

THE ISSUE OF THE SCOPE OF APPLICATION OF SUBSTANTIVE LAW NORMS BY AN ARBITRAL TRIBUNAL

Izabela Wysocka, MA

SWPS University, Poland

e-mail: iwysocka@swps.edu.pl; <https://orcid.org/0000-0001-5810-2438>

Abstract. The issue of the scope of application of substantive law norms by a tribunal of arbitration remains a relevant topic in Polish legal doctrine. Among legal scholars, there are still discrepancies in assessing to what extent an arbitral tribunal should apply substantive law. These uncertainties arise from the interpretation of Article 1194 of the Code of Civil Procedure and the manner in which the aforementioned legal norm is sanctioned. The answer to the research problem posed required an analysis of the public policy clause, the violation of which constitutes the basis for a complaint to set aside an arbitral award. The paper covers some basic principles of the legal order whose violation can result in the highest sanction for an award rendered by an arbitral tribunal – the setting-aside.

Keywords: arbitration proceedings; substantive law; public policy clause; principle of non-interference of state court

INTRODUCTORY REMARKS

The proceedings before an arbitral tribunal have their source in the provision for an arbitral tribunal, whose source is the autonomous will of the parties. Autonomy of will in arbitration manifests itself from the moment of renunciation of state jurisdiction and submission of the dispute to an arbitral tribunal through the provision for an arbitral tribunal. The legal nature of the arbitration agreement cannot be unequivocally determined, and the doctrine in this regard is also inconsistent. However, without delving into the previously discussed considerations, it should be emphasized that there is an inseparable bond between the concept of the source of arbitration and the fundamental principle of substantive civil law, which is manifested externally by the will of the parties in the form of the conclusion of an arbitration agreement, which is a *sine qua non* condition of the arbitral proceedings [Czech 2017, 59]. The autonomous will of the parties also translates into a decision regarding the law applicable to the arbitration proceedings. The issue of the application of substantive law norms by an arbitral tribunal is still relevant in Polish legal scholarship. This issue was raised

mainly before the amendment of the Code of Civil Procedure in 2005. Undoubtedly, despite a coherent line of case law on the application of substantive law by an arbitral tribunal, doubts arise in practice as to whether the limits established by the public policy clause are sufficient or whether the arbitral tribunal should be bound to a greater extent by substantive law, and whether its violation should be sanctioned in post-arbitration proceedings. This issue has recently returned to the academic agenda due to a case before the Arbitration Court at the National Chamber of Commerce regarding a claim for a declaration.¹ This paper analyses the views of legal scholarship and case law on the application of substantive law by an arbitral tribunal. To properly assess whether the current legal solutions are sufficient, the solutions of the German and French legal systems are also discussed. The above considerations lead to the conclusion as to whether the solutions indicated by the legislator in the Polish legal system are indeed sufficient.

1. THE NATURE AND SCOPE OF THE APPLICATION OF SUBSTANTIVE LAW NORMS BY AN ARBITRATION COURT IN THE POLISH LEGAL SYSTEM ACCORDING TO ARTICLE 1194 OF THE CIVIL PROCEDURE CODE

The issue of the scope of application of substantive law by an arbitration court has been and continues to be a subject of discussion among legal scholars. The source of this discussion is Article 1194(1) of the Code of Civil Procedure,² which states that an arbitration court shall resolve a dispute according to the law applicable to the given relationship, and, if the parties have explicitly authorized it to do so, according to general principles of law or principles of fairness. The current wording significantly differs from the previous version prior to the 2005 amendment. The former provision, Article 712(1)(4) CCP, allowed a party to demand the annulment of an arbitration award if the decision on the parties' claims is unclear, contradictory, violates the rule of law, or social coexistence principles. This provision laid the foundation for the discussion on the extent to which an arbitration court should be bound by substantive law. In Polish legal doctrine, two divergent views have emerged. P. Ballada was a proponent of the radical approach of binding the arbitration court to substantive law. In his argument, he maintained that it is necessary to observe the principles of substantive law by the arbitration court and, therefore, it has an obligation to apply it correctly; otherwise, it would pose a risk to the rule of law in the legal system

¹ Judgment of the National Chamber of Commerce of the Arbitration Court of 24 April 2006, ref. no. SA 193/05, Lex no. 1724100.

² The Act of 17 November 1964, the Civil Procedure Code, Journal of Laws of 2023, item 289 as amended [hereinafter: CCP].

[Ballada 2002, 93]. On the other hand, J. Sobkowski presented a different view, pointing out that the basis of the arbitration proceedings is the agreement of the parties to submit to the arbitration court, whose foundation is the autonomous will of the parties. Therefore, an arbitration court cannot make decisions based on the substantive law indicated by the parties or on principles of fairness [Sobkowski 1980, 69]. The doctrine also raised the argument that the former provisions of the law did not explicitly indicate that the arbitration court could make decisions independent of substantive law, but the view was expressed that the arbitration panel could act as *amiable compositeurs*. [Błaszczak 2010, 206]. Contemporarily, however, introduced by the amendment of 2005, Article 1194 CCP, which is modelled on Article 28(1) of the Model Law³ obliges the arbitral tribunal to resolve the dispute on the basis of the law applicable to the specific legal relationship [Aslanowicz 2017, 116].

The discrepancy in the views of the doctrine, therefore, results from different interpretations of the norm of Article 1194 CCP. In particular, it should be noted that these doubts have arisen due to the fact that this provision is an example of *legis imperfectae* [Knoppek 2014, 71]. In the light of Article 1206 CCP, there is no such criterion that would constitute a basis for setting aside an arbitral award due to an erroneous interpretation of substantive law. However, in accordance with the established line of case law, the judiciary indicates that the setting aside of an arbitral award under Article 1206(2) may be justified only in the event of a breach of the substantive law applicable to the resolution of the relationship in respect of the basic principles of the legal order.⁴

At this point, attention should also be paid to the competence of the arbitrator, which is designated by the legislator under Article 1170(1) CCP, according to which the arbitrator may be a natural person regardless of citizenship, having full legal capacity. As follows from this legal basis, the legislator has not limited the competence of the arbitrator to individuals with legal education. Consequently, the lack of adequate understanding of the law due to the lack of appropriate education may lead to a mistaken interpretation of substantive law by the arbitral tribunal. In doctrine, it is emphasized

³ Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf [accessed: 10.01.2023].

⁴ Judgment of the Appellate Court in Warsaw of 27 January 2016, ref. no. I ACa 472/15, Lex no. 1999268. It should also be noted that in this ruling, the Appellate Court indicated that an incorrect interpretation of substantive law provisions, which formed the basis for resolving the dispute in question, does not necessarily constitute a violation of the public policy clause. The assessment of whether an arbitral award violates fundamental principles of the legal system should be formulated in a narrow manner.

that such an assumption, in light of Article 1194 CCP, is an argument in favour of the fact that the arbitral tribunal is not obliged to apply substantive law in a manner corresponding to the judgments of state courts [ibid.].

The above arguments indicate the validity of the claim that an arbitral tribunal, when rendering an arbitral award, evaluates substantive legal norms. Also noteworthy in this regard is the aforementioned judgment of the Arbitral Tribunal at the National Chamber of Commerce.⁵ In this case, the Arbitral Tribunal applied the provisions of Article 189 CCP, i.e. the action for a declaratory judgment. The subject of the arbitration was the issue of legal interest, namely the legal interest as a prerequisite for the admissibility of the action for a declaratory judgment [Gessel-Kalinowska vel Kalisz 2020, 779]. As indicated by B. Gessel-Kalinowska Kalisz, the question of the validity and correctness of the application of Article 189 CCP in arbitration proceedings should not be subject to analysis, as the validity of the action for a declaratory judgment is based on the provision of the arbitral tribunal. However, the issue of the scope of the application of the provisions of Article 189 CCP, in particular the prerequisite of legal interest arising from this provision, should be subject to analysis [ibid., 782-83]. In view of the representative of doctrine, it is unjustified to apply limitations resulting from the interpretation of the provisions of Article 189 CCP in this case, in particular the legal interest [ibid., 787].

2. BASIC PRINCIPLES OF LEGAL ORDER

The public policy clause includes within its scope the fundamental principles of the legal order arising from procedural rules as well as substantive law norms.⁶ In the case of a lack of conformity of the arbitral award with the fundamental principles of the legal order, it is not subject to assessment whether such conformity exists with all the absolutely binding norms of substantive law, but only the effect of the award – when it cannot be reconciled with the fundamental principles of the national legal order.⁷ According to the established line of jurisprudence of the Supreme Court, the basis for setting aside an arbitral award under Article 1206(2)(2) CCP is considered to be such principles of the legal order, which “include constitutional norms of fundamental importance, as well as fundamental principles

⁵ Ref. no. SA 193/05.

⁶ Judgment of the Appellate Court in Warsaw of 30 September 2020, ref. no. VII AGa 2119/18, Lex no. 3160237.

⁷ Judgment of the Supreme Court of 9 January 2019, ref. no. I CSK 743/17, LEX no. 2618514; judgment of the Supreme Court of 11 May 2007, ref. no. I CSK 82/07, OSNC 2008/6/64; judgment of the Supreme Court of 15 May 2014, ref. no. II CSK 557/13, LEX no. 1491130.

of individual areas of law, and constitutional-political and socio-economic principles.”⁸ The impossibility of appealing an arbitral award in case of an incorrect interpretation of substantive law also results from the fact that a state court, in proceedings for setting aside an award, does not examine the substance of the matter in terms of merit, nor in formal or legal terms.⁹ The above primarily follows from the principle of non-interference of the state court in proceedings before an arbitral tribunal [Michalik 2021, 37]. The principle of non-interference of the state court in proceedings before a non-state court is mainly based on Article 5 of the Model Law, which states that in matters not regulated by the law of arbitration, the state court is not authorized to intervene unless the law expressly permits it. However, in assessing the principle of non-interference of the state court in proceedings before a non-state court under the Polish legal system, attention should be paid in particular to Article 1159(1) CCP, which states that the court may only take action in the scope regulated by the provisions of this part of the Code. The legislator refers to the fifth part of the Code of Civil Procedure in the legal basis mentioned. As stated by the Supreme Court in its judgment of January 21, 2016, Article 1159(1) CCP “limits the interference of the state court in the functioning of the non-state court and the course of proceedings before the non-state court in the scope regulated by Article 1154-1217 of the Code of Civil Procedure to cases defined by law.”¹⁰

As indicated above, the catalogue of basic principles of legal order is an open catalogue, which consequently raises many discrepancies in the views of legal scholars. The following text analyses the case law of Polish common courts in order to assess which principles should be considered as basic principles of the legal order. The first principle to be distinguished is the principle of party autonomy. The Supreme Court indicated in a judgment of June 15, 2021 that the content of this principle is complex, but it can certainly be recognized that its basic aspect is the freedom to undertake legal actions in accordance with the will of the given entity, which is expressed in “the freedom to establish, modify and terminate a civil law relationship,

⁸ Decision of the Supreme Court of 7 June 2019, ref. no. I CSK 76/19, Lex no. 2688975.

⁹ Judgment of the Supreme Court of 13 December 1967, ref. no. I CR 445/67, OSNCP 1968 No. 8-9, item 149; judgment of the Appellate Court in Szczecin of 23 April 2008, ref. no. I ACa 204/07, Legalis no. 298774; judgment of the Appellate Court in Katowice of 26 April 2018, ref. no. V AGa 570/18, Legalis no. 2654102.

¹⁰ Judgment of the Supreme Court of 21 January 2016, ref. no. III CSK 429/15, OSNC-ZD 2017/3/47. The Appellate Court in Krakow, in its judgment of 17 June 2014, ref. no. I ACa 540/14, stated that Article 1159(1) CCP “indicates the exclusion of the jurisdiction of state courts in cases where the parties have submitted their dispute to arbitration. However, in situations where the possibility of taking action by a state court is an exception, each case must clearly result from the law, and an extended interpretation of exceptions is not permissible,” Legalis no. 1185865.

to choose a counterparty (party) to a legal transaction and to shape a legal transaction.”¹¹ The court also highlighted that, within the principle of party autonomy, it is essential to respect the actual will of the parties in the light of the provisions of civil substantive law on the interpretation of will. Judicature also indicates that one of the primary principles of the legal order of the Republic of Poland is the comprehensive consideration of the case, and failure to recognize its essence constitutes a breach of the public policy clause.¹² Moreover, within the scope of substantive law, jurisprudence emphasizes that the concept of public policy includes, *inter alia*, the principle of the restitutionary nature of liability for damages, the principle of freedom of contract and equality of parties, the principle of *pacta sunt servanda*, the principle of equal treatment of creditors in the reorganization proceedings, and the principle of economic freedom.¹³

Undoubtedly, therefore, it must be acknowledged that the range of principles that a court may deem to be fundamental principles of the legal order in the Republic of Poland is broad. Consequently, considering the fact that the concept of public policy is an indeterminate concept, it is subject to interpretation, and thus leaves the court with considerable discretion in proceedings concerning an application for the setting aside of an arbitral award.¹⁴ However, as previously demonstrated, not every violation of substantive law resulting from an erroneous application of substantive law or a faulty interpretation leads to the recognition that there has been a breach of public policy. The above only justifies that the provision of Article 1194 CCP is fundamentally narrowly sanctioned within the proceedings for setting aside an arbitral award, as it is limited solely to the public policy clause.

3. THE SCOPE OF APPLICATION OF SUBSTANTIVE LAW BY AN ARBITRAL TRIBUNAL IN GERMAN AND FRENCH LAW

In German law, arbitration has a long and significant history both in practice and in law. The Civil Procedure Code, originating from the last century, has included Book X, which regulates arbitration proceedings from the very beginning [Böckstiegel 1997]. The provisions of the German Civil Procedure Code in Book X have always been characterized by respect for the parties’ autonomy as the foundation of arbitration proceedings

¹¹ Judgment of the Supreme Court of 15 June 2021, ref. no. V CSKP 39/21, Lex no. 3245326.

¹² Judgment of the Court of Appeal in Warsaw of 18 November 2019, ref. no. VII AGa 804/19, Lex no. 2788564.

¹³ Judgment of the Court of Appeal in Poznań of 27 June 2018, ref. no. I ACa 232/17, Lex no. 2549899.

¹⁴ Judgment of the Court of Appeal in Katowice of 31 July 2017, ref. no. V ACa 129/17, Lex no. 2659678.

[Wojciechowski 2008, 105]. It is worth noting that the Polish legislator used the solutions of Book X of the German Civil Procedure Code during the legislative work on the reform of the Polish Civil Procedure Code in the field of arbitration proceedings [Wiśniewski 2015, 167]. The issue of the scope of application of substantive law by an arbitral tribunal is regulated in para. 1051 of the German Code of Civil Procedure.¹⁵ According to para. 1051(1) of the German Code of Civil Procedure (ZPO), an arbitral tribunal decides a dispute in accordance with the laws that the parties have designated as applicable to the substance of the dispute. The reference to the law or legal system of a specific country, unless the parties have expressly agreed otherwise, is to be understood as a direct reference to the substantive law of that country, rather than its conflict of laws rules [Wojciechowski 2008, 105]. Pursuant to this legal provision, the choice of substantive law applicable to a given arbitration proceeding is governed by the parties' autonomous will. However, it should be noted that para. 1051 only applies if the place of arbitration is in Germany (para. 1025(1) ZPO).

In French law, the rules governing arbitration proceedings are set forth in Book IV. Moreover, it should be noted that these rules do not mirror the UNICTRAL Model Law, which served as the foundation for the German provisions on proceedings before a court of arbitration and, as mentioned above, also for the amendment of the Polish Code of Civil Procedure in 2005 [Idem 2009, 167]. The scope of the substantive law applicable to a court of arbitration is regulated by Article 1474, which provides that the arbitrator decides the dispute in accordance with the principles of law, unless the parties have authorized him to render a decision as an *amiable compositeur* (according to the principles of equity) in the arbitration agreement [ibid., 178]. It is worth noting the distinction between deciding as an arbitrator *ex aequo et bono* and as an *amiable compositeur* [Mońdział 2015, 160]. Deciding *ex aequo et bono* directly expresses a decision based on the principles of equity. In this regard, the task of the arbitrators is to "make a subjective assessment according to their own concept of a fair settlement of the dispute" [Ereciński 2012, 793]. In contrast, the concept of *amiable compositeur* is much more significant in the French system of arbitration proceedings, as this concept originates from French law [Mońdział 2015, 160-61]. As Article 1474 of the French Code of Civil Procedure indicates, the arbitral tribunal is obliged to decide based on the principles of law, unless the parties have authorized it to render a decision as an *amiable compositeur*. The difference between deciding on the principles of equity and as an *amiable compositeur* is significant in this regard, as an *amiable compositeur* is obliged to apply the law, but in a suitably modified way [Mońdział 2015, 161].

¹⁵ Zivilprozessordnung [hereinafter: ZPO].

FINAL CONCLUSIONS

From the conducted analysis of the scope of application of substantive law by an arbitration court, the first conclusion that emerges is the search for the source of the parties' will in the fundamental principle of civil law – the autonomy of the parties' will. It should be acknowledged that in arbitration proceedings, the arbitration court should primarily be guided by the parties' will and intention to submit to arbitration. Subsequently, in seeking an answer to the question of what should be the scope of application of substantive law by an arbitration court, in line with the developed case law, it is one that does not violate the clause of public policy. However, it should also be pointed out that, despite the fact that the clause of public policy is an indeterminate concept, it only includes those most important basic principles of the legal order within its scope. The narrow scope of sanctioning any violation of substantive law by an arbitration court, whether through failure to apply the criteria arising from the substantive norm or through erroneous interpretation, allows the arbitration court a broad range of decision-making. Finally, the issue of a claim for determination in arbitration proceedings deserves emphasis. It is the duty of the adjudicating panel to assess the validity of application, whether in the case of Article 189 CCP or in the case of another legal norm.

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