in the event of denying the motion, it would be impossible or significantly difficult to enforce the prospective judgment or achieve the aim of the proceedings). The court agreed with the claimant that a prospective arbitral award can order the claimant to pay claims that were extinguished due to set-off declarations which are the subject of litigation. Consequently, such arbitration must be prevented from concluding. Further, the court found that the means of securing the claim desired by the claimant are allowable under Polish law.

The defendant filed an appeal against the regional court decision. It claimed, among other things, that:

- a state court cannot intervene in arbitration in the form of an anti-arbitration injunction, as

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under Article 1159(1) of the Code of Civil Procedure (modelled on Article 5 of the UN Commission on International Trade Law (UNCITRAL) Model Law) the court can intervene only where it is provided by the law;

- the law does not allow for such an intervention; and
- the claimant had no legal interest in this case, as it had other procedural means of defending its rights.

Decision

The Court of Appeals reversed the decision and denied the motion to secure the claim. The court found, among other things, that there was no legal interest in seeking the court's protection in a desired way (ie, declaration that the set-off was effective). Even where an arbitral tribunal finds itself incompetent to hear set-off arguments, the claimant still has legal instruments to defend its rights. It could, for example:

- question the tribunal's jurisdiction to hear the entire case;
- file a motion to set aside the prospective award on the basis of violation of public policy;
- oppose the award's enforcement or execution, also on the basis of violation of public policy; or
- initiate an anti-enforcement action (for further details please see "[Favourable award does not guarantee successful execution of claims](#)").

The Court of Appeals also found that, due to the above, it did not have to discuss the possibility of issuing an anti-arbitration injunction in detail. However, it underlined that the securing of claims cannot impair a party's procedural rights granted by the law (eg, to initiate and pursue other proceedings). The court therefore found that such a means for stopping arbitration does not have its basis in the Code of Civil Procedure. It also pointed to Article 1180(3) of the Code of Civil Procedure (modelled on Article 16(3) of the UNCITRAL Model Law), which sets the limits of court intervention regarding an arbitral tribunal's decision on jurisdiction. It seems that an anti-arbitration injunction would exceed these limits.

Comment

The Court of Appeals clearly denied the possibility of issuing an anti-arbitration injunction in Poland. It found that it is not a means of securing claims under Polish law and pointed to other means for a party to defend its rights. The outcome of the case is unsurprising, as it is in line with what has been the popular opinion among arbitration practitioners in Poland for some time. The reasoning behind the decision is also founded on a general rule that state court intervention in arbitration should be limited and explicitly provided for in the law – hence, a declaratory judgment on the validity of an arbitration agreement is not allowed under Polish law (for further information please see "[No declaratory judgment on validity of arbitration agreement](#)").

The case above is domestic, but may have an impact on international proceedings. However, it is unclear whether a Polish court would recognise an anti-suit or anti-arbitration injunction issued abroad. This issue is noteworthy after the Court of Justice's judgment in *Gazprom*,⁽¹⁾ under which EU law does not regulate recognition and enforcement of arbitral anti-suit injunctions. Although this issue is complicated, it is possible that a Polish court could deny recognition or enforcement due to the fact that such injunctions may interfere with a party's rights to pursue its claims before a court or tribunal. Therefore, such measures might be contrary to Polish procedural public policy.

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Endnotes

(1) Court of Justice judgment of May 13 2015, *Gazprom OAO v Lithuania*, C-536/13, available [here](#).

