Latest Changes in Polish Civil Procedure: An Opportunity for Arbitration?

Kluwer Arbitration Blog
December 19, 2019

Marcin Olechowski, Anna Tujakowska (Sołtysiński Kawecki & Szlęzak)

Please refer to this post as: Marcin Olechowski, Anna Tujakowska, 'Latest Changes in Polish Civil Procedure: An Opportunity for Arbitration?', Kluwer Arbitration Blog, December 19 2019, http://arbitrationblog.kluwerarbitration.com/2019/12/19/latest-changes-in-polish-civil-procedure-an-opportunity-for-arbitration/

Polish civil procedure is in the midst of a very significant makeover. The bulk of amendments came into effect on 7 November 2019 (the Polish version of the amending act to the Polish Code of Civil Procedure (CCP) is available **here**). This blog post discusses the nature of those amendments and their significance for arbitration.

Arbitration Is Still Struggling to Gain Traction

For a number of years now, arbitration in Poland has been struggling to gain traction. This is despite a fairly modern procedural framework, and efforts to streamline post-arbitration proceedings (with only one instance of judicial control in setting-aside proceedings). Indeed, while over 10 million civil and commercial matters are referred to the common courts every year,[fn]*See* Concise Statistical Yearbook of Poland, GUS (Statistics Poland, Warsaw 2019, p. 83).[/fn] the combined annual inflow of the two main Polish arbitral institutions (SA KIG and Lewiatan) has consistently hovered around 200-300 new cases per annum over the past several years. Arguably, the disproportion is smaller for high-stakes commercial cases – court statistics include all cases combined (including small

claims, registry matters, etc.) and there is evidence that complex contracts tend to include arbitration clauses – but it is still very significant.

In the absence of more in-depth research, the exact reasons for this remain unclear. However, some factors can be identified.

One of the culprits is clearly a broader lack of awareness as to the availability of arbitration and its advantages. Recent data collected by the Polish Ministry of Justice in 2018 indicates that over 50% of entrepreneurs have no idea what arbitration is at all. Professional training of lawyers also emphasizes court litigation rather than arbitration (and, based on topical observations, the availability of having a second bite of the apple afforded by appellate review in court proceedings remains an important factor). Although, at the same time, in our experience, in more complex contracts, when clients are assisted by more "sophisticated" counsel, arbitration is often the favored means of settling future disputes.

Another factor is the costs of proceedings. Until recently, court fees in Poland were capped at a maximum level of PLN 100,000 (i.e., approx. EUR 23,000). This meant that for any case with a value of EUR 700,000 or more it was *a priori* cheaper to litigate than to arbitrate.

Finally, despite recurring complaints about the efficiency of the court system, Polish courts enable relatively speedy resolution of most cases. According to the 2018 EU Justice Scoreboard, going through both instances in a civil or commercial matter takes, on average, about 11 months (7.2 months in the 1st instance and 3.5 months in the 2nd instance).

The Reform Makes Litigation More Expensive and Procedurally Challenging

Those statistics are, of course, quantitative only. In reality, the duration of court proceedings varies significantly depending on both geography and subject matter. In Warsaw, which is the busiest appellate circuit, over 17% of cases take more than 12 months in the first instance (and over 3% take more than 3 years).[fn]Data for 2017 available from the Polish Ministry of Justice.[/fn] Complex commercial

cases that involve a large number of witnesses and/or require court-appointed experts also last longer (3 to 4 years for the first instance is not uncommon in large construction litigation).

As a result, there is a broadly perceived need to increase the speed and efficiency of court proceedings. The most recent reform of the CCP introduces sweeping procedural changes which are supposed to achieve this goal. We consider, however, that those changes are just as likely to make arbitration a more attractive dispute resolution mechanism insofar as they increase the rigidity of the procedural framework in certain key areas and potentially lead to significant procedural pitfalls.

Firstly, the amended rules impose stricter time limits. For instance, any counterclaim will have to be submitted together with the statement of defense within 14 days of service of the statement of claim which may constitute a serious challenge in more complex cases. Set-off claims will also be more difficult as the revised rules limit the ability to raise set-off during litigation.

Secondly, the amendment reintroduces separate proceedings in commercial matters that will be procedurally much more demanding than ordinary civil proceedings. In particular, they include strict cut-off dates for submission of evidence. All supporting evidence will have to be invoked in the statement of claim and the statement of defense, respectively, under the sanction of being disregarded by the court. In addition, the admissibility of witness evidence will be considerably limited. In principle, demonstrating that a contract (or other legal action) was made will only be possible based on documents.

The more flexible procedural framework in arbitration – which can be crafted by the parties and the tribunal to accommodate the specifics of a particular case – may thus offer a much more appealing alternative, particularly in high-stakes disputes and factually complex cases.

Finally, insofar as the amendment also significantly increases court fees in civil and commercial matters (in some cases by even several thousand percent) and doubles the maximum applicable court fee (from PLN 100,000 to PLN 200,000), it also partly reduces the cost gap that previously existed between court litigation and arbitration. Accordingly, from now on, arbitration administered by Polish arbitral institutions will be cheaper than litigation for disputes of up to EUR

3,000,000.[fn]For a EUR 3,000,000 claim the arbitration costs will be at the level of approx. PLN 200,000, which is the same as the court fees.[/fn]

Arbitration Law Is Being Clarified

On the sidelines of this broader reform of the CCP, a number of changes have also been made to Part V of the CCP which contains the provisions of Polish arbitration law. These changes were enacted by a separate amendment which came into effect as of 8 September 2019 (the Polish version of the amending act is available **here**). They follow prior reforms aimed at creating a more arbitration-friendly environment (*see* prior posts by other authors showcasing the development of consumer arbitration **here** and the simplification of setting aside and enforcement proceedings **here**), and clarify or resolve a number of points that were previously controversial.

Firstly, the Polish legislator has finally decided to clarify the matter of arbitrability of disputes. Until recently, Article 1157 CCP – which deals with this point – was drafted in a manner that raised doubts about whether all patrimonial disputes were arbitrable or only those which were capable of settlement. The original language of this article provided that parties can submit to arbitration any disputes over patrimonial rights (*prawa majątkowe*) and non-patrimonial rights (*prawa niemajątkowe*) that are amenable to judicial settlement, except for disputes relating to alimony. This wording raised two questions: whether the requirement of being amenable to judicial settlement determined arbitrability for all types of disputes (or only non-patrimonial disputes) and, if so, what exactly was meant by the amenability to judicial settlement in the case of patrimonial disputes (for instance, whether nullity of a contract or shareholders' resolution was subject to judicial settlement or not). This provision has now been reworded in a way that makes it clear that all patrimonial disputes, except for matters related to alimony, are arbitrable (the condition of being amenable to judicial settlement now expressly applies only to non-patrimonial disputes). Accordingly, the amendment should finally put prior uncertainties to rest.

Secondly, the amendment makes clear that disputes over the validity of shareholder resolutions in limited liability and joint-stock companies are also arbitrable and puts in place a new framework for the resolution of these disputes

(we will be discussing this in more detail in a separate blog post).

Thirdly, a newly introduced Article 1169 § 2^1 CCP addresses the problem of arbitral appointments in multi-party arbitration. The matter was not previously regulated in any clear manner. From now on, the applicable rule is that where there is more than one person (or entity) on the claimant or respondent side of a dispute, all such persons have to act jointly (unanimously) in order to appoint an arbitrator (unless otherwise provided for in the arbitration agreement).

Finally, the amendment deals with the very practical issue of determining the applicable version of the rules of procedure of a permanent arbitral institution to which the parties have submitted their dispute (Article 1161 § 3 CCP). The change consists of giving precedence to the arbitral rules in force at the date of commencement of arbitration proceedings (rather than the rules in force at the time of conclusion of the arbitration agreement).

A Chance for Arbitration?

We consider that the combined effects of those amendments opens new opportunities for the growth of arbitration in Poland. This is because, on balance, we expect the sweeping changes to civil procedure to create confusion and uncertainty rather than contribute to the efficiency of court proceedings. Litigation will thus become more expensive, complicated and, potentially, even more lengthy.

By comparison, the procedural framework for arbitration is almost an island of stability that recent changes merely strengthen. In addition, the procedural flexibility offered by arbitral proceedings has now become even more attractive, and the proceedings themselves have become comparatively less expensive for users. Of course, none of those changes addresses arbitration’s main problem, namely insufficient awareness of potential users, but they create a good starting point for arbitral institutions to step up their efforts to reach such users with their message.

It can thus be hoped that a more robust framework for arbitration, against the backdrop of increased difficulty in safely navigating through procedural pitfalls in court litigation, will provide arbitration with more traction in Poland.