

Polish Supreme Court judgment
dated 7 January 2009
Case No. II CSK 397/08

Summary by arbitraz.laszczuk.pl:

In 2002, two individuals, R.K. and M.K., doing business together in the form of an ordinary partnership, entered into a contract to build a shopping centre, as the general contractor, with the owner, D.T. "C." SA (whose business was subsequently merged into a successor entity, M.R.E. sp. z o.o.) The contract, including a clause calling for arbitration of disputes before the Court of Arbitration at the Polish Chamber of Commerce, was signed by one of the partners, who also held a general power of attorney to represent the other partner.

In 2003, the owner filed a claim in arbitration for over PLN 500,000 in damages due to the need to hire another contractor to perform the work and contractual penalties of PLN 200,000 or 700,000, in the alternative, depending on whether the arbitration court held that the owner had validly set off a portion of the contractual penalties against the fee payable to the general contractor, or under a theory of unjust enrichment. In 2005, the arbitration court issued an award for the owner in the full amount of the claim for damages and PLN 350,000 on the claim for contractual penalties or unjust enrichment.

The contractor filed a petition in the regional court to set aside the award on the grounds that it violated public policy. In a subsequent pleading filed before the petition was served on the defendant, the plaintiff also alleged that the arbitration clause was invalid.

After two rounds of rulings, appeals and remands, considering the petition for the third time the regional court denied the petition to set aside the award. The court of appeal denied the appeal, finding that consideration of the allegations of violation of public policy would require the court to review the merits of the award, which was impermissible.

On cassation appeal to the Supreme Court of Poland, the plaintiffs alleged that the appellate court should have considered the allegation of the invalidity of the arbitration clause, signed by only one of the two partners holding only a general power of attorney to act for the other partner, which was effectively asserted by the plaintiffs, and in any event

should have considered the invalidity of the arbitration clause on its own initiative as independent grounds for holding that the award violated public policy. They also alleged that the appellate court erred in refusing to review in detail the record before the arbitration court in order to determine whether the allegedly erroneous holding by the arbitration court allowing the owner to set off contractual penalties against the general contractor's fee constituted a violation of public policy requiring the award to be set aside.

The Supreme Court found that it was clear that the arbitration clause was invalid because the partner signing it held only a general power of attorney to act for the other partner rather than a specific power of attorney authorizing conclusion of an arbitration clause, but the court could not consider this objection because the plaintiffs failed to assert it in the petition to set aside the award. Because this was provided in the code as specific grounds for setting aside an award when raised in the petition to set aside the award, if it was not raised in the petition the court could not consider it separately, at its own initiative, as a violation of public policy.

The Supreme Court further held that the court of appeal had improperly rejected the allegation that the substance of the award violated public policy, without conducting a thorough review of the record before the arbitration court and the reasoning behind the award in order to determine, first, whether the award violated substantive law, and, if so, whether the violation was serious enough to constitute a violation of public policy.

The court vacated the judgment of the court of appeal accordingly and remanded the case for reconsideration.

Excerpts from the text of the court's ruling:

1. An arbitration clause is an agreement which is governed by the Civil Code, including Art. 58 § 2. ... Such agreement requires a specific power of attorney, and thus the power of attorney granted to the other partner—and that only to arrange banking formalities—was not sufficient for conclusion of an arbitration clause, and thus the clause was invalid.

2. It is clear from Civil Procedure Code Art. 714 that in a proceeding to set aside an arbitration award the court will consider on its own initiative only one of the grounds for the petition, namely that provided in Civil Procedure Code Art. 712 §1(4), i.e. whether the arbitration award violates the rule

of law or principles of social coexistence. This means that all other grounds for the petition, including that there was no arbitration clause or that the clause was invalid or ceased to be in force (Art. 712 §1(1)), will be considered by the court only if they were asserted in the petition to set aside the arbitration award.

3. There is no catalogue of the rule of law, but such principles are shaped by the case law. Merits review of an arbitration award by the state court is thus limited to an assessment of whether the award violates such principles. ... This has to do with such violations of regulations of substantive law that result in violation of the principles of the rule of law, and the arbitration award violates the leading legal principles in force in the Republic of Poland, conflicts with the legal system, or violates the principles of the political and socio-economic order.

4. Conducting an evidentiary proceeding is intended to determine a state of facts, and it is not the task of the state court to conduct a new merits assessment of the correctness of the claims pursued before the arbitration court.

5. An arbitration award holding effective a setoff in violation of Civil Code Art. 505(1), or awarding damages in a situation in which no loss was suffered, violates the principles of the rule of law.

6. Whether the assessment by the arbitration court was correct is unreviewable by the state court, but without a doubt ruling on the basis of a selective, unobjective assessment of the evidence violates the principles of the rule of law.