

Favourable award does not guarantee successful execution of claims

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Introduction

The Warsaw Court of Appeals judgment of October 9 2015 is a recent and important contribution to the development of arbitral law in Poland.⁽¹⁾ The court made a clear distinction between the jurisdictions of state courts and arbitral tribunals regarding the enforcement of claims. It also discussed the defence of set-off raised after an award has been made. Finally, and perhaps most importantly for foreign parties arbitrating in Poland, the court clarified when a claim covered by a valid and enforceable arbitration agreement can be examined only by a state court.

Defence from enforcement of arbitral award

In Poland a respondent's loss in arbitration or litigation is only one step in the final pursuit of claims. The claimant must enforce a judgment or an award. The enforcement can be initiated on the basis of an enforcement title (ie, an execution title appended with an enforcement clause in state court proceedings). The law mentions several kinds of enforcement titles, but the most popular is a final and binding state court judgment (Article 776 and Article 777, Section 1(1) of the Code of Civil Procedure). Arbitral awards are enforced under the New York Convention 1958 or under Articles 1214 and 1215 of the Code of Civil Procedure, and prerequisites for the denial of enforcement are based on well-known international standards set out in the New York Convention and Article 36 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law (although the standards of enforcement of domestic awards are more lenient).

However, even if a claimant prevails in litigation or arbitration (and therefore obtains the execution title) and subsequently obtains an enforcement clause (thus acquiring an enforcement title), the debtor still has a powerful weapon to defend itself from execution. It can initiate an anti-enforcement action, which aims at removing the enforcement clause from the enforcement title. There are several bases for such an action under Article 840 of the Code of Civil Procedure, but the most popular refers to a situation where the claim expires after the creation of an execution title or following the closing of a hearing. A claim expires under Polish law, for example, when the debtor has paid it or the creditor releases the debtor from the debt. It also expires due to a set-off, and debtors often rely on this defence.

Facts

A lessee sued a lessor in arbitration to establish that the lease agreement between them was not binding; it also demanded the reimbursement of rent. In its award of January 9 2013, the arbitral tribunal ordered the lessor to return the rent paid on the basis of the lease agreement to the lessee. This award was appended with an enforcement clause on April 12 2013 by the Warsaw Regional

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Court and therefore became an enforcement title.

The parties motioned each other for payment of various sums stemming from various titles, but all relating to the lease. On April 19 2013 the lessor declared a set-off. Subsequently, it initiated state court proceedings to remove the enforcement clause from the arbitral award of January 9 2013 on the basis of the set-off.

The lessee did not formally ask the court to refer the parties to arbitration under Article 1165(1) of the Code of Civil Procedure, modelled after Article 8(1) of the UNCITRAL Model Law. However, it claimed that the action was an attempt to circumvent the arbitration agreement. Only an arbitral tribunal should be competent to hear whether the claim that was subject of the set-off existed.

Regional court judgment

In its judgment of September 3 2014, the Warsaw Regional Court dismissed the action. It agreed with the respondent that the question of the existence of the claim that was the subject of the set-off, pertained to arbitration and only an arbitral tribunal could confirm that such a claim existed. As the court had no evidence of the existence of the claim, it had to dismiss the action.

The claimant appealed the judgment. It argued that as it had offset the claim, it could not have sued the other party as the claim had been extinguished. Consequently, the arbitral tribunal could not award any monies to the claimant; nor could it motion the arbitral tribunal to declare that there was a set-off. Finally, it could not initiate an anti-execution action before an arbitral tribunal, as such an action can only be heard before a state court.

Appeals court judgment

On October 9 2015 the Warsaw Court of Appeals repealed the judgment and referred it back to the regional court. The court found that the claimant had relied on offsetting a claim after the arbitral tribunal had issued an award. This was acceptable as there is no provision forcing a party to rely on a set-off during arbitral or state court proceedings. Further, it underlined that any claim can be offset and a party need not obtain a judgment confirming the claim first to be able to offset it.

Consequently, the judgment of an arbitral tribunal was not necessary for a set-off to be effective and to extinguish a claim. If a claim has been extinguished, it no longer exists and cannot be enforced before a court or tribunal, therefore obtaining any sort of confirmation of set-off is not possible, save for in the anti-execution action. This action can be heard only before a state court. Consequently, the regional court should have heard the claim and assessed whether the set-off was effective and should entail removing the enforcement clause from the arbitral award.

Comment

The appeals court judgment reflects a proper understanding of the nature of anti-execution action. This is quite often the debtor's last defence before the final execution of a claim. What can be noteworthy for foreign parties is that even if a claim is covered by an arbitration agreement, but a party does not choose to pursue it in arbitration and instead decides to offset it, the claim can be examined before a Polish state court. The court will verify whether the enforcement clause should be removed from an execution title (eg, an arbitral award). In order to do so, the court must examine whether the set-off was effective (ie, whether the claim being offset existed at all). However, this cannot be called a circumvention of an arbitration agreement. In principle, an anti-execution action does not stay the execution of the claim. The debtor can only motion for such a stay. Consequently, an anti-execution action strikes a fair balance between the interests of both the creditor and the debtor.

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Endnotes

(1) File ref I ACa 2048/14, available [here](#) in Polish.

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