

No declaratory judgment on validity of arbitration agreement

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Introduction

Legal uncertainty is highly undesirable in business. However, uncertainty is likely in dispute resolution, at least to some extent and especially regarding the outcome. Other factors, such as the forum, costs and conduct of proceedings can and should be determined at the start of a dispute. This also pertains to the issue of whether a case should be heard in arbitration or before a state court.

Parties want to clarify the problem of arbitral jurisdiction promptly (eg, by means of a declaratory decision). However, a recent Supreme Court judgment of January 21 2016 (III CSK 429/15) confirms that there is no possibility of obtaining such a declaratory decision regarding the validity and effectiveness of an arbitration agreement.⁽¹⁾ This issue should and can be decided only after a dispute emerges. Consequently, according to the Supreme Court, a party which is uncertain of the validity of an arbitration agreement must initiate a substantive case before either a state court or an arbitral tribunal. Only then can the jurisdiction of the tribunal be determined.

Proceedings which can decide jurisdiction of arbitral tribunal

Poland adheres to the United Nations Commission on International Trade Law (UNCITRAL) Model Law. It adopted Article 8(1) of the Model Law in Article 1165(1)-(2) of the Code of Civil Procedure, pursuant to which a defendant has a right to ask a state court before which a case in a matter which is the subject of an arbitration agreement is brought, to refer the parties to arbitration. The court will do so unless the agreement is defective. Poland also adopted Article 16(3) of the Model Law in Article 1180(3) of the code, which grants the arbitral tribunal the possibility to rule on a plea of no jurisdiction raised in a separate decision. In the event that the tribunal decides that it has jurisdiction, each of the parties can ask the state court to decide. Further, Poland also adopted Article 5 of the Model Law in Article 1159(1) of the code, which prohibits a state court from intervening in matters of arbitration, except where so provided.

In addition to the abovementioned proceedings, questions regarding jurisdiction of an arbitral tribunal can be raised in post-arbitral proceedings. In a motion to set aside an award, a party can claim that there was no arbitration agreement or that it was invalid, ineffective or lost its effect (Article 1206(1)(1) of the code). A foreign award can be denied enforcement or recognition for the same reason (Article 1215(2)(1) of the code).

However, other legal systems provide for the possibility of a state court to determine the jurisdiction of an arbitral tribunal in a declaratory judgment (eg, Section 32 of the English Arbitration Act and Section 1032(2) of the German Code of Civil Procedure). There is a general possibility in Polish procedural law to ask the court to determine the existence of a right or a legal relationship under Article 189 of the code. However, the authorities were undecided on whether a party could ask a

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state court to declare the defectiveness or non-defectiveness of an arbitration agreement. The Supreme Court decision clarifies this issue.

Facts

Two entities concluded a cooperation agreement in 2010. Before an arbitration was initiated, one of the parties requested a state court to establish that the arbitration agreement in the main contract was defective and thus not binding.

Both the regional court and the Court of Appeals denied the claim. An action under Article 189 of the Code of Civil Procedure can be successful if a party establishes that it has legal interest in the determination of an issue. There is no such legal interest if a party has other means of achieving its aim (eg, when it can make a claim for payment under an agreement it has no legal interest in asking the court to determine that that agreement is valid). In the case of the jurisdiction of an arbitral tribunal, there are means available to question this issue both before the state courts and an arbitral tribunal (see Articles 1165(1)-(2) and 1180(3) of the code). The Court of Appeals underlined that there was no provision in the code on arbitration providing for a declaratory action and thus a state court cannot intervene, as it is not directly authorised to do so (Article 1159(1) of the code). Consequently, a state court cannot make a declaratory judgment regarding the jurisdiction of an arbitral tribunal, unless a substantive case is brought before it.

Decision

The Supreme Court confirmed the judgment of the Court of Appeals. However, it did not find a reason for such a decision in a provision prohibiting the state court's intervention in arbitration (Article 1159(1) of the code), as the lower courts did. It only agreed with the lower courts that a party motioning for such a declaration does not have a legal interest in such a determination. The party has its day in court as it can question the jurisdiction of a state court or arbitral tribunal as soon as a case is initiated. Therefore, the party does not need to obtain a declaration regarding this issue beforehand.

Comment

The Supreme Court judgment is in line with the competence-competence principle and can generally be accepted. However, there are cases where a party should be able to determine whether a binding arbitration agreement exists even before a dispute emerges. This is due to two main reasons.

First, in the case of a pending arbitration, the arbitrators may – but do not have to – rule on the plea of no jurisdiction in a separate decision (Article 1180(3) of the code). Consequently, they can decide that issue in the final award. This would entail unnecessary and costly proceedings, which could have been avoided if the arbitrators had had the binding ruling of a state court on the arbitration agreement in front of them. Hence, in such cases a party can have legal interest to initiate Article 189 of the code.

Second, the extent to which a court decision has binding power in other cases is debatable. It is disputed under Polish law whether the binding effect of a judgment exceeds the operative part of a decision of a court or tribunal and extends to the reasoning.⁽²⁾ If it does not, then proceedings under Article 189 of the code would be the only kind of proceedings in which the court would rule on the validity of an arbitration agreement in the operative part of a decision. In other proceedings, the operative part of the judgment is not descriptive (eg, the court merely denies claim or recourse against the award or rejects the statement of claim). It is only in the reasoning where the motives of the court are shown. Consequently, a declaratory judgment under Article 189 of the code can have a strong binding effect for other courts and thus would settle the issue of jurisdiction once and for all (which is always in the interest of justice).

However, these arguments were not analysed by the Supreme Court and thus were not determined. According to the Supreme Court, a party that is uncertain of the validity of an arbitration agreement must initiate a substantive case before either a state court or an arbitral tribunal. Only then can the jurisdiction of the tribunal be determined.

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Endnotes

(1) For details of the judgment (in Polish) see [here](#).

(2) For further information please see "[Supreme Court decides on *res judicata* of arbitral awards](#)".

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