

Development of Consumer Arbitration in Poland - Further Amendments to the Polish Arbitration Law

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Introduction

After recent amendments to the Polish Arbitration Law (part five of the Polish Code of Civil Procedure, Official Journal of Laws of the Republic of Poland, No 43, item 296, as amended, available in Polish [here](#)) ("**CCP**") , which were a subject of my previous posts, the Polish legislator commenced in June 2016 the process of implementation of the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes ("**EU Directive**") (available in Polish [here](#), text of the EU Directive available [here](#)). Consequently, new provisions regarding consumer arbitration are proposed to be introduced into the Polish Arbitration Law.

Consumer Arbitration in Poland - Key Features

De lege lata, consumer arbitration in Poland is based on a "mixed system" composed of two pillars. First, there are permanent consumer arbitration courts at the regional trade inspectorate - Trade Inspection (*Inspekcja Handlowa*). The second pillar is comprised of sector-based private or public bodies like the Banking

Arbitrator (*Arbiter Bankowy*) or the Permanent Consumer Arbitration Court at the President Office of Electronic Communications (*Prezes Urzędu Komunikacji Elektronicznej*).

The Polish Arbitration Law does not provide specific rules for consumer arbitration. It is important to note, however, that if an arbitration clause has not been individually negotiated with a consumer, and simultaneously included in general terms and conditions or other contractual documents, it is deemed to be an abusive clause and consequently is null and void (see art. 3853 of the Polish Civil Code, Official Journal of Laws of the Republic of Poland, No 16, item 93, as amended, available in Polish here).

The Implementation of the EU Directive in Poland

According to art. 1 of the EU Directive, its purpose is to contribute to the proper functioning of the internal market through the achievement of a high level of consumer protection, by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. The EU Directive deals with out-of-courts dispute resolution mechanisms which should invite consumers to resolve their disputes amicably. The Polish legislator decided to implement the EU Directive in a form of a separate act on alternative dispute resolution for consumer disputes ("**Draft Law**") (available in Polish here). The Draft Law was passed on 23 September 2016 by the lower house of the Polish parliament.

In general, the EU Directive upholds the ADR legal framework for consumers in Poland. The Draft Law, however, introduces new provisions to the Polish Arbitration Law regarding:

1. arbitration clauses in consumer contracts,
2. enforcement of a consumer's protection during arbitration proceedings,
3. new ground for setting aside an arbitral award, and
4. new ground for refusing the recognition and enforcement of an arbitral award.

The official justification for these amendments (available in Polish here) is not detailed. The assurance of the protection of consumers involved in arbitration as a "weaker" contractual party is highlighted as a main reason.

Arbitration Clauses in Consumer Contracts

The Draft Law introduces new art. 1164, which in paragraph 1 states that an arbitration clause which involves consumer disputes may be drawn up after a dispute has arisen and must be made in writing. Moreover, new art. 1164 paragraph 1 excludes application of art. 1162 paragraph 2 of the CCP, according to which a requirement for a written arbitration clause is also met if the arbitration clause is included in letters exchanged between the parties or statements made by means of remote communication which enable their content to be recorded. Reference, contained in an underlying agreement, to a document containing a clause providing that a dispute is to be brought before an arbitral tribunal complies with the requirements concerning the form of an arbitration clause if such an agreement is made in writing, and the reference incorporates that clause into the underlying agreement.

New art. 1164 paragraph 1 is identical with art. 1164 of the CCP which deals with arbitration clauses included in employment contracts. The Draft Law follows the “protection” given to the employees and grants it to consumers as well. It must be noted that both of these potential users of arbitration – employees and consumers – are, in general, “weaker” contractual parties. Hence, the exclusion of application of art. 1162 paragraph 2 second sentence of the CCP which allows to incorporate an arbitration agreement by reference may be considered as well founded especially as it harmonizes with art. 3853 of the Polish Civil Code.

It is doubtful, however, whether the exclusion of application of art. 1162 paragraph 2 first sentence of the CCP, according to which the requirement for a written arbitration clause is also met if the arbitration clause is included in letters exchanged between the parties, or statements made by means of remote communication which enable their content to be recorded (art. 1162 paragraph 1 first sentence of the CCP) is in favor of consumers. At the end of the day it may be very difficult to conclude an arbitration agreement with a consumer.

According to paragraph 2 of new art. 1164, an arbitration clause in consumer contracts shall indicate that the parties to the arbitration clause/agreement are aware of its legal effects, in particular regarding the legal effects of an arbitral award or settlement reached before an arbitral tribunal which have equal legal effects as a judgment of a court or a settlement reached before a court. This provision should be considered redundant, despite the fact that a consumer is a

“weaker” party to the contract. There is no need to put into an arbitration clause any additional content which may cause disputes regarding the interpretation of the arbitration clause and its validity. The proposed art. 1164 paragraph 1 already guarantees legal protection for a consumer, as an arbitration clause may be concluded with a consumer only after the dispute arose.

Enforcement of a consumer’s protection during arbitration proceedings

The Draft Law introduces another provision which aims to protect a consumer by ensuring that in case of resolving a consumer dispute on the basis of general principles of law or equity, a consumer may not be deprived of the protection afforded to him/her by mandatory rules of law applicable to a given relationship (art. 1194 § 3). Even though the reason for this provision is rather straightforward, the necessity of this provision is questionable. Mandatory rules of law, especially in relation to consumers, should always be taken into account even though the case will be resolved on the basis of general principles of law or equity (which must be explicitly indicated by the parties – art. 1194 § 1 of the CCP). Should mandatory rules of law be disregarded by an arbitral tribunal, an arbitral award may be set aside as being contrary to public policy.

A new ground for setting aside an arbitral award and for refusing the recognition and enforcement of an arbitral award

The Draft Law introduces a new ground for setting aside an arbitral award (art. 1206 § 2 item 3) and a new ground for refusing the recognition and enforcement of an arbitral award (art. 1214 § 3 item 3). These grounds can be invoked if an arbitral award deprives a consumer of the protection afforded to him/her by mandatory rules of law applicable, or in case of choice-of-law clause, an arbitral award deprives a consumer of the protection afforded to him/her by mandatory rules of law which would have been applicable in case of lack of choice of law (art. 1194 § 3).

Intertemporal rules

According to art. 61 and 62 of the Draft Law, new provisions regarding consumer arbitration will apply to arbitration clauses concluded and arbitrations commenced after the Draft Law enters into force. Pending arbitrations, setting aside proceeding, and recognition and enforcement proceedings will be decided under the arbitration law, as it was before the amendment.

Conclusions

In general, proposed amendments are welcome, as they fulfill a gap in the Polish Arbitration Law regarding consumer arbitration. However, a few of them, in particular a requirement for arbitration clauses to contain information about the legal effects of arbitration clause and arbitral award, seem to be too paternalistic and may have effect contrary to the goal of the Draft Law - promotion of the ADR methods. Whether legal solutions chosen by the Polish legislator will prove to be satisfactory remains to be seen after further debate and review of case law rendered under these prospective new rules.

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