Chapter 10

Investment Treaty Arbitration

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1. Introduction

Significant changes in the area of international arbitration concerning the protection of foreign investments which have taken place during the last 30−40 years have influenced arbitration in Poland. This chapter will describe the Polish legal environment of investment arbitration, in particular matters concerning Poland being a place of investment arbitration or a country in which the award rendered by an investmet tribunal is enforced. It will also discuss issues related to Poland being a defendant in investment arbitration proceedings. It should be emphasized that although Poland has not been chosen as a place of investment arbitration yet, there are no legal obstacles for investment disputes to be resolved before the Court of Arbitration at the Polish Chamber of Commerce or any other arbitral tribunal in Poland.

Little more then a decade ago, investment treaty arbitration was virtually unknown beyond the circles who were involved in negotiations of investment protection treaties. Even then the parties involved in drafting these treaties, most likely, were not aware of the rapid change that was going to take place within the not so distant future. The proliferation of investment treaties providing for arbitration as a means of resolving disputes between investors, and states arising out of these treaties, caused a revolutionary development in international adjudication. The system entered the public mindset in the mid-90's after several claims were brought under NAFTA and numerous bilateral investment treaties (BITs). Investment arbitration became a new prong of arbitration.

Although commercial arbitration and investment arbitration have many common features, there exist significant differences.

The main one is that the arbitral tribunals resolving treaty claims have

been equipped with a comprehensive jurisdiction to review sovereign acts of the state by applying broadly worded standards of investment protection and, as such, they are empowered to resolve core matters of international law. Until recently, no *ad hoc* arbitral tribunal privately contracted was competent to rule on the compliance of a state's sovereign acts with international law in the field of foreign investment protection.

Second, in contrast to commercial arbitration, where the jurisdiction of the arbitral tribunal is based exclusively on a valid arbitration clause contained in the agreement between the parties, the authority of the tribunal in an investment dispute usually emanates from an interplay of parties' consent, and objective legal rules contained either in the investment protection law of the host state, or in a bilateral or multilateral investment treaty. Such laws and treaties contain a public offer of the state to arbitrate. This offer may be accepted by an investor as a consequence of which an agreement to arbitrate is reached and the investor is entitled to initiate arbitration proceedings.

In the nineteenth and most of the twentieth century, international courts and tribunals rarely had jurisdiction over disputes concerning state regulation of foreign nationals. The disputes were customarily resolved in procedures in which the states were parties, not the interested individuals. Thus, private parties' access to international arbitration was limited, to say the least. This has changed since bilateral and multilateral investment treaties have become the dominant international instruments through which foreign investment is protected. As a consequence, investors have gained the right to pursue their own claims against states before international arbitral tribunals. All of this equally applies to Poland and thus influences Polish arbitration practice and regulations.

2. Legal sources of investment arbitration

2.1. Bilateral investment treaties

Poland has entered into over 60 bilateral investment treaties, together with all major capital exporting countries. These BITs set out general standards upon which an investor doing business in Poland is entitled to rely on. Poland as a host country undertook in these BITs to treat foreign investments in accordance with international standards, in particular not to unlawfully expropriate or discriminate against its own nationals and nationals of other states. Furthermore, these BITs guarantee investors fair and equitable treatment, full protection and security and free transfer of funds.

All BITs provide for the possibility of resolving disputes between foreign investors and host states through international arbitration. Consequently,

investors can rely on the BITs concluded between their home state and Poland, for the purpose of bringing their claims before international arbitral tribunals. In addition, the possibility of avoiding the domestic common courts of the host state is of great significance for the investor.

2.2. Multilateral investment treaties

Poland is a party to only one multilateral investment treaty, namely the Energy Charter. To date, the Energy Charter has been signed or acceded to by 51 states, the European Community and Euratom (the total number of its members is therefore 53). The fundamental aim of the Energy Charter is to strengthen the rule of law on energy issues, by creating a set of rules to be observed by all participating governments, thereby mitigating risks associated with energy-related investment and trade. The treaty protects foreign investors against non-commercial risks such as discriminatory treatment, direct or indirect expropriation, or breach of individual investment contracts. It offers similar protections to energy sector investors as do BITs to investors from other sectors.

It is worth mentioning that Poland is not a signatory of the ICSID Convention. Although the Convention does not include material provisions on investment protection, it has become one of the most important international instruments in the field of investment treaty arbitration. The ICSID Convention defines the basic procedural framework for conciliation and arbitration of investment disputes arising between member countries (being parties to the Convention) and investors that qualify as nationals of other member countries. ICSID does not conciliate or arbitrate disputes; it provides the institutional and procedural framework for independent arbitral tribunals constituted in each case to resolve the dispute.

3. Investment dispute resolution clauses in Polish BITs

Taking into account the number of BITs entered into by Poland, this section will be limited to a general overview of jurisdiction clauses only. It is common ground among academics and practitioners that when it comes down to details, there are no typical features of BITs. It is often a small difference in the wording that makes all the difference in the treaty interpretation.

The vast majority of Polish BITs include widely phrased jurisdiction clauses. They provide that either: (i) all disputes (e.g. BITs with Spain, Netherlands, Canada) or (ii) disputes in relation to the investment (e.g. BITs with Austria, Finland, USA), or (iii) disputes concerning breaches of the BIT, between investors and Poland, may be referred to international

arbitration. In these cases, there are no doubts that the investors' claims resulting from the breach of BIT by Poland may be resolved before an arbitral tribunal. Several BITs provide that the jurisdiction of the arbitral tribunal is limited to claims arising out of breaches by Poland of specific treaty provisions, usually those concerning expropriation, nationalization, amount of compensation, and fair and equitable treatment (eg. BITs with The United Kingdom and Switzerland). Remedy for breaches of other treaty provisions may be sought by investors before domestic courts in Poland.

All BITs allow the investor to choose between rules under which the dispute may be resolved. Most common are ICC Rules, UNCITRAL Rules, Additional Facility Rules, ICSID Convention, or regulations agreed by the parties. The jurisdictional provisions of an investment treaty usually offer the investor a choice between two or three options. The investor needs to notify Poland of his choice and, as a consequence, it is considered that an arbitration agreement between the parties is reached.

In the case of the Energy Charter the investor may chose to submit the dispute for resolution, following a three month negotiation period, to: (i) the domestic courts of the host state, or (ii) a previously agreed dispute resolution procedure, or (iii) international arbitration. If the investor takes the last option, he then has to make a further choice between the ICSID Convention (including Additional Facility Rules), UNCITRAL Arbitration Rules, or SCC Rules.

It is worth noting that over 70% of BITs entered into in Poland opt for the ICSID Convention as a basis of resolving investment disputes. However, as Poland did not sign the Convention, this possibility is not available for the time being. Therefore, these BITs stipulate that until Poland joins the ICSID Convention, the arbitration proceedings may be conducted pursuant to Additional Facility Rules. In such an event, the arbitration is administered by the ICSID, but the provisions of the Convention are not applicable to such proceedings. The main differences between arbitrations under Additional Facility Rules and the ICSID Convention are that in the latter case: (i) the arbitral awards must be recognized and enforced by states as if they were final judgments of their own common courts (no need to apply for recognition or enforcement by the common court), (ii) recourse to local courts is excluded (awards cannot be challenged before common courts, even on the narrow basis provided for in the New York Convention), and (iii) either party may file an application for annulment of the award to the *Ad hoc* Committee (awards may be reviewed on limited grounds specified in the ICSID Convention).

Finally, investment treaties often allow investors to bring their claims relating to breach of BIT obligations before common courts in Poland (as an

alternative to arbitration). However, the author is not aware of any investment claims being heard by Polish common courts. The reluctance of investors to use this avenue in seeking remedies is understandable, as courts constitute part of the state's organization and, furthermore, it is not certain that judges possess appropriate knowledge and experience in dealing with such complex matters as the intertwinement of private and public laws (both national and international).

Factors affecting the choice between particular procedures of resolving a dispute include: (i) the value of the claim, (ii) the legal issues raised, (iii) the nationalities of the parties, (iv) the preferred venue of arbitration, and (v) the effect of the choice of rules on the composition of the arbitral tribunal.

4. Poland in investment arbitration

4.1. Poland as a respondent

Based on publicly available information provided till date, there have been approximately twenty cases brought by investors against Poland to the level of international arbitration. Proceedings initiated in seven cases, i.e. by (i) Ameritech, (ii) France Telecom, (iii) Saar Papier, (iv) Lutz Schaper, (v) Eureko, (vi) Cargill, and (vii) Nordzucker, have already been completed. An additional eleven cases are still pending: (i) Vivendi, (ii) Mercuria, (iii) Traco, (iv) Laboratories Servier / Biofarma / Arts Et Techniques Progrès, (v) East Cement, (vi) Ukrainian investor, (vii) Luxembourg investor, (viii) David Minnotte / Robert Lewis, (ix) Vincent Ryan / Schooner Capital / / Atlantic Investment Partners, (x) Mitch Nocula and (xi) Crowley Data. The frequency with which disputes are brought by investors is increasing, due in part, to an increased awareness among the investors and the legal community about such a possibility. Bringing a case to international arbitration is often a last resort for an investor. Nonetheless, the existence of a credible option to take a case to arbitration is important in encouraging states to observe their treaty obligations and in promoting a stable environment for investment in line with the aims of BITs.

4.2. Polish investors as claimants

Up until now there has been no information on Polish investors initiating arbitration proceedings against other states on the basis of BITs. A few words of explanation should be provided concerning the investment claims of Cementownia Nowa Huta with its seat in Cracow (Kraków), Poland ("Nowa Huta") and *Europe Cement Investment & Trade S.A. with its seat in Kraków, Poland ("Europe Cement"), both brought against Turkey on the basis*

of Polish-Turkish BIT. Despite both claimants being formally registered in Poland, these cases should not be perceived as disputes initiated by genuine Polish investors. Nowa Huta and Europe Cement claimed they had acquired shares in Cukurova Elektrik. ("CEAS") and Kepez Elektrik ("Kepez") from the Turkish Uzan family. The shares in Nowa Huta and Europe Cement were in turn directly and indirectly held by the Uzan family. The dispute arose out of the termination by Turkey of concession agreements granted to CEAS and Kepez. In order to shift the existing dispute to an international level and benefit from BIT protection, the Uzan family decided to transfer their shares in CEAS and Kepez to Polish companies and then initiate investment arbitration against Turkey. It turned out that the "investors" have not been able to provide basic documents justifying their claims, including documents proving that they had acquired shares in CEAS and Kepez. In both cases, the claims were dismissed in their entirety and the claimants were ordered to pay Turkey's legal fees and expenses (over USD 9 million in total).

4.3. Poland as a place for investment arbitration

As in many other countries, there are no special provisions for investment arbitrations held in Poland. The rules contained in the Code of Civil Procedure and international conventions (i.e. the New York Convention, and other multilateral and bilateral treaties) to which Poland is a party, governing commercial arbitration (in detail described in the preceding chapters of this book) will also be applicable to investment arbitration.

It is unlikely that the parties, if the investor or the claimant is Polish, would agree to Poland being the place for investment arbitration. The reasons are many and there is no need to expand on them. However, there are no legal and non-legal obstacles for an investment dispute not involving any Polish entity being resolved before arbitration in Poland.

In practice, it is important that the parties to an investment arbitration and the arbitrators ensure that the proceedings are conducted and the award is made in accordance with procedural and substantive laws and rules that are acceptable to Polish common courts so that those courts may not set aside, or suspend the award on the grounds that it infringes certain provisions of Polish law and public policy.

As in any international commercial arbitration or investment arbitration held in a country other than Poland, there are potentially four separate questions of applicable law which the arbitral tribunal dealing with an investment dispute seated in Poland would need to face.

First, what law governs the validity of the arbitration agreement? The primary source of law would be international law (in particular the relevant

bilateral investment treaty) and the express terms of the parties' agreement.

Second, what law governs the arbitration proceedings themselves? The law regulating the arbitral process will be the law chosen by the parties, international law (in particular the relevant BIT) and the mandatory rules of the Code of Civil Procedure. Although some academics favor the detachment of international arbitrations from the national law of the state where the arbitral proceedings are held, the realistic assumption is that some interference between national laws and rules of international law is unavoidable. This is true not only for Poland but also for countries which are seen as popular arbitration venues. One cannot escape from a consideration of the national arbitration law (in the case of Poland it is the Code of Civil Procedure), and invariably no law guarantees that the host state will not intervene in international arbitral proceedings.

Third, what law applies to the substance of the dispute? The arbitral tribunal seated in Poland would need to apply, just as an arbitral tribunal in any other jurisdiction, international law (in particular BIT), general principles of international law, and most likely the law of the state party being a respondent in such proceedings. In any case, it would not be entitled to apply the Polish substantive law. However, most BITs do not explicitly refer to the law that tribunals must apply in arbitrating investment disputes.

And finally, in the event of a conflict regarding the substantive law, under what law is the dispute to be resolved? The answer to this question will depend on the circumstances of a given case. In the absence of an agreement between the parties in this respect, the arbitral tribunal will need to decide which law will prevail taking into account the wording of a particular BIT and all other applicable regulations. It is sometimes the case that no guidelines can be found in the provisions of law (irrespective of whether international or national), and then the arbitral tribunal must decide taking into account all other circumstances.

Before the parties decide to choose Poland as the place of arbitration, often three additional questions of practical nature are asked. Do arbitrators need to be Polish nationals? Does the tribunal need to hold all hearings in Poland? And finally, may the arbitration be conducted in a different language other than Polish?

The answer to the first question is negative; there are no legal obstacles for the tribunal to be composed of the same persons had the arbitration taken place in any other place of the world. Arbitrators do not need to be appointed from any panel, or a list kept by any institution in Poland. What is more, internationally recognized practitioners who often act as arbitrators in investment disputes are included in the list of arbitrators

recommended by the Court of Arbitration at the Polish Chamber of Commerce.

Secondly, the place of arbitration and the place of hearings are terms well distinguished under Polish law and practice. The hearings do not need to be held at the place of arbitration. It is often the case in international arbitration that a particular country is chosen by the parties as the place of arbitration, but all, or some hearings, for reasons of convenience or otherwise, are held in a third country. A shift of physical location of a hearing has no legal effect on the arbitration proceedings.

As to the language, it is allowed for arbitrations in Poland to be conducted in languages other than Polish. Furthermore, there is no need to provide translation of all documents or files into Polish. If the language is not specified in the relevant BIT, it is always recommended that the parties select the applicable language, taking into account several factors: the choice of applicable law; the language of the contract and other principal documents; the mother tongue of likely fact and expert witnesses; and the availability of suitable arbitrators and counsel with the necessary language skills. Selecting two languages is also possible, but inevitably entails complications and expenses. In addition, the risk of misunderstanding caused by inexact translation increases significantly in bilingual proceedings.

5. Enforcement of investment arbitration awards in Poland

5.1. General

One of the differences between commercial and investment treaty arbitration is that, in the latter proceedings, all awards are issued against states. This feature of investment arbitration awards may make them more difficult to enforce. Therefore, a question arises on what the claimant's rights are if the state frustrates the award? The answer to this question depends on the provisions and on the basis of which the arbitration has been conducted. Investment treaties often allow the investor to choose between different types of rules under which the dispute will be resolved. Generally, two types of situations may be distinguished, depending on the rules governing the arbitration in an investment dispute.

The first concerns proceedings conducted on the basis of ICC Rules, UNCITRAL Rules, SCC Rules, LCIA Rules, Additional Facility Rules or any other regulations agreed by or chosen by the parties (with the exception of the ICSID Convention). In all these cases awards are enforced in accordance with the New York Convention. This means that the recognition and enforcement of an investment treaty arbitral award does not dif-

fer from the recognition and enforcement of commercial arbitration awards against state entities.

It is worth noting that Poland made two reservations to the New York Convention. One, concerning reciprocity; it means that Poland decided to apply the rules of the New York Convention only to those arbitral awards which were made in states being party to the Convention. Additionally, Poland undertook to apply the New York Convention only to disputes arising out of relationships which are considered commercial under national law. One might argue that by this reservation the New York Convention does not apply to investment arbitration because it is not commercial. The majority view is that this reservation does not exclude the application of the New York Convention to investment disputes. The investment disputes, despite their specific nature (i.e. often dealing with public law matters), relate to commercial activity, commercial matters and thus should be treated as commercial.

The second situation applies to awards made on the basis of the ICSID Convention. Pursuant to art. 53 of the ICSID Convention, the award rendered under the Convention is binding upon the parties and is not subject to appeal, or to any other remedy, except those which are explicitly provided for in the Convention. This basically means that the enforcement of an ICSID award does not require any recognition procedure to be initiated pursuant to the local laws or the New York Convention. ICSID awards are not to be substantively reviewed, even on the narrow grounds provided for in the New York Convention. Recognition of the ICSID award may be obtained from a competent court of a contracting state on a simple presentation of a copy of the award certified by the Secretary General of the Center. However, there exist certain limitations to this rule. It applies to awards, not to any decision, or order the arbitral tribunal may issue during the course of arbitration proceedings. Furthermore, the rule concerns pecuniary obligations imposed by the award only.

Up to now Poland has not signed the ICSID Convention and, as a consequence, is not bound by its provisions. Therefore, no arbitration proceedings can be conducted against Poland on the basis of the ICSID Convention nor can an arbitral award be enforced in Poland without its prior recognition pursuant to the provisions of the New York Convention or the Code of Civil Procedure (in cases where the New York Convention is not applicable). For the reasons mentioned above, an award enforcement on the basis of the ICSID Convention will not be further discussed.

Once the investor has obtained recognition of its arbitral award against Poland, a final hurdle remains, i.e. execution of a state’s assets to satisfy the judgment (the term ‘execution’ is used to define the legal process of seizing and selling property). Not to leave any doubts, the New York

Convention does not provide any exceptions from the rule that the execution of awards should be governed by national laws. Furthermore, the Convention does not waive any execution immunity of the state. In practical terms it means that the execution is governed by domestic laws and, more importantly, a state may introduce regulations making its property immune from execution. Assets which are immune from execution (for example, property used by diplomatic missions) cannot be used to satisfy an award. These two features are common for all executions irrespective of which place in the world is chosen by the investor to proceed with seizing and selling the state's property. As a consequence, the execution of an investment award is often more difficult in comparison with the execution of an arbitral award made against parties other than state entities.

In the context of investment arbitration, an interesting question arises on whether the investor who was not allowed to have his arbitral award recognized or enforced in Poland (either against Poland or any other state), could seek remedies from Poland on the basis of a BIT arguing that he was not treated fairly and equitably or that he was discriminated or his award was expropriated. In other words, could a state be liable under a BIT for denying recognition or enforcement of an arbitral award?

As will be seen from the following paragraphs, the current regulations in force (not only in Poland) pertaining to recognition and enforcement do not adequately protect the interest of investors who have prevailed in arbitration against states. To minimize the risk, investors entering into contact with states should always seek to obtain an explicit waiver of both the jurisdictional and execution immunity. Such a waiver at the inception of what often appears a rosy investment relationship may later prove crucial in ensuring that an award issued in his favor does not become a worthless paper judgment.

5.2. Enforcement in Poland against Poland

The execution of an award in Poland against Poland is conducted in accordance with Articles 1060 and 1062–1064 of the Code of Civil Procedure. The provisions are vague and there may appear certain doubts on how these provisions should be applied with respect to investment arbitration awards.

Pursuant to Article 1060 § 1 CCP, the investor should first summon the state organizational unit which activity relates to, the obligation to be performed in accordance with the award. In the event the damage was caused by an act or ordinance contrary to the constitution, international treaty or other act, a summons should be served on the Minister of the

State Treasury. It may sometimes be difficult to distinguish between amounts awarded to an investor as a consequence of a legislative act being contrary to the constitution, international treaty or other act, and the amounts awarded for other breaches of the state's obligations, in investment treaty arbitration. This is because investment treaty tribunals often resolve disputes relating with state sovereign acts by applying international law.

Pursuant to Article 1060 § 2 CCP, in the event the state does not pay the amounts imposed by the award within two weeks of being summoned, the investor may apply to the common court for the granting of an enforcement clause. After receiving the enforcement clause the investor is entitled to conduct the enforcement proceedings against the state, but only from the responsible state organizational unit's bank account. No other state property is available to the investor to satisfy his claim.

If the state does not perform non-pecuniary obligations imposed by the award within two weeks, the investor may only apply to the court with the request that an additional deadline be set for fulfilling these obligations and, if the award continues to be frustrated, request that the head of the responsible state organizational unit be fined.

5.3. Enforcement in Poland against other states

Enforcement of an award by an investor in Poland against another state is even more uncertain. Like most countries, Poland does not have clear provisions defining how this should be carried out.

Some countries have adopted laws providing for rules of exempting certain assets of other states located in these countries from execution immunity. The practice proves that even in countries which have such laws, the situation – from the perspective of an investor commencing enforcement in these countries – is far from certain. For example, in the United States of America, the Foreign Sovereign Immunities Act provides a presumption that the property of states in the United States is immune from execution. However, there are several exceptions. The most important is that the property of another state is not immune from execution if it is not used in the United States for commercial activity. It means that the investor will be able to attach and execute those assets which are used for commercial purposes. There are different opinions and inconsistent case law on what property may be treated as used for commercial activity. Generally, any diplomatic or consular assets are deemed a non-commercial property. Likewise property used by military authorities will not be considered as commercial. Similar regulations were enacted in the United Kingdom and Canada. In other countries, no regulations were intro-

duced, but case law developed allowing a private party to benefit from a similar exception (France, Switzerland).

The Code of Civil Procedure provides restriction as to the possibility of conducting enforcement against certain foreign natural persons, such as members of diplomatic missions and their families. As there are no regulations in the Code or any other act providing for exemptions from execution immunity, the enforcement in Poland of an investment arbitral award against another state may prove difficult.