10th
Anniversary
Edition

2016-2017

The Baker McKenzie **International Arbitration Yearbook**

Poland

Poland

Łukasz Hejmej[1], Sylwia Piotrowska[2] and Aleksandra Żanowska[3]

A. Legislation and rules

A.1 Legislation

What has not changed in Poland during the last decade is the fact that Polish arbitration law is based on the UNCITRAL Model Law[4] and that Polish arbitration law is, in principle, embodied in the Polish Civil Procedure Code (CPC). Nevertheless, the last 10 years have brought about a few significant amendments to arbitration law in Poland. When analyzing these amendments, it is clear that they aim to simplify the procedures surrounding arbitration proceedings. At the same time, lawmakers have aimed to expand the use of arbitration as a means of resolving disputes to areas of law previously excluded from the scope of arbitration, and to ensure the proper conduct of proceedings.

The most significant changes in Polish arbitration law occurred in 2016. First of all, post-arbitral proceedings (proceedings for the setting aside of awards and proceedings for the recognition and enforcement of foreign awards) have been, in principle, consolidated

[1] Łukasz Hejmej is a partner at Baker McKenzie's Warsaw office and heads the Firm's Litigation and Dispute Resolution Practice Group in Warsaw. Łukasz specializes in the liability of financial institutions and securities litigation, mainly advising insurance companies, banks and securities brokers on issues related to D&O, IPO, BBB and PI insurance claims, professional malpractice claims, currency and commodity derivatives, as well as restructuring and bankruptcy.
[2] Sylwia Piotrowska is a counsel at Baker McKenzie's Warsaw office and a member of the Firm's Global Dispute Resolution Practice Group. She specializes in commercial proceedings before arbitration and common courts. She closely cooperates with other Baker McKenzie departments in litigation matters, in particular with the Real Estate Department and the IT Department.
[3] Aleksandra Żanowska is an associate at Baker McKenzie's Warsaw office and a member of the Firm's Global Dispute Resolution Practice Group. She specializes in commercial litigation and arbitration.
[4] The UNCITRAL Model Law before the 2006 amendments.

into one instance. Second, the effects of the bankruptcy of an entity on arbitration proceedings have been reduced to a minimum, as now the declaration of bankruptcy affects arbitration agreements and proceedings almost in the same way it affects forum selection clauses and court proceedings. Third, the disclosure requirements of arbitrators were modified so that it is mandatory for arbitrators to provide a statement of their impartiality and independence.

With regard to the first amendment, on 1 January 2016, the Act of 10 September 2015 on the Promotion of Amicable Dispute Resolution came into force. By virtue of this act, post-arbitral proceedings were shortened — from two-instance to one-instance proceedings.

Before the amendments, parties wishing to set an award aside or enforce a foreign arbitral award in Poland faced a lengthy procedure, starting with two instances of court proceedings and the possibility of filing an extraordinary means of appeal — a cassation complaint to the Supreme Court. Additionally, the courts that heard the cases varied. In the first instance, cases could be heard either by the district courts or regional courts. In the second instance, it was respectively either the regional courts or the appellate courts.

Following the amendment introduced in 2016, requests for setting an award aside and for the recognition and enforcement of a foreign arbitral award are heard in one instance only. Moreover, all such requests are heard before appellate courts. Nevertheless, this does not make these post-arbitral proceedings as swift as the ones introduced, for example, in Austria in 2014. In Poland, a party may still challenge the appellate court's final decision by filing a cassation complaint, if all requirements to use this extraordinary legal measure have been fulfilled. However, it seems reasonable to have the Supreme Court oversee these matters and intervene in case of obvious mistakes of the lower courts.

With regard to the second amendment, on 1 January 2016, the Act of 5 May 2015 on Restructuring Law came into force to amend the Polish Bankruptcy Law. Due to these amendments, bankruptcy affects

arbitral proceedings in the same manner it affects any other proceedings before state courts. Additionally, the commencement of bankruptcy proceedings does not impact the effectiveness of an arbitration agreement.

Before 1 January 2016, all arbitration agreements entered into by a party that was declared bankrupt were ineffective by operation of the law upon the declaration of its bankruptcy. Moreover, all arbitration proceedings concerning such parties had to be discontinued.

After 1 January 2016, upon the declaration of bankruptcy, arbitration proceedings are no longer discontinued, but stayed until the trustee of the bankrupt estate is established. The arbitral proceedings are reinstated against the trustee in bankruptcy. Yet, the arbitration proceedings are subject to the requirement that the creditor must first exhaust the means of pursuing its claim in bankruptcy proceedings. This means a creditor should undertake to include its claim on the list of claims prepared by the trustee in bankruptcy. If the claim is not included in the list of claims of the trustee in bankruptcy, the creditor may proceed with the arbitration in order to receive a legal title (a recognized arbitral award), allowing it to be included in the list of claims of the trustee in bankruptcy.

The opening of bankruptcy proceedings does not impact the effectiveness of an arbitration agreement. However, the trustee in bankruptcy will have the right to withdraw from the arbitration agreement. First, it may be done when the arbitration proceedings are not pending — if pursuing the claim in arbitration would impede the liquidation of the bankruptcy estate. However, this withdrawal requires the approval of the bankruptcy court. Second, it is deemed that the arbitration agreement has been withdrawn from if, upon the demand of the other party to the arbitration agreement submitted to the trustee in bankruptcy in writing, the trustee does not state within 30 days whether it will withdraw from the arbitration agreement. Additionally, the other party to the arbitration agreement may also withdraw from the arbitration agreement if the trustee in bankruptcy

refuses to share in the costs of arbitration. This may be done even if the trustee in bankruptcy does not withdraw from the arbitration agreement itself. As a result of the withdrawal (either by the trustee in bankruptcy or the other party to the arbitration agreement), the arbitration agreement expires.

With regard to the third amendment, also introduced by the Act of 10 September 2015 on the Promotion of Amicable Dispute Resolution, since 1 January 2016, arbitrators have had an explicit obligation to provide in writing their statement of impartiality and independence. This statement has to be provided to both parties to the dispute and to the other members of the arbitral tribunal. This requirement was added to the existing obligation of arbitrators to disclose to the parties without due delay all circumstances that could raise doubts as to the arbitrator's impartiality or independence.

A.2 Institutions, rules and infrastructure

The last 10 years have brought major changes to the rules of arbitration institutions in Poland. Arbitration institutions in Poland followed the trends set out by UNCITRAL and the amendments to the UNCITRAL Arbitration Rules in 2010. Although not all changes were introduced in Poland, the arbitration institutions have been developing their rules.

In Poland, there are currently two main arbitration institutions that administer arbitrations, as well as provide the rules of arbitration and facilities where they may be conducted. These two institutions are the Court of Arbitration at the Polish Chamber of Commerce and the Lewiatan Court of Arbitration at the Lewiatan Confederation.

A.2.1 Court of Arbitration at the Polish Chamber of Commerce

In the last decade, the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce have been upgraded to meet modern standards. Since 1 January 2015, these Arbitration Rules have been separated from the mediation rules, to form a clear and comprehensive set of procedures.

The major changes to the Arbitration Rules include the possibility of commencing arbitration either by filing a request for arbitration or a statement of claim,[5] the possibility of consolidating proceedings[6] as well as the possibility for witnesses to file witness statements in writing.[7]

A.2.2 Court of Arbitration at the Lewiatan Confederation

The Rules of the Lewiatan Court of Arbitration at the Lewiatan Confederation have been subject to a sequence of amendments.

The 2010 Arbitration Rules allowed an arbitral tribunal to request the assistance of state courts in evidentiary proceedings if the arbitral tribunal is not able to examine the evidence on its own. Also, the serving of documents became possible via means of distance communication which evidences the transmission of documents (eg, email).

The 2012 Arbitration Rules introduced opt-out emergency arbitrator proceedings, the possibility of consolidating proceedings taking place between the same parties,[8] as well as the possibility of nominating a sole arbitrator or a presiding arbitrator not on the list of recommended arbitrators of the Court of Arbitration at the Lewiatan Confederation.[9]

---

[5] Before the amendment, the proceedings could be commenced only by a statement of claim.

[6] The requirements for consolidations are that: the proceedings to be consolidated are pending, they are pending between the same parties, the composition of the arbitral tribunal is the same in all proceedings to be consolidated, and the claims in these proceedings are based on the same arbitration agreement or are related to each other.

[7] If all parties to the dispute agree that the witness does not have to be heard and the witness statement is sufficient, the witness may be excused from appearing at the hearing.

[8] The consolidation will be however impossible if the members of the arbitral tribunals in the proceedings to be consolidated vary.

[9] Before this amendment, the sole arbitrator or the presiding arbitrator could be chosen solely from the list of recommended arbitrators provided by the Court of Arbitration at the Lewiatan Confederation, which was a certain limitation to the parties' autonomy.

The 2015 Amendment to the 2012 Arbitration Rules introduced an option for the parties to agree to an intra-arbitration appeal mechanism. The parties, by choosing to apply the appeal mechanism introduced by the 2015 Amendment, may appeal against the award rendered by the arbitral tribunal. In such a case the appeal tribunal is also chosen by the parties and the case is heard before a panel of three arbitrators, unless the parties have agreed otherwise. The appeal tribunal may either agree with the ruling of the award and render it as its own or may change the award. Yet, it cannot remand the case. The award of the appeal tribunal is final.

B. Cases

B.1 Public purpose objection of undue process and the impartiality of arbitrators [10]

The Appellate Court in Gdańsk dealt with the issue of whether a party may raise an objection of public purpose in proceedings for the enforcement of an arbitral award on the ground of lack of due process, arguing that it was due to the impartiality of the arbitrator. The court held that a public purpose objection cannot be used instead of the procedure for challenging an arbitrator in the course of arbitration proceedings.

The case concerned a dispute between a Chinese company and a Polish company. The arbitration proceedings were conducted under the LCIA Arbitration Rules (1998) before a sole arbitrator — an English barrister. During the proceedings, the arbitrator disclosed to the parties that he had become a member of the same barristers' chambers as one of the counsel of the Chinese respondent. He stated that he had no affiliation with the respondent's counsel, and that he would step down as an arbitrator if any of the parties filed a challenge. No challenge was filed. In the end, the arbitrator decided the case. Nevertheless, at the stage of enforcement of the arbitral award,[11] the

[10] Decision of the Appellate Court in Gdańsk of 11 February 2014, case file no. I ACz 1475/13.

[11] The enforcement took place in accordance with the New York Convention.

Polish company raised the objection of public purpose, stating that the impartiality of an arbitrator falls within the public purpose clause, as it amounts to a denial of due process in the arbitration proceedings, and therefore can be raised regardless of any limitations.[12] On this basis, it requested the court to refuse the enforcement of the arbitral award, as it argued the sole arbitrator was impartial because of an alleged affiliation with the respondent's counsel. This objection was dismissed in the Regional Court. The Polish company's appealed, but the Appellate Court in Gdańsk dismissed the appeal.

The Appellate Court decided that the public purpose basis for refusal of enforcement of an award cannot be used if the party did not raise a challenge to the arbitrator in the course of arbitration. This is because by not raising such a challenge, the party waived this objection as with regard to the issue of due process in the proceedings. However, the court stated that there are two exceptions to this rule, based on the IBA Guidelines on Conflict of Interest in International Arbitration: (i) if the circumstances raised by a party fall within the Non-Waivable Red List; or (ii) depending on the specific facts of the case — if the circumstances raised by a party fall within the Waivable Red List (or exceptionally, the Orange List), provided that the parties were not informed of the circumstances giving grounds for the challenge. It is worth noting that the IBA Guidelines on Conflicts of Interest in International Arbitration were not invoked in the relevant arbitration agreement. However, the Appellate Court decided to apply the standards set out in these guidelines.

[12] Under the LCIA Arbitration Rules (1998), pursuant to Article 31.1: "A party who knows that any provision of the Arbitration Agreement (including these Rules) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be treated as having irrevocably waived its right to object." Therefore, the fact that during the arbitration proceedings, no challenge of the sole arbitrator was filed, barred the Polish company from raising the objection of impartiality of the arbitrator under Article V(1)(d) of the New York Convention.

B.2 Possibility of altering institutional arbitration rules in an arbitration agreement, and the consequences[13]

The Supreme Court dealt with the consequences of altering the arbitration rules of an arbitration institution. It decided that when referring a dispute to institutional arbitration, the parties may alter, by agreement, the provisions of that institution's arbitration rules. This, however, does not create an obligation for the arbitration institution to admit the claim subject to an arbitration clause altering the institution's arbitration rules.

The case concerned an arbitration agreement concluded between two Polish companies. In this agreement the parties agreed to refer the dispute to arbitration under the Arbitration Rules of the Court of Arbitration at the Lewiatan Confederation. However, they decided that they wished to have two-instance arbitration proceedings, which was not provided for in the Arbitration Rules chosen by the parties.[14] When the dispute arose, the parties referred the dispute to arbitration, which was conducted in accordance with the unaltered rules in one-instance proceedings. After the award was rendered, one of the parties filed a motion to set it aside. The case ended up before the Supreme Court, where it was set aside.

The Supreme Court held that arbitration law in Poland recognizes the principle of party autonomy. Thus, the parties may alter, in their arbitration agreement or any other agreement, the arbitration rules of the institution to which they want to refer their dispute. The arbitration institution is not obligated to admit the case on such altered terms. It may refuse to hear the case (which is in line with Article 1168 Section 2 of the CPC). It cannot, however, admit the case and impose on the parties to the dispute without their consent the unaltered arbitration rules. If the arbitration institution admits the case, it is obliged to

[13] Judgment of the Polish Supreme Court of 20 March 2015, case file no. II CSK 352/14.

[14] The arbitration agreement was concluded in 2009, and the dispute arose in 2011, which was therefore before the introduction of the 2015 Amendment to the 2012 Arbitration Rules. This provides for two-instance arbitration proceedings.

respect the agreement concluded by the parties, including all the alterations it entails.

C. Trends and observations

On 10 January 2017, several amendments will be introduced to Polish arbitration law. The upcoming changes follow the tendency to encourage parties to refer their disputes to arbitration. To achieve this aim, the lawmakers are attempting to create a more regulated framework for arbitration. The upcoming changes aim to regulate the resolution of consumer disputes, for example, by referring consumer disputes to arbitration.

C.1 Consumers and arbitration

The changes in arbitration law have been introduced as an implementation of the Directive on consumer ADR.[15] The aim of this Directive and the amendment to Polish law is twofold. First, it aims to ensure consumers have access to means such as arbitration to resolve their disputes with business parties. To achieve this aim, among other things, permanent arbitration courts specializing in commercial disputes will be introduced in local commercial chambers. Second, the amendment introduces new requirements for the parties to comply with, to ensure that consumer rights are also properly protected in arbitration.

In light of these aims, there are three key changes to arbitration law in the CPC with regard to: (i) the requirement for the conclusion of a valid and effective arbitration agreement; (ii) the basis for deciding the dispute and rendering the award; and (iii) the grounds for setting aside and refusal of recognition or enforcement of the award.

An arbitration agreement concluded with a consumer will be effective only if it is concluded after a dispute has already arisen. Thus, a

[15] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

business party cannot include in its standard terms an arbitration clause for future potential disputes. Also, in order to be valid, an arbitration agreement between a consumer and a business party must include a statement that the parties are aware of the consequences of entering into the arbitration agreement. In particular, it must be stated that the parties are aware of the fact that an arbitration award or settlement in arbitration after being recognized or enforced by the court is equal in force to a final and binding court judgment.

With regard to the basis for rendering awards in disputes concerning consumers, an arbitral tribunal cannot render an award *ex aequo et bono* if it results in the refusal of the protection granted to consumers by the mandatory provisions of law. The law applicable to the legal relationship is the basis for the assessment of the mandatory standard of protection of the consumer. Such mandatory provision of Polish law may include, for example, the principle that the terms of standard form contracts that fundamentally breach consumer rights are ineffective, or that the term for a consumer to cancel an off-premises contract is at least 14 days.

With regard to the last category of provisions affected by the 2017 amendment, a new basis for the setting aside or refusing recognition and enforcement of an arbitral award has been introduced. After 10 January 2017, the court will have to set the award aside or refuse to recognize or enforce it if the arbitration award denied the consumer the rights granted in their favor by the mandatory provisions of law applicable to the contract by operation of the law, regardless of the choice of law clause included in the contract. The assessment of this matter will be made by the court.

All changes with regard to arbitration proceedings are applicable to arbitration, setting aside or recognition and enforcement proceedings commenced after 10 January 2017.

C.2 Observations

Polish arbitration law is evolving so as to take into account new trends. Simplifying post-arbitral proceedings, allowing arbitration with regard to entities declared bankrupt and expanding the scope of disputes subject to arbitration is in line with the need for faster resolution of disputes. At the same time, it safeguards the interests of smaller market players and ensures that proceedings are conducted so as to respect the basic principles of law.