Important changes to arbitration of corporate disputes introduced

07 November 2019 | Contributed by Kubas Kos Gałkowski

Arbitration & ADR, Poland

Introduction

The arbitrability of corporate disputes has long been a controversial issue in Poland. This is particularly relevant to challenges to shareholders' resolutions. Some commentators argued that it was impossible to hear such disputes in arbitration, primarily due to the fact that the parties cannot conclude a settlement in such a case (which is a prerequisite for the arbitrability of disputes under Polish law) and also for practical and procedural reasons. Other commentators more rightly opined that the objective arbitrability of such disputes was not an obstacle in this regard. Rather, the particular regime of a dispute (ie, the applicable rules and subjective scope of the arbitration agreement, covering shareholders, the company, its bodies and their members) decided whether such a dispute could be resolved in arbitration. Recent changes in Polish law (introduced by the Act of 31 July 2019) aimed to resolve these controversies and give the green light to arbitrating corporate disputes. Unfortunately, it seems that these amendments have failed to solve all of the above problems and created additional uncertainties.

Before amendment

Article 1157 of the Code of Civil Procedure is the general Polish provision on arbitrability. From 2005 the article read that unless a special provision provided otherwise, parties could submit disputes regarding property rights or non-property rights – which could be the subject of a court settlement, with the exception of matters relating to alimony – for resolution by an arbitral tribunal.

Further, Article 1163(1) of the code read that an arbitration clause included in the articles of association of a commercial company regarding disputes relating to the company's relationship was binding on the company and its partners (shareholders). In the Resolution of 7 May 2009 (III CZP 13/09),**(1)** the Supreme Court clarified that this provision is not an exception to the general rule of Article 1157 of the code. Therefore, corporate disputes were admissible only if the parties could conclude a settlement as to their subject matter.

After amendment

The 2019 amendment clarified that the requirement to conclude a court settlement pertains only to non-property disputes. Therefore, all disputes regarding property rights are now arbitrable. For some authors, this constituted the first obstacle to arbitrate corporate disputes in Poland.

The most wide-reaching change is to Article 1163. First, the arbitration agreement contained in the articles of association of a company binds not only the company and its partners (shareholders), but also the company's bodies and their members.

Second, the new law has introduced a requirement for disputes pertaining to shareholders' resolutions under which the arbitration agreement covering such disputes must include an obligation to announce the initiation of proceedings in a manner required for company announcements no later than one month from the start date. The announcement may also be made by the claimant. In such cases, each partner (shareholder) may join the proceedings on one side within one month of the announcement. The arbitral tribunal appointed in the earliest case will hear all other cases pertaining to a given shareholders' resolution.

The new law also introduced:

- a rule according to which parties, if they do not decide otherwise, are bound by the version of the arbitration rules in force on the date of filing the request for arbitration (and not the date on which the arbitration agreement was concluded, as was the case before the amendment – Article 1161(3) of the code); and
- a rule according to which parties acting on the same side in multi-party arbitration will appoint the arbitrator unanimously, unless the arbitration agreement provides otherwise (Article 1169(2^1) of the code).

Comment

The amendment has caused mixed feelings. First, it is odd that such important changes were introduced through the back door. The new law initially included no provisions on arbitration. Such provisions were introduced in the course of the legislative process. This means that the *travaux preparatoires* are limited (there is no official reasoning regarding the amendment) and do not constitute a useful tool in the interpretation of the new rules.

It is also a great surprise that the law contains no intertemporal rule. Therefore, it came into force on 8 September 2019 (after a relatively short, 30-day *vacatio legis*). The lack of such rule raises several questions about whether the new provisions apply to arbitrations already initiated and arbitration agreements concluded earlier (rendering them ineffective if they do not conform with the new requirements).

As to the particular changes, some (like the clarification of the arbitrability rule) are to be applauded. The obligatory consolidation of all disputes pertaining to one resolution could become a great asset for arbitration in Poland. This is because such disputes are not subject to obligatory consolidation if they are resolved before a Polish state court, unlike in, for example, Germany. This means that corporate disputes can be resolved more efficiently through arbitration.

However, some changes are controversial. The new requirements for arbitration agreements contained in articles of association raise problems for several reasons. From a practical perspective, they do not clarify what happens to the second and further proceedings initiated under the same resolution. What if certain decisions are made (eg, securing claims or agreeing on terms of reference and the procedural calendar), evidence gathered and costs incurred? Will all case files be merged or can the tribunal decide what will prove useful?

Further, the provision in question sets out new requirements only as far as disputes relating to shareholders' resolutions are concerned. It remains a mystery whether an arbitration agreement lacking content required by the amendment will remain effective with regard to other disputes (eg, the expulsion of a shareholder).

It is also unclear why the new law provides that the arbitration agreement covering corporate disputes should include an obligation to announce the start of proceedings in a manner required for company announcements. There are obvious and better solutions (eg, an invitation to join the proceedings in a manner used to inform the shareholders of the shareholders' meetings). The widespread announcement of a dispute, if a company is not public, may be detrimental to its reputation or could be used by its competitors.

Further, the new law provides that each partner (shareholder) can join the proceedings on one side within one month of the date of the announcement. It is unclear why the law provides for such a short deadline. On the contrary, under general Polish procedural rules, a party can join the proceedings until the conclusion of the case in the second instance. There are examples of deadlines of similar length (eg, Article 4.1 of the German Arbitration Institute's Supplementary Rules for Corporate Disputes). However, even after the lapse of this period, parties can join the arbitration under certain conditions (Article 4.3). Further, such a short deadline may create a situation in which a party needs to join the proceedings without knowing the position of all other parties (eg, when the reply to the statement of defence has not yet been filed). The proposed mechanism raises questions as to its constitutionality, as it can be regarded as infringing on the right to a fair trial.

Further, with regard to the necessity of the joint appointment of arbitrators in multi-party disputes, this rule is at least questionable. There are a number of situations in which parties on the same side of a dispute have different interests or simply cannot agree on a nomination that works for both (or all) of them. A party can name only a typical corporate dispute relating to a resolution taken by the majority of shareholders and questioned by the minority. This kind of dispute is multi-party by nature under Polish law. Pursuant to Article 249(1) and 252(1) of the Code of Commercial Companies, such a lawsuit should be brought against the company itself. Majority shareholders join the proceedings on the side of the company. Other shareholders may also do so and these groups of interest can have different opinions on the resolution and appointment of arbitrators.

Preventing such parties from being able to appoint an arbitrator and at the same time allowing the opposite party to make its own appointment raises an 'equality of arms' question. This is not a new problem (eg, the French Supreme Court decision in *Siemens v Dutco*)**(2)** and can be resolved in numerous ways. For instance, Article 12(8) of the International Chamber of Commerce (ICC) Rules provides that in the absence of a joint nomination and where all parties are unable to agree a method for the constitution of an arbitral tribunal, the ICC Court may appoint each member of the tribunal and will designate one of them to act as president. This seems to be a better mechanism, giving the parties an equal chance in the appointment process.

For further information on this topic please contact Maciej Durbas or Rafał Kos at Kubas Kos Gałkowski by telephone (+48 22 206 83 00) or email (maciej.durbas@kkg.pl or rafal.kos@kkg.pl). The Kubas Kos Gałkowski website can be accessed at www.kkg.pl.

Endnotes

(1) Available in Polish here.

(2) French Supreme Court, 18 YB Com Arb 140 (1993).

Maciej Durbas

Rafał Kos