

POLISH LITIGATION: SECRET AND HIGHLY CONFIDENTIAL

The Office of the State Attorney of the Treasury is most reluctant to share information on conducted cases. Now it has reasons to reconsider

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It may well be likely that the orthodox position taken by the Office of the State Attorney of the Treasury will have to be modified, as it lost a case concerning access to public information before the Voivodeship Administrative Court (Polish abbreviation: “WSA”) in Warsaw (case file no. II SAB/Wa 252/12). The decision is not final.

International Arbitration

The Court has ruled that an international agreement does not bar the application of the Freedom of Information Act (Journal of Laws of 2001, No. 112, Item 1198, as amended). Accordingly, the Office of the State Attorney of the Treasury cannot withhold arbitration court judgments from citizens by relying on such legal grounds. That is the crux of the WSA’s ruling, which allowed a complaint regarding the Office’s failure to act. The Court stated in its oral presentation of reasons that there can be no doubt that the Office has the responsibility of providing access to public information, including rulings in its possession.

- The Court has shared my view that an international agreement cited by the Office does not exclude the operation of the Freedom of Information Act – according to the pleased author of the action, Krzysztof Izdebski, Association of Local Civic Leaders (Polish abbreviation: SLLCO).

In May, Mr. Izdebski lodged an application with the Office for a copy of an UNCITRAL arbitration court ruling in the case of Servier versus Poland. The dispute with Sevier, the French pharmaceutical company, which demanded nearly EUR 235 million (PLN 950 million), was resolved, leaving Poland with the obligation of paying over EUR 4 million. However, the Office refused to disclose details.

A Special Objective

- We will acquaint ourselves with the written reasons behind the WSA's rulings and subsequently take a decision as to any appeal in cassation – according to the comments of Dr. Marcin Dziurda, President of the Office of the State Attorney of the Treasury.

- However, it is significant that the Court has accepted the view expressed in an earlier NSA (Polish abbreviation of the Supreme Administrative Court) judgment. Accordingly, the Court recognized that where other special procedures are in place, the Freedom of Information Act is not applicable. Such a special regulation may be another statutory act. However – the Office's President added - according to the WSA, this principle is not applicable to international agreements.

He has stressed that the ruling deals with arbitration cases conducted by the Office. Therefore, no excessively general conclusions should be drawn. The President has also declared that the Office of the State Attorney acts in line with the law and the case-law of the Supreme Administrative Court in cases dealing with freedom of information, relying on two favorable rulings for the Office. The first ruling is the judgment of the NSA of 23rd July 2012 (I OSK 896/12) in a case dealing with failure to provide access to statements of claim. The second ruling is the judgment of the NSA of 16th June 2009 (I OSK 89/09) concerning the non-disclosure of *opinio iuris*.

- It follows from the reasons provided with regard to our case that not all information held by the Office of the State Attorney of the Treasury can be classified as public information – as noted by the President of the Office.

He quotes the NSA judgment, from which it follows that “by reason of the special objective of the activities of the Office of the State Attorney of the Treasury involving tasks in its capacity of representative of the State Treasury (..), it must be noted that a request for providing access to this entity's procedural writs, lodged in the course of particular cases, has no grounds in the provisions of the Freedom of Information Act”.

For the time being, the Court has ordered the Office to review the application for access to the arbitration award.

- I am quite certain that the Office will decline from providing access, this time relying on the business secrets of Servier - according to Krzysztof Izdebski.

However, he has expressed doubt whether the whole arbitration award can be deemed as a business secret.

- Such rulings are made public all over the world. Only Poland – he adds – seems to have a problem with openness to the public.

The value of openness

The core of the issue is the fact that under arbitration awards, the Polish party is often obliged to pay heavy damages. And the public is not advised why.

- Another question also rises – according to Izdebski – who is responsible for decisions which have the effect that an investor in Poland has a feeling of being cheated, and the arbitration award has confirmed this feeling.

According to Mr. Izdebski, the Office is doing its best not to disclose information on its actual activities.

- This gives rise to suspicion whether it is not a matter of concealing its possible errors. Perhaps this is not the case; on the other hand, the Office's intransigent attitude invites such questions. It also undermines the citizens' confidence in the State. Especially that the lion's share of the Office's budget is devoured by expenses for outsourced law firms which represent Poland in arbitration cases. Perhaps a discussion is needed whether there is any need for the Office's existence – according to Mr. Izdebski.

/Captions/:

The most interesting international arbitration cases with the participation of the Office of the State Attorney of the Treasury

- Mercuria Energy Group Limited, the parent company of the Polish J&S Energy SA, demanded payment of nearly \$ 400 million for the alleged breach of Article 10 (1) of the Energy Charter Treaty. The arbitration court dismissed the claim.

- In the **Vivendi SA and Vivendi Telecom International SA** versus Poland case regarding PTC shares, the French claims were as large as € 2 billion. The case ultimately ended in an understanding.
 - The **Eureka B.V.** versus Poland case was the most notorious, involving the privatization of PZU, where the claims amounted to PLN 35 billion; an understanding was reached.
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- **App. PLN 40 million – the running expenses of the Office of the State Attorney of the Treasury in 2011**
 - **App. PLN 15 million - retainers of outsourced law firms in the greatest arbitration litigation**
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The lion's share of the Office's budget consists of expenses for outsourced law firms