A New Framework for Arbitration of Corporate Disputes in Poland

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As discussed in our previous post (available **here**), Polish civil procedure, including arbitration law (contained in Part V of the Polish Code of Civil Procedure or 'CCP') has undergoing significant changes. This post focuses on those amendments that substantially modify the legal framework for arbitration of corporate disputes.

Problems with the Arbitrability of Shareholder Resolutions

Until now, the question whether corporate disputes concerning the validity of shareholder resolutions in limited liability (*spółka z ograniczoną odpowiedzialnością*) and joint-stock (*spółka akcyjna*) companies are arbitrable was a source of considerable controversy in Poland. This was due to a less than fortunate formulation of the criteria of arbitrability under Article 1157 CCP, as well as problems inherent to the challenge of corporate resolutions (who should participate, binding effect, etc.).

Article 1157 CCP originally 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: (i) whether the requirement of being amenable to judicial settlement determined arbitrability for

all types of disputes (or only non-patrimonial disputes) and, if so, (ii) what exactly was meant by amenability to judicial settlement in the case of patrimonial disputes. In particular, some commentators considered that corporate disputes concerning the validity of shareholder resolutions cannot be settled. Other commentators relied on Article 1167 CCP (which explicitly confirms the effectiveness of an arbitration agreement in companies' statutes), arguing that it constituted a *lex specialis* to the general rule encapsulated in Article 1157 CCP and thus was tantamount to legislative recognition of the arbitrability of all corporate disputes. Courts were also divided on the subject. To add more confusion, the Polish Commercial Companies Code ('CCC') puts in place a number of special rules applicable to corporate disputes over the validity of shareholder resolutions, including strict cut-off dates for making such challenges (generally six months from the moment of adoption of the resolution, and three months in listed companies – cf. Articles 249 § 1, 251 CCC and Article 422 § 1, 424 CCC).

As a result, in practice, when parties went to arbitration with a corporate dispute concerning the validity of shareholder resolutions, such disputes would usually involve complex jurisdictional discussions, as well as rather frequent parallel proceedings. In particular, the strict cut-off dates applicable to challenges of shareholder resolutions prompted some parties to initiate court proceedings simultaneously with arbitration – as a precaution in order not to lose the right of challenge should the arbitral tribunal ultimately refuse jurisdiction.

Scope of Amendments

A number of amendments to the CCP which entered into force on 8 September 2019 (the Polish version of the act is available **here**) aim to remedy the confusion described above.

First of all, the amendments resolve any prior doubts in favor of the arbitrability of disputes about the validity of shareholder resolutions. Article 1157 CCP has now been reformulated to make it clear that all patrimonial disputes, except alimony claims, are arbitrable. A revised Article 1163 CCP now also expressly mentions disputes about the validity of shareholder resolutions in the context of arbitration.

Secondly, the amendments seek to limit the risk of parallel proceedings. They extend the scope *ratione personae* of the arbitration agreement included in a

company charter as binding upon not only the company and its shareholders, but also the company's statutory bodies (organs) and their members (Article 1163 § 1 CCP). Previously, those provisions did not refer to a company's statutory bodies and their members. As a result, it was possible for action against a shareholders' resolution to be taken in parallel proceedings in arbitration and in the common courts. For instance, a shareholder would be bound by an arbitration clause and challenge a resolution in arbitration, while a member of the board (officers of a company have their own standing in such suits) would claim not to be bound by the arbitration clause and bring the challenge in front of a common court. Consequently, it was possible that the court and the arbitral tribunal could issue conflicting decisions on the same case. The amendment not only limits this risk, but also aligns the CCP with the relevant substantive provisions of the CCC (Article 250 § 1 CCC and Article 422 § 2 point 1 CCC and the provisions of Article 295 § 1 and Article 486 § 1 CCC governing *actio pro socio*). A new Article 1163 § 2 CCP also provides for a type of mandatory consolidation of arbitration proceedings by operation of law. In the case of a challenge brought in arbitration regarding a shareholder resolution, the arbitral tribunal which is the first to be appointed will have jurisdiction over all other claims concerning the same shareholders' resolution.

Thirdly, the amended provisions also seek to address the tension between the private nature of the arbitral process and the broader effect of a shareholders resolution on all shareholders. They do this by introducing a number of formal pre-requisites for arbitration agreements included in the articles of association (statutes) of a commercial company (Article 1163 § 2 CCP). These pre-requisites appear largely inspired by the German BGH's *Arbitrability II* decision of 2009 (which spelt out the requirements that need to be fulfilled in order for a corporate dispute to be arbitrable under German law; a blog post discussing this decision is available **here**) and aim to ensure the ability for all concerned shareholders to participate in the arbitration while avoiding the pitfalls of parallel proceedings.

From now on, for an arbitration agreement to be valid, and encompass corporate disputes, it must provide for the obligation to publish information on the commencement of arbitral proceedings in the manner required for announcements of a given company (be it in the Court and Business Gazette (*Monitor Sądowy i Gospodarczy*), via the company's website, or through registered mail). The announcement must be made within one month of the date of commencement of

arbitration proceedings. The announcement may be made either by the company or by the claimant, and any shareholder may join the arbitration proceedings, either on the claimant's or respondent's side, within one month of the date of such announcement. This new framework is an attempt to address, in an arbitral context, the problem of so-called "extended effectiveness" (*rozszerzona prawomocność*) of decisions dealing with shareholder resolutions. Indeed, under the CCC, a final and non-appealable judgement annulling a resolution is binding on the company, all of its shareholders and the members of the company's governing bodies. Before the amendment, the possibility that an arbitral award could also bind shareholders or individuals who did not participate in the arbitration was vigorously debated. The new provisions seek to put an end to those debates and give each shareholder the ability to make a conscious decision whether to join the proceedings.

Implications of the Amendments

The assessment of those changes by the legal community is mixed.

A clear positive of the recent amendments is the resulting legal certainty of the arbitrability of shareholder resolutions. In doing so, the Polish legislator joins a trend prevailing in leading European jurisdictions. This not only serves to bolster the position of arbitration in a broader ecosystem of dispute resolution mechanisms, but also underlines the importance of the shareholders' freedom to shape their corporate relationship. Similarly, the effort to limit parallel proceedings is also welcome.

However, the new framework also raises a number of questions.

First, the new regime applies indiscriminately to all limited liability and joint-stock companies without making any distinction between company types or sizes. On the one hand, this raises a number of challenges in larger organizations – particularly, with ensuring that smaller shareholders are duly heard, as well as purely logistical issues in case, for example, of joint-stock companies with very large shareholder bases (by and large, arbitrators are not best prepared for dealing with mass claims). On the other hand, the mandatory publication mechanism appears to be somewhat of an "overkill" for small closed corporations (*e.g.*, a limited liability company with one or two shareholders will also need to comply with such

publication requirements).

Second, the new provisions are silent on the modalities of introducing (and amending) an arbitration agreement into the statutes of a corporation. While in the case of smaller corporations it is possible to preserve the necessary link with shareholder consent (consent being a cornerstone of arbitration), this is much more tenuous in the case of larger companies with many shareholders. For instance, one may easily imagine a majority shareholder imposing an arbitration agreement on minority shareholders who will have no real possibility to negotiate the wording of the arbitration agreement included in the statutes when joining the company (or a majority shareholder removing or amending such an arbitration agreement). Unfortunately, the amendments do not shed any light on those questions.

Third, it remains to be seen how the mandatory publication and consolidation mechanisms will work in practice – notably, to what extent they risk creating a new-found space for dilatory or even guerrilla tactics (in particular, the CCP is silent on the effects of such a joinder and the modalities of exercising such right of joinder). The mandatory consolidation mechanism also introduces a certain disconnect with the parties' basic right to select their arbitrator (and may raise questions in view of the Dutco doctrine[fn]In the Dutco decision, the French Supreme Court found that in case of multiparty arbitration "any procedure for designating an arbitral tribunal set out in a pre-dispute arbitration agreement that does not ensure the strict equality of all parties in constituting that tribunal may not be implemented against a party unless, after the dispute has arisen, all parties confirm their earlier-agreed designation method." *See* Ricardo Ugarte and Thomas Bevilacqua, 'Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions', Journal of International Arbitration, (Kluwer Law International 2010, Volume 27 Issue 1) pp. 9 – 49.[/fn]). All of those question marks are potential sources of challenges and disruption that may affect future proceedings.

Finally, in the absence of any express transitory provisions, it is unclear what should happen with the existing arbitration agreements contained in corporate charters that do not provide for publication requirements, with pending arbitrations based on such agreements, and on awards that have been issued in disputes over shareholder resolutions. This is a material failure of those amendments that negatively impacts on legal certainty.

In light of those concerns, it remains to be seen whether in practice those changes will indeed contribute to the increased use of arbitration in resolving disputes over shareholder resolutions. Certainly from a practical perspective, it seems easier – at this stage at least – to imagine efficient arbitral proceedings of that sort in the context of smaller to mid-sized limited liability companies rather than large joint-stock companies.