Loss of effect of arbitration clause

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Introduction

On February 5 2015 the Supreme Court issued a judgment (V CSK 231/14) related to a provision of the law regarding the expiration of an arbitration clause (ie, Article 1168 of the Code of Civil Procedure). Pursuant to this provision, if a person identified in an arbitration clause as an arbitrator or presiding arbitrator refuses to perform that function – or if it is otherwise impossible for him or her to perform that function – the arbitration clause will lose its effect, unless the parties decide otherwise. According to the same provision, unless the parties have agreed otherwise, the arbitration clause will lose its effect if the arbitration court defined therein refuses to hear the case or if it is otherwise impossible for the court to hear the case.

In the event of an arbitration clause losing its effect – be it pursuant to the provision above, other provisions of law or for other reasons – the case can be considered only by a common court.(1) The abovementioned judgment related to a mediation-arbitration clause contained in a contract. From a practical perspective, it illustrates how a mediation-arbitration clause should be constructed to make it fully workable under Polish law.

Background

The case before the Supreme Court involved a contract for construction work. According to the contract, in the event of a dispute related to the performance of the construction work, a party had first to submit a written motion to resolve the dispute to the engineer of the contract, who was designated to supervise the construction work and manage the contract. Following this, the dispute was to be considered by a conciliator. If the parties did not accept the decision of the conciliator, the dispute was to be resolved by an arbitration court.(2) The case concerned a dispute that arose after the contract was completed and therefore after the engineer of the contract had ceased to perform his function.

Decision

The Supreme Court took the view that because the contract had already been completed – and therefore the engineer of the contract had ceased to perform his role – there was no entity designated by the contract to which a party could submit the dispute before starting the arbitration procedure. Although the court did not elaborate further on this issue, it implies that it concluded that because the mediation procedure could not be initiated, the dispute could not be decided by submitting the case to the arbitration court. The fact that the case could not be heard by an arbitration court meant that the arbitration clause contained in the contract lost its effect.

Comment

The Supreme Court decision deserves strong criticism. The mediation (conciliation) part of the procedure for resolving disputes was by no means intended to be binding on the parties. On the contrary, the contract expressly provided that the parties could disapprove the conciliator's decision, in which case the dispute would be submitted to the arbitration court. Thus, the parties agreed that in terms of disputes between them that arose from the contract, they would be bound by the decision of the arbitration court only. Therefore, whether mediation between the parties took place was of no legal importance. Even if mediation did not take place because the procedure enabling such mediation could not be initiated – in the absence of the engineer of the contract – it should still have been possible to resolve the dispute by the arbitration court indicated in the contract.

Further, it should be assumed that if the parties to the contract had agreed that disputes between them arising from the contract were to be resolved through arbitration, they were referring to disputes which appeared before and after the contract was completed. In construction contracts, some errors may come to light after the contract is completed. Thus, it can reasonably be assumed that the

parties' intention was to submit their disputes to arbitration after completion of the contract (ie, after the engineer of the contract ceased to perform his role). The fact that the arbitration clause also covered claims that arose after completion of the construction contract was expressly confirmed by the Supreme Court in the substantiation of its judgment.(3)

The absence of the engineer of the contract should not lead to the conclusion that the case cannot be submitted to the arbitration court and that the arbitration clause loses its effect. Such a formalistic approach endangers the safety of well-established commercial practices, especially in the construction industry, where such clauses often apply.

However, when introducing a mediation-arbitration clause into a contract, it should be drafted in a way which makes clear that even if mediation does not take place, the case can still be submitted to the arbitration court indicated in the contract.

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Endnotes

(1) An arbitration clause may also lose its effect:

- if the unanimity or majority of votes required to issue a decision by the arbitration court cannot be obtained;
- if the time provided for in the contract for the arbitration court's decision to be issued elapses and the decision is not issued; or
- for other reasons stipulated by the parties in the contract.

(2) In the substantiation of its judgment, the Supreme Court did not provide the exact wording of the mediation-arbitration clause contained in the contract. This commentary is based on the description of the clause included in the substantiation. However, the description raises certain doubts as to the actual contents of the clause.

(3) The Supreme Court additionally referred to its February 5 2009 judgment (I CSK 311/08) and the Warsaw Appeal Court's August 21 1997 judgment (I Acz 756/97).