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We regret to announce the death of our most reputable colleague Prof. Pierre Laive from Switzerland. We are thankful for his efforts invested in our common project. His personality and wisdom will be deeply missed by the whole editorial team.

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Case Law

II. Poland – The Supreme Court Judgments and Decisions of Appellate Courts

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Abbreviations

k.c. [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]

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[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.

1. An arbitration agreement encompasses not only the disputes explicitly mentioned in its substantive scope but also cases relating to these disputes (Appellate Court of Katowice (*Sąd Apelacyjny w Katowicach*) 1st Civil Division, Case No. V ACz 510/14 of June, 2 2014)[2]

Key Words:
domestic arbitration | effect of an arbitration agreement | Polish arbitration law | scope of the arbitration agreement | state courts

States involved:
[POL] – [Poland];

Laws and Regulations Applied in Decision:
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: 1165 § 1;[3]

[*Rationes Decidendi*]:

17.01. An arbitration agreement encompasses not only the disputes explicitly mentioned in its substantive scope but also cases relating to these disputes. Consequently, the prohibition of hearing the case by the state court is applicable also if the determination of the case presented before the state court and not explicitly covered by an arbitration agreement is impossible without examining a dispute being the subject of such an agreement.

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[2] The full text of this Decision is available in Polish on the Appellate Court of Katowice website at: http://orzeczenia.katowice.sa.gov.pl/content/$N/151500000002503_V_ACz_000510_2014_Uz_2014-06-02_001.

[3] Article 1165 k.p.c. [POL] (unofficial translation): § 1. If a case is brought before a court concerning a dispute covered by an arbitration clause, the court shall reject a statement of claim or a motion to initiate non-contentious proceedings if the defendant or participant to non-contentions proceedings raises the existence of the arbitration clause before entering the merits of the case.

§ 2. The provisions of § 1 shall not apply if an arbitration clause is invalid, ineffective, unenforceable or has expired, and if the arbitration court declines jurisdiction.

§ 3. The fact that an action has been brought before a court does not prevent an arbitration court from hearing the case concerned.

§ 4. The provisions of the preceding paragraphs also apply if the venue of the proceedings before an arbitration court is located outside the borders of the Republic of Poland or is not defined.

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

17.02. On May 27, 2008, A, the claimant and B, a bank, the defendant, entered into a framework agreement for foreign currency options. This agreement contained an arbitration clause submitting all disputes that could have arisen therefrom to arbitration under the auspices of the Arbitration Court at the Polish Bank Association. Subsequently, on August 7, 2009 the parties entered into a credit agreement. The claimant initiated proceedings before a state court relying on the invalidity of the credit agreement which did not contain any arbitration clause. The defendant argued that the case is covered by the arbitration clause from the framework agreement, so the statement of claim should be rejected.

17.03. In the decision of March 21, 2014, the Regional Court of Katowice rejected the statement of claim and acknowledged the jurisdiction of the arbitral tribunal. The court decided that the determination of the case is dependent on the existence of the obligations relating to the foreign currency options stemming from the framework agreement. This is because the alleged invalidity of the credit agreement (providing the basis for the claim) stems from the non-existence of the options obligations arising from the framework agreement, which is covered by the arbitration clause.

17.04. The claimant subsequently filed a complaint to the Appellate Court repeating its argumentation.

[***Decision of the Appellate Court***]:

17.05. The Appellate Court dismissed the complaint. It reminded that the arbitration agreement entails two kinds of effects. The positive effect pertains to the jurisdiction of the arbitral tribunal to hear the case. The negative effect consists in the prohibition of hearing a case before a state court. This rule is confirmed in Article 1165 § 1 of the Code of Civil Procedure, under which if a case is brought before a court concerning a dispute covered by an arbitration clause, the court shall reject the statement of claim.

17.06. The claimant argued that it paid more than PLN 5 million to the bank without any basis as the credit agreement was null and void. Although the credit agreement contained no arbitration clause, the Appellate Court found that Claimant took credit to pay for the currency options that were organized under the framework agreement that contained such a clause. Consequently, the determination of the case is dependent on finding whether claimant was obligated to pay for the currency options under the framework agreement or not. The aim of the credit agreement was to give the claimant monies to repay its obligations stemming from the framework agreement and not to substitute this agreement. Consequently, the framework agreement and therefore the arbitration clause remained in force.

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2. While examining the motion to set aside the arbitral award, the state court cannot control the evidential issues of the case; particular, detailed provisions of the Polish Public Procurement Law do not form public policy; if one party does not want to resolve the dispute through the Dispute Adjudication Board, the other party can direct its claim to the arbitral tribunal (Appellate Court of Gdańsk (*Sąd Apelacyjny w Gdańsku*) 1st Civil Division, Case No. I ACa 550/13 of November, 28, 2013)[4]

Key Words:
arbitration award | annulment of the award | dispute resolution clause | domestic arbitration | judicial review | Polish arbitration law | public policy | recourse against the award | review of the arbitral award | state courts

States involved:
[POL] – [Poland];

Laws and Regulations Applied in Decision:
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;[5]

[4] The full text of this Decision is available in Polish on the Ministry of Justice's website at: http://orzeczenia.ms.gov.pl/content/$N/151000000000503_I_ACa_000550_2013_Uz_2013-11-28_001. As of October 2014, the case is pending before the Supreme Court of Poland under case No. IV CSK 443/14.

[5] 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

[***Rationes Decidendi***]**:**

17.07. While examining the motion to set aside the arbitral award, the state cannot control the evidential issues of the case. This is because the recourse proceedings are not the second instance of the same case. Furthermore, particular, detailed provisions of the Polish Public Procurement Law do not form public policy.

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

17.08. On October 4, 2006, A, the claimant and B, the defendant, entered into an agreement for building a water supply and sewage network. The FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer were applicable. The contract was also entered into as a part of public procurement. In Article 20 of the Conditions, the Parties agreed that B, the contractor would direct its claim to the engineer, then to the Dispute Adjudication Board consisting of one person. The clause stipulated than if the parties did not agree on the composition of the board within 42 days, the Board would be appointed by a third party. Arbitration would be the third level of dispute resolution.

17.09. Within the course of works, B asked A to agree on additional works for the sum of more than EUR 1 million. B proposed a candidate for the Dispute Adjudication Board, but A refused. B did not ask any third party for the appointment and on April 26, 2010, filed a statement of claim to the Arbitration Court at the Polish Chamber of Commerce for the payment of circa EUR 1.5 million in additional works.

17.10. On April 30, 2012, the arbitral tribunal awarded the claim in its totality. The tribunal found that the prearbitral procedure was not obligatory and the lack of the decision of Dispute Adjudication Board is not an obstacle for arbitration.

17.11. On the merits of the case, the tribunal found that B should receive remuneration for additional works as it performed them and duly notified the engineer. This was confirmed by the expert's opinion.

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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 the fundamental principles of the legal order of the Republic of Poland (public policy clause).

17.12. A filed a recourse against the arbitral award. It argued that the tribunal had exceeded its mandate and its award violated public policy by violating the parties' autonomy, disregarding public procurement law and selective evaluation of evidence. The Regional Court agreed that the arbitral tribunal exceeded the scope of the arbitration agreement. The prearbitral proceedings were obligatory. Under the arbitration agreement, there was only one situation in which the parties could direct their claims to the arbitral tribunal directly and it was when it was impossible to hear the claim before the Dispute Adjudication Board (because its mandate expired or it was impossible to appoint its members). In the case at hand, it was not impossible to appoint the Dispute Adjudication Board as there was a third party designated to act if the parties did not agree.

17.13. Furthermore, the court found that the arbitral award violated the public policy clause as it completely disregarded the Polish Public Procurement Law.

17.14. B challenged the judgment claiming that the Regional Court did not interpret the arbitration agreement properly and violated Article 1206 of the Code of Civil Procedure by finding that there are reasons to set aside the award. A defended its position.

[***Decision of the Appellate Court***]**:**

17.15. The Appellate Court changed the judgment of Regional Court and dismissed the motion to set aside the arbitral award. First, as to the argument of the Regional Court that the arbitral tribunal exceeded its mandate, the Appellate Court performed a thorough interpretation of the arbitration agreement. It found that if A, the employer, was not interested in appointing a Dispute Adjudication Board, this body could not resolve the dispute. Consequently, B, in directing the claim to the arbitral tribunal without having the dispute resolved by the Dispute Adjudication Board, did not violate any rules chosen by the parties.

17.16. Furthermore, the court found that the parties to the arbitral proceedings were treated equally and had the proper opportunity to present their case. In examining the motion to set aside the arbitral award the state court cannot control the evidential issues of the case. This is because it does not control the award in its totality, but only certain aspects of the award, arbitration agreement and the proceedings that could be raised in the motion to set aside the award.

17.17. As to violation of the public policy, the Appellate Court explained that such a violation did not take place. Even if it did, the provisions of the Public Procurement Law in question do not constitute Polish public policy.

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3. The professional legal counsel representing a party in international arbitration is expected and required to know the legal culture and customs of the place of arbitration and any omissions caused by the lack of this knowledge cannot be cured by the invocation of the public policy clause. (Appellate Court in Gdańsk (*Sąd Apelacyjny w Gdańsku*) First Civil Division, Case No. I ACz 1475/13 of February, 11 2014)[6]

Key Words:
arbitration award | enforcement of the award | international arbitration | public policy

States involved:
[POL] – [Poland];
[CHN] – [China]

Laws and Regulations Applied in Decision:
The 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;[7] Article V Section 2.[8]

[*Rationes Decidendi*]:

17.18. The professional legal counsel of a party to international arbitration should be expected and required to know not only English, as the

[6] The full text of this Decision is available in Polish on the Appelate Court in Gdańsk's website at: http://orzeczenia.gdansk.sa.gov.pl/content/$N/151000000000503_I_ACz_001475_2013_Uz_2014-02-11_001.

[7] 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 it 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.

[8] Article V Section 2 of the New York Convention: 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds out that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

language of arbitration, but also the legal culture and customs of the place of arbitration – any omissions in that respect concerning the lack of challenge of arbitrator in a appropraite time – cannot be later cured by reference to the public policy clause.

17.19. The public policy clause cannot replace the proper challenge of an arbitrator. However, there are situations in which although a party failed to challenge the arbitrator, the arbitral award will not be enforced in the Republic in Poland on the grounds of the public policy under the provisions of the New York Convention.

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

17.20. On June 30, 2010 two companies – J, with its registered seat in China, and C, with its registered seat in Poland entered into arbitration before the London Court of International Arbitration ("LCIA") before a sole arbitrator in a case for payment of amounts due to C by J.

17.21. In the course of the proceedings, the sole arbitrator disclosed to the parties on November 25, 2010 that he received an offer to join the same barristers' chamber as counsel of one of the parties. The arbitrator explained that there is no conflict of interest due to the specific nature of the relationships between the members of the barristers' chamber in England. However, at the same time, the arbitrator acknowledged that the parties may be unfamiliar with the organization of the English bar and thus stated that he will resign from his position as an arbitrator if any of the parties requests his resignation within 15 days. No such request was filed. As a result, on December 13, 2010 the sole arbitrator informed that he will proceed with the examination of the case.

17.22. On August 11, 2011 the arbitrator dismissed all of C's claims towards J as to their merits in a first partial award. In a second partial award, delivered on February 1, 2012, the arbitrator decided that C should return the costs of the proceedings to J as it was the losing party.

17.23. By a decision of September 23, 2010 initiated at the motion of J, the Regional Court in Gdańsk decided to enforce the partial award on the costs of the arbitral proceedings of February 1, 2012 against C. This decision was challenged by a complaint of C filed with the Appellate Court in Gdańsk. C claimed, among others, that the arbitral award violated the public policy, as the case was resolved by an arbitrator who was not impartial and independent – namely the sole arbitrator who, in the opinion of C, was "working in the same law firm as the counsel for the petitioner [i.e. Chinese company J] and in a subordinate position".

[***Decision of the Appellate Court***]**:**

17.24. The Appellate Court dismissed the complaint. Firstly, the Court underlined that C's argument of that the sole arbitrator was working in the same law firm as J's counsel and was subordinate was completely

baseless as far the facts of the case were concerned. During the arbitral proceedings the sole arbitrator clearly stated that he does not know the counsel for J. Moreover, the Court stated that the members of a given barristers' chamber run law practices that are independent of each other and are not in any way partners and are not financially connected in any way that would cause a conflict of interest. The Court explained that C was not unfamiliar with international transactions and that it was represented by professional counsel. Thus, even if it had any doubts as to the nature of the relationship between the sole arbitrator and counsel for J, under the English law the arbitrator's brief of November 25, 2010 should be a sufficient indicator to C's counsel that this matter needs further examination. The Court concluded that a professional counsel who represents a party in international arbitrator is expected and required to be familiar with the legal culture and customs of the place of arbitration (in this case England) and cannot invoke the lack of his knowledge in this respect as a legal defense.

17.25. Moreover, the Court stated that the lack of a party's challenge of an arbitrator in a appropriate time in accordance with law and the rules of arbitration cannot be replaced by the invocation of the public policy clause at the stage of proceedings for the enforcement of the arbitral award.

17.26. Notwithstanding the above, the Court reasoned that there are two situations in which a party to arbitration proceedings may successfully invoke the public policy clause in connection with the violation of its right to a fair trial due to the resolution of the dispute by an arbitrator who lacked impartiality and independence.

17.27. The first situation is when an arbitrator violates the *nemo iudex in causa sua* principle which is also covered by the red list of International Bar Associations Guidelines on Conflicts of Interest in International Arbitration. In the opinion of the Court, this principle is covered by the Polish public policy clause in the meaning of Article V section 2 letter b of the New York Convention and should be enforced even if the parties failed to challenge the arbitrator during the arbitral proceedings.

17.28. Secondly, a party may invoke the public policy clause and request the court to refuse to enforce an arbitral award if the arbitrator failed to inform the parties during the arbitration of the circumstances that affect his impartiality and independence that are covered by the red and orange lists of the IBA and deprived the parties of a chance to challenge him on these grounds already in the course of the arbitration.

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4. The Polish public policy includes not only the principles of freedom of contract and *pact sunt servanda* but also rules that limit the freedom of contract – such as principles of contract fairness. In practice, courts more often set aside arbitral awards due to their contradiction with the rules of public policy that limit the principle of freedom of contract than due to the violation of this very principle or the principle of *pacta sunt servanda* (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. V CSK 45/13 of February, 13 2014)[9]

Key Words:
arbitration award | domestic arbitration | public policy | setting aside of an arbitral award

States involved:
[POL] – [Poland];

Laws and Regulations Applied in Decision:
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 1206 § 2 point 2;[10]

[9] The full text of this Decision is available in Polish on the Supreme Court's websiteat: http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/V%20CSK%2045-13-2.pdf.

[10] 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; 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

Kodeks cywilny z dnia 23 kwietnia 1964 r. [*Civil Code*] [k.c.] [POL], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 15, item 93, as amended; Article 353,[11] Article 484 § 2;[12]

[***Rationes Decidendi***]**:**

17.29. The Polish public policy includes the principles of parties' autonomy and *pacta sunt servanda.* These rules are, however, not absolute. Under Article 353[1] of of the Civil Code, the parties' autonomy and *pacta sunt servanda* are limited by the nature of the legal relationship, statutory provisions and principles of social coexistence. Therefore, the Polish public policy contains also rules that provide for limits of those two principles.

17.30. Those "limiting principles" include in particular: the principle of freedom of economic activity, the principle of contractual fairness, the principle of compensatory nature of damages.

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

17.31. On August 17, 2007, Companies H.P., H. and P, as contractors entered into a contract with Municipality W. as an investor for the expansion of the sewer system at housing complex O. The contractors were also obligated to provide post-construction documentation and file a notification of the handover of the investment for use. The contract provided for contractual penalties if the contractors failed to finish their work on time. H.P., H. and P managed to complete the expansion works on time, but were late with providing of the documentation and filing the notification, which constituted 3% of the value of the contractors' consideration. As a result, Municipality W. requested contractual penalties in the amount of approximately PLN 38 million

before such a tribunal, arising under a 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 the statute the dispute cannot be resolved by an arbitral tribunal, or 2) the arbitral award is contrary to the fundamental principles of the legal order of the Republic of Poland (public policy clause).

[11] Article 353[1] k.c. [POL] (unoffical translation): Parties making an agreement may arrange their legal relationship as they see it fit as long as its terms or purpose does not contradict the nature of the relationship, the statutory law or principles of social coexistence.

[12] Article 484 § 2 k.c. [POL] (unoffical transaltion): If the obligation was performed in a material part, the debtor may request the reduciton of the contractual penalty; the same applies if the contractual penalty is grossly excessive.

from H.P., H. and P. Subsequently Municipality W. deducted the contractual penalties from the price for the works.

17.32. The contractors initiated arbitration against the Municipality of W. requesting payment of their remuneration. The companies stated that the contractual penalties should be reduced by the arbitral panel under Article 484 Section 2 of the Civil Code as grossly excessive. The arbitral tribunal concurred with their opinion and in the award of April 20, 2011 reduced the contractual penalties to approximately PLN 1.8 million - i.e. declared that it was the amount that the Municipality of W. could deduct from the price for the expansions of the sewer system - and ordered the Municipality of W. to pay the rest of the price.

17.33. The Municipality of W. filed for the setting aside of the arbitral award with the Regional Court. W. stated that the arbitral tribunal, by reducing the contractual penalties which were calculated in full accordance with the provisions of the contract to such a great extent, violated the public policy clause under Article 1206 Section 2 point 2 of k.p.c., namely the principle of parties' autonomy and *pacta sunt servanda*. The Regional Court found this argumentation persuasive and by a judgment set aside the arbitral award. This judgment was later upheld by the court of the second instance. As a result, companies H.P., H. and P filed a cassation complaint with the Supreme Court.

[***Decision of the Supreme Court***]**:**

17.34. The Supreme Court ruled in favor of H.P., J. and P, set aside the judgment of the Appellate Court and changed the judgment of the Regional Court by dismissing the motion for setting aside of the arbitral award.

17.35. The Supreme Court reasoned that although it is true that the Polish public policy includes principles of freedom of contract and *pacta sunt servanda* they are not absolute and are subject to certain limitations. Those limitations include the principles of a compensatory nature of damages and contract fairness. The "limiting principles" themselves are also the part of the Polish public policy. As a result, the reduction of the contractual penalties by the arbitral tribunal made under Article 484 § 2 k.c. in this case was done in accordance with the law.

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