



The European Arbitration Review 2018

Published by Global Arbitration Review in association with

Advokattfirman Delphi
ArbLit
Association for International Arbitration
Bär & Karrer AG
Billiet & Co
Clyde & Co LLP
De Brauw Blackstone Westbroek
Dittmar & Indrenius
Fried, Frank, Harris, Shriver & Jacobson LLP
FTI Consulting
Jenner & Block London LLP
Konrad & Partners

Kubas Kos Galkowski
Lazareff Le Bars
Leaua & Asociatii
Lévy Kaufmann-Kohler
Luther Rechtsanwalts-gesellschaft mbH
MARCHENKO DANEVYCH
Pérez-Llorca
Peter & Partners International Ltd
PLMJ Lawyers
Squire Patton Boggs (US) LLP
Ulčar & Partners Ltd
VMB Law Firm

Poland

Rafał Kos and Maciej Durbas

Kubas Kos Gałkowski

In 2017 there were two major changes in the Polish arbitration landscape. Firstly, a new set of rules for consumer arbitration was introduced. These changes involve the form of an arbitration agreement as well as grounds for challenging an arbitral award and questioning the recognition or enforcement of an arbitral award. The amendments are aimed at reinforcing consumers' rights in arbitration.

Secondly, the Polish state became more active on the field of commercial and investment arbitration. The new law on the General Counsel to the Republic of Poland affected several issues. The General Counsel to the Republic of Poland (GCRP) took over arbitral cases from external counsels. Moreover, an arbitration court was established at the GCRP. Finally, the law broadened the scope of representation of the Polish state entities by the GCRP and introduced representation of the state-owned commercial companies.

These issues will be discussed below along with a short description of the most important case law made available after the last issue of this review was published.

New regulation of consumer arbitration

Important changes to Polish arbitration law were introduced on 10 January 2017 through the Act on the Out of Court Resolution of Consumer Disputes of 23 September 2016, in line with the EU Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes. The changes will impact business practice by altering a number of rules, including the form of an arbitration agreement and the preconditions for the enforcement of awards.

The rules in question apply to arbitration with a consumer (ie, a person who carries out a legal act with an entrepreneur, which is not directly connected to his or her commercial or professional activity). Under 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. A similar rule applies to labour disputes in Poland. It is worth noting that the new legislation did not alter article 385³(23) of the Civil Code, under which an arbitration agreement in a contract with a consumer is presumed to be an unfair contract term.

After the amendments, pursuant to Polish arbitration law, under pain of nullity, in the arbitration agreement, the parties must acknowledge 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 supplemented the Code of Civil Procedure with article 1194(3), 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.

The law therefore introduces a new basis to question arbitral awards, both in proceedings for the setting aside of an award (article 1206(2)(3) of the Code of Civil Procedure) and recognition/enforcement proceedings (domestic and foreign, article 1214(3)(3)). After the amendment, the court can *ex officio* set aside an award or refuse its recognition or enforcement 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 law, applicable if no choice of law would have been made.

The amendment of the arbitration law applies *pro futuro*. The new rules do not affect arbitration agreements concluded before the new legislation entered into force. These agreements are governed by the previous rules and do not have to fulfil the requirements that were introduced. Moreover, the new rules do not apply to arbitral proceedings pending when the new legislation entered into force or awards made before that date.

There is no significant case law on the new rules. Therefore, the way the courts will interpret them remains unknown. On the one hand, the judiciary can adopt a pro-consumer approach and, for example, demand more from the entrepreneurs than a mere acknowledgment by the consumers that they know what arbitration means. On the other hand, courts can be satisfied with some standard, but carefully drafted clauses in mass contracts. Furthermore, it is also not clear which provisions will be regarded as 'binding provisions relevant to a certain legal relationship', the violation of which will result in the setting aside or the refusal of the enforcement of an arbitral award.

In any case, the amendment is a significant step towards promoting consumer arbitration in Poland, which is not popular at all. The new rules, securing consumer rights can encourage some development in this area.

New regulation on the General Counsel to the Republic of Poland

The takeover of arbitral cases by the General Counsel to the Republic of Poland from outside counsels

In 2016, the GCRP developed a new strategy to become independent from outside counsels. Under the new act of 15 December 2016 on the General Counsel to the Republic of Poland, it can still hire an outside counsel if a case involves expertise on foreign law or knowledge of procedures of an international institution. However, in 2016 the GCRP relied only once on this possibility. In this period the GCRP took over seven arbitral cases from outside counsels and started working on another two cases without any external help.

This is not a coincidence. The takeover was the last step of a long process. The GCRP, when founded, had limited knowledge

of foreign law, arbitration etc. This required hiring outside counsels, usually top Polish and international law firms. However, after a few years the GCRP gained expertise in the area and also hired lawyers from arbitration departments of law firms, therefore assembling a team ready to deal with international arbitrations alone. The GCRP organised a team of lawyers experienced in arbitration and now claims to be ready to defend the Polish state without any external help.

Consequently, representation of the State Treasury, state entities and – as will be described in detail below – state-owned enterprises will be a rule. Hiring an outside counsel – an exception. This, in the GCRP's view will result in reducing the costs of legal representation of the State.

Representation by the General Counsel to the Republic of Poland of state-owned commercial companies

The new act of 15 December 2016 on the General Counsel to the Republic of Poland is based on a rationale that the legal representation of the state in Poland is effective and can be reinforced and extended to other state-connected entities. The GCRP's report for 2016 shows that the GCRP's efficiency as counsel is indeed high, as the GCRP notes over 90 per cent of wins as the defendant and nearly 90 per cent as the claimant.

The rule that the GCRP, in principle, represents the state in all domestic and non-domestic arbitrations and all post-arbitral cases in Poland has not changed under the new regulation. The new law, however, introduced possibility to represent certain entities by the GCRP – eg, in litigations and arbitrations with the amount in dispute over 5 million zloty. The list of these entities includes major Polish state-owned commercial companies in, for example, airline, energy, banking, chemical, insurance, military, oil and rail industries as well as other entities such as museums, state-owned media and universities. The representation of these entities will be – as described in the reasons for the amendment – less expensive than by outside counsel.

Establishment of the Arbitration Court at the Office of General Counsel to the Republic of Poland

Furthermore, the new law introduced a court of arbitration at the GCRP. The court can accept cases from state-connected entities other than the State Treasury itself. The court offers arbitration and ADR services. The undoubted advantage of the court is the fact that the administrative fee for accepting the case is capped at 100,000 zloty. The same amount constitutes a cap for a court fee before Polish state courts. This may, therefore, be a significant incentive to accept the services of the court at the GCRP.

The rules of the court were recently adopted. Consequently, there are no guidelines as to their interpretation. They are, however, not much different from a standard catalogue of arbitral rules. There are some provisions that are worth noting. First and foremost, the rules provide for emergency proceedings for securing claims. There are also other provisions that may serve for organising efficient arbitral process.

Moreover, a draft award should be consulted with the Secretary General, whose opinion is of a non-binding nature. Furthermore, all awards will be published, if the parties do not object. This may serve to build a strong case law database.

Time will tell what the popularity and effectiveness of the court of arbitration at the GCRP will be. It is not clear whether the GCRP, being an institution created to represent parties in proceedings, will be able to effectively manage a court of

arbitration. Furthermore, various different configurations can raise conflict of interest issues, as the parties to the proceedings before the court will be state-connected. Consequently, the development of the court should be observed to verify whether it will become a strong competitor to the existing institutions. It may turn out that it will find its own niche and coexist with other courts.

Significant case law

Introduction

In 2017 (and late 2016) there were several interesting cases. Despite the fact that Polish arbitration law is quite mature (it was adopted around 20 years ago), a number of issues are still unsettled and require a guideline in the form of a Supreme Court judgment. Below, we collected several of the most important decisions that were made available to the public.

Challenge of an award due to a party's inability to present its case

In its judgment of 7 October 2016, (I CSK 592/15), the Supreme Court made it very clear when an arbitral award can be set aside or its recognition/enforcement denied due to party's inability to present its case. Such grounds can be successful only when a party was not notified of the hearing, not heard at all or not able to present its position during the course of the proceedings. This is not the case when the court denies – in the form of a reasoned decision – some evidentiary motions. Consequently, the inability to present a case cannot form a loophole to question a decision the party is not happy with.

This decision of the Supreme Court can be welcomed with applause as it underlines that the control of the state court in post-arbitral proceedings over an arbitral award is limited. It cannot become a form of rehearing the case as to the merits.

An unfair arbitration clause is invalid

In its judgment of 27 October 2016 (V CSK 66/16), the Polish Supreme Court denied the motion for the recognition and enforcement of an award for the lack of a valid arbitration agreement. The decision was based on Austrian law, under which an agreement that is grossly unfair for one of the parties is null and void. This was the case with an arbitration agreement opting for New York as the place of arbitration in a contract concluded by a European subsidiary of a US franchisor with a European franchisee. Such a model of dispute resolution – in the Court's view – makes it difficult for the franchisee to pursue its rights.

The Court's decision is based on the sentiment of protectionism of the weaker parties in contracts. Therefore, even entrepreneurs need to evaluate whether the contractual equilibrium is not tilted towards the stronger party. This is because they are taking a risk that if they push the boundary too far, they would lose the desired protective mechanisms. However, it is not clear whether the Supreme Court will maintain this course in its future judgments.

The lapse of a time limit to render an award causes the arbitration agreement to lose its effect

In its judgment of 16 November 2016 (I CSK 780/15), the Supreme Court confirmed that if parties put a time limit in their arbitration agreement for the arbitrators to render an award and this time limit lapses, the award rendered subsequently is defective as the arbitration agreement had lost its effect.

This judgment proves that parties need to be very careful

when drafting their agreements. Any provision, condition or time limit contained in an arbitration agreement can be a double-edged sword. On the one hand – when efficiently used – they can facilitate the dispute resolution process. On the other hand, when the requirements set by the parties are omitted, then, the entire process can be jeopardised.

No anti-arbitration injunctions in Poland

In its 22 November 2016 decision (IACz 1997/16), the Kraków Court of Appeals clarified that Polish courts cannot prohibit a party from initiating or continuing arbitration – ie, they cannot issue anti-arbitration injunctions. The Court found that such a measure is not known, as far as securing claims in Poland is concerned. Furthermore, a party in such a situation has other measures to protect its rights.

The decision is hardly surprising as it confirms a common opinion of practitioners and scholars. It is also based on a general rule that state court intervention in arbitration is as limited as possible. Consequently, a party that claims that the case does not belong to arbitration has to question the jurisdiction of the tribunal in the arbitral process itself and in the postarbitral proceedings.

Awarding claims that have no basis in the facts of the case violates public policy

Although limited, sometimes an intervention in an arbitral process by the state courts is necessary. In the judgment of 28 February 2017, the Court of Appeals of Kraków (IACa 1438/16) decided that awarding claims to a party that failed to prove their existence and quantum violates public policy and triggers the setting aside of an award.

The facts of this case show that the award's reasoning was not sufficient and failed to erase doubts as to the basis and quantum of a claim brought in arbitration. Consequently, tribunal's award was not able to defend itself in postarbitral proceedings.

An agent needs to be authorised to conclude an arbitration agreement

A decision of the Supreme Court of 2 March 2017 (V CSK 392/16) regarded the proof of the agent's authorisation to conclude an arbitration agreement. The court questioned the possibility to recognise an award due to the fact that there was no proof that the agent was authorised to act on behalf of a party when he concluded the agreement. As the contract was entered into through an exchange of electronic documents, the agent should have been authorised in at least the same form. No authority can be implied in this regard. The court also found that the principle of separability of the arbitration agreement law requires a separate examination of the law applicable to the arbitration agreement and to the main contract.

The decision brings an important caveat relevant not only in the field of arbitration. A contract can be concluded by authorised persons. Under Polish law there is no general presumed authority, so one should verify whether the board members, proxies or attorneys-in-fact are empowered to act on behalf of a party. Otherwise, in certain cases, the court would find that the arbitral tribunal has no jurisdiction to hear a case.

An arbitral tribunal is allowed to reduce the claim by approximately 60 per cent

The Supreme Court of Poland also heard a case involving an agent's claim for commission for the transfer of one of the best football strikers in the world from a Polish to a German club. In its 28 March 2017 judgment (II CSK 444/16), the court found no grounds to challenge the award of an arbitration tribunal at the football association's arbitration court which – in the second instance proceedings – reduced the claim of the agent by around 60 per cent, after having compared the fees due to the footballer and his agent. The tribunal was empowered to decide *ex aequo et bono* under the rules of the court but reduced the claim on the basis of applicable Polish substantive law. The Supreme Court found that the decision was well reasoned and fully acceptable.

The decision confirms that the intervention in the arbitral process on the grounds of public policy is limited to the most severe violations of the Polish legal order. A reasoned reduction of a claim due to abuse of right is in line with this order. This is yet another sign that the intervention into the arbitral process by the state courts is limited and in line with international standards. However, as proved by the judgment of the Court of Appeals of Kraków of 28 February 2017, described above, sometimes such intervention is necessary.

State court intervention in the tribunal's decision on costs is limited

The judgment of the Court of Appeals of Warsaw of 28 March 2017 (VI ACA 603/16) was passed in an unusual case in which a party attacked an award as to the costs of the proceedings. The arguments were dismissed. The court found that the tribunal, having a wide discretion in deciding the case, did not violate public policy by dismissing the claim for costs, as the party failed to bring the motion for costs in an agreed manner and reason it properly.

The case is a reminder that scrutiny in documenting and bringing forth motions for the reimbursement of arbitral costs is crucial. Mistakes in this regard may result in losing the claim for costs.

The arbitral tribunal and state court are not bound by the grounds for challenging an arbitral award in subsequent proceedings

In its 26 May 2017 judgment (I CSK 464/16), the Supreme Court ruled that if an arbitral award is successfully challenged (in the proceedings in question due to the inability of a party to present its case) and the claimant brings its claims again in arbitration, both the second arbitral tribunal and the state court are not bound in postarbitral proceedings by the reasons that led the first arbitral award to be set aside. Consequently, the courts can establish the facts of the case differently.

In the case at hand, the first arbitral award was set aside as the state court found that the defendant was not properly notified of the case. In the second proceedings, the defendant – on this basis – argued that the claim is time-barred as it was not interrupted. In the second case, the arbitral tribunal found that the correspondence was filed properly to the defendant and the time-bar was interrupted and the claim should be awarded. The Supreme Court did not find any basis to question this reasoning.



Rafał Kos
Kubas Kos Galkowski

Rafał Kos, PhD, LLM (Washington, DC) is an attorney-at-law and partner at Kubas Kos Galkowski. He has extensive experience in conducting cross border litigations and group proceedings. He is the Vice-President of the Confederation Lewiatan Arbitration Court in Warsaw. He was a member of the following: the Parliamentary Justice and Human Rights Committee on Class Actions (2009); the Minister of Justice Team for the Amendment of the Bankruptcy and Restructuring Law (2012); the Minister of Economy's Alternative Dispute Resolution Expert Team (2013); and is currently a member of the Business Law Task Force at the Ministry of Economic Development (2015). He has been recommended as a leading expert on arbitration in Who's Who Legal, as well as on dispute resolution in Chambers and Partners and in the most prestigious Polish ranking of law firms conducted by the Rzeczpospolita daily. He is a member of the Arbitration Committee of The Polish Bar Council and The Board of Visitors of the Columbus School of Law (CUA). He speaks Polish, English and German.



Maciej Durbas
Kubas Kos Galkowski

Maciej Durbas, LLM (Vienna, Hong Kong) is an attorney-at-law and senior associate at Kubas Kos Galkowski, works on the team handling litigations as well as in 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
00-609 Warsaw PL
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

Kubas Kos Galkowski is a law firm with a well-established position confirmed by rankings. It specialises in court and arbitration proceedings, real estate law, banking and finance, companies law and trade law, as well as bankruptcy law and enterprise restructuring. Arbitration proceedings in commercial transactions are one of the fundamental specialisations of Kubas Kos Galkowski. The team of attorneys has many years of experience in representing clients, and is supported by numerous academic achievements in the area of arbitration proceedings, which is a guarantee of the highest standards of legal services. Kubas Kos Galkowski has represented clients, including leading Polish and foreign businesses, in comprehensive arbitrations with high amount in dispute under the rules of the world's leading arbitration institutions (The Vienna International Arbitral Centre, The Swiss Chambers of Commerce Association for Arbitration and Mediation, and The International Chamber of Commerce). Its partners are often selected as arbitrators in domestic and international arbitrations.



**ABA Section of
International Law**
Your Gateway to International Practice

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research



**THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012**