

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

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

Volume IV

2014

Independence and Impartiality of Arbitrators

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List of Abbreviations

AAA	American Arbitration Association
ABA	American Bar Association
ADR	Alternative dispute resolution
ARIAS UK	United Kingdom AIDA Insurance and Reinsurance Arbitration Society
CAM	Chamber of Arbitration of Milan
CEFAREA	French Reinsurance and Insurance Arbitration Centre
CESL	Common European Sales Law
CPC	Czech Code Procedure Civil
DAB	Dispute Adjudication Board
DCFR	<i>Draft Common Frame of Reference</i>
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
DRB	Dispute Resolution Board
ECHR	European Convention on Human Rights
FIDIC	International Federation of Consulting Engineers
GCCP	German Code of Civil Procedure
GDDKiA	General Directorate of National Roads and Motorways
IBA	International Bar Association
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and communication technology
JRPRRD	Joint Resolution, LLC Procedures for the Resolution of US Reinsurance Disputes
LCIA	London Court of International Arbitration
NYC	New York Convention of 1958
RIDSP	Resolution of Intra-Industry US Reinsurance and Insurance Disputes Supplementary Procedures

SCC	Stockholm Chamber of Commerce
SCCI	Slovak Chamber of Commerce and Industry
UMA	Uniform Mediation Act
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitral Centre
WIPO	World Intellectual Property Organization

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Abbreviations

kick. [POL]	Kodeks cywilny z dnia 23 kwietnia 1964 r. [Civil Code] published in: Dziennik Ustaw [Journal of Laws] 1964, No. 15, item 93, as amended;
k.p.c. [POL]	Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [Code of Civil Procedure of November, 17 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 June, 10 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
Poland – China Agreement	Umowa między Polską Rzeczpospolitą Ludową a Chińską Republiką Ludową o pomocy prawnej w sprawach cywilnych i karnych z 5 czerwca 1987 [<i>Agreement between Poland and China on cooperation in civil and criminal cases of June, 5 1987</i>], published in: Dziennik Ustaw [Journal of Laws] 1988, No. 9, item 65, as amended;
PIL [POL]	k.s.h. [POL] Kodeks spółek handlowych z dnia 15 września 2000 r. [<i>Code of commercial companies of</i>

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

September, 15 2000], published in: Dziennik Ustaw [Journal of Laws] 2000, No. 94, item 1037, as amended; Prawo prywatne międzynarodowe z dnia 12 listopada 1965 r. [Private International law of November, 12 1965], published in: Dziennik Ustaw [Journal of Laws] 1965, No. 46, item 290, as amended;

u.z.n.k. [POL] Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji [Act of 4 April 1993 on Combating of Unfair Competition], published in: Dziennik Ustaw [Journal of Laws] 1993, No. 47, item 211, as amended;

1. Party Cannot Invoke New Grounds for Setting Aside the Award after the Lapse of the Time Period for Filing the Recourse (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. V CSK 222/12 of March, 27 2013)²

Key words:

arbitration award | annulment of the award | domestic arbitration | judicial review | polish arbitration law | public policy | review of arbitral award | state courts

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 November, 17 1964] [k.p.c.] [POL], published in: Dziennik Ustaw [Journal of Laws] 1964, No. 43, item 296, as amended; Articles: 1206 § 1 point 1; Article 1206 § 2 point 2;³ Article 1208 § 1 and 2;⁴

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%20222-12-1.pdf>.

³ 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

16.01. Party cannot invoke new grounds for setting aside the award after the lapse of the time period for filing the recourse. The state court deciding on the recourse cannot take into account *ex officio* grounds set forward in art. 1206 § 1 point 1 k.p.c. that were not raised in the recourse.

16.02. Finding that a contract is binding even when it does not contain its necessary elements would be contrary to the basic principles of public policy of the Republic of Poland.

[Description of Facts and Legal Issues]

16.03. On June 26, 2007, two Polish companies, P and I entered into a framework agreement aimed at creating an environment for concluding options contracts on the financial market. On July 11, 2008 the parties entered into an additional agreement securing I's claims against P.

16.04. According to the framework agreement, option contracts were concluded during a telephone conversation and later on I sent to P a confirmation in writing, which P had to send back to I. The lack or resending was treated as a tacit acceptance. P was obligated to pay a premium in case of buying put options and I was obligated to pay one in case of call options. Each party gained certain right (put or call option) according to conditions set forward by the party to ensure the reciprocity of the transaction. The remuneration was meant to be equal and subject to set off. In any other case, a party was obligated to pay the difference.

16.05. From August 1, 2007 to October 3, 2008 parties entered into a number of transactions according to the abovementioned conditions. Twelve of

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; 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).

⁴ Article 1208 k.p.c. [POL] (unofficial translation): § 1 A recourse for setting aside an arbitral award should be filed within three months from the date when the award was received or if the party motioned for supplementation, correction or interpretation of the award – within three months from the date when the arbitral tribunal delivered its decision on this motion. § 2 If the recourse for setting aside an arbitral award is based on reasons stated art. 1206 § 1 point 5 or 6, the time period for filing the recourse starts on the date when the party gained knowledge of these reasons. The party cannot file the recourse after five years from receiving the arbitral award.

- them concluded before July 16, 2007 brought PLN 200.000 of income to P. Remaining, amounting to PLN 18.231.734,96 had not been settled.
- 16.06.** According to § 48 of the framework agreement, all the disputes arising out of the framework agreement were submitted to arbitration under auspices of the Court of Arbitration at the Polish Bank Union, according to its rules.
- 16.07.** P initiated arbitration for establishing that abovementioned transactions for PLN 18.231.734,96 were void. The court dismissed the claim and awarded I's counterclaim for payment of these sums.
- 16.08.** P filed a recourse to set aside the award. On May 10, 2011, the Regional Court dismissed the recourse against the award. The court found that the award did not violate art. 1206 § 1 point 1 in conjunction with art. 1161 § 2, art. 1206 § 1 point 2 and 4 and art. 1206 § 2 point 2 k.p.c. The arbitration agreement did not violate the principle of equality of the parties and was fully effective, P had the full possibility to defend its rights, there was also no violation of the tribunal's rules and the award was not contrary to the basic principles of the public policy.
- 16.09.** The Appellate Court shared this assessment of the case and dismissed P's appeal. The Court found that the arbitral tribunal did not violate the principle of equality of the parties. P had a chance to appoint an arbitrator from outside of the list prepared by the Court of Arbitration at the Polish Bank Union. The Court also found that the arbitral award did not violate the basic principles of public policy of Republic of Poland. This is because the arbitral tribunal correctly dismissed P's allegation that the framework agreement was void due to the fact that it did not specify the necessary features of the contract (*essentialia negotii*). Furthermore, P did not prove that it suffered damage and its amount.
- 16.10.** P filed a cassation to the Supreme Court repeating its argumentation.

[Decision of the Supreme Court]

- 16.11.** The Supreme Court dismissed the cassation. First of all, the Court underlined that Polish Code of civil procedure consists of rules of different nature. The rules on the admissibility of the recourse against the award and those specifying the formal prerequisites thereof and the conduct of proceedings are of strictly procedural nature. However, the rules on the grounds for a recourse against the award – creating a basis for court's substantive decision – constitute an equivalent to substantive law.
- 16.12.** The Court reminded as well that it is bound by the grounds invoked by the party filing the recourse. However, it can assess *sua sponte* grounds referred in art. 1206 § 1 point 1 k.p.c. (inarbitrability) and art. 1206 § 1 point 2 (public policy). A party can obviously rely on these two grounds as well.

- 16.13.** However, the Supreme Court underlined, relying on its previous decisions, that as far as the remaining grounds are concerned, a party cannot invoke new ones after the lapse of the time to file the recourse. Consequently, in the case at hand the Supreme Court could not assess the ground specified in art. 1206 § 1 point 1 k.p.c. (validity and effectiveness of the arbitral agreement) as P raised it outside of the time limit described above.
- 16.14.** The Court agreed with P that if a contract does not specify the necessary features of the contract (*essentialia negotii*) and an arbitral tribunal bases its decision thereon, such an award is contrary to public policy of the Republic of Poland. However, in the case at hand such a situation did not occur. The Appellate Court correctly found that the framework agreement was precise enough.
- 16.15.** Furthermore, the Court found that awarding damages to I was not contrary to principles of social coexistence. The Appellate Court correctly found that P was aware of the risk stemming from option contracts. It also did not question previous transactions which brought it profit.

2. The Court Rules on the Recognition or Enforcement of the Award on a Public Hearing Both When It Grants and Dismisses the Motion (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. I CSK 186/12 of January, 23 2013)⁵

Key words:

arbitration award | enforcement proceedings | judicial review | new york convention | official translation | polish arbitration law | recognition and enforcement of foreign arbitral awards | review of arbitral award | right to be heard | state courts

States Involved:

[POL] - [Poland];

[GER] – [Germany]

⁵ Full text of this Decision available in Polish on the website of the Supreme Court at: <http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/1%20CSK%20186-12-1.pdf>.

Laws Taken into Account in This Ruling:

- Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [*Code of Civil Procedure of November, 17 1964*] [k.p.c.] [POL], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 43, item 296, as amended; Article; 148;⁶ Article 379 point 5;⁷ Article 1213,⁸ Article 1215 § 1;⁹
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June, 10 1958 [*Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych, sporządzona w Nowym Jorku dnia 10 czerwca 1958 r.*], [New York Convention], published in: Dziennik Ustaw [*Journal of Laws*] 1962, No. 9, item 41;¹⁰ Article II;¹¹ Article IV.¹²

⁶ Article 148 k.p.c. [POL] (unofficial translation): § 1 If there is no provision to the contrary, the hearings are open and the court examines the case on a public hearing. § 2 The court can delegate the case to a public hearing and set a trial also when the case is to be decided on a closed hearing.

⁷ Article 379 k.p.c. [POL] (unofficial translation): There is a mistrial when (...) 5) a party was deprived of the right to present its case.

⁸ Article 1213 k.p.c. [POL] (unofficial translation): The court rules on the recognition or nonrecognition of the award upon a motion of a party. A party is obligated to append the motion with an original version of the award or a settlement or a copy thereof certified by the court of arbitration along with an original version of the arbitration agreement or an official copy thereof. If the arbitral award or a settlement concluded before the court of arbitration are not made in Polish, a party is obligated to append the motion with a certified translation thereof.

⁹ Article 1215 k.p.c. [POL] (unofficial translation): § 1 The court rules on the recognition or enforcement of the award or a settlement concluded before a court of arbitration on a public hearing.

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

¹¹ Article II of the New York Convention:

1. Each Contracting State shall recognize 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.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

¹² Article IV of the New York Convention: 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;

- 16.16.** The phrase “the court rules on the recognition or enforcement of the award on a public hearing” refers not to the a type of the decision of the court but a type of case the court is deciding. Consequently, the court shall decide on the motion on a public hearing irrespectively of the type of the decision it is going to issue (both granting and dismissing the motion). If the court rules on a closed hearing instead of a public one, a party is deprived of its right to present the case, which leads to mistrial (art. 379 point 5 k.p.c.).
- 16.17.** Consequently, the proceedings for the recognition of a foreign arbitral award should be conducted on the basis of the New York Convention with the supplementary application of k.p.c. As a result, the form requirements have to be taken from the New York Convention and not from art. 1162 k.p.c.
- 16.18.** The lack of documents required by art. 1213 k.p.c. is a formal flaw of the motion, which can be cured by a party.

[Description of Facts and Legal Issues]

- 16.19.** G (Germany) entered into an agreement with S.K. conducting business under the name A.-P. (Poland) for the sale of grain. The contract was concluded by a broker, according to the customs of grain market. The contract contained an arbitration clause submitting all disputes arising thereof or relating thereto to a London arbitration under Grain and Feed Trade Association (GAFTA).
- 16.20.** G initiated arbitration proceedings claiming that S.K. breached the contract. Tribunal in an award of July 14, 2008 awarded EUR 285.450 to G. Subsequently, G sought to enforce the award in Poland and filed an appropriate motion, appending it with a copy of the award certified by GAFTA General Director along with a sworn translation into Polish and the copies of the contract prepared by the brokers along with a sworn translation. G invoked English law as the proper law to assess the effectiveness of the arbitration agreement.
- 16.21.** Regional Court in its decision of December 14, 2011 dismissed the motion on the grounds that G did not append the motion with an original or an official copy of the award.
- 16.22.** G filed a complaint however it was dismissed by the Appellate Court in a decision of November 10, 2011. The Appellate Court indicated that

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

the copy of the award was not appended with a stamp or a signature. Notarial copy thereof did not relate to the content of the award but to the GAFTA General Director's statement of compliance of the copy with the original. The Court found that failure to append the motion with a certified copy as required by art. 1213 k.p.c. is not a defect of form of the motion, but a circumstance justifying dismissal of the motion on the grounds of not proving prerequisites for recognizing or enforcing the award.

16.23. Furthermore, the Appellate Court found that under art. 1215 § 1 k.p.c. only recognizing the award requires conducting a public hearing. Dismissing the motion does not require such a hearing. Consequently the fact that the Regional Court dismissed the motion in camera does not constitute a violation of the said provision of k.p.c. Moreover, as G did not append the motion with necessary documents, conducting an open hearing would not change G's situation.

16.24. G filed a cassation to the Supreme Court repeating its argumentation. In particular it underlined that it did submit "an original version of the award or a settlement or a copy thereof certified by the court of arbitration along with an original version of the arbitration agreement or an official copy thereof" within the meaning of art. 1213 k.p.c. It also raised that the decision of the Appellate Court violated art. IV(1)(a) of the New York Convention by wrong interpretation the notion of "the duly authenticated original award or a duly certified copy thereof" and consequential wrong finding that G did not submit the award in the required form. G attacked the decision also on the grounds of art. IV(1)(b) in connection with art. II(1) and (2) of the New York Convention by wrong interpretation of this provision and in consequential wrong finding that G did not submit "an agreement" in the required form.

[Decision of the Supreme Court]

16.25. The Supreme Court allowed the cassation and remitted the case to the Appellate Court. The Court agreed with G's position that a court needs to decide on the motion for recognition or enforcement of an arbitral award on a public hearing, irrespectively whether it allows or dismisses the motion. Article 1215 § 1 k.p.c. confirms the principle stipulated in art. 148 § 1 k.p.c. that the court examines the case during a hearing. Any exception to this rule must stem directly from a provision of law and in any case shall be interpreted narrowly. The phrase "the court rules on the recognition or enforcement of the award" refers not the a type of the decision of the court but a type of case the court is deciding. Furthermore, the Supreme Court reminded that the similar position

had also been presented in its decision of June 24, 2009, file ref. no I CSK 538/08 and of July 4, 2008, I CZ 139/07.

- 16.26.** If the court rules on a closed hearing instead of a public one, a party is deprived of its right to present the case, which leads to mistrial (art. 379 point 5 k.p.c.). The Appellate Court should have noticed the mistrial and take it into account *ex officio*. As it did not, its decision had to be set aside.
- 16.27.** The Supreme Court instructed the Appellate Court as well to take into account the provisions of the New York Convention, which take precedence over k.p.c., as decided by the Supreme Court in the decision of January 18, 2007, file ref. no I CSK 330/06. The Supreme Court in this decision underlined that the New York Convention specifies so called substantive prerequisites for recognizing an award (primarily in art. IV and V). Consequently, the proceedings for the recognition of a foreign arbitral award should be conducted on the basis of the New York Convention with the supplementary application of k.p.c. As a result, the form requirements have to be assessed on the basis of the New York Convention and not on the basis of art. 1162 k.p.c. According to art. II(2) of the New York Convention 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.
- 16.28.** This provision has to be interpreted liberally and also other means of concluding an arbitration agreement are possible. As to the issue of carrying the arbitral award, it should be assessed on the basis of law of the state where the award was rendered. The Supreme Court disagreed as well with the opinion of the Appellate Court on the qualification of the documents required to recognize or enforce an award. The Supreme Court reminded that it already ruled in the decision of the November 3, 2004, file ref. no III CK 510/03 that lack of documents required by art. 1213 k.p.c. is a formal flaw of the motion, which can be cured by a party.
- 16.29.** As an additional issue, the Supreme Court found that the arbitral award in the case at hand did not specify the name of defendant (a person), but only specified the name of its business. The law applicable to the arbitral award decides on these issues, as underlined in the decision of the Supreme Court of July 17, 2007, file ref. no III CZP 55/07.

3. Arbitration Agreement Signed by a Polish Partnership Not According to Its Rules of Representation Is Not Binding for This Partnership (Appellate Court of Katowice (*Sąd Apelacyjny w Katowicach*) 1st Civil Division Decision, Case No. I ACz 279/13 of May, 17 2013)¹³

Key words:

arbitration award | *arbitration clause* | *conflict of law* | *conflict-of-law* | *enforcement proceedings* | *judicial review* | *new york convention* | *recognition and enforcement of foreign arbitral awards* | *state courts*

States Involved:

[POL] - [Poland];

[CHI] – [China];

Laws Taken into Account in This Ruling:

- Umowa między Polską Rzeczpospolitą Ludową a Chińską Republiką Ludową o pomocy prawnej w sprawach cywilnych i karnych z 5 czerwca 1987 [*Agreement between Poland and China on cooperation in civil and criminal cases of June, 5 1987*] [Poland-China Agreement] [POL]; published in: *Dziennik Ustaw* [*Journal of Laws*] 1988, No. 9, item 65, as amended; Article 16(1)(d);¹⁴ Article 21;¹⁵
- Kodeks spółek handlowych z dnia 15 września 2000 r. [*Code of commercial companies of September, 15 2000*] [k.s.h.] [POL]; published in: *Dziennik Ustaw* [*Journal of Laws*] 2000, No. 94, item 1037, as amended; Article 29;¹⁶

¹³ Full text of this Decision available in Polish on the website of the Polish Ministry of Justice at: [http://orzeczenia.ms.gov.pl/content/\\$N/15150000000503_I_ACz_000279_2013_Uz_2013-05-17_001](http://orzeczenia.ms.gov.pl/content/$N/15150000000503_I_ACz_000279_2013_Uz_2013-05-17_001).

¹⁴ Article 16(1)(d) Poland-China Convention [POL] (unofficial translation): 1. On the conditions set forward by this Agreement, the Contracting Parties shall recognize and allow to enforce on its territory the following judgments rendered on the territory of the Contracting Party after this agreement enters into force: (...) d) arbitral awards.

¹⁵ Article 21 Poland-China Convention [POL] (unofficial translation): The Contracting Parties shall recognize and enforce arbitral awards rendered on the territory of the Contracting Party under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958.

¹⁶ Article 29 k.s.h. [POL] (unofficial translation): § 1. Each partner shall have the right to represent the partnership. § 2. The right of the partner to represent the partnership shall include all acts in court and out of court. § 3. The right of representation may not be limited with effect towards third parties.

- Prawo prywatne międzynarodowe z dnia 12 listopada 1965 r. [*Private International law of November, 12 1965*] [PIL] [POL]; published in: Dziennik Ustaw [*Journal of Laws*] 1965, No. 46, item 290, as amended; Article 9 § 2;¹⁷
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June, 10 1958 [*Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych, sporządzona w Nowym Jorku dnia 10 czerwca 1958 r.*], [New York Convention], published in: Dziennik Ustaw [*Journal of Laws*] 1962, No. 9, item 41;¹⁸ Article II;¹⁹ Article IV;²⁰ Article V(1)(a).²¹

16.30. If a rules of representation of a Polish partnership stipulate for a joint representation of the partnership by at least two partners acting together, the arbitration agreement signed by only one partner is not binding.

¹⁷ Article 9 PIL [POL] (unofficial translation): § 2 The legal capacity of a legal entity is assessed on the basis of the law of its seat.

¹⁸ Poland signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on June, 10 1958; it was ratified by Poland on October, 3 1961 and entered into force in Poland on January, 1 1962. The text of the New York Convention was published in Polish in the Journal of Laws 1962, No. 9, item 41.

¹⁹ Article II of the New York Convention:

1. Each Contracting State shall recognize 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.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

²⁰ Article IV of the New York Convention: 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
 - (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

²¹ Article V of the New York Convention: 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; (...).

16.31. Arbitration agreement can be either an arbitration clause, or a submission agreement, concluded after the dispute emerges.

[Description of Facts and Legal Issues]

16.32. A and B concluded a contract of sale on December, 27 2007. By this contract A appointed B as its agent in terms of the brand X and temporarily empowered B to sell two models of its product. B obligated itself to actively conduct sales of these two models and make its best efforts to reach sale goals in a certain period of time. The contract provided also that all disputes arising out of or connected with the contract shall be settled by negotiations. In case of lack of agreement, the dispute shall be settled by the China International Economic and Trade Arbitration Commission (CIETAC), branch in Shanghai, according to the rules of this Commission in force on the date of filing the request for arbitration. The award shall be final and binding for the parties.

16.33. The contract was concluded in English and its copy (facsimile) was signed by A on December, 27 2007 and then signed by B and faxed back to A. In the place for the signature of B there was a stamp of the company of B and one illegible signature. B filed the following information with the Polish National Court Register (stemming from the deed of partnership): each partner of the company is empowered to represent the company, however at least two partners together or one of them together with a proxy are empowered to make declarations of will and signatures in the name of the company.

16.34. In 2009 the parties took part in a mediation in the Mediation Centre in N., China. B actively took part in the proceedings. Since November, 3 2009, B made 26 payments to A.

16.35. Subsequently, A initiated arbitration under CIETAC. On June, 17 2011 CIETAC filed to A and B an information of accepting the request for arbitration, the list of arbitrators and the rules. However, B did not appoint an arbitrator, did not file an answer to the request and did not appoint any counsel. CIETAC used company Y for mailing services. The confirmation of reception of correspondence is organized in the following manner: the courier scans the number of the mail and the receiver makes a signature on the scanner. Such confirmations of dispatch were made on June, 22 2011 and October, 27 2011.

16.36. On 24 October 2011 a CIETAC tribunal awarded to A from B USD 828.473 with interest from 1 January 2010 to the date of payment, CNY 82.931 for legal costs, CNY 58.525,43 for reimbursement of costs of travel to Poland and CNY 157.344,25 for arbitration fees.

- 16.37.** A filed for a motion for enforcement of the arbitral award in Poland to the Regional Court. B argued that there was no arbitration agreement in the case at hand.
- 16.38.** The Court found that, first, Poland-China Agreement applied in the case, and, second, Poland-China Agreement, as far as the rules on the recognition and enforcement are concerned, directed to the rules set forward in the New York Convention, especially articles II and IV.
- 16.39.** The Regional Court also found that the the contract of December, 27 2007 contained a valid arbitration clause. It is true that the contract was signed by only one partner of B (when under the deed of partnership stipulated for a joint representation), however the arbitration agreement did not set Polish law as the governing law. Even if Polish law applied, under Article 29 k.s.h., on the basis of caselaw, each partner is empowered to act towards third parties on behalf of the company. Consequently, one of the partners of B could sign the contract in the case at hand. Irrespectively of that, Article II New York Convention recognizes both arbitration clause and the submission agreement – both signed by the parties or contained in an exchange of letters or telegrams. Consequently, in the case at hand the arbitral award was issued on the basis of a valid submission agreement, contained in the exchange of facsimile. Moreover, the Regional Court found that B was properly notified in the arbitration proceedings.
- 16.40.** Consequently, the motion for enforcement was granted. The motion for recognition was denied as the award was subject to enforcement.
- 16.41.** B filed a complaint. It underlined, that one partner was not empowered to represent the company, that the arbitration clause cannot be a submission agreement, as it was concluded before the dispute emerged and that it did not receive the notifications during the arbitral proceedings.

[Decision of the Appellate Court]

- 16.42.** In deciding whether the arbitration agreement was valid, the Court underlined that it first needs to establish the proper law to asses the said validity. Under Article 9 § 2 PIL, the legal capacity of a legal entity needs is assessed on the basis of the law of its seat. Relying on caselaw, the Appellate Court indicated that law of the seat of a legal entity decides, i.a. on the issue of representation. The Court therefore decided, on the basis of these conflict of law rules that, B's ability to sign the arbitration agreement needs to be assessed on the basis of Polish law, in particular k.s.h. Under Article 29 § 3 k.s.h. it is true that the right of representation of a partnership may not be limited with effect towards third parties, however the deed of partnership can clearly prescribe for a joint representation of the partners.

- 16.43.** Such a requirement for a joint representation was stipulated in B's deed of partnership and consequently as the contract between A and B was not signed by two partners, it is not valid.
- 16.44.** Furthermore, the arbitration clause included in the contract cannot, by any means, be treated as a submission agreement. A submission agreement is concluded after a certain dispute emerges. In the case at hand, the arbitration agreement was rather a arbitration clause in a contract.

4. In Case of Doubts, a Dispute Arising out of a Tort that Is an Act of Unfair Competition Does Not Fall under an Arbitration Agreement Drafted to Cover Disputes Arising out of or in Connection with Performance of a Contract (Appellate Court of Poznań (*Sąd Apelacyjny w Poznaniu*) 1st Civil Division Decision, Case No. I ACz 2239/12 of January, 10 2013)²²

Key words:

rejection of statement of claim | arbitration agreement

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 November, 17 1964*] [k.p.c.] [POL], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 43, item 296, as amended; Articles: 1161 § 1²³ and Article 1165 § 1;²⁴

²² Full text of this Decision available in Polish on the governmental website with collection of decisions of State Courts at: [http://orzeczenia.poznan.sa.gov.pl/content/\\$N/15350000000503_I_ACz_002239_2012_Uz_2013-01-10_001](http://orzeczenia.poznan.sa.gov.pl/content/$N/15350000000503_I_ACz_002239_2012_Uz_2013-01-10_001)

²³ Article 1161 § 1 k.p.c. [POL] unofficial translation: § 1 Submission of a dispute to the jurisdiction of an arbitral tribunal requires agreement of the parties, in which the following shall be indicated: the subject of the dispute or legal relationship from which the dispute arises or may arise (arbitration agreement).

²⁴ Article 1165 § 1 k.p.c. [POL] (unofficial translation): § 1. If a party files with the state court a statement of claim concerning a case that regards dispute covered by the arbitration agreement, the court rejects the statement of claim or a motion for initiation of non-litigious proceedings, when the defendant or participant of the non-litigious proceedings raises a defense of the arbitration agreement before engaging into the dispute as to its merits.

➤ Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji [*Act of 4 April 1993 on Combating of Unfair Competition*], published in: Dziennik Ustaw [*Journal of Laws*] 1993, No. 47, item 211, as amended; Article 18 Section 1 Point 4;²⁵

- 16.45.** If parties included in a business contract an arbitration agreement which contains a broad wording and stipulates that the arbitration agreement covers all of the parties' disputes arising out of the contract or connected thereto, then disputes stemming under Polish law out of acts of unfair competition do not fall within the arbitration agreement. That is because acts of unfair competition under Polish law are torts and thus claims originating therefrom are not "arising out of contract or connected thereto". That is also true even if a given act of unfair competition was committed alongside performance of the contract.
- 16.46.** An arbitration agreement constitutes an exception to the right to be heard by a state court. As such it should be interpreted narrowly. In case of doubts as to the scope of the arbitration agreement, it should be interpreted to favor the right to be heard by a state court.

[Description of Facts and Legal Issues]

- 16.47.** Parties A and B concluded a contract under which A was to supply certain goods to B and B was to resell them at its own shop (hereinafter as: the "Contract"). According to the attachment to this contract A was obligated to grant to B a number of discounts for price of the supplied goods. The contract contained in its § 8 a dispute resolution clause that stipulated: "All disputes arising out of performance of this contract or in connection thereto Parties shall resolve amicably and in absence of a settlement, Parties submit those disputes to the jurisdiction of the Court of Arbitration at the Polish (...) in W (...)".
- 16.48.** Party A sued B before the state court – the Regional Court in Poznań (hereinafter as: the "Regional Court") – for return of value of the discounts that it granted to B under the Contract. A claimed that B by requesting discounts from A for the price of the goods that it later resold B committed an act of unfair competition in the understanding of the u.z.n.k. U.z.n.k. provides that it is an act of unfair competition to obstruct access to the market to other entrepreneurs, in particular by requesting payments (other than reflecting trade margin) for accepting their goods for resale.

²⁵ Article 18 Section 1 Point 4 u.z.n.k. [POL] (unofficial translation): In case of committing of act of unfair competition, the entrepreneur whose interest was endangered or impaired, may request: [...] 4) repairing of damage under general principles [...].

- 16.49.** In defence B raised that the parties included in their contract an arbitration agreement that encompassed the claims made by Party A under u.z.n.k. Therefore, B argued, the dispute should be heard in arbitration not before the state court and petitioned the Regional Court for rejection of A's statement of claim under article 1161 § 1 k.p.c.
- 16.50.** The Regional Court granted the motion of B and rejected the statement of claim of A by its decision of November 21, 2012 (hereinafter as: the "Decision of the Regional Court"). The Regional Court stated that parties were bound by arbitration agreement and therefore the disputed belonged in arbitration not in state court.
- 16.51.** Party A filed a complaint from the Decision of the Regional Court to the Appellate Court in Poznań (hereinafter as: the "Appellate Court"). In the complaint A argued that the arbitration agreement did not cover acts of unfair competition. In the opinion of A, Party B committed the act of unfair competition "alongside performing" the Contract not "while performing" the Contract or in connection with its performance. Moreover, Party A stated that while concluding the arbitration agreement the parties did not contemplate it to cover acts of unfair competition.

[Decision of the Appellate Court]

- 16.52.** The Appellate Court began its reasoning with a brief analysis of the nature of claims made by A. The Court stated that claim for return of the value of discounts that A granted to B is its nature a claim for unjust enrichment. For that reason, the Appellate Court explained, the claim of B is not a contractual one, neither did it remain in connection with the Contract.
- 16.53.** The Appellate Court held that generally it is acceptable to submit disputes arising out of acts of unfair competition to jurisdiction of arbitral tribunal. However, in the opinion of the Appellate Court, one cannot assume that while concluding an arbitration agreement to cover disputes "arising out of or in connection of performance of" the Contract the parties contemplated that one of them will commit an act of unfair competition.
- 16.54.** In the assessment of the Appellate Court, the case law clearly states that an arbitration agreement should precisely define what disputes does it cover. If an arbitration agreement is drafted broadly to cover all claims "arising out of or connected with performance" of a contract then it cannot be presumed that it encompasses also tort claims arising out of acts of unfair competition. The Appellate Court stated that conclusion of an arbitration agreement means exclusion of a category of disputes from the jurisdiction of state courts. Due to the fact that it is

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a right of the parties to be heard by a state court any exclusions therefrom should be interpreted narrowly. As a result, due to doubts as to the scope of the arbitration agreement included in the Contract, the Appellate Court decided that it should be interpreted narrowly as well.

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