Czech (& Central European) Yearbook of Arbitration

Czech (& Central European) Yearbook of Arbitration

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in Arbitral Proceedings
(Civil versus Common Law Perspectives)

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NEWS & REPORTS

All contributions in this book are subject to academic review.

List of Abbreviations

AA	arbitration award(s)
AC	Arbitration Court at the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic
ADR	Alternative Dispute Resolution
ArbAct [CZE]	Act [Czech Republic] No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards, as subsequently amended
AUT	the Republic of Austria
BIT	Bilateral Investment Treaty
CC	Act [Czech Republic] No. 40/1964 Coll., as subsequently amended, Civil Code
CC RF	Civil Code of the Russian Federation
CCP	Act [Czech Republic] No. 99/1963 Coll., as subsequently amended, Code of Civil Procedure
CIETAC	*China International Economic and Trade Arbitration Commission*
CISG	Convention on the International Sale of Goods
COA	Cause of Action
CommC	Act No. 513/1991 Coll., as subsequently amended, Commercial Code
ConCourt	Constitutional Court of the Czech Republic
Constitution [POL]	Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [*Constitution of the Republic of Poland of 2 April 1997*], published in: Dziennik Ustaw [*Journal of Laws*] 1997, No. 78, item 483, as amended

CZE	Czech Republic
ECICA	Egyptian Chamber of International Commercial Arbitration
EConv	European Convention on International Commercial Arbitration, done in Geneva on 21 April 1961
ECJ	European Court of Justice
EU	European Union
ExecProcC	Executory Procedure Code. Act [Czech Republic] No. 120/2001 Coll., on Judicial Executors and Executory Activities
HUN	Hungary
Charter	Charter of Rights and Freedoms of the Czech Republic – Resolution of the Presidium of the Czech National Council No. 2/1993 Coll. of 16 December 1992 on the promulgation of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic, as amended by the Constitutional Act of the Czech Republic No. 162/1998 Coll.
ICAC	International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
NAFTA	North American Free Trade Agreement
k.c. [POL]	Kodeks cywilny z dnia 23 kwietnia 1964 r. [*Civil Code of 23 April 1964*], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 16, item 93, as amended
k.p.c. [POL]	Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [*Code of Civil Procedure of 17 November 1964*], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 43, item 296, as amended
NCC	Act [Czech Republic] No. 89/2012 Coll., Civil Code, effective as of 1 January 2014 and replacing also CC [CZE] and CommC [CZE]

New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 [*Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych, sporządzona w Nowym Jorku dnia 10 czerwca 1958 r.*], published in: Dziennik Ustaw [*Journal of Laws*] 1962, No. 9, item 41
NYConv	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention
PIL	Act [Czech Republic] No. 91/2012 Coll., on Private International Law, effective as from 1 January 2014 and replacing also some provisions of ArbAct [CZE]
PILP	Act [Czech Republic] No. 97/1963 Coll., as subsequently amended, on Private International Law and Procedure
R	Resolution (rendered in arbitral proceedings or in course of a court litigation)
RC	Regional Court(s) [Czech Republic]
RSP	Part of the dossier numbers of disputes handled by the AC and formerly by the AC at the Czechoslovak Chamber of Commerce and Industry. This abbreviation is followed by the reference number of the case (before the slash) and the year the case was submitted to the AC (after the slash).
SC	Supreme Court of the Czech Republic
SVK	Slovak Republic
UNIDROIT	International Institute for the Unification of Private Law
UNCITRAL	United Nations Commission on International Trade Law
u.z.n.k. [POL]	Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji [*The Suppression of Unfair Competition Act of 16 April 1993*], consolidated, published in: Dziennik Ustaw [*Journal of Laws*] 2003, No. 153, item 1503, as amended.
VAT	Value added tax

Articles

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3. Poland

Abbreviations used in these annotations:

Constitution [POL]	Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [*Constitution of the Republic of Poland of 2 April 1997*], published in: Dziennik Ustaw [*Journal of Laws*] 1997, No. 78, item 483, as amended;
k.c. [POL]	Kodeks cywilny z dnia 23 kwietnia 1964 r. [*Civil Code of 23 April 1964*], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 16, item 93, as amended;
k.p.c. [POL]	Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [*Code of Civil Procedure of 17 November 1964*], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 43, item 296, as amended;
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 [*Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych, sporządzona w Nowym Jorku dnia 10 czerwca 1958 r.*], published in: Dziennik Ustaw [*Journal of Laws*] 1962, No. 9, item 41;[1]
u.z.n.k. [POL]	Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji [*The Suppression of Unfair Competition Act of 16 April 1993*], consolidated, published in: Dziennik Ustaw [*Journal of Laws*] 2003, No. 153, item 1503, as amended.

[1] Poland signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 10 June 1958; it was ratified by Poland on 3 October 1961 and entered into force in Poland on 1 January 1962. The text of the New York Convention was published in Polish in the Jounal of Laws 1962, No. 9, item 41.

Andrzej Kubas, Kamil Zawicki, Magdalena Selwa

I. Charge of the Non-Existence or the Invalidity of the Arbitration Clause in the Proceedings on the Recognition and Enforcement of an Arbitration Award and the Previous Content-Related Defense in the Arbitration Proceedings (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. V CSK 323/11 of 13 September 2012)[2]

Key words:
arbitration agreement | arbitration clause | recognition of foreign arbitral awards | enforcement of foreign arbitral awards | New York Convention | substantive law

States Involved:
[POL] - [Poland];
[GEO] - [Georgia];
[DEU] - [Germany].

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; Article 1162 § 2;[3]
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 [*Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych, sporządzona w Nowym Jorku dnia 10 czerwca 1958 r.*], published in: Dziennik

[2] Full text of this Decision available in Polish on the website of the Supreme Court at: http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/V%20CSK%20323-11-1.pdf (accessed on January 23, 2013).

[3] Article 1162 § 2 k.p.c. [POL] (unofficial translation): The requirement as to the form of the arbitration agreement shall also be met if the clause is contained in correspondence exchanged between the parties or statements made using telecommunications enabling the content thereof to be recorded. Reference in a contract to a document containing a provision on submission of a dispute to arbitration shall meet the requirement as to the form of the arbitration agreement if the contract is made in writing and the reference is such that it makes the clause an integral part of the contract.

Ustaw [*Journal of Laws*] 1962, No. 9, item 41; Article II (1) and (2),[4] Article IV (1).[5]

Rationes Decidendi:

10.01. If during proceedings before a foreign arbitration court the participant did not question its jurisdiction and undertook a content related defense, then he cannot effectively call upon the non-existence or the invalidity of the arbitration clause in the proceedings on the recognition and enforcement of an arbitration award.

10.02. Proceedings regarding the recognition and enforcement of foreign arbitration awards are proceedings as to the merits of the case, the basis of which is substantive law. The court may, in consequence, apply the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Journal of Laws from 1962, No. 9, item 41) as the applicable substantive law.

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

10.03. With the arbitration award of the Arbitration Court at the Waren-Verein der Hamburger Bőrse e. V. Association in Hamburg (Germany) of 3 November 2010 (hereinafter respectively as: "Arbitration Court" and "Arbitration Award") G-N. Ltd, with its registered seat in Old Tbilisi (Georgia) was awarded from "R.-H." S.A. with its registered seat in W. (Poland) the amount of USD 101,600 with interest and fees on account of the remaining sale price of hazelnuts. In the course of proceedings before the Arbitration Court, the parties confirmed its jurisdiction. Respondent "R.-H." S.A. with its registered seat in W. undertook a content related defense and did not question the issued Arbitration Award by the means of appeal he was entitled to and about which he was informed.

10.04. Applicant G-N. Ltd, with its registered seat in Old Tbilisi (hereinafter: "Applicant") motioned with the Regional Court in C. (hereinafter: "Regional Court") for the enforcement of the foreign Arbitration Award.

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[4] Article II of the New York Convention: 1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. 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.

[5] Article IV (1) of the New York Convention: 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.

10.05. The Regional Court established that the parties undisputedly entered into a contract for the delivery of hazelnuts, as a result of it being sent via e-mail by participant "R.-H." S.A. with its registered seat in W. (hereinafter: "Participant") and its signing and performance by the Applicant. The Applicant demonstrated that the arbitration clause was included in the contract, in the meaning of Article 1162 § 2 k.p.c. [POL]. The Regional Court found that this clause existed and was effective since it might be concluded in electronic format, which had taken place. Moreover, the Participant's company stamp and signature were included under the contract. With the decision of 25 November 2010, the Regional Court ascertained the enforceability of the Arbitration Award and granted it an enforcement clause.

10.06. The Participant challenged the above decision of the Regional Court with a complaint raising the charge of the invalidity of the arbitration clause.

10.07. The Court of Appeals in K. (hereinafter: "Court of Appeals") in examining the Participant's complaint, stated that the Participant in citing the invalidity of the arbitration clause in essence proves its non-existence. In this context, the Court of Appeals referred to, first and foremost, the requirements included in Article IV of the New York Convention, specifically to the obligation of the party applying for recognition and enforcement to supply the original agreement or a duly certified copy thereof. Meanwhile, the documents attached by the Applicant to the application for the enforcement of the Arbitration Award are not original as they only constitute copies of the scanned documents which do not fulfil the requirements of the written agreement signed by the parties.

10.08. In the opinion of the Court of Appeals, the Applicant did not, moreover, demonstrate in an undoubted manner that the conclusion of the arbitration clause took place in electronic format. Doubts in this scope are not removed by the content of the presented "e-mail correspondence" as well as the attachments, as it does not directly follow therefrom which contracts they are referring to. This proves the lack of the existence of the arbitration clause which is not repaired by the fact of Participant's participation in proceedings before a foreign Arbitration Court.

10.09. For the reasons above, with the decision of 4 April 2011, the Court of Appeals changed the challenged decision of the Regional Court and dismissed the Applicant's application for the enforcement of the Arbitration Award.

10.10. The Applicant lodged a cassation complaint against this decision of the Court of Appeals, citing, among others, the violation of Article IV

(1)(b) in conjunction with Article II (1) and (2) of the New York Convention by the non-recognition of the written agreement of the parties in electronic format as well as the formulation of the obligation to present the arbitration agreement in its original, as well as the violation of Article III sentence 2 in conjunction with Article II (1) and (2) of the New York Convention by rendering the recognition and enforcement dependent on the conditions more cumbersome than in Article 1162 § 2 k.p.c. [POL].

10.11. In the cassation complaint, the Applicant also raised the charges of the alleged violation by the Court of Appeals of Article V (1) of the New York Convention by encumbering the Applicant with the obligation of demonstrating that the parties concluded a valid arbitration agreement, Article III sentence 1 in conjunction with Article V (1) and (2) of the New York Convention by the refusal of the enforcement of the Arbitration Award despite the lack of the obstacles indicated thereto and again Article V (1) and (2) of the New York Convention by dismissing the application for the enforcement of the Arbitration Award due to the non-existence of the arbitration clause which is not listed in the cited Article V (1) and (2) of the New York Convention as a premise for the refusal of enforcement of the arbitration award.

10.12. The Applicant also raised the charge that the Court of Appeals in examining the Participant's complaint exceeded the boundaries of that complaint and the charges presented therein by having based its adjudication on the provisions of the New York Convention, while the Regional Court and the Participant, in its complaint, cited only the domestic law, i.e. the provisions of the k.p.c. [POL]. In the opinion of the Applicant, such actions by the Court of Appeals constituted a violation of Article 378 § 1 k.p.c. [POL] in conjunction with Article 397 § 2 k.p.c. [POL].

[**Decision of the Supreme Court**]

10.13. The Supreme Court recognised that the charge of the violation by the Court of Appeals of Article 378 § 1 k.p.c. [POL] in conjunction with Article 397 § 2 k.p.c. [POL] raised by the Applicant is not accurate, as in the present case, the obligation to apply the New York Convention existed. Meanwhile in scholarly writings and case law it is duly accepted that the proceedings on the recognition and enforcement of a foreign arbitration award are proceedings as to the merits of the case with the background provided by substantive law. The Supreme Court indicated that the Court of Appeals could, in consequence, apply the New York Convention provisions as the applicable substantive law.

10.14. In the assessment of the Supreme Court, the Applicant's charge questioning the refusal of enforcement of the Arbitration Award as a result of the assumption of the non-existence of the arbitration clause is also unsubstantiated. It is obvious, in accordance with the rule of logical interpretation, that the lack of the arbitration clause is a far-reaching obstacle for the recognition and enforcement than the invalidity of the clause.

10.15. The Supreme Court also emphasized that the Applicant, in referring to the arbitration clause, should prove its legal effectiveness.

10.16. In the opinion of the Supreme Court, the conclusion of the Court of Appeals that the arbitration clause was not concluded effectively by the parties was of fundamental significance for the adjudication in the case. This conclusion is disputable in light of interpretation of Article II (2) and Article IV (1) (b) of the New York Convention. The Supreme Court is of the opinion that the provision of Article II (2) of the New York Convention is more liberal, also allowing of agreeing on the arbitration clause in electronic format, even without the signatures of the parties. This is at the same time a basic provision, deciding on the admissible form of the arbitration agreement, however the requirements connected with the submission of the arbitration agreement included in Article IV (1) of the New York Convention should be examined through the prism of the form in which this agreement could be concluded. In consequence, Article IV of the New York Convention is of a derivative nature and as a result cannot deprive the norm indicated in Article II of the New York Convention of its rationality.

10.17. The Supreme Court also indicated that the Court of Appeals referred to the restrictive understanding of Article IV of the New York Convention, without analyzing the form of the arbitration clause stipulated in Article II of the New York Convention and not indicating the relationship between these provisions. However, in ascertaining that the non-existence of the arbitration clause does not repair the fact of Participant's participation in the proceedings before the Arbitration Court, as the provisions in force do not foresee such an effect, the Court of Appeals touched upon a very significant, precedential, legal issue. In the examined case, it is undisputed that in the proceedings before the Arbitration Court, the parties confirmed its jurisdiction, and the Participant undertook a content related defence and did not question the issued Arbitration Award. In the opinion of the Supreme Court, a question arises in such a situation as to whether the Participant can effectively refer to the non-existence or the invalidity of the arbitration clause in proceedings on the recognition and enforcement of the Arbitration Award in Poland.

10.18. The Supreme Court noted that the New York Convention did not foresee such a preclusion, neither did it foresee the jurisdiction of the arbitration court in the lack of an arbitration agreement. However, in the foreign doctrine the stance that the party which entered into a content related dispute before an arbitration court not raising the lack of jurisdiction of the said court (i.e. from the ineffectiveness of the clause) loses this charge in proceedings on the recognition and enforcement of an arbitration award before a domestic court is strongly represented. It is emphasised that the essence of the New York Convention is ordering the actions of the parties to be in compliance with the principles of good faith and good practices, and hence, the ban on acting in contradiction to these rules. This interpretation prevents the parties from disloyal actions towards co-participants and the arbitration court, causing unnecessary costs and a waste of time. There is no fear that the party's procedural rights will be limited as he decides on the arbitration clause autonomously. The Supreme Court demonstrated that it approved of this interpretation which in the examined case deprived the Participant's charges regarding the non-existence of the clause of legitimacy.

10.19. For the presented reasons, the Supreme Court reversed the challenged decision of the Court of Appeals and dismissed the Participant's complaint, thus ruling in favour of the Applicant.

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II. Arbitration Courts and *Res Iudicata*; Binding Force of the Previous Arbitration Award Recognised in a Legally Valid Manner (Supreme Court (*Sąd Najwyższy*) Civil Chamber Resolution, Case No. I CSK 416/11 of 13 April 2012)[6]

Key words:
arbitration award | *arbitration proceedings* | *arbitration court* | *state courts* | *recognition of foreign arbitral awards* | *enforcement of foreign arbitral awards review* | *res judicata* | *public policy*

States Involved:
[POL] - [Poland].

[6] Full text of this Resolution is available in Polish on the website of the Supreme Court at: http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/I%20CSK%20416-11-1.pdf (accessed on January 23, 2013).

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; Article 365 § 1,[7] Article 1206 § 2,[8] Article 1212 § 1.[9]

Rationes Decidendi:

10.20. The arbitration award's standing in contradiction with another award of the arbitration court recognised by the state court can constitute a violation of the fundamental principles of the legal order of the Republic of Poland (public policy clause).

10.21. As unambiguously confirmed by Article 1212 § 1 k.p.c. [POL], the state court's judgement on the recognition or on the enforcement of an arbitration award leads to vesting such an award with the power identical to that of judgements of state courts. The arbitration court's award which was recognised or whose enforceability was ascertained, due to the state court's judgement related thereto, in legal transactions ought to be treated just like any other judgement of the state court. Therefore, if the award of the arbitration court enjoys the same power as the judgement of the state court, then Article 365§ 1 k.p.c. [POL] shall apply thereto.

10.22. From Article 365 § 1 k.p.c. [POL] follows that the state court adjudicating on the recognition of the second arbitral award, as bound by the previous judgement of also the state court, ought not to allow two awards which in the same case settled the same question differently enter legal transactions since it would threaten the authority of the administration of justice and undermine trust in courts, i.e. it would stand in contradiction with the fundamental principles of the legal order of the Republic of Poland.

10.23. In the proceedings to the petition for setting aside the arbitration award, the state court can examine whether issuance by the arbitration court adjudicating on an prejudicial issue of an award different than the

[7] Article 365 § 1 k.p.c. [POL] (unofficial translation): Legally final judgment bounds not only the parties and the court that has issued it, but also other courts and other state authorities and public administration bodies, whereas in the cases stipulated by a statute other persons as well.

[8] Article 1206 § 2 k.p.c. [POL] (unofficial translation): An arbitral award shall also be set aside if the court finds that: 1) in accordance with statute the dispute cannot be resolved by an arbitral tribunal, or 2) the arbitral award is contrary to fundamental principles of the legal order of the Republic of Poland (public policy clause).

[9] Article 1212 § 1 k.p.c. [POL] (unofficial translation): An arbitral award or a settlement entered into before an arbitral tribunal shall have legal effect equal to a court judgment or a settlement entered into before a court, upon recognition or enforcement thereof by the court.

already legally finally recognised arbitration award was admissible only from the point of view of the public policy clause. Therefore, the court must consider whether under the circumstances of the case, such important reasons have emerged that it is necessary to depart from the principle that no two awards settling the case between the same parties differently can function in legal transactions. In this scope, referring to the range of circumstances which allow to reopen the proceedings concluded by a legally final judgment before the state court should be of use. Examining the admissibility of departing from the principle that says that the arbitration court is bound by the earlier prejudicial arbitration award which was recognised in a final manner or the enforceability of which was ascertained in a final manner, in the proceedings for the setting aside the arbitration award, the state court cannot limit itself to the very statement of the arbitration court that new facts or evidence have emerged in the case. Accordingly applying the assessment criteria formed against the background of the provisions on reopening the proceedings concluded by a legally final judgment, the state court should assess whether these are truly new facts and evidence and whether the party was unable to make use of them in the previous proceedings.

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

10.24. On 17 April 2000, legal predecessors of the parties (presently T.R. Sp. z o. o. in W. and E. S.A. in W., hereinafter respectively as: "T.R." or "Landlord" and "E." or "Tenant") concluded the agreement for the lease of the building located in W. for the period of five years (hereinafter: "Agreement"). Next, an annex was drawn up (hereinafter: "Annex") which prolonged the Agreement's validity to 10 years. The Agreement included an arbitration clause by virtue of which the disputes arising from the Agreement were submitted to the jurisdiction of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw (hereinafter: "Court of Arbitration"). In 2005, a dispute arose between the parties regarding the further binding force of the Agreement related to the doubts concerning the Annex prolonging the Agreement.

10.25. By means of the award of 24 November 2005, issued in the case with the file reference number SA-49/05 (hereinafter: "Award of 24 November 2005") the Court of Arbitration established that until 31 July 2010 T. R. and E. were bound by a legal relationship in the form of a lease following from the Agreement of 17 April 2000. The petition for setting aside of Award of 24 November 2005 was dismissed in a legally final manner and the award was recognised by virtue of the legally final decision of 28 May 2007issued by the Regional Court in Warsaw.

10.26. With the statement of claims of 18 September 2007 filed with the Court of Arbitration, T.R. sought to be awarded from E. the amount of PLN 4,144,914.99 on the grounds of rent and extra costs for the period from August 2005 until January 2006, including the statutory interest rates. Next, by means of the statement of claims of 26 January 2009, filed with the said Court of Arbitration, T.R. motioned to be awarded from E. the amount of PLN 20,696,038.24 on the grounds of compensation for the improper performance of the Agreement which the parties were bound by.

10.27. By virtue of the awards of 30 July 2009, issued in the cases to file reference numbers SA-185/07 and SA-20/09 (hereinafter: "Awards of 30 July 2009"), the Court of Arbitration dismissed both statements of claims. In the identically worded substantiations of the Awards of 30 July 2009, the Court of Arbitration indicated that the previous Award of 24 November 2005 had been based on erroneously established facts. The circumstances revealed already after the Award of 24 November 2005 had been issued, and especially the evidence collected in the criminal investigation, proved the invalidity of the Annex to the Agreement questioned by the Tenant. For this reason, the Agreement expired on 1 August 2005 and all the claims based thereupon were subject to dismissal as ungrounded. The Court of Arbitration emphasised that in face of new circumstances having been revealed, it was entitled to issue a different assessment of validity of the contentious Agreement than the Court of Arbitration had issued in the previous case to the file reference number SA-49/05, concluded by the Award of 24 November 2005.

10.28. Landlord T.R. filed the petitions for setting aside the Awards of 30 July 2009 while Tenant E. motioned for both petitions to be dismissed.

10.29. The petitions for setting aside the Awards of 30 July 2009 were dismissed by the Warszawa-Praga Regional Court in Warsaw by virtue of the verdict of 6 August 2010.

10.30. Landlord T.R. challenged the verdict above with an appeal. However, the Court of Appeals in Warsaw dismissed it, having found, similarly like the Regional Court, that the Award of 24 November 2005, in which the Court of Arbitration established that the parties were bound by the lease relationship until 31 July 2010, had not been binding for the Court of Arbitration issuing the Awards of 30 July 2009. Hence, there were no obstacles for the Court of Arbitration, having ascertained that the Award of 24 November 2005 had been based on erroneously established facts, to be able to determine that the parties were bound by the Agreement only until 1 August 2005.

10.31. Landlord T.R. challenged the above-given verdict of the Court of Appeals with a cassation complaint.

10.32. The charges of the Landlord's cassation complaint amounted to the assertion that in the challenged verdict, the Court of Appeals violated Article 1206 § 2 k.p.c. [POL]. T.R. seeked the violation of this provision first and foremost in the fact that due to the erroneous interpretation of Article 1212 § 1 k.p.c. [POL], in the case under examination, the Court of Appeals did not apply Article 365 § 1 k.p.c. [POL] to carry out the assessment of the consequences of the Award of 24 November 2005. Moreover, in the opinion of the complainant T.R., the reason due to which the Court of Appeals found that it was unable to call upon the public policy clause included in Article 1206 § 2 k.p.c. [POL] was also an erroneous interpretation of Article 1184 § 2 k.p.c. [POL] and Article 403 k.p.c. [POL]. The substance of the charges raised in the cassation complaint amounted to the question whether the principle following from Article 365 § 1 k.p.c. [POL] that the legally final judgement binds not only the parties and the court which has issued it, but also other courts, applies to the arbitration court as well. In particular, whether the arbitration court can adjudicate differently than in the earlier arbitration award recognised by the state court in a legally final manner if in the case between the same parties in which the earlier judgement is prejudicial since, in the assessment of the court of arbitration adjudicating later, new evidence has emerged.

[**Resolution of the Supreme Court**]

10.33. Settling the issue above, the Supreme Court reminded that Article 365 § 1 k.p.c. [POL] meant also that the legally final verdict bound also other courts, other state authorities and public administration bodies, whereas in the cases stipulated by a statute other persons as well. This means that the legally final judgement is of prejudicial nature, i.e. it must be taken into account in recognition of other cases between the same parties if the question settled thereby is of significance for the settlement in these cases. One must also bear in mind that under Article 366 k.p.c. [POL] the legally final verdict enjoys the force of *res iudicata* which constitutes an obstacle for the repeated ruling in the same case between the same parties.

10.34. In its further reasoning, the Supreme Court indicated also that arbitration courts, although able to proceed according to the principles other than those adhered to by state courts, issued awards ending the dispute between the parties. The arbitration court's award can be enforced voluntarily by the parties and then it is them who decide whether it is to be enforced, even if it does not meet the standards prescribed for such awards by the law. However, the arbitration court's award, similarly like the state court's verdict, can constitute a definitive

settlement of the case and, regardless of the parties' will, be subject to the forced enforcement. For such an arbitration award or a settlement concluded before the arbitration court to be afforded the treatment equal to that of state court judgements, it must comply with the requirements determined by the statute. However, if it is so is decided by the state court in a separate decision to the motion of the party. The judgement of the state court on the recognition or enforcement of the court of arbitration's award leads to vesting this verdict with the same force as that enjoyed by judgements of state courts, as unambiguously is confirmed by Article 1212 § 1 k.p.c [POL].

10.35. In the opinion of the Supreme Court, the above means that the arbitration award which was recognised or whose enforceability was ascertained due to the state court judgement on recognition or enforcement, in the legal transactions should be treated identically as any other judgement of the state court. Therefore, if the arbitration court's award enjoys the same force as that of the state court's judgement, then Article 365 § 1 k.p.c. [POL] shall apply thereto. The provision of Article 1212 k.p.c. [POL] stipulates no exceptions from vesting the arbitration award with the same legal effects as the judgement of the state court.

10.36. In this situation, according to the Supreme Court, one must differently perceive the fact that Article 365 § 1 k.p.c. [POL] does not state directly that the arbitration court is the addressee of the norm expressed therein. The arbitration court's award shall be made equal with that of the state court when it is recognised or its enforceability is ascertained. This means that if the parties and the arbitration court appointed by them want the award of this court to be vested with the equal effects as that of the judgement of the state court, then they must take into consideration the fact that the arbitration court has already prejudicially ruled in the same case between the same parties. If the earlier award of the arbitration court has already been recognised by the state court or the state court has ascertained its enforceability, then it is of fundamental significance for the possibility of recognition of another award issued between the same parties.

10.37. In the opinion of the Supreme Court, the state court which is to adjudicate on the recognition (or enforcement) of another award of the arbitration court must not omit the fact that the state court has already adjudicated in the same case. Thus, it follows from Article 365 § 1 k.p.c. [POL] that the court adjudicating on the recognition of the second arbitration award, as bound by the previous award, and also by the judgment of the state court, should not allow in legal transactions two awards which in the same case between the same parties settled the

same question differently since this would threaten the authority of the administration of justice and undermine trust in courts, that is it would be in contradiction with the fundamental principles of the legal order of the Republic of Poland. Article 1214 § 3 point 2 k.p.c. [POL] confirms this indicating that the arbitration court's award, should not be recognised or that its enforceability should not be ascertained if it stood in contradiction with the fundamental principles of the legal order of the Republic of Poland.

10.38. The Supreme Court also indicated that bearing in mind the fact that allowing into legal transactions two awards whose enforcement is guaranteed by the State and which settle the same issue differently would threaten the fundamental principles of the legal order of the Republic of Poland, not only does the legislator create a barrier for the recognition of arbitration award issued later, but it also equips the adversary party with an instrument having the form of a petition for setting aside such an award. It is characteristic that under Article 1206 § 2 k.p.c. [POL] it is expressly stipulated that the arbitration court's award is set aside also when it contradicts the fundamental principles of the legal order in the Republic of Poland. It is fitting to point out that the legislator gives the principal significance to the petition for setting aside the arbitration award since under Article 1217 k.p.c. [POL], in the proceedings for the recognition or enforcement of an arbitration award, the court does not examine the circumstances mentioned in Article 1214 § 3 k.p.c. [POL] if the petition for setting aside the arbitration award was dismissed in a legally final manner. Hence the increased significance of the examination during the proceedings for the setting aside the arbitration court's award whether said award does not violate the fundamental principles of legal order of the Republic of Poland by allowing into legal transactions two awards which differently settle the same issue between the same parties.

10.39. However, the Supreme Court noted that there is an exception to the principle of being bound with a final verdict, even in relation to the state courts, in the form of the possibility of reopening the proceedings. This possibility is not predicted in relation to awards of arbitration courts. Recognising, however, that in terms of principle, the arbitration court ought to take into consideration the earlier arbitration award which was recognised or whose enforceability was ascertained by the decision of the state court, a question emerges to what extent in the proceedings to the petition for setting aside the arbitration award, the state court can examine whether it was admissible for the arbitration court to settle the prejudicial issue differently than in the previous arbitration award that had already been recognised in a legally final manner.

10.40. The Supreme Court adopted the stance that in the proceedings to the petition for setting aside the arbitration award, the state court can examine the issue above only from the point of view of the public policy clause. Hence, this court must consider whether such important reasons have occurred in the circumstances of the case that it is necessary to depart from the principle that no two awards differently settling in the case between the same parties can function in legal transactions. In this scope, it would be advisable to refer to the scope of the circumstances which enable the reopening of the proceedings before the state court. There is no grounds to apply the provisions regulating the petition for the reopening of the proceedings directly to the assessment of the arbitration court's award, however, the lack in Polish law of the regulations of the reopening of the proceedings in relation to arbitration courts must not lead to the arbitrary assessment by the arbitration court whether it should take into consideration the earlier arbitration award adjudicating on the same matters and between the same parties.

10.41. In the assessment of the Supreme Court, in examining the admissibility of the departure from the principle which says that the arbitration court is bound by the earlier prejudicial arbitration award which was in a legally final manner recognised or whose enforceability was ascertained in a legally final manner, in the proceedings for setting aside the arbitration award, the state court must not limit itself to the very statement of the arbitration court that new facts or evidence have emerged in the case. Correctly applying the assessment criteria formed against the background of the regulations concerning the reopening of the proceedings concluded with a legally final verdict, the state court should assess whether these are truly new facts and evidence and whether the party was unable to make use of them in the previous proceedings. Such an examination, necessary for the purposes of assessment whether in the specific established factual status the departure from the rule that the same issue must not be settled differently in the awards allowed in legal transactions is admissible, does not constitute a limitation of the freedom guaranteed to the arbitration courts by the legislator. However, it is indispensable in the proceedings for setting aside the arbitration court's award with the view of ensuring that it complies with the fundamental principles of the legal order of the Republic of Poland which also includes the necessity for the arbitration court to take into consideration the fact that its awards can be allowed in legal transactions only on the condition that they are not in contradiction with another award of the arbitration court. Therefore, the state court cannot limit itself only to the formal

examination whether the substantiation of the arbitration court includes arguments advocating the departure from the binding of the arbitration court with the earlier award, but in the frames of the award's compliance with the public policy, it should assess them and substantiate why they have such a result that the principle of stability of legally final judgements and certainty of legal transactions should be waived.

10.42. For the reasons given above, the Supreme Court reversed the challenged verdict of the Court of Appeals in Warsaw and remitted the case thereto for rehearing.

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III. Arbitrability of Claims of Unfair Competition (a Claim for Handing over of Unjustified Benefits); Accurate Specification of the Subject of an Arbitration Clause (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. I CSK 354/11 of 4 April 2012)[10]

Key words:
arbitration agreement | *arbitration clause* | *arbitrability* | *unfair competition*

States Involved:
[POL] - [Poland].

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; Article 1161 § 1;[11]
- Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji [*The Act of 16 April 1993 on Combating Unfair Competition*], [u.z.n.k.] [POL], consolidated, published in:

[10] Full text of this Decision is available in Polish on the website of the Supreme Court at: http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/I%20CSK%20354-11-1.pdf (accessed on January 23, 2013).

[11] Article 1161 § 1 k.p.c. [POL] (unofficial translation): Submission of a dispute to arbitration requires an agreement between the parties defining the subject of the dispute and the legal relationship under which the dispute has arisen or may arise (an arbitration agreement).

Dziennik Ustaw [*Journal of Laws*] 2003, No. 153, item 1503, as amended; Article 15 Sec. 1 point 4, Article 18 Sec. 1 point 5.[12]

Rationes Decidendi:

10.43. The claim for the handing over of unjustified benefits mentioned in Article 18 Sec. 1 point 4 u.z.n.k. [POL][13] as a dispute over a property right remains at the disposal of the parties, it can also become a subject of a settlement concluded between the parties. Hence, it can also be covered by the arbitration clause.

10.44. The accurate specification of the subject of the arbitration clause should sufficiently identify the legal relationship transferred for the examination by the court of arbitration. Specifying only that it is to be a legal relationship related to the performance of an agreement, must not be found sufficient in the case at issue since it allows for arbitrability in the assessment of the scope of the said arbitration clause. At the same time, it is impossible to omit the fact that subjecting a specific legal relationship to be examined by the arbitration court signifies that these cases are excluded from the recourse to court. Hence, such an interpretation should be indicated which would advocate, in the event of doubts, limitation of exclusions from the recourse to court.

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

10.45. The company JJW sp. j. J. K., J. R., W. L. (hereinafter: "Claimant") lodged an action for payment against C. P. Sp. z o.o. (hereinafter: "Respondent"). With the decision of 6 December 2010, the Regional Court refused to reject the statement of claims, which the Respondent motioned for.

10.46. The Respondent filed a complaint against the above-mentined decision of the Regional Court on the refusal to reject the statement of claims. With the decision of 7 March 2011, the Court of Appeals changed the

[12] Article 18 Sec. 1 u.z.n.k. [POL] (official translation): Where the act of unfair competition is committed, the entrepreneur whose interest is threatened or infringed may request: 1) relinquishment of prohibited practices, 2) removing effects of prohibited practices, 3) making one or repeated statement of appropriate content and form, 4) repairing the damage, pursuant to general rules, 5) handing over unjustified benefits, pursuant to general rules, 6) adjudication of an adequate amount of money to the determined social goal connected with support for the Polish culture or related to the protection of national heritage – where the act of unfair competition has been deliberate. Full text of this Act is available in English at: http://www.uokik.gov.pl/download.php?plik=7635.

[13] Probably the Supreme Court meant Article 18 Sec. 1 point 5 u.z.n.k. [POL] instead of point 4, as follows from the specification of the claim pursued in the case at issue i.e. the claim for the handing over of unjustified benefits.

Regional Court's decision in such a manner that it rejected the statement of claims.

10.47. The Court of Appeals found that in the case at issue the parties were bound by an agreement, the Terms of Commerce of 2 July 2007, 1 January 2008, and 2 January 2009 constituted a part of which. The agreement regulated the cooperation between the parties which consisted in the Claimant's delivering their produce with the view of selling them in the Respondent's outlets. In point 21 of the Terms of Commerce, the parties specified that any disputes arising from this agreement or in connection therewith shall be settled solely and exclusively by the court of arbitration selected by the parties whereas if the parties fail to specify which court of arbitration was selected, the court competent to settle any disputes arising from the agreement or in connection therewith shall be the Court of Arbitration at the Polish Confederation of Private Employers "Lewiatan". In the case at issue, the Claimant brought forth an action on the grounds of the Respondent's inflicting the act of unfair competition specified in Article 15 Sec. 1 point 4 u.z.n.k. [POL] which consisted in the collection of charges other than commercial margins for accepting goods for sale and, on the grounds of Article 18 Sec.1 point 4 u.z.n.k. [POL],[14] demanded from the Respondent the return of the benefits the Respondent had obtained in an unjustified manner.

10.48. The Claimant lodged a cassation complaint from the said decision of the Court of Appeals, among others raising the charge of violation of Article 1161 § 1 k.p.c. [POL].

[**Decision of the Supreme Court**]

10.49. The Supreme Court reminded that under Article 1157 k.p.c. [POL], for the adjudication of the arbitration court the parties can submit disputes on property rights or disputes on non-property rights which can be subject to a court settlement, except for alimony cases. The Supreme Court emphasised that it shares the view expressed in earlier case-law that the claim for the handing over of unjustified benefits mentioned in Article 18 Sec.1 point 4 u.z.n.k. [POL][15] as a property right dispute remains at the disposal of the parties and it can become a subject of the settlement concluded by the parties. Hence, it can also be covered by the arbitration clause.

10.50. However, the Supreme Court indicated that in the present case the issue is whether the arbitration clauses concluded by the parties

[14] *Ibid.*

[15] *Ibid.*

extended to disputes of this type. As follows from the contents of these clauses, they expressly pertain to the disputes arising from or connected with the agreements of cooperation in the scope of sales of goods. Respondent's performance of an act of unfair competition consisting in collecting extra charges was neither connected to the performance of these agreements nor did it remain in connection with the realisation of the agreements, but was performed only on the occasion of realisation of these agreements, as aptly pointed out by the Claimant. Hence, the claim pursued by the Claimant is neither of a contractual character nor does it remain in connection with the content of the agreements concluded between the parties, but it pertains to the act of unfair competition perpetrated by the Respondent. The claim pursued by the Claimant is independent of the agreement concluded between the parties. The act of unfair competition used by the Claimant to derive their claim from constitutes the basis of the legal relationship that is separate from the agreement existing between the parties. It unambiguously follows from the contents of the arbitration clauses that they pertained solely to the disputes arising from or connected with the performance of the agreement while not any disputes to arise during their realisation.

10.51. The Supreme Court emphasised that assuming that the arbitration clauses at issue also extended to, be it only indirectly, the claims following from acts of unfair competition would stand in contradiction with the requirement of sufficient specification of the subject of such an arbitration clause which is mentioned in Article 1161 § 1 k.p.c. [POL]. The accurate specification of the subject of the arbitration clause should sufficiently identify the legal relationship transferred for the examination by the court of arbitration. Specifying only that it is to be a legal relationship related to the performance of an agreement, in the case at issue must not be found sufficient since it allows for arbitrability in the assessment of the scope of the said arbitration clause. At the same time, it is impossible to omit the fact that subjecting a specific legal relationship to be examined by the arbitration court signifies that these cases are excluded from the recourse to court. Hence, such an interpretation should be indicated which would advocate, in the event of doubts, limitation of exclusions from the recourse to court.

10.52. In this state of affairs, in the Supreme Court's assessment, repealing of the challenged decision of the Court of Appeals on the rejection of the statement of claims proved necessary for the content-related adjudication of the pending dispute by the court of first instance (i.e. Regional Court). For this reason, the Supreme Court repealed

the challenged decision of the Court of Apperals and dismissed the Respondent's complaint against the Regional Court's decision on the refusal to reject the statement of claims.

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IV. Binding of the State Court by the Factual Findings of the Arbitration Court; Premises for Setting Aside an Arbitration Award (the Premise of Failure to Observe the Requirements regarding the Fundamental Principles of Procedure before a Court of Arbitration) (Supreme Court (*Sąd Najwyższy*) Civil Chamber Resolution, Case No. I CSK 286/11 of 15 March 2012)[16]

Key words:
arbitration award | arbitration proceedings | arbitration court | state courts | review | public policy | principles of law | civil law | constitutional right to court proceedings

States Involved:
[POL] - [Poland];
[DEU] - [Germany].

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; Article 1206;[17]

[16] Full text of this Resolution is available in Polish on the website of the Supreme Court at: http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/I%20CSK%20286-11-1.pdf.

[17] Article 1206 k.p.c. [POL] (unofficial translation): § 1. A party may by petition demand that an arbitral award be set aside if: 1) there was no arbitration agreement, or the arbitration agreement is invalid, ineffective or no longer in force under the provisions of applicable law; 2) the party was not given proper notice of the appointment of an arbitrator or the proceeding before the arbitral tribunal or was otherwise deprived of the ability to defend its rights before the arbitral tribunal; 3) the arbitral award deals with a dispute not covered by the arbitration agreement or exceeds the scope of the arbitration agreement; however, if the decision on matters covered by the arbitration agreement is separable from the decision on matters not covered by the arbitration agreement or exceeding the scope thereof, then the award may be set aside only with regard to the matters not covered by the arbitration agreement or exceeding the scope thereof;

- Kodeks cywilny z dnia 23 kwietnia 1964 r. [*Civil Code of 23 April 1964*] [k.c.] [POL], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 16, item 93, as amended; Article 471;[18]
- Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [*Constitution of the Republic of Poland of 2 April 1997*] [Constitution] [POL], published in: Dziennik Ustaw [*Journal of Laws*] 1997, No. 78, item 483, as amended; Article 45[19]

Rationes Decidendi:

10.53. In terms of principle, the state court which examines the petition of the party dissatisfied with the manner in which the arbitration court settled the case is bound by the factual findings of the arbitration court. The proceedings before the state court, however, are not of a control nature, characteristic for a common court of second instance, and are limited to the premises indicated expressly in the provisions and providing admissible legal grounds for a petition for setting aside the arbitration court's award (Article 1206 § 1 and 2 k.p.c. [POL]). From the content of the provisions, it follows that the petition is not to be used to challenge the course and the outcome of the proceedings before the arbitration court, but to render it impossible to uphold in force such an award of a court of arbitration which violateselementary formal requirements for hearing disputes.

10.54. Among the premises specified in Article 1206 § 1 k.p.c. [POL], point 4 contains the possibility of setting aside the arbitration court's award

exceeding the scope of the arbitration agreement cannot constitute grounds for vacating an award if a party who participated in the proceeding failed to assert a plea against hearing the claims exceeding the scope of the arbitration agreement; 4) the requirements with regard to the composition of the arbitral tribunal or fundamental rules of procedure before such tribunal, arising under statute or specified by the parties, were not observed; 5) the award was obtained by means of an offence or the award was issued on the basis of a forged or altered document; or 6) a legally final court judgment was issued in the same matter between the same parties. § 2. An arbitral award shall also be set aside if the court finds that: 1) in accordance with statute the dispute cannot be resolved by an arbitral tribunal, or 2) the arbitral award is contrary to fundamental principles of the legal order of the Republic of Poland (public order clause).

[18] Article 471 k.c. [POL] (unofficial translation): The debtor is obliged to redress the damage arising from non-performance or improper performance of an obligation, unless the non-performance or improper performance are an outcome of circumstances which the debtor is not liable for.

[19] Article 45 of the Constitution [POL]: 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. Official translation available at: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (accessed on January 23, 2013).

due to the failure to observe the requirements regarding the fundamental principles of procedure before such a court of arbitration, arising under the statute or specified by the parties. Such principles include the basing of the award on established facts which takes place after evidentiary proceedings have been conducted. Hence, only in the situation where the state court found that such evidentiary proceedings were not conducted at all or were incomplete, or they were conducted in an obviously defective manner by transgressing the rules of logical reasoning and connecting facts in a cause-and-effect sequence, selective admission of evidence in the case, taking evidence presented only by one party with an unsubstantiated omission of the evidence motioned for by the adversary party, etc., it would be possible to find that the requirements mentioned in Article 1206 § 1 point 4 k.p.c [POL] were not adhered to.

10.55. One cannot share the assertion that the principles of civil liability for inflicting a damage does not fall within the fundamental principles of the legal order in Poland (public policy clause). Against the background of the civil law, and thus in private law relations in which, as a result of various events – especially hazardous actions resulting from business operations, traffic of vehicles, as well as acts in law, damages are a common occurrence and, as such, require legal regulations which guarantee the compensatory liability. The provisions in this scope fall within the category of the law of obligations fundamental norms and, in the frames of *ex delicto* and *ex contractu* liability, they can be found to form some of the fundamental principles of the state's legal order.

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

10.56. On 12 February 2004, the company H. GmbH & Co. KG with its registered seat in Germany (hereinafter: "Claimant") concluded with the State Treasury – General Directorate for National Roads and Motorways (hereinafter: "Respondent" or "State Treasury") the contract for the construction of a section of a ring-road of the city of T. (hereinafter: "Contract"). In the Contract, the parties specified the deadline for the completion of the works and Claimant's remuneration. Due to unpredicted circumstances, keeping the deadline proved impossible and in subsequent annexes to the Contract, the deadline for the completion of the works was prolonged and Claimant's remuneration was increased while the remaining provisions of the Contract remained unchanged.

10.57. On 8 September 2006, in compliance with the Special Conditions of the International Federation of Consulting Engineers (hereinafter: "FIDIC Conditions"), which were included within the Contract, the Claimant

motioned for the Dispute Adjudication Board (hereinafter: "Board") to establish the right to prolong the works by 6-9 months at least and, in such a case, to receive extra remuneration. In the decision of 30 November 2006, the Board granted the Claimant such rights, however, only 69 days of prolonged works and additional remuneration on the grounds of the delay resulting from the State Treasury's fault. Due to the notices of dissatisfaction submitted by both parties, the Board's decision did not become binding. In the situation, as established on the grounds of clauses 20.4 and 20.6 of the FIDIC Conditions, where the dispute is not resolved amicably due to the non-finality and not being bound by the Board's decision, the case ought to be solved by recourse to international arbitration. However, in the Contract, the parties agreed that instead of the recourse to international arbitration, they choose to submit the case to be settled by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw (hereinafter: "Court of Arbitration"), however, observing the duty to submit the dispute before the Board first.

10.58. In keeping with the provisions of the Contract, the Claimant filed the case with the Court of Arbitration, first motioning for the award of the amount exceeding Euro 1.8 million including interest rates as a part of the claims to, subsequently, modify the demand by motioning for the issuance of the preliminary award settling the basis of the action. On 8 August 2008, the Court of Arbitration issued the award (hereinafter: "Award") by virtue of which, it dismissed the statement of claims in full. The Court of Arbitration substantiated its adjudication with the fact that in the annexes to the Contract, the parties agreed on the Claimant's new remuneration and the deadline for the completion of works, hence, the Claimant's demand pertaining to the costs of reorganising the works with the view of delivering them on time and explained by the Respondent's unsubstantiated refusal to prolong the time for the completion of the works had been unsubstantiated.

10.59. The Claimant filed a petition for setting aside the Award of the Court of Arbitration, however, the Regional Court in Warsaw with the verdict of 27 October 2009 dismissed the petition, substantiating it with the non-fulfilment of any of the basis required for the complaint to be allowed which are enumerated in Article 1206 k.p.c. [POL].

10.60. As a result of the Claimant's appealing against the said verdict of the Regional Court, by virtue of the verdict of 19 November 2010, the Court of Appeals in Warsaw changed the challenged verdict of the Regional Court and set the Court of Arbitration's Award aside in full. The Court of Appeals stated that the Award was in contradiction with

the fundamental principles of the legal order of the Republic of Poland in the meaning of Article 1206 § 2 point 2 k.p.c. [POL] (the public policy clause), i.e. it violated the fundamental principles of the public policy pertaining to civil liability (full compensation principle). According to the Court of Appeals, the Court of Arbitration had not at all considered the Claimant's claim concerning the payment of damages for the improper, in the Claimant's opinion, performance of contractual obligations by the Respondent. Whereas the Court of Arbitration's statements which in the substantiation of the Award can eventually pertain to this issue, in the case for payment of damages must be found in flagrant violation of the requirements to be found in Article 1197 § 2 k.p.c. [POL] and in § 36 (2) of the Court of Arbitration Rules of Procedure and unable to constitute the recognition of the merits of the dispute for the payment of *ex contractu* damages.

10.61. The Respondent State Treasury challenged the Court of Appeal's verdict above by means of the cassation complaint in which it raised the violation of Article 1206 § 2 k.p.c. [POL]. In the Respondent's opinion, this violation was to have consisted in, amongst others, the Court of Appeals' erroneous assumption that the full compensation principle is a fundamental principle of the public policy of the Republic of Poland; the Court of Appeals having made new factual findings other than those following from the motives of the Court of Arbitration while having conducted the evidentiary proceedings only in regard to a fragment of the circumstances of the case; and in having adopted that the award of the arbitration court may be in contradiction with the principle of the right to court proceedings.

[**Resolution of the Supreme Court**]

10.62. The Supreme Court pointed out that delegating resolution of disputes which can arise in connection to the performance of the contract concluded between the parties onto the arbitration court is based on the trust in this form of proceeding and it breeds consequences in the form of submitting to the award of a team of arbitrators selected and accepted by both parties. The award is issued on the grounds of the arbitration court's rules of procedure approved by the parties who also accept the rules of procedure in the scope of application of procedural and substantive law departing from the state judiciary, also as regards the hearing of evidence with the view of establishing the facts.

10.63. The Supreme Court also found that the facts established by the arbitration court, in terms of principle, bound the state court hearing the petition of the party dissatisfied with the manner in which the arbitration court had settled the case.

10.64. However, in the opinion of the Supreme Court, the proceedings pending before the state court to the petition for setting aside the arbitration court's award are not of a control nature, characteristic for the common court of second instance, and are limited to the premises expressly indicated in legal provisions and which constitute admissible legal grounds for the petition for setting aside the arbitration award (Article 1206 § 1 and 2 k.p.c. [POL]). From the contents of the provisions, it follows that the petition does not serve the purpose of undermining the course and outcome of the proceedings before the arbitration court, but to render it impossible to uphold in force such an award that violates elementary formal requirements for hearing disputes such as the lack of an arbitration clause or exceeding scope thereof, depriving one of the parties of the ability to defend their rights before the arbitration court, non-observance of requirements with regard to the composition of the arbitration court or fundamental rules of procedure before such a tribunal arising from the statute or specified by the parties, criminal activities, or *res iudicata* (Article 1206 § 1 k.p.c. [POL]).

10.65. The Supreme Court emphasised that under Article 1206 § 2 k.p.c. [POL], the state court's authority to set the arbitration court's award aside *ex officio* in two cases is of an exceptional character. This is the case when under the statute the dispute cannot be resolved by the arbitration court (point 1) and when the arbitration court's award contradicts the fundamental principles of legal order of the Republic of Poland and the public policy clause applies (point 2).

10.66. The Supreme Court noted also that amongst the premises specified in Article 1206 § 1 k.p.c. [POL], point 4 provides for the possibility of setting aside the arbitration court's award due to the failure to observe the requirements regarding the fundamental principles of procedure before such a court of arbitration arising under the statute or specified by the parties. These principles include the basing of the award on the established facts which takes place after the evidentiary proceedings have been conducted. Hence, only in the situation where the state court found that such evidentiary proceedings were not conducted at all or were incomplete, or they were conducted in an obviously defective manner, with transgressing the rules of logical reasoning and connecting facts in a cause-and-effect sequence, selective admission of evidence in the case, taking evidence presented only by one party with an unsubstantiated omission of the evidence motioned for by the adversary party, etc., it would be possible to find that the requirements mentioned in Article 1206 § 1 point 4 k.p.c [POL] were not adhered to. At the same time, the Supreme Court shared the view, presented in the doctrine, that a narrowing

interpretation ought to be applied to the quoted provision, thus limiting the possibility of challenging the award of the arbitration court only to the fair trial principles and such procedural infringements which could impact the arbitration court's award.

10.67. Referring the above to the case at issue, the Supreme Court found that the Court of Appeals had not ascertained that the Award fulfilled any of the premises specified in Article 1206 § 1 k.p.c. [POL], and in particular the premise from Article 1206 § 1 point 4 k.p.c. [POL]. Hence, in face of such an ascertainment favourable for the Respondent, one must not at the same time find the Claimant in the right as regards the legitimacy of the charges raised in the appeal against the verdict of the Regional Court or make one's own factual findings necessary to interpret the Contract between the parties, and in particular required to interpret the annexes thereto, around the content of which a fundamental dispute has arisen.

10.68. The Supreme Court also considered whether the Court of Appeal's ascertainment that the violation by the Award of the public policy clause was substantiated in keeping with Article 1206 § 2 point 2 k.p.c. [POL]. This clause is based on the finding under specific circumstances that the arbitration court's award contradicts the fundamental principles of the public policy in the Republic of Poland. In the present case, this signifies a departure from the principles of civil liability for causing a damage which should be repaired in full for the Claimant. Whereas in the assessment of the Court of Appeal, the Court of Arbitration did not examine the claim for damages pursued under Article 471 k.c. [POL] at all and, hence, it did not examine the dispute as to its merits.

10.69. The Supreme Court found that one cannot share the Respondent's claim that the principles of civil liability for causing damage do not fall within the fundamental principles of the legal order in Poland. On the grounds of the civil law, and hence in private law relations in which, due to the variety of events – especially hazardous actions resulting from business operations, traffic of vehicles, as well as acts in law, damages are a common occurrence and, as such, require legal regulations which guarantee the compensatory liability. The provisions in this scope fall within the category of the law of obligations fundamental norms and, in the frames of both *ex delicto* and *ex contractu* liability, can be found to form some of the fundamental principles of the state's legal order.

10.70. Hence, the Supreme Court pointed out that if any person suffers damage and the liability principles within one of the civil liability regimens are fulfilled, then within the limits stipulated by the law,

compensation should be awarded from the person liable for inflicting the damage. Nonetheless, appropriate premises must be fulfilled, i.e. damage must emerge in the first order as well as the event remaining in a cause-and-effect relationship therewith which, by virtue of law, entails compensatory liability. According to the Claimant, in the present case this event came as the improper performance of the Contract by the Respondent. However, in the Supreme Court's assessment, it is difficult to detect anything of the kind in the present case. The Claimant motioned for the establishment of the right to prolong the performance of the Contract and in the event of establishment of such a right, for the right to additional remuneration. Next, the demand of the statement of claims was modified in such a way that the issue was the preliminary settlement regarding the right to compensation. The Court of Arbitration conducted extremely detailed evidentiary proceedings, examined the same principle of the action for damages finding the statement of claims ungrounded and due to this it did not adjudicate on the value of the compensation. It also was the reason for the refusal to admit the evidence proffered by the Claimant in this scope. In the substantiation of the Court of Appeals challenged verdict, the correctness of such proceedings and of the adjudication of the Court of Arbitration is expressly confirmed. For these reasons, one must not agree that the Court of Arbitration's Award violated Article 1206 § 2 point 2 k.p.c. [POL].

10.71. The Supreme Court emphasised also that the view presented in the case-law and in the doctrine that Article 45 of the Constitution [POL] enacting the right to court proceedings does not refer to arbitration courts at all, but to the state judiciary is correct.

10.72. At the same time, the Supreme Court indicated that despite the non-state character, the proceedings before the arbitration court must also be conducted with the observance of independence, impartiality, and other rules characteristic of civil proceedings. However, it found that in the case at issue no legitimate charges had been demonstrated on the grounds of the provision most closely related to the present problem, i.e. Article 1206 § 1 point 2 k.p.c. [POL] in relation to depriving the Claimant of the right to defend their rights before the Court of Arbitration.

10.73. For the reasons given above, the Supreme Court set aside the verdict of the Court of Appeals, which the Respondent challenged with the cassation complaint, and it dismissed the Claimant's appeal against the verdict of the Regional Court *ipso facto* recognising that there were no grounds to set aside the Court of Arbitration's Award dismissing the Claimant's claims.

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