ARBITRATION AGREEMENTS

Arbitration in Poland after the 2015 amendments of the Code of Civil Procedure and the Bankruptcy Law

BY LUKASZ HEJMEJ AND ALEKSANDRA ZANOWSKA - APRIL 12, 2016 - 8 MINS READ

In a nutshell, arbitration must fulfil two main aims to be attractive to its potential users: enforceability of the award must be certain and proceedings must be efficient. In light of those aims, the year 2015 brought two major changes to arbitration proceedings in Poland. Firstly, the amendment of the Bankruptcy Law put an end to all the doubts that arose with regard to the effect of the bankruptcy proceedings of a party to an arbitration agreement on the validity of such agreement. Secondly, the amendment of the Polish Arbitration Law significantly shortened post-arbitration proceedings. Both these changes came into force on 1 January 2016, proving once again that Poland is becoming a more arbitration-friendly jurisdiction.

Effect of the declaration of bankruptcy on arbitration

The Act of 5 May 2015 – the Restructuring Law – amended the Polish Bankruptcy Law. Due to the amendments introduced by the new act, from 1 January 2016, bankruptcy affects arbitral proceedings in the same manner it affects any other proceedings before state courts. Moreover, the validity of an arbitration agreement is not compromised by the declaration of the bankruptcy of a party to it.

Before the amendment

Before the introduction of the amended Bankruptcy Law, pursuant to Articles 142 and 147 of the Bankruptcy and Reorganization Law, in case of the declaration of bankruptcy of a party to an arbitration agreement, the arbitration agreement expired on the date on which the bankruptcy was declared. Also, all arbitration proceedings pertaining to the bankrupt party were discontinued. This regulation, apart from not being arbitration friendly, was fairly troublesome. This was because the expiry of an arbitration agreement blocked not only the possibility to commence arbitration in the future, but it also affected pending arbitration proceedings as well as the post-arbitration actions of recognition and the enforcement of arbitral awards rendered on the basis of the expired arbitration clause.[1]

As, due to this regulation, post-arbitration proceedings could also be affected by bankruptcy proceedings, it jeopardized the practicality of continuing any arbitral proceedings at all. These doubts also existed in international arbitration cases when one of the parties declared bankruptcy under Polish law or where the arbitral proceedings were seated in Poland. In light of the uncertainty of the effects of bankruptcy, an otherwise properly granted award could end up being unenforceable or set aside. In such cases the aim of arbitration could be compromised.

The most vivid example of the problematic character of the discussed regulations was the proceedings in the Elektrim cases[2]. In two arbitration proceedings pending with regard to Elektrim, a company incorporated and seated in Poland, the arbitral tribunals came to two contradictory conclusions. The main issue was whether Article 142 of the Polish Bankruptcy and Reorganization Law could affect international arbitration conducted outside of Poland. In the proceedings held under the ICC Rules of Arbitration seated in Geneva, the tribunal discontinued the proceedings stating that due to the regulations of Polish law, Elektrim had no legal capacity to participate in the proceedings.[3] This decision was upheld by the Swiss Federal Tribunal.[4] Conversely, the Tribunal in the LCIA proceedings reached an entirely different conclusion, deciding that Polish law is not applicable and cannot affect the proceedings.[5] This understanding was confirmed by UK courts, which relied on EU Council Regulation No. 1346/2000 of 29 May 2000 on Insolvency Proceedings.[6] The arbitral award rendered in the LCIA arbitration, although not enforced in proceedings before the District Court in Warsaw, was found to be enforceable after an appeal.[7]

After the amendment

Since 1 January 2016, upon the declaration of bankruptcy, arbitration proceedings have been held up *ex officio* until the trustee of the bankrupt estate is established. Afterwards, the tribunal continues the proceedings, reinstating them also *ex officio*. Nevertheless, arbitration proceedings are affected by the requirement that the creditor must first exhaust the proceedings for the inclusion of its claim on the list of claims prepared by the trustee in bankruptcy. If the claim is not included in the list of claims of the trustee in bankruptcy, the creditor may proceed with the arbitration.

The above rule does not affect the validity of the arbitration agreement. However, the trustee in bankruptcy shall have the right to withdraw from the arbitration agreement. This will be possible in two circumstances:

- when arbitration proceedings are not pending – if pursuing the claim in arbitration would impede the liquidation of the bankruptcy estate, but solely upon the approval of the bankruptcy court; or
- upon the request of the other party to the arbitration agreement, submitted to the trustee in bankruptcy in writing; if the trustee in bankruptcy does not answer this request within 30 days, it is deemed that the arbitration agreement has been withdrawn from.

The other party to the arbitration agreement may withdraw from the arbitration agreement, even if the trustee in bankruptcy did not withdraw from it, if the trustee in bankruptcy refuses to participate in the costs of arbitration.

As a result of the withdrawal, the arbitration agreement expires.

Jurisdiction of courts in post-arbitration proceedings

On 1 January 2016, the Act of 10 September 2015 on the Promotion of Amicable Dispute Resolution came into force. By virtue of this act, the Code of Civil Procedure was amended and post-arbitral proceedings were shortened – from two-instance to one-instance proceedings.

Nevertheless, this does not make the setting aside of proceedings or proceedings for the enforcement of a foreign arbitral award in Poland as swift as those introduced, *inter alia*, in Austria in 2014. In Poland, a party may still challenge such final decision by filing a complaint in cassation, if the other requirements to use this extraordinary legal measure have been fulfilled. Bearing in mind the fact that Polish state courts are not yet that experienced in dealing with arbitration-related matters as courts in e.g. Switzerland or France, it seems reasonable to have the Supreme Court overlooking these matters and intervening in case of obvious mistakes of the lower courts.

Before the amendment

Before 1 January 2016, the post-arbitration proceedings were in general held in two instances. Apart from that, in case of the setting-aside of proceedings and proceedings for the enforcement of foreign arbitral awards, the parties were entitled to file a complaint in cassation to the Supreme Court. This meant that whatever time the parties saved in arbitral proceedings (if any), they could lose in the post-arbitral stage, if the other party decided to challenge the arbitral award.

After the amendment

Since 1 January 2016, post-arbitration proceedings have been significantly shortened. The proceedings for setting aside and the enforcement or recognition of an award are limited to one instance. A party may still challenge a final decision by filing a complaint in cassation to the Supreme Court. However, the grounds for the complaint are very narrow. These grounds are limited to infringements of substantive law or infringements of procedural law if this infringement could have affected the result of the proceedings; however, this is only if the case involves an important uncertain legal question which requires the Supreme Court's ruling, the complaint is obviously justified or the proceedings were void. This change simplifies the whole process. Also, as there is one instance less, the proceedings should be more time and cost efficient.

An additional simplification of the proceedings is the fact that after the amendment, in all post-arbitration proceedings, only the Appellate Courts have jurisdiction in the first instance. Since there are only 11 Appellate Courts in Poland, this will allow those courts to gain more experience in dealing with arbitration-related matters and, hopefully, case law will become more uniform and clear.

Conclusion

The recent changes to Polish law pertaining to arbitration show that Poland aims to support this method of dispute resolution and is becoming more arbitration-friendly.

[1] The Polish Supreme Court, in the Judgment of 23 September 2009 (case file No. I CSK 121/09), stated that post-arbitration proceedings should not be discontinued when the declaration of bankruptcy was rendered after the arbitral award had already been rendered. If however, the declaration of bankruptcy took place before the award was rendered, all arbitration proceedings should be discontinued.

[2] The Elektrim cases referred to in this note are: (i) Josef Syska and Elektrim S.A. (in administration) v. Vivendi and Ors heard in arbitration under LCIA Arbitration Rules, seated in London, and (ii) Vivendi and Ors v. Deutsche

Telecom and Ors, heard in arbitration under the Rules of Arbitration of ICC, seated in Geneva.

[3] Interim award of 21 July 2008.

[4] Decision of the Swiss Federal Tribunal, 31 March 2009, Vivendi v 4A, 428/2008.

[5] Interim Partial Award of 20 March 2008.

[6] Syska v Vivendi Universal SA & Ors, 2 October 2008, [2008] EWHC 2155 (Comm); Syska & Anor v Vivendi Universal S.A. & Ors, 9 July 2009, [2009] EWCA Civ 677.

[7] Decision of the District Court in Warsaw, 20 August 2009, case file No. VIII Co 388/08; Decision of the Appelate Court in Warsaw, 26 November 2009, case file No. I ACz 1883/09.

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Lukasz Hejmej

Lukasz Hejmej is a partner at Baker & McKenzie in in Warsaw. He is qualified in Poland and he holds an LL.M. from Columbia University, focused on international arbitration. Lukasz Hejmej has conducted arbitrations under the UNCITRAL, ICC, and CIETAC Arbitration Courts, the Court of Arbitration at the National Chamber of Commerce in Warsaw and the Court of Arbitration at the Polish Confederation of Private Employers according to “Lewiatan” arbitration rules. He participated in drafting the New Regulations of the Arbitration Court at the Polish Chamber of Commerce in Warsaw (including the Rules for Mediation) and the Court of Arbitration at the Polish Confederation of Private Employers, known as “Lewiatan. Lukasz Hejmej can be reached at lukasz.hejmej@bakermckenzie.com and +48 22 445 3147.

Aleksandra Zanowska

Aleksandra Żanowska is a senior associate in Baker McKenzie's Warsaw office and a member of the Firm’s Global Dispute Resolution Practice Group. She specializes in arbitration, in particular investment arbitration. In addition, she represents clients in complex litigations, including IP disputes. She holds an LL.M. from Harvard Law School. In 2022, she was seconded to the arbitration team in Baker McKenzie's London office.

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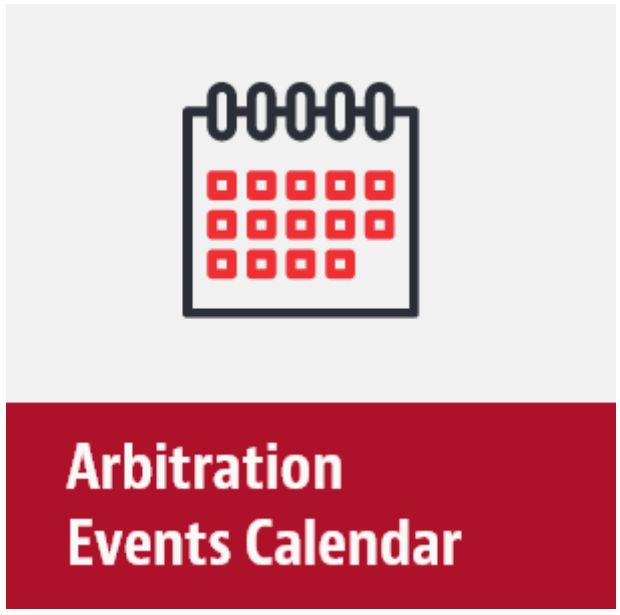
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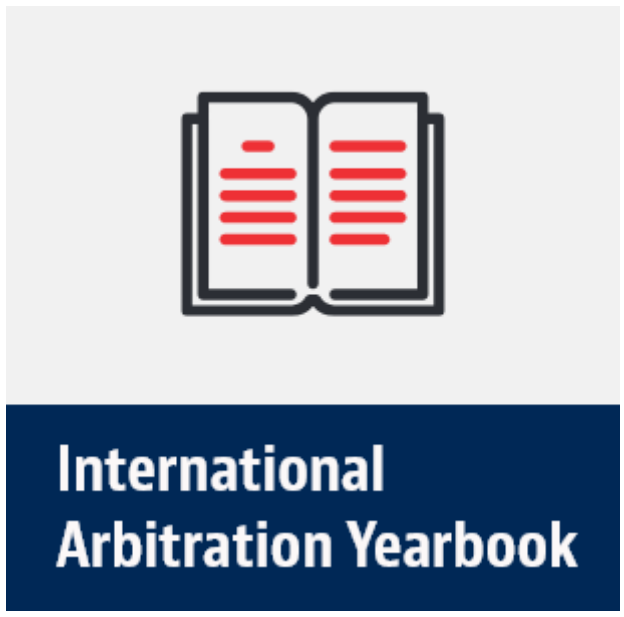
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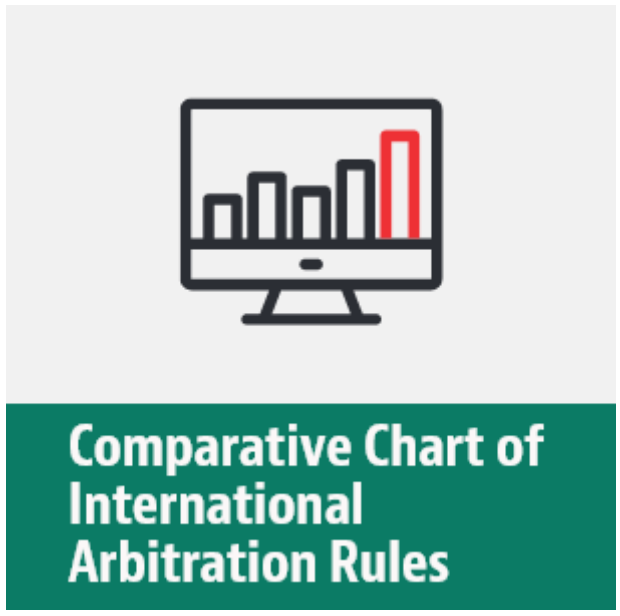
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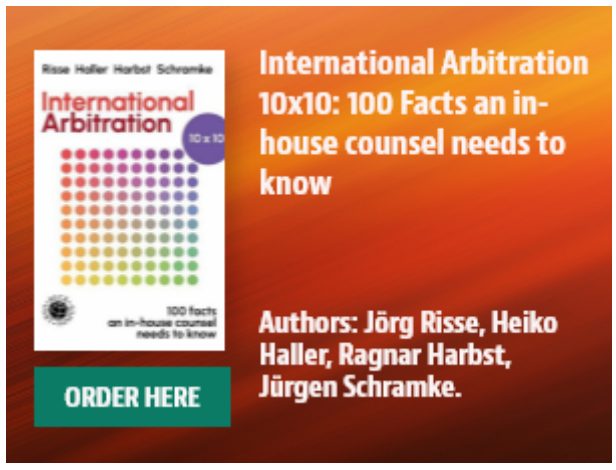

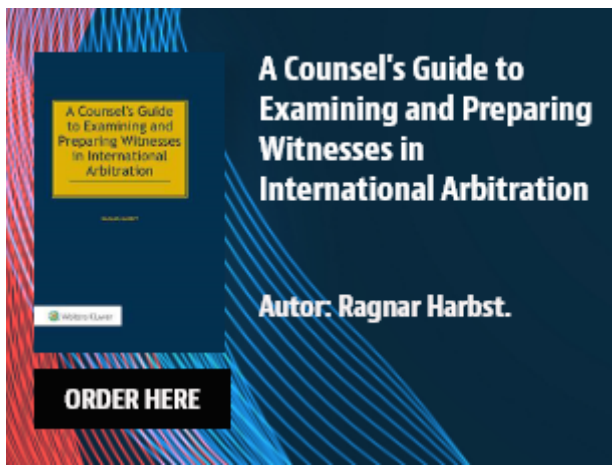

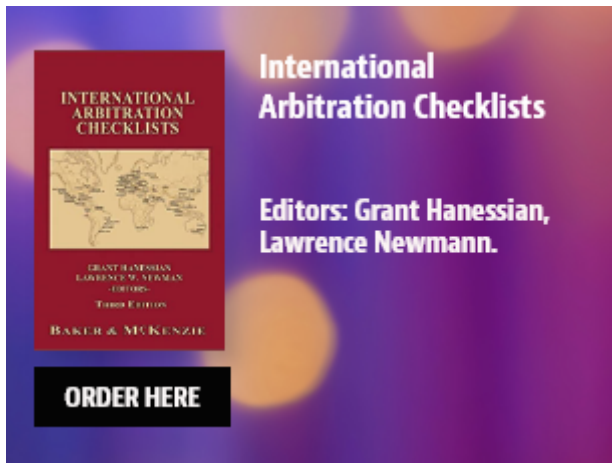

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