



Arbitration

in 49 jurisdictions worldwide

2014

Contributing editors: Gerhard Wegen and Stephan Wilske



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Getting the Deal Through is delighted to publish the ninth edition of *Arbitration*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 49 jurisdictions featured. New jurisdictions this year include Equatorial Guinea, Mexico, Nigeria and Scotland.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editors Gerhard Wegen and Stephan Wilske of Gleiss Lutz for their continued assistance with this volume.

Getting the Deal Through

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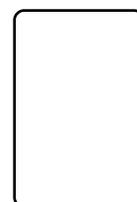
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The Polish Chamber of Commerce

Justyna Szpara and Maciej Łaszczuk

Łaszczuk & Partners

The Court of Arbitration (the Court) at the Polish Chamber of Commerce (the PCC) has been in continuous operation since 1 January 1950, when it was created for the purpose of resolving disputes in international trade. In relations between entities from the former Eastern Bloc, arbitration at the chambers of commerce in the relevant countries was mandatory, as reflected by the Moscow Convention of 1972. Thus, at the beginning the Court acted on the basis of arbitration agreements between the parties (typically Polish entities trading with western European businesses), but it also had mandatory jurisdiction over cases brought against Polish commercial entities (state-controlled) by commercial entities from other countries that were parties to the Moscow Convention.

After 1989 the Court smoothly transformed into the most prominent modern arbitration institution in Poland, for both domestic and international cases. The Court handles around 300 to 400 cases yearly, about 20 per cent of them international, and is one of the most important arbitration institutions in the region.

The Court also provides mediation services, through its Mediation Centre. The Court may also administer ad hoc arbitrations.

What is the Court of Arbitration at the PCC?

The Court of Arbitration at the PCC is an arbitration institution affiliated with the Polish Chamber of Commerce, but is a separate organisational unit. The seat of the Court is Warsaw. One of the organisational units of the Court is its Mediation Centre.

The activities of the Court are run by its president, appointed for a three-year term by the presiding council of the Polish Chamber of Commerce, upon nomination by the president of the Chamber and in consultation with the Arbitral Council of the Court. The current president of the Court is Marek Furtek. The Arbitral Council is responsible for adopting and amending the Rules of the Court, as well as default appointment of arbitrators and deciding on challenges to arbitrators. The members of the Arbitral Council are appointed by the presiding council of the Chamber, upon nomination by the president of the Chamber, for a three-year term. Current members of the Arbitral Council are: Andrzej Kalwas (president), Krystyna Szczepanowska-Kozłowska (vice president), Andrzej Szlęzak (vice president), Zbigniew Banaszczyk, Zbigniew Cwiakalski, Grzegorz Domański, Marian Kępiński, Andrzej Koźmiński, Maciej Łaszczuk, Maciej Tomaszewski, Andrzej Tynel and Cezary Wiśniewski.

Arbitration under the Rules of the Court of Arbitration at the Polish Chamber of Commerce

Rules

The current Rules of the Court of Arbitration at the Polish Chamber of Commerce were issued in 2007. However, under Polish arbitration law, which applies when the place of arbitration is in Poland, if the parties agree on an institutional arbitration, the rules in force at the time of execution of the arbitration agreement, and not at the time of initiating the arbitration, will apply, unless the parties agree otherwise. Thus, previous versions of the Rules may also be relevant.

The Rules govern proceedings where the parties agreed for institutional arbitration by the Court. In ad hoc arbitration administered by the Court, the Rules do not apply unless agreed by the parties.

The Rules give effect to the parties' autonomy to regulate the conduct of the proceeding. In any case the arbitrators are obliged, while applying the Rules, to follow the rules agreed by the parties, whether contained in the arbitration agreement or otherwise mutually agreed.

The Rules expressly require the arbitrators to encourage the parties to settle at every stage of the proceeding. This is not understood as obliging or authorising the arbitrators to mediate between the parties or reveal their assessment of the case, but as a general obligation to promote settlement.

The Court has begun work on drafting a new set of Rules. The goal is to secure the greatest efficiency and quality of the work of the Court and also to meet the expectations of users and adapt to changes taking place in the economy and the legal system in Poland and around the world. The new Rules of the Court will also reflect trends and changes in international arbitration law and practice. The new Rules are being drafted by a committee appointed for this purpose, led by Maciej Łaszczuk. The other members of the committee are Witold Jurcewicz, Rafał Morek, Łukasz Rozdeiczer, Justyna Szpara, Andrzej Szumański and Maciej Tomaszewski.

Arbitrators

The Court maintains a list of arbitrators, prepared and reviewed by the Arbitral Council. The Council seeks to list recommended arbitrators of high quality and exceptional skills. The list is not binding on the parties, except that a sole arbitrator or presiding arbitrator must be named from the list, and when the Arbitral Council appoints an arbitrator it will select from this list. There are now almost 250 arbitrators on the list, including the most prominent members of the Polish arbitration community as well as arbitrators from such countries as Austria, Belgium, the Czech Republic, France, Germany, Hungary, India, Italy, Slovakia, Switzerland, the United Kingdom and the United States. Interestingly, under the Rules in force, persons included in the list of arbitrators are not allowed to represent parties in arbitrations at the Court.

The arbitrators are required to follow the Code of Ethics adopted by the Arbitral Council. Breach of the Code may be grounds for removal from the panel or removal from the list of arbitrators.

Under the default rule, cases are heard by three-member panels.

A sole arbitrator is appointed:

- when the amount in dispute is less than 40,000 zlotys, unless the parties decided there should be a three-member panel;
- if the parties so agreed; or
- if the parties did not agree on the number of arbitrators, upon decision of the Arbitral Council at the motion of a party or ex officio, if justified by the circumstances of the case (for example, if the amount in dispute is only slightly above the 40,000 zlotys threshold and the case is uncomplicated).

Seat of arbitration

Under the default rule, the seat of the arbitration under the Rules is Warsaw. The parties may agree on a different seat, or otherwise the arbitrators may designate another place of arbitration if justified by the circumstances of the case or the convenience of the parties. Nevertheless, hearings and any other activities during the proceeding may be held elsewhere than at the seat of arbitration.

Language of arbitration

The parties may agree that the proceeding be conducted in Polish, English, French, German or Russian. If the parties do not agree otherwise, the proceeding will be conducted in Polish. Nevertheless, the arbitrators may decide that particular activities be conducted in another language, for example, the language of the witnesses or experts or the language of a contract. If the proceeding is conducted in a language other than Polish, however, the essential documents in the proceeding must be translated into Polish. This rule was adopted for the sake of the state court's oversight of the award (if a petition is filed to set aside the award, the record in the arbitration will typically serve as evidence). However, the rule requiring translation of almost the entire record seems outdated and serves little purpose in international arbitration and there are plans to abandon this requirement.

Multiparty proceedings and third-party intervention

The Rules contain provisions regarding multiparty proceedings and intervention. If there are multiple parties on one side, they must jointly name the arbitrator, and if they do not agree the arbitrator will be named by the Arbitral Council. Any submissions and communications from the tribunal must be served on all of the multiple parties.

The Rules also allow third-party intervention. A third party may be permitted to participate by the tribunal, upon consent of the parties. If the tribunal permits intervention, the third party will be requested to pay an arbitration fee. If the fee is not paid by the deadline stated, the intervention will not be allowed. An intervening third party is not entitled to appoint an arbitrator.

Commencement of arbitration

The arbitration starts when a statement of claim is filed with the secretary general of the Court (no notice for arbitration as such is required). The statement of claim must be prepared in the language of the arbitration (and if that is not Polish, with a Polish translation), with copies for each of the respondents and for each arbitrator. The statement of claim should:

- state the parties and their addresses, and in the case of legal persons enclose transcripts from the Court register or other public register for the party;
- indicate the arbitration agreement (arbitration clause) or other basis for the jurisdiction of the Court;
- specify the amount in dispute; and
- specify the claim, together with the grounds, and cite evidence in support of the facts alleged.

If the statement of claim is filed by an attorney, it should be accompanied by the original power of attorney or a certified copy, together with the address of the attorney.

A statement of claim may also name the arbitrator appointed by the claimant, move for the case to be heard by a sole arbitrator or move for an arbitrator to be appointed by the Arbitral Council. Otherwise, the secretary general will give the parties up to three weeks to appoint the arbitrator or arbitrators.

The Rules do not require terms of reference to be prepared by the tribunal and signed by the parties. The organisation of the proceeding occurs through the tribunal's procedural orders.

Jurisdiction

The Rules fully respect the Kompetenz-Kompetenz principle, and the arbitral tribunal is exclusively authorised to rule on its own jurisdiction (subject to judicial review as provided in the arbitration law). Nonetheless, the Rules also provide for a kind of prima facie review of jurisdiction by the secretary general. If jurisdiction is apparently lacking, the secretary general will notify the claimant accordingly and give the claimant up to two weeks to state if it continues to support jurisdiction. If within this term the claimant informs the Court that it does not support the case, the claim is deemed not filed. Otherwise, upon lapse of the term the secretary general proceeds with the statement of claim, and in such case the arbitration tribunal will decide on its own jurisdiction.

Consolidation and set-off

The Rules allow for consolidation of cases for decision in one proceeding. Consolidation requires an order by the arbitral tribunal, when both parties ask for consolidation before the end of the hearing, the consolidated cases are between the same parties and are conducted under the auspices of the Court, and the arbitration panel is the same in all of the cases. The cases do not have to be related, but in practice it is only feasible to seek consolidation when the cases arise out of the same or related contracts. In practice consolidation happens rarely, mostly due to the requirement for identical panels.

The Rules allow the tribunal to hear a defence of set-off regardless of whether the set-off right arises out of the same contract or is covered by an arbitration agreement. Nonetheless, if a separate counterclaim is brought instead of a defence of set-off, the counterclaim must be covered by an arbitration clause providing for the jurisdiction of the Court (although not necessarily the same arbitration agreement as the main claim).

Hearings

A hearing is standard. In certain situations, however, the Rules permit skipping the hearing and deciding the case on written submissions only. This will apply primarily when the parties agree there should be no hearing. Otherwise, the tribunal will decide whether to hold hearings or decide the case on written submissions only. However, if any of the parties asks for a hearing, the tribunal is required to conduct a hearing.

Awards

The Rules provide certain time limits for issuing an award. An award should be issued within one month following the close of the case. The secretary general of the Court may, ex officio or at the request of the chairman of the arbitral tribunal, extend the deadline by a specified period if necessary due to the complexity of the issues to be resolved or other circumstances of the case. Failure to meet the deadline does not in itself invalidate an award.

An award is made in writing and served on the parties following payment of all costs. The original of the award and all copies thereof must bear the signatures of all members of the arbitral tribunal, or at least two members, specifying the reason for the lack of signature by the other arbitrator.

The Rules provide for limited review of the award by the institution. The award is then signed by the secretary general of the Court and the president of the Court, and must bear the seal of the Court. When signing the award, the secretary general of the Court and the president of the Court certify that the arbitral tribunal was appointed in accordance with the Rules and that the signatures of members of the arbitral tribunal are authentic. Before signing the award, the president may, without interfering in the merits of the decision, return the award to the chairman of the arbitral tribunal to make any necessary formal corrections or rectify evident mistakes.

Confidentiality

The Rules expressly provide for the confidentiality of proceedings. Hearings are closed to the public. All the participants in the proceeding are required to maintain confidentiality, but the scope of confidentiality is defined by the parties themselves, either in the arbitration agreement or in the statements filed with the arbitral tribunal. The parties may also agree that the fact of commencement of the arbitration should be treated as confidential, but this is not considered to be the default rule. Only parties and their attorneys, as well as persons requested by the tribunal (such as witnesses or experts), may be present during hearings. However, upon consent of both parties and the tribunal other persons may be present, with a maximum of two persons indicated by each of the parties. Awards are also confidential, but the Arbitral Council may decide to publish an award (redacted to assure the anonymity of the parties). In any event, the Council is required to give priority to the parties' autonomy, so if the parties object to publication the Council should not allow publication.

Costs

The Court may be seen as competitive in terms of costs of arbitration. The fees payable to the Court include a fixed registration fee of 2,000 zlotys (or less in certain cases) and an arbitration fee. The arbitration fee is calculated based on the amount in dispute, on a sliding scale (regressive, from 8.0 per cent to 0.3 per cent).

In any final award on the merits, the arbitrators should decide on allocation of costs, including attorneys' fees. There are no fixed rules on cost allocation, but typically the 'loser pays' rule is applied. Attorneys' fees should be assessed per attorney, according to his or her work input, up to the maximum of half of the arbitration fee in the case, but no more than 100,000 zlotys. This means that allocation of attorneys' fees is not necessarily based on the actual costs incurred by the parties, and each of the parties should expect that even if they win the case, they will be required to bear some part of these costs.

Mediation

The Rules also provide a framework for mediation. Mediation under the Rules may be started prior to commencement of arbitration or litigation. Mediation may be conducted based on a written agreement between the parties or upon consent of both parties. The mediator should be appointed jointly by the parties, but if they do not agree the mediator will be appointed by the Arbitral Council from the list of mediators. If mediation leads to a settlement, it should be recorded by the mediator and signed by both the mediator and the parties. There is also an option for the parties to request jointly that the settlement be converted into an award. In such case the Arbitral Council will appoint the mediator as an arbitrator authorised to issue an award. Although not expressly stated in the Rules, a joint motion of the parties to convert the settlement into an award should be deemed to be an arbitration agreement (unless the parties have already signed an arbitration agreement covering the dispute).

Proceedings concerning internet domain disputes

There is a separate section of the Rules devoted to disputes concerning infringement of rights in connection with registration of '.pl' internet domains. The Court has entered into a cooperation agreement with the Scientific and Academic Computer Network (Naukowa i Akademicka Sieć Komputerowa, or NASK, the institute responsible for administering '.pl' domain names) as one of three arbitration institutions designated to resolve disputes between third parties and entities that have registered '.pl' domains concerning infringements caused by the domain registration. NASK's general terms provide for mandatory arbitration in such cases, requiring the NASK customer against whom a third-party claim is brought to sign an arbitration agreement or the domain registration will expire (it should be noted that the validity of this requirement in relations with consumers is doubtful).

The procedure under this section of the Rules is solely for infringement disputes; other claims between the same parties (eg, for payment of the fee) cannot be joined in the same proceeding. The Rules apply if at least one of the parties has its seat or residence in Poland. If both parties to the dispute are foreign (ie, with their seat or residence outside Poland), the WIPO Expedited Arbitration Rules for Domain Name Dispute Resolution under PL will be applied instead.

The procedure in a domain dispute is simplified to ensure speed and efficiency. For example, all communications within the proceeding should be made by e-mail (unless mandatory provisions of law require otherwise). Essentially, the language of the proceeding should always be Polish, unless the arbitrators decide otherwise, upon joint motion of the parties. The default rule is that a dispute is decided by one arbitrator, instead of a three-member panel (but the parties may decide otherwise). Certain deadlines for the parties and the arbitrators are shorter than for the general procedure under the Rules.

Decisions ending the proceeding (awards and settlements) are automatically forwarded to NASK to implement the actions envisaged in its general terms. The awards are also published.

* * *

The Court of Arbitration at the PCC is the most important institution on the Polish and regional arbitration market, and is witnessing a constant increase in the number of cases, both domestic and international. The Court is also involved in promoting arbitration, organising arbitration seminars and other events on a regular basis, as well as through publications related to arbitration. Since 2012, the Court has held the biennial Draft Common Frame of Reference Warsaw International Arbitration Moot for law students. Since 2003, it has also organised a competition for law students for the best Master's thesis on arbitration.

More information on the Court can be found at www.sakig.pl.

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