

**Czech (& Central European)  
Yearbook of Arbitration®**



**Czech (& Central European)  
Yearbook of Arbitration®**

**Volume XI**

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**(Best) Practices in Arbitration**



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# LEX LATA

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## List of Abbreviations

<b>ADR</b>	Alternative Dispute Resolution
<b>AIFC</b>	Astana International Financial Centre
<b>BILOS</b>	Brazilian Institute for the Law of the Sea
<b>BRI</b>	China's Belt and Road Initiative
<b>CIETAC</b>	China International Economic and Trade Arbitration Commission
<b>CISG</b>	United Nations Convention on Contracts for International Sale of Goods
<b>COVID-19</b>	Coronavirus disease 2019
<b>DIS</b>	German Arbitration Institute
<b>FDI</b>	Foreign direct investment
<b>FIDIC</b>	International Federation of Consulting Engineers
<b>GDP</b>	Gross Domestic Product
<b>HKIAC</b>	Hong Kong International Arbitration Centre
<b>IBA</b>	International Bar Association
<b>ICA CCI</b>	International Court of Arbitration in Affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic in Kyrgyzstan
<b>ICC</b>	International Chamber of Commerce
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ISTAC</b>	Istanbul Arbitration Centre
<b>k.c. [POL]</b>	Polish Civil Code of 23 May, 1964, published in: <i>Dziennik Ustaw [Journal of Laws]</i> 1964, No. 16, item 93, as amended
<b>k.p.c. [POL]</b>	Polish Code of Civil Procedure of 17 November, 1964, published in: <i>Dziennik Ustaw [Journal of Laws]</i> 1964, No. 43, item 296, as amended
<b>LCIA</b>	London Court of International Arbitration
<b>PETs</b>	Privacy enhancing technologies

<b>PSSP [POL]</b>	Polish Arbitration Association based in Warsaw
<b>RAA</b>	Russian Arbitration Association
<b>SCAI</b>	Swiss Chambers' Arbitration Institution
<b>SCC</b>	Arbitration Institute of the Stockholm Chamber of Commerce
<b>SIAC</b>	Singapore International Arbitration Centre
<b>SIDRC</b>	Seoul International Dispute Resolution Centre
<b>TIAC</b>	Tashkent International Arbitration Centre
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNIDROIT</b>	The International Institute for the Unification of Private Law
<b>UPIC</b>	Principles of International Commercial Contracts
<b>USLU</b>	Ural State Law University
<b>VIAC</b>	Vienna International Arbitral Centre
<b>WTO</b>	World Trade Organization

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Case Law

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## Poland

### Arbitration Case Law 2020

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***Key words:***

*unenforceability of arbitration clause | costs of the arbitration proceedings | Polish arbitration law*

***States involved:***

[POL] - [Poland]

Ruling of the Court of Appeals in Warsaw of 27 April 2020, file ref. no VII AGz 35/20

***Laws Taken into Account in This Ruling:***

Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [*Code of Civil Procedure of 17 November 1964*] [k.p.c.] [POL], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 43, item 296, as amended; Articles 1165,<sup>1</sup> 1168.<sup>2</sup>

Konstytucja Rzeczypospolitej Polskiej [*The Constitution of the Republic of Poland of 02 April 1997*] [Konstytucja] [POL]

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<sup>1</sup> (1) If an action is brought in a matter which is the subject of an arbitration agreement, the court shall reject a statement of claim or petition if the defendant or respondent invokes an arbitration agreement before defending on the merits of the case.

(2) The provision of § 1 shall not apply if the arbitration agreement is invalid, ineffective, unenforceable or inoperative, or if the arbitration court declines its jurisdiction.

(3) Bringing legal action shall not preclude the case from being heard by an arbitration court.

(4) The preceding paragraphs shall also apply if the seat of arbitration is outside the Republic of Poland or has not been determined

<sup>2</sup> (1) If a person identified in an arbitration agreement as an arbitrator or presiding arbitrator refuses to serve or otherwise proves incapable of serving in such capacity, the arbitration agreement shall cease to have effect, unless the parties decide otherwise.

(2) Except as otherwise agreed by the parties, an arbitration agreement shall cease to have effect if the arbitral tribunal indicated therein refuses to hear the case or otherwise proves incapable of hearing the case.

published in: Dziennik Ustaw, [Journal of Laws] 1997, No. 78, item 483, as amended; Article 45.<sup>3</sup>

Kodeks cywilny z dnia 23 kwietnia 1964 [The Civil Code of 23 April 1964] [k.c.] [POL], published in Dziennik Ustaw, [Journal of Laws] 1964, No. 16, item 93, as amended; Article 475(1).<sup>4</sup>

*[Rationes Decidendi]:*

- 8.01.** Circumstances such as the lack of funds to cover the costs of the arbitration proceedings do not constitute a premise for the arbitration clause to lose its effect, nor do they constitute its unenforceability within the meaning of Articles 1165 and 1168 of the Code of Civil Procedure. While submitting a dispute to arbitration, the parties to the arbitration agreement must be aware of the negative effects as, for example, the lack of certain procedural guarantees applicable before a common court such as exemption from bearing the costs of the proceedings.

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

- 8.02.** In the facts of the case, in 2011 the parties entered into an investment agreement pursuant to which any disputes arising out of or in connection with the agreement would be resolved by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, composed of three arbitrators in accordance with the rules of that court in force on the day the claim was filed.
- 8.03.** In 2019 the plaintiff filed a statement of claim at the Regional Court in Warsaw, however, in its decision, the Regional Court in Warsaw rejected the claim due to the arbitration clause claim raised by the defendant.
- 8.04.** The plaintiff didn't agree with the ruling and considered that there were no grounds for rejecting the statement of claim on the grounds that the arbitration clause has expired. The plaintiff argued that hearing the case by the indicated arbitration court became impossible as he did not have the means to cover the costs of the arbitration proceedings, and thus he had no real possibility to pursue his rights before the arbitration court. In the plaintiff's opinion, the lack of funds for initiating the proceedings leads to the expiry of the arbitration agreement. The plaintiff indicated that pursuant to Article 1165(2) k.p.c. and

<sup>3</sup> (1) Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

(2) Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly.

<sup>4</sup> (1) If the performance becomes impossible as a result of circumstances for which the debtor is not liable, the obligation shall expire.

(2) If the thing which is the object of the performance has been transferred, forfeited, or damaged, the debtor shall be obliged to release all that which he obtained in exchange for that thing or as the redress of the damage.



Article 1168(2) k.p.c., an arbitration agreement shall cease to be effective if the arbitration tribunal refuses to hear the case or otherwise proves incapable of hearing the case. Notwithstanding the above, the plaintiff argued that for the above reasons there are also premises to consider the arbitration clause unenforceable within the meaning of Article 1165(2) k.p.c. As a result of the above, the plaintiff filed a complaint against the decision of the Regional Court.

- 8.05.** In the final judgement of 27 April 2020, case No. VII AGz 35/20, the Court of Appeals in Warsaw dismissed the complaint and shared the position of the Regional Court.

*[Decision of the Regional Court]:*

- 8.06.** The Regional Court ruled that in the reality of the case both conditions for rejecting the claim listed in Article 1165(1) k.p.c. were met, i.e. the dispute between the parties was covered by an arbitration clause and the defendant raised a charge of the arbitration clause before entering into a dispute as to the merits.

- 8.07.** The Regional Court strongly rejected the possibility of recognizing the arbitration clause as unenforceable due to the subsequent insolvency of the party to the arbitration clause, stating that the party that is bound by the arbitration clause is always liable for its ability to pay the arbitration fees required by the regulations to which the party is bound to.

- 8.08.** The Regional Court noted that, in accordance with Article 475(1) k.c., the debtor's difficulties in performing any pecuniary benefits should not be equated with the inability to perform, even in the event of his insolvency. It is assumed that the debtor is always responsible for his ability to pay. Consequently, in the opinion of the Regional Court, the insolvency was not the reason for establishing the arbitration clause as unenforceable as referred to in Article 1168(2) k.p.c. Furthermore, it was noted that the mere fact of concluding a subscription for an arbitration court constituted a voluntary restriction of constitutional access to the (general) court between the parties to this agreement.

*[Decision of the Court of Appeals]:*

- 8.09.** The Court of Appeals dismissed the complaint and shared the position of the Regional Court.

- 8.10.** Firstly the Court of Appeals pointed out two potential reasons for the inability to perform the arbitration agreement resulting from Article 1168 k.p.c. - the pathological nature of the agreement itself (primary inability) or the subsequent events unforeseen by the parties (secondary inability). In the former case, it should be assumed that the agreement is ineffective *ab initio*. On the

other hand, the provision of Article 1168(2) k.p.c., to which the plaintiff refers, refers only to situations in which it “turned out” to be impossible to hear the case within the framework of the arbitration organisation agreed upon by the parties, which should be understood as a *consequential impossibility*, rather than as the *original impossibility* to execute the agreement being revealed. The Court of Appeals found that in the case under consideration, the lack of funds to cover the costs of the proceedings was not such a consequential impossibility.

- 8.11.** The Court of Appeals pointed out that there is no provision which explicitly provides for the lack of effectiveness of the arbitration clause in the event of the deterioration of the party’s financial situation. In turn, according to the established views of the doctrine representatives, other reasons of the expiry of the arbitration clause, as provided for in Article 1168(2) k.p.c., include: the refusal or inability to perform the function of an arbitrator directly indicated in the agreement, death of the arbitrator, long-term illness of the arbitrator or his imprisonment, refusal of the indicated arbitration institution, lack of unanimity or majority of votes required by the agreement, dismantling of the permanent arbitration court indicated in the clause, issuance of a final judgment by a common court in a dispute subject to the jurisdiction of an arbitration court, expiry of the time limit with which the arbitration clause was included, fulfilment of the resolutive condition included in the clause, or reasons directly indicated in the agreement.
- 8.12.** As the Court of Appeals emphasised, an obstacle in the execution of an arbitration agreement concerns an arbitrator or arbitration institution indicated by the parties, and not some external cause, in particular an arbitration clause concerning the parties to the agreement. In addition, they have all the nature of objective circumstances and are permanent in nature. Such circumstances do not include the deterioration of the financial situation of one of the parties.
- 8.13.** Regarding the claimant’s argument that the lack of possibility of exemption from the costs of the proceedings deprives him of his right to court, the Court of Appeals indicates that the parties, when deciding to submit a dispute to arbitration, must be aware of both the positive and negative effects as for example the lack of certain procedural guarantees applicable before a common court.
- 8.14.** The Court of Appeals also referred to the plaintiff’s charge regarding the violation of Article 45 of the Polish Constitution. According to the Court of Appeals, the rules relating to the administration of justice contained in the Constitution cannot

be applied to arbitration, which derives its competence to resolve a given dispute from the free, independent decision of the parties on how to exercise their private rights. As it is suggested, the submission of a case to arbitration may be understood as a waiver of the right to hear the case in a state court (right to court), i.e. the protection afforded by the state.

- 8.15.** Regarding the unenforceability of the arbitration clause within the meaning of Article 1165(2) k.p.c., as claimed by the plaintiff, this argument is also illegitimate. This provision refers to two separate legal institutions - the unenforceability of the clause and the lack of its effect (expiry of an arbitration agreement). The unenforceability (inability to execute) of an arbitration clause refers to arbitration agreements which, although they do not violate any mandatory provision of the law and are in principle important, the conduct of the arbitration proceedings on their basis encounters virtually invincible difficulties. The expiry of an arbitration agreement, on the other hand, means the definitive cessation of its effects due to circumstances occurring after its conclusion.
- 8.16.** The representatives of the doctrine indicate that the clause is unenforceable when e. g. the agreement provides for such requirements for arbitrators that it is in fact impossible to establish an arbitration tribunal, because it is not possible to identify arbitrators who would meet these requirements, the agreement indicates a state in which, for obvious reasons, due to the socio-political situation, the institution of proceedings is not possible (e.g. due to war) or if the arbitration agreement has been formulated vaguely and thus its meaning cannot be determined. None of these situations appeared in the given case.
- 8.17.** Finally, the Court of Appeals indicated that the reasoning of the District Court based on Art. 475(1) k.c. is perfectly reasonable, as the arbitration clause is a pre-litigation civil law agreement, transferring the dispute between the parties to the arbitration court, to which the provisions of the Civil Code apply. This clause is incorporated by the parties who are not yet parties to specific civil proceedings and, as a result, the clause has no direct effect on the specific proceedings, which excludes its qualification as a “procedural act”.
- 8.18.** The material legal nature of an arbitration clause is supported by the fact that the clause remains binding also on the legal successors, that when assessing the effectiveness of the clause the substantive law is directly applicable (e.g. provisions regarding legal capacity, invalidity of the legal acts and defects

- of a declaration of intent) or the fact that the drafting of an arbitration agreement does not interrupt the period of limitation.
- 8.19.** All things considered, the Court of Appeals believes that linking a poor financial situation with the lack of effect of arbitration clause would have very negative consequences. A party could easily, by their own omissions or dishonest actions, e.g. by disposing of property, circumvent the impossibility of withdrawing from an arbitration agreement by invoking the unenforceability of the arbitration clause due to the lack of funds and thus making it unenforceable. The Court of Appeals also points to the problem of when to determine the lack of funds to initiate and conduct arbitration proceedings and on the basis of what evidence.
- 8.20.** However, it needs to be noted that the Court of Appeals did not rule out the possibility that, in the case of a duly proven lack of funds to cover the costs of arbitration proceedings it would be possible to declare an arbitration clause unenforceable in order to ensure the effectiveness of an individual's fundamental rights such as the right of access to court. Yet this would only happen under the condition of that objective and permanent reasons, which make it impossible to cover the costs of proceedings, exist.

***Key words:***

*setting aside the award | arbitration rules | right of defence | Polish arbitration law*

***States involved:***

[POL] - [Poland]

Ruling of the Court of Appeals in Warsaw of 30 January 2020, file ref. no VII AGa 1508/18

***Laws Taken into Account in This Ruling:***

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in: *Dziennik Ustaw [Journal of Laws]* 1964, No. 43, item 296, as amended; Article 1206,<sup>5</sup> 1161(3),<sup>6</sup> 271<sup>1,7</sup>, 1193,<sup>8</sup> 1208(1).<sup>9</sup>

*[Rationes Decidendi]:*

**8.21.** If the parties acted upon the Arbitration Rules of 2015 in the arbitration proceedings applicable at the moment of initiating the arbitration proceedings instead of Arbitration Rules of 2007 applicable at the moment of concluding the arbitration agreement, which according to the law should have applied to the proceedings, it should be deemed that the parties implicitly

<sup>5</sup> Article 1206.

(1) A party may file a motion to set aside a judgment of an arbitration court if:

- 1) there was no arbitration clause, or an arbitration clause is void, invalid or has expired according to the relevant law,
  - 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 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,
  - 5) a judgment was achieved by means of an offence or on the basis of a false or falsified document,
  - 6) non-appealable court judgment has been issued in the same case between the same parties.
- (2) Moreover, a judgment of an arbitration court shall be set aside if the court determines that:
- 1) the dispute cannot be settled by an arbitration court according to this Act,
  - 2) 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),
  - 3) a ruling of 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.

<sup>6</sup> Article 1161(3)

(3) An arbitration agreement may identify a permanent arbitration 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 arbitration tribunal in force on the date of the arbitration agreement.

<sup>7</sup> Article 271<sup>1</sup>

A witness shall testify in writing if the court so decides. In such case, the witness takes an oath by signing the text of the oath. A witness shall present the text of the testimony to the court within the time limit specified by the court. The provisions of Articles 165 § 2, 274 § 1 and 276 shall apply accordingly.

<sup>8</sup> Article 1193.

In the event of the breach of the provisions of this Part which may be waived by the parties, or in the event of breach of the terms and conditions of proceedings before an arbitration court determined by the parties, the party who was aware of the breach may not allege such breach before the arbitration court or in a petition to set aside the judgment of the arbitration court if the party failed to raise the plea immediately or within a time limit determined by the parties or by the provisions of this Part.

<sup>9</sup> Article 1208.

(1) A motion to set aside a judgment of an arbitration court shall be filed with a court of appeals in the region of which the court which would have been competent to examine the case if the parties had not made a provision for arbitration, and in the case of a lack of this basis - to the Court of Appeal in Warsaw, within two months from the date of service of the judgment or, if a party petitioned to have the judgment supplemented, corrected or interpreted, within two months from the date of service of a relevant ruling by the arbitration court.

agreed to apply the Arbitration Rules of 2015. Moreover, the party who was aware of the fact that the Arbitration Rules of 2007 should have applied in the arbitration proceedings may not allege that breach in a petition to set aside the judgment of the arbitration court if the party failed to raise that objection in the arbitration proceedings. Thus, the fact that the parties did not question the fact of application the arbitration rules from the moment of initiating the arbitration i.e. the Arbitration Rules of 2015 and acted in accordance with these rules means that they accepted the Arbitration Rules of 2015 and there are no grounds to set aside the arbitration award.

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

- 8.22.** On 11 January 2018 the Court of Arbitration at the Polish Chamber of Commerce [CA PCC] issued an arbitration award in which it ordered the respondent [B] to pay the plaintiff [A] PLN 145,850.34 together with statutory interests for delay and costs of the arbitration proceedings. The claim was dismissed in the remaining scope.
- 8.23.** ‘B’ submitted a complaint against the CA PCC award claiming that the decision of the CA PCC violates the basic principle of the arbitration proceedings i.e. the violation of Article 1206(1) point 4 PCC. B claimed that the proceedings before the CA PCC were conducted under the Arbitration Rules of 2015 (regulations of a permanent arbitration court applicable on the date of bringing forth an action) and not as it was agreed upon between the Parties and in accordance with Article 1161(3) PCC, under the rules applicable at the moment of the conclusion of the arbitration agreement i.e. the Arbitration Rules of 2007.
- 8.24.** According to the Arbitration Rules of 2015 the witness statement should be conducted in the following order: first on the basis of a written statement by the witness and then by supplementary questioning at a hearing. Moreover, the Arbitration Tribunal may take evidence from a witness solely on the basis of the witness’s written statement. The Arbitration Rules of 2007 did not prescribe for such a possibility. B claimed that this fact had a considerable influence on the proceedings, simply because the questioning of the witness at the hearing may have enabled to clear the contentious issues between the parties. Moreover, the Arbitration Rules of 2007 did not allow the Arbitration Tribunal to influence the manner of taking the evidence and restrict the parties in introducing new evidence during the proceedings.
- 8.25.** The second basis of the complaint was constituted pursuant to Article 1206(1) point 2 PCC as the violation of the right of defence during the proceedings before the CA PCC i.e. the

- arbitration tribunal's rejection of the motion to postpone the hearing. In the motion to postpone the hearing B indicated that he had been compelled to appoint a new attorney in fact one day before the hearing and new counsel had not had enough time to familiarise himself with the case. Thus, the lack of postponing the hearing violates B's right of defence.
- 8.26.** As the third basis of the complaint B indicated that the CA PCC award violates the public policy order of Poland i.e. Article 1206(2) point 2 PCC as the attorney in fact – R.D. was not authorised to acknowledge the debt.
- 8.27.** Additionally, at the hearing before the Court of Appeals in Warsaw B extended the first basis of the complaint and indicated that the application of Arbitration Rules of 2015 also influenced the constitution of the arbitration tribunal i.e. the incorrect way of nominating the chairman of the arbitration tribunal.
- 8.28.** During the proceedings the Court of Appeals in Warsaw established that A and B concluded the lease agreement on 18th December 2007. The lease agreement included the following arbitration clause: *All disputes resulting from this Lease Agreement or in connection with it shall be resolved by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw in accordance with the Arbitration Rules, the language of the proceedings shall be English. The jurisdiction of the state courts within the above indicated scope should be excluded.*
- 8.29.** 'A' initiated the proceedings before the CA PCC on 10 November 2016. The CA PCC applied the Arbitration Rules of 2015, due to the fact that (4) sec. 3 of the Arbitration Rules of 2015 stipulated that *Unless otherwise provided by the parties, the Arbitration Rules in force on the date of commencement of the proceeding shall apply.* As the arbitration agreement did not include any information on the applicable arbitration rules, the CA PCC applied the Arbitration Rules of 2015. On 02 December 2016 the CA PCC served the copy of the statement of claim together with the Arbitration Rules of 2015 to B. In its first letter to the CA PCC, B did not question the application of the Rules of 2015 nor did he do so in the reply to the statements of claim and in the course of the proceedings before CA PCC.
- 8.30.** In its decision of 08 September 2017 the Arbitration Tribunal of CA PCC obliged the parties to submit witnesses' written statements and to file the motion to question the witness called by the other party during the hearing. After the parties submission the Arbitration Tribunal issued the decision of

22 September 2017 on the schedule of the proceedings, which was accepted by both parties.

**8.31.** On 09 November 2017 B's counsel informed the Arbitration Tribunal about the expiration of the power of attorney on 17 October 2017. As on 10 November 2017 neither party filed a motion to question the counter-party's witness during the hearing.

**8.32.** On 20 November 2017 B filed a motion to postpone the hearing scheduled for 01 December 2017 due to the information of the expiration of the power of attorney of B's counsel. The Arbitration Tribunal rejected the motion. The hearing took place on 01 December 2017. During the hearing B was represented by a professional attorney who was appointed one day before the hearing. After the hearing both parties filed a brief with their final position. Until the moment of closing the proceeding neither party questioned the application of the Rules of 2015. Moreover, both parties acted in accordance with the Arbitration Rules of 2015.

*[Decision of the Court of Appeals in Warsaw]:*

**8.33.** The Court of Appeals in Warsaw ruled in favour of A and dismissed B's complaint.

**8.34.** Firstly, the Court of Appeals in Warsaw indicated that B was not deprived of the right of defence as the result of the rejection of the motion to postpone the hearing of 01 December 2017. The Court of Appeals indicated that the right of defence can be violated: when the party was not informed about the hearing after which the arbitration tribunal issued a judgment, when the party had no opportunity to present its position in the case, when the arbitration tribunal violated the principle of equal treatment or the party had no opportunity to be heard and present evidence or when the party was not allowed to familiarise himself with the opponent's arguments and evidence and present its position in this regard. The Court of Appeals indicated that B had had the opportunity to present its position during the hearing, B received an additional 30 days to present its position with regard to the statement of claims and appoint the arbitrator. B was represented by two professional counsels first R.D. and then S.S. Moreover, B filed many briefs during the proceedings. The Court of Appeals in Warsaw indicated that B had had almost three weeks to appoint new counsel after the expiration of the power of attorney of R.D. The fact that B appointed the counsel one day before the hearing could not justify the motion to postpone the hearing. Furthermore, the Arbitration Tribunal granted both parties the possibility to file their final position within a month of the date of the hearing. B's



counsel filed B's final position in the brief of 02 January 2018. This brief had not included any remarks regarding the lack of questioning the witness during the hearing or objection against the application of the Arbitration Rules of 2015. Therefore, the Court of Appeals in Warsaw dismissed the second basis of the complaint regarding the violation of the right of defence.

- 8.35.** The Court of Appeals in Warsaw also indicated that the witness's written statements cannot be regarded as a violation of the right to defence. The possibility of conducting witness testimony by written statements is expressly provided by Article 271<sup>1</sup> PCC. Moreover, the Court of Appeals in Warsaw indicated that not all rejection of evidence should be deemed as the violation of the right to defence. The right of defence can be violated only if the party to the proceedings cannot present its position at all. In the current proceedings B and its professional counsels filed many briefs and attended the one and only hearing on 01 December 2017.
- 8.36.** In reference to the first basis of the complaint i.e. the violation of the basic principle of the arbitration proceedings the Court of Appeals in Warsaw indicated that the fact that the arbitration proceedings were initiated on 10 November 2016, did not mean that the Arbitration Rules of 2015 should have applied. In the lack of the agreement between the parties in this regard, Article 1161(3) PCC should have been applicable within its version from the moment of the conclusion of the arbitration agreement.<sup>10</sup> At that moment Article 1161(3) PCC stipulated that unless the parties have agreed otherwise the rules from the moment of the conclusion of the arbitration agreement should be applicable. Thus, the Court of Appeals in Warsaw found that the Arbitration Tribunal should have applied the Rules of 2007. However, the Court of Appeals in Warsaw examined whether the Parties subsequent conduct did not modify that fact.
- 8.37.** The Court of Appeals in Warsaw noticed that the arbitration agreement is concluded usually before the dispute arises. Thus, it happens that between the moment of the conclusion of the arbitration agreement and initiating the arbitration proceeding the rules applicable to the proceedings are amended. Hence, it is a common practice to apply the rules from the moment of initiation of the arbitration proceedings in order to avoid

<sup>10</sup> Article 1161(3) PCC was amended in 2019 and now it stipulates that *Unless the parties have agreed otherwise, they are bound by the regulations of a permanent arbitration court applicable on the date of bringing an action.*

- a situation that the arbitration tribunal should proceed on the basis of the rules which were repealed.
- 8.38.** The abovementioned facts influenced the amendment of Article 1161(3) PCC. As at 08 September 2019 the parties were bound by the rules of the court of arbitration applicable at the moment of the conclusion of the arbitration agreement. As of 08 September 2019 the parties are bound by the rules of the court of arbitration applicable at the moment of initiating the dispute. The amendment was introduced also due to the fact that new rules are usually better than its previous version.
- 8.39.** However, the Court of Appeals also noticed that before the amendment in 2019 the parties may have agreed to apply the rules of the court of arbitration from the moment of initiating the arbitration proceedings. The Court of Appeals also indicated that in the arbitration proceedings the parties have a lot of freedom on deciding how the arbitration proceedings should look. The parties may not only decide which version of the rules of the court of arbitration should apply but also the parties may modify those rules.
- 8.40.** The Court of Appeals in Warsaw indicated that B was represented in the arbitration proceedings by the professional counsels. The objection against the application of the Arbitration Rules of 2015 was not raised at any stage of the arbitration proceedings. Furthermore, B and his counsels acted on the basis of the Arbitration Rules of 2015, which was served to B together with the statement of claims. Both parties agreed with the Arbitration Tribunal decision of 22 September 2017 in which the Arbitration Tribunal expressly indicated the application of the Arbitration Rules of 2015 and presented the schedule of the proceedings.
- 8.41.** Thus, it should be deemed that B accepted the Arbitration Rules of 2015. Such conduct should have meant that both parties agreed to apply the rules of the court of arbitration from the moment of initiating the dispute. Thus, Article 1161(3) having stipulated the application of the rules from the moment of concluding the arbitration agreement did not apply, due to the existence of the agreement between the Parties.
- 8.42.** Furthermore, the Court of Appeals in Warsaw invoked the fact that B was represented by professional counsels, who should have raised an objection against the application of the Arbitration Rules of 2015 during the arbitration proceedings. Under Article 1193 PCC, if the party failed to raise the fact of the breach of the terms and conditions of the proceedings before an arbitration court, the party may not allege such a breach in

- a petition to set aside the judgment of the arbitration court. Hence, the complaint should also be dismissed on this ground.
- 8.43.** The Court of Appeals in Warsaw also indicated that the discretionary power of the arbitration tribunal is broader in the proceedings before the arbitration tribunal than in the proceedings before the state court. In the proceedings to set aside the arbitration award the court controls the manner of taking evidence only from the perspective of the basic principles of law. Only when there was no evidentiary hearing at all or it was conducted remarkably incompletely, or with obvious errors, by abusing the rule of logical reasoning, by selective choice of evidence or by admitting the evidence submitted by one party together with rejecting the evidence of the counter party, we can speak of the violation of the basic principle of proceedings before the arbitration tribunal. In the case at hand, such a situation did not take place. The lack of questioning the witness during the hearing did not fulfil any of the above indicated prerequisites.
- 8.44.** The Court of Appeals in Warsaw also dismissed the third basis of the complaint i.e. the lack of authorisation to acknowledge the debt by B's counsel. This was done for the following reasons. Firstly, B had not proved the influence of that fact on the case. Secondly, during the proceedings to set aside the award, the court cannot control the award with the substantive provisions of law, and with the evidence. The restricted scope of the control by the state court is stipulated in order to provide effectiveness and attractiveness of the arbitration proceedings.
- 8.45.** Only the violation of the basic substantive provisions classified as the violation of the public policy can be grounds to set aside the arbitration award. According to the established Polish case law, there is no violation of public policy when the award is not fully consistent with all substantive provisions of law. In his complaint, B did not invoke the violation of such provisions which may have constituted the violation of the public policy. Thus, there were no grounds to set aside the award on this basis.
- 8.46.** The Court of Appeals in Warsaw also dismissed the B's objection raised during the hearing before the Court of Appeals due to the fact that all objections against the arbitration award must be raised in the complaint submitted to the state court during the two month period from the date of service of the judgment as it is stipulated by Article 1208(1) PCC.

