The Impact of Uniform Law on National Law: Limits and Possibilities in the Area of Commercial Arbitration

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PRELIMINARY REMARKS

This report is limited, in principle, to dealing with the issues raised in the Questionnaire Addressed to National Reporters, as prepared by the General Reporter on the topic "Commercial Arbitration". Therefore, below I attempt to answer, one by one, the questions listed in that Questionnaire.

For convenience only, I have added short headings of my own for particular issues discussed herein.

In the area of commercial arbitration, Uniform Law, whether understood in a broad or narrow sense, is significant on three levels: procedural law, substantive law and conflict of laws. Therefore, in order to avoid confusion, it seems appropriate to bear in mind that the impact of Uniform Law on national law may relate either to the law governing the competence, composition and procedural activity of arbitral tribunals, or to the rules applied by arbitrators to a conflict of laws or to substantive law when settling disputes.

1. Concept of Uniform Law

The term "Uniform Law" (in Polish: "*prawo jednolite*") is habitually used by Polish legal writers when referring to the international unification of legal norms concerning civil and commercial law relations. It is used in a rather narrow meaning comprising: (i) legal norms established as a result of the joint law-making activity of at least two states, to be applied by the competent authorities, particularly the law courts of those states and (ii) legal norms established for the same purpose by international or supranational organizations so authorized by their member states[1].

Typical examples of Uniform Law in its narrow meaning are; international treaties providing legal norms in the field of intellectual property rights, international transportation, promissory notes, bills of exchange and checks, international sales of goods,

[1] The notion of Uniform Law as the main source of the international trade law was promoted in books and articles by Prof. Jerzy Jakubowski, especially in his monograph: *Prawo jednolite w międzynarodowym obrocie gospodarczym, Problemy stosowania* (Uniform Law in International Commercial Relations, Problems of application), Warszawa 1972; See also: J. Jakubowski, M. Tomaszewski, A. Tynel, A. Wiśniewski: *Zarys międzynarodowego prawa handlowego* (Outlook of international trade law), Warszawa 1983, pp. 24-28.

conflict of laws, international civil procedure and, last but not least, international arbitration.

It does not matter whether such uniform legal norms are located in a separate document attached to an international treaty which imposes on the contracting states an obligation to introduce them into the national legislation, or if they are comprised within a single document of an international treaty.

On the other hand, the regulations of the European Parliament and the Council of the European Union ("EU Regulations") are also regarded as Uniform Law of the member states of the European Union.

Uniform Law should be clearly distinguished from model laws (such as, for example, the UNCITRAL Model Law on International Commercial Arbitration) which, strictly speaking, are not laws at all but a mere proposal of legal norms to be adopted by national legislators, thereby in fact contributing to a multinational uniformity of law.

Generally, Polish legal scholars do not include, within the narrow notion of Uniform Law, usages or customs of international trade, general principles of law governing contracts and obligations, or general rules of procedure, which are sometimes included in a vague concept of *lex mercatoria* or transnational law.

This does not mean, however, that the role of such principles and rules, in particular the significance of trade usages and customs, is neglected. On the contrary, their practical importance for state courts and arbitral tribunals may not be overestimated, owing, *inter alia*, to certain provisions of Uniform Law providing for their application. Therefore, they are treated as a set of rules and principles which may be strictly coupled with Uniform Law, though not comprising a part thereof[2].

2. Incorporation of Uniform Law into the Polish legal system

EU Regulations are automatically incorporated into the Polish legal system after their publication in the Official Journal of the European Union. They are binding in their entirety and directly applicable in the member states, in accordance with the Treaty establishing the European Community.

[2] Jakubowski: *Prawo jednolite*, p. 7.

The incorporation of Uniform Law deriving from international treaties requires ratification of the relevant treaty by the President of the Republic of Poland, who is so authorized by an act of parliament[3].

Pursuant to Article 92.1-3 of the Polish Constitution, a ratified international treaty, after its publication in the Journal of Laws of the Republic of Poland, becomes part of the national legal order and applies directly, unless its application depends on the issuance of an act of parliament. An international treaty ratified by prior consent through an act of parliament has priority over an act of parliament if the latter is incompatible with the treaty. If an international treaty ratified by Poland establishes an international organization, the law made by such organization applies directly and has priority in the case of a conflict with acts of parliament.

This means that the legal norms contained in ratified international treaties governing civil and commercial law relations are directly applicable in Poland after their official translation into the Polish language has been promulgated in the Journal of Laws of the Republic of Poland. Sometimes, however, if the relevant international treaty expressly provides, an act of parliament reproducing the content of the uniform law attached to the treaty has to be enacted in order to implement such uniform law into the Polish legal order.

In the area of commercial arbitration, Poland has adopted Uniform Law deriving from the Geneva Protocol of 1923 on Arbitration Clauses, the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention 1958") and the European Convention of 1961 on International Commercial Arbitration ("EU Convention 1961").

In this context, it should also be mentioned that the great reform of Polish arbitration law introduced by the Act of 28 July 2005 amending the Code of Civil Procedure ("CCP") was to a large extent based on the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"). However, unlike the UNCITRAL Model Law, the new Polish arbitration law is designed to govern domestic, as well as international, arbitration[4]. As a result, many norms of the Polish arbitration law have the same content as

[3] As to the place and role of international law and European Union law in the Polish legal order see L. Garlicki: *Polskie prawo konstytucyjne. Zarys wykładu.* (Polish constitutional law. An outlook of lecture), Warszawa 2004, p. 146 ff.

[4] The same approach to the UNCITRAL Model Law was adopted in the Netherlands, Germany and Austria where arbitration laws apply to international as well as domestic cases.

the norms of arbitration laws in other countries that reformed their national legislation in this area on the basis of the UNCITRAL Model Law.

3. Inclusion of Uniform Law into the national law applicable to contractual or non-contractual obligations

The best example of such inclusion may be given by the United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April 1980 ("CISG") which applies to contracts on the sale of goods between parties whose places of business are in different states "*when the rules of private international law lead to the application of the law of a Contracting State*". It means that the CISG itself considers its provisions as forming part of the national law of the Contracting States.

The extent to which Polish law should be considered as including Uniform Law, if designated as the proper law of the contract or the law governing the tort, depends exclusively on the provisions of the relevant Uniform Law determining the sphere of its application. The same also applies when Poland is designated as the place or seat of the arbitration.

4. Uniform Law incorporated in a foreign law and public policy

I can hardly imagine, in practice, a situation in which Polish legal notions applicable in the settlement of a dispute by state courts or an arbitral tribunal (in particular, the notion of public policy or *ordre public*) would not accept Uniform Law incorporated in a foreign law (substantive or procedural) as applicable, as the case may be, to the contract giving rise to the dispute at the foreign arbitral place or seat.

In the case of Uniform Law binding for Poland, it is inconceivable that its application would be refused on the grounds of Polish public policy (*ordre public*). However, if it is not the case, an intervention of the public policy (*ordre public*) clause against Uniform Law incorporated in the foreign applicable law seems to be theoretically possible in Poland.

The same is true with regard to international mandatory rules or *lois de police* sometimes called rules of necessary (immediate) application, which generally apply irrespective of the law governing a contract pursuant to the ordinary conflict of laws rules of Polish private international law.

5. No doctrine of precedent or collateral estoppel

In Poland, commercial arbitration is perceived as an institution designed to do justice in individual cases rather than as an authority qualified to develop a system of national or international law[5].

Among the numerous advantages of arbitration, Polish experts unanimously emphasize its confidentiality, a virtue that users of commercial arbitration have come to expect[6].

For the above reasons, arbitral awards are not officially published in Poland, although sometimes they are informally disseminated in business and legal circles.

Moreover, it should be noted that rules of arbitration adopted by Polish arbitral institutions (also called "permanent arbitration courts") very often provide for publication of the arbitral awards in full or in part, with the consent of the parties concerned and with the assurance that their anonymity will be maintained[7]. In practice, however, publication of awards made within an institutional arbitration very occurs rarely[8] and I have never seen publication of any award rendered in an *ad hoc* commercial arbitration in Poland.

Poland is not a country using the *stare decisis* system. A state court judgment on an issue of law in one case has no binding force of precedent for other state courts of an equal or lower rank in future cases, where the facts are substantially the same. All the more, the system of precedents (*stare decisis*) is not applicable to arbitral awards.

In Poland, there is no concept of "issue preclusion" and no doctrine of "collateral estoppel" (to be distinguished from the classic concept of *res iudicata*) in relations between state courts, between state courts and arbitral tribunals, as well as between arbitral tribunals themselves. Certainly, well-grounded and convincing reasons given to a judicial or arbitral decision on a point of law in one case may induce other state courts or arbitral tribunals to settle that point of law identically in another case. This will be done, however, *imperio rationis* and not *ratione imperii* of the first decision.

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[5] Cf. M. Tomaszewski: Effectiveness of Legal Protection before Arbitral Tribunals – The Polish Experience in: Veroeffentichungen der Wissenschaftlichen Vereinigung fur Internationales Verfarenrechts e.V., Band 17, Herausgegeben von P. Gottwald, Bielefeld 2006, pp. 210-211.

[6] M. Tomaszewski: Effectiveness..., pp. 217-219.

[7] So, for example, Paragraph 49 of the Rules of the Arbitration Court at the Polish Chamber of Commerce which provides that the Arbitration Council may give its consent to the publication in full or in part of an award with respect to the anonymity of and will of the parties.

[8] However, the editors of a new "Bulletin of the Court of Arbitration at the Polish Chamber of Commerce" as well as the editors of the newest Polish quarterly "ADR. Arbitration and Mediation" whose first issue appeared in March of this year declare their willingness to publish the most interesting arbitral awards rendered in Poland.

6. Favorable treatment of arbitration

The main purpose of the above mentioned arbitration reform in Poland was to modernize Polish law in line with globally accepted standards, to strengthen the autonomy of arbitration in relation to the judiciary and to promote more frequent use of this method of dispute settlement, not only in international but also in domestic relations[9].

Under Polish law, parties may submit to an arbitral tribunal any disputes concerning property rights, except for rights to alimony or maintenance, as well as disputes about non-property rights which may be settled by an agreement between the parties before the court.

There is no doubt that the new Polish arbitration law is "arbitration friendly", as are, on a matter of principle, the state courts in Poland, although in the lower courts (first instance), the judges have relatively little experience in arbitration issues and may sometimes incorrectly understand and apply the provisions of Polish law and international treaties in this area. However, a possible legal mistake committed by a court of the first instance may easily be corrected in an appeal.

In my opinion, the "friendly" attitude of Polish law and the state courts towards arbitration and arbitral awards is not affected depending on whether a state party or a state interest is directly involved in or affected by the resolution of the dispute, or in the case of public procurement contracts. It is also irrelevant whether the arbitration is international or domestic and whether its place (seat) is within or outside the territory of Poland.

7. No control on the merits of arbitral awards

Under Polish law, an arbitral award rendered in Poland may only be set aside by a state court if proceedings were commenced as a result of an application to set aside such award, and exclusively on strictly specified and limited grounds.

Pursuant to Article 1206 § 1 of the CCP, a party may apply for setting an arbitral award aside if:

1) there was no arbitration agreement or such agreement is invalid, ineffective or has expired under the law applicable thereto; or

[9] General information on the new Polish arbitration law is given by T. Szurski and A. Wiśniewski: Poland (in:) International Handbook on Commercial Arbitration, Supplement 46, August 2006.

2) the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise deprived of the possibility to defend his rights before the arbitral tribunal; or

3) the award deals with a dispute not contemplated by or not falling within the arbitration agreement or contains decisions on matters beyond the scope of such agreement, provided that if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside and provided. Moreover, that the party which took part in the arbitral proceedings raised objections in such proceedings as to the examination of claims falling outside the scope of the arbitration agreement; or

4) the requirements regarding the composition of the arbitral tribunal or fundamental principles of the arbitral proceedings resulting from law or an agreement between the parties were not observed, or

5) the award was obtained by criminal means or on the basis of a forged or altered document;

6) a final judgment was rendered in the same case (cause of action) between the same parties.

Moreover, in accordance with Article 1206 § 2 of the CCP, an arbitral award should also be set aside if the state court finds that:

1) the subject matter of the dispute is not capable of settlement by arbitration under Polish law, or

2) the award is in conflict with the fundamental principles of the legal order of the Republic of Poland (public policy or *ordre public* clause).

An arbitral award or a settlement agreement entered into before an arbitral tribunal has the same legal force as the judgment of a state court or settlement agreement made before such court after its recognition or the issuance of a leave for its enforcement by a state court (Article 1212 § 1 of the CCP).

As far as arbitral awards rendered in Poland are concerned, the state court may and shall refuse their recognition or enforcement only, if:

1) the subject matter of the dispute is not capable of settlement by arbitration under Polish law; or

2) recognition or enforcement of the award would be in conflict with the fundamental principles of the legal order of the Republic of Poland (Article 1214 § 9 of the CCP).

It results from the above that in the proceedings for setting aside, as well as in the proceedings for recognition or enforcement of an arbitral award rendered in Poland, there is no room for the state courts to exercise any control on the merits of the award, except for examination under a public policy (*ordre public*) clause as to whether there is any conflict between the award and the fundamental principles of the Polish legal order. If no such conflict exists, an arbitral award must be recognized or receive leave for enforcement and may not be set aside for the reason that the arbitral tribunal committed a mistake with respect to the law or the facts. In particular, the fact that an arbitral tribunal having its seat in Poland fails to observe the Polish rules on conflicts of laws may not adversely affect the legal effectiveness of the award[10].

As regards procedural matters, the state courts are certainly empowered to examine, at least under the public policy clause, during the proceedings for setting aside an arbitral award rendered in Poland, as well as in proceedings for recognizing and enforcing such award, whether the fundamental principles of due process and fair trial were actually observed[11].

The same may be said in relation to the recognition and enforcement of arbitral awards rendered abroad, taking into account the fact that Poland is a party to the NY Convention 1958 which does not provide for any control on the merits of foreign arbitral awards but enables "tests" of arbitrability and public policy to be made under the laws of the state in which the recognition or enforcement is sought[12].

8. Notion and role of public policy

The reservation of public policy (*ordre public* clause) is generally understood in Poland as referring to the fundamental principles of the Polish legal order, which may not be violated on the territory of Poland by application of a foreign law or by recognition or enforcement of a foreign or domestic arbitral award[13].

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[10] The same situation was under the former Polish arbitration law. Cf. M. Tomaszewski: *Zakres swobody stron w wyborze prawa właściwego dla zobowiązań umownych* (Scope of the parties' authonomy in selecting the law applicable to contractual obligations), Studia Juridica 1977, vol. VI, pp. 84-88.

[11] For the significance of this principles in Polish arbitration law see: M. Tomaszewski: Effectiveness..., pp. 207-209.

[12] See e.g. A. J. van den Berg: The New York Arbitration Convention of 1958, Kluwer 1981, pp. 269-273, 369-381.

[13] On the notion and role of the Polish public policy in private international law see a classic monograph by M. Sośniak: *Klauzula porządku publicznego w prawie międzynarodowym prywatnym* (Ordre Public Clause in Private International Law), Warszawa 1961, cf. also the handbook of M. Pazdan: *Prawo prywatne międzynarodowe* (Private International Law), Warsaw 2007.

In this context, the fundamental principles of the legal order of the Republic of Poland include the most important (but not all) mandatory rules in force in this country. Such rules may derive, in particular, from the Constitution of the Republic of Poland, from international treaties on human rights to which Poland is a party and even from acts of parliament for particular branches of law such as the Civil Code, the Family and Tutorship Code or the CCP.

The importance of those mandatory rules is measured taking into consideration the core social and economic values deserving utmost protection under Polish law. Consequently, the application of the *ordre public* (public policy) clause always requires a valuation of the relevant mandatory rules and is inevitably coupled with a degree of uncertainty, which may be reduced to a large extent by prudent and reasonable "case law", supported by the doctrine of private international law and international commercial arbitration.

Under Polish law, as well as under the NY Convention 1958, the lack of arbitrability is regarded as separate grounds (separate from the reservation of public policy (*ordre public*)) for refusing to recognize and enforce arbitral awards. Such an absence is normally stated under Polish law which does not conflict in this respect with any Uniform Law binding in Poland.

It is not easy to establish how the reservation of public policy (*ordre public*) operates in practice with respect to the recognition and enforcement of arbitral awards because there are almost no published judgments of Polish courts applying such reservation. However, the doctrine of law in this matter unanimously recommends only very prudent and moderate use of the reservation[14].

9. Influence of arbitral awards on judicial decisions and legislation

At present, there is no visible influence of arbitral awards or determinations on decisions of state courts and legislative changes in Poland.

I have never heard of a Polish state court's judgment using reasons supported by or even making reference to a determination of a point of law given by an arbitral tribunal. The same comes to mind with regard to determinations made by local or international arbitral institutions in charge of administering arbitrations.

[14] Cf. M. Pilich: *Klauzula porządku publicznego w postępowaniu o uznanie i wykonanie zagranicznego orzeczenia arbitrażowego* (Ordre Public Clause in proceedings on recognition and enforcement of a foreign arbitral award), Kwartalnik Prawa Prywatnego 2003, vol. 1, pp. 158-187.

As far as I am aware, nor have any changes or proposed changes to Polish substantive or procedural law (even in the area of arbitration) relied on references to arbitral awards.
In my opinion, arbitral awards may potentially impact on Polish judicial practice and legislation with respect to the interpretation of Uniform Law, especially in the area of international trade (e.g. CISG). This may be reasonably expected in the case of arbitrators who are well known as distinguished experts in the matter concerned provided, of course, that their interpretation is based on strong legal arguments exposed in the reasons of the award.

10. Arbitral awards based on Uniform Law

Taking into consideration the fact that disputes arising from international trade transactions are most frequently submitted to arbitration, as well as the fact that the most frequent transactions of this kind are contracts for the international sale of goods, it is no wonder that many arbitral awards rendered in Poland or abroad, but enforced or enforceable in this country against Polish nationals or residents (whether physical or legal persons) are based on Uniform Law, in particular on the provisions of the CISG.
Moreover, the provisions of the NY Convention 1958 and the EU Convention 1961 on arbitration agreements are very often applied by arbitral tribunals in Poland and abroad when they exercise competence to decide on their own competence.
There are also numerous foreign arbitral awards in which the law applicable to the merits of the dispute was established on the basis of conflict of laws rules contained in Uniform Law.
The author of this report, acting as arbitrator, had, in many cases, the opportunity to apply Uniform Law to resolve issues of substantive, procedural or private international law.

11. Impact of arbitral awards on the implementation and application of Uniform Law

Up to now, I have not seen any impact of arbitral awards and determinations in introducing, firming up or applying Uniform Law, especially through legislative change or the action of state courts in Poland.
Foreign courts' decisions regarding arbitral awards or determinations referring to or based on Uniform Law are more and more often invoked by counsels of the parties in order to induce Polish courts to follow interpretations of Uniform Law adopted by foreign courts.

This is, in particular, observed with regard to the interpretation and application of the NY Convention 1958 owing to the fact that a lot of foreign court judgments that apply such treaty are published and easily available.

12. Fashioning of the new Polish arbitration law

As mentioned under point 3 above, the great reform of Polish arbitration law made in 2005 was primarily based on the UNCITRAL Model Law. The experts of the Committee for Codification of the Civil Law, who prepared the draft of the reform, were also inspired by recent legislation in the Netherlands and Germany on international and domestic arbitration.

However, the actions and rules of international arbitral institutions have had no direct, visible impact, although they may have an indirect influence due to the personal knowledge and experience of the experts engaged in the reform.