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The Consequences of Respondent's Failure to Timely Object to the Jurisdiction of the Arbitral Tribunal

I. It is a generally accepted standard in arbitration that a party who entered the dispute as to the merits – in practice it means respondent submitting his statement of defence – without raising an objection to the jurisdiction of the arbitral tribunal, cannot make such plea at a later date unless the arbitrators shall consider the delay justified.

II. However, theoretical reasons behind this practical solution can vary. One should take into account a conclusion that the statement of claim (by the very fact of being addressed to the arbitral tribunal) and the statement of defence (by not objecting thereto) form together an arbitration agreement; however, even failing this, the objection may be considered time-barred as the matter of procedure. In the latter case, a further question arises: whether the objection shall be time-barred in the arbitration proceedings only, or is it totally forfeited so that it cannot be raised as the premise of the setting aside of a domestic arbitral award or of the refusal of the recognition and enforcement of a foreign award.

III. There are two motives for the selection of the topic of this report. One is a recent decision of the Polish Supreme Court; the other, an outstanding sentence in the new VIAC Arbitration Rules of 2013.

The comparison of the VIAC Rules with the rules of Polish arbitration institutions: the Lewiatan Court of Arbitration Rules of 2012 (in particular, Sec. 27) and the 2007 Rules of the Court of Arbitration at the Polish Chamber of Commerce (in particular, Sec. 4) shows that all these regulations are essentially based on the ideas and even language of the UNCITRAL Model Law and, as the result, are very similar. The basic feature of the model regulation is the distinction between the objection as to the jurisdiction of the arbitral tribunal in the matter of the dispute as the whole (which usually results from the asserted lack of effective arbitration agreement and should be raised at the latest together with the defence on the merits) and the mere excess of the scope of such agreement leading to a partial objection (to be raised as soon as the matter comes out). However, Art. 24 of the Vienna Rules contains, in Art. 24 Sec. 1, an additional sentence stating clearly – in addition to the determination of the time-limits for raising both types of objections

– that "a later objection shall be barred in both cases". The search for the source of this language leads us to the Austrian arbitration law, the provision of Sec. 592 item 2 of the ZPO containing an identical sentence. However, while in the arbitration rules such sentence could only relate to the arbitration proceedings as such, in the ZPO it conceivably might affect raising a plea of lacking arbitral jurisdiction before state courts as well. But, does it?

IV. To give the problem a wider background, one should start the analysis with the UNCITRAL Model Law which, in Art. 7 Sec. 5 (option one) of its amended 2006 version rules that an arbitration agreement is deemed to be concluded in writing if in the statement of claim the existence of such agreement is alleged and in the statement of defense it is not denied. Compared to the tentative rule described under No. II above, this provision seems to additionally require an express allegation of the jurisdiction of the arbitral tribunal in the text of the statement of claim.

V. In our region of Europe, this rule (the strength of which lies in its simplicity) has been frowned at by the legislators. Indeed, treating the exchange of procedural writings, of which at least one is silent on the subject, as an agreement in writing looks like an excessively forced solution. Both German (Sec. 1031 (6) ZPO) and Austrian (Sec. 583 (3) ZPO) arbitration laws have accepted such *per facta* concluded agreement only insofar as it would cure the formal defects of an agreement effectively concluded but not considered to be made in writing (even pursuant to the relaxed standards of the written form developed by the contemporary arbitration laws). This leaves open the problem of the validity before state courts of the objection that there was no arbitration agreement at all which has been expressly time-barred in arbitration.

VI. The Polish legislator decided to pick and choose from the Model Law rule in yet another way: the Polish Code of Civil Procedure provides in Art. 1206 Sec. 1 item 3 that the objection concerning an excess of the scope of arbitration agreement cannot be raised in the setting-aside proceedings. This leaves open the matter of the objection of the lack of effective agreement (which would include, in contrast to Austrian and German laws, also the instances of the insufficiency of the form).

VII. The majority of the German legal doctrine and the recent state court practice support the opinion that the plea of the lack of arbitration agreement, once time-barred in arbitration, cannot be raised before state court[1]. I was unable to locate a clear opinion in the Austrian sources in my disposal but it seems that the mentioned before sentence in Sec. 592 item 2 of the ZPO (which has no counterpart in German or Polish regulations): "a later objection shall be barred in both cases" (cases of the entire lack of an arbitration agreement and of the excess of the scope thereof) may supply an additional argument in favour of a similar solution. A separate confirmation that the plea which has not been raised in the arbitration within the prescribed time-limit is forfeited in the arbitration (only) would be redundant.

[1] See *J. Münch*, [in:] *T. Rauscher, P. Wax, J. Wenzel* (ed.), Kommentar zum Zivilprozessordnung, vol. 3, Munich 2008, pp. 162–164; *G. Wagner*, [in:] Practitioner's Handbook on International Arbitration, ed. *F.B. Weigand*, Munich 2002, pp. 813; *I. Hanefeld*, [in:] Practitioner's Handbook on International Arbitration, ed. *F.B. Weigand*, 2nd ed., London 2009, pp. 530–531.

Więcej informacji na stronie wydawcy

http://www.ksiegarnia.beck.pl/czasopisma-adr-arbitraz-i-mediacja-kwartalnik