State court refuses recognition or enforcement in collusion cases

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AUTHORS

Maciej Durbas

Rafał Kos

Introduction

Under Article 1214(3) of the Code of Civil Procedure, Polish state courts can refuse the enforcement of arbitral awards made in Poland only due to a lack of arbitrability, a violation of public policy or consumer rights (for further details please see "Important changes regarding consumer arbitration introduced"). The grounds for refusal are limited and consistent with international standards. This is understandable, as a motion to set aside an award is regarded as the primary recourse against a defective award in Poland. It allows for broader (but still limited) control of an arbitral award, similar to the control prescribed in the United Nations Commission on International Trade Law Model Law.

Due to the above, parties unhappy with the outcome of arbitration often try to question its enforcement based on public policy, raising numerous violations of law that do not amount to public policy. Such attempts are correctly dismissed by the Polish courts. However, public policy is a tool that can also protect the legal system in certain situations. Two interesting Katowice Court of Appeals decisions made on the same day by the same judge in two non-related cases demonstrate how the courts deals with collusion cases.(1)

Facts

In Case V AGo 3/18, the party filed a motion to enforce an *ad hoc* award made by a single arbitrator. The award ordered the debtor, a natural person, to pay more than Zl6 million with interest. The creditor offered to resolve the dispute in arbitration only in the motion for payment. The debtor agreed and acknowledged the debt, which resulted in no hearing and the rendering of the award *in camera*. The debtor did not oppose to the motion in the enforcement proceedings.

The court noted that there was another case pending before the court whose facts were identical (ie, *ad hoc* arbitration on the basis of a submission agreement and the debtor's acknowledgment of the debt) save for the amount in dispute (Zl2 million). It also underlined that enforcement proceedings were pending against the debtor. The court also examined the motioning party's publicly available financial data. The documents proved that the company had failed to show any basis for the existence of such a debt against the debtor.

In Case V AGo 13/18, a party filed a motion to recognise an *ad hoc* award. The opposing party expressly concurred with the motion, which is not a typical situation. However, the Court of Appeals noted that there was a pending shareholder's dispute that could affect the enforcement, as it affected persons authorised to represent the motioning party. This is because in 2017, two groups of shareholders had simultaneously organised two shareholders' meetings. The parties that signed the arbitration agreement were elected as a result of one of the meetings. However, one group of shareholders filed for invalidation of the other group's resolutions and obtained a stay of the proceedings by the registry court.

Decisions

In Case V AGo 13/18, the court found that the persons that had signed the arbitration agreement were not authorised to represent the motioning party. This is because the registry court stayed the proceedings to change the company's board members until the shareholders' disputes had been resolved. In the Court of Appeals' opinion, this was sufficient to establish that only the board members mentioned in the company's register were authorised by the company and not the persons who had signed the arbitration agreement.

The court also noted that public policy serves to shield the legal system and not the interests of particular parties and underlined that "there are no grounds to recognise an award, if the available evidence leads to the conclusion that the award serves to achieve other objectives than those to which, in accordance with its substance, it should".

The court relied on the same rationale in Case V AGo 3/18. It found that:

> *there are no grounds to declare the arbitration award enforceable, if the available material leads to the conclusion that the judgment may violate the legal interests of third parties (creditors) from outside of the circle of the related companies and individuals or serve other objectives than those to which, in accordance with its substance, it should.*

The court also found that the circumstances of the case demonstrated that there was no real dispute between the parties. The dispute's actual aim was to "legalise legally dubious business transactions" and "actually trigger other hidden legal effects" (ie, impede on the enforcement of claims against the debtor by creating other fictious debts).

Comment

It is unusual for a Polish court (not only in arbitration cases) to be faced with two collusion cases at the same time, let alone on the same day. The judgments in question are also noteworthy as the parties hid facts from the court that were relevant to assess the compliance of the arbitral awards in question with public policy. As refusal for public policy can be made *ex officio*, the court noted that it can also submit evidence *ex officio* in this regard.(2) As the evidence was publicly available, it could assess that the real objectives of the awards were hidden and illegal.

It is difficult to tell whether the court's assessment was correct without knowing the full facts of the case. However, the cases show that the courts treat public policy seriously and correctly refuse to enter arbitral awards made in fictious cases into the legal system.

It is also safe to conclude that arbitrators faced with a dispute in which the defendant acknowledges its debt and agrees with the claimant should be vigilant and verify whether the parties are seeking to achieve hidden objectives and not merely to resolve their dispute. Otherwise, they risk their awards being refused recognition or enforcement.

For further information on this topic please contact Maciej Durbas or Rafał Kos at Kubas Kos Gałkowski by telephone (+48 22 206 83 00) or email (maciej.durbas@kkg.pl or rafal.kos@kkg.pl). The Kubas Kos Gałkowski website can be accessed at www.kkg.pl.

Endnotes

(1) Court of Appeals of Katowice decision of 19 March 2018, V AGo 3/18, available in Polish here and Court of Appeals of Katowice decision of 19 March 2018, V AGo 13/18, available in Polish here.

(2) This rationale was also relied upon by the Supreme Court in a 28 October 1993 decision (file ref II CRN 70/93).
