
THE
INTERNATIONAL
ARBITRATION
REVIEW

EDITOR
JAMES H CARTER

LAW BUSINESS RESEARCH

THE INTERNATIONAL
ARBITRATION REVIEW

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter

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New York

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Chapter 31

POLAND

*Wojciech Kozłowski, Michał Jochemczak and Katarzyna Kempa**

I INTRODUCTION

Poland's growing economy has led to rapid development of the use of commercial arbitration. Twenty years ago international commercial arbitration in Poland barely existed, whereas today the number of arbitral cases and arbitration practitioners increases exponentially each year. That being said, further steps need to be taken for Poland to become a truly arbitration-friendly environment.

Arbitration in Polish law is regulated by Part V of the Code of Civil Procedure ('the CCP'). The current regulation was introduced in 2005 and is based on the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration. Polish law does not distinguish between international and domestic arbitration. Consequently, Part V of the CCP applies to all arbitrations having their seat in Poland, including institutional and *ad hoc* arbitrations. There are, however, some provisions applicable to arbitrations that have their seat outside of Poland. Moreover, the parties may depart from some of the CCP's provisions; for example, with respect to the conduct of the proceedings.

Poland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'). Hence, in the vast majority of cases the recognition and enforcement of foreign arbitral awards will be made on the basis of the New York Convention. Poland is also a party to the European Convention on International Commercial Arbitration of 1961.

As will be discussed, *infra*, Polish courts are generally pro-arbitration and pro-enforcement oriented.

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i Arbitrability

In Polish law the first criterion of arbitrability is the civil nature of the case. Civil cases are defined in Article 1 of the CCP as cases involving civil law relationships, but also include family law, labour law and social security cases. Article 1157 of the CCP further limits the scope of arbitrability by stating that pecuniary (i.e., claims involving an economic interest) and non-pecuniary claims that are ‘capable of being settled’ are arbitrable. Although the issue has been a subject of controversy, the requirement of a capacity to settle applies to both pecuniary and non-pecuniary claims.¹

In the context of the arbitrability of corporate disputes, interesting questions have arisen in connection with Article 1163, which provides that an arbitration clause included in the articles of association or a statute of a company binds the company and its shareholders. Controversy arose under this provision as to whether disputes concerning claims for annulment or the invalidity of shareholders’ resolutions are arbitrable. Many authors expressed the view that these disputes cannot be settled (criterion of settlement capacity) and thus are not arbitrable. Some scholars advocated the view that Article 1163 constitutes a *lex specialis* with respect to Article 1157 and thus allows corporate disputes, even those that may not be subject to settlement, to go to arbitration. However, the Polish Supreme Court ruled against this interpretation in its resolution of 7 May 2009,² indicating that the requirement of settlement capacity applies to all disputes, including corporate disputes. The Supreme Court stated that it would be unreasonable to condition the arbitrability of a dispute upon the type of act containing an arbitral clause. It indicated that this would make disputes arbitrable where an arbitral agreement was included in the articles of association or a statute, whereas the same disputes would be non-arbitrable should the arbitral clause be contained elsewhere (for instance, in a shareholders’ agreement). The Supreme Court decided that Article 1163 of the CCP does not allow for such a distinction and, consequently, Article 1157 should prevail over Article 1163 of the CCP. In other terms, settlement capacity remains the main criterion of arbitrability for all corporate disputes under Polish law.

Having said this, Polish authors who support the view that disputes concerning claims for the annulment or invalidity of shareholders’ resolutions are not arbitrable often rely on the assumption that, in general, any claims for annulment or declaration of invalidity cannot be settled. But this view has been rejected by the Supreme Court. In its decision of 21 May 2010, the Polish Supreme Court held that ‘arbitrability is not affected by the circumstance that the dispute concerns the non-existence, invalidity

1 Article 1157 expressly excludes claims for alimony from arbitration. While determining arbitrability, other provisions in addition to Article 1157 should be taken into consideration. Social security disputes and unlawful form agreements are excluded from settlement pursuant to, respectively, Article 477¹² and Article 479⁴¹ of the CCP, and consequently these disputes are non-arbitrable.

2 Resolution of the Polish Supreme Court of 7 May 2009, III CZP 13/09, publ. OSNC 2010/1/9.

or any other defect of a legal act'.³ By this ruling, the Supreme Court confirmed that disputes concerning invalidity or annulment also have settlement capacity. There are, however, further reasons invoked against arbitrability of these disputes. In particular, it is argued that these disputes are not arbitrable because a court decision on invalidity of a shareholders' resolution has the *erga omnes* effect, while arbitral awards are only binding *inter partes*.

In conclusion, it remains to be seen what approach the Polish Supreme Court will take towards the arbitrability of disputes concerning claims for the annulment or invalidity of shareholders' resolutions.

ii Bankruptcy

Polish bankruptcy law contains a unique provision according to which, in the case of bankruptcy of a party to an arbitral agreement, the arbitration agreement loses its effect and that, as a result, all pending arbitral proceedings should be discontinued (Articles 142 and 147 of the Polish Bankruptcy and Restructuring Act). This provision has led to a series of interesting decisions by both Polish courts and international arbitral tribunals.

The Supreme Court, in its decision of 23 September 2009 stated that the Article 142 provision does not influence proceedings with respect to the annulment of an award that remain pending on the date of insolvency, as long as the award was made before a party was declared insolvent.⁴

A landmark decision was rendered by the Appellate Court of Warsaw on 16 November 2009 with respect to the recognition of an award made by the LCIA arbitral tribunal where one of parties was declared insolvent in Poland during arbitral proceedings pending in London (the English courts examined this question in the seminal *Vivendi v. Syska* judgment).⁵ The court of first instance, the District Court of Warsaw, had refused to enforce the LCIA award on the grounds that Article 142 of the Polish Bankruptcy and Restructuring Act constituted a mandatory rule and therefore the award violated Polish public policy. The appellate court did not agree with the findings of the district court demonstrating the pro-enforcement attitude of Polish courts. The main points of the appellate court's reasoning are set forth, *infra*.

The law governing an arbitration clause: first, the appellate court addressed the question of which law governs an arbitration clause, stating that even if the parties had chosen Polish law to govern their contract this might not necessarily have been their choice with respect to the arbitration clause. It indicated that there exists a presumption that the law governing the contract also governs the arbitral agreement, but this presumption is rebuttable. In the case at hand the appellate court agreed with the LCIA tribunal that the above presumption had been rebutted and ruled that the arbitration

3 Decision of the Polish Supreme Court of 21 May 2010, II CSK 670/09, publ. OSNC 2010/12/170.

4 Decision of the Polish Supreme Court of 23 September 2009, I CSK 121/09, publ. OSNC 2010/4/57.

5 Decision of the Appellate Court of Warsaw of 16 November 2009, I ACz 1883/09, not publ. Two of this chapter's authors were involved in these proceedings.

agreement was governed by English law because the parties had chosen London as the seat of arbitration.

Second, the appellate court analysed Article 15 of the EC Regulation No. 1346/2000, which provides that '[t]he effects of insolvency proceedings on a pending lawsuit concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending'. The court stated that the expression 'pending lawsuit' should be understood to encompass 'all proceedings concerning the determination of the existence, validity, content or amount of the claim, pending on the date of the declaration of insolvency, including arbitration proceedings'. In other words, the court affirmed the findings of the English courts and held that the effects of the Polish bankruptcy on arbitral proceedings pending in England should be determined pursuant to English law.

Third and finally, the court examined whether Article 142 constituted a 'mandatory rule' within the meaning of Article 7 of the Rome Convention of 1980. The court found that Article 142 could by no means be considered mandatory in this sense, since it does not directly serve to protect vital interests of the Republic of Poland. The court also referred to Article 9 of the Rome I Regulation (currently in force, replacing Article 7 of the Rome Convention) and stated that in the light of Article 9 (which is more precise than its predecessor) there is no doubt that Article 142 cannot constitute a self-imposing, mandatory rule. Therefore, the court ruled that the district court had no grounds to refuse recognition of the award, as its recognition could not have been contrary to Polish public policy (Article V(2)(b) of the New York Convention).

In the international context, some state courts in foreign jurisdictions give effect to the Polish Bankruptcy and Restructuring Act, whereas other decline to do so. In its decision of 2 October 2008, the English Commercial Court (as mentioned, *supra*) declined to order discontinuation of the proceedings before the LCIA,⁶ whereas the Swiss Supreme Court in its decision of 31 March 2009 followed the provision of the Polish Bankruptcy and Restructuring Act and ordered that arbitration in Geneva be discontinued with respect to the party that had been declared bankrupt.⁷ Interestingly, the Swiss Supreme Court found that Polish insolvency law affects the parties' legal capacity and, as a consequence, deprives the insolvent party of the capacity to participate in arbitration.

iii Main Polish arbitral institutions

The Court of Arbitration of the Polish Chamber of Commerce ('the PCC'), established in 1950, is the largest permanent court of arbitration in Poland. It administers approximately 300 to 500 cases per year (440 cases in 2010, 352 cases in 2009). The average value of claims in 2010 was 3,450,307 zlotys. Proceedings before the court can be conducted in Polish, English, German, French or Russian. Under the current presidency of Marek Furtek, the court administers both domestic arbitrations (approximately 80 per cent of cases) and international arbitrations (approximately 20 per cent of cases). Most of the

6 Decision of the English Commercial Court of 2 October 2008, [2008] APPL.R. 10/02.

7 Decision of the Swiss Supreme Court of 31 March 2009, 4_A428/2008.

cases before the court concern construction or lease disputes. One of the distinctive features of proceedings before the Court of Arbitration at the PCC is that the parties cannot recover costs of legal representation above 100,000 zlotys. This provision of the court's rules has been heavily criticised, as it prevents parties from claiming costs that have been reasonably incurred in relation to an arbitration.

The second largest permanent court of arbitration in Poland is the Court of Arbitration of the Polish Confederation of Private Employers, Lewiatan. The Lewiatan Court of Arbitration was established in 2005 and its current president is Beata Gessel-Kalinowska vel Kalisz. The Lewiatan Court of Arbitration is significantly smaller than the Court of Arbitration at the PCC, administering approximately 50 cases in total between 2005 and 2010. In light of the court's modern approach and dynamic development, however, one can expect the number of disputes submitted before it to increase substantially over the next few years.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Since 2005, Polish regulation of arbitral proceedings in the CCP has undergone only minor changes. In 2010, two articles of the CCP were revised: Articles 1214 and 1215. Article 1214, as amended, expressly states that a court decision to enforce an award is subject to an appeal. This amendment, however, only confirms what had been previously stated in doctrine. A provision has also been added to Article 1215, according to which proceedings in respect of the recognition and enforcement of foreign arbitral awards are subject to cassation (extraordinary appeal) before the Supreme Court, as well as the resumption of proceedings or the declaration of nullity of a final and non-appealable decision. This amendment attempts to harmonise the regulation of the recognition and enforcement of foreign arbitral awards with a similar regulation concerning the recognition and enforcement of foreign state court decisions.

As far as arbitral institutions are concerned, in 2010 the Lewiatan Court of Arbitration amended its arbitration rules by introducing a fast-track procedure ('accelerated proceedings') for claims that do not exceed 50,000 zlotys. Parties may also subject disputes concerning amounts in excess of 50,000 zlotys to accelerated proceedings. These accelerated proceedings provide in particular that the tribunal shall consist of a sole arbitrator, written briefs shall be delivered electronically (unless the parties agree otherwise) and that time limits are abridged in comparison to 'regular' proceedings. Furthermore, in accelerated proceedings, the hearing is limited to one day and new evidence cannot be submitted after the hearing has been closed.

The introduction of an accelerated procedure is in line with the global development of fast-track dispute resolution procedures. However, the largest arbitration court in Poland, the Court of Arbitration at the Polish Chamber of Commerce, has yet to introduce an expedited procedure.

ii Arbitration developments in local courts

Since the enactment of the new arbitration law in 2005, local Polish courts have developed case law that is often contradictory. While numerous questions based on the

2005 regulation have arisen, three issues appear to be of particular importance and shall be summarised, *infra*: the Kompetenz-Kompetenz principle, the scope of the arbitration agreement and the enforceability of arbitral awards.

The Kompetenz-Kompetenz principle

In a recent decision of 24 November 2010, the Supreme Court adopted a pro-arbitration approach towards the principle of Kompetenz-Kompetenz.⁸ The decision of the court was based on the following facts. Two companies, E and B (a bank) entered into a currency interest rate swap ('CIRS') agreement that contained an arbitration clause. On the basis of the agreement B charged E's bank account. E filed a claim before a state court on the basis of a bank account agreement (which did not contain an arbitration clause) arguing that the agreement did not entitle B to charge E's account. E claimed that the bank account agreement did not contain an arbitration clause and therefore the claim was subject to the state court's jurisdiction. B claimed that the court did not have jurisdiction to determine the dispute, because the dispute arose out of a CIRS agreement containing an arbitration clause.

The Supreme Court found that the dispute could not be resolved without determining the effects of the CIRS agreement. Consequently, the Supreme Court held that a dispute cannot be decided by a state court where 'resolution of a dispute before that court would not be possible without [simultaneous] resolution of a dispute covered by an arbitration agreement'.

Does the arbitration agreement extend to tort and undue performance claims?

In interpreting the scope of an agreement to arbitrate, Polish courts present a fairly inconsistent approach. The Polish Supreme Court has issued contradictory decisions in this respect. For example, in its decision of 5 February 2009, the Supreme Court held that tort claims arising out of unfair competition fell within the scope of an arbitration agreement included by the parties in a framework agreement, provided that these claims arose from a situation where, simultaneously, a breach of contract occurred.⁹ Yet, in its decision of 2 December 2009 the Supreme Court, while analysing a similar case, found that claims for undue performance, arising from acts of unfair competition committed 'on the occasion' of a contract, do not fall within the scope of an agreement to arbitrate.¹⁰

Does the arbitration agreement extend to disputes arising from bills of exchange?

Another interesting judgment was delivered by the Supreme Court on 16 December 2010.¹¹ In this case a bill of exchange was drawn on the basis of a contract (which included an arbitration agreement) and subsequently endorsed by the original creditor

8 Decision of the Polish Supreme Court of 24 November 2010, II CSK 291/10, LEX nr 738541.

9 Decision of the Polish Supreme Court 5 February 2009, I CSK 311/08, LEX nr 492144.

10 Decision of the Polish Supreme Court of 2 December 2009, I CSK 120/09, LEX nr 584183.

11 Judgment of the Polish Supreme Court of 16 December 2010, I CSK 112/10, LEX nr 784174.

(the payee) to a third party (the endorsee). The endorsee brought an action before a state court against the drawer of the bill of exchange. The defendant objected to the court's jurisdiction on the grounds that the dispute fell within the scope of the arbitral agreement. The question before the Supreme Court was whether an arbitral clause included in a contract applied to disputes arising out of a bill of exchange.

The Supreme Court ruled that, although disputes arising out of bills of exchange are generally arbitrable, it would be unreasonable for the parties to submit such claims to arbitration because only a state court order can guarantee prompt enforcement of bills of exchange. It indicated that since it is 'unreasonable' to subject such claims to arbitration, in the event of uncertainty it should be presumed that the parties did not intend to subject such disputes to arbitration, unless they expressly indicated this in the arbitration agreement.

The Supreme Court held that the latter did not happen in this case. The dispute was not subject to arbitration because the arbitration agreement was not adequately specific and the bill of exchange was endorsed to a third party. Thus, the Supreme Court held that the objection to the court's jurisdiction, based on the existence of an arbitration agreement, could only be raised where an arbitration agreement expressly refers to a bill of exchange.

The Supreme Court's finding that the arbitral agreement had to 'expressly and directly' refer to a given bill of exchange is somewhat unsettling, as the Supreme Court did not define how specific the reference to a bill of exchange must be. This judgment may be considered as setting additional criteria for arbitration agreements that need to be drafted carefully in order to cover disputes arising out of bills of exchange.

Enforcement of arbitral awards

On 30 September 2010, the Polish Supreme Court declined to enforce an arbitral award on the grounds of violation of Polish public policy. The dispute arose between the State Treasury of Poland and a company E, concerning a restructuring agreement. The arbitral tribunal's decision was based upon the text of the contract and gave little credibility to evidence indicating the parties' intentions. The arbitral tribunal dismissed the State Treasury's evidentiary motion aimed at establishing the mutual intent of the parties when entering into the agreement and held that the parties had entered into a donation agreement rather than a restructuring contract. As under Polish law a donation must be concluded in the form of a notary deed, the tribunal concluded that the agreement was invalid as it was not made in the prescribed form. Consequently, the arbitral tribunal dismissed the State Treasury's claim.

The State Treasury of Poland filed a petition with a district court for the annulment of the award. The district court annulled the award on the grounds that in the arbitral proceedings the State Treasury was deprived of the right to present its case due to the dismissal of its evidentiary motion. Upon re-examination of the matter (the Supreme Court remanded the case for consideration), the appellate court held that the district court incorrectly assumed that the arbitral tribunal's dismissal of the evidentiary motion had deprived the State Treasury of the right to present its case. It nevertheless found that the award violated the principle of party autonomy expressed by Article 65(2) of the Polish Civil Code, which provides that 'in contract construction, one should examine the common intention of the parties and the contract's purpose rather than relying on

the contract's literal wording'. Consequently, the appellate court dismissed the appeal filed by company E. The latter again filed for cassation with the Supreme Court. This time the Supreme Court followed the reasoning of the appellate court and dismissed the request for cassation on the grounds that the principle of party autonomy, expressed in Article 65(2) of the Polish Civil Code, constitutes one of the central principles of Polish law and therefore the arbitral award violated Poland's public policy.

In another recent judgment, the Supreme Court examined the grounds of a petition for the annulment of an arbitral award (Article 1205 *et seq.* of the CCP). In this case, an arbitral tribunal issued an award declining jurisdiction on the ground of the absence of an arbitration agreement, after which a party filed for annulment of the award. The Supreme Court held that an 'award' ruling that a tribunal lacks jurisdiction is not an award on the merits but rather a procedural 'decision', and as such it cannot be annulled since only awards on the merits can be challenged by way of a petition for annulment.¹² The Supreme Court found that a tribunal's decision where it declines jurisdiction is final and cannot be subject to court examination. Consequently, if a tribunal declines jurisdiction, a party cannot challenge this decision and may only pursue its claim before a state court.

iii Investor–state disputes

By 2010, Poland had concluded 62 bilateral investment treaties ('BITs'). These treaties typically provide for arbitration under the UNCITRAL Arbitration Rules, although some also provide for arbitration administered by ICSID as an alternative. References to ICSID have no practical meaning, however, as Poland is not a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 ('the Washington Convention'). In all BIT disputes, the Polish State Treasury is represented by the Procurator-General of the State Treasury. Poland is also a party to the Energy Charter Treaty.

III OUTLOOK AND CONCLUSIONS

Although arbitration in Poland is rapidly developing, it still remains a relatively novel method of dispute resolution. Polish business circles continue to display a certain degree of hesitation when it comes to resolving disputes via arbitration. It should also be noted that several significant disputes in Poland are submitted each year to arbitration in foreign venues such as Paris and London. Nevertheless, the prospects for arbitration in Poland remain promising: the more developed the Polish economy becomes, the use of arbitration to resolve disputes will undoubtedly continue to grow.

12 Judgment of the Polish Supreme Court of 28 January 2011, I CSK 231/10, LEX nr 784175.

Appendix 1

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