

Award vacated for *ultra petita* decision regarding interest



01 August 2019 | Contributed by Kubas Kos Gałkowski

Arbitration & ADR, Poland

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Introduction

It is obvious to arbitration practitioners that an arbitral award cannot deal with claims not brought before a particular tribunal. However, it is also clear that vacating an award due to a violation of public policy should be an exceptional measure.

The Supreme Court recently dealt with these two principles and leaned towards the former, setting aside a domestic award for interest granted for a different period than the one demanded by the claimant in the proceedings. **(1)**

Facts

The dispute centred on two separate proceedings before the Arbitration Court at the Polish Chamber of Commerce. In the first case, on 18 December 2012, the tribunal ordered the respondent to pay approximately Zł17.2 million (approximately \$4.5 million). The motion to set aside the award in this case was dismissed by the Polish courts in a final and binding manner.

During the second proceedings, the claimant demanded:

- interest from the sums awarded in the first proceedings in the amount of approximately Zł6.7 million (\$1.8 million), due before the date on which the claim was brought (ie, 29 March 2013); and
- additional interest for delay.

The respondent invoked some formal arguments, but as they did not pertain to the heart of the dispute, they will not be discussed further.

In a 24 April 2014 award, the tribunal awarded the claimant approximately Zł2.4 million (ie, interest due from 3 April 2013 to 24 April 2014) with further interest as of the date of the award, dismissing the remainder of the claim. The tribunal found that the sums awarded in the first proceedings were indisputably due to the claimant. However, they should have been paid only on the claimant's demand and only the service of the statement of claim in the second proceedings (3 April 2013) served as such a demand. Therefore, the tribunal awarded interest from this date to the date of its judgment (ie, 24 April 2014).

The respondent filed a motion to set the second award aside. It argued that the award should be vacated because the tribunal had deprived it from presenting its case and had violated the rules of procedure (Article 1206(1)(2) and (4) of the Code of Civil Procedure, modelled after Article 34(2)(a)(ii) and (iv) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law).

The respondent also claimed that the award violated Polish public policy (Article 1206(2)(2) of the Code of Civil Procedure, modelled after Article 34(2)(b)(ii) and (iv) of the UNCITRAL Model Law). The reason for said violation was the fact that the tribunal had awarded sums that had not been claimed in the proceedings and had thus been decided *ultra petita* (ie, a decision beyond the claims submitted to the tribunal).

The motion to set aside the award was dismissed by the regional court and an appeal was dismissed by the Court of Appeals. The court noted that the tribunal had awarded much less than the claimant had wanted. Although the period for which the interest was calculated in the award (ie, 3 April 2013 to 24 April 2014) was different than the one mentioned in the statement of claim (ie, 1 April 2010 to 29 March 2013), the court found that the decision could be placed in the framework of the demand.

The respondent filed a cassation complaint with the Supreme Court arguing that the Court of Appeals had erred in assessing that the award had not been made *ultra petita*.

Decision

The Supreme Court agreed with the respondent and vacated the Court of Appeals judgment and remitted it for rehearing. The Supreme Court underlined that the no *ultra petita* rule is a fundamental rule of Polish procedural law and arbitral proceedings and its violation can be treated as a violation of the right to be heard. The court invoked Polish case law in this regard.

The court went on to explain that if the arbitral tribunal had found that the interest was due only from 3 April 2013, it could not have awarded any claims from the respondent, as the claimant had demanded interest only up to 29 March 2013. Therefore, in awarding interest calculated from 3 April 2013, the tribunal had violated the agreed rules of procedure. It had also gone against the respondent's right to be heard as a party cannot defend itself properly against arguments that have not been raised in the proceedings. The Supreme Court satisfied itself in explaining this violation, without the need to discuss whether the issue amounted to a violation of Polish public policy.

Comment

The Supreme Court's judgment seems, at first glance, a bit formalistic. The claimant received less than it had asked for, hence there should be no major issue with the award. However, analysis of the judgment shows that the award was indeed made *ultra petita*. Why the tribunal failed to notice that the period for which it granted interest was different than the one mentioned in the statement of claim remains a mystery. Maybe it went too far in 'splitting the baby' (ie, wanting to award some interest, but in a lower amount than that demanded by the claimant). Maybe there were other reasons not contemplated in the Supreme Court judgment.

Irrespective of why such a decision was made, this case serves as an important caveat for counsels and arbitrators. Counsels should be prepared to offer arbitrators alternative bases for their claims that are defensible in post-arbitral proceedings. Conversely, arbitrators should evaluate claims carefully and be sure that they did not overstep their mandate. Otherwise, even a favourable award will not bring the case to a favourable conclusion, as demonstrated in the above case.

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Endnotes

(1) Supreme Court judgment of 8 February 2019, I CSK 757/17, available in Polish [here](#).

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