

## **POLAND | Arbitration and impecunious parties**

Landmark decision of the Polish Supreme Court on the inability to bear the costs of arbitration as a reason for lack of arbitral tribunal's jurisdiction, commented by Kubas & Kos Gałkowski

### **INTRODUCTION**

Not many recent decisions of the Polish Supreme Court have stirred the "arbitration pot" in Poland quite as much as the one issued on 19 January 2024 (file ref. no II CSKP 897/22). The decision relates to a somewhat controversial topic, i.e., whether the party's financial situation causing an inability to bear the costs of arbitration may be the reason to deny the jurisdiction of the arbitral tribunal due to the arbitration agreement's incapability of being performed. In the abovementioned decision, the Polish Supreme Court joined the worldwide discussion on the matter and presented a view that that may be the case in some situations.

### **FACTUAL BACKGROUND**

The decision at hand was rendered based on the following factual circumstances and pertained to a domestic arbitration.

The plaintiff brought an action before a state court. The defendant argued that an arbitration agreement covered the claim, and on that basis, the Regional Court in Warsaw rejected the plaintiff's action.

The Regional Court in Warsaw rejected the view that the plaintiff's financial situation should affect the arbitration agreement. It held that a party bound by the clause should always be seen as responsible for its ability to pay the arbitration fees required by the arbitration rules by which it was bound.

The plaintiff lodged a complaint against the decision in the Court of Appeals in Warsaw. However, the Court dismissed the complaint and shared the view presented by the Regional Court. The Court of Appeals underlined that the grounds of unenforceability of an arbitration agreement should be objective and permanent. In the present case, the plaintiff did not prove that it was permanently prevented from incurring the costs of the arbitral proceedings. The plaintiff has appealed this decision to the Supreme Court, which set aside the decision of the Court of Appeals, which means that the Court of Appeals will rehear the case.

### **THE RATIONALE PRESENTED BY THE SUPREME COURT**

The Supreme Court began the analysis by pointing out that the arbitration agreement was an expression of the parties' autonomy of will; however, due to the fundamental nature of a constitutional right to a court, the parties' autonomy could not be perceived as unlimited. The Supreme Court found that a right to a court and adequate judicial protection took precedence over the autonomy of parties and *pacta sunt servanda* embodied in the arbitration agreement.

Further, the Supreme Court underlined that as an arbitration clause was not tantamount to a waiver of judicial protection, one of the presuppositions for its effectiveness must be the availability of the forum agreed by the parties—in other words, the possibility of obtaining adequate legal protection before an arbitral tribunal.

The Supreme Court underlined that in some instances, the legal fees required to initiate arbitration proceedings may constitute an objective barrier to access to court and arbitral tribunal. However, while

before a state court, a party's financial situation may be mitigated by obtaining financial aid (exemption from court fees), such exemption was not a common mechanism in arbitration. In such a scenario, the absence of such a possibility in arbitration may constitute an obstacle and make access to the arbitration effectively impossible. The rejection of an action brought before a state court in the event of an objective impossibility to commence arbitration proceedings based on the plaintiff's impecuniosity, in that case, would be tantamount to depriving the party of judicial protection in general – its case would be heard neither by the state court nor by the arbitral tribunal.

The Supreme Court then referred to and shared the view presented by courts in other jurisdictions (e.g., Germany, Liechtenstein, Portugal) and stated that while objective inability to bear the arbitration fees would not lead to the expiration (termination) of the arbitration agreement, it may entail its incapability of being performed.

In the end, the Supreme Court pointed out that the discussed solution should be perceived as a last resort (*ultima ratio*) that may only be invoked if the arbitration rules do not allow any other remedies, e.g., the temporary bearing of the costs by the arbitration institution or by the opposing party. It must also be preceded by a careful analysis of the facts of the cases and evaluated on a case-by-case basis, including from the abuse of rights perspective.

## **COMMENT**

The perception of the Supreme Court's commented decision varies throughout the Polish arbitration community. Of course, the format of this publication does not allow us to evaluate every aspect of the decision critically.

Our aim was instead to show the legal community the following:

- a. Poland has become yet another jurisdiction where a party's impecuniosity might affect the arbitration agreement. Therefore, careful evaluation is required when commencing and conducting disputes with parties that might not have the funds to initiate arbitration.
- b. It is not yet clear whether and how other Polish courts will apply the principles outlined in the Supreme Court's decision, as this decision does not bind the courts from a legal standpoint.
- c. It is not yet clear whether and how the decision will affect the practice of Polish arbitral institutions, the Polish legal regime, and the practice of arbitration.