

Polish Supreme Court judgment
dated 9 March 2012
Case No. I CSK 312/11

Summary by arbitraz.laszczuk.pl:

In 2004, the General Director for National Roads and Motorways (GDDKiA) entered into contracts with a consortium of B. SA (Poland) and F.A. SA (Spain) for construction of sections 3 and 4 of the A2 motorway in Poland. The contracts were based on FIDIC forms and included an arbitration clause calling for *ad hoc* arbitration under UNCITRAL Rules.

In 2006, the consortium members brought a claim in arbitration against the Polish State Treasury (in the person of GDDKiA), seeking additional compensation under contractual clauses calling for indexing of fees based on inflation and changes in the PLN/EUR exchange rate during the extended period of performance of the contracts, which claims were also characterized as claims for damages for breach of contract. In 2007 the arbitration court issued "interim and partial" awards upholding the claims by the consortium members in principle, i.e. as to liability.

In 2008, the State Treasury filed a petition with the regional court to set aside the interim and partial awards on the grounds that they violated public policy, denied GDDKiA an opportunity to defend its rights, and granted relief beyond that sought by the claimant, by upholding alternative claims for damages, not expressly asserted by the claimants, which had sought compensation based on indexation of the contractual fees. The court held that the petition was premature because the awards were interim and partial. On appeal, the court of appeal held that under the UNCITRAL Rules, a petition to set aside interim and partial awards was permissible, and remanded the case to the regional court.

On remand, in 2009 the regional court denied the petition, finding that the claimants had asserted their alternative claims, and the court could not set aside the awards without impermissibly reviewing the merits or correctness of the awards. The court of appeal denied the appeal by GDDKiA.

The Supreme Court denied the cassation appeal by GDDKiA, holding that GDDKiA was not deprived of an opportunity to defend its rights and that the awards did not violate public policy.

Excerpts from the text of the court's ruling:

1. In the view of the appellant, it was allegedly deprived of the opportunity to defend its rights before the arbitration court (Civil Procedure Code Art. 1206 §1(2)) because the arbitration court upheld a claim as to liability which had never been raised. ... As the appellant ... does not allege that it was stipulated otherwise between the parties, it may be assumed that under the rule set forth in Civil Procedure Code Art. 1188 §2 the arbitration court regarded the claim for damages set forth in a pleading as effectively asserted.

2. The principle of the equal rights of the parties was respected in the proceeding before the arbitration court, as each of the parties was provided an opportunity to present its position on the matter at each stage of the proceeding.

3. The public policy clause, like any general clause, is not precisely defined, which leaves great discretion to the court ruling on a specific case, but nonetheless, on the basis of this clause, the review of the constitutive elements of an arbitration award may not take on the dimensions proper to a review of the merits (correctness) of the award. ... The prohibition of a review of the merits (correctness) of an award is tied to the essence of application of the public policy clause. In applying the clause, the point is not to determine whether the award is consistent with all relevant mandatorily applicable regulations of law, but only to determine whether the award effected a result contrary to the fundamental principles of the domestic legal order.

4. The fundamental principles of the legal order are the fundamental constitutional rules concerning the socio-economic system and the overriding principles governing specific fields of substantive and procedural law. It has been recognized in the case law that such principles include economic freedom and the freedom of contract, ... the principle of the autonomy of the will of the parties and the equality of entities, ... and the principle of social justice.

5. Procedural public policy ... may be grounds for assessing an arbitration award in two aspects. First, the procedure which led to issuance of the arbitration award is assessed for its compliance with fundamental procedural principles of the legal order. Second, the effects of the arbitration award are assessed from the perspective of their consistency with procedural public policy, i.e. whether they are reconcilable with the system of procedural law, e.g. whether they violate the principle of *res judicata* or the rights of third parties.