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## The influence of declaring bankruptcy of a Polish business on the arbitration clause

The Polish Ministry of Justice has prepared draft amendments to the Bankruptcy and Rehabilitation Law (“BRL”), proposing the repeal of two controversial provisions of this Act. Under the current law, on the declaration of a business bankruptcy (bankruptcy with the possibility of entering into a reorganisation agreement – Article 142 BRL, as well as bankruptcy covering the liquidation of the bankrupt party’s estate – Article 147 BRL), any arbitration covenants made by the bankrupt party lose their force of law, and any already pending proceedings are subject to discontinuance.

The application of the above provisions in practice raised doubts, producing a number of contrasting judgments. It is undisputed that, with the present shape of Articles 142 and 147, the BRL orders the discontinuance of all arbitration proceedings pending on the basis of arbitration covenants made by the bankrupt party, regardless of whether the object of the proceedings is regarded as a part of the bankrupt party’s estate or not.

Some Polish common courts of law went even one step further, deriving from the provisions a basis on which to also discontinue proceedings relating to the recognition or the enforcement of an arbitration award, and even proceedings caused by the instigation of a complaint over the setting aside of an award.

In light of one of the lines of judgment of the Polish courts, the discontinuation of these proceedings should take place regardless of whether the arbitration clause’s loss of the force of law took place before or after the issuance of the arbitration award. This line, fortunately, is not dominant and will probably not become widely accepted; it has, however demonstrated the imperfections of the existing regulations.

Such a stance undoubtedly discouraged the use of arbitration clauses amongst Polish

businesses, since a declaration of bankruptcy would prevent arbitration proceedings being concluded with a judgment as to the merit. Even if an arbitration concluded with an award before the declaration of bankruptcy, then the risk still existed that the Polish courts would refuse to recognise or enforce such an award.

In cases in which arbitration proceedings are pending before an arbitral tribunal in one of the EU member states, for the establishment of the effects of the bankruptcy of a party to the proceedings on arbitration, Council Regulation no. 1346/2000 on Insolvency Proceedings is applicable. On its basis however, contradictory judgments of arbitration tribunals in the EU member states have been issued. Some of these tribunals discontinued the proceedings, citing the BRL and Article 4 of Regulation 1346/2000; others have continued the proceedings, and adjudicated the dispute as to the merits, with reference to Article 15 of the Regulation. Polish legal regulations, and their court interpretation, create an uncertainty in the EU with regard to arbitration proceedings involving Polish businesses.

What is more, a large number of international arbitration proceedings are pending in states outside the EU, where the Regulation is not in force. This first and foremost refers to Switzerland. Switzerland is a popular venue amongst parties concluding arbitration agreements. However, the selection of Swiss arbitration tribunals in a contract involving Polish businesses risks the discontinuation of the arbitration proceedings in the event of the Polish party’s bankruptcy. In the assessment of the Swiss common courts of law and arbitration tribunals, the capacity of a company to be a party in arbitration proceedings is subject to assessment according to the provisions of its personal status – in the example of Polish companies, according to Articles 142 and 147 BRL.

These problems arising from the bankruptcy of Polish companies that are party to arbitration clauses are to be stopped by the draft law proposing the repeal of the provisions of Articles 142 and 147 BRL. These changes to BRL have been long awaited and urged, by arbiters as well as lawyers. The most significant effect of the planned changes is the maintenance in force of the arbitration clause despite the declaration of bankruptcy of a Polish business. As a result, the risk of the discontinuance of arbitration proceedings pending with the bankruptcy of a participating party will be eliminated. So will the doubt as to the possibility of recognition or enforcement of any arbitration awards issued in arbitrations involving the bankrupt party. Hence as a result of this change the existing doubts in relation to the conclusion of arbitration clauses in agreements with Polish businesses should disappear. ■

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