Czech (& Central European) Yearbook of Arbitration®

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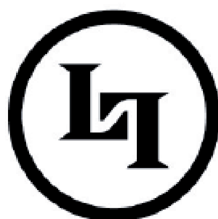
Volume X

2020

Arbitration and International Treaties, Customs and Standards



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Printed in the EU.
ISBN/EAN: 978-90-829824-2-8
ISSN: 2157-9490

Lex Lata B.V.
Mauritskade 45-B
2514 HG – THE HAGUE
The Netherlands

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The Court of Arbitration at the Polish Chamber of Commerce in Warsaw
Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej w Warszawie

Proofreading and translation support provided by:
SPĚVÁČEK překladatelská agentura s.r.o., Prague, Czech Republic and Pamela Lewis, USA.

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List of Abbreviations

ADR	Alternative Dispute Resolution
ALARB	The Latin American Arbitration Association
BITs	Bilateral investment treaties
Brexit	The United Kingdom's departure from the European Union
CCP	The Code of Civil Procedure
CIArb	Chartered Institute of Arbitrators
CJEC	the Court of Justice of the European Communities
EU	European Union
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflict of Interest in International Arbitration
ICC	International Chamber of Commerce. May also refer to the ICC International Court of Arbitration, depending on the context.
ICC Rules	ICC Rules of Arbitration (either the 1998 ICC Rules, or the 2012 ICC Rules, depending on the context; the current version is the 2012 ICC Rules as amended and effective since 1 March 2017).
ICC Court	ICC International Court of Arbitration.
ICCA	International Congress and Convention Association
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the settlement of investment disputes between States and nationals of other States (1958)
ISDS	Investor-state dispute settlement
LCIA	London Court of International Arbitration
MMR	Morbidity and Mortality Report
NAFTA	North American Free Trade Agreement
P2P	Peer-to-Peer
PILA	(Swiss) Private International Law Act
RAS	Riunione Adriatica di Sicurtà

SCC	Stockholm Chamber of Commerce. Also refers to the Arbitration Institute of the SCC, depending on the context.
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the current version entered into force on 1 January 2017).
SCEUS	Salzburg Centre of European Union Studies
SIAC	Singapore International Arbitration Centre
SLTA	Swiss LegalTech Association
UKIP	The United Kingdom Independence Party
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNCITRAL	The United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules, as amended in 2013
UNCTAD	United Nations Conference on Trade and Development
US	United States
ZPO	Zivilprozessordnung

Articles

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Arbitration Case Law 2019 - Selected Case Law of the Polish Supreme Court Related to Arbitration

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Key words:
scope of review of an arbitral award | principle of party-disposition (of the matter at issue) | rule of a court being bound by the matter at issue (relief or remedy sought) | ruling ultra/aliu petita | principle of equity | Polish arbitration law

States involved:

[**POL**] – [Poland]

Ruling of the Supreme Court of 08 February 2019; case ref. I CSK 757/17

Laws Taken into Account in This Ruling:

Kodeks postępowania cywilnego z dnia 17 listopada 1964r. [Code of Civil Procedure of November 17, 1964] [k.p.c.] [CCP], published in: Dziennik Ustaw [Journal of Laws] 1964, No. 43, item 296, as amended; Articles: 1188(1); 1202 first sentence; 1206(1) (2),(3),(4);[1]

[1] Article 1188. CCP (unofficial translation)
§ 1. The plaintiff should file a complaint and the defendant may respond to the complaint within the time limit agreed by the parties or, unless the parties decide otherwise, within the time limit determined by the arbitration court. The parties may attach such documents as they think proper to a complaint and an answer to a complaint.
Article 1202. CCP (unofficial translation)
Unless the parties have agreed otherwise, each party may, having notified the other party, petition the arbitration court, within one month from the receipt of a judgment, to supplement the judgment with claims raised in proceedings which the arbitration court did not adjudicate in the judgment.
Article 1206. CCP (unofficial translation)
§ 1. A party may file a motion to set aside a judgment of an arbitration court if:
2) a party was not duly notified of the appointment of an arbitrator or proceedings before an arbitration court, or was otherwise deprived of the possibility to defend his rights before an arbitration court;
3) a judgment of an arbitration court concerns a dispute which is not covered by an arbitration clause or falls beyond the subject-matter and scope of that clause, however, if adjudication in matters covered by an arbitration clause may be separated from adjudication in matters not covered by that clause or falling beyond the subject-matter and scope of that clause, a judgment may only be set aside insofar as it concerns those matters which are not covered by the arbitration clause or fall beyond the subject-matter and scope of that clause; the fact that a judgment falls beyond the subject-matter and scope of an arbitration clause may not

UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 [UNCITRAL Model Law]; Article 23[2].

[*Rationes Decidendi*]:

12.01. The fact that the Court of Arbitration ruled *ultra* or *aliu petita* (beyond the limits of the claim submitted) is not explicitly indicated in the Code of Civil Procedure [CCP] as a legal ground for a motion to set aside its judgment. However, one of the main principles of arbitration proceedings is a rule of a court being bound by the matter at issue (relief or remedy sought), which has a private-law connotation (party autonomy), being also protected at the level of constitutional law.[3] The guarantee function of this principle is reflected in forewarning the opposite party as to the scope of the plaintiff's claim (the matter at issue) and enabling the respondent to take appropriate defense. Therefore, ruling on the dispute beyond the limits of the action does constitute the infringement of general principles of due process before an arbitration court and, as a result, the violation of the right to be heard.

[*Descriptions of the Facts and Legal Issues*]:

12.02. Two proceedings were pending between the parties before the Chamber of Commerce. The Court of Arbitration at the Polish Chamber of Commerce [CA PCC] ruled on 12 December 2012 in favor of the plaintiff [A] and ordered the respondent [B] to

be a basis to set that judgment aside if a party who attended proceedings did not raise allegations against the hearing of claims falling beyond the subject-matter and scope of the arbitration clause;
4) requirements concerning the composition of an arbitration court or the basic principles of proceedings before that court, as provided for by this Act or determined by the parties, were not met;

2 Article 23. [UNCITRAL Model Law]
(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

3 THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2nd APRIL, 1997
Article 30
The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.
Article 31
1. Freedom of the person shall receive legal protection.
2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

pay the amount of approximately PLN 17.2M (approx. USD 4.5M) - [the First Arbitral Award]. In the remaining scope the claim was dismissed or the proceedings was remitted. The second proceedings concerned secondary claims – A was pursuing statutory interest on the amounts ordered by CA PCC in the First Arbitral Award. For that reason, A demanded that the B paid the capitalized amount of approximately PLN 6.7M (approx. USD 1.8 M). What is important in this case, the amount was calculated from the date of filing the first claim (i.e., 01 April 2010) until the date on which the second claim was brought (i.e., 29 March 2013).

12.03. On 24 April 2014 CA PCC issued a judgment in which ordered B to pay A the sum of approximately PLN 2.4M (approx. USD 610,000) as the interest calculated from 03 April 2013 until 24 April 2014. In the remaining scope the claim was dismissed [the Second Arbitral Award]. **Thus, CA PCC adopted a different period of the interest claim than the one demanded.**

12.04. 'B' submitted a complaint against the Second Arbitral Award and claimed that the decision of CA PCC deprived it of the possibility to defend his rights before an arbitration court (Article 1206(1)(2) CCP). According to B, CA PCC discretionary adopted in its contested judgment different period of the interest claim. The second basis of the complaint was constituted pursuant to Article 1206(2)(2) CCP, (i.e. situation when a judgment of an arbitration court is contrary to the basic principles of the legal order of the Republic of Poland (the public order clause). The Regional Court[4] (the first instance court) dismissed the complaint as being unfounded. 'B' appealed against this judgment. The Court of Appeals shared the stance of the Regional Court according to which the Court of Arbitration did not rule beyond the limits of the statement of claim. The Court of Appeals assumed that the contested judgment ordered B to pay the lower amount than A requested so that it could not be the ruling *ultra petita* (beyond the limits of the action). However, the court noticed that it was the ruling incompatible with the statement of claim. **Therefore, according to the reasoning put forward by the Court of Appeals, the capitalization of interest was reasonable, however, the discrepancy between the sum awarded by the CA PCC and indicated by the plaintiff**

[4] On 01 January 2016 amendment of the Polish Code of Civil Procedure entered into force, changing the proceeding initiated by motion to set aside a judgment of an arbitration court (published in: Dziennik Ustaw [Journal of Laws] 2015, item 1595). Pursuant to Article 1207 CCP, provisions on appeal shall apply accordingly to proceedings following a motion to set aside a judgment of an arbitration court. This means that the proceedings was reduced to one instance and since then only court of appeal is competent to examine the motion. Against the court of appeal judgment may be lodged a cassation appeal.

resulted from a different period of the claim that had been taken into consideration by the CA PCC. The reason why CA PCC adopted different period of the claim was legitimate, since there was no reason to consider that the respondent was delayed in payment of the principal amount from 01 April 2010. The debtor was called upon to render his performance by the service of the claim of the interest, i.e. 03 April 2013.

12.05. In the light of the foregoing, the Court of Appeals found that the contested arbitral award did not violate the principle of party-disposition, nor did it infringe the rule of a court being bound by the matter at issue (relief or remedy sought). The Court of Appeals emphasized that the judgment was placed within the scope of the demand. As a consequence, the allegation of deprivation of the possibility of defense before the court of arbitration as well as that one concerning the violation of the right to be heard were meritless, hence also the allegation of the infringement of the public order clause was unfounded.

12.06. Ultimately, B filled a cassation complaint to the Supreme Court in which argued that the Court of Appeals had erred in assessing that the award had not been made *ultra petita*, therefore, requested the setting aside of the contested arbitral award and the referring of the case back for rehearing, with the order to pay the costs of the proceedings.

[*Decision of the Supreme Court*]:

12.07. The Supreme Court ruled in favor of B and set aside the contested judgment [the Second Arbitral Award] along with referring of the case back for rehearing to the Court of Appeals.

12.08. Firstly, the Supreme Court observed that the parties, having made an arbitration clause, disaffirmed the common courts' competence of dispute settlement by giving this competence over to an authority acting in accordance with parities' autonomy. As a consequence, the supervision exercised by a state court over an arbitral award, however necessary and guaranteed by law, is not an instance supervision. Therefore, this supervision is incomplete in nature and limited to the most-reaching violations and abuses of arbitration proceedings, which are of significance not only from the point of view of the parties, but also of general interest.

12.09. Furthermore, the limits of the power to review the legality of arbitral award as well as the grounds of its supervision are constituted in Article 1206 CPP. Among these grounds, contrary to some foreign legislations, the situation in which an arbitration court ruled beyond the limits of the statement of claim (*ultra ou alia petitia*) was not listed. What is more, unlike the state court

proceedings (Article 321(1) CCP)[5], the Code of Civil Procedure did not set out explicitly the rule of an arbitration court being bound by the matter at issue (relief or remedy sought).

12.10. However, this **does not mean that ruling by an arbitration court beyond the limits of the action (*ultra ou alia petitia*) is outside of the scope of the supervision conducted by a state court.** On the one hand, it should be noted that the rule of a court being bound by the matter at issue (*ne eat iudex ultra petita partium*) in cases relating to individual subjective rights has fundamental and axiomatic importance for the framework of court proceedings. This rule is an expression of the principle of party-disposition, which has a private-law connotation (party autonomy) and which is also protected by the Constitution of the Republic of Poland. According to this rule, the responsibility for pursuing the protection of private subjective rights rests with their holders (disposers) and not with the authority appointed to settle the dispute. On the other hand, this principle has an important guarantee function from the point of view of the opposite party to the proceedings. **By outlining the subject matter of the proceedings, it specifies the framework within the respondent bears the burden of undertaking the defense. Moreover, it allows the risk associated with an unfavorable court's decision to be prior specified.**

12.11. The Supreme Court indicated that the Code of Civil Procedure does not determine any obligatory elements of the statement of claim filed to an arbitration court (Article 1188(1) CCP), however, the necessity to specify the demand as a factor determining the subject matter of arbitration proceedings can be indirectly derived from Article 1202 first sentence CCP. The need to specify the demand (relief or remedy sought) and its factual basis is also indicated in Article 23 of the 1985 UNCITRAL Act of 1985, to which Article 1188 CCP refers.

12.12. Moreover, according to the Supreme Court, it did not matter in this case that the amount of interest awarded after capitalization turned out to be lower than the amount requested in the statement of claim. Claim for (statutory) interest is not only individualized by the amount and facts regarding its basis, but also by a factor of time related to the period for which interest is demanded.

12.13. The reasoning of the Supreme Court was followed by the idea that if the court of arbitration had found that the interest was due

[5] Article 321. CCP (unofficial translation)
§ 1. The court may not adjudicate as to an object which is not covered by a claim or award more than was claimed.

only from 03 April 2013, it could not have awarded any claims from the respondent, as the plaintiff had demanded interest only up to 29 March 2013. Consequently, the arbitral award which adjudged the amount of interest calculated from 03 April 2013, had violated the general principles of due process – i.e. the principle of equity and the principle of party-disposition. Finally, it had also infringed the respondent's right to be heard as a party cannot defend itself properly against arguments that have not been raised during the proceedings.

Key words:
written form of a contract | agreement in writing | validity of an arbitration agreement | effectiveness of an arbitration agreement | arbitration agreement by reference | exchange of means of communication | Polish arbitration law | NY Convention

States involved:
[**POL**] – [**Poland**]

Ruling of the Supreme Court of 04 April 2019; case ref. III CSK 81/17.

Laws Taken into Account in This Ruling:

Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [Code of Civil Procedure of November 17, 1964] [k.p.c.] [CCP],

published in: Dziennik Ustaw [Journal of Laws] 1964, No. 43, item 296, as amended; Article 1161; Article 1162;[6]
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards; New York, 10 June 1958 [NY Convention]; Article II(2); Article IV; Article VII(1).[7]

[*Rationes Decidendi*]:

12.14. The Supreme Court ruled that pursuant to provisions of NY Convention an oral or implicit agreement does not satisfy the standard of a written form, just as an arbitration clause included in general terms to which only a confirmation of the contract refers. Although a written form is recognized if a contract is concluded by an exchange of letters, telegrams, e-mails, etc., the exchanged documents should match or address each other and include parties' intent to arbitrate. Further liberalization of construction of these provisions would negate a warning role as well as an informational, documentary and probative role of stipulation of a specific contractual form. Possibility of familiarizing oneself with declarations of intent is extremely important as it allows to determine jurisdiction of a state or an arbitration court. The Supreme Court reached similar conclusions while resolving the issue under Article 1162 CCP. Although the provision allows to

[6] Article 1161. CCP (unofficial translation)
§ 1. In order to submit a dispute to arbitration, the parties must conclude an agreement specifying the matter at issue or the legal relationship from which a dispute has arisen or may arise (arbitration agreement).
§ 2. Provisions of an arbitration agreement which violate the principle of equality of the parties, in particular provisions which entitle only one of the parties to bring a dispute before an arbitral tribunal specified in the arbitration agreement or before a court, shall be ineffective.
§ 3. An arbitration agreement may identify a permanent arbitral tribunal as competent to resolve a dispute. Except as otherwise agreed by the parties, the parties shall be bound by the rules of such permanent arbitral tribunal in force on the date of the arbitration agreement.
Article 1162. CCP (unofficial translation)
§ 1. An arbitration agreement shall be in writing.
§ 2. An arbitration agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters by means of telecommunication which provide a record of the agreement. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

[7] Article II sec. 2 NY Convention
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
Article IV NY Convention
1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
(a) The duly authenticated original award or a duly certified copy thereof;
(b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.
Article VII sec. 1 NY Convention
1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

conclude an arbitration agreement by reference, such reference should be introduced in a written contract. Since the reference was included only in the confirmation of the contract drafted by one party, and the second party did not respond in writing to that confirmation and only began to exercise its contractual obligations, the requirement of a written form had not been satisfied. Apart from the reasoning presented in terms of NY Convention provisions, the Supreme Court determined that the will of the parties should have been unquestionable, especially since the issue concerned a constitutional right to a fair trial.

[*Descriptions of the Facts and Legal Issues*]:

12.15. On 27 July 2015 an arbitration court at the Federation of Cocoa Commerce (FCC) awarded EUR 750,000 in favor of A against B (Arbitration Award). As a consequence of B's appellation on 21 March 2016 an arbitration court at FCC changed the previous judgment and awarded EUR 710,000 in favor of A against B (Appeal Award). On 28 October 2016 the Court of Appeals dismissed A's application for a declaration of enforceability of the appeal award as well as for recognition of the arbitration award.

12.16. The applicant (A) argued that it had concluded five sales contracts with B. FCC Contract Rules, which include an arbitration clause, had been incorporated in the contracts. In line with the practice established between the parties, B was making its order by phone or e-mail, then A was sending confirmations of the contracts by e-mail and simultaneously by mail, and B began to exercise its contractual obligations. Therefore, since all the contracts had been concluded by e-mail, a requirement of a written form stipulated in Article II NY Convention had been met. Printouts of the e-mails enclosed to the application meet a requirement of supplying an original agreement or a duly certified copy thereof.

12.17. In response to the applicant's argumentation, B questioned validity of an arbitration clause. In its opinion FCC Contract Rules had not been incorporated in the contracts, and even if the incorporation had been made, it had not covered the arbitration clause. Under NY Convention a party is not allowed to introduce an arbitration clause by reference. Simultaneously prerequisites of such introduction stipulated by Polish law had not been satisfied. The reference to FCC Contract Rules had been included only in documents drafted by A, where there had been no indication about the arbitration clause, while a party's consent to arbitrate cannot be presumed. Furthermore, a standard form contract should have been presented to B and

not made available only online for payment. Therefore, a written form of the contract, required both by NY Convention and Polish law, had not been satisfied. Irrespective of the foregoing, B invoked a breach of a principle of the legal order of the Republic of Poland.

12.18. Apart from the aforementioned circumstances, the Court of Appeals found that the confirmations of the contracts included a note that all terms and conditions (rules) of FCC Contract shall be regarded as included in the contract and as a part thereof, while the terms and conditions are available on FCC's website.

12.19. Taking the foregoing into consideration, the Court of Appeals decided that NY Convention should have been applied. Pursuant to Article II NY Convention an arbitration clause should be in writing, whereas under Article IV NY Convention recognition and enforcement of an arbitral award require submitting a contract in a written form that includes an arbitration clause. Although it is a formal requirement, if a party declares that its documents meet the standard, it is necessary to make a substantive assessment whether requirements of Article II NY Convention had been satisfied.

12.20. During the process of construction of Article II(2) NY Convention the Court of Appeals stated that correspondence by e-mail meets the standard of a written form. By reason of the development of means of distance communication, all means that allow to preserve content of a declaration and to recreate it in writing satisfies the standard of a written form as the purpose of the written form is preservation of parties' declarations in a certain way. Therefore, oral declarations (e.g. by phone) or *per facta concludentia* (e.g. by beginning to exercise a contractual obligation) does not meet the standard.

12.21. Subsequently, the Court of Appeals noticed that NY Convention did not provide a possibility of concluding arbitration agreements by including them in written confirmations of contracts, especially when a confirmation is provided only by one party of a contract. However, if an arbitration agreement is to be concluded by an exchange of documents, such documents should match or address each other. The written form requires that both parties make their declarations in writing. Therefore, the way of the contracts' conclusion adopted by A and B did not meet prerequisites stipulated in Article II(2) NY Convention.

12.22. Following the examination of Polish law the Court of Appeals reached the same conclusion. The difference between Article II NY Convention and Article 1162 CCP is that under Polish law it is possible to agree to arbitrate by reference. However,

the standard is satisfied only if an agreement that includes the reference is in writing and the reference makes an arbitration agreement a part of the main agreement. Thus, if the agreement with the reference had not been concluded in writing, the standard provided by Article 1162 CCP had not been met.

12.23. The Court of Appeals also noticed that the construction of contractual and statutory provisions that concern consent to arbitrate should be treated with great care to avoid a breach of a right to a fair trial that is protected both by Polish Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms. A failure in complying with a written form of an arbitration clause results in its invalidity, and under NY Convention at least in its ineffectiveness. A requirement of submission of a written contract has a substantive character, so failure in satisfying this requirement leads to dismissal of the application.

12.24. The applicant (A) filed a cassation appeal with the Supreme Court in which it alleged that the ruling of the Court of Appeals had breached Article II(1) and (2) in connection with Article IV(1b) NY Convention by their misconstruction, as the Court of Appeals had ruled that an oral or implicit declaration does not meet the standard of a written form, while a term "an exchange of letters or telegrams" means that the documents should match or address each other and therefore the requirement is satisfied if the exchange of the documents had taken place before sending the confirmation of the contract from one party to another. In A's opinion, Article IV(1b) NY Convention had been breached due to the Court of Appeals' conclusion that failure in submitting a written contract, referring to an arbitration clause included in a different document, leads to ineffectiveness of the arbitration clause.

12.25. Furthermore, A argued that Article 1162(2) CCP in connection with Article 1162(1) and (2) sent. 1 CCP had been breached by their misconstruction, as the Court of Appeals had ruled that a form "in writing", stipulated for a contract referring to another document that includes an arbitration clause, is not satisfied if an entrepreneur, acting in line with the agreed practice, sends to another party a confirmation of a contract, and the other party does not oppose and exercises the contract. The applicant (A)

also alleged a breach of Articles 316(1) CCP[8] and 328(2) CCP[9] in connection with Articles 361 CCP[10] and 13(2) CCP[11] in a form of omission of a document, according to which B had known general terms of the contract, since B had concluded similar contracts with other entities.

12.26. The foregoing lead A to file a motion for setting the Court of Appeals' ruling aside and its change by affirming A's application, or alternatively for setting the Court of Appeals' ruling aside and referring the case back for rehearing.

[*Decision of the Supreme Court*]:

12.27. The Supreme Court ruled in favor of B and dismissed A's appeal.

12.28. The Supreme Court recognized that the essence of the dispute is whether the parties had concluded – by conclusion of the sales contract – a contract in writing under Article II(2) NY Convention or consented to arbitrate in compliance with the rules stipulated in Article 1161 in connection with Article 1162 CCP. The Supreme Court also determined that the subject of the dispute is whether a requirement of a written form of a contract or an arbitration clause is satisfied when a party sends a confirmation of a contract to another party, which does not oppose to the confirmation and begins to exercise the contract.

12.29. Pursuant to the provisions of NY Convention, a term "an agreement in writing" (to arbitrate) is defined as a contractual clause or as a compromise, that is an agreement to arbitrate after the dispute has arisen. In both these cases agreements may be undersigned by the parties or concluded by an exchange of letters or telegrams.

12.30. The Court of Appeals rightly found that the standard provided by NY Convention is also satisfied if declarations of intent are made by new means of communication. However, in every case two requirements should be met. First, both parties should declare their intention to arbitrate. Second, it is insufficient to accept an idea to arbitrate, but it is necessary to make declarations of

[8] Article 316 § 1 CCP (unofficial translation)
§ 1. Having closed a case, the court shall render a judgment on the basis of the status quo existing at the time the case is closed; in particular the fact that a claim becomes due while the case is pending shall not preclude the court from awarding the same.

[9] Article 328 § 2 CCP (unofficial translation)
§ 2. A statement of reasons for the judgment should state the factual basis for the case resolution, namely the facts that the court considers to have been proved, evidence on which the court relied, reasons for which the court denied credibility and probative value to other evidence, and the legal basis for the judgment, including a reference to the relevant provisions of law.

[10] Article 361 CCP (unofficial translation)
Except as otherwise provided herein, provisions on judgments apply mutatis mutandis to court orders.

[11] Article 13 § 2 CCP (unofficial translation)
Except as otherwise provided by specific regulations, provisions concerning contentious proceedings apply mutatis mutandis to other types of proceedings governed by this Code.

intent in a written form within the meaning provided by Article II(2) NY Convention.

12.31. An oral or implicit agreement to arbitrate does not meet the standard provided by the provisions of NY Convention, as such an agreement is not concluded in writing. The same conclusion should be made in a situation in which one party sends by phone or e-mail a confirmation of the contract with reference to general terms that include an arbitration clause, while the other party begins to exercise the contract. Even if the intent to arbitrate may be derived from such actions, the intent had not been expressed in a written form stipulated by law.

12.32. Furthermore, under Article II NY Convention conclusion of "a contract in writing" requires the other party's declaration of intent to arbitrate. Only then "an exchange of letters or telegrams" occurs within the meaning of Article II(2) sent. 2 NY Convention, regarded as the documents matching or addressing each other that include consensus to arbitrate. The standard is not satisfied by ordinary correspondence between the parties if the correspondence does not include declarations to give competence to an arbitration court. Therefore, the Court of Appeals rightly determined that in the caste at hand the e-mail correspondence is not of the aforementioned character.

12.33. Further liberalization of Article II(2) NY Convention construction leads to deprivation of meaning of a written contract requirement where the parties oblige themselves to arbitrate. Thereby important roles of a specific form of a contract would be negated. It primarily concerns a warning role – i.e. inducing the parties to consider a decision to arbitrate – as well as an informational, documentary and probative role – i.e. allowing to obtain some information about the fact of conclusion of a contract and about its content. Possibility of familiarizing oneself with declarations of intent made in writing is especially important due to the fact that conclusion of a contract in writing or an arbitration clause is always a subject of determination of a state or an arbitration court that decides on its jurisdiction.

12.34. Making declarations in writing decreases a risk of erroneous determination whether the declarations should be recognized as expression of parties' intent to arbitrate. Moreover, it allows to determine a subject of a dispute and a legal relationship from which a dispute arose or could arise. These roles would not be accomplished if one declaration of intent is made in writing while the other one – orally or *per facta concludentia*. Sending "a letter or a telegram" (that is an undersigned document) does not satisfy the standard of a written form within the meaning of

Article II(2) sent. 2 NY Convention. In order to determine the conclusion of a written contract, the aforementioned sending of "a letter or a telegram" should constitute an "exchange", i.e. there should be a correlative letter or declaration, and both of these "letters or telegrams" match or address each other and include parties' consent to arbitrate.

12.35. Prerequisites of an arbitration agreement by reference, stipulated in Article 1162(2) sent. 2 CCP in connection with Article VII(1) NY Convention, had not been satisfied. Article 1162(2) sent. 2 CCP states that a written form of an arbitration clause is satisfied if the agreement refers to a document that includes a provision under which the disputes shall fall under the jurisdiction of an arbitration court and the agreement is concluded in writing, while the reference makes the arbitration clause a part of the agreement. This provision introduces liberalization and simplification of requirements stipulated in Article 1162(1) CCP. However, effective application of Article 1162(2) sent. 2 CCP is only possible if an agreement – from which a dispute may arise, i.e. so called "a main agreement" – is in writing.

12.36. There are different standpoints on how to understand a requirement of a written form for the main contract. Generally it should be understood in the same way as in terms of a written form for an arbitration clause. The discrepancy between the standpoints results from whether it concerns a form of an arbitration clause stipulated in Article 1162(1) CCP, which requires signatures made with one's own hands (Article 78(1) CC)[12] or an equivalent electronical form (Article 78(2) CC), or whether it requires to satisfy the form stipulated in Article 1162(2) sent. 1 CCP. In the second case it would be possible to introduce an arbitration clause by reference by the exchange of unsigned letters or declarations made in a different form if means of communication allow to preserve content of the declarations, e.g. by e-mail.

12.37. Even if one accepts the second aforementioned standpoint, in the case at hand the concluded sales contracts did not meet the said requirement of a contractual form. The foregoing deliberations remains valid, i.e. mere beginning to exercise contractual obligations after obtaining a confirmation of the contract does

[12] Article 78 Civil Code [CC] (unofficial translation)

§ 1. In order to observe written form for a legal act, it is sufficient to set a handwritten signature to a document containing a declaration of intent. In order to execute a contract, it is sufficient to exchange documents containing declarations of intent, each of which is signed by one of the parties, or documents, each of which contains a declaration of intent of one party and is signed by this party.

§ 2. A declaration of intent made electronically and bearing a secure electronic signature verified by a valid qualified certificate is equivalent to a declaration of intent made in writing.

not satisfy the requirement of a written form, also recognized as an exchange of letters or declarations. It is insufficient to state that the other party does not question the conclusion of the main agreement that includes reference to the arbitration clause stipulated in another document. The issue of existence of an arbitration clause always requires separate assessment and determination on its validity and effectiveness. In the case at hand B questioned the grounds for arbitration from the very beginning. Therefore, one cannot accept A's view that due to the acceptance of the main contract B consented to arbitrate, while A was excused from presenting "a written contract" or its certified copy (Article IV(1)(b) NY Convention).

12.38. Jurisdiction of an arbitration court results from parties' will, which should be unquestionable, especially since providing jurisdiction to an arbitration court has influence on benefiting from a constitutional right to a fair trial (Article 45 of the Constitution of the Republic of Poland). The aforementioned provisions of NY Convention and CCP should be assessed from this point of view, taking into consideration the fact that liberalization tendencies concern only a form of an arbitration clause, not a form of the main agreement. Moreover, in relation to the issue of a form it is primal and fundamental to determine whether both parties consented to arbitrate. In the case at hand lack of satisfaction of a requirement of a written form within the accepted construction of Article II(2) NY Convention and Article 1162 CCP justified the dismissal of the application. As a result, it was unnecessary to further deliberate on whether B made its declaration of intent, which form should be assessed from the legal point of view.

Key words:
legal successor of beneficiary of an arbitral award | *proceedings for recognition or confirmation of the enforcement of an arbitral award* | *writ of execution* | *public order clause* |
Polish arbitration law

States involved:

[**POL**] – [Poland]

Ruling of the Supreme Court of 27 March 2019; case ref. V CSK 107/18

Laws Taken into Account in This Ruling:

Kodeks postępowania cywilnego z dnia 17 listopada 1964r. [Code of Civil Procedure of 17 November 1964] [k.p.c.] [CCP], published in: Dziennik Ustaw [Journal of Laws] 1964, No. 43, item 296, as amended; Articles: 788(1); 1212; 1213(1); 1214(3); 1215(2);[13] United Nations Convention on the Recognition and

[13] Article 788. CCP (unofficial translation)
§ 1. If, after an enforcement order has been issued or in the course of proceedings before an order has been issued, a right or obligation is transferred to another person, the court shall issue a writ of execution on behalf of or against that person, if the transfer is proven by an official document or private document bearing an officially certified signature.
Article 1212. CCP (unofficial translation)
§ 1. A judgment of an arbitration court or a settlement reached before an arbitration court have the same legal effect as a court judgment or a settlement reached before a court upon their recognition or confirmation of their enforcement by the court.
§ 2. A judgment of an arbitration court or a settlement reached before an arbitration court are recognized or have their enforcement confirmed in accordance with the terms and conditions determined in this Title, irrespective of the state of issue.
Article 1213. CCP (unofficial translation)
§ 1. The court recognizes a judgment of an arbitration court or a settlement reached before an arbitration court or declares them to be enforceable on the petition of a party. The party's petition should be accompanied by the original or a copy certified by an arbitration court of a judgment issued by the arbitration court or settlement reached before the arbitration court, as well as the original or an officially certified copy of the arbitration clause. If a judgment of an arbitration court or a settlement reached before an arbitration court, or an arbitration clause, are not made in Polish, the Party shall provide their certified translation into Polish.
Article 1214. CCP (unofficial translation)
§ 3. The court shall refuse to recognize or confirm the enforcement of a judgment of an arbitration court or a settlement reached before an arbitration court if:
1) according to this Act, the dispute cannot be adjudicated by an arbitration court,
2) recognition of a judgment of an arbitration court or a settlement reached before an arbitration court would be contrary to the basic principles of the legal order of the Republic of Poland (the public order clause),
3) a ruling of an arbitration court or a settlement concluded before an arbitration court deprives a consumer of the protection afforded to them by the mandatory provisions of the law applicable to the agreement to which the consumer is a party, and where the applicable law is a law selected by the parties - the protection afforded to the consumer by the mandatory provisions of the law which would be applicable should no law have been selected.
Article 1215. CCP (unofficial translation)
§ 2. Notwithstanding the reasons listed in Article 1214, the court shall, at the request of a party, refuse to recognize or confirm enforcement of a judgment of an arbitration court issued abroad or a settlement reached before an arbitration court abroad if the party proves that:
1) there was no arbitration clause, an arbitration clause is void, invalid or has expired according to relevant law,
2) the party was not duly notified of the appointment of an arbitrator or proceedings before an arbitration court, or was otherwise deprived of the possibility to defend his rights before an arbitration court,
3) a judgment of an arbitration court concerns a dispute which is not covered by an arbitration clause or falls beyond the subject-matter and scope of that clause, however, if adjudication in matters covered by an arbitration clause may be separated from adjudication in matters not covered by that clause or falling beyond the subject-matter and scope of that clause, a refusal to recognize or confirm enforcement of a judgment of an arbitration court may only concerns those matters which are not covered by the arbitration clause or fall beyond the subject-matter and scope of that clause,
4) the composition of an arbitration court or proceedings before an arbitration court were not in accordance with an agreement between the parties or, if there was no such agreement, with the law of the state where proceedings before an arbitration court were conducted,
5) a judgment of an arbitration court is not yet binding on the parties or has been set aside, or its enforcement has been postponed by a court of the state in which or according to whose laws the judgment was issued.

Enforcement of Foreign Arbitral Awards; New York, 10 June 1958 [NY Convention]; Article V(1)(b) and 2(b);[14]

[*Rationes Decidendi*]:

12.39. Although the Court of Appeals is right when saying that confirmation of the enforcement of an arbitral award may be done only once in relation to a specific judgment, the Supreme Court determines that simply adopting (without taking appropriate evidence) that this confirmation have already been done, constitutes a sufficient ground for filing a cassation appeal. Therefore, a *sui generis* competition between proceedings for recognition/confirmation of the enforcement of a judgment of an arbitration court and proceedings for a writ of execution for an enforcement order after having a right or obligation transferred to another person/entity (a legal successor of a beneficiary of an arbitral award) was only apparent, since the Supreme Court repealed the contested judgment, which had adjudicated an enforcement title for the benefit of the applicant, *i.e.* a legal successor of a beneficiary of an arbitral award and concluded that **if the enforcement of arbitral award had already been gained, then the proceedings pursuant to Article 788 CCP would have been conducting in relation to (or with the participation of) the legal predecessor that had accomplished the enforcement title for its own benefit.** Hence, if the submission of a motion to confirm enforceability of the arbitral award is done by an acquirer of debt, the original of enforceable title issued in favor of the previous creditor should have been attached.

[*Descriptions of the Facts and Legal Issues*]:

12.40. An arbitration proceedings between a municipality [M] and an entity [X] was pending before the International Court of Arbitration [ICC] in 2015. According to the final judgment of 26 March 2015, ICC ordered M to pay X the amount of approx. PLN 2.3M (approx. USD 581,000) as well as the amount of approx. PLN 1.5M (approx. USD 380,000) as for the interest. A motion for a writ of execution for the ICC judgment was

[14] Article V
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

submitted by a bank [B], on its behalf, as a legal successor of X (a debt assignment agreement concluded in 2013).

12.41. Such a motion was dismissed by the Court of Appeals. The Court stated that, in fact, it was the motion to recognize or to confirm the enforceability of the arbitral award, therefore, the applicant [B] should have attached to the motion e.g. an original loan agreement in order to prove its claim secured by the assignment. As a result, B did not meet the formal requirements for the effectiveness of its motion. Moreover, the Court indicated that two legal grounds had been accumulated as the bases to rule in the proceedings – 1° - a motion to recognize/confirm the enforceability of an arbitral award, Article 1213(1) CCP, and 2 - a motion for the writ of execution for an enforcement order - Article 788 CCP.

12.42. After having the first motion dismissed, B filed the second one with the same content. This time, B attached the additional required documents.

12.43. Again, the Court of Appeals established its jurisdiction over the case. Although the Court initially qualified the case both as the proceedings for recognition or confirmation of the enforcement of an arbitral award and for a writ of execution for an enforcement order, it is significant that it appeared only in the reasoning of the judgment that the motion could not have been qualified as an application for confirmation of the enforcement of an arbitral award, since such a statement had already taken place, hence it had already been a subject of a decision of another Polish state court. In such circumstances, the Court of Appeals issued a decision granting a writ of execution to the arbitral award and only indicated that there was no legal ground for re-examining the issue of recognition or confirmation the enforcement of a judgment of an arbitration court. Therefore, the Court of Appeals did neither examine legal bases constituted in Articles: 1214(3) CCP; 1215(2) CCP nor in Article V(2)(b) NY Convention.

12.44. It should be noted that in the background of the present case a few separate proceedings were initiated on the request of entities which had the same objective to achieve – declaration of the enforceability of the same arbitral award. The reason behind this was that the entity (a party to the arbitration proceedings - X) concluded several different debt assignment agreements for the transfer of claims awarded subsequently by the arbitral award.

12.45. Ultimately, municipality [M] filed a cassation appeal to the Supreme Court in which it argued that the Court of Appeals had erred in assessing that the award had determined the merits of the case since the Court of Appeals should have carried out the

proceedings for confirmation of the enforcement of the arbitral award, therefore, requested the setting aside of the contested arbitral award and the referring the case back for rehearing, with the order to pay the costs of the proceedings.

12.46. The applicant [B] requested that the cassation appeal be dismissed, arguing that in the proceedings for a writ of execution for an enforcement order after having a right or obligation transferred to another person/entity (Article 788 CCP) a cassation appeal is not allowed.

[*Decision of the Supreme Court*]:

12.47. The Supreme Court ruled in favor of M and set aside the contested judgment along with referring the case back for rehearing to the Court of Appeals.

12.48. Firstly, the Supreme Court found that it is allowed to file a cassation appeal in that case. The reasoning of the Supreme Court was followed by the idea that there were discrepancies between the issues having reflected to the merits of the case, since the Court of Appeals eventually adopted a different reasoning of the contested judgment than it appeared in its sentence (dispositive part of the judgment), which also did not correspond to the matter at issue and the course of the proceedings. The Court of Appeals decided over the case for confirmation of the enforceability of a foreign arbitration court judgment and ruled on it by granting a writ of execution in favor of B, and did only adopt (without proper examination) that there was no basis for 're-confirmation' of the enforceability, since such a statement had already been made.

12.49. It should be emphasized, that the Supreme Court set aside the contested judgment solely for procedural reasons, therefore, legal grounds for refusal of the confirmation of the enforcement of the arbitral award were considered to be premature to have been examined.

12.50. The Supreme Court reminded that during the proceedings on the recognition/confirmation of enforceability of an arbitration court's judgment issued abroad, a Court of Appeals (firstly) applies accordingly provisions concerning an appeal and (secondly) a cassation appeal may be filed against its final decision (Article 1215(3) CCP). Therefore, such a case shall be heard by a panel of three professional judges (Article 367(3) CCP in conjunction with Article 1213^1(2) CCP). A motion for recognition/confirmation of enforcement of the arbitral award, by granting it a writ of execution, may be submitted by a legal successor of a beneficiary of an arbitral award only if it is a legal successor that initiates the proceedings for incorporating such

a judgment into the national legal system for the first time. The jurisdiction of the court adjudicating in such a case is extended to examine the premises of Article 1214(3) CCP and 1215(2) CCP as well as legal grounds of legal succession (Article 788 CCP).

12.51. The Supreme Court indicated that the Court of Appeals was correct in stating that **confirmation of enforceability of a judgment of an arbitration court may only be issued once**. Moreover, there are no legal grounds to repeat the proceedings for incorporating such a judgment into the national legal system. The Supreme Court emphasized the chronology of the actions that should have been undertaken by the Court of Appeals. Firstly, it should be recalled that an arbitration award is not an enforcement order. An arbitration award, whose enforceability was recognized/confirmed, is characterized by binding effect vested in valid court decisions (Article 365 CCP)[15] and *res judicata* (Article 366 CCP).[16] Secondly, after having a right or obligation transferred to another person/entity (a legal successor of a beneficiary of an arbitral award) a writ of execution might be granted for such an enforceable title, provided that (1) the applicant is a legal successor of the entity which obtained the enforceable title and (2) the applicant demonstrates legal succession with an official document or a private document with an officially certified signature.

12.52. As for the issue of the existence of competition between previous decisions on the enforceability of an arbitral award, the Supreme Court determined the serious inadequacies in scope of the factual findings of the Court of Appeals, related to the infringement of procedural law. It is not apparent from the files of these proceedings and from the evidence carried out in these proceedings that the previous ones were completed by issuing such a decision concerning the enforceability. This presumption refrained the Court from the confirmation of enforceability based on B's application. Therefore, it is not certain whether these relevant legal effects, from which the Court of Appeals derived its negative decision on the enforcement of the arbitration award, had indeed arisen.

12.53. Moreover, the Supreme Court indicated that allegations regarding the correctness of assessment of legal grounds for

[15] Article 365. CCP (unofficial translation)
§ 1. A non-appealable ruling shall be binding not only on parties and the court that has issued the ruling but also on other courts as well as other state and public administration authorities, and on other persons as may be provided for in this Act.

[16] Article 366. CCP (unofficial translation)
A non-appealable judgment shall have the force of res judicata only insofar as it relates to what was the subject-matter of adjudication with respect to the cause of action, and only between the same persons.

confirmation of enforceability, defined in NY Convention and CCP (Article 1214(3) and 1215(3) CCP), relate to legal substantive requirements of confirmation of enforceability. Although the abovementioned provisions of law do not have a substantive nature, they compose a functional equivalent to the provisions constituting legal bases for issuing a judgment in proceedings of examination of civil law cases. **The inappropriate assessment of the conditions for recognition/confirmation of enforceability of an arbitral award, therefore, belongs to *errores in iuidicando*** and not to *errores in procedendo*.

12.54. Regarding the allegations of failure to examine the conditions for refusal of recognition of the judgment when it is contrary to the basic principles of the legal order of the Republic of Poland (the public order clause) - Article V(2)(b) NY Convention as well as failure to carry out the proceedings for confirmation the enforceability of a foreign arbitral award (violation of Article 1212 CCP in conjunction with Articles 1214 CCP and 1215 CCP), the Supreme Court stated that the abovementioned allegations are justified so far as the Court of Appeals did not make factual findings that would be sufficient to determine whether the proceedings for confirmation the enforceability of an arbitration award has already been carried out and has been completed by a final court ruling.

12.55. Should it have happened, the matter at issue which forms the basis of proceedings for granting a writ of execution to an arbitral award after having a right or obligation transferred to another person/entity cannot be re-examined. However, if that judgment had not been issued, the Court of Appeals is obliged, after referring the case back for rehearing, to re-examine the issue by analyzing the conditions listed in NY Convention, which takes priority over the provisions of CCP (Article 91(2) of the Constitution of the Republic of Poland).

12.56. In conclusion, the Supreme Court referred to the issue of relation between (1) proceedings for confirmation of the enforcement of a judgment of an arbitration court and proceedings for a writ of execution for an enforcement order after having a right or obligation transferred to another person/entity and (2) creditors' competitiveness within execution proceedings and stated that in a situation where an enforceable title has already been issued, in order to prevent and minimize risk of execution proceedings on the basis of two (or more) enforceable titles, the legal successor [B], when submitting a motion for granting a writ of execution after having a right transferred in its favor, should also attach the original of the enforceable title issued in favor of the seller [X].

However, if the confirmation of the enforcement of an arbitral award by granting a writ of execution has already been carried out, the proceedings pursuant to Article 788 CCP should have been referred to the legal predecessor [X], which had obtained the enforceable title for its own benefit. Therefore, **there should be no situation such as in this case, that several enforceable titles, which were issued on the basis of the same arbitral award, remain valid in the legal system.** The writ of execution for an enforcement order after having a right or obligation transferred to another person/entity cannot be granted in favor of all of the entities which may have been bound by an assignment agreement with an initial creditor, since it results in a situation of competition between creditors that are entitled to pursue the same claim within enforcement proceedings.

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