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# Conflict of interest in corporate disputes arbitration

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Corporate disputes have not yet gained momentum on the Polish arbitration market, despite recent legislative amendments. A recent Supreme Court case involving the assessment of a corporate arbitration dispute deserves attention, as it clarified that in the case of a dispute over the control of a company, one centre of interest is not able to appoint two arbitrators – one for the company and one for its shareholders.[(1)]

### Facts

The case involved the shareholders' meeting of a company (S). During this meeting, all the board members were dismissed, including A, and a new board was introduced, comprising B and C.

V, an Italian company and a minority shareholder, boycotted the meeting and requested that the regional court declare the resolutions invalid. It also motioned the regional court to declare the resolutions ineffective for the duration of the proceedings. The regional court allowed this motion to a large extent.

Under Polish law, the defendant in such proceedings was the company itself. The company invoked an arbitration agreement, but the regional court did not refer the parties to arbitration. It claimed that the case for

declaring a shareholders' meeting resolution invalid was not arbitrable as the parties could not conclude a settlement in such a case. The regional court's decision became final and binding.

Despite that, another shareholders' meeting of S was convened, and similar resolutions were adopted. V extended its claim against these resolutions as well and motioned for the court to declare the repeated resolutions invalid. V motioned the regional court to stay the effects of the resolutions for the duration of the proceedings, and the court allowed the motion.

However, S appealed, and the court of appeal repealed the regional court's order and dismissed (to a large extent) both of V's motions for staying the effects of the resolutions. This meant that the changes in the board of S were effective.

Along with initiating litigation, V launched ad hoc arbitration based on an arbitration clause in S's articles of association. A (a dismissed board member introduced by V) appointed an arbitrator on behalf of S. V appointed the second arbitrator, and the two arbitrators appointed the presiding arbitrator. S questioned this appointment and the tribunal's jurisdiction and refused to participate in the proceedings, arguing that V had de facto nominated the panel's majority.

The arbitral tribunal disagreed with V and declared itself competent, finding no irregularity in its formation. This was a majority decision as the presiding arbitrator issued a dissenting opinion, agreeing with S that it had been deprived of the right to appoint an arbitrator. The presiding arbitrator also stepped down from the case.

S appealed this decision on jurisdiction but was late with filing, and the regional court rejected its motion on formal grounds.

After the presiding arbitrator stepped down, the co-arbitrators nominated another chairperson. S repeated its arguments on defective appointments but again refused to participate in the proceedings.

The tribunal agreed with V and declared all the attacked resolutions invalid. S (after V lost control over it) motioned to set the award aside.

**Court of appeals**

The court of appeals agreed with S and set the tribunal's award aside.

First, the court of appeals found that when A nominated the arbitrator on behalf of S, it was formally a board member of S. This is because the regional court stayed the effects of a resolution revoking A from S's board.

That said, A could not act on behalf of S due to a conflict of interest. The court of appeals invoked the Supreme Court's case law: a shareholder, who has attacked a given resolution, and was a board member of the company, cannot act on behalf of the company in the proceedings. Polish law provides for a company's representation by a proxy or a curator in such a situation. The fact that V had obtained a favourable freezing injunction, staying the effects of the challenged resolutions, was irrelevant.

For these reasons the court of appeals agreed that S had proved that the composition of the arbitral tribunal was defective (article 1206(1)(4) of the Polish Code of Civil Procedure, being the implementation of article 34(2)(a)(iv) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law)). The court found that this also amounted to a violation of procedural public policy (article 1206(2)(2) of the Polish Code of Civil Procedure, being the implementation of article 34(2)(b)(ii) of the UNCITRAL Model Law). The court of appeals invoked the right to a fair trial.

Secondly, the court of appeals found that the dispute in relation to declaring a shareholder's resolution invalid was not arbitrable. This is because the parties could not conclude a settlement, a prerequisite for arbitrability under article 1157 of the Polish Code of Civil Procedure.

V filed a cassation complaint to the Supreme Court.

**Supreme Court**

The Supreme Court dismissed V's cassation complaint. After a thorough analysis, the Supreme Court agreed with the court of appeals that A could not represent the company in arbitration and appoint an arbitrator on S's behalf. This was because of the conflict of interest, and such a situation required the company to be represented by a proxy or a curator. The Supreme Court applied Polish company law extensively in relation to conflicts of interest when deciding whether a company has to be represented by the ultimate beneficial owner of a shareholder who

initiates proceedings against a company. The Supreme Court found that the same centre of interest (V) had appointed two co-arbitrators, which rendered the tribunal's composition defective.

Having found such violation, the Supreme Court did not examine whether the dispute was arbitrable or whether the defects in the tribunal's composition amounted to a violation of public policy.

**Comment**

It is hard to argue that the decision is correct. One of the party's rights was violated in the arbitration. A dissenting opinion of the presiding arbitrator and his stepping down while rendering the decision on jurisdiction proves that one party de facto appointed two arbitrators. This cannot stand.

However, it could be argued whether such a situation indeed refers to a violation of the composition of the arbitral tribunal or, instead, to a different basis for setting aside or refusing enforcement of an award, namely preventing a party from presenting its case (article 1206(1)(2) of the Polish Code of Civil Procedure, being the implementation of article 34(2)(a)(ii) of the UNCITRAL Model Law). This is because, in such a case, not only could a party be prevented from appointing its arbitrator, its board (controlled by a shareholder in dispute with the company) could have also selected counsel and/or presented its position in the proceedings. These activities of the company should also be regarded as defective. Preventing a party from presenting its case is a more reasonable and general basis for this.

Further, the Supreme Court should have corrected two other opinions made by the court of appeals. First, contrary to the court of appeals' view, shareholders' disputes are arbitrable in Poland. Second, the fact of whether violations of the party's right to appoint an arbitrator amount to a violation of public policy is questionable, especially given that there is a separate provision to challenge the award on that basis.

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**Endnotes**

(1) Judgment of Polish Supreme Court of 17 June 2021, file ref No. V CSKP 30/21, available in Polish here.