

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

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

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Abuse of Arbitration



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[Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej w Warszawie]

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List of Abbreviations

AACCM	The Arbitrazh Arbitration Court of the City of Moscow
ADR	The alternative dispute resolution
ArbAct	The Arbitration Act
BCB	The British Caribbean Bank
BelCCI	The Belarusian Chamber of Commerce and Industry
BIT	The Bilateral investment treaties
BörseG	The Austrian Stock Exchange Act (Börsegesetz)
CAC	The Czech Arbitration Court
CCJ	The Court of Justice
CCP	The Code of Civil Procedure
CEO	The chief executive officer
CETA	The EU-Canada Comprehensive Economic and Trade Agreement
CIETAC	The China International Economic and Trade Arbitration Commission
CIRS	The currency interest rate swap
CRCICA	The Cairo Regional Centre for International Commercial Arbitration
EAEU	The Eurasian Economic Union
EDAC	The Energy Disputes Arbitration Center
EGZPO	The Introductory Act to the Code of Civil Procedure
ELRI	The Energy Law Research Institute
ESIPA	The EU - Singapore Investment Protection Agreement
EU	The European Union
EVIPA	The EU - Viet Nam Investment Protection Agreement
EXAA	The Energy Exchange Austria

FETÖ	The Fethullahist Terrorist Organization
FITR	Fork in the road clauses
FTA	Free Trade Agreement
HICA	The Helsinki International Commercial Arbitration
HKIAC	The Hong Kong International Arbitration Centre
IAC	The International Arbitration Court
IAL	The International Arbitration Law
IBA	The International Bar Association
ICC	The International Control Commission
ICSID	The International Centre for Settlement of Investment Disputes
IP-address	The Internet Protocol address
ISTAC	The Istanbul Arbitration Centre
ISTAW	The Istanbul Arbitration Week
ITOTAM	The Istanbul Chamber of Commerce Arbitration and Mediation Center
JCAA	The Japan Commercial Arbitration Association
JN	The Jurisdictional Act
LCIA	The London Court of International Arbitration
LLC	The Limited Liability Company
MASAK	The Turkish Financial Crimes Investigation Board
OECD	The Organisation for Economic Co-operation and Development
OIC	The Organization of Islamic Cooperation
OIC-AC	The Organization of Islamic Cooperation Arbitration Centre
OTA	Orascom Telecom Algérie S.P.A.
OTH	Orascom Telecom Holding S.A.E.
OTMT	Orascom TMT Investments S.à r.l.
PAI	The permanent arbitration institution
PEL	Patel Engineering Limited
PILA	The Private International Law
SAKIG	The Court of Arbitration at the Polish Chamber of Commerce in Warsaw

SAL	The Court of Arbitration at the Confederation of Lewiatan
SIAC	The Singapore International Arbitration Centre
SIDiR	The Polish Consulting Engineers and Experts Association
SPA	The Share Purchase Agreement
TOBB UYUM	The Union of Chambers and Commodity Exchanges of Türkiye
TPA	The Trade Promotion Agreement
UAE	The United Arab Emirates
UK	The United Kingdom
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
VIAC	The Vienna International Arbitration Centre
ZPO	The Code of Civil Procedure (Zivilprozeßordnung)

Case Law

Poland

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Poland

Arbitration Case Law 2023

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Key words:

arbitration agreement | arbitral tribunal | arbitration rules | plea of arbitration agreement | motion to set aside an arbitral award | public policy clause | right to a court

States involved:

[POL] – [Poland]

Decision of the Supreme Court of Poland of 29 March 2023, file ref. no II CSKP 702/22

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: 1161¹, 1165²

Kodeks cywilny z dnia 23 kwietnia 1964 [Civil Code of

¹ § 1. Submission of a dispute to arbitration requires an agreement between the parties, which must specify the subject matter of the dispute or the legal relationship from which the dispute has arisen or may arise (arbitration agreement).

§ 2. Provisions of an arbitration agreement that violate the principle of equality of parties, in particular that entitle only one party to bring an action before the arbitral tribunal provided for in the agreement or before a court, shall be ineffective.

§ 3. An arbitration clause may designate a permanent arbitration court as the court having jurisdiction to resolve a dispute. Unless otherwise agreed by the parties, they shall be bound by the rules of the permanent arbitration court in force on the date of filing the suit.

² § 1. If a case is brought before the court concerning a dispute covered by an arbitration agreement, the court shall reject the statement of claim, or the motion to commence non-litigation proceedings, if the defendant or the participant in the non-litigation proceedings raised the plea of an arbitration agreement before engaging into the dispute on the merits.

§ 1(1). The court shall reject the statement of claim, or the motion to commence non-litigation proceedings ex officio, if it concerns a dispute which was the subject of a termination of proceedings pursuant to Article 1161(1) § 2.

§ 2. The provision of § 1 shall not apply when the arbitration agreement is invalid, ineffective, unenforceable or has expired, as well as when the arbitral tribunal has declared its lack of jurisdiction.

§ 3. Initiating of a case before the court shall not prevent the arbitral tribunal from hearing the case.

§ 4. The provisions of the preceding paragraphs shall also apply, when the place of arbitration is outside the borders of Poland or is not designated.

23 April 1964] [k.c.] [POL], published in: Dziennik Ustaw [Journal of Laws] 1964, No. 16, item 93, as amended; Articles: 65³

[Rationes Decidendi]:

- 12.01.** In the case a party alleged that i.a. due to the fact that the arbitration rules, which the parties incorporated into their arbitration agreement, were amended, the arbitration agreement was invalid (or unenforceable), and thus the other party was barred from raising a plea of an arbitration agreement in court proceedings. The courts presented a view that Polish law cannot be interpreted in such a way, that making any changes to the arbitration rules, that were incorporated by the parties, should automatically be regarded as equal to excluding the possibility of conducting the arbitration proceeding by affecting the validity or effectiveness of the arbitration agreement. Therefore, a party is allowed to raise a plea of an arbitration agreement.

[Description of the facts and legal issues]:

- 12.02.** Parties concluded an arbitration agreement with the following wording: “Any disputes arising in connection with the conclusion or performance of the Framework Agreement shall be resolved by the Court of Arbitration at the Polish Bank Association”. After the conclusion of the arbitration agreement, the arbitration rules of the Court of Arbitration at the Polish Bank Association were amended, due to organizational changes in the structure of the Court. One of these amendments changed the authority competent to examine the parties’ challenges of arbitrators – from a collegiate body (the Presidium of the Court) to a one-person body (the President of the Court).
- 12.03.** One party (claimant) filed a statement of claim to the state court, which covered a claim for payment of ca. 4.000.000 PLN on the basis of a CIRS (currency interest rate swap) agreement. The other party (defendant) raised a plea on the basis of Art. 1165 CCP, and requested that such statement of claim be rejected by the state court, as relating to a dispute covered by the arbitration agreement (plea of an arbitration agreement).
- 12.04.** The Regional Court in Warsaw rejected the statement of claim on the basis of Art. 1165 CCP.

³ § 1. A declaration of intent shall be interpreted in such a way as the circumstances under which it was made, the rules of social intercourse and established custom require.

§ 2. In contracts, it is appropriate to examine what the parties intended and the purpose of the contract was rather than to rely on its literal wording.

[Decision of the Regional Court]:

- 12.05.** The Court found that the dispute covered by the statement of claim was covered by the arbitration agreement. The Court stood on a position that the scope of the arbitration agreement should be interpreted taking into account that it was incorporated into the Framework Agreement between the parties. Consequently, the arbitration agreement covered not only the Framework Agreement itself, but also other specific contracts that were concluded in connection with the Framework Agreement, e.g. the CIRS agreements. The Regional Court also stated that the amendment to the arbitration rules of the Court of Arbitration at the Polish Bank Association did not affect the validity, effectiveness or enforceability of the arbitration agreement. The claimant lodged a complaint against this decision.

[Decision of the Court of Appeals]:

- 12.06.** The Court of Appeals in Warsaw dismissed the claimant's complaint.
- 12.07.** First, the Court found that the arbitration agreement met all statutory formal requirements stemming from art. 1161 CCP, e.g. it indicated the legal relationship which was covered by it. Thus, it could be the basis of a plea of arbitration agreement.
- 12.08.** Second, the Court also shared the view presented by the Regional Court, that the dispute was covered by the arbitration agreement. The Court of Appeals stated that the CIRS agreements were concluded in connection with the Framework Agreement, and additionally were included in the list of contracts, that the parties were to further conclude, which was an appendix to the Framework Agreement. Therefore, the dispute was covered by the arbitration agreement in the Framework Agreement.
- 12.09.** Third, the Court stated that there was no reason to declare the arbitration agreement invalid, ineffective, unenforceable or expired. In particular the amendments to the arbitration rules did not have such effect. In the opinion of the Court, the organizational changes in the structure of the Court of Arbitration did not affect the possibility to conduct the arbitration proceedings. The parties did not make specific arrangements on how to conduct the arbitration proceeding, relying instead on the arbitration rules of a permanent court of arbitration. Additionally, the Court underlined that even though the authority, which would examine parties' challenges to the arbitrators, was changed, it did not influence any parties' rights, as parties were still empowered to file such a challenge.

- 12.10.** The claimant submitted a cassation appeal against the decision of the Court of Appeals.
- [Decision of the Supreme Court]:*
- 12.11.** The Supreme Court dismissed the cassation appeal filed by the claimant. The Supreme Court shared the view presented by both the Regional Court and the Court of Appeals.
- 12.12.** First, the Supreme Court underlined that general incorporation of the arbitration rules by the parties in their arbitration agreement cannot be interpreted as including a blanket authorization (consent) to be bound by any subsequent amendments to the arbitration rules. Such incorporation cannot, however, also be regarded as having the effect that making any amendments to the arbitration rules should automatically be regarded as tantamount to excluding the arbitration from proceeding. Contrary interpretation would interfere with the autonomy of the permanent court of arbitration to amend their arbitration rules.
- 12.13.** Second, in case of the subsequent amendments to the arbitration rules, it was necessary to determine whether such amendments affected the parties' procedural guarantees of due process. This was crucial, since opting for arbitration constituted a specific form of 'self-limitation of the right to a court,' and may therefore interfere with the sphere of procedural guarantees stemming from i.a. the Constitution.
- 12.14.** Third, in light of the above findings, the Supreme Court shared the view of the Court of Appeals that the amendments of the arbitration rules that did not lead to a reduction in the aforementioned procedural guarantees of the parties, cannot be assessed as affecting the validity or effectiveness of the arbitration agreement. The Supreme Court stated that the claimant did not prove that the present amendment of the arbitration rules in any way affected its procedural rights.
- 12.15.** Fourth, interestingly, the Supreme Court also presented an opinion that formulating the arbitration clause in a general manner may support the finding that the parties placed their trust in the arbitral institution and accepted such possible amendments to the rules, insofar as they did not have the effect of materially reducing their procedural guarantees.
- 12.16.** In light of all the above, the Supreme Court concluded that there was no basis to declare the arbitration agreement invalid, ineffective or unenforceable.

Key words:

motion to set aside an arbitral award | public policy clause | right to a court

States involved:

[POL] – [Poland]

Decision of the Supreme Court of Poland of 7 September 2023, file ref. no. I CSK 3998/22

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: 398⁹ § 1⁴, 1193⁵, 1208 § 1⁶, 1208 § 3⁷, 1206 § 2⁸
Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland of 2 April 1997] [Konstytucja], published in: Dziennik Ustaw

⁴ § 1. The Supreme Court shall admit a cassation appeal for examination if:

- 1) there is a significant legal issue in the case;
- 2) there is a need for interpretation of legal provisions giving rise to serious doubts or causing discrepancies in the case law;
- 3) the proceedings are invalid, or
- 4) the cassation appeal is obviously justified.

⁵ Where there has been a failure to comply with a provision of this Part from which the parties may derogate, or a failure to comply with the rules of procedure of an arbitral tribunal determined by the parties, a party who had knowledge of the failure may not plead such failure before the arbitral tribunal or rely on such failure in an action to set aside an arbitration award if the party has not raised the plea promptly or within the period specified by the parties or the provisions of this Part.

⁶ § 1. A motion to set aside an arbitral award shall be brought before the court of appeal, within the territory of which the court would have had jurisdiction to hear the case, if the parties had not entered into an arbitration agreement, or, in the absence of such grounds, before the Court of Appeals in Warsaw, within two months from the date of service of the award or, if a party has requested that the award be supplemented, corrected or interpreted, within two months from the date of service by the arbitral tribunal of a decision deciding on that request.

⁷ § 3. A cassation appeal may be filed against a judgment rendered in proceedings to set aside an arbitral award. It is also possible to request the resumption of proceedings concluded by a final judgment rendered in proceedings to set aside an arbitral award and to declare the illegality of a final judgment issued on this matter.

⁸ § 2. An arbitral award shall also be set aside if the court finds that:

- a. a dispute cannot be submitted to arbitration;
- b. recognition or enforcement of the arbitral award (or the settlement reached before it) would be contrary to the fundamental principles of the legal order of Poland (public policy clause);
- c. the arbitral award (or the settlement reached before it) deprives the consumer of the protection granted to them by the mandatory provisions of the law applicable to the contract to which the consumer is a party and, where the law applicable to that contract is the law chosen by the parties, the protection granted to the consumer by the mandatory provisions of the law which would have been applicable in the absence of the choice of law.

[Journal of Laws] 1997, No. 78, item 483; Articles: art. 45(1)⁹.

[Rationes Decidendi]:

- 12.17.** The Supreme Court reiterated the position already presented in the case law that the issue of a constitutional ‘right to a court’ may be examined by the court in the proceedings relating to a motion to set aside the arbitral award. Such examination may be conducted while evaluating whether the arbitral award violated the fundamental principles of the legal order of Poland (e.g. public policy clause).

[Decision of the Court of Appeals]:

- 12.18.** The Court of Appeals in Warsaw dismissed the motion to set aside the arbitral award.
- 12.19.** The applicant in the motion relied on the allegation that the arbitral award was contrary to the fundamental principles of the legal order of Poland (public policy clause). The applicant heavily relied in this regard on the fact that the arbitral tribunal dismissed its evidence and refused to hear two witnesses requested by the applicant. The Court of Appeals rejected the applicant’s arguments.
- 12.20.** The Court of Appeals first underlined that the majority of the arguments raised by the applicant were aimed at a renewed examination of the merits of the case, which the Court regarded as inadmissible.
- 12.21.** Second, the Court of Appeals found that the applicant could not rely on an alleged violation of procedure relating to evidence. That was because the arbitration rules, which were applicable to the case, required the parties to raise an objection of a violation of procedure in order to rely on it at a further stage of proceedings. If a party did not raise such an objection, it was understood as a waiver and a party was barred from raising it at a later stage, also in the post-award proceedings. Alike regulation was also present in the Code of Civil Procedure.
- 12.22.** In any case, even if the argument was not time-barred, the Court of Appeals found it was unsuccessful due to the fact that it lacked any merit. In the view of the Court, the applicant did not prove that dismissal of evidence requested by the applicant amounted to a violation of Polish public policy.
- 12.23.** Additionally, the Court analysed the applicant’s argument that its constitutional right to a court was violated. The Court of Appeals rejected the applicant’s argument and underlined that it

⁹ Everyone has the right to a fair and public hearing without undue delay by a competent, autonomous, impartial and independent tribunal.

was quite the opposite, as the arbitral tribunal examined the case in detail, which was evidenced by the conduct of the proceeding and lengthy and detailed reasoning of the award. The Court of Appeals concluded by stating that losing could not mean that the losing party has been deprived of the right to a court.

- 12.24.** The applicant submitted a cassation appeal against the decision of the Court of Appeals.

[Decision of the Supreme Court]:

- 12.25.** The Supreme Court denied the admittance of the cassation appeal for the examination.
- 12.26.** Under Polish law, one may file a cassation appeal against the court's judgement relating to setting aside of the arbitral award. However, such cassation appeal is subject to the general regime, and requires that specific prerequisites are met. That is because the Supreme Court does not examine each cassation appeal, but only those that fulfil the strict criteria stemming from the Code of Civil Procedure. One of such criteria is the requirement that the applicant is obliged to prove that the cassation appeal is filed in a case, in which there is a significant legal issue, a need for interpretation of legal provisions giving rise to serious doubts or discrepancies in the case law, in which the proceedings are invalid, or the cassation appeal is obviously justified.
- 12.27.** In the case the applicant alleged that there was a significant legal issue, namely whether a motion to set aside the arbitral award based on the public policy clause could be based on an allegation of a violation of the constitutional right to a court. This is to say, whether a court hearing such motion to set aside should also examine whether there has been a violation of one's right to a court.
- 12.28.** The Supreme Court stated that the above issue is not a significant legal issue, within the meaning of Art. 398⁹ § 1 CCP, as it was already evaluated in the case law. The Supreme Court emphasized that it followed from the case law that the question of the right to a court cannot be a bar to the question of a violation of a public policy clause, and therefore the possibility of raising such an allegation in a motion to set aside an arbitral award cannot be excluded. The Supreme Court also pointed out that such conclusion could not be different, even while taking into account that an arbitral tribunal was not 'a court' within the meaning of the Constitution and within the meaning of a constitutional right to a court.
- 12.29.** Additionally, the Supreme Court underlined that the Court of Appeals did not exclude the possibility of reviewing the

case through the prism of a constitutional right to a court and considered it in its judgement. The Court of Appeals analysed the arguments raised by the applicant (e.g. dismissal of the evidentiary requests, alleged violation of substantive law, alleged wrong interpretation of the contract) and found that the right to a court had not been violated in the present case.