

Voluntary Enforcement of Arbitral Awards

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ABSTRACT

The article describes the issue of voluntary enforcement of arbitral awards. The question is whether voluntary enforcement is a legal structure or an attitude of the parties. It seems that voluntary fulfilment of the obligations created / sentenced in the award doesn't need any specific rules and legal background. The party which is willing to pay or perform other obligations is always free to do it. Contrariwise, the party may use various tools to delay or even extinct the enforcement of the award. The other question is whether enforcement could be voluntary. Shouldn't a term "fulfilment" be used instead? This leads to the conclusion that voluntary enforcement is a term that refers more to the will of the party to fulfil the obligations.

Keywords: *arbitral award enforcement, ethics in arbitration*

1. INTRODUCTION

During 2020 edition of the Kovalyov Reading in Ekaterinburg, Russia, I was asked to speak about voluntary enforcement of the arbitral awards. The first thought and question was whether "voluntary enforcement" is not an oxymoron. The etymology of the word "enforcement" relates to force. And force itself is used against somebody who is not willing to cooperate and fulfil their obligations. "Execution" of arbitral awards is a controversial phrase as well. It could be understood in two opposed ways. On one hand "execution" means something what was planned and has to be done, on the other hand "execution" relates even to performance of the death penalty. Probably there are milder words that could be used to describe the "voluntary execution". Maybe we could speak about "implementation" of the arbitral awards or theirs fulfilment. This is not a childish game which goal is to find synonyms but a serious issue as it shows the attitude of the speakers and actors of the arbitral proceeding to what could be done with the award. It is obvious that enforcement is a legal term and as a such it will be used in this article but the question should be not only on the issue of official name and obviously of the procedure of the enforcement but on the psychological attitude of the losing party / debtor as well.

2. STUDY METHODOLOGY

The rules of enforcement and setting aside of the arbitral awards are relatively similar in most of the countries. Those issues will be described by, using as an example, the rules applicable in Poland. Poland is not only the EU

and OECD member but what is more important from the perspective of this article Poland signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and is the party of the European Convention on International Commercial Arbitration. Polish rules related to discussed issues seem to be close to model rules.

3. FINDINGS OF THE STUDY

The article 1214 §2 of the Polish Code of Civil Procedure (Kodeks postępowania cywilnego, "KPC") provides that the court shall declare the enforceability of the award of the arbitral court or of the settlement concluded by such court by giving them an enforcement clause. An arbitral award or settlement, the enforceability of which has been established, are executive titles.

In layman's terms it means that the arbitral award after being "approved" by the court can be executed with, in the most common situation, the help of public bailiff.

The article 1214 §3 KPC provides when the court refuses to declare the enforceability of the award. This is when:

- the (Polish) law doesn't allow such dispute to be resolved in arbitration;
- the declaration of enforceability would violate the public order clause;
- the award violates the rights of customers.

The additional rule refers to foreign arbitral awards. The enforcement of those is possible only after conducting a hearing (article 1215 §1 KPC) what is in accordance with the New York Convention. It seems that the ratio legis for conducting a hearing is that foreign awards may have some unknown or atypical clauses and solutions. This runs to conclusion that verification whether the award has sufficient elements to be enforced needs to be done with more attention what could be done during the hearing.

The procedure of obtaining of the enforcement clause for the arbitral award in Poland seems to be easy. The similar

procedure is applied in other countries, for example in Germany (sections 1060 and 1061 of *Zivilprozessordnung*) or Russian Federation (articles 236 – 246, 416, 417 and 423 – 427 of Civil Procedure Code). The Article III of the New York Convention implemented the rule that enforcement of foreign arbitral awards shouldn't be significantly more expensive nor significantly more complicated than the enforcement of domestic awards. It is obvious that it allows some differences as long as they aren't significant.

Taking Polish example into consideration the article 1205 KPC provides that the arbitral award issued in Poland may be set aside. The grounds for that are enumerated in article 1206 KPC and those are:

- lack or invalidity of arbitration agreement;
- the party was not properly notified about the nomination of arbitrators, the case or was deprived of the opportunity to defend the rights in other way;
- the arbitral award concerned the issues which were not the part of arbitration agreement;
- the requirements as to the panel or basic rules of conduct were not met;
- the award was the result of the crime;
- the case was already decided by the court (*res iudicata*);
- the law does not allow to settle such dispute within the arbitral proceeding;
- the award is against the public order clause;
- the award violated the customer rights.

The possibilities to set aside the award are described in further part of the article.

4. DISCUSSION OF THE RESULTS

The issue presented in this article refers to the voluntary enforcement. It is obvious that the party which wants to fulfil the obligations indicated in the award (in most common case to pay the disputed amount) is always allowed to do that. In such case there is not only no need to declare the enforceability or approve the award in any form but even no need to obtain the award. If the party is willing to accept the demand, the case can be settled or the issue can be even accomplished without any formal proceeding.

The question is whether it is worth to fulfil the award voluntarily. What are the positive aspects of such action and, looking from the other perspective, what are the possibilities to slow down or even to extinct the enforcement of the award if there is such will of the debtor.

The positive elements, the results of voluntary fulfilment of the award, are related to monetary aspects and psychological issues. The monetary aspects are simple. The party that accepts to fulfil the obligations doesn't take the risk of rising interest nor fees and costs related to prolongation of the dispute and attempts to complicate or even to make the enforcement impossible. The psychological issues refer mostly to parties' reputation and business position. Very often the arbitral proceedings are highly professionalised. This term refers not only to the highest standards (both on field of knowledge and ethical) of arbitrators and counsels but to the parties themselves and disputed matter what means that arbitral proceedings are between business parties and are related to their professional activities. Usually the parties and their disputes are known to public or at least in their business environment. Being fair and fulfilling of the obligations play an important role as it influences market position and prestige of the party. It is not naive. The research conducted in the USA by A. Schneider among the lawyers in Chicago and Milwaukee showed that lawyers who are willing to cooperate with the other party by being honest, showing respect and negotiating on "fair play" basis are considered to be much more effective than those who are competing. A frank and fair lawyer is not only considered to be more effective but can gain from his good reputation. His more reliable in courts' and opponents' eyes. The client could feel satisfaction that his case has been handled by a professional who is not playing any controversial games. The behaviour of the lawyer doesn't create any risk for his client's reputation. Moreover, the opposite party in this case can ask such lawyer for help in another case in the future.

The policies in arbitration are very similar. The parties which are willing to "play fair" and to fulfil their obligations would be respected. Losing the case won't be considered as a shame but as a result of a dispute which is something normal in business relations. The parties which are doing everything, including various controversial "tricks" to postpone their duties or even not to fulfil their obligations won't be respected in their business environment. There is a saying that "arbitration is for gentlemen". Both parties have to agree on the arbitrator, procedure and obviously on arbitration instead of having the case in court. Parties have to agree on those and various other issues what requests talks and procedural agreements between them. Petr Dobias draws attention to the view that it does not appear practical to define ethical standards of behaviour of parties in international arbitration because enforcement would be hardly possible. But even without defining them in an official way they are used and commonly accepted.

The question is what are the possibilities if one of the parties would try to break the gentlemen's agreement and take action to slow down or event to extinct arbitration. The dilatory techniques which may be used in such circumstances could be divided into two groups.

The first group refers to the techniques which could be used during the arbitral proceeding. The basic technique refers to the existence, validity or scope of the arbitration

agreement. The party against which a claim has been made may try to convince the tribunal that the arbitration clause doesn't exist or has significant mistakes and "holes" which makes further proceeding inadmissible. The next step is to challenge the arbitrator by rising doubts and evidence against his impartiality and independence. If those steps won't be successful the party should focus on proper arbitral proceeding. This should include not only the steps taken towards winning of the case but to minimize the size of potential loss and delay the time of such loss as well. Apart from substantive arguments which obviously have to be presented during the case one of the techniques relates to the motions as to evidences which are very time complicated and time consuming. A similar technique involves calling the expert witness for the hearing. As Paweł Pietkiewicz says, the way the expert witness is heard depends largely on the will of the parties of the dispute and their joint arrangements. So this is actually another issue which could refer to "fair play" and "gentlemen's rules". The party may try to convince the opponent to call the expert witness not to receive real information but to make the proceeding more complicated and longer.

The second group of dilatory techniques is more essential from the perspective of this article. Those are the actions which can be taken to slow down or completely block the enforcement of the arbitral award. This are the steps where "being fair", what was described above, plays the role. It is obvious that every party is trying to do everything, to use all possible and allowed means to finalize the case with the award which fulfils the parties needs and expectations. But the parties that care about their reputation should consider acting in accordance with the rule: "I lost honourably". Various, more or less controversial actions could be taken during the case but when the case is over the honest party should accept the opponent's victory.

What are the possibilities to block the enforcement of the arbitral award, to do everything what is against the idea of voluntary enforcement. Probably there are two options, the first one are the measures taken against the award itself and the second are against the enforcement.

As already mentoned, the article 1205 KPC provides that the arbitral award issued in Poland may be set aside. The grounds for that are enumerated in article 1206 KPC. The action taken against the award on one of the mentioned in article 1206 KPC grounds doesn't suspend the enforcement of the award automatically. But according to article 1210 KPC the enforcement can be suspended by the court. The article 1210 KPC doesn't regulate explicitly whether the decision of the court should be ex officio or upon a motion of the party. Leading Polish commentaries accept both options. The reasons for taking ex officio action by the court seems to be especially justified if the reasons to set aside the award are of the kind which should be taken into consideration by the court ex officio. It is difficult to estimate the possibility that the court will suspend the enforcement of the award but the attempt to suspend is expedient for a non-loyal party which lost the arbitral proceeding. The regular fee for such motion is 5%

of the value of the dispute so it seems that it is worth to bear the risk and costs.

The whole case to set aside the award may take months or even years. The judgment in such case can be subject to the cassation clame to the Supreme Court. If the enforcement of the award would be suspended on basis of article 1210 KPC it could take even few years before the party which lost the arbitral case would be obligated to fulfil the duties.

The grounds for setting aside of the award were listed earlier. Some of them seem to be broad. For example the issue of arbitration agreement could be discussed. It is commonly known that the arbitration agreement should indicate the organization which would govern the dispute or indicate the rules how the organization will be chosen. The clause that says that the case would be handled by the "arbitration court in Moscow" is not sufficient. But if the organization is called, for example as "The Arbitration Center of Moscow" and in arbitration agreement would be called as "The Arbitration Center of Moscow City" the question is if the clause is correct, especially if only one of those organizations exists and the parties already used it before. Similar level of difficulty applies to the problem of the scope of the arbitration agreement. If the arbitral award concerned the issues which were not the part of arbitration agreement the award can be set aside. The question is what should be done if the scope of the award crossed the line slightly. If there are reasonable doubts whether discussed element was still a part of arbitration agreement or already not. A deep research on the issue of repairing defective arbitration clauses was prepared by Liene Pierhurovica. where she focused on both, the New York Convention and the European Convention on International Commercial Arbitration.

Probably the public order clause is the widest category to which various motions and arguments could be included. Various actions and decisions could be treated as the violation of the public order clause. The judgment of the Polish Supreme Court says that the aim of the public order clauses is to protect important systemic, social, economic or moral values preferred by the legal system of the state. That leads to conclusion that almost every idea and judgment which is even just slightly different from a standard practice in the country could be treated as the violation of the public order clause. Obviously refusal to recognize or enforce an award may only occur in exceptional cases, where the circumstances involved can truly be referred as extraordinary but it is very often worth to try whether in specific case the argumentation about violation of the public order clause would work.

To summarize, the motion to set aside the award have the chances to be successfully recognized if is based on tenable arguments. A well prepared counsel is able to find such arguments. And if the motion would be dismissed by the court it would at least take some time what can be beneficial for the party.

The second group of actions are the actions not to set aside the award but directly against the enforcement. Three grounds have already been mentioned (the law doesn't allow such dispute to be resolved in arbitration; the

declaration of enforceability would violate the public order clause; the award violates the rights of customers). Again, the public order clause is very broad and various elements could be presented in front of the courts. From an economical perspective the risk of taking such actions is relatively low. The costs aren't high comparing to the disputed amount.

5. CONCLUSION

Stephen Walker presented pros and cons of arbitration. His list is very interesting because most of authors describe arbitration as cheaper and quicker than litigation. S. Walker disagrees with the opinion that arbitration is cheaper. He is right as usually arbitration is not cheaper because of arbitrators' fees and appointing organizations' costs. What is more interesting is that S. Walker denies the common argument that arbitration is quicker. He focuses on limited case management powers of arbitrators (comparing to courts). Unfortunately he didn't comment on the fact that even quickly given award may need time during enforcement proceeding.

One of the differences between the court and arbitration is that arbitration is voluntary. The parties need to agree for arbitration. After the agreement is concluded the parties should behave in accordance to "fair play" rules. If the parties agreed for the specific organization, procedure, chose the arbitrators it would be unethical and even naive to try to discredit the procedure and case. It would be childish to deny the arbitrator which the party chose earlier. On the other hand the law allows to take the steps to negate the award and block its enforcement. This can make the whole procedure much longer as under certain circumstances the proceeding by the court are a kind of additional instances of the arbitration.

In case where the losing party is loyal the rules which regulate the enforcement are often not needed. The party simply pays the debt or fulfils other kind of duty. If the party is not loyal and is trying to find various possibilities to desist the award and its enforcement there is no ground to speak about voluntary enforcement.

This runs to the conclusion that voluntary enforcement is more a kind of state of mind than legal structure. The issue of voluntary enforcement should answer the question whether it is worth to implement the award, to fulfil the duties. It is very probable that the party would meet the opponent in the future and it is very important to focus on reputation in business environment.

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