The Changing Face of Arbitration in Poland

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Like so many prized achievements of our civilisation, an arbitration culture may only be built gradually in favourable conditions created in a particular jurisdiction over a considerable period of time. Those conditions certainly include: modern arbitration-friendly legislation that provides a solid framework and support to arbitral proceedings from the state and the state courts, a specialized arbitration community, including arbitrators and counsel familiar with best practices and standards developed worldwide, and support from state courts displaying a pro-arbitration approach and refraining from refusing to give effect to an arbitration agreement or an arbitral award for trivial reasons. If such pro-arbitration environment remains stable and a record of significant disputes can be shown over years, a country may be on its way to joining the elite club of preferred arbitration venues.

The Poland of 2010 is certainly not a member of the club yet, even if it has made enormous progress in the last 20 years. It has been five years since Poland adopted a new arbitration law based on the 1985 UNCITRAL Model Law on International Commercial Arbitration. The legislation may be claimed to be a huge improvement to the legal framework, even though after its initial strong period, it calls for revision and some fine-tuning: The arbitration community in Poland has also significantly transformed over the last few years and attaches an ever-increasing importance to the best practices and standards applicable in international arbitration. Polish state courts, although uneven and not always familiar with the peculiar characteristics of arbitration, generally endorse arbitral awards and have adopted a narrow interpretation of the public policy grounds for review of arbitral verdicts. With respect to matters that are referred to arbitration, the statistics of Poland’s leading arbitration courts are worth considering, both in terms of the number of cases in the docket, as well as the aggregate value of the claims. Nevertheless, many big-ticket arbitrations are referred to seats abroad, including London, Paris, Vienna and Geneva. This article provides a short overview of the current features of arbitration law and practice in Poland.

Arbitration law

The current legal framework for arbitration in Poland, both international and domestic, has been laid down in the 5th Book of the Code of Civil Proceedings (articles 1154 to 1217), effective from 17 October 2005. The legislation replaced the outdated and otherwise inadequate regulations from 1964, which were designed for a centrally planned economy and remained largely unchanged since they came into force. The current legislation has been based on the 1985 UNCITRAL Model Law, but it did not take account of the amendment of the Model Law that took place in 2006. On an international level, Poland is also party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the European Convention on International Commercial Arbitration of 1961. Poland is also party to the Energy Charter Treaty and to more than 60 bilateral investment treaties, the majority of which provide for settlement of disputes between the investor and the host state in an international arbitration procedure. But it is notable that to date Poland has not joined the ICSID Convention.

While a discussion of those provisions of the Polish arbitration law that do not depart from the letter or spirit of the UNCITRAL Model Law does not seem particularly attractive, it is worthwhile briefly elaborating those aspects of national legislation that are peculiar to the Polish legal system, or which a potential counsel or party to arbitration in Poland should be aware of. These include, among other issues the problem of arbitration agreements entered into by proxies, reference to institutionalised arbitration and applicable rules in an arbitration clause, arbitrability and the procedural pitfalls of an action to set aside an arbitral award.

Arbitrability

With respect to arbitrability under Polish law, the relevant test is whether the dispute would be suitable for a settlement before a state court, that is, whether the subject of the dispute concerns rights and obligations that are freely disposable by the parties or one of them. The test is applicable both for disputes related to monetary and non-monetary claims. Pegging the notion of arbitrability to the settlement capability renders non-arbitrable all instances of disputes in which the public interest is prevailing, but the scope of arbitrability in certain vital areas (eg, competition, IP and securities), especially is far from clear.

With respect to bankruptcy matters, Polish law is abundantly clear as it provides for the automatic loss of legal effect of all arbitration clauses entered into by the insolvent party and mandates termination of all arbitral proceedings pending at the moment of the opening of bankruptcy proceedings (articles 142 and 147 of the Bankruptcy and Reorganization Law). The provisions in question have recently become notorious due to the Elektrim affair, where the defendant became insolvent in the middle of a pending set of arbitration and post-arbitration proceedings, setting the stage for a battle for control over a major Polish GSM operator. The insolvency of Elektrim revived the thorny conflict of policies between arbitration and insolvency and led to divergent interpretations of the English, Swiss and Polish courts. While the English courts upheld the LCIA awards rendered in spite of Elektrim’s bankruptcy, giving a pro-arbitration interpretation of the EC Insolvency Regulation, the Swiss Supreme Court upheld the ICC award of the tribunal declaring lack of jurisdiction over Elektrim, due to the purported lack of subjective capacity of the insolvent Elektrim to participate in arbitral proceedings. In Poland, whereas the Circuit Court rather unsurprisingly refused to recognise and enforce the LCIA awards in Poland on the grounds of the public policy exception, these decisions were overturned by the Court of Appeal in Warsaw, which in a well-reasoned decision of 26 November 2009 took the position favouring international arbitration and partially granted enforcement in Poland of the awards, even though they were rendered when bankruptcy proceedings had already been opened with respect to Elektrim.

Another hotly debated issue of arbitrability in Polish legal writing in the last few years was the problem of to what extent internal
In accordance with article 1161, section 3 of the Code of Civil Procedure, a provision that is not capable of being settled by a court, some writers advanced the view that a special more lenient test for arbitrability applies with respect to corporate disputes under article 1163 of the Polish Code of Civil Procedure. In its decision of 7 May 2009, the Polish Supreme Court dispelled any doubts on that subject, rendering actions to annul or set aside corporate decisions as non-arbitrable. Although the Supreme Court did not go into the written reasons for its decision beyond the wording and context of the relevant provisions of the Code of Civil Proceedings (articles 1157 and 1163), two reasons are usually invoked against the arbitrability of those disputes. On the other hand, it is alleged that the decision of a court or a tribunal on the annulment or setting aside of a resolution of the shareholders meeting should be effective against all current and future shareholders of the company, as well as against all members of its members of the board and officers. This begs the question of the procedural rights and guarantees of all persons having a legal interest in the resolution of a particular dispute, in view of the principle of confidentiality and lack of effective access for interveners into arbitral proceedings. Secondly, a resolution of the shareholders meeting may be annulled or set aside due to an infringement of mandatory provisions of law or company bylaws, or when it unduly tampers with the rights of particular shareholders. This is considered to bring elements of public policy to these disputes.

Arbitration agreement by proxy

Shortly before the old arbitration law was replaced in Poland by the 2005 legislation, the Polish Supreme Court developed a particular line of case law where it repeatedly held that an arbitration clause in a commercial contract is at a different level from other contractual stipulations, as it aims to exclude the parties with respect to a defined dispute or legal relationship from the jurisdiction of the state courts. Therefore, a general power of attorney to represent a principal, sufficient to negotiate and sign a commercial contract was held insufficient to bind the principal with an arbitration clause included in such contract. A more detailed, generic or specific authorisation to enter into an arbitration agreement was held to be necessary.

Article 1167 of the Code of Civil Proceedings, applicable since 17 October 2005, made it clear that a power of attorney given by a business entity to a proxy to enter into a transaction (eg, a contract) entails also the power to effectively enter into an agreement to arbitrate disputes resulting from that transaction. However, the old cases remain good law with respect to arbitration agreements entered into by consumers and other non-business parties. It is also unclear whether the new regulations should apply to contracts pre-dating the entry into force of the new law that were entered into by proxies lacking authorisation in due form. Despite the judgment of the Polish Supreme Court endorsing the application of the new law to assess the validity of arbitration clauses pre-dating 17 October 2005, doubts persist as an arbitration agreement that could not bind the party from the outset for being done ultra vires, may not be said to gain the full legal effect, including retrospectively, when the arbitration agreement was executed. Although this provision may be justified on the grounds that it reflects the will of the parties as it was at the moment of the arbitration agreement, in practical terms the rule is responsible for some confusion, especially when a dispute breaks out many years after the agreement was signed. To increase the confusion, the leading Polish arbitration institution, the Court of Arbitration at the Polish Chamber of Commerce, has replaced its arbitration rules five times since 2000, and notably it replaced its arbitration rules with new ones each year in 2005 to 2007. In case parties wish to sign up for arbitration in accordance with the rules in force as of the date of commencement of arbitration, they should expressly provide so in the arbitration agreement.

Setting aside an arbitration award

The legal framework of an action to set aside an arbitral award is probably most peculiar in the entire system of Polish commercial litigation. The grounds for setting aside an arbitral award are narrow and generally follow the lines of article 34 of the UNCITRAL Model Law. On the other hand, court proceedings resulting from an action to set aside an arbitral award tend to be unbearably long. The time limit to bring an action to set aside an arbitral award is three months from the moment when the award is served upon a party, and when the party requested rectification of a clerical error, supplementation or interpretation of an award, from the moment when the decision on that subject is served upon the party. This is the longest procedural time limit for a challenge of a judicial decision in the entire Polish legal system available to individuals. The application should be made to the state court which would have been competent to deal with the dispute decided by the arbitrators, had there been no arbitration agreement. This implies two-tier court proceedings with a full appeal against the decision of the court of first instance and frequently also an appeal to the Supreme Court on the points of law. Moreover, parties having a legal interest in the dispute resolved with an arbitral award may appear in the court proceedings as interveners. It is furthermore settled by now that the excessively burdensome rules on evidence applicable to normal commercial litigation in Poland do not apply to actions to set aside an arbitral award and the resulting proceedings, even though these are regarded for other purposes on the same footing as other commercial court cases. This allows the parties to make fresh motions for evidence virtually until the close of the proceedings.

In practice, most challenges are brought with charges of serious departure from an important procedural rule or violation of public policy. As a matter of principle, state courts are hesitant to allow such challenges, but decisions in particular cases depend on the personal experience and idiosyncrasies of the particular judge or judges.

Call for changes

After the first five years of application of the new Polish arbitration law, there is a widely perceived need for its revision and improvement. Ideas on the extent and direction of these amendments, are, however divergent. Some opt for extensive changes, whereas others propose limiting the amendments to fine tuning and clarification of a few provisions. The top priorities for amendment should include repealing the current bankruptcy law provisions on arbitration agreements and arbitral proceedings or replacing them with a more arbitration friendly solution and limiting duration and access to court proceedings relating to setting aside arbitral awards. Legislative initiatives should also take into account whether and to what extent Poland should implement the amendments to the UNCITRAL Model Law adopted in 2006.
Arbitration community

The Polish arbitration community has undergone some transformation and is gradually growing both in numbers and international experience. In the last few years Polish companies were either parties or objects of their shareholders’ disputes in some prominent international arbitration disputes, especially in the telecom and oil sectors. On the other hand, the Polish state administration found itself frequently on the respondent’s side in numerous investment treaty and construction disputes. Those disputes offered many Polish lawyers first-hand experience in big-ticket arbitrations as well as apposite international standards and best practices. Until recently, most arbitration proceedings in Poland were very much court-like, to the extent that even though the Code of Civil Procedure did not apply to arbitral proceedings, the content and spirit of its provisions were pre-eminent and shaped the conduct of arbitration from the first pleading to the final award. With the recent experience gained, the shape of arbitral proceedings in Poland is beginning to change intensely. Thus we are witnessing a spill-over effect of international standards, with instances of purely domestic arbitrations with discovery requests processed along the lines of the IBA Rules on Evidence, party-appointed expert opinions, written witness statements, procedural orders, terms of reference and many other procedural devices typical to arbitration that were previously unheard of to many. Furthermore, there is a noticeable increase in the presence of the Polish law students in international moot arbitration events, including VIS and FDI moots, which is likely to contribute to further proliferation of international arbitration standards on the Polish legal market once these young apprentices of the art of arbitration enter practice.

Adherence to best practices and standards is further supported by leading arbitration institutions and organisations. The Court of Arbitration at the Polish Chamber of Commerce adopted its Code of Ethics for Arbitrators, whereas in December 2008 the Polish Arbitration Association resolved to establish Expert Groups tasked to develop a code of best practices for permanent arbitration courts. On 21 May 2010 the draft code was presented and submitted for consultation to both the members of the Arbitration Association and the main permanent arbitration courts in Poland. The code, consisting of nine articles, is intended to provide a set of (non-binding) principles related to the functioning of permanent arbitration courts, with focus on the notions of independence and transparency. Whereas the majority of the code’s provisions may only be considered when the respective arbitration rules are revised, others have a more general applicability, including default reference to the IBA Guidelines on Conflict of Interest in International Arbitration, recommended in article 7 of the code.

State courts

The approach of state courts to arbitration is far from uniform. On the one hand, wide autonomy of arbitration has been endorsed and pronounced in many decisions rendered by the Supreme Court. For instance, in its order of 9 July 2008 (V CZZ 42/08), the Supreme Court held that: “the autonomy of arbitral proceedings is very large, in accordance with the intentions of the lawmaker, which considerably curtails the control powers of the state courts. The principal aim of this regulation is the speed of resolution of civil disputes, and not to create an additional phase of pre-trial proceedings. Parties resolving to submit their dispute to arbitration should consider these conditions, including also the limited scope of external scrutiny of arbitral awards.” In accordance with these lines, the courts are generally reluctant to admit actions to set aside arbitral awards. The statement of principle announced in numerous cases by the courts is that the scope of judicial control over the arbitral award is limited and that awards may only be annulled in cases of violations of the most basic values of the legal, political or economic order or fundamental principles of the legal order.

Nonetheless, there seems to be no general agreement as to how to apply that general standard in individual cases and what threshold the state courts should apply to exercise the ultimate control of arbitral awards. There were for example instances of cases where arbitral tribunals were annulled because the tribunal was held to unduly refrain from exercising its discretionary powers to limit the amount of liquidated damages under article 484, section 2 of the Polish Civil Code, or where a set-off was admitted in contradiction to a rule of the Polish Civil Code (article 505(1)), which did not seem to justify setting aside of an award on public policy grounds.

Another instance of this lack of clear judicial policy on arbitration is depicted by two decisions rendered by the Supreme Court in 2009 on the scope of an arbitration clause in a commercial contract. In a decision of 5 February 2009 concerning a dispute with a rather narrow arbitration clause, the Supreme Court held that “submission to arbitration of disputes from a contractual relationship means that the arbitration court is competent to hear any and all claims for performance of the contract, claims resulting from non-performance or improper performance of the contract, claims for restitution in the event of nullity or rescission of the contract, as well as claims based on tort (delict), when they arise from an instance of non-performance or improper performance of a contract”. Ten months later, however, the Supreme Court adopted a much narrower interpretation of an apparently broader clause which referred to arbitration of any disputes arising under or related to a contract. The decision of the Supreme Court of 2 December 2009 concerned a situation where the parties were bound by three agreements related to the supply by one of the parties of products to the other party running a chain of supermarkets. Since the latter party allegedly coerced the supplier into making additional payments for placing the products on the shelves, the supplier sued the chain of the supermarket invoking breaches of the fair market practices act. The Polish Circuit Court and the Court of Appeals held that the claims were related to the contract and thus within the scope of application of the arbitration clause. The Supreme Court, while it held that disputes under the unfair market practices act are arbitrable in principle, stated that in the situation before it there was nonetheless no evidence that the parties originally envisaged in the arbitration agreement that one of the parties shall suffer unfair market practice. Thus since the Supreme Court relied on the cause of action indicated by the claimant, it refused to give effect to the arbitration agreement as it held that the arbitration agreement did not apply to the situation at hand.

The lack of a uniform approach of Polish state courts to arbitration may be attributed to a number of reasons. One of the reasons rests in the model of judicial training. Unlike in some jurisdictions (but like in many others), most judges in Poland do not have any previous professional experience as counsels or trial lawyers, nor any other experience that would equip them with even the most general idea of the arbitration process. Judicial tenure basically requires completion of an apprenticeship period, focused primarily on the theory and practice of court law. In most cases, state court judges’ practical experience of arbitration and the arbitral process is limited to situations where the state courts are called on by the parties to exercise control over an arbitral decision or an arbitral award in the light of certain statutory or conventional standards. This may occur either as the result of a juridical challenge, or an action for setting aside an award of a motion to confirm or enforce an award. In all these situations the courts are normally required to assess the soundness of arguments of the parties alleging (sometimes inflatedly) or refuting allegations concerning perceived
irregularities in the arbitral process or the arbitral decision. However, the lack of first-hand experience with the arbitral process and all its features that distinguish it from the judicial process may certainly operate as a factor increasing the risk of an unpredictable/erroneous decision.

On the other hand, one should also emphasise differences between various judges with respect to their arbitration-related knowledge. Certainly some state court judges in Poland have considerable knowledge of arbitration law, but not all. However, since there are no specialised courts in Poland dealing with arbitration-related issues (eg, actions for setting aside), in theory every state court judge may potentially one day be assigned to pronounce on the existence of grounds to set aside or enforce an arbitral award. Again, however, this problem is not peculiar to Poland.

Finally, the third factor that affects the position of the state courts, apart from scarcity of first-hand experience related to arbitration and the divergent level of expertise of the judges on the subject, is the divergent quality of arbitral awards. As has been mentioned before, there are many small arbitral centers and ad hoc arbitrations in Poland, and their standards of performance may differ. Because of the way the state court judgments in Poland are reported, it is not always clear whether a particular ruling should be read as a general statement of principle that should be relied upon in future cases, or as a specific judicial reaction to a particular award, confined to the specific facts of the case at hand.

Cases
Most arbitration cases in Poland are handled by permanent arbitration courts, including the Arbitration Court at the Polish Chamber of Commerce and the Lewiatan Court of Arbitration, which have ambitions of further increasing their role within the region. There are also many smaller institutions that may be of local significance.

The case-load of the Arbitration Court at the Polish Chamber of Commerce demonstrates an increasing inflow of cases. By August 2010 the court had registered 299 new cases, against 260 new ones in 2008 and 352 in 2009. The percentage of cases where at least one of the parties was non-Polish has also been rising, both in absolute numbers and in percentages, from 18 per cent in 2009 to 23 per cent in 2010. In terms of value, the aggregate value of the disputes in 2008 and 2009 was similar, amounting to approximately €190 million, as compared to approximately €126 million up to 19 August 2010. The average value of a claim has fallen from close to 3 million zloty whole (€730,000) to 1.75 million zloty whole (€420,000). The statistics of the Lewiatan Court of Arbitration are still much lower.

However, with respect to big-ticket arbitrations, most are still referred to arbitration under the Arbitration Rules of leading international centres, such as the ICC, LCIA and VIAC. Recent examples include shareholders’ disputes in Polish telecoms, Polkomtel and PTC, referred to arbitration in Vienna, London and Geneva, or the pending arbitration between the Polish oil company PKN Orlen and the Russian Yukos relating to a dispute regarding PKN Orlen’s acquisition from Yukos of the controlling stake in the Lithuanian oil refinery in Mozejki (Mazeikiu Nafta).12

Notes
1 Decision of the Supreme Court of 21 May 2010, II CSK 670/10; nonpubl.
2 Syska et al v Vivendi Universal et al, High Court of Justice Queen’s Bench Division Commercial Court (Ch. Clarke), judgment of 2 October 2008 [2008] EWHC 2153; Court of Appeal, judgment of 9 July 2009, [2009] EWCA Civ 677
4 Case No. I Acz 1883/09, unreported, kindly facilitated to the author.
5 Resolution of the Supreme Court from 7 May 2009, III CPI 13/09, OSNC 2010/1/9.

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6 Among others: resolution of the Supreme Court from 8 March 2002, III CZP 8/02, OSNC 2002/11/133; judgment of the Supreme Court of 5 February 2005, II CKN 1143/00, Lex No. 53286, order of the Supreme Court of 13 April 2004, II CK 451/02, Pr.Bankowe 2005/2/18; order of the Supreme Court of 25 August 2004, IV CK 144/04, Lex No. 188486.

7 Order of the Supreme Court of 22 February 2007, IV CSK 200/06, OSNC 2008/2/25; resolution of the Supreme Court of 21 January 2009, III CZP 136/08, OSNC 2009/12/160

8 Judgment of the Supreme Court of 11 April 2002, nonpub., quoted in the judgment of the Supreme Court of 26 November 2008, III CSK 163/08, LEX No. 479315.

9 Judgment of the Supreme Court of 28 April 2000, II CKN 267/00, OSNC 2000/11/203.

10 I CSK 311/08, Lex nr 492144

11 I CSK 120/09, nonpubl.

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