

**Kraków Court of Appeal order  
dated 22 November 2016  
Case No. I ACz 1997/16**

**Summary by arbitraz.laszczuk.pl:**

The plaintiff in this court case (respondent in a separate arbitration proceeding) was an electricity seller, distributor and trader, and the defendant in the court case (claimant in the arbitration) was a counterparty. The parties entered into a set of contracts under which the plaintiff/respondent and the defendant/claimant acted mutually as both sellers and buyers, and the plaintiff/respondent provided commercial balancing services to the defendant/claimant with respect to trading in electricity. Pursuant to their mutual dealings, the plaintiff/respondent issued an invoice to the defendant/claimant in July 2015 under the contract for balancing services in the amount of about PLN 6.2 million, while the defendant/claimant issued invoices to the plaintiff/respondent in July and October 2015 totalling about PLN 800,000. As the plaintiff/respondent's invoice from July remained unpaid while the defendant/claimant issued its own invoices, the plaintiff/respondent decided to declare payment of the defendant/claimant's invoices by setting those amounts off against the larger amount of its own invoice. As a net result, the amount owed by the defendant/claimant under the invoice issued by the plaintiff/respondent was reduced from about PLN 6.2 million to about PLN 5.4 million as of October 2015.

The defendant/claimant disputed the effectiveness of the setoffs, and commenced proceedings before the Court of Arbitration at the Polish Chamber of Commerce seeking payment of about PLN 800,000—the full amount of the invoices the claimant had issued to the respondent.

The respondent asserted the setoffs as a defence in the arbitration proceeding. However, the arbitral tribunal ruled that it did not have jurisdiction to consider the defence of setoff.

Concerned that the arbitral tribunal would ignore the setoffs and issue an award to the claimant for debts the respondent regarded as non-existent, the plaintiff filed

an action in the Kraków Regional Court against the defendant seeking a declaratory judgment that its setoffs were valid.

To secure its claim in the state court, the plaintiff sought interim relief in the form of an anti-arbitration injunction, ordering the claimant to seek a stay of the arbitration, prohibiting the claimant from seeking enforcement of any award issued by the arbitral tribunal, and establishing for the duration of the state court proceeding that the plaintiff's setoffs were valid. The regional court granted the interim relief.

The defendant filed an interlocutory appeal with the Kraków Court of Appeal. Thereafter, the defendant entered restructuring proceedings in the district court.

The court of appeal found that the plaintiff had not substantiated the legal basis for its underlying claim for a declaratory judgment. There is no legal interest in obtaining a declaratory judgment if the plaintiff has further-reaching legal measures available to it. Here, if an arbitration award were issued against the plaintiff (respondent in the arbitration), it could apply to set aside the award, or oppose enforcement. Even if enforcement of the award was granted, it could oppose execution on the award.

Accordingly, the court of appeal amended the order of the regional court to deny the application for interim relief.

The court of appeal did not directly rule on the permissibility of issuing an anti-arbitration injunction, but pointed out that the nature of the interim relief must be tied to the relief sought in the proceeding, and cannot affect the defendant's right to pursue measures available to it in a different proceeding. In the court's view, the regulations relied on by the plaintiff did not provide sufficient legal grounds for the state court to block the arbitration proceeding.

**Excerpts from the text of the court's ruling:**

**1. Under Art. 1194 §2 of the Civil Procedure Code, in every instance, and thus also when ruling under general principles of law and equity, the arbitral tribunal shall take into consideration the provisions of the contract and the established customs applicable to the given legal relation. Such established customs include *lex mercatoria* (autonomous commercial law). Under either field, the basis for the resolution of the validity of the claim by the arbitral tribunal,**

depending on the procedural stance of the respondent, may be the relevant institution connected with the defence of setoff.

2. The legal construction of setoff may be relevant also for the dispute before the arbitral tribunal. In particular, once the dispute is pending before the tribunal, assertion by the opposing party of an effective defence (under substantive and procedural law) of setoff, depending on the substance of the overall procedural defence by the respondent in that proceeding, may exert the effect of acknowledgement of the debt by the party asserting that defence in the proceeding, and in further consequence lead to a kind of modification of the dispute in the proceeding (depending on the position of the party initiating the proceeding), which becomes an evaluation of the existence of the claim covered by that defence.

3. In a situation in which the existence of the claim determined exclusively by the defence of setoff constitutes the subject of the dispute in another proceeding, there are no grounds for finding that the plaintiff has a legal interest in obtaining a declaration that it was effectively set off. ... Given such arrangement of the procedural relations between the parties, the arbitration agreement made by the parties applies to issues covered by the agreement within the meaning of Civil Procedure Code Art. 1161 (as it is connected with the issue of effective performance by the respondent of the obligation covered by the agreement), and it cannot be found that the agreement has ceased to be in force (Art. 1165 §2).

4. The construction of the institution of setoff in the specific conditions of the proceeding before the arbitral tribunal may speak in favour of considering it in that proceeding (if it was connected with acknowledgement of the claim covered by the arbitration agreement), unless the permissibility of asserting such defence (e.g. in a proceeding for an order for payment) is expressly excluded. Analogous reasons may constitute a basis for refusing enforcement of the arbitration award by the state court under Civil Procedure Code Art. 1214 §3(2).

5. After an arbitration award is enforced by issuance of an enforcement clause for the award pursuant to Civil Procedure Code Art. 1214 §2 (also considering the repealed portion of Art. 777 §1(2)) of the code), the award

**constitutes a writ of enforcement coming from a court, and consequently Art. 840 of the code may be applicable.**

**6. Leaving to the court the discretion to select the method of security does not mean that the choice can be arbitrary. The court is bound by the demand stated by the party applying for the security as to the method of security, the nature of which may relate only to the purpose of the proceeding, and in consequence may not affect the realm of procedural actions the other party is entitled to by law in terms of its freedom to exercise the legal means afforded to it in another proceeding. There is no justification in the civil procedure regulations in question for obstructing the course of proceedings before an arbitral tribunal.**