

Supreme Court sets high formal requirements for motion to recognise foreign award

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Introduction

Parties sometimes believe that the recognition and enforcement of an arbitral award is a mere formality, as the substantive proceedings are already over. However, the enforcement stage can prove to be very formal and parties should be careful not to overlook certain requirements of a motion. A May 25 2016 Supreme Court decision (V CSK 257/15) demonstrates the serious consequences that can stem from parties' errors in this regard.⁽¹⁾ It also shows that Polish courts sometimes require a party to present more than just original or certified copies of the arbitration agreement and the award, as prescribed in Article IV(1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Facts

A Russian claimant filed to enforce an award made by the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry against a Polish respondent. The claimant had acquired rights and duties stemming from an agreement with the respondent under an assignment agreement and had successfully pursued its claims in arbitration.

In defence against the motion to enforce the award, the respondent claimed, among others things, that:

- it had not had a chance to present its case in arbitration;
- the assignment agreement was invalid; and
- it did not consent to the terms of the assignment agreement.

The respondent also raised another formal argument: the claimant had presented the courts merely with the main agreement and not the original version of the assignment agreement. However, both the Regional Court and the Court of Appeals had disagreed with the respondent and enforced the award.

Decision

The Supreme Court:

- agreed with the respondent;
- set aside the Court of Appeals decision; and
- sent the case for a rehearing.

It emphasised that under Article IV(1) of the New York Convention and Article 1213(1) of the Code of Civil Procedure, every motion to recognise or enforce a foreign arbitral award should be appended

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with an original or certified copy of the award and the arbitration agreement (along with translations thereof, if necessary). These are considered requirements of a double nature: they are formal and substantive requirements of a motion. However, these provisions do not explicitly regulate a situation in which the rights and duties under the agreement containing an arbitration clause were assigned.

The court found that, if one of the parties to an arbitration agreement transferred its rights and obligations under this agreement by means of an assignment, the assignment agreement should also be attached to the motion to recognise or enforce the award, as it is a formal requirement of such a motion. The court based its reasoning on Article IV of the New York Convention and Article 1213 of the Code of Civil Procedure: one reason why the claimant must submit the award and the arbitration agreement is to allow the court to verify whether the parties mentioned in the award correspond to those that agreed to arbitration. Consequently, if the rights under the agreement were assigned, filing such an assignment agreement would also be considered a formal requirement of a motion to recognise or enforce an award.

As a result, the Supreme Court found that the term 'agreement in writing' under Articles II(1) and (2) of the New York Convention also encompasses the agreement for the assignment of rights under the arbitration agreement. Such an agreement should be filed with a motion under Article IV(1)(b) of the New York Convention as a formal requirement.

If a party fails to append its motion with such an assignment agreement, it should be called to amend its procedural error. However, if the court fails to request such an amendment and proceeds with the case, it is impossible to remedy the procedural defect later in the proceedings and the court should hear the motion from a substantive point of view. If there is no written agreement, including an agreement for the assignment of rights, the recognition or enforcement of the award should be denied. However, the Supreme Court underlined that a party cannot be surprised with such a decision and the court should notify it of the consequences of failing to present the court with all of the documents necessary to grant the motion.

Comment

The Supreme Court decision goes far in setting the formal prerequisites of a motion to recognise or enforce a foreign arbitral award, arguably too far (ie, beyond the text of the New York Convention, which requires the claimant to merely present the arbitration agreement and the award along with their translations, if necessary). Whether the claimant will succeed in showing its standing and entitlement to act on the basis of the award remains another issue. Making the requirement to prove the assignment of rights a formal requirement of a motion to recognise or enforce an award can preclude a party – under Polish procedural law – from proving this issue later in the proceedings. Consequently, foreign parties planning to enforce an award in Poland should be careful to gather all evidence and documents before filing a motion. The decision in question shows that correcting any irregularities in this regard may subsequently be impossible. It also stands against the Supreme Court's liberal attitude towards enforcing foreign arbitral awards.⁽²⁾

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Endnotes

(1) Judgment available in Polish [here](#).

(2) January 23 2015 decision (V CSK 672/13), available in Polish [here](#), in which the court found that a party does not have to append its motion for enforcement with an arbitration agreement if its existence is beyond dispute.

