

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

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

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List of Abbreviations

AAA	American Arbitration Association
AAA International Arbitration Rules	American Arbitration Association Arbitration Rules
ACICA Rules	2016 Australian Centre of International Commercial Arbitration Rules
ADR	Alternate Dispute Resolution
AIA	(Italian Arbitration Association -Associazione italiana per l'arbitrato)
ArbAct	Act (of the Czech Republic) No. 216/1994 Coll., on Arbitration and the Enforcement of Arbitral Awards, as amended.
Australian Arbitration Act	International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2011
CC	Act (of the Czech Republic) No. 89/2012 Coll., the Civil Code
CC (1964)	Act (of the Czech Republic) No. 40/1964 Coll., the Civil Code, as amended
CCP	Act (of the Czech Republic) No. 99/1963 Coll., the Code of Civil Procedure, as amended
CIETAC Rules	2015 China International Economic and Trade Arbitration Commission Arbitration Rules
Commercial Code	Act (of the Czech Republic) No. 513/1991 Coll., the Commercial Code, as amended
DIS Rules	1998 German Institute of Arbitration Rules
HKIAC	Hong Kong International Arbitration

	Centre
IBA	International Bar Association
ICAC Rules	Arbitration Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, adopted on 18 October 2005, as amended on 23 June 2010
ICC	International Chamber of Commerce.
ICC Rules	ICC Rules of Arbitration of the ICC International Court of Arbitration, in force as from 1 January 2012
ICT	Information and communication technologies
IP	Intellectual Property
LCIA	London Court of International Arbitration
LCIA Rules	Arbitration Rules of the London Court of International Arbitration, in force from 1 October 2014
Milan Rules	Rules of the Chamber of Arbitration of Milan
New York Convention	Convention in the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
New Zealand Arbitration Act	Arbitration Act 1996, Public Act 1996 No 99, reprint 1 January 2011
OECD	Organisation for Economic Co-operation and Development
RAA Online Rules	Online Arbitration Rules of the Russian Arbitration Association, in force as from 1 October 2015
Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations.
SC	Supreme Court of the Czech Republic.
SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as from 1 January 2010
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre, in force from 1 April 2013

Swiss Rules	2012 Swiss Rules of International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law
UNCITRAL Model law	the Model law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments on 7 July 2006
UNCITRAL Rules	UNCITRAL Arbitration Rules, revised in 2010, adopted in 2013
WIPO	World Intellectual Property Organization

Poland – the Supreme Court Judgements

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Abbreviations used in annotations

k.c. [POL]	Kodeks cywilny z dnia 23 kwietnia 1964 r. [<i>Civil Code</i>] published in: Dziennik Ustaw [<i>Journal of Laws</i>] 1964, No. 15, item 93, as amended;
k.p.c. [POL]	Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [<i>Code of Civil Procedure of November, 17 1964</i>], published in: Dziennik Ustaw [<i>Journal of Laws</i>] 1964, No. 43, item 296, as amended;

I. A previous arbitral award issued between the same parties has certain binding effects upon future arbitral proceedings (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. IV CSK 282/15 of January, 20 2016)¹

Key words:

domestic arbitration | binding power of arbitral awards | polish arbitration law | preliminary ruling

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: 365 Section 1,² 366,³ 1212 Section 1,⁴

[Rationes Decidendi]:

- 13.01.** An arbitral award is equal to the judgment of the state court after being recognised or enforced, therefore, it has the same binding force and the authority of *res judicata* as the final and enforceable judgment of the state court. Both the state courts

¹ Full text of this Decision available in Polish on the website of the Polish Supreme Court at: <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iv%20csk%20282-15-1.pdf> (accessed on 21 December 2016).

² Article 365 k.p.c. [POL] (unofficial translation): Section 1. A non-appealable ruling shall be binding not only on parties and the court that has issued the ruling but also on other courts as well as other state and public administration authorities, and on other persons as may be provided for in this Act.

^{Section 2.} The Code of Criminal Procedure specifies to what extent the rulings of a civil court shall not be binding on a court in criminal proceedings.

³ Article 366 k.p.c. [POL] (unofficial translation): A non-appealable judgement shall have the force of *res judicata* only insofar as it relates to what was the subject-matter of adjudication with respect to the cause of action, and only between the same persons.

⁴ Article 1212 k.p.c. [POL] (unofficial translation): Section 1. A judgment of an arbitration court or a settlement reached before an arbitration court have the same legal effect as a court judgment or a settlement reached before a court upon their recognition or confirmation of their enforcement by the court.

^{Section 2.} A judgment of an arbitration court or a settlement reached before an arbitration court are recognised or have their enforcement confirmed in accordance with the terms and conditions determined in this Title, irrespective of the state of issue.

and the parties are bound by such arbitral award, so it should be taken into account when deciding on subsequent disputes between the same parties. What is more, if an award deals with an issue of a precedential nature, that issue cannot be re-litigated in further proceedings. An arbitral award serves as the preliminary ruling in another case pending between the same parties. Accepting that an arbitration award does not have binding force or *res judicata* effect would totally undermine the purpose for the existence of arbitration.

[Description of Facts and Legal Issues]:

- 13.02.** The case revolved around a real estate dispute. In December 2006, the claimant A, acting as the buyer, and the defendant B, acting as the seller, entered into a sale contract for commercial buildings and, consecutively signed property management contract where B, as the manager, agreed to manage the same property for A, as the property owner. The sale contract, consisted of a warranty granted to A, that within a period of four years, rental of the real estate will generate profits of at least EUR 1.300.000,00 per year. To safeguard the buyer's receivables from the property, A retained part of the purchase price, which was to be paid back in annual instalments once the buildings actually generated the abovementioned profits. On the other hand, if annual rent generated profits lower than specified in the Sale Agreement, the amount of the deficit was to be deducted from the annual instalment paid by A.
- 13.03.** B was authorised to claim the collateral in the event that the property management contract was terminated owing to the claimant's fault. In such event warranty should expire and A would be required to release the retention to B.
- 13.04.** In March 2007 A terminated the property management contract in part (with respect to commercial management of leasing of the property), without standing any grounds, paying the seller a total management fee of over PLN 520.000,00. The seller deemed the rental income warranty to have lapsed accordingly, and demanded release of the EUR 488.000,00 retention. The seller pursued this claim in an *ad hoc* arbitration and in 2010 obtained an award in this amount. The tribunal clarified that the property management contract had been valid and was terminated due to A's fault, so there was a ground for claiming the collateral. The award was enforced by a state court and executed in part.
- 13.05.** The claimant then motioned the state court to remove the enforcement clause from the arbitral award, arguing that the claim

awarded in arbitration expired due to a set off. The anti-enforcement action was unsuccessful, the Regional Court rejected the statement of claims of A applying Article 365 Section 1 of the code of civil procedure. In the opinion of the state court of first instance (Regional Court), the arbitral tribunal decided certain issues ultimately. The regional court explained that the rental income warranty had lapsed due to termination of the management contract, and thus the A's claim for breach of the rental income warranty could not be set off against the amount of the arbitration award. A appealed from that decision to the court of second instance (Appellate Court), however the Appellate Court dismissed the complaint and agreed with the court of first instance.

- 13.06.** Both the Regional Court and the Appellate Court agreed that they were not bound by the arbitral tribunal's holding that the management contract was valid, holding instead that the management contract was invalid because the buyer lacked a property manager's licence.
- 13.07.** Subsequently A filed a cassation complaint to the Supreme Court. A argued, *inter alia*, that the court of appeal had erred by conducting an interpretation of the arbitral award, in holding that it was bound by the findings held in the justification for the award that the rental income warranty had lapsed, rather than being bound only by the operative wording of the award.

[Decision of the Supreme Court]:

- 13.08.** The Supreme Court ruled in favor of B and dismissed the cassation complaint.
- 13.09.** Namely, it held that accepting that an arbitration award does not have binding force or *res judicata* effect would totally undermine the purpose for the existence of arbitration.
- 13.10.** Pursuant to Article 1212 Section 1 of the code of civil procedure, the state court is bound, under the rules set forth in Article 365 Section 1 of the code of civil procedure, by a legally final and enforceable arbitration award, which also has *res judicata* effect in the respect indicated in Article 366 of the code of civil procedure.



II. Exceptionally, it is possible to set aside an arbitral award partially, but only provided that the challenged part of the award can be entirely separated

from the rest of the award (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. I CSK 305/15 of May, 6 2016)⁵

Key words:

domestic arbitration | polish arbitration law | setting aside the domestic arbitral award | public policy clause

States involved:

[POL] - [Poland];

Laws Taken into Account in This Ruling:

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*] 2014, item 101, consolidated text with further amendments; Articles: 321 Section 1,⁶ 1205,⁷ 1206 Section 2 point 2,⁸ 1207;⁹

⁵ Full text of this Ruling available in Polish on the website of the Polish Supreme Court at: <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20csk%20305-15-1.pdf> (accessed on 21 December 2016).

⁶ Article 321 k.p.c. [POL] (unofficial translation): Section 1. The court may not adjudicate as to an object which is not covered by a claim or award more than was claimed. Section 2. (Repealed).

⁷ Article 1205 k.p.c. [POL] (unofficial translation): Section 1. A judgment of an arbitration court issued in the Republic of Poland may only be set aside by the court in proceedings instituted following a motion to set the judgment aside, in accordance with the following provisions. Section 2. If the parties have agreed that proceedings before an arbitration court will involve more than one instance, the provisions of Section 1 shall apply to the final judgment of an arbitration court resolving the claims of the parties.

⁸ Article 1206 k.p.c. [POL] (unofficial translation): Section 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 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. Section 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).

⁹ Article 1207 k.p.c. [POL] (unofficial translation): Section 1. The provision of Article 187 apply accordingly

- k.c. [POL] Kodeks cywilny z dnia 23 kwietnia 1964 r. [*Civil Code of April, 23 1964*] published in: Dziennik Ustaw [*Journal of Laws*] 2016, item 380, consolidated text with further amendments; Article: 388.¹⁰

[Rationes Decidendi]:

- 13.11.** A party may demand in the motion for setting aside the arbitral award that the state court set aside the award in the whole or just in a specific part. Nonetheless, the state court is bound by the scope of the motion articulated by the petitioning party. The arbitral award cannot be set aside in part where individual parts of the award are so interconnected that none of them could be separated from the others and become a subject of the independent decision of the court without essential distortion of the logic of the whole award. As an exception, it is possible to set aside an arbitral award partially, but only provided that the challenged part of the award can be entirely separated from the rest of the award.

[Description of Facts and Legal Issues]:

- 13.12.** The dispute in this case concerned currency option hedging contracts concluded between A (limited liability company) and B (Bank) in 2008. A sued B in domestic arbitration and demanded that options contracts be declared invalid on grounds of exploitation (Article 388 Section 1 of the civil code). A also made a claim for payment from B as a result of invalidity of the said contracts. B filed a counterclaim against A seeking for payment. What is important for the outcome, A failed to pay the arbitration fee on its claim for declaration of invalidity of the options contracts. Notwithstanding, the arbitral tribunal in its award of June 10, 2011, dismissed both of the A`s claims and granted B`s counterclaim in part, exceeding PLN 24 million.
- 13.13.** Following the A`s motion to set aside the arbitral award on the grounds of violating public policy clause, the regional court de-

to a motion to set aside a judgment of an arbitration court.

Section 2. Proceedings to set aside the award shall be conducted pursuant to Book one Part one, unless the following provisions state otherwise.

¹⁰ Article 388 k.c. [POL] (unofficial translation): Section 1. If one of the parties, taking advantage of the forced circumstances, infirmity or inexperience of the other party, in exchange for his performance accepts or reserves for himself or for a third party the performance whose value at the moment of the conclusion of the contract exceeds to a glaring extent the value of his own performance, the other party may demand a reduction in his performance or an increase in the performance due to him, and where both proved to be excessively difficult, he may demand invalidation of the contract.

Section 2. The above entitlements shall expire upon the lapse of two years from the day of the conclusion of the contract.

cided to set it aside but only in part in which the arbitral tribunal dismissed A's claim for invalidation of the options contracts. So, the A's motion was dismissed in the remaining part, which meant that the court refused to set aside the part of the award granting the counterclaim for payment.

- 13.14.** Subsequently, A appealed from the unfavorable judgment. The appellate court on December, 15 2014, rendered a judgment in which changed the regional court's ruling and set aside the arbitral award in the part in which it had not been previously set aside by the court of first instance. In this way the arbitral award has been quashed in its entirety.
- 13.15.** The appellate court argued the arbitral award violated fundamental principles of the legal order of the Republic of Poland, i.e. principle of the equality of the parties as well as the right to a fair and due trial. This conclusion was based on the fact that the arbitral tribunal had denied the A's claim for invalidation of the options contracts due to non-payment of the arbitration fee, but nevertheless rendered a verdict dismissing A's both claims on the merits as well as granting B counterclaim in part.
- 13.16.** Eventually, B filed a cassation complaint to the Supreme Court in which contended that appellate court violated several provisions of the code of civil procedure, especially those concerning the procedure and grounds for setting aside the arbitral award (Articles 1205-1207). In B's opinion, these errors led to incorrect judgment setting aside the entire arbitral award.

[Decision of the Supreme Court]:

- 13.17.** The Supreme Court dismissed B's cassation complaint with the following reasoning.
- 13.18.** First of all, the Supreme Court gave some general remarks on motion to set aside an arbitral award. Such motion is a claim to establish a legal relationship, in which a petitioning party demands that the state court render a ruling setting aside the existing legal relationship formed by the arbitral award. A state court, while accepting the motion, can only issue a judgment (of quashing nature) setting aside the arbitral award and just in the scope demanded by the petitioning party. The main goal of arbitration proceedings is to speed up the process of resolving civil disputes, thus those proceedings are not perceived as an additional phase of a pre-trial procedure. The parties to arbitration agreement need to accept that the state courts exercise merely slight control of the arbitral awards.
- 13.19.** Besides this, the Supreme Court stated that however the relief sought expressed in a motion to set aside an arbitral award may,

in general, encompass setting aside the whole arbitral award or just a part of the award, the state court is bound by the scope of the motion articulated by the petitioning party. In the circumstances of the case, A petitioned to set aside the arbitral award in its entirety, therefore regional court could not set it aside just partially, since such verdict did not accept the A's demand in full and was an acceptance of the demand of a different kind, not pursued by A.

- 13.20.** Furthermore, such scope of setting aside the arbitral award was also justified by the fact that individual parts of the award were so interconnected that none of them could be separated from the others and became a subject of independent decision of the court without essential distortion of the logic of the whole award. The future decision as to the merits of the A's claim for invalidation of the options contracts may have a significant impact on the assessment of the foundation of the claims for payment sought by A in principal claim as well as B in counterclaim.
- 13.21.** Presented arguments enabled the Supreme Court to assert that exceptionally, it is possible to set aside an arbitral award in part, but only provided that the challenged part of the award can be entirely separated from the rest of the award.
- 13.22.** Finally, the Supreme Court concluded that the entire arbitral award is contrary to fundamental principles of the legal order of the Republic of Poland (Article 1206 Section 2 point 2 of the code of civil procedure), since the previous assessment if the pecuniary claims of both parties were grounded or groundless cannot be approved where the arbitral tribunal had not initially decided on invalidity of the options contracts from which the claims of both parties for payment were derived.

