2020 Statistics of Polish Post-Award Case Law: Is Poland Arbitration-Friendly?

Arbitration has been well-established in Poland already before and throughout the 1920s. It has, however, experienced a downturn between 1945 and 1989 due to the distrust of the Polish state. The winds had changed in the 1990s when arbitration started to flourish again.

Since then, the Polish parliament introduced several reforms previously discussed on this blog, e.g.:

- implementation of the UNCITRAL Model Law in 2005 (in its initial 1985 version, without the amendments adopted in 2006);
- shortening the timeline of post-award proceedings in 2016;
- implementation of the EU law on consumer arbitration in 2017;
- introduction of detailed rules for arbitration of corporate disputes in 2019.

This blog post looks at how the law operates and analyzes the statistics of post-award cases decided by Polish courts in 2020 to determine whether Poland is an arbitration-friendly jurisdiction.

EMPIRICAL SURVEY OF 2020 POLISH POST-AWARD CASE LAW

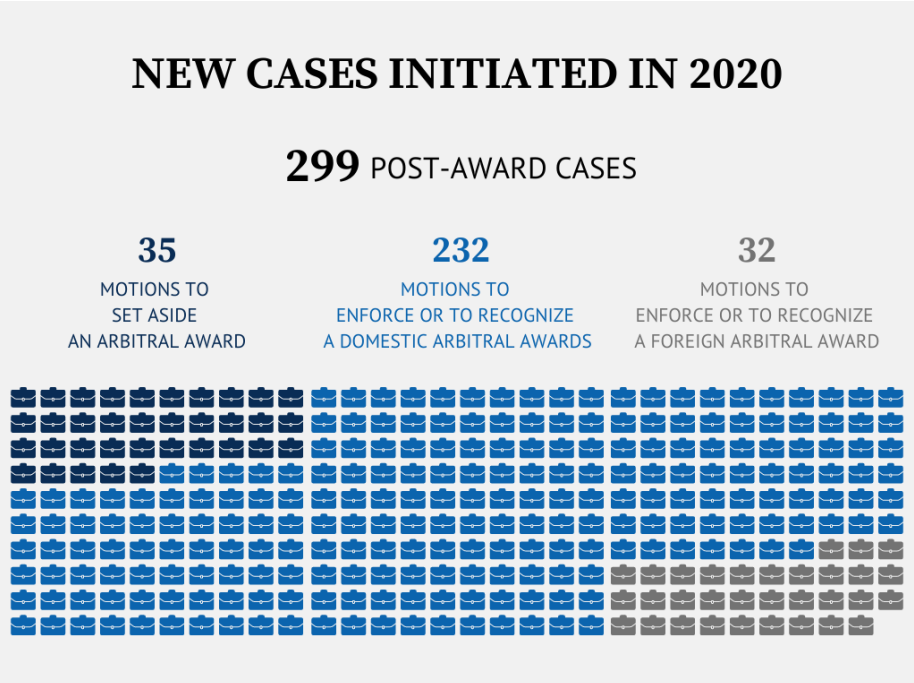
Polish "law in books" does not differ from lex arbitri of leading arbitration-friendly jurisdictions. We have, however, asked ourselves what the state of the "law in action" is.

While there is some anecdotal evidence on the state of arbitration in Poland, it is not sufficient to draw definitive conclusions. Therefore, to answer our question, we have decided to conduct an empirical survey of 2020 post-award case law originating from 11 Polish Courts of Appeal, i.e. the courts that have jurisdiction at the post-award stage.

STATISTICS

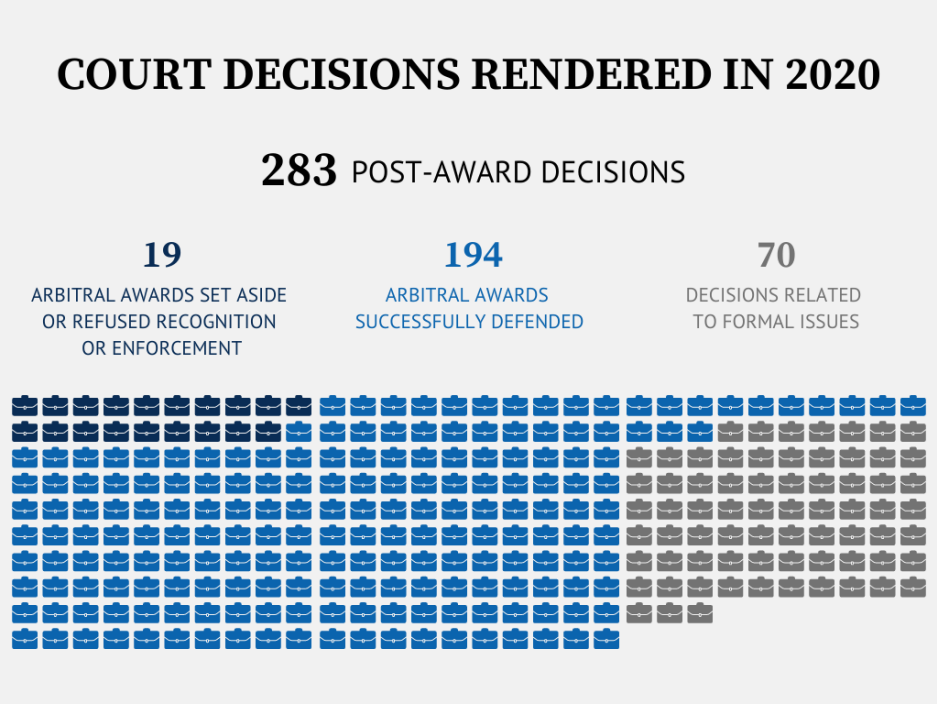
Following our survey, we have been able to put together the following statistics, i.e. the "hard facts":

1. ***New cases***

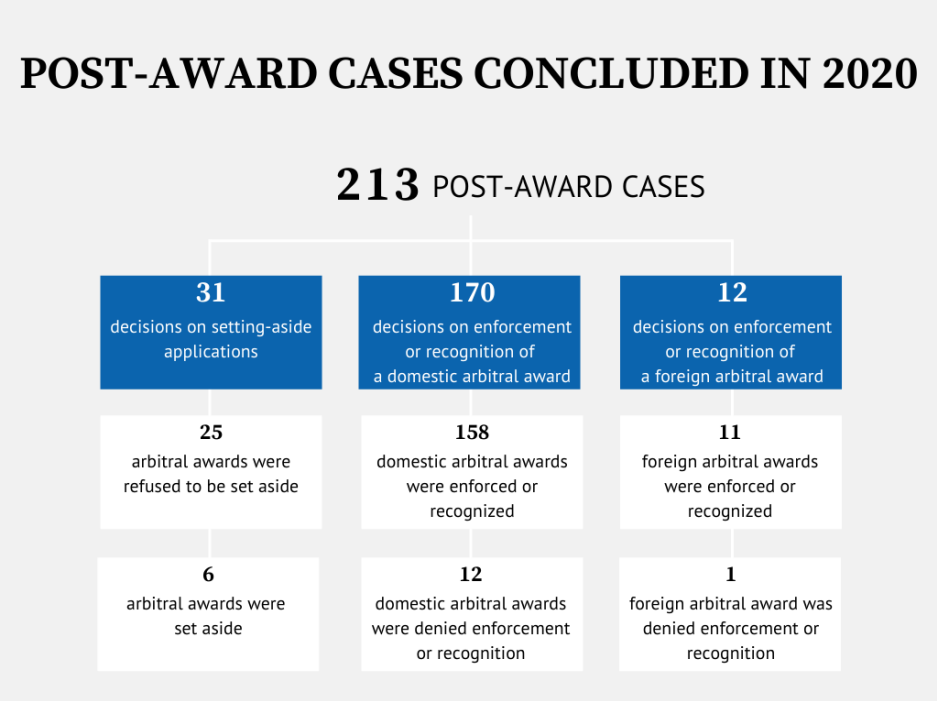


In 2020, parties initiated 299 cases related to the post-award stage. In particular, 35 motions were filed to set aside an arbitral award, 232 motions to enforce or to recognize a domestic arbitral award, and 32 applications to enforce or to recognize a foreign arbitral award.

2. Court decisions



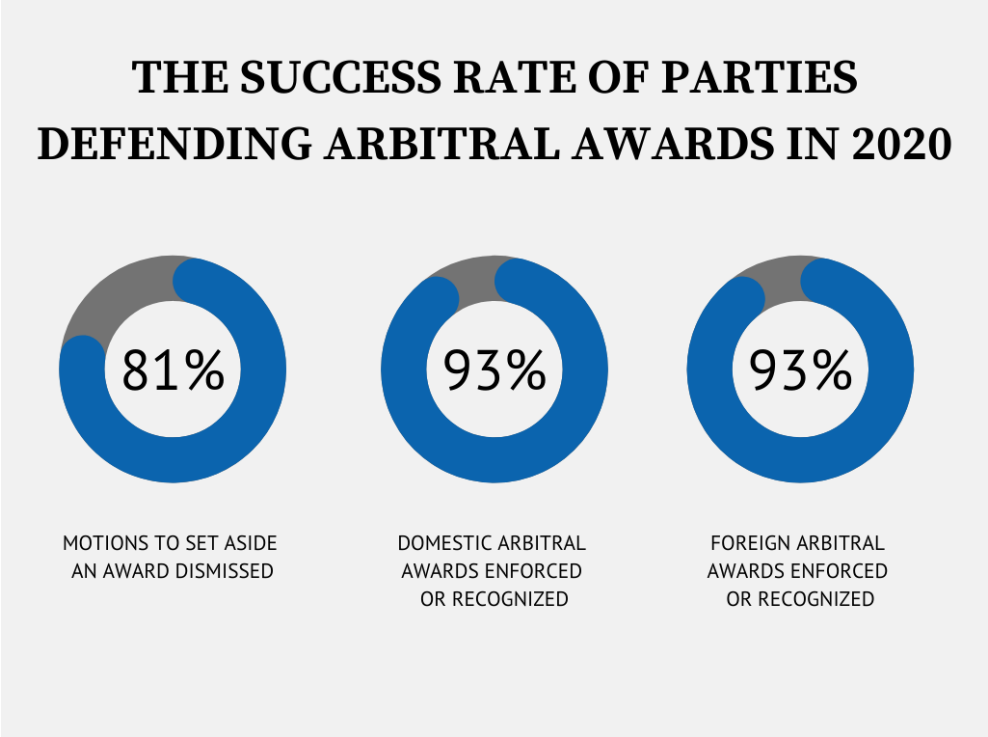
Polish Courts of Appeal issued 283 decisions in 2020 in post-award cases. Out of this number, 70 decisions related to formal issues, e.g., in cases where proceedings were withdrawn. We have therefore excluded these from consideration.



In 2020, the courts ruled on 31 setting-aside applications (approximately 15% of all rendered non-formal decisions), 170 applications for recognition or enforcement of domestic awards, and 12

applications for recognition or enforcement of foreign awards (approximately 85% of non-formal decisions).[1]

Out of the 213 decisions, only in 19 cases (approximately 9%) awards were set aside or refused recognition or enforcement. Successful parties, therefore, defended 194, i.e. more than 91% of awards before Polish courts.



Out of the 31 setting-aside proceedings, awards were set aside only in 6 cases, i.e. the courts refused to set aside awards in approximately 81% of cases.

Out of the 170 recognition or enforcement proceedings for domestic awards, 158 (approximately 93%) were successful.

Out of the 12 recognition or enforcement proceedings for foreign awards, 11 (approximately 93%) applications were granted, and only one was refused.

The Warsaw Court of Appeal heard 30% of all cases considered by Polish courts at the post-award stage and took the longest to conclude a case.

CONCLUSIONS AND FURTHER THOUGHTS

First, the fact that there were relatively few setting-aside applications (15% of all post-award cases) is, in our view, due to two reasons. Polish law provides for a narrow standard of review for arbitral awards. The grounds for recourse are limited and based mainly on the UNCITRAL Model Law. Furthermore, the court fee for recognition or enforcement is relatively low (PLN 300 or EUR 65). Conversely, the court fee for a motion to set aside an arbitral award depends on the amount in dispute (5% with a cap

[1] We have assumed these numbers to be correct. However, the courts have informed us that they have recorded a slightly higher volume of decisions in their statistics: 37 setting-aside decisions (compared to the 31 we received), 206 domestic recognition or enforcement decisions (compared to the 170 we received), 22 foreign recognition or enforcement decisions (compared to the 12 we received). The discrepancy may be due to the fact that courts have discontinued a number of cases due to formal reasons, e.g., where a party has withdrawn the application or failed to produce the necessary documents. If the courts have issued more decisions than we received, we believe our 80% sample remains sufficient, i.e. 213 decisions considered of the 265 decisions recorded in court statistics.

of PLN 200,000 or EUR 44,000). The fact that a party needs to pay a significant court fee and usually has a relatively low chance of success may discourage it from filing the motion to set aside an arbitral award.

In turn, the number of successful setting-aside motions (6 out of 31, or 19%) may indicate that where a party decides to file the motion, it appears to have a good reason to do so. The rate of success in setting-aside proceedings is also almost three times higher than the rate of successful defense against an application to recognize or enforce an award (approximately 7%).

Second, awards survived in more than 90% of post-award cases considered by Polish courts. In our view, this is good news for the parties. In most jurisdictions, there are instances where arbitral awards fall at the post-award stage, and there are bound to be some of such cases in Poland as well. In particular, it is great to see that courts enforced or recognized 11 foreign arbitral awards and refused recognition or enforcement only once. This is important as in proceedings for recognition or enforcement of a foreign award the courts typically perform a more detailed review than in recognition or enforcement of a domestic award. In the former case, the review is based on Article V of the New York Convention. In turn, in the latter case, i.e. for domestic awards, the court can refuse enforcement or recognition only for three reasons (non-arbitrability, violation of public policy, and violation of consumer rights). The limited standard of review stems from the fact that setting-aside proceedings, providing a standard of review based on Article 34 of the UNCITRAL Model Law, are the main forum for more precise control of a domestic award under Polish law.

Third, the information that courts provided within our survey was not specific as to the length of proceedings. However, judging by the file reference number, we deduced that ⅔ of cases for recognition or enforcement started and ended in 2020, and ⅓ started in 2019 and ended in 2020. These numbers improve when the caseload of the Warsaw Court of Appeal – which is overloaded by the number of cases on its docket – is excluded from the statistics. Out of the setting-aside proceedings that ended in 2020, 30% started in 2018, 52% in 2019, and 20% in 2020 (the numbers would be 0%, 62%, and 38%, respectively if the statistics from the Warsaw Court of Appeal are excluded). These numbers show that courts consider cases for recognition or enforcement relatively fast.

Fourth, Anna Tujakowska recently presented her study on institutional arbitration in Poland. The research shows that parties initiated approximately 200 cases before Polish arbitral institutions in 2019 and 300 in 2020 (a rise of 36%). There is a similar 33% rise between the number of post-award cases that ended in Poland in 2020 (201 decisions referring to domestic awards out of 213) and the number of cases at the post-award stage that started in Poland in 2020 (267 proceedings referring to domestic awards out of 299). Continuous statistical analysis in the coming years will verify whether there is a correlation between the rise of arbitral and post-award proceedings.

Finally, only six court decisions out of 283 that we obtained referred explicitly to ad hoc arbitration. More cases could potentially relate to ad hoc proceedings, but court decisions are frequently redacted in a way that did not allow us to draw definitive conclusions on this point. However, the information we did see suggests that the vast majority of the arbitral awards subject to setting aside and recognition or enforcement proceedings in Poland appear to have been rendered in proceedings administered by Polish arbitral institutions. The presence of Polish parties before foreign institutions is also significant and often rising. In 2020 Poland ranked second in the CEE region on the number of LCIA cases and third in ICC cases. Therefore, Polish parties seem to prefer institutional arbitration over ad hoc proceedings.

Of course, measuring arbitration-friendliness based on statistics has its limitations. For instance, several cases in which the Warsaw Court for Appeal refused to enforce domestic awards relate to proceedings between the same parties. Thus, more than one award could pertain to one dispute and be potentially

tainted with the same irregularity. Also, the reasons for the defectiveness of an award are rarely obvious. Conversely, there might be dozens of simple cases that increase the numbers in the statistics. However, it is a fact that only a few percent of arbitral awards fall at the post-award stage in Poland. This is a sign that Poland indeed is an arbitration-friendly jurisdiction, at least considering the numbers. We will continue our research in the future and try to establish yearly patterns.