The European Arbitration Review

2019

Poland

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

Poland

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Summary

Is Poland an arbitration-friendly place? How does one avoid the pitfalls of Polish law? How are challenge and enforcement proceedings conducted? When is an arbitral award likely to be set aside by a Polish court? Many foreign practitioners may pose these, and similar, important questions while considering Poland as an arbitration venue. In order to dispel these doubts and to give readers an overview of the Polish arbitration landscape in recent months, we would like to tackle several areas: assessment of the 2016 reform of the Polish Code of Civil Procedure; legislative changes in the field of investment arbitration; the most interest- ing cases in arbitration-related proceedings; as well as activities aimed at the popularisation of arbitration in Poland.

LEGISLATIVE CHANGES

Polish Arbitration Reform From A Two-year Perspective

The consequences of significant changes introduced to Polish arbitration law on 1 January 2016 might be observed from a longer perspective at the turn of 2017 and 2018.

The amendments to Part V of the Polish Code of Civil Procedure regard challenges to arbitral awards before state courts, as well as recognition and enforcement proceedings. First, the deadline for filing challenges to arbitral awards has been shortened from three to two months. Second, the Polish legislature decided to 'flatten' the post-arbitral proceedings by eliminating one court instance. Currently, applications to set aside an award and to recognise and enforce it may be submitted only to a court of higher instance, ie, the Court of Appeal. In limited circumstances, recourse against a judgment of the Court of Appeal is available before the Polish Supreme Court in cassation proceedings – solely on grounds encompassing infringements of substantive law or infringements of procedural law, if the infringement could have affected the result of the proceedings. Additionally, the case must involve an important legal question that requires the Supreme Court's ruling, that the complaint is obviously justified or that the proceedings were void.

Prior to 1 January 2016, post-arbitral proceedings were held in two instances, with limited possibilities to file a complaint in cassation to the Supreme Court. This two-instance system made the proceedings considerably lengthy and inefficient, particularly bearing in mind the need for speed in both international and domestic arbitration. Therefore, the main purpose of the abovementioned legal reform was to shorten post-arbitral proceedings and to improve the quality of state court rulings. The 11 Courts of Appeals functioning in Poland are now expected to develop more expertise in arbitration-related cases, gain more experience in this field and to make relevant jurisprudence more consistent. In other words, Poland as a place for arbitration shall be more friendly and more predictable for parties making such a choice in arbitration clauses. Analysis of recent judgments and post-reform statistics might reflect whether this aim was, or is going to be, accomplished.

1 January 2016 also brought a significant amendment affecting arbitration in Poland in the realm of Polish bankruptcy law. Under the previous regulations, all arbitration clauses executed by a party that has since become insolvent lost their effect, and all arbitration pending at the time of initiation of bankruptcy proceedings had to be terminated. Following the 2016 amendment, arbitration clauses concluded by an insolvent debtor remain in force and pending arbitration proceedings may be continued; if arbitration is not commenced before the declaration of bankruptcy, such a possibility remains open. This amendment of Polish bankruptcy law has been welcomed by Polish arbitration practitioners.

Post-reform Setting Aside Statistics

According to official statistics of the Ministry of Justice,[1] attempts to set aside arbitral awards have been successful in only a very small percentage of cases. In 2016, 56 applications to challenge arbitral awards were submitted, 21 of which were decided in 2016. Only two arbitral awards were set aside by the Courts of Appeal.

In 2017, 76 challenge proceedings were initiated before the state courts. The Courts of Appeal rendered 96 rulings, including decisions in outstanding cases from the year 2016. Only six arbitral awards were annulled as a result of these proceedings.

An important conclusion might be drawn from the presented statistics made available by the Ministry of Justice. Namely, over a two-year-period, only 6 per cent of arbitral awards (ie, eight out of 132 challenged by the Parties) were set aside by the Courts of Appeal. These statistics show that state courts are not eager to set aside the arbitral awards, which makes the arbitral awards relatively stable and increases confidence of the parties in Poland as a place of arbitration.

Extraordinary Complaint

On 3 April 2018, a new statute on the Polish Supreme Court came into force. The bill introduced a new legal instrument into the Polish legal field: an extraordinary complaint. Although this new instrument does not refer directly to arbitration proceedings, but might be applied to different kind of procedures before Polish state courts, it may affect post-arbitration proceedings as well.

Pursuant to the new statute, the extraordinary complaint might be submitted against a final award of a state court if it is necessary for the protection of the public order and social justice, in case the award may not be set aside or changed by means of any other extraordinary legal instruments, as well as if:

- the award violates the rules or freedoms and rights of citizens and individuals specified in the Polish Constitution;
- the award grossly violates substantive law involving the mis interpretation or misapplication thereof; or
- there is obvious contradiction between significant finding of the court and content of evidence gathered in the case.

The extraordinary complaint might be submitted solely by the General Prosecutor, the Ombudsman or, within the scope of their competence, the President of the State Treasury Solicitor's Office, the Ombudsman for Children, the Patient Ombudsman, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for small and medium-sized enterprises, and the President of the Office of Competition and Consumer Protection. The extraordinary complaint might be submitted within five years after the contested award has become final or, if the cassation complaint has been filed in the relevant case, within one year after the cassation complaint has been decided by the Supreme Court. In addition, in the course of three years after the entry into force of the new bill, the extraordinary complaint might be submitted also against rulings that became final after 17 October 1997. The extraordinary complaint is decided by the separate division of the Supreme Court.

The new regulation has been widely criticised by the Polish legal community. Due to its novelty, no extraordinary complaint has yet been recognised by the Supreme Court.

Goodbye To Intra-EU BITs

The judgment of the Court of Justice of the European Union (CJEU) of 6 March 2018 in case ***C 284/16 Slovak Republic v Achmea BV*** triggered a discussion of the future of intra-EU bilateral investment treaties (BITs) among Polish arbitration practitioners. However, even before the aforementioned judgment, and following recommendations of the European Commission, significant legislative changes in the field of arbitration might have been observed in Poland as regards investment arbitration (ie, in 2017 Poland started terminating intra-EU BITs). Combined with the outcome of the ***Achmea*** case, this begs the question of the availability of treaty protection to foreign investors from the EU member states.

After Italy (2012) and Ireland (2013) terminated their intra-EU BITs, and after it was reported that the president of Romania submitted to Romanian parliament draft legislation approving the termination of Romania's intra-EU BITs (2015), it was reported (in February 2016) that the Polish government would likewise review the usefulness of its intra-EU BITs, bearing in mind their likely incompatibility with EU primary law. In January 2017, the prime minister of Poland issued regulation by which a special working group was formally appointed to this end.

During 2016 and 2017, several sources reported that Poland was considering the mutual termination of its intra-EU BITs with the Czech Republic, Denmark, Estonia, Latvia and Romania. None of the official sources of legal information have so far reported their termination, however. Having said that, in September 2017, a bill was announced that empowered the president of Poland to unilaterally terminate the intra-EU BIT with Portugal and, in November 2017, a notice of the termination of the intra-EU BIT with Portugal was issued. Moreover, in April and June 2018, a number of similar bills empowered the president of Poland to unilaterally terminate the intra-EU BITs with Austria, Belgium and the Grand Duchy of Luxembourg, Bulgaria, France, Croatia, Cyprus, Germany, Greece, Finland, Hungary, Lithuania, the Netherlands, Spain, Sweden and the United Kingdom. The notices of termination of those intra-EU BITs have not been published in the ***Journal of Laws*** yet. However, their publication can be expected soon. This means that most of the intra-EU BITs will be terminated by Poland within the next couple of months.

The justifications of the respective bills emphasise that the European Commission has requested that all EU member states terminate their intra-EU BITs. The Polish government also emphasised the fact that the termination of bills would not have negative implications for the economic relationships between Poland and other EU member states, including the volume of foreign direct investments in Poland and the volume of Polish direct investments abroad. According to the Polish government, the intra-EU BITs have outlived their useful function already during the transition period after 1989 and are no longer necessary after 2004. Interestingly, none of the five national commercial chambers that were approached by the Polish government to comment on the plan to terminate the intra-EU BITs stood firmly against that move. The chambers considered the intra-EU BITs to be helpful for Polish business enterprises (even though they rarely launch investor-state arbitrations) but, at the same time, the social partners duly noted the EC position on the intra-EU BITs in the process of preparatory consultations. Therefore, it appears that the ***Achmea*** case was only a nail in the coffin of Poland's intra-EU BITs – which, after Poland joined the EU in 2004, generated 13 intra-EU disputes against Poland and caused a further two disputes launched by Polish

investors against EU member states – although it did not constitute the direct (or only) reason for their termination.

What implications will the termination of the intra-EU BITs have on the rights of foreign investors in Poland? In the short term, realistically, any changes caused by termination of the intra-EU BITs considered by itself are unlikely to be dramatic to foreign investors. This is to say, during the notice period as stipulated in the intra-EU BITs, all the obligations assumed by Poland thereunder will remain in force. Moreover, most of the intra-EU BITs contain sunset clauses that prolong the treaty protections (however, in the cases of the mutual termination of intra-EU BITs with the Czech Republic, Denmark, Estonia, Latvia and Romania, one can assume that the relevant sunset periods may be shortened).

As proved by the ***Airbus*** case, which has withdrawn its intra-EU investment treaty claim against Poland over a cancelled contract with the Ministry of Defence, it is the ***Achmea*** ruling (referred to by the government in its announcement summarising the ***Airbus*** decision), rather than the termination of the intra-EU BITs itself, that is keeping investors awake at night. Enforceability of awards issued on the basis of intra-EU BITs in the EU member states, including Poland, has become questionable after ***Achmea***.

SIGNIFICANT CASE LAW

Below, we present several interesting decisions rendered by Polish courts in 2017 and 2018, including precedent-setting rulings, decisions confirming positions consistently presented by the Polish courts, as well as solutions of problems not tackled in Polish arbitration practice so far.

Wide Scope Of Arbitration Clause

Polish courts take an arbitration-friendly stance as regards the validity of arbitration clauses. In its decision of 21 November 2017, case ***No. I ACz 1823/17***, the Court of Appeal in Cracow confirmed the validity of an arbitration clause according to which all disputes that have any relation to the relevant agreements shall be referred to arbitration.

In this case, the Court of Appeal refused to decide the case submitted to a state court due to the existence of the arbitration agreement whose validity was denied by a claimant. The claimant alleged that the dispute resolution clause was too broad and failed to identify an arbitrable dispute. The Court, following previous judicial authority on the matter, decided that a dispute resolution clause in an agreement is generally considered to cover all disputes that arise in connection with, or out of, the legal relationship that might be identified. The court also confirmed that, where the parties referred disputes arising out of a contract to arbitration, the arbitral tribunal is competent to decide all claims regarding the performance of the contract, non-performance or improper performance of that contract, reimbursement of unjust enrichment occurring in the event of invalidity or termination of the contract, as well as tort claims arising from events that constitute also non-performance or improper performance of the contract.

This judgment is bound to be warmly welcomed by the arbitration community. This broad interpretation of the arbitration clause must be assessed as an arbitration-friendly approach of the state courts, enabling realisation of the parties' intent to submit their dispute to arbitration to the broadest possible extent.

No Substantive Re-settlement Of The Dispute In Setting Aside Proceedings

It is also well established in Polish jurisprudence that in the course of proceedings for setting aside an arbitral award, a general court does not examine appropriateness of the manner of dispute resolution adopted by the arbitral tribunal, in particular as regards assessment of the evidence or correctness of the facts established. In other words, the proceedings for setting aside an arbitral award do not lead to substantive reconsideration of the dispute between the parties to the arbitration.

The above position was upheld by the Polish Supreme Court in its judgment of 24 May 2018 in case *No. V CSK 6/18*. An application for the setting aside of the arbitral award was made by the respondent in arbitral proceedings, who cited the public policy clause in the context of an evidentiary agreement concluded between the parties.

It was stressed by the Supreme Court that the public policy clause, having as it does a general character and leaving wide discretion to the state court, does not entitle this court to re-examine the case pending earlier before the arbitral tribunal. While applying the public policy clause, the state court is not entitled to assess whether the judgment is consistent with all applicable legal provisions. Only the fundamental rules of the Polish legal order might be taken into account, without substantive evaluation of the decision rendered by arbitral tribunal. The procedural public legal order might be taken into account in two aspects: compliance of steps leading to issue of the arbitral award with basic procedural rules of legal order; and compliance of the arbitral award's effects with basic rules of procedural order (such as res iudicata).

The above judgment upholds the existing line of rulings concerning public policy clause and the extent of setting aside proceedings. Dotting the final 'i' by the Supreme Court in this regard increases the stability of jurisprudence and builds confidence among entities choosing Poland as the place of arbitration.

Detriment To A Third Party As A Basis For Refusal To Enforce An Arbitral Award

Following the approach that general courts do not examine the merits of the case in setting aside proceedings, one may pose a question in what kind of situations arbitral awards are likely to be challenged or refused to be enforced in Poland. In its decision of 19 March 2018, case *No. V AGo 3/18*, the Court of Appeal in Katowice refused to enforce an arbitral award due to possible detriment to a third party, contradictory to public policy clause.

In the view of the Court of Appeal, the business activities conducted by and between the parties to the arbitration were questionable as to their factual goals and legal effects. The Court ruled that there was no real dispute between the parties and that the conduct of the parties was in fact meant to hinder enforcement conducted by other creditors against one of the parties to the arbitration. As a consequence, enforcement of the award would be detrimental to third parties (the other creditors) and, therefore, circumvent the applicable law.

The Court of Appeal indicated that, within the scope of the public policy clause, a court is empowered to verify the existence and validity of the acknowledgement of debt that constituted the basis of an arbitral award. The purpose of the public policy clause is not to protect the interests of a party to arbitration, but to protect the state's public order.

Lack Of Diligent Consideration Of The Case As Grounds For Setting Aside The Arbitral Award

Despite the fact that, as a rule, the state court is not entitled to re-examine the arbitration case, the award might be set aside in Poland if the arbitral tribunal has failed to diligently

consider the substance of the case, as set forth in the Supreme Court's decision of 7 February 2018, case ***No. V CSK 301/17***.

The application to set aside the arbitral award cited lack of diligent consideration of the case and of the gathered evidence, as well as incorrect apportionment of the burden of proof, which led to the violation of public policy clause. The Supreme Court, admitting that the application was justified and that the arbitral award should be annulled, pointed out several important issues.

The evidence submitted by parties to the arbitral proceedings shall be assessed within the arbitral award regardless of whether it supports the final decision of the tribunal or not – it enables the parties and the state courts to retrace the reasoning of arbitral tribunal. It is even more important in light of the fact that arbitration proceedings are mainly conducted at one instance. If the justification for the arbitral award does not reflect the reasons of the decision, the tribunal appears unreliable to both parties to the proceedings – especially for the party losing the case. Obviously, it is not necessary to describe every single piece of evidence separately, especially if the number of documents is large. However, significant evidence (including expert opinions) cannot be simply ignored by the arbitral tribunal, even if it is assessed as unreliable.

The mere fact that the justification of a partial award is, at approximately 100 pages, voluminous does not, in and of itself, mean that the arbitral tribunal has duly heard the case on its merits. The motives presented in the arbitral award must be convincing and must always address the substance of the case. This necessity of comprehensive consideration of the case, including diligent assessment of all circumstances and evidence gathered in the course of the proceedings, must be upheld as a fundamental rule of the Polish procedural legal order.

In general, this decision of the Supreme Court presents a very balanced approach towards the public policy clause. On the one hand, it is confirmed that the state court cannot control the merits of the case pending before the arbitral tribunal. On the other hand, there remains the possibility of setting aside an award that does not address the substance of the case. This case marks the first occasion that the view emphasising the necessity to consider the case diligently by the arbitral tribunal was expressed so categorically in Polish jurisprudence. However, as the content of arbitral award is unknown, it is impossible to express the view whether the Supreme Court made a proper assessment of arbitral proceedings. The question also arises of how far the general courts will go in the future in determining whether the substance of the case was addressed by arbitral tribunals.

Procedural Irregularities In Appointment Of The Sole Arbitrator

Procedural irregularities in the appointment of the sole arbitrator might also lead to a challenge of the arbitral award, as decided by the Court of Appeal in Wrocław in a decision dated 31 August 2017 (case ***No. I Aca 536/17***), on the basis of interesting factual background.

The arbitral proceedings in question were initiated under the Rules of the International Chamber of Commerce against a Polish municipality in connection with a construction project. As the parties failed to jointly appoint a sole arbitrator, a candidate was proposed by the ICC Court on the basis of article 13(4)(a) of the ICC Rules. According to the aforementioned provision, the ICC Court may appoint directly (without the necessity of obtaining a proposal of a National Committee or Group of the ICC) to act as arbitrator any

person whom it regards suitable where one or more of the parties is a state, or may be considered to be a state entity. The Court of Appeal expressed the view that a municipality constitutes neither a state nor a state entity and that, accordingly, the arbitrator should be appointed in compliance with article 13(3) of the ICC Rules – at the proposal of a National Committee or Group of the ICC.

These irregularities in the appointment procedure, in the opinion of the Court of Appeal, violated the principle of equality between the parties. By acceding to the view of the claimant as regards the arbitrator's appointment, the ICC Court favoured the claimant over the municipality. In addition, the Court of Appeal observed that the parties had been treated unequally as regards the possibility of submitting evidentiary motions, in that the respondent had been deprived of fair possibility to submit its statements and supporting evidence.

As GESSEL Attorneys at Law was involved in the abovementioned dispute, this decision of the Court of Appeal cannot be commented on by the authors. In this regard, we defer to other voices in the legal doctrine.[2]

Violation Of The Procedural Rule Nemo Iudex In Causa Sua

Another interesting example of violation of procedural rules leading to challenge of arbitral award is the infringement of rule ***nemo iudex in causa sua*** found by the Court of Appeal in Łódź´ in a decision dated 3 March 2017 (case ***No. I Aca 1139/16***). In the Court's view, the arbitral tribunal had not complied with requirements regarding the composition of the arbitral tribunal and the fundamental rules of procedure before such tribunal (article 1206, section 1, point 4 of the Polish Code of Civil Procedure).

In the factual circumstances of the case, a unique connection between the arbitration court and one of the parties could be observed. To wit, the institutional arbitration court was functioning at the entity acting as the claimant in these arbitral proceedings. The president of the arbitration court was taking actions on behalf of the claimant while performing the contract constituting the object of the dispute. Due to this fact, the president of the arbitration court was familiar through and through with the factual and legal background of the case, being at the same time the shareholder and president of the management board of company operating the arbitration court.

The Court of Appeal came to the conclusion that, in this respect, the principle ***nemo iudex in causa sua*** had certainly been violated, leading also to a violation of the fair trial standard. Additionally, the respondent had been deprived of a real and fair possibility to challenge the appointed arbitrator. The challenge procedure had not been properly followed – the respondent's application was rejected without even initiating relevant actions before giving the final judgment. The circumstances raised in the application were not checked, and the arbitrators did not submit their impartiality statements while the application was, in the view of the Court of Appeal, fully justified.

Bearing in mind that the connection between the claimant and the arbitration court was of an institutional and permanent nature, and the arbitration clause specified only one arbitration court, the arbitration clause fell to be deemed as void or, at least, ineffective.

The Court of Appeal faced an unusual situation of tight personal and factual connections between the arbitration court, the appointed arbitrators and one of the parties. Setting aside of the arbitral award in such a case takes a stand against the ideas to create arbitration courts

functioning as entities being parties to the proceedings and develops the fair trial standard in a proper way.

Conclusions

The analysis of the recent judgments presented above leads to the conclusion that the Polish state courts generally respect the wide autonomy of arbitral tribunals and show little inclination to interfere with their decisions as to the merits of the case. The arbitral awards are likely to be set aside only in extreme cases (eg, as a result of violation of the fundamental principle ***nemo iudex in causa sua***). As a rule, in post-arbitral proceedings, Polish courts do not address the merits of the cases decided by the arbitral tribunals – the established lines of authority are clear in this respect. An arbitration-friendly approach is also visible in other aspects, such as broad interpretation of arbitration clauses which influences the competence of arbitral tribunals to hear the case in a positive manner.

POPULARISATION OF ARBITRATION IN POLAND

In recent years, numerous efforts of arbitration community aimed at popularisation of arbitration in Poland might be easily observed.

May 2018 witnessed the first edition of the Warsaw Arbitration and Mediation Days[3] and, due to its success, plans are now afoot to hold this conference on a regular two-year basis. The event was jointly organised by all major Polish arbitration institutions, including ICC and ICC Poland, the two main institutional Polish arbitration courts – the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Lewiatan Court of Arbitration, as well as leading Polish law firms. The WAMD conference attracted a number of great speakers and participants from Europe and is likely to become one of the most important arbitration events in the CEE region.

Warsaw is also well known to arbitration practitioners in the area of post-M&A disputes due to the Dispute Resolution in M&A Transaction Conference.[4] This event attracts speakers and participants from all over the world. The fifth edition of the conference will take place on 23 and 24 May 2019.

The increasing popularity of arbitration in Poland is reflected in professional publications in this area. In recent years, the two main institutional arbitration courts published official commentaries to their arbitration rules; the Court of Arbitration at the Polish Chamber of Commerce in Warsaw launched its commentary in 2017, and the Lewiatan Court of Arbitration in 2016.

In 2018, the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, the biggest permanent arbitration court in Poland, adjusted its arbitration rules to the latest international standards, implementing new provisions on expedited procedure.

The Polish arbitration community also focuses on training young practitioners and on the promotion of arbitration among young lawyers. In 2018, the seventh edition of the Lewiatan Arbitration Moot took place. A number of arbitration events for students and young practitioners are also organised each year by Polish arbitration institutions, universities and law firms.

These various initiatives of the Polish arbitration community are focused on promotion of arbitral proceedings among legal practitioners as well as businesspeople making decisions about including arbitration clauses in agreements.

Notes

[1] The statistics were made available by the Ministry of Justice on 20 August 2018 at the specific request of the authors of this article, submitted on the basis of Act on Official Statistics of 29 June 1995, and have not been officially reported.

[2] See, eg, S Wilske, T J Fox, R Kos, 'The view from Europe. What's new in European arbitration?', *Dispute Resolution Journal* 2017, vol. 72, p. 82 et seq.

[3] More information available at www.warsawarbitration.pl.

[4] More information available at www.sadarbitrazowy.org.pl.

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