

**Czech (& Central European)  
Yearbook of Arbitration<sup>®</sup>**



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

**Volume VIII**

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**Arbitral Awards and Remedies**



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## Questions About This Publication

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All contributions in this book are subject to academic review.



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## List of Abbreviations

AAA	American Arbitration Association
ACCP	Austrian Code of Civil Procedure
ADR	Alternate dispute resolution
ArbAct	Act [Czech Republic] No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards, as amended
BEPS Project	Base Erosion and Profit Shifting Project
BIT	Bilateral Investment Treaty
CAFTA	Central American – United States Free Trade Agreement
CAM	Chamber Arbitral Maritime
CAS	Chromalloy Aeroservices
CCI RF	Chamber of Commerce and Industry of the Russian Federation
CETA	Comprehensive Economic and Trade Agreement
CFC	Controlled Foreign Companies
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CJEU	Court of Justice of the European Union
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
DTC	Double Tax Conventions
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EU	European Union
European Convention on International Commercial Arbitration	European Convention on International Commercial Arbitration Geneva, 1961
FAA	Federal Arbitration Act
FCIArb	Fellow of the Chartered Institute of Arbitrators
FOSEA	Federation of Oil, Seeds and Fats Associations
FTA	Free Trade Agreement

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<b>GAA</b>	Guarantees Acknowledgment Act of Alberta
<b>GAFTA</b>	Grain and Feed Trade Association
<b>GCCP</b>	German Code of Civil Procedure
<b>Geneva Convention 1927</b>	Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927
<b>Geneva Protocol 1923</b>	Protocol on Arbitration Clauses, Geneva, 24 September 1923
<b>Hague Convention</b>	Convention for the Pacific Settlement of International Disputes adopted at the 1907 Hague Peace Conference
<b>HKIAC</b>	Hong Kong International Arbitration Centre
<b>ICAC</b>	International Commercial Arbitration Court
<b>ICC</b>	International Chamber of Commerce
<b>ICCA</b>	International Congress and Convention Association
<b>ICDR</b>	International Centre for Dispute Resolution
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICSID Convention</b>	Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 1965
<b>ICT</b>	International Court of Justice
<b>ICT Rules</b>	the Rules of the International Court of Justice of 1978
<b>ICT Statute</b>	the Statute of the International Court of Justice of 1945
<b>ILA</b>	International Law Association
<b>IMA</b>	Arbitration Center at the Institute of Modern Arbitration
<b>JAMS</b>	Judicial Arbitration and Mediation Services
<b>LCIA</b>	The London Court of International Arbitration
<b>LMAA</b>	London Maritime Arbitrators Association
<b>MAC</b>	Maritime Arbitration Commission
<b>MAP</b>	Mutual Agreement Procedure

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<b>MGIMO</b>	Moscow State Institute of International Relations
<b>ML</b>	UNCITRAL Model Law on International Commercial Arbitration
<b>NAFTA</b>	North American Free Trade Agreement
<b>New York Convention</b>	Convention in the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>PAI</b>	Permanent Arbitral Institution
<b>PILA</b>	(Swiss) Private International Law Act
<b>PILS</b>	Private International Law of Switzerland
<b>QMUL</b>	Queen Mary University of London
<b>RAAB</b>	Arbitral Institution for Constructions
<b>RF CCI</b>	Chamber of Commerce and Industry of the Russian Federation
<b>RIAA</b>	Reports of International Arbitral Awards
<b>RSP</b>	Arbitration Center at Russian Union of Industrialists and Entrepreneurs
<b>SCC</b>	Stockholm Chamber of Commerce
<b>SIAC</b>	Singapore International Arbitration Centre
<b>Slovak Arbitration Act</b>	Act No. 244/2002 Coll. on Arbitration, as amended
<b>Slovak Constitution</b>	Act No. 460/1992 Coll. Constitution of the Slovak Republic
<b>Swiss Federal Constitution</b>	Federal Constitution of the Swiss Confederation of April 18, 1999
<b>TAS</b>	Tribunal arbitral du sport
<b>UAL</b>	Law of Ukraine “On International Commercial Arbitration”
<b>UCCI</b>	Ukrainian Chamber of Commerce and Industry
<b>UML</b>	UNCITRAL Model Law on International Arbitration
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Arbitration Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law
<b>UNCITRAL Model Law</b>	Model law on International Commercial Arbitration as adopted by the United

**UNCTAD**

**VIAC**

**WIPO**

**ZPO**

Nations Commission on International  
Trade Law on 21 June 1985, with  
amendments on 7 July 2006  
United Nations Conference on Trade and  
Development  
Vienna International Arbitral Centre  
World Intellectual Property Organization  
German Civil Procedure Code



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Case Law

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## Poland - the Supreme Court Judgments

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Marek Topór, associate, Kubas Kos Galkowski,

Kamil Zawicki, attorney at law, partner, Kubas Kos Galkowski (ed.)

### Abbreviations used in annotations

k.c. [POL]	Kodeks cywilny z dnia 23 kwietnia 1964 r. [Civil Code] published in: Dziennik Ustaw [Journal of Laws] 1964, No. 16, item 93, as amended;
k.p.c. [POL]	Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [Code of Civil Procedure of 17 November, 1964], published in: Dziennik Ustaw [Journal of Laws] 1964, No. 43, item 296, as amended;
p.p.m. [POL]	Prawo Prywatne Międzynarodowe z dnia 4 lutego 2011r. [Private International Law of 4 February 2011], published in: Dziennik Ustaw [Journal of Laws] 2011, No. 80, item 432, as amended;
n.y.c. [POL]	Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych sporządzona w Nowym Jorku z dnia 10 czerwca 1958 r. [Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958], published in: Dziennik Ustaw [Journal of Laws] 1962, No. 9, item 41, as amended;

- I. **The control of the decision of the arbitration court is not equivalent to the control within the appeal proceedings typical for the state judiciary. The specificity of the state judiciary control over arbitration courts' awards results in the fact that a potential breach of substantive law cannot cause an arbitrary sentence's revocation *per se*, unless that infringement would lead to a violation of the basic principles of the legal order of the Republic of Poland, whereas the faulty interpretation of limitation regulations does not cause a contradiction of the arbitration court's decision herewith. (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. I CSK 464/16 of 26 May 2017)<sup>1</sup>**

**Key words:**

*binding power of the state court's judgments | state courts | Polish arbitration law | public order clause*

**States involved:**

[POL] - [Poland];

[DE] - [Germany]

<sup>1</sup> The full text of this Decision is available in Polish on the website of the Polish Supreme Court at: [http://www.sn.pl/orzecznictwo/SitePages/Baza\\_orzeczen.aspx?ItemSID=24881-57a0abe2-a73c-441d-9691-b79a0c36be5c&ListName=Orzeczenia3](http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?ItemSID=24881-57a0abe2-a73c-441d-9691-b79a0c36be5c&ListName=Orzeczenia3) (accessed on 23 August 2017).

***Laws Taken into Account in This Ruling:***

Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [*Code of Civil Procedure of 17 November 1964*] [k.p.c.] [POL], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 43, item 296, as amended; Articles 386 § 6<sup>2</sup>, 1206<sup>3</sup>

Kodeks cywilny z dnia 23 kwietnia 1964 r. [*Civil Code*] published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 16, item 93, as amended; Article 751<sup>4</sup>

<sup>2</sup> Article 386. k.p.c. [POL] (unofficial translation): § 1. If an appeal is accepted, the court of second instance shall vary the contested judgment and shall adjudicate on the merits of the case.

§ 2. If proceedings are established to have been invalid, the court of the second instance shall set aside the contested judgment, annul the proceedings insofar as they are invalid and refer the case back to the court of first instance for reconsideration.

§ 3. If a complaint is subject to rejection or there are grounds to terminate proceedings, the court shall set aside the judgment and reject the complaint or terminate the proceedings.

§ 4. Except in cases as referred to in § 2 and 3, the court of second instance may set aside a contested judgment and refer a case back for reconsideration only if the court of first instance did not adjudicate on the merits of the case or if the issuing of a judgment requires the entire evidentiary hearing to be repeated.

§ 5. If a judgment is set aside and a case is referred back for reconsideration, the case is heard by a different panel.

§ 6. The legal assessment and indications for further proceedings referred to in a statement of reasons for a judgment of the court of second instance shall be binding both on the court to which a case is referred and on the court of the second instance while the case is reconsidered. However, this shall not apply if the legal status changes.

<sup>3</sup> Article 1206. k.p.c. [POL] (unofficial translation) § 1. A party may file a motion to set aside a judgment of an arbitration court if:

1) there was no arbitration clause, or an arbitration clause is void, invalid or has expired according to relevant law,

2) a party was not duly notified of the appointment of an arbitrator or proceedings before an arbitration court, or was otherwise deprived of the possibility to defend his rights before an arbitration court,

3) a judgment of an arbitration court concerns a dispute which is not covered by an arbitration clause or falls beyond the subject-matter and scope of that clause, however, if adjudication in matters covered by an arbitration clause may be separated from adjudication in matters not covered by that clause or falling beyond the subject-matter and scope of that clause, a judgment may only be set aside insofar as it concerns those matters which are not covered by the arbitration clause or fall beyond the subject-matter and scope of that clause; the fact that a judgment falls beyond the subject-matter and scope of an arbitration clause may not be a basis to set that judgment aside if a party who attended the proceedings did not raise allegations against the hearing of claims falling beyond the subject-matter and scope of the arbitration clause,

4) requirements concerning the composition of an arbitration court or the basic principles of proceedings before that court, as provided for by this Act or determined by the parties, were not met,

5) a judgment was achieved by means of an offence or on the basis of a false or falsified document,

6) a non-appealable court judgment has been issued in the same case between the same parties.

§ 2. Moreover, a judgment of an arbitration court shall be set aside if the court determines that:

1) the dispute cannot be settled by an arbitration court according to this Act,

2) a judgment of an arbitration court is contrary to the basic principles of the legal order of the Republic of Poland (the public order clause).

<sup>4</sup> Article 751. k.c. [POL] (unofficial translation): The following shall be subject to limitation upon the lapse of two years:

1) claims for remuneration for the acts performed and for reimbursement of expenses incurred, which are due to persons who live professionally by performing acts of such a kind on a permanent basis or within the scope of their enterprise's activity; the same shall apply to claims on account of advance payment granted to these persons;

2) claims on account of maintenance, care-taking, upbringing or education, if they are due to persons who live by such acts on a professional basis or to persons who run establishments designed for that purpose.

*[Rationes Decidendi]:*

- 18.01.** The fact that the legal assessment is not binding upon the arbitration court (as it is in the court proceedings) does not imply that the findings and interpretation of the law included in the state court's judgment setting aside the arbitration award are of no importance for the arbitration court that will be hearing the case *ex novo*. The arbitration court should consider such a judgement (i.e. the judgement setting aside the arbitration award) and come to the appropriate conclusions within the general duty of any arbitration court to issue a decision that will not be subject to appeal proceedings of the state court.

*[Description of Facts and Legal Issues]:*

- 18.02.** The dispute in this case concerned a contract for services concluded in 2003 between A – the plaintiff and B – the defendant. The parties submitted the contract to the jurisdiction of the Polish law and agreed that all disputes shall be brought before an *ad hoc* arbitration court, consisting of three arbiters.
- 18.03.** In its award of 14 December 2006, the *ad hoc* arbitration court ordered that the defendant (B) shall pay the remuneration and annual bonus to the plaintiff (A) as well as cover the costs of the arbitration proceedings.
- 18.04.** Following B's claim, the Regional Court in its judgement of 6 March 2008 set aside the judgment of the arbitration court in the part awarding the payment and stated that all of the letters sent to B – including the letters concerning the commencement and conduct of the arbitration proceedings – were not effectively delivered to the defendant. Although the plaintiff was aware that the defendant had changed his business name in the appropriate Register, A sent the letters subject to the former business name of the defendant. Consequently, the Regional Court found that B's allegation concerning the lack of the possibility to defend his rights before an arbitration court was justified.
- 18.05.** After the renewed constitution of the arbitration court, the court its award of 21 November 2012 ordered the defendant (B) to pay the owed sum with interest to the plaintiff and cover the costs of the proceedings.
- 18.06.** As a result of an examination of the defendant's motion, the Regional Court in its judgement of 12 December 2014 set aside the award of the arbitration court and considered that the contested award violated several fundamental principles of the legal order of the Republic of Poland (however, different principles than the one indicated in the defendant's motion as allegedly infringed upon), i.e. the arbitration court, after examination of the argument of the limitation period, stated

that the period of limitation set in Article 751 k.c. [POL] has not expired, because it was effectively interrupted by the call to arbitration, delivered to B, whereas the Regional Court in its judgement of 6 March 2008 stated that the call to arbitration as well as any other pleadings were not effectively delivered to the defendant. Nevertheless, the arbitration court conducted its own legal assessment of the delivery thereof and stated not to be bound by the assessments of the Regional Court made in the award of 6 March 2008.

- 18.07.** Considering the above, the Regional Court stated that the own legal assessments of the arbitration court violated the fundamental principle of the legal order of the Republic of Poland, i.e. the principle of the validity and permanence of final and enforceable judgments.
- 18.08.** A appealed against the unfavourable judgment. On 16 December 2015, the Court of Appeals rendered a judgment in which it changed the Regional Court's ruling and dismissed the complaint.
- 18.09.** The court didn't sustain the argumentation of the court of first instance and argued that the judgment of the arbitration court didn't violate the principle of the finality of judgements (*res iudicata*), because the binding force of the judgements concerns only the subject-matter of the adjudication, but not the reasons for the judgement and the assessment of facts.
- 18.10.** Moreover, the Court of Appeals clarified that the examination of the merits of the arbitration court's award is not the scope of state courts' duties which means that the determinates concerning the limitation period may not be controlled.
- 18.11.** Eventually, B filed a cassation appeal to the Supreme Court in which B requested the setting aside of the contested ruling and referring of the case back for reconsideration or – alternatively – for setting aside the contested ruling and the dismissal of A's appeal.

*[Decision of the Supreme Court]:*

- 18.12.** The Supreme Court ruled in favour of A and dismissed B's cassation appeal. Namely, it held that the binding force of the judgment doesn't comprehend the assessment of facts as well as motives of the ruling, included in the statement of the reasons for the judgment.
- 18.13.** Furthermore, the Supreme Court stated, that amidst the arbitration court re-ruling on the basis of the same arbitration clause, after a revocation as a consequence of the complaint and the court that admitted the complaint to set the arbitration award aside, there is no analogical correlation corresponding

to the court of first and second instance in the structure of the state judiciary. The Code of Civil Proceedings did not adopt a structure present in some legislations, within which the state court, admitting a complaint to set aside a judgment of an arbitration court, may refer the case to an arbitration court for reconsideration. Consequently, the arbitration court is not bound by legal assessment and indications following the regulation of Article 386 § 6 k.p.c. [POL].

- 18.14. The control of the decision of the arbitration court is not equivalent to the control within the appeal proceedings typical for the state judiciary. The specificity of the state judiciary control over arbitration courts' awards results in the fact that a potential breach of substantive law cannot cause an arbitrary sentence's revocation *per se*, unless that infringement would lead to a violation of the basic principles of the legal order of the Republic of Poland, whereas the faulty interpretation of limitation regulations does not cause a contradiction of the arbitration court's decision herewith.
- 18.15. The presented arguments enabled the Supreme Court to assert that the Arbitration Court had not violated the basic principles of the legal order of the Republic of Poland.

**II. There is no legal basis to assume that the special power of attorney for the conclusion of an arbitration agreement is necessary for the effectiveness and validity of the arbitration clause. The exchange of documents in the form of an email is sufficient to conclude an effective arbitration clause, irrespective of the fact that it does not meet the requirements of written form under the Polish Civil Code. According to the principle of separability in international arbitration, the issue of authorisation to enter into an arbitration agreement should be analysed separately from the main agreement. (Supreme Court (*Sąd Najwyższy*) Civil Chamber Decision, Case No. V CSK 392/16 of 2 March 2017)<sup>5</sup>**

<sup>5</sup> The full text of this Decision is available in Polish on the website of the Polish Supreme Court at: <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/V%20CSK%20392-16-1.pdf> (accessed on 23 August 2017).



**Key words:**

*legal form for power of attorney to conclude an arbitration agreement | special power of attorney | polish arbitration law | public order clause*

**States involved:**

[POL] - [Poland]

**Laws Taken into Account in This Ruling:**

Kodeks cywilny z dnia 23 kwietnia 1964 r. [*Civil Code of 23 April 1964*], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 16, item 93, as amended; Articles 98,<sup>6</sup> 99<sup>7</sup>

Prawo Prywatne Międzynarodowe z dnia 4 lutego 2011r. [*Private International Law of 4 February 2011*], published in: Dziennik Ustaw [*Journal of Laws*] 2011, No. 80, item 432, as amended; Articles 23,<sup>8</sup> 25 Section 1<sup>9</sup>

Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych sporządzona w Nowym Jorku z dnia 10 czerwca 1958 r. [*Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958*], pub-

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<sup>6</sup> Article 98 k.c. [POL] (unofficial translation): The general power of attorney shall confer authorization to acts of ordinary management. Acts which exceed the scope of ordinary management shall require a power of attorney specifying their kind unless statutory law requires a power of attorney for a particular act.

<sup>7</sup> Article 99 k.c. [POL] (unofficial translation): Section 1. If the validity of an act in law requires a special form, the power of attorney authorizing the performance of that act shall be granted in the same form. Section 2. A general power of attorney shall be made in writing on pain of nullity.

<sup>8</sup> Article 23 p.p.m. [POL] (unofficial translation): Section 1. Power of attorney shall fall under the law chosen by the principal. However, in relation to a third party with whom an attorney performed an act in law, one may invoke the chosen law only in the case in which such a party knew or might have easily learned about such choice of law. A principal may invoke the chosen law in relation to the attorney only in the event in which the latter knew or might have easily learned about the choice of law.

Section 2. If no law is chosen, the power of attorney shall subsequently fall under:

- 1) the law of the state of the attorney's seat in which he/she permanently operates; or
- 2) the law of the state in which the principal's enterprise is situated, if the attorney permanently operates there; or
- 3) the law of the state in which the attorney actually operated when representing the principal or in which he/she should operate according to the principal's intent.

<sup>9</sup> Article 25 p.p.m. [POL] (unofficial translation): Section 1. The form of an act in law shall fall under the law governing in respect of such an act. However, it shall be sufficient to preserve the form stipulated by the law of the state in which the act is performed. If a contract is entered into by persons staying in different states upon the making of the declaration of intent, it shall be sufficient to preserve the form stipulated for such an act by the law of one of such states.

lished in: Dziennik Ustaw [*Journal of Laws*] 1962, No. 9, item 41, as amended; Articles II Paragraph 2,<sup>10</sup> V Paragraph 2<sup>11</sup>

*[Rationes Decidendi]:*

**18.16.** There is no need for a special power of attorney for the effectiveness and validity of the arbitration agreement entered into by the agent. The exchange of documents in the form of an email is sufficient to conclude an effective arbitration clause, irrespective of the fact that it does not meet the requirements of a written form under the regulation of the Polish Civil Code.

*[Description of Facts and Legal Issues]:*

**18.17.** The dispute in this case arose from the bioethanol delivery agreement concluded between A (Hungarian company – the plaintiff) and B (Polish limited liability company – the defendant). The contract conditions, in particular the price and delivery times, were negotiated via telephone, and then set forth and signed as the attachment to the email. Next, the parties exchanged such documents via email. What is important, the contract included a provision on the choice of law and the arbitration clause.

**18.18.** Company A's representative properly signed the abovementioned contract, while Mr. D.G. was acting on behalf of company B as the managing director who was not a member of B's Board of Directors. It should be emphasized that Mr. D.G. was acting *de facto* on behalf of B and another company from B's group of companies – C (Polish joint stock company). However, Mr. D.G. was orally introduced by Mr. G.Ś., the President of the Management Board of B, as a person responsible for contracts with A, and before signing the contract him, never presented a written empowerment from any of the companies. Both company B and C had the same person as the President of the Management Board, and belonged to the same capital group.

**18.19.** The goods were delivered, and B only paid partially for them. In the beginning, company B asked A to reduce the price of the bioethanol, but ultimately adopted the position that it has not entered into a binding contract for the delivery of bioethanol,

<sup>10</sup> Article II n.y.c. [POL] (official text): Paragraph 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

<sup>11</sup> Article II n.y.c. [POL] (official text): Paragraph 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 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.

- maintaining that D.G. was not employed by B and had no power of attorney to represent the company.
- 18.20.** A initiated arbitration against B (claim for payment), and eventually obtained a favourable award ordering B to pay A for the remaining part of the payment for delivery.
- 18.21.** Next, A motioned for the recognition of the award in Poland, and on 29 December 2015, the Regional Court granted the enforcement arguing that pursuant to Article II section 2 of the n.y.c. [POL] the term “agreement in writing” means both, the arbitration clause set out in the contract, and the compromise – signed by the parties to the agreement or contained in an exchange of letters or telegrams. In the opinion of the state court of first instance (the Regional Court), under the n.y.c. an exchange of documents in the form of an email is sufficient to conclude a valid and effective arbitration clause.<sup>12</sup>
- 18.22.** Furthermore, the court found that only after ascertainment that the given arbitration agreement meets the formal requirements under Article II of the n.y.c. [POL] it is possible to go further into the analysis of the case merits, namely the premises specified in Article V of the n.y.c. [POL].
- 18.23.** The Regional Court was of the opinion that the law applicable to the question of the managing director’s authority must be analysed and determined separately from the issue of the law applicable to the main contract. The court indicated that in accordance with Article V Paragraph 2 the recognition of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter is not arbitrable under the law of that country; or the award would be contrary to the public policy of that country. Further, the court stated that both the n.y.c. and the European Convention on International Commercial Arbitration did not regulate the issue of the law applicable to the power of attorney to conclude the arbitration agreement.
- 18.24.** Consequently, the court assumed that taking the circumstances of the case into account, there was no choice of law applicable to the power of attorney, thus in order to determine it, Article 23 of the p.p.m. [POL] should be applied. This, in turn, results in the fact that Article 25 Section 1 of the p.p.m. [POL] should be used for the form of the power of attorney. Eventually, after a detailed

<sup>12</sup> This is in line with the Supreme Court’s view expressed in the Case No. V CSK 323/11 of 13 September 2011. The full text of this Decision is available in Polish on the website of the Polish Supreme Court at: <http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/V%20CSK%20323-11-1.pdf> (accessed on 23 August 2017).

conflict-of-law analysis, the court stated that the Polish law is applicable for the power of attorney granted to D.G.

- 18.25.** Apart from this, the Regional Court argued that according to Article 99 Section 1 of the k.c. [POL] if a special form is required for the validity of the certain juridical act, a power of attorney to perform such act should be granted in the same form. However, in light of Article II of the n.y.c. [POL] for the effectiveness of the arbitration agreement a written form is required. Furthermore, the court stated that in the contemplated case there was, undoubtedly, no power of attorney granted to D.G. in written form, even in an electronic form as its variation.
- 18.26.** However, the court expressed the view that offence against the regulation regarding the form of a power of attorney to conclude an arbitration agreement does not constitute grounds to refuse the recognition of the award under Article V of the n.y.c. [POL]. The court also highlighted that the fact that the managing director acted on behalf of B with oral or implied authorization makes it possible for the court to recognize the award. What is crucial, if in the circumstances of the case, Mr. D.G. had no authorization, the court would have denied recognition under Article V of the n.y.c. due to the violation of the Polish public policy.
- 18.27.** Subsequently, B appealed against the unfavourable decision. On 25 March 2016, the Court of Appeals rendered the decision in which it denied B's appeal against the decision of the Regional Court, essentially sharing the position and reasoning of the court of first instance.
- 18.28.** In addition, but without affecting its decision, the Court of Appeals expressed the controversial thesis, that if indeed there was an award against the person who is not the debtor, that would not violate Polish public order clause.
- 18.29.** Eventually, B filed a cassation complaint to the Supreme Court in which contended that the Court of Appeals violated several provisions of the k.c. [POL] (Article 99) and the n.y.c. [POL] (Article V Paragraph 2).

*[Decision of the Supreme Court]:*

- 18.30.** The Supreme Court ruled in favour of B and accepted the cassation complaint.
- 18.31.** Firstly, the Supreme Court underlined the implications of the separability doctrine, arguing that there is no doubt about the autonomy of the arbitration clause in relation to the main contract in both literature and jurisprudence.<sup>13</sup> Consequently, it

<sup>13</sup> According to the doctrine of separability, the arbitration clause is juridically independent of the main contract in which it appears, see: A. Samuel (in:) Separability of arbitration clauses - some awkward

is assumed that the validity of the arbitration clause should be assessed independently, even if it takes the form of a clause in the contract.

- 18.32.** The assessment of the effectiveness of the power of attorney for the arbitration clause is independent of the assessment of the effectiveness of the power of attorney to conclude the main agreement, and the ascertainment that the agent was duly authorized to conclude the agreement is not decisive for the assessment that he or she was duly empowered to subject to the arbitration court's jurisdiction, on behalf of the principal, all the disputes arising out of the agreement.
- 18.33.** In other words, the law applicable to the arbitration agreement itself does not extend to the issues related to the power of attorney, i.e. the governing law of the arbitration agreement does not comprise the issues related to the power of attorney to conclude an arbitration agreement.
- 18.34.** Further, according to Article 23 Section 1 of the p.p.m. [POL] the power of attorney is subject to the law chosen by the principal. In the circumstances of the case, B has not made a choice of law to a power of attorney. Besides, it would be difficult to conclude impliedly on the choice of law. Thus, Articles 23 and 25 Section 1 of the p.p.m., [POL] indicating the Polish law as the law of the state of the agent's seat, should be applied.
- 18.35.** Furthermore, the requirement of a special power of attorney must arise from the provision of the appropriate Act (see: the second sentence of Article 98 of the k.c. [POL]), which means that this requirement cannot be imposed when there is no provision of the Act providing for such a requirement. The statutory law undoubtedly does not provide for such requirements for a power of attorney to the arbitration agreement. This means that there is no legal basis to assume that the special power of attorney for the conclusion of an arbitration agreement is a condition *sine qua non* for the effectiveness and validity of the arbitration clause, though, of course, it is sufficient for that purpose.
- 18.36.** Then, the Supreme Court gave some general remarks on the arbitration clause as a juridical act that has a direct impact on the manner in which the legal protection of a party is exercised. The importance and procedural effects of the arbitration agreement are so serious that it must be treated as an activity beyond the scope of ordinary management. Its effects are of a procedural

nature, because they shape the procedural situation of the party bound by the arbitration clause.

- 18.37.** The exchange of documents in the form of an email, ergo this special variant of the written form of the arbitration clause, is sufficient on the basis of international arbitration, irrespective of the fact that it does not meet the requirements of the written form resulting from the regulation of the Civil Code.
- 18.38.** Furthermore, the Supreme Court explained that the power of attorney to enter into an arbitration agreement should have constituted a document of equal form to the agreement itself (Article 99 Section 2 of the k.c. [POL]). Although the Court of Appeals came to the conclusion that the power of attorney has been effectively granted to Mr. D.G., in the circumstances of the case there was no proof that the written form was preserved, even in its electronic version.
- 18.39.** Finally, the Supreme Court underlined that concluding an arbitration agreement on the basis of an invalid power of attorney does not preclude the application of Article V Section 2 of the n.y.c. [POL] due to the violation of the Polish public policy.
- 18.40.** Consequently, the Supreme Court remitted the case for rehearing.

