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Yearbook of Arbitration<sup>®</sup>**



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

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**Jurisdiction of Arbitral Tribunals**



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Case Law

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## Poland

### Arbitration Case Law 2021

**Kamil Zawicki, attorney at law, co-managing partner, Kubas Kos Gałkowski, Bartłomiej Pobożniak, associate, Kubas Kos Gałkowski, Angelika Ziarko, associate, Kubas Kos Gałkowski**

#### **Key words:**

*invalidity of an arbitration clause | signing the arbitration clause on behalf of the company by an unauthorised person | Polish arbitration law*

#### **States involved:**

[POL] – [Poland]

Decision of the Supreme Court of Poland of 10 March 2021, file ref. no V CSKP 64/21

#### **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(1),<sup>1</sup> 1165(2),<sup>2</sup> 1180(1).<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 58(1).<sup>4</sup>

Ustawa o Krajowym Rejestrze Sądowym z dnia 20 sierpnia

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<sup>1</sup> If an action concerning a dispute covered by an arbitration clause is brought before a court, the court shall dismiss the claim or the motion for non-litigious proceedings if the defendant or a party to the non-litigious proceedings raised a charge of the arbitration clause before entering into a dispute on the merits.

<sup>2</sup> The provision of paragraph 1 shall not apply where the arbitration clause is invalid, ineffective, unenforceable or no longer in force, or where the arbitral tribunal has decreed its lack of competence.

<sup>3</sup> The arbitral tribunal may determine its own competence, including the existence, validity, or effectiveness of an arbitration clause. The invalidity or expiry of the underlying contract containing the arbitration clause shall not of itself render the arbitration clause invalid or extinct.

<sup>4</sup> An act in law that is contrary to the statute or intended to circumvent the statute shall be invalid unless the relevant provision provides for a different effect, in particular that the invalid provisions of the act are replaced by the relevant provisions of the statute.

1997 r. [National Court Register Act] [u.k.r.s.] [POL], published in: Dziennik Ustaw [Journal of Laws] 1997, No. 121, item 769, as amended; Article 14,<sup>5</sup> Article 17(1).<sup>6</sup>

*[Rationes Decidendi]:*

- 9.01.** If a contract that includes an arbitration clause in its content is signed by a person who is not and has never been entitled to represent the company, the contract's invalidity shall also extend to the arbitration clause. Therefore, a state court and not an arbitration tribunal is competent to resolve a dispute arising from such a contract. The fact that the person signing the contract was entered in the National Court Register as a member of the company's management board is irrelevant if the entry in the Register was made as a result of unlawful actions.

*[Description of the facts and legal issues]:*

- 9.02.** In 2004 and 2006, the claimant and the defendant company entered into two share purchase agreements containing arbitration clauses. Any disputes arising from the agreements were to be referred to an arbitral tribunal in Cyprus. The claimant company was represented by N. J. However, N. J. had never been a member of the management board of the claimant company and therefore had no right to represent it. Court in other proceedings established that the resolution of the supervisory board based on which N. J. was appointed to the management board was invalid. However, when the agreements were concluded, N. J. was disclosed in the National Court Register as a member of the management board of the claimant company.
- 9.03.** Under Article 17(1) of the National Court Register Act, it is presumed that the data entered in the National Court Register are accurate. In turn, under Article 14 of the u.k.r.s., an entity obligated to apply for entry in the Register may not invoke in relation to third parties acting in good faith to data that have not been entered in or have been deleted from the Register. Thus, the main legal issue in the case pertained to whether the abovementioned provisions provide a sufficient legal basis to find that concluded agreements and the arbitration clauses contained therein should be considered valid in relations between the parties.
- 9.04.** The claimant company brought an action before the Regional Court. The defendant invoked the arbitration agreement.

<sup>5</sup> An entity obligated to apply for entry in the Register may not invoke data which have not been entered in the Register or which have been deleted from it against third parties acting in good faith.

<sup>6</sup> Data entered in the Register shall be presumed to be accurate.

Consequently, the Regional Court rejected the statement of claims under Article 1165(1) CCP by recognising the arbitration clause's effectiveness and the arbitration court's competence to hear the case.

- 9.05.** The claimant and the prosecutor participating in the proceedings filed complaints against the above-indicated decision with the Court of Appeals. The applicants demanded that the Regional Court hear the action.

*[Decision of the Court of Appeals]:*

- 9.06.** The Court of Appeals shared the opinion of the Regional Court that both the concluded agreements and the arbitration clauses contained therein should be deemed valid between the parties. The Court of Appeals noted that under the law then in force, a legal transaction made by a person who was not authorised to represent the company was, as a rule, invalid and did not produce legal effects.<sup>7</sup> However, the court pointed out that this is not an absolute rule, as the provisions of law, including the u.k.r.s., provide for several regulations aimed at protecting third parties acting in good faith against the effects of invalidity of a legal transaction.

- 9.07.** In the opinion of the Court of Appeals, the provisions of Article 14 and Article 17(1) of the National Court Register Act constituted such grounds in the case under consideration. If the defendant was in good faith, i.e., did not know that N. J. was not a member of the claimant's management board or could not easily obtain this information. Under the National Court Register Act, the claimant could not invoke this circumstance against the defendant. Consequently, in the Court of Appeals' view, in the relationship between the claimant and the respondent, the agreements concluded, and the arbitration clauses contained therein should be deemed valid and effective. Thus, if the defendant invoked arbitration clause, the statement of claims brought before the state court should have been rejected under Article 1165(1) CCP.

*[Decision of the Supreme Court]:*

- 9.08.** The Supreme Court agreed with the prosecutor's allegations, reversed the appealed decision, and remitted the case to the Court of Appeals for re-examination. In the opinion of the Supreme Court, the application of the provisions of the National

<sup>7</sup> The current legal status provides for the possibility of confirmation of such an act [in law] by the company, which results in „repairing“ the action. In the absence of confirmation, however, the act remains invalid.

Court Register Act as done by the lower courts was too far-reaching.

- 9.09.** The Supreme Court pointed out that, admittedly, following the case law, a third party may not effectively raise a charge of invalidity of an agreement concluded by a company in a situation where the member of the management board who signed the agreement had been already dismissed (was no longer a member of the management board) but was still listed in the National Court Register. However, according to the Supreme Court, such a situation should be distinguished from the facts of the case in question. N. J. had never been an effectively appointed member of the management board of the claimant company. The entry of N.J. in the National Court Register as a member of the claimant's management board was based on unlawful actions. The provisions of the u.k.r.s. do not extend the protection of good faith to such situations. In the opinion of the Supreme Court, in such circumstances, there are no reasons to protect the effectiveness of an act in law performed by an unauthorised person. The concluded share sale agreements, and the arbitration clauses contained therein, were invalid under Article 58(1) of the Civil Code.
- 9.10.** The Supreme Court noted that the principle of autonomy of the arbitration clause does not speak against the declaration of invalidity of the arbitration clause either. Under the provision of Article 1180(1) CCP, the invalidity or loss of effect of the underlying agreement in which an arbitration clause is included does not by itself mean the invalidity or the clause's loss of effect. However, this provision refers to situations where the reasons for the invalidity or expiration of the agreement are specific to the agreement itself and do not concern the arbitration clause. In the case at hand, the reasons for invalidity of the agreement and the arbitration clause were the same, i.e., an unauthorised person signed the agreements (and arbitration clauses).
- 9.11.** Given the circumstances above, in the opinion of the Supreme Court, there were no grounds to reject the statement of claims in the case. Under Article 1165(2) CCP, a statement of claims is not rejected if the arbitration clause is invalid, ineffective, unenforceable, or expired.

**Key words:**

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

**States involved:**

[POL] – [Poland]

Judgement of the Supreme Court of 10 May 2021, file ref. no I CSKP 64/21

**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.] [CCP], published in: Dziennik Ustaw [Journal of Laws] 1964, No. 43, item 296, as amended; Articles 365(1),<sup>8</sup> 1180(3),<sup>9</sup> 1206(1)(3),<sup>10</sup> Article 1213(1).<sup>11</sup>

*[Rationes Decidendi]:*

**9.12.** If the arbitral tribunal dismisses the party's objection to the tribunal's jurisdiction, then the jurisdiction of the arbitral tribunal can be evaluated by the state court in the proceedings initiated by either party under Article 1180(3) CCP. The state court analyzes the effectiveness and the validity, and existence of the arbitration agreement at hand. If the state court renders a final decision as to the jurisdiction of the arbitral tribunal, such a decision is binding during the setting aside proceedings (Article 365(1) CCP). As a result, the party is also precluded

<sup>8</sup> A final judgment is binding not only on the parties and the court that issued it, but also on other courts and other state bodies and public administration bodies, and in cases provided for by statute, also on other persons.

<sup>9</sup> The objection referred to in paragraph 2 may be decided upon by the arbitral tribunal in a separate decision. If the arbitral tribunal dismisses the objection in such a decision, either party may, within two weeks after the date of service of the decision to that party, apply to the state court for a decision. The commencement of proceedings before the state court shall not stay the consideration of the case by the arbitral tribunal. The provisions of Article 1207 shall apply to the proceedings before the state court accordingly. The decision of the court may be appealed against.

<sup>10</sup> A party may by way of an application demand that the award of the arbitral tribunal be set aside if:

1) there was no arbitration agreement, the arbitration agreement is invalid, ineffective or has lost its force according to the law applicable to it, (...)

3) the award of the arbitral tribunal relates to a dispute not covered by the arbitration agreement or exceeds the scope of such agreement; however, if the decision on matters covered by the arbitration agreement is separable from the decision on matters not covered by the agreement or exceeding its scope, the award may be set aside only with respect to matters not covered by the agreement or exceeding its scope; exceeding the scope of the arbitration agreement may not constitute grounds for setting aside the award if the party that participated in the proceedings did not raise objections to the determination of claims outside the scope of the clause (...).

<sup>11</sup> The court decides on recognition or enforcement of the arbitral award of the arbitral tribunal or the settlement concluded before the arbitral tribunal at the request of a party. The party is required to attach to the request the original or a copy certified by the arbitral tribunal of the award or settlement concluded before it, as well as the original arbitration agreement or an officially certified copy thereof. If the award of the arbitral tribunal or the settlement concluded before it or the arbitration agreement are not drafted in Polish, the party is obliged to attach a certified translation thereof into Polish.



from raising arguments as to the jurisdiction of the arbitral tribunal in their application on the setting aside of an arbitral award if it fails to do so during arbitral proceedings.

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

- 9.13.** As to the facts of the case, in 2010, A (seller) and C (buyer) entered into a share purchase agreement. The purchase price was to be paid in four instalments. The sales agreement also contained an arbitration agreement.
- 9.14.** Additionally, in the same year, F and C entered into a surety agreement under which F guaranteed that if C did not pay A the purchase price specified in the sales agreement in part or in full, it would do so. F and C implemented an arbitration agreement therein.
- 9.15.** C did not pay A the fourth instalment of the purchase price. A pursued its claim for payment against C before an arbitral tribunal. In 2011 the arbitral tribunal awarded A its claim. A state court declared the award enforceable against C based on Article 1213(1) CCP.
- 9.16.** In 2013 the state court dismissed C's claim for removing the enforceability clause from the above-mentioned arbitral award. C argued that A is barred from enforcing the arbitral award against it, as A's claim ceased to exist due to the set-off made by C. The courts of two instances did not share C's position and ultimately dismissed its claim.
- 9.17.** Meanwhile, in 2011 A brought a claim against F (a guarantor) before an arbitral tribunal. F objected as to the arbitral tribunal's jurisdiction because there was no arbitration agreement between A and F. The arbitral tribunal dismissed F's objection and declared itself competent to hear the case. The arbitral tribunal found that the arbitration agreement concluded between A and C in the sales agreement. Still, the arbitration agreement also came to effect between A and F.
- 9.18.** F initiated the proceedings before a state court under Article 1180(3) CCP (based on Article 16(3) of UNCITRAL Model Law) and requested that the court resolve the issue of the arbitral tribunal's jurisdiction. In 2014 the court dismissed F's application and decided that the arbitral tribunal had jurisdiction to hear the case. The court of the second instance dismissed F's complaint.
- 9.19.** In 2015 the arbitral tribunal awarded A's claim against F in full. In particular, the arbitral tribunal found that F's set off, which was based on C's claims against A, was unsuccessful. The arbitral tribunal also stated that it was not necessary to take evidence on the circumstances regarding the set-off, because

they were irrelevant to the case and also the findings made by state courts in the proceedings between A and C, in which the courts found that the set-off was unsuccessful, were binding onto the arbitral tribunal. Moreover, the arbitral tribunal found that A and F effectively concluded a surety agreement and thus also entered into an arbitration agreement, an element of the surety relationship.

*[Decision of the Regional Court]:*

- 9.20.** The Regional Court dismissed F's application for the setting aside of the arbitral award.
- 9.21.** First, the Regional Court found that the ruling regarding the arbitral tribunal's jurisdiction also implicitly encompasses a ruling on the existence of the arbitration agreement in question. That was because Article 1180(3) CCP assumed that a judgment of a state court confirming the jurisdiction of an arbitral tribunal was the only logical consequence of the existence, validity, and effectiveness of an arbitration agreement. The Regional Court noted that the court, while ruling upon the arbitral tribunal's jurisdiction under Article 1180(3) CCP thoroughly analysed the effectiveness and the existence and validity of the arbitration agreement between A and F.
- 9.22.** Second, the Regional Court stated that in any case based on Article 365(1) CCP, it was bound by the previous ruling on the arbitral jurisdiction rendered by the state court under Article 1180(3) CCP. Thus, F was precluded from raising objections regarding the jurisdiction of the arbitral tribunal, as this issue was already decided in a final manner. Therefore, the Regional Court dismissed F's arguments as to the lack of jurisdiction of the arbitral tribunal.
- 9.23.** Third, the Regional Court found that F was not unable to present his case. The Regional Court noted that not taking evidence and dismissing the party's request for evidence did not constitute a deprivation of an opportunity for a party to defend its rights if, as in this case, the arbitral tribunal duly motivated its procedural decision under the accepted procedural rules.

*[Decision of the Court of Appeals]:*

- 9.24.** The Court of Appeals dismissed F's appeal and shared the position of the Regional Court.
- 9.25.** The Court of Appeals adopted the findings of the Regional Court regarding the jurisdiction of the arbitral tribunal as its own. The Court of Appeals also agreed that the court had already

determined the issue of the arbitral tribunal's jurisdiction during the proceedings based on Article 1180(3) CCP.

- 9.26.** The Court of Appeals additionally noted that the arbitral tribunal correctly conducted the evidentiary proceedings. The Court of Appeals found that it was proven by the contents of the arbitral award that the factual circumstances of the case were thoroughly analysed. In particular, the reasoning of the arbitral award proved that the arbitral tribunal also examined the circumstances of F's set-off.

*[Decision of the Supreme Court]:*

- 9.27.** In the final judgement of 10 May 2021, file ref. no I CSKP 64/21, the Supreme Court dismissed F's cassation complaint regarding the setting aside application. The Supreme Court shared the views previously presented by the courts in the case.
- 9.28.** First, the Supreme Court underlined that it was of paramount importance to the resolution of the case to determine whether the courts while examining the application of setting aside of the arbitral award, were indeed bound by the previous court decision in this regard rendered based on Article 1180(3) CCP.
- 9.29.** The Supreme Court noted that if the arbitral tribunal dismissed the objection raised by a party that the tribunal lacked jurisdiction, a state court might review the legitimacy of this position only in the proceedings initiated based on Article 1180(3) CCP. The purpose of this procedure is to prevent the issue of the arbitral tribunal's jurisdiction from being resolved in a binding manner only after the conclusion of the arbitral proceedings. Therefore, this review mode precludes the possibility of successfully invoking such objection as to the jurisdiction in the party's application for setting aside an arbitral award on the grounds outlined in Article 1206(1)(1) and (3) CCP. That is since the previous ruling binds the court reviewing such an application based on Article 365(1) CCP.
- 9.30.** The Supreme Court emphasised that the binding ruling on the jurisdiction of the arbitral court based on Article 1180(3) CCP made it impossible (in the absence of new factual circumstances that occurred after the award was issued) – by force of Article 365(1) CCP – to set aside an arbitral award under Article 1205 et seq. CCP. It also made it impossible to set aside an arbitral award due to the absence of an arbitration agreement (Article 1206(1)(1) CCP) as the possibility of invoking this objection was previously exhausted by initiating the proceedings based on Article 1180(3) CCP.
- 9.31.** Second, the Supreme Court found that irrespective of whether the dismissal of evidentiary requests made by F by the arbitral

tribunal could be qualified at all as tantamount to depriving the party of the possibility to defend its rights, still the arbitral tribunal's position on the effectiveness of the set-off was adopted after a thorough analysis and did not justify setting it aside on this basis. The arbitral tribunal based its findings on the set-off not only because F had not proven that the set-off was effective but also on the analysis and interpretation of the agreement between A and C. In the cassation appeal, F had not formulated any new objections that would make it possible to assess and undermine this view. This, in turn, meant that F's argument in this regard was unsubstantiated.