EXPERT DISPUTE RESOLUTION

A GAME-CHANGER FROM THE SUPREME COURT


Paweł Bukiel and **Vladyslav Semerynskyi** from Squire Patton Boggs Warsaw write about what lies in store for arbitration clause unenforceability.

Recently, the Polish Supreme Court has issued a precedence-setting ruling. The court rendered the arbitration clause void if the claimant cannot pay the arbitration fees. The ruling has caused a massive uproar amid the Polish arbitration circles. It may have far-reaching consequences for the future of Polish arbitration, as it puts in doubt the fundamental principle of the parties' liberty to choose the dispute resolution method.

In its January 19, 2024 ruling in II CSKP 897/22, the Supreme Court undermined the hitherto pervasive assumptions, arguing that an objective inability to pay the arbitration fees should render the arbitration clause void. Such an interpretation jeopardizes the cornerstone of arbitration, that is the parties' sole discretion to choose the forum to resolve their disputes. However, given the novel nature of the ruling, it remains unclear how, and whether at all, the courts will apply the guidelines set by the Supreme Court in its ruling.

NO MONEY, NO RULING

In the matter that gave rise to the January 19, 2024 ruling, the Supreme Court probed the Warsaw Appeals Court ruling on dismissing the action, following the claimant alleging the arbitration clause. In the cassation request, the claimant alleged that the Warsaw Appeals Court, among other things, had breached Article 1165(2) of the Polish Civil Procedure Code, read with Article 45(1) of the Polish Constitution and Article 6(1) of the European Convention on Human Rights.

In principle, if the claimant alleges the existence of the arbitration clause, the court must dismiss the action. However, under Article 1165(2) of the Polish Civil Procedure Code, the action will not be dismissed if the arbitration clause is rendered void. Article 45(1) of the Polish Constitution and Article 6(1) of the European Convention on Human Rights, in turn, set the foundations for the right to have one's matter fairly and openly resolved by a competent, independent and impartial court. During the proceedings, the claimant argued that it could not afford the arbitration fees, which precluded it from commencing the proceedings. It emphasized that had the matter gone to trial, it could have sought a court fee relief. Therefore, according to the claimant, dismissing its action and referring the matter to arbitration would have breached its Constitutional right to a fair trial.

In its January 19, 2024 ruling in II CSKP 897/22, the Supreme Court repealed the challenged Warsaw Appeals Court ruling. The Supreme Court agreed that: "an objective inability to pay the fees necessary to commence and complete the proceedings before the arbitration court may render the arbitration clause void as provided for in Article 1165(2) of the Polish Civil Procedure Code".

INTO THE VOID

The arbitration clause is rendered void if the arbitration court is unable to hear the matter. In its ruling dated 5 February 2014, case file no.: V CSK 231/14, the Supreme Court ruled that the arbitration clause is void if "it transpires that the arbitration court is unable to hear the matter, as per the arbitration clause, either because it is impossible to appoint the arbiters or circumstances are precluding the arbitration court, referred to in the arbitration clause, from hearing the matter, or if both these prerequisites exist jointly and the agreement in place between the parties does not provide otherwise".

The arbitration clause is also void if it is vague or contradictory to the extent the dispute may not be resolved by drawing on it. An example of such vagueness is an inability to determine the arbitration court of the parties' choosing. Also void is the arbitration clause where the parties have indicated a nonexistent arbitration court or if any other specific laws stand in the way of applying it.

When assessing whether or not the arbitration clause is effective, one should draw primarily on reviewing its very language and the circumstances under which it is applied—that is, for instance, whether the arbitration court of the parties' choosing exists.

PARTIES' AUTONOMY

Arbitration owes its very existence to the parties' intentions. The arbitration clause, as the "centerpiece" of arbitration, is also a testament to the parties' autonomous intentions in deciding to refer their dispute to arbitration.

The arbitration clause is a trial agreement. Thereunder, the parties waive the common courts' jurisdiction over certain matters. As the Supreme Court rightfully indicated in its November 16, 2016 ruling in I CSK 780/15: "When including certain provisions in the arbitration agreement, the parties must be aware of their meaning and consequences".

A natural consequence including the arbitration clause is waiving certain institutions associated with the common courts in favor of others—available only in arbitration. By way of an example, when including the arbitration clause, the parties willingly waive the court fee relief.

The arbitration clause does not infringe on the constitutional right to have one's matter fairly and openly resolved by a competent, independent and impartial court, as provided for in Article 45(1) of the Constitution and Article 6(1) of the European Convention on Human Rights. This is because the parties may still refer their dispute to arbitration. Besides, third-party funding or other dispute resolution funding mechanisms, which have been also gaining popularity in Poland, have been currently compen-

sating for no court fee relief in arbitration.

INTERNATIONAL CASES

Courts of many jurisdictions have pondered arbitration clause unenforceability due to no funds for commencing and completing the arbitration proceedings. The rulings issued in various countries differ significantly.

In its resolution dated 12 July 2017 in N 307-ЭС17-640, А56-13914/2016, the Russian Supreme Court said that the party's (a commercial company) distress may not, in and of itself, render the arbitration clause void. According to the Supreme Court, no funds for commencing the arbitration proceedings does not oblige the common court to hear the matter as to its substance if the parties had included a valid and enforceable arbitration clause in their agreement.

An identical ruling was issued earlier by the Russian Circuit Court for the Northwestern Circuit, dated July 8, 2016, in А56-50929/2015.

The German Bundesgerichtshof has adopted an entirely contradictory and unique view. In its ruling dated September 12, 2000, in III ZR 33/2000, Bundesgerichtshof said that the claimant's lack of funds may render the arbitration clause void. In the court's opinion, such a solution will enable the party that does not have the funds at its disposal to refer the matter to the common court.

The third concept, found in British jurisprudence, is reflected in the ruling in Paczy vs. Haendler & Natermann G.m.b.H. Thereby, insufficient funds to commence and complete the arbitration proceedings may constitute reasonable grounds for rendering the arbitration clause void only if such lack of funds is directly linked to the breach in dispute. This approach is somewhat of a compromise between the above rather extreme concepts, though it seems to be leaning towards the former. However, it allows a specific exception to the rule.

SUMMARY

In the January 19, 2024 ruling in II CSKP 897/22, the Supreme Countr reframed the notion of arbitration clause unenforceability due to lack of funding, and it has spurred the arbitration circles to debate and reflect on the future shape of Polish arbitration. The ruling has changed the orthodox practices and may have far-reaching ramifications for the parties' autonomy in choosing the dispute resolution method and the arbitration system's general stability.

An innovative and equitable approach to the law is desired. However, it should not significantly deviate from the fundamental principles and well-established practices underlying the system. In this context, if the courts choose to apply the Supreme Court's most recent guidelines, they should exercise great caution and do so only under exceptional circumstances. The Supreme Court has yet to publish the grounds for its ruling. It is essential for such grounds to set the precise boundaries and conditions for applying the proposed concept, which will be instrumental in ensuring clarity, integrity and predictability of the arbitration practice.

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