

The Arbitrators' (Perceived) Power to Revise a Contract vs. the Power of the Public Policy Clause

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I. Introduction

Arbitration is a creature that owes its existence to the will of the parties alone.¹⁾ This phrase is often used as the leitmotif of arbitration. It draws attention to two of its prominent features, namely its contractual nature and the decisive role of the parties in shaping its procedural scheme.

However, this phrase also entails other ideas. The substantive part of arbitral disputes, especially commercial ones, is most often also connected to the “parties’ will”, *i.e.* a contract, its interpretation, existence, non-performance, dissolution, etc. Arbitrators are quite often asked to interpret the agreement in an exact manner, determine its existence or inexistence, or decide whether it was properly performed or avoided.

There are, however, other cases when the tribunals do not have merely some declarative powers. They are asked by the parties or empowered by substantive law to alter the provisions of the contract, in other words to shape and adapt the contractual scheme of the parties’ commercial relationship. A special term “adaptration” has even been coined to describe this type of arbitration.²⁾

The decision of the arbitrators to revise (or not to revise) a contract takes on the form of an award. It is therefore subject to judicial control in state court proceedings for the recognition or enforcement of an award or in proceedings to set aside the award. The basis of such control is the compliance of the award with the public policy of the state of recognition or enforcement, respectively, or of the state of the seat of arbitration. Consequently, it needs to be established – and this is the subject of this paper – what the limits of an arbitrator’s powers to revise the contract are *vis-à-vis* the state court’s obligation to safeguard the compliance of the award with the public policy of a given legal system.

¹⁾ *Laurentienne-vie, compagnie d’assurances inc. v. Empire, compagnie d’assurance-vie*, Recueil de Jurisprudence du Québec 1708, paras. 13 and 16 (Cour d’Appel de Québec 2000).

²⁾ Klaus Peter Berger, *Power of arbitrators to fill gaps and revise contracts to make sense*, 17 *ARBITRATION INTERNATIONAL* 1, 17 (2001).

This paper commences with recalling the basic notion of public policy and the process of the verification whether an award is contrary thereto. Further, the authors proceed with describing the rules on the basis of which the arbitrators are empowered to revise a contract. Examples are based on Polish law, nevertheless they encompass ideas common to most civil and sometimes also common law jurisdictions.

Further, the rules on public policy and the rules on contract revision are investigated and evaluated on the basis of the case law to show how the limits of arbitrators' substantive powers fall within the scope of the public policy and whether Polish mandatory substantive law on contracts forms part of the public policy. In other words, this paper attempts to answer the question of which rules of contract modification limit the tribunals' power to revise the parties' contractual relationship.

II. Public Policy and its General Standards

A. Legal Framework

The Polish arbitration law is included in book V. of the Polish Code of Civil Procedure (*Kodeks postępowania cywilnego – CCP*)³, Articles 1154 *et seq.* It is based almost in its entirety on the provisions of the UNCITRAL Model Law on International Commercial Arbitration, although in the latter's original version, before the amendments adopted in 2006.

Consequently, the Polish arbitration law shares the common features of all Model Law jurisdictions. This is also the case with the following provisions on the preconditions for setting aside the award and its recognition and enforcement (similar to analogical reasons for the denial of enforcement of a foreign judgment):

- Article 1206 § 2 point 2: The award is also set aside when the court finds that (...) the award is contrary to the fundamental principles of public policy of the Republic of Poland (public policy clause).
- Article 1214 § 3 point 2: The court declines to recognize or enforce an arbitral award or a settlement concluded before it if (...) enforcement and recognition of an arbitral award would be contradictory with the fundamental principles of public policy of the Republic of Poland (public policy clause).

Poland is also a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention) and the European Convention on International Commercial Arbitration of April 21, 1961 (the European Convention). The rule stemming from the abovementioned Article 1214 § 3 point 2 of the CCP is equivalent to that rooted in Article V (2) (b) of the New York Convention, under which the recognition or enforcement of the

³) Journal of Laws no. 43, item 296 as amended (1964).

award is denied if the award is found to be contrary to the public policy of a country. This is because Article 34 (2) (b) (i) of the Model Law, on which Article 1214 of the CCP is based, is modelled on Article V (2) (b) of the New York Convention.⁴⁾

B. Features of Public Policy Under the Polish Code of Civil Procedure

There is no doubt that in both types of post-arbitral proceedings Polish courts examine the compliance of an award with public policy *ex officio*.⁵⁾ The notion of the *ordre public* has no legal definition and it is therefore examined by judges *de casu ad casu*. However, case law has already discussed some factual backgrounds and violations of public policy. This constitutes a good basis for assessing whether an award is compliant with the fundamental principles of the Polish legal system.

The abovementioned provisions of the CCP refer to the Polish legal system, as neither applicable law nor case law refer explicitly to the concept of international public policy, or at most only as a supportive argument. This is a “standard” model, as “the test of public policy compliance would normally be a national test in light of the international public policy at the place of arbitration”.⁶⁾ Poland has not followed the path of French legislature, which expressly referred to international public policy.⁷⁾

According to the Polish doctrine, it is only possible to rely on the prerequisite of public policy when setting aside an award or denying its recognition or enforcement in case of the gravest and most serious discrepancies between an award and the Polish legal order. It therefore constitutes a specific “safety valve” for the domestic legal order.⁸⁾ The court does not examine whether the award in question is “right” or “wrong”, “correct” or “incorrect”. It, therefore, does not conduct a *révision au fond*, a second examination of the merits of the case. Neither does it exam-

⁴⁾ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2620 (2009).

⁵⁾ See, e.g., Tadeusz Ereciński, in, V KODEKS POSTĘPOWANIA CYWILNEGO. KOMENTARZ. 729 (Ereciński et al., eds. 2009); Maciej Łaszczuk & Justyna Szpara, *Postępowania postarbitrażowe*, in VIII SYSTEM PRAWA HANDLOWEGO. ARBITRAŻ HANDLOWY 611–612 (Szumański ed., 2008).

However, the Polish Supreme Court has already found that a qualified violation of the rules of arbitral procedure – that hypothetically fall within the scope of other prerequisites of the denial of enforcement or the setting aside of an award, that are examined on a motion of a party – can make an award contrary to public policy. See Polish Supreme Court, March 6, 2008, docket no. I CSK 445/07, SIP Legalis.

⁶⁾ JULIAN LEW & LOUKAS MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 676 (2003).

⁷⁾ BORN, *supra* note 4, at 2621–2622.

⁸⁾ With regards to foreign state court judgments: Piotr Rylski, *Article 1146 note 23*, in, KODEKS POSTĘPOWANIA CYWILNEGO. KOMENTARZ (Dolecki & Wiśniewski eds., 2012).

ine the facts of the case again.⁹⁾ Its task is merely to prevent awards which are fundamentally contrary to the basic features of Polish public policy from entering the Polish legal system. This requires a narrow interpretation of the public policy.¹⁰⁾

Some time ago, the Polish Supreme Court laid down the basic principles for examining the compliance of an award with Polish public policy. It firmly stated that the court did not examine whether the award was compliant with the substantive law (in general), neither did it review whether the award was based on facts, nor whether the facts had been established correctly,¹¹⁾ because the notion of the public policy is reserved to the most basic principles of constitutional nature, as well as the fundamental principles of substantive and procedural law.¹²⁾ In other words, the Polish arbitration law “therefore allows a dispute to be resolved by an arbitral tribunal not in accordance with the provisions of the applicable law. It prohibits only a dispute from being resolved in a manner which is contrary to the basic principles of Polish public policy”.¹³⁾

The abovementioned understanding of public policy is shared by many jurisdictions. One can quote *e.g.* the judgment of the German Supreme Court (*Bundesgerichtshof*): “A violation of essential principles of German law (ordre public) exists only if the arbitral award contravenes a rule which regulates the bases of the public or commercial sphere, or if it contradicts the German ideas of justice in an unacceptable manner. A mere violation of the substantive or procedural law applied by the arbitral tribunal is not sufficient to constitute such violation.”¹⁴⁾ Another, somewhat similar, example was brought by the Swiss Federal Tribunal, which, in one of its judgments, expressed that an award can be set aside on the grounds of public policy “(...) only when it ignores some fundamental legal principles and is therefore plainly inconsistent with the widely recognized system of values, which according to the prevailing opinions in Switzerland, should be the basis of any legal order”.¹⁵⁾

⁹⁾ Polish Supreme Court, May 11, 2007, docket no. I CSK 82/07, SIP Legalis; *See also*: Tadeusz Ereciński, *supra* note 5, at 725.

¹⁰⁾ Tadeusz Ereciński, *supra* note 5, at 730.

¹¹⁾ Polish Supreme Court, Sept 3, 2009, docket no. I CSK 53/09, SIP Legalis.

¹²⁾ *See*, Mateusz Pilich, *Klauzula porządku publicznego w postępowaniu o uznanie i wykonania zagranicznego orzeczenia arbitrażowego*, 1 KWARTALNIK PRAWA PRYWATNEGO 169–170 (2003).

¹³⁾ Jerzy Rajski, *Granice swobody sądu arbitrażowego w zakresie stosowania przepisów prawa w sprawach gospodarczych*, 1 E-PRZEGLĄD ARBITRAŻOWY 12 (2011).

¹⁴⁾ BGH, July 12, 1990, *in* NJW 3210, 3211 (1990) *cited in* BORN, *supra* note 4, at 2844.

¹⁵⁾ (Swiss) BG, *X. Ltd v. Y. AG*, Feb 11, 2010, docket no. 4A 444/2009.

C. Notion of Public Policy on the Basis of Case Law

Nevertheless, the public policy clause is a blanket and indeterminate term.¹⁶⁾ It does not have a legal definition. It seems that an English judge was right nearly two hundred years ago, when he described public policy as “a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.”¹⁷⁾

This indeterminateness grants the court freedom in assessing the prerequisites for the refusal to recognize and determine the enforceability of a foreign judgment. However, legal academics and case-law have developed a number of guidelines to be followed for assessing the compliance of a judgment with the Polish legal order.

The Polish case law on public policy is substantial. However, the main ideas of the judgments cited below can provide only an illustration and – regardless of the general lack of precedence of Supreme Court judgments outside the case it is deciding, under Polish law – can only represent guidelines which need to be verified on a case to case basis.

First, as already indicated above, the public policy clause consists of fundamental systemic principles (constitutional principles) and the principles resting at the base of specific branches of the law.¹⁸⁾ The rules of social coexistence or good faith can also constitute elements of the public policy clause¹⁹⁾, as well as the principles of freedom of business activity and the freedom of contracts.²⁰⁾ The rule of the parties' autonomous will and the equality of entities is also an element of public order in the sphere of civil law.²¹⁾

Consequently, “A judgment of a foreign court violates the basic rules of legal order in Poland, inter alia, when its effect cannot be reconciled with the concept itself of a specific legal institution in Poland, but not only with specific provisions regulating the same legal institution in both states.”²²⁾ As a result, such an award does not have to be in compliance with every mandatory rule of Polish law, but only with the most basic ones.²³⁾

¹⁶⁾ See, Mateusz Pilich, *supra* note 12, at 181-85.

¹⁷⁾ *Richardson v. Mellish*, [1824] 2 Bing 229, 252, per Burrough J. cited in ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDE, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.85 (2009).

¹⁸⁾ Polish Supreme Court, April 21, 1978, docket no. IV CR 65/78, SIP Legalis.

¹⁹⁾ Tadeusz Ereciński, *supra* note 5, at 531; Kazimierz Piasecki, *Article 1146 note 21*, in KODEKS POSTĘPOWANIA CYWILNEGO KOMENTARZ (Piasecki ed., 2007).

²⁰⁾ Polish Supreme Court, Oct 4, 2006, docket no. II CSK 117/06, SIP Legalis; Court of Appeals of Warsaw, April 4, 2006, docket no. VI ACa 1138/05, <http://arbitraz.laszczuk.pl/>.

²¹⁾ Polish Supreme Court, March 9, 2004, docket no. I CK 412/03, SIP Legalis.

²²⁾ *With regard to foreign state court judgments*: Polish Supreme Court, Jan 1, 2002, docket no. I CKN 722/99, SIP Legalis.

²³⁾ *With regard to foreign state court judgments*: Court of Appeals of Warsaw, May 30, 2000, docket no. I ACa 57/00, SIP Legalis.

Consequently, as described above, a Polish court examining the compliance of an award with public policy does not conduct *révision au fond*, i.e. it does not assess the compliance of the award with the entire substantive law and it does not evaluate the facts of the case. This can lead to a conclusion that Poland can be unequivocally described as an arbitration-friendly jurisdiction. However, as will be shown below, further case law of the Supreme Court indicates that quite often – when dealing with a case where arbitrators modified or had the possibility to modify the contractual agreement of the parties in one way or another – courts have, at least to some degree, evaluated the factual background of the case. What is more, the Supreme Court went even further with determining the scope of the most basic rules of the Polish legal order, not limiting itself to the few fundamental principles.

II. Standards of Mandatory Substantive Law on Contracts

As mentioned above, arbitrators apply substantive law to resolve a substantive dispute between the parties. This aspect of arbitration is quite often eclipsed by procedural issues (e.g. procedure for the appointment of arbitrators, multi-party problems). One must, however, not forget that the main task of arbitrators is to rule on the parties' substantive request for relief.

This paper discusses two main categories of substantive rules relating to the modification of contracts. The first relates to general situations in which arbitrators are empowered to alter the provisions of an agreement. The second encompasses standards for the modification of the parties' contractual duties in the event of the non-performance or improper performance of the contract. As described above, this paper focuses on the rules of Polish substantive law, however, the vast majority of these rules share common ideas underlying most modern jurisdictions. Their Latin names are very well known in many countries and this is the best proof thereof.

A. General Standards for Contract Revision

The most basic principle behind the Polish Civil Code (*Kodeks cywilny* – CC)²⁴ is the Roman concept that contracts must be kept, *pacta sunt servanda*. This was so obvious for the Polish legislature that it did not include such a principle expressly in the text of the CC. This was also the case in the United Nations Convention for the International Sale of Goods of March 11, 1980, although this principle is undoubtedly in force under the Convention.²⁵) However, as far as Pol-

²⁴) Journal of Laws, no. 16, item 93 as amended (1964).

²⁵) See, Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, 59 RABELS ZEITSCHRIFT 3–4, ¶ 4 (2) (1995).

ish law is concerned, this rule arguably stems from Article 353 § 1 of the CC under which the creditor must be able to claim performance from the debtor and the debtor is obligated to deliver this performance.

This principle is treated as a cornerstone of the Polish law of obligations.²⁶⁾ Consequently, every other principle that introduces some sort of exception to this rule has to be interpreted narrowly. This is the case with the *rebus sic stantibus* principle enshrined in Article 357¹ § 1 of the CC, under which the court can change the parties' performance under a contract or even dissolve their agreement should the circumstances change after the contract was concluded.²⁷⁾ This principle can be applied only in exceptional circumstances.²⁸⁾ This is true regardless of the doctrinal dispute whether the *rebus sic stantibus* principle is an exception to the general rule of *pacta sunt servanda* or – to the contrary – an explanation of this rule, which helps determine the real content of the *pactum*.²⁹⁾

It is worth noting in this respect that both *pacta sunt servanda* and *rebus sic stantibus* were considered to form part of the international *lex mercatoria* and were recognized by international tribunals.³⁰⁾

Another variation of *rebus sic stantibus* is the principle of indexation of obligations, included in Article 358¹ of the CC. As a general rule, if the subject of the obligation, from the moment it arises, is a sum of money, the performance is carried out by paying the nominal sum. However, if significant changes in the purchasing power of money occur after the obligation arises, the court, having considered the parties' interests and in accordance with the principles of community life, may change the amount of the monetary performance or the manner of its delivery even if these rules were laid down in a court decision or contract.

One more rule of Polish contract law is described in Latin as *pacta quae turpem causam continent non sunt observanda*, in other words the exploitation doctrine. According to Article 388 § 1 of the CC, if one of the parties, exploiting a

²⁶⁾ See, e.g., Adam Brzozowski, *Article 357 note 1*, in *KODEKS CYWILNY KOMENTARZ* (Pietrzykowski ed., 2011).

²⁷⁾ Article 357¹ of the CC: If, due to an extraordinary change in circumstances, a performance entails excessive difficulties or exposes one of the parties to a serious loss which the parties did not foresee when executing the contract, the court may, having considered the parties' interests, in accordance with the principles of community life, designate the manner of performing the obligation, the value of the performance or even decide that the contract be dissolved. When dissolving the contract, the court may, as needed, decide how accounts will be settled between the parties, being guided by the principles set forth in the preceding sentence.

²⁸⁾ Adam Olejniczak, *Article 357 note 1*, in *KODEKS CYWILNY KOMENTARZ* (Kidyba ed., 2010).

²⁹⁾ See, Adam Brzozowski & Adam Olejniczak, *Wpływ zmiany okoliczności na zobowiązania*, in, VI SYSTEM PRAWA PRYWATNEGO ZOBOWIĄZANIA – CZĘŚĆ OGÓLNA 696 *et seq.* (Olejniczak ed., 2011) for the relation between *pacta sunt servanda* and *rebus sic stantibus*.

³⁰⁾ LEW, MISTELIS & KRÖLL, *supra* note 6, at 458 and arbitral case law referred therein; EMMANUEL GAILLARD & JOHN SAVAGE, *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 1460 *et seq.* (1999) and the arbitral case law referred therein.

forced situation or the inefficiency or inexperience of the other party, in exchange for its own performance accepts or stipulates for itself or for a third party a performance the value of which grossly exceeds the value of its own performance at the time the contract is executed, the other party may demand that its performance be reduced or that the performance due to it be increased, and if both turn out to be extremely difficult, it may demand that the contract be declared invalid.

The possibilities of the parties to accept and perform the obligation are limited, because *ad impossibilia nemo tenetur*, i.e. nobody can oblige itself to do the impossible. Not only a contract for an impossible performance is invalid (Article 387 § 1 of the CC), the obligation also expires if a performance becomes impossible due to circumstances for which the debtor cannot be held accountable (Article 475 § 1 of the CC) or – in the case of reciprocal obligations – if one of the reciprocal performances becomes impossible due to circumstances for which neither party is liable, the party that was to make the performance cannot demand reciprocal performance, and, if it had already received it, it is obligated to return it according to the provisions on unjust enrichment (Article 495 § 1 of the CC).

Finally, the *casus a nullo praestatur* rule included in Article 361 § 1 of the CC, under which a person obliged to pay compensation is liable only for normal consequences of the actions or omissions from which the damage arises.

B. General Standards for Contract Modification in the Event of the Non-performance of the Contract

As stated before, the second set of standards encompass rules applicable in the event of non-performance of the contract.

First, the Polish civil law on obligations is based on the principle of fault. Under Article 471 of the CC, the debtor is liable for the non-performance, unless non-performance or improper performance is due to circumstances for which the debtor is not liable.

Under the absolute liability principle included in Article 473 § 2 of the CC, the stipulation that a debtor will not be liable for damage which he may cause to a creditor intentionally is invalid. In other words, no one can be released from liability for the intentional breach of an obligation (*dolus*).³¹⁾

Another principle behind the CC is the principle of full restitution (or full compensation). Under Article 363 § 1 of the CC, the damage should be remedied, at the aggrieved party's choice, either by restoring the previous condition or paying a relevant sum of money. The damage, according to Article 361 § 2 of the CC consists of both the loss (*damnum emergens*) and the lost profits (*lucrum cessans*).³²⁾

³¹⁾ See, Maciej Kaliński, *Odpowiedzialność odszkodowawcza*, in VI SYSTEM PRAWA PRYWATNEGO. ZOBOWIĄZANIA – CZĘŚĆ OGÓLNA 64 (Olejniczak ed., 2011).

³²⁾ For the concept of damage under Polish law see MACIEJ KALIŃSKI, SZKODA NA MIENIU I JEJ NAPRAWIENIE (2011).

However, the compensation cannot exceed the damage. This principle was already used when denying the enforcement of a US judgment in Poland, awarding punitive damages.³³⁾

This is because the amount of damage in Poland is assessed on the basis of the so called differential method, *i.e.* by comparing the state of the assets of the aggrieved party before the act causing damage with the state of the assets after this act and being the result thereof.³⁴⁾

The parties can certainly agree on the amount of damages by means of a contractual penalty (liquidated damages). The stipulated amount is then due regardless of the value of the damage suffered. However, the debtor may demand that liquidated damages be reduced if the greater part of the obligation has been performed or if liquidated damages are grossly excessive (Article 484 § 2 of the CC).

This short recollection of the basic principles of the Polish contract law was necessary to explain their relationship with the public policy.

IV. Applying Public Policy on General Standards for Contract Revision

This short presentation of the Supreme Court's recent case law is aimed at determining which of the abovementioned principles of contract law form part of the Polish public policy. What is important, nearly all cases were decided in post-arbitral proceedings.

First, the Polish Supreme Court found it necessary to intervene in cases involving contractually agreed penalties (liquidated damages) on the grounds that they were blatantly excessive which, in the opinion of the Court, obligated the arbitration tribunal to reduce them, even acting *ex officio*.³⁵⁾

Second, the Court also regarded as one of the basic principles of contract law the rule that contractual penalties can only be imposed in case of non-performance of non-monetary obligations (to avoid circumvention of the prohibition against setting an excessive interest for monetary obligations).³⁶⁾ In the

³³⁾ See Court of Appeals of Warsaw, Jan 26, 2012, docket no. I ACz 2059/11, www.inpris.pl/fileadmin/user_upload/documents/cimoszewicz_v_wprost/VI_ACz_2059.11.pdf; nonetheless, the said judgment is presently being reviewed by the Supreme Court under docket number I CSK 697/12. The proceedings before the Supreme Court had not been concluded before this paper was filed for printing.

³⁴⁾ Aleksandra Duży, *Dyferencyjna metoda ustalenia wysokości szkody*, 10 *Państwo i Prawo* 55 *et seq.* (1993).

³⁵⁾ Polish Supreme Court, April 11, 2002, docket no. III CKN 492/01, SIP Legalis. This judgment was criticized by the doctrine, see Krzysztof Falkiewicz, *Zakres kognicji sądu powszechnego przy kontroli wyroków sądów polubownych – wybrane zagadnienia w praktyce orzeczniczej*, in *ARBITRAŻ I MEDIACJA. KSIĘGA JUBILEUSZOWA DEDYKOWANA DOKTOROWI ANDRZEJOWI TYNELOWI*, 148 *et seq.* (Łaszczuk et al., eds., 2012).

³⁶⁾ Polish Supreme Court, July 24, 2009, docket no. II CNP 16/09, SIP Legalis.

same judgment, the Court also strongly opposed establishing such interest which exceeded the statutory limits. Although this judgment was not issued in a post-arbitral case, it sets forth a principle that courts will most certainly follow in such cases.

In this judgment, the Polish Supreme Court adopted a position which is opposed to that of the French courts. In the case *Iro-Holding v. Sélitex*, the Court of Appeals of Paris refused to set aside an award on the grounds of an excessive interest rate, emphasizing that this rate was not higher than those charged in other countries.³⁷⁾ However, the Court referred to international public policy, contrary to the Polish Supreme Court, which discussed the principles of Polish contract law.

Third, the Polish Supreme Court emphasized that public policy required the parties to stipulate a time limit for relying on their contractual right to rescind the contract for the sake of legal certainty in their contracts.³⁸⁾ In the same judgment, the Court found that *pactum de non cedendo*, i.e. a contract under which the creditor obligates himself not to assign a right under the contract to a third party, is included in the idea of *pacta sunt servanda* and cannot be modified by arbitrators. This last concept is not surprising and is also recognized worldwide, e.g. the Swiss Supreme Court also recognized *pacta sunt servanda* as an element of Swiss public policy.³⁹⁾

Fourth, the Court found that the rules forbidding the set-off of certain claims also constitute a part of public policy.⁴⁰⁾

Fifth, the Court recognized another principle mentioned above as an element of public policy, namely the principle that the compensation should reflect the damage (the full compensation principle).⁴¹⁾ On the other hand, it underlined that damages cannot lead to enrichment through obtaining a compensation which exceeds the amount of the damage. As already mentioned above, the same idea was shared by the Court of Appeals of Warsaw in a recent decision regarding the enforcement of a US judgment in Poland, awarding punitive damages for libel.⁴²⁾ The court denied enforcement because: “The declaration of enforceability

³⁷⁾ CA Paris June 8, 1983 *Iro-Holding v. Sélitex*, in *Revue d'Arbitrage* 497 (1983): “(...) it is not shown, or even alleged, that the rate of the contractual interest rates in comparison to those charged in foreign countries concerned is excessive, and in its nature violates international public policy within the meaning of French private international law.”

³⁸⁾ Polish Supreme Court, Aug 11, 2005, docket no. V CK 86/05, SIP Legalis.

³⁹⁾ (Swiss) BG, Nov 24, 2009, docket no. 4A_284/2009.

⁴⁰⁾ Polish Supreme Court, April 28, 2000, docket no. II CKN 267/00, SIP Legalis. See also: Polish Supreme Court, Jan 7, 2009, docket no. II CSK 397/08, SIP Legalis: “The case-law of the Supreme Court indicated that the award of a court of arbitration establishing the effectiveness of set-off contrary to Article 505 point 1 of the Civil Code [laying down the rules for set-off – authors’ note] or awarding compensation in the situation where no damage was incurred, infringed the principles of the rule of law.”

⁴¹⁾ Polish Supreme Court, June 11, 2008, docket no. V CSK 8/08, SIP Legalis.

⁴²⁾ Court of Appeals of Warsaw, Jan 26, 2012, docket no. I ACz 2059/11, www.inpris.pl/fileadmin/user_upload/documents/cimoszewicz_v_wprost/VI_ACz_2059.11.pdf.

of the judgment of the District Court for Cook County, Illinois, USA, regarding the decision on 'penal damages', unknown to the Polish law and in an obvious manner contradictory with the function of compensation for a non-material damage inflicted by infringement of personal interests, would remain in contradiction with the public policy clause, and hence it constitutes an obstacle for allowing the motion." Along the same lines, the Supreme Court emphasized that compensation cannot be awarded in the case of a lack of damage.⁴³⁾ One Court of Appeals went even further and found that the damage awarded by the arbitral award must "correspond" to the damage incurred.⁴⁴⁾

Sixth and finally, the Supreme Court required the arbitrators who awarded damages to properly establish the causal relationship between the breach of an obligation and the damage.⁴⁵⁾

V. Conclusions

The above considerations allow us to reach some conclusions. First, it is clear that several principles of civil law relating to the modification of obligations have already been declared to form part of Polish public policy.

Even less relevant issues such as excessive contractual penalties and the courts' duty to mitigate them, ignoring the prohibition of set-off, disregarding *pactum de non cedendo*, ignoring the mandatory law on the maximum interest rates, can each result in an arbitration award being set aside under Article 1206 § 2 point 2 of the CC or not being recognized or enforced under Article 1214 § 3 point 2 of the CC.

All these examples also show that the Polish understanding of the public policy clause is much broader and more casuistic than its meaning in France, Austria or Switzerland, where the notion of public policy is truly limited to the most serious violations of the legal order.⁴⁶⁾

Consequently, in the present state of the Polish arbitral law, arbitrators' powers to revise a contractual relationship between the parties, at least from the Polish perspective, seem more perceived than real. On the other hand, the power of the public policy clause to come in the way of the arbitrator's ruling is indeed very real.

Therefore, from the arbitrators' point of view, it is advisable to ensure that the domestic public policy, as well as public policy in countries where parties may seek recognition or enforcement of the award, is not ignored, in order to limit the risk that the award may be set aside or its enforcement denied.

⁴³⁾ Polish Supreme Court, Sept 30, 2010, docket no. I CSK 342/10, SIP Legalis.

⁴⁴⁾ Court of Appeals of Szczecin, May 27, 2009, docket no. I ACa 177/09, SIP Legalis.

⁴⁵⁾ Polish Supreme Court, Oct 18, 2006, docket no. II CSK 123/06, SIP Legalis.

⁴⁶⁾ BORN, *supra* note 4, 2625 *et seq.*, 2841 *et seq.*

It is also quite understandable that, apart from *ex aequo et bono* arbitrations and certain types of cases (for example gas and oil disputes on long-term agreements), the power of arbitrators to modify the contract will not be triggered very often. Even if arbitrators are granted the possibility to revise the contract by the applicable substantive law, they seem to be reluctant to use that power.⁴⁷⁾ However, if the tribunal actually has the power to revise the contract and decides to do so, it also needs to examine the facts underlying the dispute between the parties in order to correctly apply the rules on contract modification. This very examination of facts is arguably decisive in this regard.

Consequently, in order to vacate the award on the grounds that arbitrators modified the contract although there were no grounds to do so (or to the contrary – they did not modify it when the grounds were obvious), a state court must at least touch upon the examination of facts by the tribunal. It was already correctly noted by the Polish doctrine – with reference to foreign state court judgments – that the border between an inadmissible *révision au fond* and a correct examination of the compliance of a judgment with the public policy clause is easy to cross.⁴⁸⁾ As highlighted in the case-law, in order to establish whether the conditions for denying the enforceability of a foreign judgment have been met, the Polish court must, to a certain degree, take into account the contents of the judgment itself. In any case, in establishing whether the effect of recognizing or enforcing the judgment would not contradict the fundamental principles of the legal order of the Republic of Poland, there is usually a need to examine certain substantive issues of the foreign judgment, since without it, the evaluation thereof would be impossible.⁴⁹⁾

This “risk” of the overly serious involvement of state courts in arbitration is inferred also from findings of the courts such as that the principle of the comprehensive examination of the case⁵⁰⁾ or the necessity to properly interpret the contract⁵¹⁾ are elements of the public policy clause. The idea to “extend” the scope of public policy is, however, not only a Polish “concept”, as “(...) even though many States are increasingly taking a restrictive approach to the application of public policy, the nebulous nature of the concept has on occasion also been used by courts in some jurisdictions as licence to review – inappropriately – the merits of a dispute”.⁵²⁾ Gary Born quotes a number of decisions from across the world, refus-

⁴⁷⁾ See, GAILLARD & SAVAGE, *supra* note 30, at ¶¶ 33 *et seq.*

⁴⁸⁾ Kazimierz Piasecki, *supra* note 19, note 23 to Article 1146.

⁴⁹⁾ Court of Appeals of Warsaw, Jan 26, 2012, docket no. I ACz 2059/11, www.inpris.pl/fileadmin/user_upload/documents/cimoszewicz_v_wprost/VI_ACz_2059.11.pdf. See also ŁUKASZ BŁASZCZAK & MAŁGORZATA LUDWIK, SĄDOWNICTWO POLUBOWNE (ARBITRAŻOWE) 286–287 (2007).

⁵⁰⁾ Polish Supreme Court, March 6, 2008, docket no. I CSK 455/07, unpublished, cited in: Maciej Łaszczuk & Justyna Szpara, *supra* note 5, 609.

⁵¹⁾ Court of Appeals of Poznań, Oct 26, 2005, docket no. I ACa No. 172/05, <http://arbitraz.laszczuk.pl/>.

⁵²⁾ Alan Redfern & Martin Hunter & Nigel Blackaby & Constantine Partasides, *supra* note 17, ¶ 10.83.

ing enforcement due to awarding excessive damages, the violation of the statute of limitations, *pacta sunt servanda* etc. This is therefore not only a Polish “problem”.⁵³⁾

This concept is however somewhat opposite to the very idea of post-arbitral proceedings, in which the court – as described above – plays the role of a withdrawn controller rather than an active adjudicator.

There are more arguments to support the idea that the state courts should not have such powers and should avoid tampering with facts of the case. However, in such a case, a verification of the compliance of arbitral awards with the key rules of contract modification may be illusory. The debate will most certainly be even more heated with new arbitral proceedings being verified by the state courts.

⁵³⁾ BORN, *supra* note 4, at 2855–2856.