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## Poland

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### A. Legislation and rules

#### A.1 Legislation

Arbitration proceedings in Poland are subject to the rules embodied in the Polish Civil Procedure Code (CPC). These rules are based on UNCITRAL Model Law.<sup>3</sup> While in 2016 the major changes to the law were focused on simplifying post-arbitration proceedings, the major changes in 2017 were focused on the possibility of arbitrating consumer cases.

The changes in arbitration law with regard to consumers have been introduced as an implementation of the Directive on consumer ADR.<sup>4</sup> They came into force as of 10 January 2017. The aim of this Directive and the amendment to Polish law was twofold. First, it aimed to ensure that consumers have access to means such as arbitration to resolve their disputes with business parties. Second, the amendment introduced new requirements so as to ensure that consumer rights are properly protected in arbitration. In light of these aims, three key changes to arbitration law were introduced in the CPC.

First, new requirements for the conclusion of a valid and effective arbitration agreement with consumers were introduced. After 10

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<sup>3</sup> The UNCITRAL Model Law before the 2006 amendments.

<sup>4</sup> 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.

January 2017, an arbitration agreement concluded with a consumer is effective only if it is concluded after a dispute has already arisen. Thus, a business party cannot include in its standard terms an arbitration clause for future potential disputes. Also, 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 after being recognized or enforced by the court an arbitration award or settlement in arbitration is equal in force to a final and binding court judgment. An arbitration agreement without these statements is invalid.

Second, after the amendment of 10 January 2017, an award in consumer cases cannot be rendered *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 provisions of Polish law may include, for example, the consumer's right to cancel an off-premises contract within at least 14 days of the date of the contract's conclusion or the principle that the terms of standard form contracts that fundamentally breach consumer rights are ineffective.

Third, after the amendment of 10 January 2017, a new basis for the setting aside or refusing recognition and enforcement of an arbitral award has been introduced for consumer cases. The court will now have to set aside the award 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 the 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 is made by the court.

These changes show that the aim of both EU law and Polish law is to expand the use of dispute resolution mechanisms such as arbitration to consumer cases. Nevertheless, in order to ensure the proper standard of protection of consumers, the requirements for consumer arbitration



were elevated beyond the standards applicable to typical arbitration cases. This means that commercial entities wanting to pursue arbitration proceedings in consumer cases will have to observe these additional requirements set by the law, so as to ensure that the arbitration is successfully carried out.

## A.2 Institutions, rules and infrastructure

There are two main arbitration institutions that administer arbitrations and also provide the rules of arbitration and the 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. There have been no significant changes to the rules of arbitration institutions in Poland.

## B. Cases

### B.1 The form of the arbitration agreement and the power of attorney to conclude an arbitration agreement<sup>5</sup>

The Supreme Court dealt with the issue of the form in which an arbitration agreement and the power of attorney for the conclusion of an arbitration agreement have to be made in order to be valid. The Supreme Court decided that while an arbitration agreement may be concluded in email correspondence, a power of attorney to conclude an arbitration agreement must be granted at least in the same form. It is not sufficient to have the power of attorney granted implicitly.

The case concerned two parties that had concluded an international supply agreement. They first discussed it via telephone and then exchanged emails. In the attachment to one of the exchanged emails, the terms of the agreement were expressed. This also included provision for arbitration in one of the clauses of the agreement. In the email correspondence there was no power of attorney attached for the representative of the purchaser. The agreement was partially

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<sup>5</sup> Judgment of the Polish Supreme Court of 2 March 2017, case file no. V CSK 392/16.

performed, but a dispute arose. The purchaser stated a few months after the exchange of emails that no agreement had been concluded, as the alleged representative of the purchaser had no power to conclude the contract, and was not in fact a representative of the purchaser. In the arbitration proceedings, the arbitral tribunal found that the agreement, including the arbitration clause, had been concluded, and thus the claims of the seller had merits. The seller then moved to enforce the award in Poland. As the buyer raised objections as to the existence of the arbitration agreement, and lost in both the first and second instance, the case finished before the Supreme Court, where the appellate court's decision was set aside.

The Supreme Court did not agree with the conclusions of the courts of lower instances, as it concluded that the form of both the arbitration agreement and the power of attorney to conclude such an arbitration agreement were crucial for the case. The Supreme Court considered as the first issue whether it is possible to conclude a valid arbitration agreement not in writing but by exchanging emails. As this was an international arbitration case, the standards set out in the New York Convention were found to be applicable. As a consequence, applying a favorable approach to arbitration, the Supreme Court concluded that an arbitration agreement under the New York Convention may be concluded not only in writing, but also by means such as an email exchange. Thus, the arbitration agreement met the formal requirements.

However, what concerned the Supreme Court was the power of attorney for the conclusion of the arbitration agreement, to which the purchaser raised objections. The Supreme Court established that Polish law should govern the power of attorney that was supposed to have been granted in order to conclude the arbitration agreement. As a result, the Supreme Court applied the Polish rule, stating that the power of attorney should be granted in the same form as is required for the action to be made based on that power of attorney or else it would be invalid. Thus, an implicit power of attorney was not enough for the purchaser's alleged representative to conclude the arbitration



agreement on account of the purchaser. This is because an arbitration agreement cannot be concluded implicitly, even though the stringent requirements for a written form of such an agreement may be loosened so that the arbitration agreement could be concluded by email exchange. As a consequence, as the implicit power of attorney to conclude an arbitration agreement was invalid, the arbitration agreement was not validly concluded. For this reason, the Supreme Court set aside the appellate court's decision.

This decision impacts the issue of concluding arbitration agreements. On the one hand, the Supreme Court's confirmation that under the New York Convention arbitration agreements may be concluded by email exchange is welcome, given the amount of business taking place by exchanging emails or other similar means of communication. On the other hand, given the stringent approach of the Supreme Court as to the formal requirements for a power of attorney to conclude an arbitration agreement, parties will have to take care when concluding arbitration agreements via email or other such means and ensure that the power of attorney is granted in the proper form.

## B.2 The autonomy of the arbitration proceedings and the limited scope of the public policy objection<sup>6</sup>

The Supreme Court dealt with two issues arising out of setting aside proceedings. First, the question of the relationship between the decision of the court in setting aside proceedings and its impact on the arbitration commenced after the setting aside of the award. Second, the issue of whether the certainty of the law embodied in the statute of limitations may constitute the basic rules of law which should be protected under the public policy objections in setting aside proceedings.

The case concerned arbitral proceedings in which an arbitral award was set aside on the basis of a party being unable to present its case. This was found to have occurred due to the wrong address being used

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<sup>6</sup> Judgment of the Polish Supreme Court of 26 May 2017, case file no. I CSK 464/16.

in the correspondence with the party during the arbitral proceedings. The court, when setting aside the award, found *obiter dicta* that the wrong address was also present on the notice of arbitration. After the setting aside proceedings ended, new arbitration proceedings were commenced, and this time the same party once again prevailed in the proceedings. The losing party once again filed for the setting aside of the award, this time alleging that the tribunal had not observed the decision of the court rendered during the first setting aside proceedings and, moreover, this led the tribunal to overlook the limitation periods included in Polish law. When hearing the case, the court of first instance agreed with these objections. However, the appellate court changed the ruling and dismissed the case. The Supreme Court agreed with the appellate court, dismissing the cassation appeal.

The Supreme Court found that the impact of the court's decision rendered in proceedings for the setting aside of an arbitral award on new arbitration proceedings (commenced due to the setting aside) was limited. The Supreme Court stated that, while it may seem that setting aside proceedings are similar to proceedings in the second instance, this impression is misleading. This is because after setting aside an arbitral award, arbitration proceedings are not recommenced. They are commenced anew, as new proceedings. This is why an arbitral tribunal hearing a case after setting aside proceedings is nonetheless autonomous when it comes to rendering a decision. It is bound by the decision rendered in the setting aside of the award to the same extent that any other tribunal or court would be bound.

The Supreme Court also considered whether the regulations pertaining to limitation periods could constitute a basis for a successful public policy objection. The Supreme Court in this respect confirmed that the question of the merits of a case cannot be reexamined by the courts in post-arbitration proceedings. The court decided that the mere improper interpretation of the law by an arbitral tribunal may not constitute the basis for the setting aside of an arbitral award. This also



applied to laws which have the aim of maintaining the stability of legal transactions (such as the rules on limitation periods).

This decision confirms that the courts in Poland observe the autonomy of arbitral proceedings, even in cases of setting aside arbitral awards. Moreover, by confirming that the public policy objection cannot be interpreted broadly, the Supreme Court confirmed that when parties agree to arbitrate their disputes, they may expect that there will be limited grounds on which they may challenge the award and should be ready to accept these consequences of agreeing to arbitration.

### C. Funding in international arbitration

There are no specific rules in Polish law which pertain to the subject of the funding of arbitration and litigation. There is also no case law that examines the issue of third-party funding in arbitration (international or domestic) or litigation in Poland. As such, it seems that there are no restrictions as to the possibility of obtaining third-party funding in arbitration proceedings.

As Polish law does not provide for any specific regulations as to a contract for funding, such contracts would have to be considered commercial contracts, to which the general rules of Polish contract law would apply. Such contracts would be valid as long as they did not contradict the law, did not contradict the nature of the contract and did not contradict the rules of social coexistence.

What would have to be considered in arbitration proceedings is the issue of the disclosure of funding in the proceedings. On the one hand, funding in arbitration and the terms of the contract for funding is, to a certain extent, irrelevant to arbitration proceedings. Also, given the possibility (and likelihood) of a confidentiality clause being included in such a contract for funding, and no rule preventing the inclusion of such a clause in the contract, the parties could make the contract for funding fully confidential. On the other hand, the undisclosed presence of the funder in the proceedings could result in a breach of the rules on the impartiality and independence of the arbitrators in the



proceedings (which stems from most arbitration rules and the CPC). This is because it cannot be ruled out that the arbitrators, even appointed by the other party to the proceedings, could have some connections to the funder, which they could not disclose unless the funder was revealed to them and the other party. Nevertheless, as there is no specific law in Poland that could be applicable to this issue, the question of whether it is necessary to reveal the funder in arbitration remains open.

Another aspect of the broad subject of funding is the question of whether lawyers in Poland may enter into conditional or contingency fee arrangements. Under the applicable codes of conduct,<sup>7</sup> lawyers cannot enter into agreements only on the basis of contingency or conditional fees. The remuneration cannot be conditional. However, this does not exclude the possibility of concluding agreements which, in addition to the agreed unconditional remuneration, include an arrangement for a so-called success fee. Such success fee would be due if the party represented by the lawyer prevailed in its case. The limitation in this respect is that the unconditional remuneration cannot be too small compared to the scope of the work performed by the lawyer. This is to ensure that the rules on unconditional remuneration are not evaded.

In summary, there are no specific provisions in Polish law that pertain to the issue of funding in arbitration. Nevertheless, all contracts must comply with the basic requirements of Polish law. What should also be taken into account is the question of the effects that the undisclosed funding may have on one of the basic rules of arbitration — the impartiality and independence of the arbitrators.

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<sup>7</sup> In Poland there are two types of lawyer admitted to the bar — advocates and attorneys-at-law. While they are members of two different bars, the differences in the scope of the work they can perform and the representation they can provide are minor.