Arbitral tribunals must consider all evidence or risk violating public policy

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Introduction

It is a well-established rule that the setting aside of an arbitral award or the refusal of its recognition or enforcement due to a violation of public policy can occur only as a last resort to remedy a grave error in the award. It is also well established that the state courts in post-arbitral proceedings do not reconsider the facts established by an arbitral tribunal. Although these rules are clear on paper, they are less clear when applied in individual cases.(1) A recent Supreme Court decision illustrates the conflict between public policy in theory and in practice.(2)

Facts

A Polish and a Spanish company initiated arbitration proceedings in Poland claiming, among other things, that they had successfully avoided a construction contract concluded with a Polish municipality. On 29 September 2016 the arbitral tribunal, in a partial award, agreed with the claimants.

The municipality motioned to set aside the award due to a violation of public policy. The respondent claimed that the tribunal had violated the principle of comprehensive consideration of the facts of a case.

Decisions

On 7 February 2017 the Wrocław Court of Appeals set aside the award. It agreed that the facts of the case had not been evaluated in full and that the tribunal had based its decision on one part of the evidence. The remaining evidence had been – without any reasoning – disregarded.

The claimants in the arbitral proceedings subsequently filed a cassation complaint with the Supreme Court. They claimed that the state court had exceeded its mandate by evaluating the evidence that had constituted the basis for the arbitral award. They also disagreed that the arbitral award had violated public policy, as Polish arbitration law and the applicable arbitration rules provide for no specific instructions as to the content of the award's reasoning. As the tribunal had presented its reasoning, the award could not be set aside on that basis.

The Supreme Court dismissed the complaint in a 7 February 2018 decision. It underlined that in hearing the motion to set aside the award, the state court should not be a second instance of the arbitral proceedings or evaluate the case *in rem*. The Supreme Court also pointed out that:

- the parties to an arbitration agreement limit their constitutional right to a trial; and
- the reasons to set aside an arbitral award should be interpreted narrowly.

Further, the Supreme Court outlined the Polish case law on public policy, which – unsurprisingly – reaffirms that public policy refers to the most basic principles of the legal system. As far as procedural public policy is concerned, it refers only to the elementary rules of due process. However, the court found that the principle of comprehensive consideration of the facts of a case forms part of procedural public policy.

The court continued by examining the arbitral award in this regard. It agreed with the Wrocław Court of Appeals that the fact that the award was lengthy (more than 100 pages) was not enough, as the arbitral tribunal had not presented its reasoning in a full and comprehensive manner. The Supreme Court noted that, as there can be no appeal against an arbitral award, the award must be well reasoned to be credible to the parties. The court clarified that this does not mean that arbitral tribunals should discuss every single document concerning a case. However, tribunals cannot consider documents from a period other than that which is the subject of the dispute, disregarding documents and witnesses, including expert witnesses. Such an analysis would be selective and render an arbitral award unconvincing and thus defective.

Comment

The Supreme Court judgment requires careful evaluation. Unfortunately, the arbitral award being subject of the motion to set aside in the case has not been made public. Examining its contents would help to verify whether:

- its reasoning met the standards established in arbitration practice and that the Supreme Court therefore went too far in examining the tribunal's award; or
- the award's reasoning was indeed so selective and incomprehensible that it had to be set aside.

However, previous concerns regarding arbitral awards and public policy remain. Public policy 'on the books' and 'in action' are not the same. The relevant case law (including the above decision) shows that the courts sometimes go (or at least seem to go) further in their examination of arbitral awards than the narrow and exceptional nature of public policy appears to allow. The exceptional nature of public policy (as explained in Supreme Court Judgment I CSK 53/09 of 3 September 2009) should – in theory – prevent the state courts from evaluating whether:

- an arbitral award has its basis in the facts presented; and
- these facts were established correctly.

The above decision departs from the reasoning presented in Judgment I CSK 53/09 for a more comprehensive analysis of the arbitral award by the state court.

It will be interesting to see which way the balance will tilt. Will the state courts extend their mandate in post-arbitral proceedings? Or will they remain reserved and treat the violation of public policy as something extraordinary?

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Endnotes

(1) For more information on this issue please see R Kos and M Durbas, 'The Arbitrators' (Perceived) Power to Revise a Contract vs the Power of the Public Policy Clause', *Austrian Yearbook on International Arbitration*, 2014 135 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler, eds, 2014).

(2) Supreme Court judgment of 7 February 2018, file ref V CSK 301/17, available in Polish here.