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Poland

Rafał Kos and Maciej Durbas

Kubas Kos Galkowski

The year 2015 brought about two very important amendments to Polish arbitration law: amendments introduced by the Act of 15 May 2015, the Restructuring Law (the Restructuring Law), in general in force as of 1 January 2016; and amendments introduced by the Act of 24 July 2015 on Amendments of Certain Acts Due to Support of Alternative Dispute Resolution (the ADR Law), the legislative process of which is still pending.

The aim of these amendments was to adapt Polish rules on arbitration (and ADR in general) to the needs of modern business and create a friendly environment for arbitration.

Restructuring Act

Previous legislation

Bankruptcy in certain jurisdictions is not an impediment to arbitral proceedings. Other legal systems adopt an opposite position. Polish rules on the relation between bankruptcy and arbitration have been very strict and have limited parties' freedom in choosing an appropriate forum to resolve their disputes. Under article 142 and 147¹ of the Act of 28 February 2003, the Bankruptcy and Rehabilitation Law, when a party becomes bankrupt, the arbitration agreements concluded by this party lose their legal effect and all pending arbitral proceedings are discontinued. All the claims should therefore be brought before a state court, including in the bankruptcy proceedings.

This rigid solution was explained by the need to maintain a strict control of the state over bankruptcy claims and the need to hear these claims in proceedings where the law was strictly applied. Arbitration was regarded as a means of dispute resolution where these aims were not always possible to be attained.

A vast majority of the Polish arbitration community criticised these solutions as outdated and explained that the above-mentioned concerns were not convincing. This is because the ability of the tribunal to decide *ex aequo and bono* is limited and, as practice shows, very rare. Furthermore, state control over arbitration in post-arbitral proceedings, however also limited, is sufficient to preserve the basic principles of the legal system.

Moreover, the desired protection of the bankruptcy estate turned out in fact to be illusory in terms of international arbitration. This was demonstrated in the *Elektrim SA* case saga. This case involved a series of arbitration and state court proceedings, including LCIA arbitration in London. *Elektrim SA*, a Polish company, was declared bankrupt and therefore, under Polish law, the proceedings to which it was a party were to be discontinued. However, the LCIA tribunal decided to apply English law to determine whether the Polish party can take part in the arbitration. It then decided to continue the proceedings and rendered awards. The enforcement and recognition of these awards was initially denied in Poland. However, in two 2009 decisions² of the Court of Appeals in Warsaw, the court refused to treat the above-mentioned provisions of bankruptcy law as mandatory rules of the Polish public policy, and granted the enforcement and

recognition. Consequently, it is in principle possible to initiate and continue international arbitrations with Polish parties and Polish bankruptcy law was not able to stop this phenomenon.

In mid-2012, the minister of justice convoked a task force comprising judges, insolvency administrators, economists and lawyers to evaluate existing regulations on insolvency and prepare solutions for the future. The *Elektrim SA* case was one of the issues that was debated. The solutions prepared by the task force were transformed into a legislation which was enacted as the Restructuring Law. In particular, the relation of arbitration and bankruptcy was significantly amended and deserves a comment.

Amendments introduced by Restructuring Law

Under the Restructuring Law, there will be only one kind of bankruptcy proceeding (the name of the Act of 28 February 2003 was also changed to Bankruptcy Law), and therefore article 142 of the Bankruptcy Law was erased. The new wording of article 147 of the Bankruptcy Law introduces a completely new perspective on arbitration.

First, a declaration of bankruptcy will not automatically trigger losing the effect of arbitration agreements and will not cause a discontinuation of pending proceedings. Pending arbitral proceedings and state court proceedings will, in principle, be treated in the same way, and general rules of the Code of Civil Procedure (CCP) regarding state courts³ will apply. This means that the tribunal shall stay the proceedings and decide to continue the proceedings in principle only when the insolvency administrator (or officer of similar competences) is established and made known to the tribunal. Proceedings involving the estate need to be pursued either by or against the insolvency administrator, who acts in the capacity of a party.⁴

Furthermore, under article 145 (1) of the Bankruptcy Law, the proceedings (arbitral or state court) with regard to a certain liability shall continue only if this liability, being subject to filing in the bankruptcy proceedings, was not included on the list of liabilities (which contains liabilities to be satisfied in bankruptcy proceedings) in a final and binding manner. Consequently, this can be described as a 'fork-in-the-road' provision, allowing for the pursuing of claims only in one forum.

The Restructuring Law also introduced article 147a of the Bankruptcy Law, which regulates the avoidance of an arbitration agreement. Under the new regulation, the arbitration agreement will no longer lose its effect after the declaration of bankruptcy and will, in principle, still be binding. However, the following rules will apply in this regard:

- the insolvency administrator shall act in the capacity of a party and is therefore entitled to sue and be sued;⁵
- the insolvency administrator shall be entitled to avoid the arbitration agreement, under the following conditions:
 - if the arbitral proceedings have not commenced before the day of announcing bankruptcy;

- with the consent of the judge-commissioner (a judge ensuring that the insolvency is performed in accordance with law); and
- if pursuing claims in arbitration will hamper the liquidation of the bankruptcy estate, particularly if the assets are insufficient to initiate and continue the arbitral proceedings;⁶
- the other party can motion the insolvency administrator in writing to decide whether the arbitration agreement will be avoided (silence within 30 days amounts to avoidance);⁷
- the other party can avoid the arbitration agreement itself if the insolvency administrator, despite deciding not to avoid the agreement, refuses to participate in the costs of the arbitral proceedings. However, it is important to note that the decision to avoid the agreement rests with the other party, which can decide to initiate the proceedings, taking into account that it will be forced to bear the costs, at least as an advance.⁸

In each case, avoidance of the arbitration agreement triggers losing the legal effect thereof.⁹

Moreover, as far as new modes of restructuring proceedings are concerned, their initiation does not affect the binding effect of the arbitration agreement (which neither loses effect as it did before, nor can be avoided, as in case of initiation of bankruptcy proceedings). The status of pending and future arbitral proceedings is the same as the proceedings before state courts. In the expedited composition proceedings, the debtor is obligated to immediately inform the court supervisor about any arbitral proceedings (and proceedings before state courts) regarding the estate initiated by or against the debtor. In these cases, admission or release of claims, concluding a settlement or admitting facts relevant for the case by the debtor without the court supervisor's consent will be ineffective.¹⁰ In the composition proceedings, the court supervisor will join the proceedings by operation of law, acting with capacity of a party.¹¹ The abovementioned rules on admission or release of claims, concluding a settlement or admitting facts relevant for the case apply in composition proceedings as well.¹² In case of initiating the recovery proceedings, if a the debtor is a party to the arbitration agreement, any proceedings can be initiated and pursued either by or against the administrator.¹³ This means that all pending proceedings need to be stayed and can resume with the administrator acting as a party.¹⁴

To conclude, the pending arbitral proceedings will be treated in a similar manner as the proceedings before the state court; this undoubtedly simplifies the legal system. In principle, the bankruptcy will not affect the arbitration agreement. However, the possibility of avoidance of the agreement in the event that the estate will not be able to participate in the costs of the proceedings creates a safety valve. In such a situation, pursuing claims in arbitration would seem less attractive for the counterparty of the bankrupt than initiating state court proceedings. On the other hand, the possibility of avoiding the arbitration agreement is in line with the insolvency administrator's power to avoid certain agreements concluded by the bankrupt entity, but is always under the control of the judge and for the benefit of the bankruptcy estate. Consequently, the new rules create a fair equilibrium of the interests of the insolvent party and its counterparties.

The ADR Law

Previous legislation

Several actions have been taken in the arbitration community to reduce the length of arbitral proceedings, including drafting

guidelines, principles, notes and good practices. These actions have undoubtedly led to many improvements in this regard.

However, the length of the arbitration itself is only part of the problem. Even a fast and effective dispute resolution by arbitrators can be jeopardised by long post-arbitral proceedings before a state court. That is why many countries (eg, Switzerland and Austria) chose to hear post-arbitral cases only in one instance. Moreover, some jurisdictions, like Switzerland, allow foreign parties even to waive the right to file a motion to set aside an arbitral award.¹⁵

In this regard, the Polish law is less flexible. Under the current wording of the CCP, proceedings for setting aside of the award are conducted on the basis of the rules pertaining to general contentious proceedings:¹⁶

- the judgment of the first instance is subject to an appeal;¹⁷
- the judgment of the second instance in some cases can be subject to cassation to the Supreme Court¹⁸ (eg, in monetary claims, the minimum amount in dispute for the cassation to be possible is 50,000 zlotys; and
- the case is initiated by the court that is competent to hear a case if the parties have not entered into an arbitration agreement.¹⁹ It can be either a district or regional court, generally depending on the value of the dispute and the type of claim.²⁰

The proceedings for the recognition and enforcement of an arbitral award are two-tiered. They end with a procedural decision which can be subject to an appeal.²¹ A cassation can also be filed, but only with respect to foreign arbitral awards.²²

These solutions lead to the conclusion that in certain arbitrations the time from the initiation of the proceedings to the execution of the claim could be longer than the length of the state-court proceedings in a similar case (and will certainly be longer if the losing party pursues every available means of appeal). Consequently, the arbitration community has advocated for amendments in this regard for many years.

In 2013, the Polish Ministry of Economy established a task force of judges, experts and practitioners to create a friendly environment for alternative dispute resolution. The proposals of the group led to the adoption of the ADR Law. On the one hand, it regulates mediation in a new way in line with modern regulations; on the other, it proposes new solutions with several aspects of arbitration to establish Poland as an arbitral-friendly jurisdiction. The aim of the amendments in both methods of dispute resolution was to facilitate business in Poland.

Amendments introduced by the ADR Law

Before examining the amendments pertaining to arbitration, some examples of changes in mediation are worth mentioning. While they do not pertain to the mediation proceedings specifically, they give an overall spirit of the changes in the CCP:

- The state court is obligated to encourage the parties to take part in mediation²³ and informs the parties about the possibility to amicably settle the case (eg, by mediation).²⁴
- If a party avoids mediation 'in an obviously groundless manner', the court will be entitled to order this party to pay the costs of the proceedings, irrespective of their outcome.²⁵
- The costs of counsels will be determined also by taking into account their attempts at amicable settlement of the case.²⁶
- Every statement of claim has to contain information as to whether the parties have tried any means of alternative dispute resolution, including mediation and if they did not – an explanation why.²⁷

It is therefore clear that the Polish legislator has noticed that the resolution of disputes outside court is highly effective for the parties and the court system, and that ADR deserves strong support.

The ADR Law also introduced the following major amendments with regard to arbitration:

- a reduction of the time-limit to file the motion to set aside an award from three to two months;
- hearing the motion to set aside an award by the court of appeals in the first instance with a possibility to file a cassation to the Supreme Court; and
- hearing the motion to enforce or recognise an arbitral award by the court of appeals in the first instance with a possibility to file an appeal (in the case of domestic awards) or a cassation to the Supreme Court (in the case of foreign awards).

The new wording of article 1174, section 1 of the CCP requires a statement of impartiality and independence from arbitrators in every proceeding and obligates them to inform the parties on all circumstances that can trigger doubts as to the impartiality and independence. This issue was previously left to arbitral rules and the agreement of the parties. The legislator decided to reinforce the principle of impartiality and independence to inspire confidence of the parties towards arbitration.

The ADR Law introduced new rules on the proceedings for setting aside the award:

- the rules on appellate proceedings before a state court will, in principle, apply to these proceedings and the motion for setting aside the award should meet the formal requirements of an appeal;²⁸
- the motion should be filed within two months (down from three months) from the receipt of the award;²⁹
- the motion should, in principle, be filed with the court of appeals in the jurisdiction of which the court which would be competent to hear a case if the parties had not entered into an arbitration agreement is situated;³⁰ and
- a party can file a cassation to the Supreme Court.³¹

The ADR Law also amended the rules on the recognition and enforcement proceedings:

- the rules on appeal proceedings before a state court will, in principle, apply to these proceedings;³²
- the motion should be filed, in principle, with the court of appeals in the jurisdiction of which the court which would be competent to hear a case if the parties had not entered into an arbitration agreement is situated;³³
- a party can file an appeal (to a different bench of the same court) in the case referring to the recognition and enforcement of domestic awards;³⁴ and
- a party can file a cassation to the Supreme Court in the case referring to the recognition and enforcement of foreign awards.³⁵

The ADR Law enters into force on 1 January 2016 and will apply to the proceedings initiated as of that date. At the time of writing, the act has been enacted by parliament and is waiting to be signed by the president.

As with Restructuring Law, the ADR Law brings useful tools to improve arbitration in Poland. The statement of independence required in all proceedings will create a spirit of trust towards arbitrators. The reduction of time of post-arbitral proceedings will reduce the overall length of pursuing claims. This is in line with a series of steps taken in Poland recently to improve the

enforcement of contracts (between 2005 and 2012, the time to enforce a contract in Warsaw was cut by a third; the overall time and cost of enforcing contracts would place Poland among the world's top 25 economies, well ahead of the average EU rank of 48).³⁶ Finally, transferring the case to the level of the court of appeals means that the post-arbitral cases will be heard by some of the best judges, highly trained and experienced. Furthermore, this will also mean that the case law will be more unified.

It is worth noting that some concerns were raised regarding reducing the two-tier post-arbitral proceedings to only one instance with a possibility of filing a cassation with the State Court. This is because the Polish Constitution of 2 April 1997 upholds the right to control judgments rendered in first instance. Its article 78 prescribes that each person has the right to appeal a decision or a judgment passed in the first instance. The exceptions to this principle and manner of appealing should be described by an act of the parliament. Under article 176 section 1, the court proceedings are at least two-tiered.

The relationship between article 78 and article 176 of the Constitution is crucial to evaluate whether all state court proceedings in Poland, including post-arbitral proceedings have to be two-tiered. This is because under article 78 there can be an exception to the two-instance system and, *prima facie*, under article 176 there cannot. Fortunately, this relation has been thoroughly described by the case law. In the judgment of the Constitutional Tribunal of 13 June 2006 (SK 54/04), the Tribunal gathered its various previous opinions in this matter. The case law seem to have developed a principle under which the necessity to secure two-instance proceedings, as required by article 176 of the Constitution, pertains only to those cases who were referred to the state courts 'from the very beginning', and not to those cases, in which the state courts intervene at later stages to control a non-court decision.³⁷

Consequently, post-arbitral proceedings do not have to be two-tiered. This possibility was used by the legislator, and hopefully this will help improve Poland's position in the arbitration world and make it a more arbitration-friendly jurisdiction, or perhaps even an arbitration hub in central and eastern Europe.

Notes

- 1 These two provisions, pertaining to different kinds of bankruptcy, were of similar wording.
- 2 Decisions of Court of Appeals of Warsaw of 16 November 2009, file ref. No. I ACz 1883/09 and 18 November 2009, file ref. No. I ACz 1686/09.
- 3 Including article 174, section 1, points 4 and 5; and article 180 section 1, point 5, Code of Civil Procedure (CCP).
- 4 Article 144 (1), Bankruptcy Law.
- 5 *Id.*
- 6 Article 147a (1), Bankruptcy Law.
- 7 Article 147a (2), Bankruptcy Law.
- 8 Article 147a (3), Bankruptcy Law.
- 9 Article 147a (4), Bankruptcy Law.
- 10 Article 258, Restructuring Law.
- 11 Article 277 (1) and (3), Restructuring Law.
- 12 Article 277 (4), Restructuring Law.
- 13 Article 311 (1), Restructuring Law.
- 14 Article 311 (3), Restructuring Law.
- 15 Article 192, Private International Law Act.
- 16 Article 1207, section 2, CCP
- 17 Article 367, section 1, CCP.
- 18 Articles 398[1] and 398[2], CCP.
- 19 Article 1158, section 1, CCP.

- 20 Cf articles 16-17, CCP.
- 21 Article 1214, section 1, CCP.
- 22 Article 1215, section 3, CCP.
- 23 Article 10, CCP.
- 24 Article 210, section 2[2], CCP.
- 25 Article 103, section 2, CCP.
- 26 Article 109, section 2, CCP.
- 27 Article 187, section 1, point 3, CCP.
- 28 Article 1207, section 1-2, CCP.
- 29 Article 1208, section 1, CCP.
- 30 Id.
- 31 Article 1208, section 3, CCP.
- 32 Article 1213[1], section 2, CCP.
- 33 Id, section 1, CCP.
- 34 Article 1214, section 4, CCP.
- 35 Article 1215, section 3, CCP.
- 36 World Bank's Report, Doing Business in Poland 2015, p. 45.
- 37 Cf, eg, judgments of the Constitutional Tribunal of: 8 December 1998 (K 41/97) and 11 June 2002 (SK 5/02).



Rafał Kos
Kubas Kos Galkowski

Rafał Kos is an attorney and partner at Kubas Kos Galkowski. He has extensive experience conducting group proceedings. He is the vice president of the Confederation Lewiatan Arbitration Court in Warsaw.

He has been a member of: the Parliamentary Justice and Human Rights Committee in the formulation of the bill on the Pursuit of Claims in Group Proceedings (2009); the Minister of Justice Team for the Amendment of the Bankruptcy and Rehabilitation Law (2012); and the Ministry of Economy Team for System Solutions in the Scope of Amicable Dispute Resolutions for Commercial Matters, facilitating the performance of business activities (2013). He is currently a member of the Minister of Economy Team for Business Law Task Force (2015).

He has been recommended as a leading expert on dispute resolution by *Chambers and Partners* and in the litigation category in the most prestigious Polish ranking of law firms conducted by the *Rzeczpospolita* daily. He speaks Polish, English and German.



Maciej Durbas
Kubas Kos Galkowski

Maciej Durbas, attorney and senior associate at Kubas Kos Galkowski, works on the team handling litigations as well as transborder proceedings in civil, commercial and real estate cases.

He has been a member of teams representing clients in international arbitration proceedings and has also participated in disputes as an assistant to the arbitrator on numerous occasions. He was initially a member of Kraków's Jagiellonian University team in the Willem C Vis International Commercial Arbitration Moot, and was awarded with an honourable mention in the 'Best Orator' competition.

Since 2010, he has been the coach for the Jagiellonian University team participating in the Vis Moot. He was a member of the Young Austrian Arbitration Practitioners and the Young Arbitration Practitioners in Poland. He is preparing a doctoral dissertation at the Jagiellonian University on the subject of arbitration. He speaks Polish, English, and French.



al. Armii Ludowej 26
Warsaw PL 00-609
Poland
Tel: +48 22 206 83 00
Fax: +48 22 206 83 02

Rafał Kos
rafal.kos@kkg.pl

Maciej Durbas
maciej.durbas@kkg.pl

www.kkg.pl

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