

Supreme Court confirms that agent's email authorisation is necessary to enter into arbitration agreement

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Introduction

International contracts are often concluded via email. This practice requires a more liberal approach to the form of arbitration agreements under the New York Convention. However, the convention is silent on the form in which an agent's authorisation (ie, power of attorney) to enter into an arbitration agreement must be made. A recent Supreme Court decision⁽¹⁾ confirms that under Polish law, such authorisation is required and should be made at least in an equal manner to that required to conclude the agreement itself (ie, at least by way of an electronic document). This decision also shows that the issue of an agent's authorisation to enter into an arbitration agreement is problematic, but not only in Poland.⁽²⁾

Facts

Hungarian seller P entered into an agreement for the sale of bioethanol with Polish buyer W. The terms of the agreement were:

- agreed by telephone;
- set out in writing;
- signed on behalf of W by its managing director; and
- exchanged by the parties via email.

The managing director was not legally entitled to represent W, as he was not a board member. However, the managing director was acting *de facto* on behalf of W and its sister company. A member of the board of both Polish companies knew of this fact and introduced the managing director as a representative of W or its point of contact.

The sales agreement contained a choice of law and an arbitration clause. The goods were delivered, but the price was paid only in part. W denied that it had entered into an agreement with P, as the managing director had not been authorised to act on behalf of the Polish party. It alleged that W had made only a partial payment on behalf of its sister company A, which was the true party to the agreement.

P initiated arbitration against W. In a partial award, the tribunal found jurisdiction under a valid and effective arbitration agreement. It underlined that the managing director had implied or presumed authority to act on behalf of W and to enter into an arbitration agreement. In another partial award, it ordered W to pay P.

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Regional court decision

P motioned for the recognition of the award in Poland. On December 29 2015 a regional court granted the enforcement. It found that under Article II(2) of the New York Convention, parties can enter into an arbitration agreement via email (in the case at hand, via scanned documents signed by the parties).

As to the managing director's authority, the court found that the law applicable to this question must be established separately, as the issue in question is not governed by the law applicable to the form of the arbitration agreement. Further, both the New York Convention and the European Convention on International Commercial Arbitration are silent on this matter. After conducting a thorough conflict-of-law analysis, the court applied Polish law. It clarified that the facts of the case showed that the managing director had had no formal power of attorney to act on W's behalf. However, it found that even if the agent of a party to an arbitration agreement is not authorised to enter into the arbitration agreement, this cannot constitute grounds to refuse recognition of the award under Article V(1)(a) of the New York Convention, which mentions only the defects of the agreement itself, but not due to a lack of authority to conclude the agreement. The court also underlined that if it had found no authorisation (oral or implied) for the managing director to act on behalf of W, it would have denied recognition under Article V(2)(b) of the New York Convention due to a violation of Polish public policy. However, this was not the case according to the court.

Court of Appeals decision

The Court of Appeals denied the Polish company's appeal against the decision to recognise the award on March 25 2016. The only notable difference in the court's reasoning was that it found that the managing director's authorisation had existed and could be implied from the facts of the case. However, W's appeal to the Supreme Court was successful.

Supreme Court decision

The Supreme Court underlined the importance of the principle of an arbitration agreement's separability, which implies that the agreement's formal validity and effectiveness must be examined separately from the main agreement. This led the court to conclude that the issue of authorisation to enter into an arbitration agreement should be analysed separately and, in the case at hand, on the basis of Polish law.

The Supreme Court considered that the arbitration agreement had been entered into through an exchange of electronic documents via email. Consequently, the power of attorney to enter into an arbitration agreement should have constituted a document of equal form to the agreement itself. The managing director had used an email alias showing its affiliation with W and his authority could be implied from the facts of the case. However, this was insufficient. W had issued no document to prove the managing director's authority to enter into the arbitration agreement. Consequently, the Supreme Court remitted the case for a rehearing, implying that concluding an arbitration agreement on the basis of an invalid power of attorney does not preclude the enforcement of an arbitral award to be denied on the basis of Article V(2)(b) of the New York Convention (ie, for public policy violation).

Comment

The Supreme Court's decision is an important contribution to the discussion regarding the form of arbitration agreements. The court confirmed that under the New York Convention, an exchange of emails is sufficient to enter into such an agreement. However, it underlined that:

- proof of the agreement itself (ie, a meeting of minds of the parties expressed by an exchange of communication) must exist; and
- the agreement must be concluded by authorised persons.

Consequently, if the means of electronic communication are used by agents, they must be authorised separately and such a power of attorney must be made at least in a form equal to that of the

arbitration agreement itself. Any defaults in this regard may have severe consequences, including the refusal of an award's recognition or enforcement rendered on the basis of the arbitration agreement being entered into by an unauthorised person.

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Endnotes

(1) Polish Supreme Court, March 2 2017, V CSK 392/16, available in Polish [here](#).

(2) For a Greek perspective, please see "[Authority to enter into an arbitration agreement](#)".

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