

Important changes regarding consumer arbitration introduced

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Significant changes to the regulation of arbitration in Poland were introduced on January 10 2017 through the Act on Out of Court Resolution of Consumer Disputes, **(1)** in line with the EU Alternative Dispute Resolution Directive (2013/11/EU). **(2)** The changes will have a profound effect on business practice and lawyers nationwide, modifying a wide range of rules – from the form of an arbitration agreement to the preconditions for the enforcement of awards. However, the act aims not only to support consumers in arbitration, but also to provide a new impetus for the development and expansion of arbitration in Poland.

Legislative changes

The changes to Polish arbitration law pertain to consumer arbitration (ie, arbitration involving a person who carries out a legal act with an entrepreneur, which is not directly connected to his or her commercial or professional activity). Pursuant to the new Article 1164¹ of the Code of Civil Procedure, an arbitration agreement pertaining to disputes which stem from agreements with consumers can only be concluded after the dispute emerges, and must be done in writing. An arbitration agreement cannot be concluded by reference or an exchange of means of communication that enables its content to be recorded. This rule is similar to the regulation of labour disputes in Poland. The new legislation left Article 385³(25) unchanged. Under said provision, an arbitration agreement in a contract with a consumer is presumed to be an unfair contract term.

Further, under pain of nullity, the parties must acknowledge in the arbitration agreement that they are aware of its effects, in particular of the binding effect of the arbitral award or settlement after the state court enforces or recognises them.

The new legislation also added Article 1194(3) of the Code of Civil Procedure, under which deciding a case *ex aequo et bono* (possible when the tribunal is explicitly empowered by the parties to do so) cannot deprive consumers of the protection granted to them by the binding provisions relevant to a certain legal relationship.

If the tribunal fails to secure this protection, it can result in the setting aside of an award (Article 1206(2)(3) of the Code of Civil Procedure) or refusal of recognition or enforcement of an award (both domestic and foreign, Article 1214(3)(3)). The law therefore introduces a new basis to question arbitral awards. This is the case when the award deprives consumers of the protection granted to them by the binding provisions of the law applicable to the agreement with the consumer or – in case the parties chose the applicable law – of the protection granted to them by the binding provisions of the law applicable if no choice of law would have been made.

The new rules have no impact on arbitration agreements made before the new legislation entered into force. Such arbitration agreements are governed by the previous rules and therefore do not

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have to fulfil the abovementioned requirements. Further, the new rules do not apply to arbitral proceedings pending when the new legislation entered into force or awards made before that date. Consequently, the amendment of the arbitration law applies *pro futuro*.

There are also further changes regarding particular sectors of the economy and additional rules that will promote out-of-court dispute resolution.

Comment

The act's provisions are unsurprising, especially as they partly reflect the German and Austrian approach to this issue. The drafters clearly wanted to promote arbitration in consumer disputes, while also protecting consumers in arbitration. On closer inspection, these objectives reinforce each other. With such pro-consumer regulations in place, arbitration will be safe from accusations that it is being imposed on the weaker party by the stronger one. As a result, the arbitration community has a greater possibility of convincing consumers that arbitration serves their interests better than the state courts, by providing a better quality and more expedient means of dispute resolution.

There is another side to this issue. The fact that the state courts are likely to interpret the new provisions in a pro-consumer manner should be considered. This means, for example, that before enforcing any arbitral awards issued in cases against consumers, courts might require not only a formal acknowledgement by the consumer that he or she knew about the consequences of the arbitral award, but also proof that somehow the consumer had or could have been aware of them. It also remains unclear which particular provisions the state courts will be willing to interpret as "binding provisions relevant to a certain legal relationship", the violation of which will result in the setting aside or refusal of the enforcement of an arbitral award. The act heralds a new and interesting chapter of history of arbitration in Poland.

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Endnotes

(1) Act of September 23 2016 on Out of Court Resolution of Consumer Disputes, *Polish Journal of Laws*, 2016/1823 of November 9 2016.

(2) EU Directive 2013/11/EU of May 21 2013 on alternative dispute resolution for consumer disputes, amending EU Regulation 2006/2004 and EU Directive 2009/22/EC.

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