

ICC award set aside for failure to admit further expert evidence

05 September 2019 | Contributed by Kubas Kos Gałkowski

Arbitration & ADR, Poland

- 🔍 Introduction
- 🔍 Facts
- 🔍 Decision
- 🔍 Comment

Introduction

A Polish appeals court vacated an International Chamber of Commerce (ICC) partial award for alleged irregularities in the arbitrator's appointment (for further details please see "ICC award set aside due to irregularities in arbitrator's appointment"). The sole arbitrator's final award was also successfully challenged and set aside. The first reason to vacate the final award was also the issue of the sole arbitrator's appointment.

The second one was that the award violated public policy. The case touched on the important issue of evidence – namely, what are the obligations of the tribunal in the event that it cannot base its award on any of the party-appointed experts' opinions. In a controversial decision, the Supreme Court clarified that in such a case, when both parties request a tribunal-appointed expert, the tribunal should allow such a motion. It cannot merely decide against the motioning party, as this may cause it to violate its obligation to consider the case, which – according to the Supreme Court – is part of Polish public policy. **(1)**

Facts

The parties were in a dispute over a construction agreement. The respondent, a Polish municipality, claimed approximately Zł120 million (approximately €28 million) from the claimant in contractual penalties and made information regarding the penalties public. This rendered the claimant insolvent and it sought remedies against the respondent in an ICC arbitration. The parties agreed that the experts would be appointed.

The claimant obtained a private opinion which argued that the respondent's demand for penalties had been baseless and had triggered damages. The claimant obtained a private opinion which argued that respondent's demand for penalties had been baseless and had triggered damages.

The respondent presented a different expert opinion, which unsurprisingly concluded that the claimant was responsible for its financial situation and questioned the respondent's liability for damages.

As both opinions were allegedly inconclusive, the tribunal (ie, the sole arbitrator) considered obtaining further expert evidence. The respondent requested a tribunal-appointed expert. The claimant made a similar request in the event that the tribunal would not award damages on the basis of the claimant's private opinion alone.

However, instead of appointing another expert or trying to erase the doubts that arose with respect to the experts' opinions in another way, the tribunal closed the proceedings and issued an award of €80,000 for the violation of the claimant's reputation and dismissed further claims in this regard (which amounted to €4 million). The tribunal also dismissed the Z114 million (approximately €27 million) main claim for damages. It acknowledged that the claimant had a claim in contract and tort against the respondent, but stated that the majority of the multi-million damages claim should be dismissed for a lack of causal connection. The tribunal claimed that the respondent had failed to demonstrate this link.

Both parties filed a motion to set aside the award. The court of appeals vacated the award for two main reasons. First, as in the previous case, the court agreed with the respondent that the sole arbitrator had not been appointed in accordance with the ICC Rules of Arbitration. The court invoked Article 12(3) of the rules, pursuant to which a sole arbitrator is appointed by the ICC Court if the parties fail to nominate a sole arbitrator within 30 days. In such cases, the arbitrator should be appointed under Article 13(3) of the rules based on the proposal of an ICC national committee or group or directly by the court if the prerequisites set out in Article 13(4) are met (eg, where one or more of the parties is a state or may be considered a state entity). The court of appeals underlined that the municipality was neither a state nor a state entity. Consequently, the ICC Court should have consulted the national committee first and should not have made an independent appointment. Notably, the claimant also questioned the sole arbitrator's appointment, but due to the fact that it had raised no arguments in this regard in arbitration, the court deemed that it had waived its right to do so.

Nonetheless, the claimant's motion to set aside the award was allowed. The court of appeals agreed that the award violated Polish public policy due to the fact that the tribunal had failed to consider the case properly. The court found that the tribunal's reasoning had been defective. If the tribunal had found that, as a matter of principle, the claimant had a claim in contract and tort against the respondent, it should have heard all of the parties' motions with respect to the claim's further prerequisites – in particular, the causal link of the respondent's violations and the claimant's alleged damages. If this link was unclear even after considering the party-appointed experts' opinions and both parties had motioned the tribunal to appoint its own expert to clarify the issue, the case was not ready to be decided. The court based its reasoning on the notion that a tribunal's refusal to consider evidence may be regarded as a reason to vacate an award if said piece of evidence is crucial in deciding the case.

The respondent filed a cassation complaint to the Supreme Court, arguing that the court of appeals had wrongfully regarded the tribunal's evidentiary decisions as violating public policy. The respondent alleged that the parties had agreed to hear the case solely with party-appointed experts; thus, no tribunal-appointed expert was allowed in the proceedings.

Decision

The Supreme Court dismissed the cassation complaint. It stated that a prohibition on appointing a tribunal-appointed expert could not be found in the ICC rules, the procedural orders of the arbitrator or even the parties' positions during the arbitral proceedings. All of these sources allowed or even expected the tribunal to appoint an expert – even *ex officio*. As the parties had requested the tribunal to make such an appointment, it should have done so. Unfortunately, for formal reasons, the respondent's cassation complaint did not touch on the core of the court of appeal's reasoning (ie, whether the state court in post-arbitral proceedings can evaluate a tribunal's evidentiary decisions made in the case of a discrepancy in party-appointed experts' opinions).

Comment

The case at hand appears to be unlucky for Polish arbitration practice. The Supreme Court's position regarding a tribunal's evidentiary obligations is debatable, as was the previous appeals court decision.

It is true that in exceptional cases, failing to admit or consider evidence offered to support a position could be regarded as a violation of public policy. However, it cannot be stressed enough that this thesis is applicable only to the most severe violations of a party's right to be heard. Otherwise, state courts in post-arbitral proceedings would be expected to step into the shoes of tribunals and evaluate evidence offered by the parties and its potential impact on the case.

This is also true in the case at hand. Although the facts of the case were not quoted extensively, it can be assumed that this case resembles many others in which two parties offer contradicting expert evidence. A tribunal can always base its decision on an expert's findings and either award or dismiss the claims. Unless the other party can demonstrate that this decision is wrong because the evidence is defective, the award should not be vacated. Therefore, the issue is not whether a tribunal must hear further evidence in the case of such discrepancies, but rather whether it has a basis to make a justifiable decision. If it can, the award should not be questioned by a state court.

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

Endnotes

(1) Supreme Court decision of 28 February 2019 (V CSK 63/18), available in Polish [here](#).

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.



Maciej Durbas



Rafał Kos