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Yearbook of Arbitration[®]**

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Yearbook of Arbitration®**

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Recognition and Enforcement of Arbitral Awards



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„We regret to announce the death of our most reputable colleague Prof. Nikolay Natov from Bulgaria. We are thankful for his efforts invested in our common project. His personality and wisdom will be deeply missed by the whole editorial team.“

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List of Abbreviations

| | |
|--------------------------------|---|
| 1923 Geneva Protocol | Protocol on Arbitration Clauses signed in Geneva on 24 September 1923 |
| 1927 Geneva Convention | Convention on the Execution of Foreign Arbitral Awards signed in Geneva on 26 September 1927 |
| 1961 Geneva Convention | European Convention on International Commercial Arbitration signed in Geneva on 21 April 1961 |
| ADR | Alternative Dispute Resolution |
| AUT | Austria |
| BIT | Bilateral Investment Treaty |
| Brussels I Regulation | Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters |
| CCP | Polish Code of Civil Procedure |
| CDC | Cartel Damage Claims |
| CETA | The Comprehensive Economic and Trade Agreement |
| CJEU | Court of Justice of the European Union |
| COMI | Centre of Main Interest |
| COMMISA | Corporación Mexicana De Mantenimiento Integral |
| Constitutional Court RF | Constitutional Court of the Russian Federation |
| ČR | Česká republika (Czech republic) |
| DEU | Deutschland (Germany) |
| Directive | Directive on Alternative Dispute Resolution in Consumer Cases |
| EC | The European Community |
| EC Treaty | Energy Charter Treaty signed in Lisbon on 17 December 1994 |
| ECHR | European Court of Human Rights |
| ECJ | European Court of Justice |
| EEA | European Economic Area |
| EEC | European Economic Community |
| EGPC | Société Egyptian General Petroleum |

| | |
|----------------------------|---|
| | Corporation |
| EU | European Union |
| FCI Arb | Fellow of the Chartered Institute of Arbitration |
| Global Panel | Global Enforcement and Recognition Panel |
| HLV Report | The Heidelberg-Luxembourg-Vienna Report |
| ICAC | International Commercial Arbitration Court at the Chamber of Commerce of Trade and Industry of the Russian Federation |
| ICC | International Chamber of Commerce |
| ICCA | International Congress and Convention Association |
| IC Ct | The International Criminal Court |
| ICSID | International Centre for Settlement of Investment Disputes |
| INSOL-Europe | International Association of Restructuring, Insolvency & Bankruptcy Professionals |
| ISDS | Investor-state dispute settlement |
| KBC | Karaha Bodas Company |
| KKO | Korkein oikeus (The Supreme Court of Finland) |
| LCIA | London Court of International Arbitration |
| NATCAS | Société National Gas Company |
| New York Convention | Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 |
| OHADA | Organisation for the Harmonization in Africa of Business Law |
| OTV | Omnium de Traitement et de Valorisation |
| Pertamina | Persusahaan Pertambangan Minyak Dan Gas Bumi Negara |
| PIL | Private International Law |
| PPP | Public-private partnership |
| RAA | Russian Arbitration Association |
| RIMA | Russian Institute of Modern Arbitration |
| SCC | Stockholm Chamber of Commerce |
| Swiss PILA | Swiss International Private Law |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| U.A.E. | United Arab Emirates |
| UK | United Kingdom |

| | |
|---------------------------|--|
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL Model Law | The UNCITRAL Model Law on International Commercial Arbitration adopted in 1985 |
| US | United States of America |
| VIAC | Vienna International Arbitral Centre |
| WJA | The World Jurist Association |
| ZBP | Polish Bank Association |
| ZPO | Zivilprozessordnung |

Magdalena Krzemińska | Marek Malciak

New Ground for the Refusal of Recognition or Enforcement of an Arbitral Award in Consumer Cases

Key words:

Recognition or enforcement of arbitral awards | civil procedure | domestic law | EU Directive on Consumer ADR | consumer protection

Abstract | *This paper discusses the new ground for the refusal of recognition or enforcement of arbitral awards in consumer cases established in Article 1214(3)(3) of the Polish Code of Civil Procedure. The regulation was introduced on 10 January 2017 as a result of the implementation of Article 11 of the EU Directive on Consumer ADR. The aim of this paper is to explain the relevance of the new regulation, and its influence on the arbitration proceedings and on the system of control of the arbitral award by State courts in domestic post-arbitration proceedings. The authors analyse the manner in which the Directive's provisions have been implemented into Polish law. In particular, by trying to assess the scope of application of both the Directive's provisions and the new provisions of the Polish Code of Civil Procedure as well. The discussed ground for the refusal of recognition or enforcement of arbitral awards rendered in disputes with consumer participation has not been further discussed in the Polish judiciary and doctrine thus far. However, this regulation may significantly remodel the resolution of disputes between consumers and traders decided in consumer arbitration and the recognition or enforcement of arbitral awards issued in these types of cases.*

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I. Preliminary Remarks

- 5.01.** The Act of 23 September 2016 on the Out of Court Resolution of Consumer Disputes¹ introduced into Article 1214 (3) (3) of the Polish Code of Civil Procedure ('CCP') a new ground for the refusal of recognition or enforcement of awards rendered by arbitral tribunals which shall apply to arbitral tribunal awards rendered in disputes between consumers and traders. The regulation implements Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on ADR in consumer cases)² ('Directive') into the Polish legal order.
- 5.02.** The Directive was drafted against the backdrop of a pan-European trend oriented towards the protection of a consumer as a weaker party to a legal relationship. According to its assumptions, an effective consumer protection policy contributes to the good functioning of the European market and its effective development. In consequence, ensuring a high consumer protection level constitutes one of the main goals of public orders of the European Union and its Member States. This goal is accomplished on multiple levels.³ One of them is an attempt at creating a system guaranteeing consumers effective access to Alternative Dispute Resolution (ADR) methods, and thus facilitating an easier method of pursuing claims. Solutions stemming from the Directive are to constitute an essential step in this direction and contribute to the increasing popularity of ADR in consumer disputes. Its fundamental goal is to create a European network of entities offering ADR services (the so-called ADR entities) in the scope of consumer disputes and to provide EU consumers with the right to submit a dispute with a trader regarding a sales or service contract to such an entity. The ADR entities network is to consist of recognised and impartial out-of-court institutions, established on a durable basis, and listed in registers kept by Member States' competent

¹ (Journal of Laws 2016, pos. 123). The Act came into force on 10 January 2017.

² (Journal of Laws L 165 of 18.06.2013, et. 63-79).

³ Cf. among others Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Journal of Laws L 210 of 7 August 1985, et. 29—33); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Official Journal of the European Communities, L 95, 21 April 1993, et. 29—34); Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Journal of Laws L 171 of 7 June 1999, et. 12—16); Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance (Journal of Laws L 304 of 22 November 2011, et. 64—88).

authorities, offering dispute resolution in the frames of ADR. The need for introducing solutions of this type for the purpose of consumer dispute resolution is, in particular, connected with the increasing importance of e-commerce (Internet), including cross-border trading in the frames of the EU. This phenomenon forces a review of traditional rights protection instruments used previously and the introduction of adjusted mechanisms for pursuing claims in consumer transactions in all Member States.

II. Principle of Legality and Its Implementation Into Polish Law

5.03. The Directive introduces a number of solutions, catering to the different methods for out-of-court resolution of consumer disputes.⁴ The principle of legality expressed in the Directive's Article 11 is of fundamental significance in the scope of ADR proceedings aimed at resolving a dispute by imposing a solution (which includes proceedings before arbitral tribunals).⁵ Referring to provisions adopted in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)⁶ and in the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (Rome Convention),⁷ this principle requires the Member States to guarantee that a resolution imposed onto a consumer and rendered by an ADR entity shall not result in the consumer being

⁴ In this scope the Directive identifies three types of ADR proceedings: 1) procedures where the ADR entity brings the parties together with the aim of facilitating an amicable solution, 2) procedures where the ADR entity proposes a solution; 3) procedures where the ADR entity imposes a solution; the Directive does not rule out an intermediate form of proceedings combining two or more such procedures (Cf. Recital 21 of the Directive).

⁵ 'Article 11 Legality

1. Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer:

(a) in a situation where there is no conflict of laws, the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident;

(b) in a situation involving a conflict of laws, where the law applicable to the sales or service contract is determined in accordance with Article 6(1) and (2) of Regulation (EC) No 593/2008, the solution imposed by the ADR entity shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State in which he is habitually resident;

(c) in a situation involving a conflict of laws, where the law applicable to the sales or service contract is determined in accordance with Article 5(1) to (3) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, the solution imposed by the ADR entity shall not result in the consumer being deprived of the protection afforded to him by the mandatory rules of the law of the Member State in which he is habitually resident.

2. For the purposes of this Article, 'habitual residence' shall be determined in accordance with Regulation (EC) No 593/2008.'

⁶ (Journal of Laws L 177 of 4.7.2008, et. 6—16).

⁷ (Journal of Laws C 169 of 8.7.2005, et. 10—22).

deprived of the protection afforded to him by the provisions of the law of the Member State where the consumer is habitually resident and which cannot be derogated from by agreement (mandatory provisions).⁸

- 5.04.** One of the tools intended to guarantee the effectiveness of Article 11 of the Directive in the Polish law is the introduction of a new ground for the refusal of recognition or enforcement of an arbitral award into Article 1214(3) CCP. Pursuant to the new Article 1214(3)(3) CCP ‘The [state] court shall refuse to recognise or enforce of a judgment of an arbitral tribunal or a settlement reached before an arbitral tribunal if a ruling of an arbitral tribunal or a settlement concluded before an arbitral tribunal deprives a consumer of the protection afforded to them by the mandatory provisions of the law applicable to the agreement to which the consumer is a party, and where the applicable law is a law selected by the parties - the protection afforded to the consumer by the mandatory provisions of the law which would be applicable should no law have been selected.’
- 5.05.** In connection to the transposition of the Directive into Polish law, an analogical solution was introduced in Article 1206(2)(3) CCP providing a new ground for setting aside an arbitral award.⁹ Simultaneously, the implementing Act of 23 September 2016 also added a new Article 1194(3) CCP pertaining to observance of protection afforded to consumer by the mandatory provisions of the law where an arbitral tribunal settles a dispute in accordance with the general rules of law or rules of equity.¹⁰ The abovementioned provisions are intended to jointly implement the rule of legality into Polish law.¹¹
- 5.06.** It is worth emphasising that according to the new Polish regulation, an arbitral award may be verified from the perspective of the consumer’s interest only at the stage following the issuance of such an award – in post-arbitral proceedings

⁸ Compare also Recital 44 of the Directive.

⁹ Article 1206 paragraph 2 CCP: ‘Moreover, a judgment of an arbitration court shall be set aside if the court determines that:

- 1) the dispute cannot be settled by an arbitration court according to this Act,
- 2) a judgment of an arbitration court is contrary to the basic principles of the legal order of the Republic of Poland (the public order clause),
- 3) a ruling of an arbitration court deprives a consumer of the protection afforded to them by the mandatory provisions of the law applicable to the agreement to which the consumer is a party, and where the applicable law is a law selected by the parties - the protection afforded to the consumer by the mandatory provisions of the law which would be applicable should no law have been selected.’

¹⁰ Article 1194 paragraph 3 CCP: ‘In the case of disputes arising from an agreement a party to which is a consumer, the settlement of a dispute in accordance with the general rules of law or rules of equity shall not lead to depriving the consumer of the protection afforded to them by the mandatory provisions of the law applicable to the given relationship.’

¹¹ Compare Correlation Table, available at: <https://legislacja.rcl.gov.pl/docs//2/12283400/12342485/12342486/dokument222681.pdf>, et. 19 (accessed on 25 September 2018).

conducted before a State court. Where any of the parties initiates post-arbitral proceedings, the new ground for the refusal of recognition or enforcement of an arbitral award introduced in Article 1214(3)(3) CCP (similarly as the ground for setting such an award aside provided for in Article 1206(2)(3) CCP) is taken into consideration by the State court *ex officio*.

5.07. The question arises whether such a solution guarantees the actual effectiveness of the goal stemming from the Directive. This question requires a thorough analysis reaching far beyond the scope of this paper. It is only worth indicating here that the implementation model adopted by the Polish legislator stirs certain doubts. Specifically, it does not create a mechanism allowing for the effective detection of all cases where an arbitral award may infringe upon consumer's interests protected by the Directive. The State court shall be entitled and, at the same time, obligated to verify an award rendered in arbitral proceedings (or a settlement concluded before an arbitral tribunal) through the prism of appropriate provisions granting the consumer protection, in principle, only in a situation in which this award is not complied with voluntarily and, in consequence, the need arises for it to be recognised or enforced by the State court (or where a motion to set aside thereof is lodged). Meanwhile, oftentimes even if parties do not approve of the settlement stemming from an arbitral award, they do not decide to initiate post-arbitral proceedings. A decision to not attempt to set aside an arbitral award may be (and frequently is) motivated by, e.g. cost-related considerations or the intention to quickly put an end to the dispute. This rationale is relevant in relation to consumer disputes as well (moreover, consumers by assumption do not possess the full or at least sufficient knowledge that would allow them to autonomously, without resorting to an assistance of a lawyer, assess whether they should comply with the rendered award or whether such an award may be contested before a State court due to its defective nature) which creates a situation where the solution provided by the Polish legislator cannot provide a full guarantee of eliminating all awards which are defective in terms of Article 11 of the Directive, from legal transactions.

5.08. The substantiation of the Act of 23 September 2016 provides only a brief and basic explanation for the introduction of the new regulations into the Code of Civil Procedure (addressing only the change introduced by Article 1194(3) CCP).¹² The

¹² Compare Sejm paper no. 630, act draft substantiation, et. 29, available in Polish at: <http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?no.=630> (accessed on 25 September 2018).

changes were discussed in a somewhat more detailed manner in assumptions for a draft of the implementing act which were submitted by the Office of Competition and Consumer Protection.¹³ This document, however, does not address the specificity of the adopted solution and consequences stemming from its introduction either. So far, the issue of the application of Article 1214(3)(3) CCP has neither been commented on in case law,¹⁴ nor has it been comprehensively discussed in literature, whereas the changes introduced by virtue of this regulation are worth discussing.

III. The Significance of Article 1214(3)(3) CCP and the Impact of the New Regulation on Arbitral and Post-arbitral Proceedings

III.1. Scope of the Regulation

- 5.09.** In the new Article 1214(3)(3) CCP, the Polish legislator pointed to two situations where a State court shall be forced to refuse the recognition or enforcement of an arbitral award. Firstly, when the ruling being verified deprives a consumer of the protection afforded to them by the mandatory provisions of the law applicable to the agreement to which the consumer is a party. Secondly, in a situation in which the applicable law is a law selected by the parties – the ruling deprives the consumer of the protection afforded thereto by the mandatory provisions of the law which would be applicable should no law have been selected.
- 5.10.** Despite departing from the literal wording of Article 11 of the Directive, the Polish regulation may be applied in situations predicted by the European legislator – both where it is necessary to rule on a dispute of an exclusively domestic nature and in the case of a cross-border dispute, but also in a situation in which parties selected an applicable law. Yet, at the same time, it seems that the implementing Act of 23 September 2016 introduced solutions that to a large degree, reach far beyond the scope

¹³ Compare Assumptions of the Office of Competition and Consumer Protection to the Act on Out of Court Settlement of Consumer Disputes, September 2014, et. 70-71, available in Polish at: <http://legislacja.rcl.gov.pl/docs//1/241375/241376/241377/dokument125933.pdf>; (accessed on 25 September 2018).

¹⁴ As on the date of submitting this paper for publication (25 September 2018) the databases which the Authors hereof are familiar with did not contain a single ruling where the settlement was based on Article 1214(3)(3) CCP or that would refer to the meaning of this provision.

required by the Directive which is of fundamental significance for the entire consumer arbitration system in Poland.

5.11. This is because the scope of application of the Directive has been narrowed down to domestic or cross-border disputes related to contractual obligations stemming from sales contracts¹⁵ or service contracts¹⁶ between traders established in the European Union and consumers residing in the European Union (see: Article 2(1) of the Directive).¹⁷ At the same time, due to the fact that the fundamental principle of ADR proceedings in consumer disputes is the initiation of this procedure by a motion filed by a consumer – proceedings initiated by traders against consumers have been directly excluded from the scope of the Directive’s application (see: Article 2(2)(g) of the Directive). Moreover, ADR proceedings by assumption encompass proceedings pending before ADR entities included in national lists of such entities. In turn, other out-of-court proceedings, including those conducted on the grounds of the procedure put in place ad hoc for the needs of a single dispute between a consumer and a trader, have been excluded from under the notion of ADR proceedings (see: Article 4(1)(g) of the Directive and Recital 20 of the Directive).

5.12. The Polish regulation does not provide for these types of restrictions. It being located in the provisions of Title V of the Code of Civil Procedure regarding arbitral tribunals allows one to hold that the legislator did not intend to restrict the application of Article 1214(3)(3) CCP only to the cases specified under the Directive. Hence, it may not be ruled out that the added regulation shall be deemed applicable not only to arbitral awards rendered in arbitral proceedings before ADR entities which the Directive explicitly mentions.¹⁸ One cannot simply rule out its application to rulings rendered by entities

¹⁵ Pursuant to Article 4(1)(c) of the Directive, ‘sales contract’ means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services;

¹⁶ Pursuant to Article 4(1)(d) of the Directive, ‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof;

¹⁷ However, cf. Recital 16, last sentence, of the Directive indicating a possibility of Member States to adopt or retain in force provisions regarding procedures of out-of-court resolution of such disputes.

¹⁸ The Polish ADR entities register in 2017 contained only two institutions from the banking & financial sector offering conduct of arbitral proceedings adjusted to the requirements of the Directive, i.e. Arbitrator Bankowy [Bank Arbitrator] at Polish Bank Association [ZBP] (with 1,046 arbitration motions lodged with it in 2017) and the Court of Arbitration at the Polish Financial Supervision Authority (with 25 arbitration motions lodged with it in 2017; compared with: 31 in 2016, 36 on 2015, 62 in 2014, 40 in 2013, and 41 in 2012) – Cf. Information on the activity of Consumer Bank Arbitration in 2017, et. 2-3, available in Polish at: http://polubowne.gov.pl/files/152/sprawozdanie_adr_ab_2017.pdf (accessed on 25 September 2018) and The Report on Activity of the Court of Arbitration at the Polish Financial Supervision Authority in 2017, et. 3, available in Polish at: http://polubowne.gov.pl/files/155/sprawozdanie_adr_spknf_2017.pdf (accessed on 25 September 2018).

other than ADR entities in the meaning of the Directive (also in the frames of an ad hoc arbitration between a consumer and a trader) and in cases where arbitral proceedings were initiated by a trader against a consumer or in cases where one of the parties involved in a dispute is an entity (a trader or consumer) from outside of the territory of the European Union. This is because it seems that these types of cases have not been excluded from the scope of application of the new Polish regulation. The relevant provision may be applied to all rulings rendered in the context of consumer arbitration which can constitute a basis for recognition or enforcement of an arbitral award before a Polish State court.

III.2. Change of the Model of Court Control of Arbitral Awards in Consumer Disputes and New Verification Template

- 5.13. The new regulation substantially alters the model of control exercised by State courts over awards of arbitral tribunals in consumer cases. Previously, the Polish Code of Civil Procedure did not distinguish between the grounds for refusing the recognition or enforcement of an arbitral award depending on the type of case or entities participating in a dispute. In Article 1214(3)(1-2) CCP, the Code established two model grounds for the refusal of recognition or enforcement considered by a court ex officio at the verification of awards of domestic arbitral tribunals. Namely in situations when according to the statute provisions, a dispute is not arbitrable and when the recognition of a judgment of an arbitral tribunal or a settlement reached before an arbitral tribunal would be contrary to the basic principles of the legal order of the Republic of Poland (the public order clause). In turn, in Article 1215(2)(1-5) it determined additional grounds which a State court could take into consideration upon a motion of a party in the event of the verification of arbitral awards rendered abroad (resembling the grounds of a motion to set aside an arbitral award which follows from the fact that a motion to set aside a foreign arbitral award is excluded).¹⁹

¹⁹ Article 1215(2) CCP: 'Notwithstanding the reasons listed in Article 1214, the court shall, at the request of a party, refuse to recognise or enforce of a judgment of an arbitration court issued abroad or a settlement reached before an arbitration court abroad if the party proves that:

- » 1) there was no arbitration clause, an arbitration clause is void, invalid or has expired according to relevant law,
- » 2) the party was not duly notified of the appointment of an arbitrator or proceedings before an arbitration court, or was otherwise deprived of the possibility to defend his rights before an arbitration court,
- » 3) a judgment of an arbitration court concerns a dispute which is not covered by an arbitration clause or falls beyond the subject-matter and scope of that clause, however, if adjudication in matters covered by

Therefore, the Polish legislator introduced a standard verification model with the source in Article 36 UNICITRAL Model Law²⁰ and Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²¹

- 5.14.** Consequently, from the point of view of substantive law, an arbitral award could be evaluated exclusively through the prism of the public order clause. In adhering to the established case law,²² State courts did not exercise the instance (appeal) control over arbitral awards, but merely verified their compliance with constitutional norms and primary rules governing individual areas of the law. In proceedings before a State court, a content-related control of an arbitral award was inadmissible. Therefore, State courts did not examine the correctness of evidentiary material evaluation carried out by an arbitral tribunal, the correctness of factual findings constituting the grounds of an award, construction or application of substantive law, or the legitimacy of a specific manner of settlement of a disputed legal relationship.
- 5.15.** Whereas currently, by virtue of Article 1214(3)(3) CCP, State courts have been granted a title and at the same time an obligation to perform a content-related verification of arbitral awards rendered in cases with participation of consumers during post-arbitral proceedings. This constitutes a significant novelty in Polish civil procedure. The correct application of the regulation discussed herein will require a change in the State court's approach to the control they perform and it may not be ruled out that it will also necessitate a critical analysis of an arbitral award to a degree which had previously been excluded from the scope of competence of the State courts. This is because the question arises, whether the new ground for

an arbitration clause may be separated from adjudication in matters not covered by that clause or falling beyond the subject-matter and scope of that clause, a refusal to recognise or enforce of a judgment of an arbitration court may only concern those matters which are not covered by the arbitration clause or fall beyond the subject-matter and scope of that clause,

- » 4) the composition of an arbitration court or proceedings before an arbitration court were not in accordance with an agreement between the parties or, if there was no such agreement, with the law of the state where proceedings before an arbitration court were conducted,
- » 5) a judgment of an arbitration court is not yet binding on the parties or has been set aside, or its enforcement has been postponed by a court of the state in which or according to whose laws the judgment was issued.”

²⁰ United Nations Commission on International Trade Law, UNICITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008).

²¹ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958; ratified by Poland, *Journal of Laws* of 1962 No. 9, item 41.

²² Compare among others, the judgment of the Supreme Court of 3 September 2009, I CSK 53/09, *Lex* no. 527154; decision of the Court of Appeals in Katowice of 26 April 2018, V AGO 11/18, *Lex* no. 2490086; decision of the Court of Appeals in Katowice of 19 March 2018, V AGO 13/18, *Legalis* no. 1775551. This stance was also accepted by the literature – cf. MARCIN ULIASZ, *Article 1214* in *KODEKS POSTĘPOWANIA CYWILNEGO. TOM IV. KOMENTARZ., 1ST EDITION*, Warszawa: C.H. Beck 15 (Adam Marciniak ed., 2017).

the refusal of recognition or enforcement of an arbitral award, grants State courts the competence of making their own factual findings in the case, e.g. in the context required to verify which protective norm should be applied in the case and whether its non-application deprived the consumer of the protection they are entitled to.

5.16. A template for the State court control is to be supplied by mandatory provisions of the State of habitual residence which grant protection to the consumer. The legislator did not explain which provisions are included within the scope of the notion above. However, one should agree with the stance expressed in the literature that these may not only be provisions of an imperative nature (*iuris cogentis*) which always apply regardless of parties' will, but also semi-imperative provisions, departures from which are possible only to the advantage of the weaker party (in this case: the consumer). Moreover, not only will these be provisions oriented specifically to protect the consumer, but rather all mandatory provisions of law that are protective in their nature.²³ It seems that domestic courts will primarily have to seek these provisions in the legislation implementing EU consumer protection rules. It may not be ruled out, however, that also specific separate regulations included in the public orders of the individual Member States will grant such protection to consumers.

5.17. The circumstances given above may undoubtedly have the impact of increasing the complexity of proceedings for the recognition or enforcement of arbitral awards in consumer cases. The application of the new control template may result in substantial problems for State courts, specifically due to the potential necessity of resorting to legal norms stemming from other public orders which so far do not constitute a significant point of reference for the verification of arbitral awards.

III.3. Change of the Arbitral Proceedings Model in Consumer Cases

5.18. The new regulation should also significantly influence the arbitral judiciary's approach to disputes where a consumer is a party. To guarantee the effectiveness of an arbitral award rendered in a consumer dispute (lack of possibility to effectively contest it in post-arbitral proceedings), arbitral tribunals currently have to take into consideration a new control template

²³ Compare BEATA WIĘZOWSKA-CZEPIEL, KODEKS POSTĘPOWANIA CYWILNEGO. KOMENTARZ DO ZMIAN WPROWADZONYCH USTAWĄ Z 23 WRZEŚNIA 2016 O POZASĄDOWYM ROZWIĄZYWANIU SPORÓW KONSUMENCKICH, Komentarz do Art. 1214, nb. 4, Lex/el. (2017).

established in Article 1214(3)(3) CCP and applied by State courts. This assumption interferes with one of the fundamental characteristics and advantages of arbitration – the flexibility of proceedings and, moreover, in a way limits the autonomy of parties' will. Not only in selecting the applicable law, but also in selecting the grounds of the ruling. The most explicit example of that is a circumstance that the above-given requirement for respecting the protection stemming from the mandatory provisions of law applies, on the grounds of the new Article 1194(3) CCP, also in arbitral proceedings in which the case is to be settled on the grounds of general rules of law or rules of equity.

- 5.19.** The regulation at issue directs the arbitral tribunal to a friendly disposition towards the consumer. The obligation of taking an adequate degree of consumer protection into account in a relationship with a trader arises regardless of whether the consumer is indeed the 'weaker' party of the legal relationship. Meanwhile, oftentimes the trader has no advantage over the consumer and in this situation favouring one of the parties of the dispute may lead to violating a fundamental principle of arbitral proceedings, i.e. the principle of the equal rights of parties, in Polish law established by Article 1183 CCP.
- 5.20.** Arbitral tribunals settling consumer disputes should display knowledge of not only mandatory provisions in the scope of consumer relations, but also the other provisions from which the protection granted to the consumer may result from. What is of relevance now, detailed criteria pertaining to the application of a specific provision are frequently ambiguous while they are given the final shape only by the case law. Despite the obligation to take into consideration the absolutely mandatory provisions protecting the consumer, in light of the Polish law, arbitral tribunals have not been granted the right to address State courts with queries regarding substantial issues related to the application of a given provision, neither do they receive any guidelines, recommendations, or indications regarding application of substantive law from State courts. In light of the arbitral tribunal's obligation, formulated in Article 1214(3)(3) CCP, to take into consideration the absolutely mandatory provisions of the law applicable to the contract a consumer is a party to (with the view of recognition or enforcement of an arbitral award), the described circumstance may breed practical problems. This is because an arbitral tribunal may not be familiar with the consumer law regulations of a foreign public order and

- it is not authorised to address a State court in this jurisdiction with a request for an interpretation of relevant provisions of law.
- 5.21.** Moreover, in the case of a conflict of laws, prior to rendering an award, arbitral tribunals are obligated to examine if there are grounds for the application of a corrective mechanism with the view of guaranteeing the consumer an adequate level of protection. Conducting reasoning like that may prove complicated. Consumer protection standards adopted in individual Member States may be highly diversified, since no single homogenous EU consumer law exists. As the literature correctly indicates, the consumer protection areas are to a large degree regulated in the context of harmonisation ordered by EU directives. The scope of implementation of these directives into national orders may, however, be different, ranging from a minimal standard up to a degree reaching significantly beyond the requirements of the directives. Additionally, the provisions of the State of consumer's residency will not grant the consumer more protection in each case. It may so happen that this protection will be identical or even smaller as the protection granted by the applicable law selected by the parties governing the contractual relationship.²⁴

IV. Recapitulation

- 5.22.** The solutions contained in the new Article 1214(3)(3) CCP substantially interfere with the institution of consumer arbitration and the previously established mechanism of the verification of arbitral awards in the context of post-arbitral proceedings. According to its assumptions, its goal, similarly as the goal of the new Article 1206(2)(3) CCP and Article 1194(3) CCP, is to guarantee that the legality principle stemming from Article 11 of the Directive is realised and to guarantee an increase of parties opting for consumer arbitration in the future.
- 5.23.** The domestic case law has not yet provided the insight that is necessary to carry out an analysis of the application of Article 1214(3)(3) CCP to arbitral awards. Neither do the published reports for the year 2017 regarding the activity of ADR entities offering consumer arbitration in Poland provide a foundation enabling one to draw any detailed conclusions on this issue.
- 5.24.** The new regulation forces arbitral tribunals to use provisions which grant the consumer a certain minimal protection standard and introduces strong connections between arbitration and EU law which to a large degree regulates the framework of

²⁴ ALEXANDER J. BĚLOHLÁVEK, ROZPORZĄDZENIE RZYM I I KONWENCJA RZYMSKA, KOMENTARZ, T. 1, Warszawa: C.H. Beck 1076 (2010).

national regulations oriented towards consumer protection. Adapting to the introduced solutions will oftentimes require arbitral tribunals to possess specialist knowledge in the scope of consumer law, including the knowledge facilitating a comparison of its application in different Member States. It is necessary for an arbitral award to be recognised or enforced, which, after all, is a key issue for the parties of a dispute (for a claimant consumer at least). Compliance with this condition should be, at least by assumption, feasible where disputes are settled by ADR entities listed in national registers in accordance with the provisions of the Directive. This is because these entities frequently specialise in specific sectors, and due to their function as an ADR entity, the area of their specialisation should, in particular, include regulations from the scope of consumer protection law. The practice will show if such qualifications prove sufficient and if the above-mentioned assumption is realised.



Summaries

DEU *[Ein neuer Grund für die Verweigerung der Anerkennung bzw. der Vollstreckung von Schiedssprüchen in Verbrauchersstreitigkeiten]*

Gegenstand dieses Beitrags ist eine Abhandlung zu dem in Artikel 1214 Abs. 3 (3) der polnischen Zivilprozessordnung verankerten neuen Grund für die Verweigerung der Anerkennung bzw. der Vollstreckung von Schiedssprüchen in Verbrauchersachen. Die Neuregelung datiert vom 10. Januar 2017 und hat ihren Ursprung in der Umsetzung des Artikels 11 der EU-Richtlinie über die alternative Streitbeilegung in Verbrauchersachen. Ziel des Artikels ist es, dem Leser die Bedeutung der Neuregelung nahezubringen, sowie deren Einfluss auf das Schiedsverfahren und auf das System der Kontrolle über Schiedssprüche, welche die allgemeinen Gerichte in dem an das abgeschlossene Schiedsverfahren anschließenden innerstaatlichen Verfahren ausüben. Die Autoren analysieren die Art und Weise, in der die Bestimmungen der besagten Richtlinie im polnischen Recht umgesetzt wurden. Dabei haben sie sich insbesondere auf die Beurteilung des inhaltlichen Geltungsbereichs der Bestimmungen der Richtlinie sowie der neuen Bestimmungen der polnischen Zivilprozessordnung konzentriert. Der hier abgehandelte Grund für die Verweigerung der Anerkennung bzw. der Vollstreckung von

Schiedssprüchen, die in Streitigkeiten mit Verbraucherbeteiligung ergangen sind, ist in Polen bisher nicht Gegenstand eingehenderer Diskussionen gewesen, und zwar weder in der gerichtlichen Praxis noch in der Lehre – und dies obwohl die Regelung dazu angetan ist, das System der Streitbeilegung zwischen Verbrauchern und Unternehmen im Rahmen von Verbraucherschiedsverfahren sowie die Anerkennung und Vollstreckung von in solchen Verfahren ergangenen Schiedssprüchen in erheblicher Weise umzuformen.

CZE [Nový důvod pro odmítnutí uznání nebo výkonu rozhodčího nálezů ve spotřebitelských věcech]

Předmětem tohoto příspěvku je pojednání o novém důvodu pro odmítnutí uznání nebo výkonu rozhodčích nálezů ve spotřebitelských věcech zakotveném v článku 1214 odst. 3 bod 3 polského občanského soudního řádu. Tato úprava byla zavedena dne 10. ledna 2017 v důsledku implementace článku 11 směrnice EU o alternativním řešení spotřebitelských sporů. Účelem tohoto článku je vysvětlit význam této nové úpravy a její vliv na rozhodčí řízení a na systém kontroly vykonávané nad rozhodčím nálezem obecnými soudy ve vnitrostátním řízení probíhajícím po skončení řízení rozhodčího. Autoři analyzují způsob, jakým byla ustanovení směrnice implementována do polského práva. Autoři se zejména zaměřili na posuzování věcné působnosti ustanovení směrnice i nových ustanovení polského občanského soudního řádu. Pojednávaný důvod pro odmítnutí uznání nebo výkonu rozhodčích nálezů vydaných ve sporech s účastí spotřebitele dosud nebyl předmětem podrobnější diskuse v polské soudní praxi ani teorii. Tato úprava však může významně přetvořit systém řešení sporů mezi spotřebiteli a podnikateli rozhodovaných ve spotřebitelském rozhodčím řízení a uznávání či výkon rozhodčích nálezů vydaných v těchto typech případů.



POL [Nowa podstawa odmowy uznania albo stwierdzenia wykonalności wyroku sądu polubownego w sprawach z udziałem konsumentów]

Artykuł omawia nową podstawę odmowy uznania albo stwierdzenia wykonalności wyroku sądu polubownego w sprawach z udziałem konsumentów ustanowioną w art. 1214 § 3 pkt 3 polskiego Kodeksu postępowania cywilnego. Regulacja weszła w życie 10 stycznia 2017 roku jako rezultat implementacji

Artykułu 11 unijnej dyrektywy w sprawie ADR w sporach konsumenckich (2013/11/UE z dnia 21 maja 2013 r.).

FRA [*Un nouveau motif de refus de la reconnaissance ou de l'exécution des sentences arbitrales en matière du droit de la consommation*]

Le présent texte a pour objectif d'examiner un nouveau motif de refus de la reconnaissance ou de l'exécution des sentences arbitrales en matière du droit de la consommation, prévu par l'article 1214, paragraphe 3, point 3, du Code de procédure civile polonais. Cette disposition a été adoptée le 10 janvier 2017 en transposition de l'article 11 de la directive européenne relative au règlement extrajudiciaire des litiges de consommation (directive 2013/11/UE du 21 mai 2013).

RUS [*Новая причина для отказа в признании или приведении в исполнение арбитражного решения в потребительских спорах*]

В данной статье рассматривается новая причина для отказа в признании или приведении в исполнение арбитражных решений в потребительских спорах, установленная статьей 1214 п. 3 абзац 3 польского Гражданского процессуального кодекса. Это регулирование было внедрено 10 января 2017 года как результат имплементации статьи 11 Директивы ЕС «Об альтернативном рассмотрении потребительских споров» (Директива 2013/11/ЕС от 21 мая 2013 года).

ESP [*Nuevo motivo para la negación del reconocimiento o de la ejecución del laudo arbitral en materia de consumo*]

El presente texto trata de un nuevo motivo para no reconocer o no ejecutar el laudo arbitral en materia de consumo anclado en el artículo 1214, párrafo 3, punto 3, del Código de procedimiento civil de Polonia. Dicha legislación fue introducida el día 10 de enero del 2017 a consecuencia de la implementación del artículo 11 de la Directiva de la UE relativa a la resolución alternativa de litigios en materia de consumo (Directiva 2013/11/UE del 21 de mayo del 2013).



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