Better late than never... Poland embraces a new arbitration regime

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RÉSUMÉ : MIEUX VAUT TARD QUE JAMAIS... LA POLOGNE SE DOTE D'UNE NOUVELLE LÉGISLATION RELATIVE À L'ARBITRAGE

Après des années de préparation et de nombreux projets successifs, une nouvelle loi relative à l'arbitrage est entrée en vigueur en Pologne en octobre 2005. Très largement inspirée de la loi-type CNUDCI sur l'arbitrage commercial international, elle unifie, au regard des standards internationaux, la législation tant interne qu'internationale en la matière. Ce faisant, la Pologne est l'un des derniers grands États européens à se doter d'un outil législatif moderne consacrant l'arbitrage comme mode alternatif de résolution des conflits... avec l'espoir que ce nouvel environnement propice à l'arbitrage rassure la confiance des épargnants, favorise les investissements étrangers et contribue à faire de la Pologne, nouveau membre de l'Union européenne et qui bénéficie d'une position centrale en Europe de l'Est, une place d'arbitrage de premier choix au plan régional.

After many years of preparation and numerous drafts, a new arbitration legislation entered into force in Poland on 17 October 2005. Based primarily on the UNCITRAL Model Law on International Commercial Arbitration (with minimal deviations) it provides a unified regime for domestic and international arbitration, harmonised with international legal standards.

Poland (despite having begun work to reform its arbitration regime before 1990) is one of the last major European states to have modernised its arbitration laws. This important development recognises a growing preference for arbitration as a method of resolving national and cross-border disputes in Poland – and the former Eastern block as a whole. It aims to address the disillusion felt by local and foreign businesses alike with the slow and overburdened Polish court system (also currently undergoing reform). One hopes that the creation of an arbitration-friendly environment in Poland will increase investor confidence, promote further foreign investment, and thus help sustain Poland's continued economic growth. With Poland's European Union accession and geographical location at the heart of Central and Eastern Europe, it should also lay the ground for Poland becoming the centre for future international arbitration proceedings in the region.

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KEY FEATURES OF THE NEW LEGISLATION

The new legislation is contained in Part V (Articles 1154 to 1217) of the Polish Code of Civil Procedure (CCP) and consists of eight chapters covering general provisions (*przepisy ogólne*), arbitration agreements (*zapis na sąd polubowy*), composition of the arbitral tribunal (*skład sądu polubownego*), jurisdiction of the arbitral tribunal (*właściwość sądu polubownego*), conduct of proceedings (*postępowanie przed sądem polubownym*), making of awards and termination of proceedings (*wyrok sądu polubownego i zakończenie postępowania*), application to set aside awards (*skarga o uchylenie wyroku sądu polubownego*) and recognition and enforcement of arbitral awards and settlements (*uznanie i stwierdzenie wykonalności wyroku sądu polubownego lub ugody przed nim zawartej*). Outlined below are some of its key features.

APPLICABILITY/SCOPE OF ARBITRABILITY

The provisions of the CCP are applicable – and mandatory (with some exceptions) – where the seat of the arbitration is Poland (but certain provisions can also apply under specifically defined and limited circumstances in cases where the place of arbitration is outside Poland or unspecified (1)). Generally speaking, the parties are free to choose the seat, but where they fail to do so, the arbitral tribunal is directed to designate the seat - taking into account the subject-matter and circumstances of the dispute, and fairness to the parties. If no choice is made, Poland is deemed by law to be the place of arbitration if the award closing the proceedings

(1) These are, primarily, the CCP provisions relating to court intervention/assistance – for example, directing a court to dismiss claims where a valid arbitration agreement is in existence, allowing recourse to the courts for interim measures and empowering courts to assist in taking evidence, as well as those provisions relating to recognition and enforcement.

was rendered in the country (Articles 1154 and 1155).

The scope of arbitrability is very widely drawn. Parties may now submit disputes over all non-property rights to arbitration. Indeed, Article 1157 states that all disputes - with the exception of alimony disputes - that are amenable to court settlement, may be submitted to arbitration. Article 1163 moreover allows for disputes involving cooperatives and/or associations and their members/shareholders to go to arbitration (members are bound where an arbitration clause is included in the articles of association/statutes). Employment disputes may also be arbitrated, where the parties have agreed to arbitrate in writing after the dispute has arisen.

In addition, the previous restrictions on Polish parties submitting disputes to arbitration courts outside Poland have also been removed by the recent legislation.

SEPARABILITY/VALIDITY OF THE ARBITRATION AGREEMENT

The new CCP provisions recognise the autonomy or separability of the arbitration agreement. Article 1180 provides that the invalidity or termination of the contract containing the arbitration clause does not ipso iure entail the invalidity of the agreement to arbitrate.

Articles 1161-1168 (or Part V, Chapter II) of the CCP set out the formal requirements for a valid arbitration agreement. The agreement to arbitrate must be in writing, though it is sufficient that the agreement is included in correspondence between the parties, or is incorporated by reference to a separate written contract/document. The arbitration agreement must also identify the nature of the dispute (by subject-matter or legal relationship) to which it applies.

Where an arbitration agreement designates an arbitrator or chairman who is unable to perform or refuses to accept such role, the agreement to arbitrate becomes invalid – unless the parties have agreed otherwise (Article 1168).

The CCP allows a person – authorised under a general power of attorney to perform legal acts – to enter into an arbitration agreement covering possible disputes relating to those acts (Article 1167).

PARTY AUTONOMY

The legislation respects and enforces the fundamental principle of party autonomy and freedom of contract. With limited exceptions, and subject to the applicable mandatory provisions of law, parties are free to decide the place, language and law of the arbitration (Articles 1155, 1187 and 1194) and agree to the terms and procedure to be applied (Article 1184). Where the parties have agreed that the dispute is to be administered by an institution or « permanent » court, the parties will be bound – unless otherwise specified – to the rules of that institution or court as at the date of the agreement to arbitrate (Article 1161).

An interesting exception restricting party autonomy (and departing from the freedom of contract principle) is found in Articles 1161 and 1169, that render void any provision in an arbitration agreement purporting to give one party more rights than another, in particular with respect to opting for arbitration or in the appointment of the arbitral tribunal. This may become a significant provision in multi-party situations. The provision appears to disallow a Dutco-style arbitration clause that requires co-plaintiffs or defendants to jointly nominate an arbitrator, where this would lead to inequality between the plaintiff(s) and defendant(s) in the constitution of the tribunal. (2)

LIMITED RECOURSE TO THE COURTS

The new regime allows for only limited recourse to the Polish courts (that have suffered much criticism for being over-burdened and inefficient). Article 1159 of the CCP mandates court intervention in the arbitration process only where the legislation specifically so provides.

Pursuant to Article 1180 – which embraces the kompetenz-kompetenz principle – an arbitral tribunal has the power to rule on its own jurisdiction and the validity of the agreement to arbitrate. A party objecting to the tribunal's jurisdiction must raise such objection before the tribunal no later than submission of its statement of defence, unless such party did not know or could not have known (even when exercising due diligence) the grounds for the objection or where those grounds arose at a later date. The arbitral tribunal has the power to admit a later application if it regards the delay to be justified. If the arbitral tribunal dismisses the application, either party is permitted to appeal to the courts to decide the matter, within two weeks of the tribunal's decision. This is shorter than the thirty-day period provided for in the UNCITRAL Model Law. Unlike the equivalent Model Law provision, the CCP states that the decision of the court may then be subject to another appeal. This is an

(2) In Societe KKM & Siemens v. Societe Dutco, 7 January 1992, the French Cour de cassation found that despite the fact that the relevant arbitration agreement specifically provided for a tribunal of three arbitrators – which meant in practice that the two defendants would have to jointly nominate an arbitrator – parties to an arbitration enjoy a right of equality in the constitution of the arbitral tribunal and that such right could not validly be waived in an arbitration agreement entered into before a dispute had arisen.

unfortunate deviation from the Model Law that may lead to unwarranted delays and uncertainty in the arbitral process. Importantly, however, while the request is pending, the arbitral tribunal may continue the proceedings.

A court is directed to reject a case brought before it, if there is a binding arbitration agreement covering the dispute and where requested to do so by one of the parties (Article 1165).

Courts may, however, still play a marginal – supportive – role in ordering interim relief (Article 1166), appointing and/or removing arbitrators (Articles 1171-1178), compelling the attendance of a witness or expert to a hearing (Article 1191), determining the appropriate remuneration of the arbitrators (Article 1179) and setting aside, recognizing or enforcing awards (Chapters VI and VIII).

THE ARBITRAL TRIBUNAL

Any natural person with full legal capacity, regardless of citizenship/nationality – save an active court judge – may serve as an arbitrator (Article 1170). Arbitrators must be independent and impartial.

The parties are free to decide the number of arbitrators and the method of their appointment. Where the parties have failed to set out the appointment procedure, the tribunal is to be composed of three arbitrators – each party appointing one arbitrator, and those appointed selecting the chair. The CCP allows for recourse to the courts where a party fails to nominate an arbitrator as required.

The grounds for challenging an arbitrator are fairly limited. A party to the arbitration may challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not hold the qualifications specifically required by the arbitration agreement (Article 1174). A party may only challenge an arbitrator appointed by that party for reasons of which it becomes aware after its appointment. The challenge procedure may be agreed upon by the parties. In the absence of any such agreement, the application should be made first to the tribunal. If the arbitrator in question is not removed within a month, the complaining party may submit the challenge to the courts (any contrary agreement by the parties being ineffective).

A court may also remove an arbitrator upon application by one of the parties, where it becomes « obvious » that the arbitrator in question will not carry out his/her tasks within the appropriate timeframe or if he/she causes delays to the process without due cause and with no proper explanation (Article 1177). Unlike Article 13 of the UNCITRAL Model Law – and again perhaps problematically – the CCP does not preclude a party from appealing the court's decision on the challenge. The arbitral tribunal is, however, free to continue with the proceedings until any challenge is ruled on by the State court (Article 1176).

Where an arbitrator resigns or is removed, the parties are entitled to appoint a substitute arbitrator according to the appointment procedure agreed upon. Where, however, two arbitrators for the same party have withdrawn or have been removed, the other party is entitled to request that the court makes the appointment.

The CCP recognises, in Article 1179, that an arbitrator has the right to be remunerated for his/her services and to be reimbursed for expenses. Where there is a disagreement over the level of remuneration, an arbitrator may request that the courts determine its appropriate amount. An arbitrator that resigns from his/her duties without good reason is liable for any resultant losses (Article 1175). The scope of this liability is unclear and will undoubtedly be the source of some future debate.

INTERIM MEASURES

Arbitral tribunals are expressly empowered to grant interim relief by the new CCP regime – unless the parties have agreed otherwise (Article 1181). Where a party demonstrates a likelihood of succeeding in its claims, the arbitral tribunal may grant such relief as it considers appropriate in light of the subject matter of the dispute. A party may also apply for such measures to the courts (Article 1166).

THE ARBITRAL PROCEDURE

The CCP provisions, relating to arbitral proceedings, closely resemble those contained in the UNCITRAL Model Law. As already indicated, the parties are free to decide the arbitral procedure. In the absence of agreement by the parties, the arbitral tribunal is to apply such procedural rules it determines to be most appropriate (Article 1184). The arbitral tribunal's powers to decide whether or not to hold oral hearings, to hear witnesses and admit evidence mirror the UNCITRAL Model Law provisions (Chapter V, Articles 1183 et seq.).

Article 1192 allows the arbitral tribunal to seek regional court assistance in taking evidence or for any other act that it is unable to carry out itself. The arbitrators and parties are permitted to take part in the court proceedings and to ask questions. This provision also applies where the place of arbitration is outside Poland or is unspecified, but the relevant evidence/act is within the regional court's jurisdiction.

APPLICABLE LAW/AWARD

The procedure for rendering either an interim or final award, and specifications as to its form and content, again broadly mirror the UNCITRAL Model Law. Article 1194 provides that the dispute shall be decided in accordance with the law applicable to the legal relationship and – where the parties have specifically so authorised - on the basis of general principles of law or equity (ex aequo et bono).

The award should set out the reasoning of the arbitral tribunal. Where the tribunal is composed of three or more arbitrators, signature by the majority will suffice – accompanied with an explanation for any missing signatures (Article 1197).

CHALLENGING AN AWARD

Articles 1205 and 1206 set out the limited grounds for setting aside an award rendered in Poland, that follow those grounds set forth in Article 34 of the UNCITRAL Model Law. Articles 1207 and 1208 set out the procedure and the time scale for challenge of an award.

RECOGNITION AND ENFORCEMENT OF THE AWARD

The new legislation facilitates the recognition and enforcement of arbitral awards. Arbitral awards have the same legal force as a court judgement, though they are incapable of direct enforcement in Poland. A successful party must first apply to a Polish court for judgment on the award. The procedure differs slightly for domestic and foreign awards.

A Polish court may only refuse to recognise an arbitral award (whether domestic or foreign) in limited circumstances. The grounds conform with those contained in Article 35 of the UNCITRAL Model Law and Article V of the 1958 New York Convention on the Recognition and Enforcement of International Arbitration Awards, to which Poland is a party (Article 1214 et seq.). New York Convention awards will be enforced by the Polish courts in accordance with the Convention, which takes precedence over the CCP in the event of any conflict between the two.

POLAND IS YET TO SIGN THE ICSID CONVENTION

Poland is party to three international dispute resolution agreements : The 1923 Geneva Protocol on Arbitration Clauses, The 1958 New York Convention on the Recognition and Enforcement of International Arbitration Awards and The 1961 European Convention on International Trade Arbitration. The new Polish Arbitration law reflects compliance with these international agreements. Poland is also a party to over 50 bilateral investment treaties.

Poland is, however, yet to sign the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

POLAND AS A SITE FOR INTERNATIONAL ARBITRATION

At present the main arbitration institution in Poland is the Arbitration Court at the Polish Chamber of Commerce (*Sad Arbitrazowy przy Krajowej Izbie Gospodarczej*), which hears approximately five hundred cases per year. Only a small fraction (10-15 %) of these are of an international character (although in terms of claim value, the Arbitration Court already ranks first in this part of Europe). In the past, most dispute resolution clauses in contracts between a Polish and foreign party have designated a foreign court or the more common arbitration venues such as the International Court of Arbitration of the ICC, the London Court of International Arbitration, the Stockholm Chamber of Commerce or the Vienna International Arbitral Centre. But there is hope – and eager anticipation – among the Polish legal and business community that this will now begin to change. The introduction of this new legislation should help make Poland a hub for future international arbitration activity in the region.