Poland's New Arbitration Legislation

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Introduction

On 28 July 2005 the Polish parliament adopted new legislation on arbitration, which came into force on 17 October 2005[1]. The new law constitutes Part Five of the Polish Code of Civil Procedure, replacing the former Volume Three. It covers both domestic and international arbitration. According to the new Article 1154 of the Code of Civil Procedure, Part Five applies when the place of arbitration is in Poland and, when the place of arbitration is outside Poland or not specified, in those cases mentioned in Part Five.

The new legislation, which is much more detailed and extensive than previous legislation, seeks to modernize arbitration in Poland. It was broadly inspired by and based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and reflects many of the Model Law's provisions.

In particular, the new legislation enhances party autonomy, strengthens the position of arbitral tribunals in the legal system and facilitates the enforcement of arbitral awards. It states the important principle that, in matters to which it applies, a State court shall intervene only where so provided in the law. Thus, the scope of State court intervention has been accordingly reduced. At the same time, however, State courts have been provided with specific tasks to strengthen the efficacy of arbitration.

The main characteristics of the new law are described below.

Scope of arbitration

The new law has broadened the understanding of arbitrability. It provides that parties can submit to arbitration any disputes over property rights (as was previously the case) and non-property rights (a new departure) that are amenable to judicial settlement, except for disputes relating to alimony. This means that parties may refer to arbitration any matters in which they are free to act and settle (by consent) before the courts. The new law explicitly allows arbitration for corporate disputes and disputes involving cooperatives and associations. It also allows labour disputes—previously entirely excluded from arbitration—to be referred to arbitration under certain conditions.

Party autonomy

The new law gives the parties the freedom to determine the procedure, the applicable law and the language of the arbitration. These matters will be decided by the arbitral tribunal only in the absence of agreement between the parties. The overriding principle of party autonomy is limited only by safeguards necessary in the public interest and specified in mandatory legal provisions, e.g. relating to the independence of arbitrators, or due process and equality of treatment. A good example of the affirmation of party autonomy is the deletion of the former Article 1105(2) of the Code of Civil Procedure, which excluded the right of parties domiciled or with registered offices only in Poland to submit their disputes to arbitral tribunals seated abroad.

[1] Published in the Polish Law Journal *Dziennik Ustaw*, No 178, pos. 1478

The new legislation also marks a significant step towards giving arbitration greater autonomy vis-à-vis State courts. At the same time it confers upon judges an assisting role in specific circumstances.

Arbitration agreement

Here, the new legislation broadly reflects the UNCITRAL Model Law and extends the scope of the previous law. An arbitration agreement is required to be in writing. This requirement is also fulfilled if the agreement is contained in an exchange of letters or statements by means of telecommunication that provide a record of their content. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and that the reference is such as to make that clause part of the contract.

The parties are required to indicate the subject of the dispute or the legal relationship out of which a dispute has arisen or may arise.

The new law explicitly states that an arbitration agreement may mention the permanent court of arbitration that has jurisdiction to settle the dispute. It adds that if the parties have not decided otherwise, they are bound by the rules of that arbitration court.

An arbitration agreement is ineffective if it violates the principle of the equality of the parties, in particular if it allows only one party to commence arbitral proceedings. This provision was criticized during the preparation of the legislation as an unjustified restriction of party autonomy, with no equivalent in the UNCITRAL Model Law, but was nonetheless finally adopted.

Two important provisions expressly refer to situations where the place of arbitration is outside Poland. First, an action brought before a State court in a matter covered by a valid arbitration agreement shall be rejected by the court if requested by a party no later than when submitting its first statement on the substance of dispute, unless the agreement is null and void, inoperative, or incapable of being performed or the court of arbitration decides that it is not competent. Second, the submission of a dispute to arbitration does not prevent a State court from ordering an interim measure in respect of the subject matter of the dispute.

Unless the parties agree otherwise, the arbitration clause becomes invalid if a person designated in the clause as an arbitrator refuses or is unable to perform this function or if the court of arbitration mentioned in the clause does not accept the matter or cannot act. This is an improvement on previous legislation, under which the arbitration clause was rendered invalid by an arbitrator's refusal or inability to serve not only when that arbitrator was designated in the arbitration clause itself but also when she or he was designed in other agreements between the parties.

Arbitrators, composition of the arbitral tribunal

Any natural person, except a State judge holding office, may serve as an arbitrator, regardless of his nationality and provided that he has full capacity to perform legal acts. Arbitrators must be impartial and independent of the parties. They are required to immediately disclose to the parties any circumstances which may give rise to doubts as to their impartiality and independence.

[2] Translation of the Polish *stały sąd arbitrażowy*. Although *sąd* means court, the expression also covers arbitration institutions providing dispute settlement by arbitration in accordance with their respective rules, such as the ICC International Court of Arbitration or, in Poland, the Court of Arbitration attached to the Polish Chamber of Commerce.

The provisions on the procedure for appointing arbitrators contained in the new law largely reflect (although not always exactly) those contained in Chapter III of the UNCITRAL Model Law. The parties are free to determine the appointment procedure and the number of arbitrators (which may be odd or even). Unless they have agreed otherwise, the tribunal will be composed of three arbitrators. Each party will appoint one arbitrator, failing which the appointment will be made by a third party or by a State court. When appointing sole or presiding arbitrators in disputes between parties domiciled or having their registered offices in different States, the State court should consider the need to appoint a person who has no connection with any of these States.

An arbitrator may be successfully challenged only when there are grounds giving rise to justifiable doubts as to his impartiality or independence, or if he does not have the qualifications agreed upon by the parties.

The parties are free to agree on a challenge procedure. However, this procedure must allow the challenging party, in the event of its challenge being rejected by the arbitral tribunal (or arbitration institution, as the case may be), to refer the matter to the State courts within thirty days of receiving notice of the rejection. Unfortunately, unlike the UNCITRAL Model Law, the new law does not exclude the right to appeal the State court's decision on the challenge. However, as in the Model Law, the arbitral tribunal can carry on with the proceedings while the matter is pending before the State court.

An arbitrator may be removed from office at any time by agreement of the parties or by a State court upon the request of one of the parties, if it becomes evident that he will be unable to perform his functions in a timely manner or is failing to act without undue delay. Whenever the mandate of an arbitrator is terminated, a substitute arbitrator will be appointed. Finally, the new law recalls that an arbitrator is entitled to appropriate remuneration and the reimbursement of his expenses.

Competence of the arbitral tribunal to rule on its own jurisdiction

The new legislation confirms the *Kompetenz-Kompetenz* principle, accepted in all modern arbitration laws. It is clearly stated that the arbitral tribunal may rule on its own jurisdiction and the existence, validity and efficacy of the arbitration agreement. To prevent obstructionist tactics, the new law states that a party may challenge the arbitral tribunal's jurisdiction no later than when submitting its answer to the request for arbitration, unless it did not know or could not reasonably have known the grounds for such challenge or the grounds only emerged later.

Conservatory measures

Unless the parties have agreed otherwise, the arbitral tribunal is empowered to order appropriate conservatory measures and may require the provision of appropriate security in connection with such measures. Such an order will be implemented once enforcement has been authorized by a court. If the measure proves to be groundless, the party that requested it is liable for any resulting damage, for which a claim may be brought in the arbitration proceedings.

Proceedings

The new legislation explicitly incorporates the fundamental principle that the parties should be treated with equality. Each party has the right to be heard and to present its case and supporting evidence. Subject to mandatory provisions of law, the parties are free to agree on

the arbitration procedure; in the absence of such agreement, the arbitral tribunal may conduct the proceedings in the manner it considers appropriate. Neither the parties nor the arbitration tribunal are bound by the legal provisions governing court proceedings.

In particular, unless otherwise agreed by the parties, the arbitral proceedings commence on the date a letter requesting that a dispute be referred to arbitration is received by the respondent. The parties are free to agree on the language or languages to be used in the proceedings, failing which they shall be fixed by the arbitral tribunal. The claimant's statement of claim and the respondent's answer, if such be the case, must be submitted within the period of time agreed by the parties or set by the arbitral tribunal. Either party may amend or supplement its request or answer during the course of arbitral proceedings, unless the arbitral tribunal considers this inappropriate due to the delay it would cause.

Unless the parties agree otherwise, the arbitral tribunal decides whether to hold a hearing. It will do so when requested by a party. The parties are to be given sufficient advance notice of any hearing so as to be able to present evidence. All written submissions made to the arbitral tribunal must be communicated to the other party and, likewise, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision must be supplied to both parties.

The arbitral tribunal will terminate the proceedings if the claimant fails to submit its statement of claim. If the respondent does not submit an answer, the proceedings will nonetheless continue. If any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. This will not however apply, unless otherwise agreed by the parties, if a party has justified its lack of activity or its absence from a hearing.

The arbitral tribunal may hear witnesses and experts and examine documentary and other evidence. It may appoint one or more experts and receive their opinions. Subject to any agreement to the contrary by the parties, experts may participate in hearings and be examined by the parties.

If the place of arbitration is outside Poland, the arbitral tribunal may request a competent district court to assist with the taking of evidence or performance of any other legal acts which it may not perform itself. The parties may participate in such evidentiary proceedings.

Award and termination of the proceedings

The new law subscribes to the principle that the arbitral tribunal decides the dispute in accordance with the law applicable to the legal relationship in question and, if explicitly so authorized, in accordance with general principles of law or on an *ex aequo and bono* basis. In all cases, the arbitral tribunal shall take into account the terms of the contract and customary practices applicable to the underlying legal relationship. Where the tribunal consists of more than one arbitrator, decisions may be reached by a majority of votes, unless the parties agree otherwise. Questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties, or by all the arbitrators. Any arbitrator who votes against the majority standpoint may mention his dissent when signing the award and, within two weeks, provide reasons, which will be annexed to the file.

If the parties reach a settlement before the arbitral tribunal, the proceedings are terminated. The essentials of the settlement agreement are to be recorded in the minutes of the hearing signed by the parties. At the request of the parties, the arbitral tribunal may record the settlement in the form of an arbitral award.

The new legislation also lays down requirements relating to the form and content of the award and the procedure for correction and interpretation of awards. These requirements again largely follow the UNCITRAL Model Law.

Recourse against the award

Applications to State courts to set aside awards rendered in Poland must be based exclusively on the limited grounds set forth in the new legislation. They are broadly similar to those contained in Article 34 of the UNCITRAL Model Law. The time allowed for bringing an application is three months from the date a party received the award. A State court, at the request of a party, may suspend the setting-aside proceedings to allow the arbitral tribunal to resume its proceedings so as to eliminate the grounds for setting aside the award.

Enforcement

The new legislation explicitly states that arbitral awards have the same legal force as court judgments. The recognition or enforcement of both domestic and foreign awards may be requested by a party through an application to the State court that would have had jurisdiction if the parties not submitted their dispute to arbitration. The grounds for refusing recognition or enforcement of a foreign award are almost identical to these listed in Article V of the New York Convention and Article 35 of the UNCITRAL Model Law.

Concluding remarks

The new legislation is an important step towards enhancing and developing arbitration in Poland. It reflects the progressive recognition that arbitration is a method of dispute settlement that is particularly suited to trade and industrial relations. Businesses and State agencies can now feel more confident about including arbitration clauses in their contracts. A number of limitations which formerly discouraged the use of arbitration have been removed, and procedural rules have been developed with full respect for party autonomy. The new legislation also increases the possibility of enforcing awards and obtaining assistance from State courts.

Consequently, Poland is now far better equipped to handle the growing number of international arbitrations resulting from its increasing international trade and continuing privatization programme. The improved legal conditions created by the new legislation may well lead to an increase in the number of disputes involving Polish parties that are submitted to foreign arbitration institutions and, in particular, the ICC International Court of Arbitration.