

LIGHT Sp. z o.o.

(CLAIMANT)

V.

ASCO Poland Sp. z o.o.

(RESPONDENT)

POZMOOT 2023

RESPONDENT MEMORIAL

AMELIA MAZURKIEWICZ - PISAREK and OSKAR URBAN

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translations and abbreviations

Article	art
Spółka z ograniczoną odpowiedzialnością (Sp. z o.o.)	limited liability company (LLC)
LIGHT Sp. z o.o.	LIGHT LLC
ASCO Poland Sp. z o.o.	ASCO Poland LLC
Kodeks Cywilny (k.c.)	Civil Code (CC)
Kodeks spółek handlowych (K.s.h)	Code of Commercial Companies (CCC)
Kodeks postępowania cywilnego (k.p.c.)	The Code of Civil Procedure (CCP)

Introduction

Honorable members of the tribunal, my name is Amelia Mazurkiewicz Pisarek and this is my co-counsel Oskar Urban. We are representing the respondent in the present dispute. The representatives of ASCO in submission 1, 2 and 3 will prove beyond reasonable doubt the necessity of dismissal of the case by the common court, and alternatively the dismissal of the case by the common court due to the waiver of previous claims by the claimant.

Statement of facts

- Cecilia Cat is the appointed president of the LIGHT LLC management board, entitled to independently represent the company without any restrictions.
- The hypermarket chosen to enforce the strategy of introducing candles into shopping malls throughout the country was: ASCO Poland LLC.

- LIGHT LLC represented by the president of the management board Cecilia Cat has extended the annex for existing cooperation with ASCO LLC.
- Cecilia Cat, while extending the annex for existing cooperation, agreed for LIGHT LLC to waive all claims for the previous cooperation, including the matter of ASCO LLC breach of provisions of art. 15 of the Act of 16 April 1993 on Combating Unfair Competition .
- Cecilia Cat moreover decided that any disputes arising from the future cooperation between the parties, regardless of the date of their occurrence, shall be submitted to the arbitration court.
- LIGHT Sp. z o. o. decided to file a lawsuit against ASCO Poland Sp. z o. o. to the District Court. The subject of the lawsuit was the payment of all previous fees other than the commercial margin.

Purpose of appeal:

Dismissal of the case by the common court due to the arbitration clause being signed by the president of the management board of LIGHT LLC Cecilia Cat. Alternatively dismissal of the case by the common court due to all claims for the previous cooperation being waived.

Opening speech:

Your Honor, the respondent is going to prove that the arbitration clause, being included into an annex extending the cooperation, did not go against the rules of social coexistence. Therefore it may not be considered due to the provisions of article 58 of the Civil Code invalid. The agreement was created following the provisions of article 353 of the Civil Code- the freedom of contracts, and did not contradict the nature of the relationship nor the law. Cecilia Cat, as the President of the Management Board, was entitled to independently represent the LIGHT LLC, and as such was obliged to exercise the diligence inherent in the professional nature of her business. If the court decides upon the admissibility of the lawsuit to the common court, the waiver of all claims for the previous cooperation between LIGHT LLC and ASCO LLC, including the breach of Art. 15 of the Act of 16 April 1993 on Combating Unfair Competition, creates a lack of basicity for the demands of the claimant.

Submission I

ISSUE:

Does the arbitration clause of the contract signed by the parties exclude this court's jurisdiction over the case?

LAW and APPLICATION:

The arbitration clause was agreed upon by the president of the management board of LIGHT LLC. According to which any disputes arising from the legal relations between the parties, regardless of the date of their occurrence, shall be submitted to the court of arbitration by one of the employers Organization. Nevertheless, LIGHT LLC decided to file a lawsuit against ASCO Poland LLC to the District Court. Therefore the case should be rejected due to the inadmissibility of the court proceedings.

Cecilia Cat as the President of the Management Board, was entitled to independently represent the company without any restrictions except from those outlined in the commercial companies code.

For equity commercial companies the code outlines restrictions in the following art. 205 of the Commercial Companies Code:

“If the board of directors is composed of more than one person, the method of representation shall be determined by the articles of association. If the articles of association do not contain any provisions in this regard, two members of the board of directors or one member of the board of directors together with a proxy shall be required to make statements on behalf of the company.”

Cecilia Cat, being the only member of the Management Board, was entitled in the articles of the association to independently represent the body, therefore creating the legal basis under a contract being embodied between LIGHT LLC and ASCO Poland LLC.

The clause, present within the contract, upon the occurrence of a legal dispute between two parties involved, being subjected to the court of arbitration was simultaneously legally included under the art. 353 of the Civil Code, the freedom of conclusion of a contract:

“Parties entering into a contract may arrange the legal relationship as they see fit, as long as the content or purpose of the relationship does not contradict the properties (nature) of the relationship, the law or the principles of social intercourse.”

According to the judicial decision of the appeal Court from 12th October 2022 (I ACa 193/21) the provision of Article 353 of the Civil Code belongs to the category of *ius cogens* provisions, and violation of any of the criteria of contractual freedom listed therein triggers the sanction of invalidity.

The criteria outlined in the Articles go as follows:

1. Does not contradict the properties (nature of the relationship)

The judicial decision (I ACa 193/21) defines such a condition as the direct plane of control being the internal consistency of the contract, and its indirect effect is to prevent the formation of the legal relationship that is grossly unfavorable to one of the parties. Furthermore as the judicial decision of the Supreme Court has established (III CZP 93/17) the term “grossly unfavorable” shall be understood as the abuse of stronger contractual position of one of the sides.

In the present case ASCO Poland LLC, informed LIGHT LLC of the arbitration court being a plausible institution for solving the disputes between two parties involved in a business relationship. Following the rule outlined in art. 1157 of the Code of Civil Procedure:

“Unless a special provision provide otherwise, the parties may submit to arbitration: disputes over property rights, except for cases of alimony”

Furthermore as it was assessed by the court decision (I ACa 1701/21) the principle of freedom of contract expressed in Article 353 of the Civil Code includes consent to the actual inequality of the parties, which may be expressed in the non-equivalence of their mutual legal

situation. Unequal distribution of the risk of obtaining benefits and the amount of benefits charged to one or both parties to the contract cannot, as a rule, in itself lead to the conclusion that the legal act violates the principles of contractual equity as invalid due the provisions of art, 58 of the Civil Code.

Therefore creating the basicity under validity of the clause upon the arbitration court proceeding, as it did not contradict the condition of the nature of relationship.

2. Does not contradict the law

The second condition is a matter of an objective assessment. Art. 1153 of the CCP creates the legal basis under the embodiment of the contract, assuming the submission of the case over property rights to the arbitration court.

Additionally the judicial decision (I ACa 193/21) requires for the formulation of the contract to be plausible and understandable to the other Party involved, in this case LIGHT LLC. As Cecilia Cat, being the president of the management board of the commercial company, did express the understanding of the provisions of the arbitration court clause, as it is agreed upon by both sides, the fulfillment of such conditions shall be stated simultaneously.

3. Does not contradict the principles of social intercourse

The third condition being a matter of subjective assessment shall be assessed basing on the established case-law. The judicial decision of the Supreme Court (III CZP 93/17) defines the principles of social intercourse as referring to the moral norms prevailing in society that regulate human relations including contractual relations, referring, among other things, to such values as honesty or fairness.

The judiciary has established the conditions shall be complementary and be seen as a coherent system designed to prevent contracts whose content or purpose impermissibly harms an overriding public or private interest from being entered into and deriving legal effects from them.

Conclusion:

In the present dispute the harm on private interest may not be stated. The applicable law: Polish Civics Code whose provisions regulate among other the acts of Limited Liability Companies as its scope as defined in article 1:

“This Code governs the civil law relations between natural and legal persons.”

For the property matters outlined by the President of Management Board of LIGHT sp.z o.o:

- disputes regarding any claims for the performance of the sales contract,
- claims for return of unjustified or improperly performed service arising in the event of invalidity of the whole or/and part of the sales contract,
- tort claims, if they result from a legal event related to the implementation of the sales contract or at the same time are considered non-performance or improper performance of the sales contract

Envisions among others the arbitration court.

Article 1157 of the Civics Code:

“Unless a special provision provides otherwise, the parties may submit to arbitration: disputes over property rights, except for cases of alimony;”

Therefore as it has been agreed upon by both sides, within the contract, a matter of breaching the provisions of article Art. 15 of the Act of 16 April 1993 on Combating Unfair Competition, as a case upon the property rights, shall be dismissed by an arbitration court and thus dismissed by the common court on grounds of inadmissibility of court proceedings.

Submission II**ISSUE:**

Does the waiver of claims against ASCO Poland LLC for previous cooperation by the CEO of LIGHT LLC remain in legal force?

LAW and APPLICATION:

Even if, *par impossible*, the court finds that the arbitration clause of the contract is contrary to the law or otherwise invalid the rest of the contract remains in force as art. 58 point 3 of the CC states:

“If only part of a legal act is invalid, the act shall remain in force as to the remaining parts, unless the circumstances show that without the invalid provisions the act would not have been carried out.”

Thus, the waiver of claims agreed to in the contract by Cecilia Cat, the President of the Management Board of LIGHT LLC, remains valid.

LIGHT LLC filed a lawsuit demanding damages against ASCO Poland LLC based on the breach of provisions of art. 15 of the Act of 16 April 1993 on Combating Unfair Competition. However, due to the waiver of claims by the Party, the particular circumstances of whether ASCO Poland did or did not breach the Act on Combating Unfair Competition are irrelevant as LIGHT LLC lawfully ceded its claim to seek damages.

Nevertheless, the claimant declared that the contract upon the waiver of claims was: exceeding the limits of freedom of contract and violating the principles of social coexistence.

As it has already been mentioned the rules governing social coexistence are a matter of subjective assessment, and therefore should be decided upon by the case-law:

The judicial decision (III CZP 93/17) has stated that the condition of social coexistence is more flexible, since it allows consideration of the totality of the circumstances of a particular case. ASCO LLC, has encouraged the representative of LIGHT LLC to agree upon the waiver of claims, basing on the assumptions that lawsuits do not build commercial relations, and claims for the retrospective period would exclude future cooperation. In this case the claims being particularly contentious and involving the accusations of wrongdoing would create the possibility that pursuing them could damage the relationship between the parties and make future cooperation less likely.

A similar matter of facts occurred in 2017: a dispute between Apple and Qualcomm. Apple filed a lawsuit against Qualcomm, alleging that the chipmaker had engaged in anticompetitive practices and charged excessive royalties for its patents. Qualcomm countersued, accusing Apple of breaching its licensing agreements and interfering with Qualcomm's relationships with its licensees.

While it is not to assess if solely the claims for the retrospective period were the reason for the breakdown of cooperation (illustrated via Apple stopping to use Qualcomm's chips in its iPhones and beginning to use chips from Intel instead) the ongoing litigation has made future cooperation less likely. This serves as valid proof that the representatives of ASCO Poland LLC did not exaggerate the facts when they warned representatives of LIGHT LLC of the risks of pursuing legal action for future cooperation.

Conclusion:

The information provided to the representative of LIGHT LLC was reliable, the issue of agreeing upon the waiver of claims, was a matter of an individual decision by a party fully entitled to make such a decision.

The art. 206 of the Commercial Companies Law, indicates:

"A member of the board of directors should, in the performance of his duties, exercise the diligence inherent in the professional nature of his business and maintain loyalty to the company."

Therefore the obligation of the inquiry upon the effects of the legal action, being the waiver of claims, laid upon the President of the Management Board Cecilia Cat. Being due to the provisions of provided article 205 of the CCC, entitled to independently represent the LIGHT LLC.

Closing speech

Your honor, today we have gathered to discuss the accusations of our clients. To conclude what was stated by my co-counsel and me. The lawsuit filed shall have been directed to the arbitration court. The contract, deciding upon such solution, was agreed upon by Cecilia Cat, the President of the management Board, being entitled to independently represent the commercial company. Therefore the provisions of such shall be abided by. Additionally the contract was embodied following the provisions of freedom of contracts, outlined in article 353 of the Civil Code, did not contradict: the nature of the relationship, the provisions of the law nor the rules governing social coexistence. However, if the claim for the inadmissability of the claim due to the inappropriate court proceedings will be rejected by the tribunal, following the provisions of article 58 of the Civil Code the issue of waiver of claims shall be simultaneously considered. Cecilia Cat decision was directed by her duty of exercising the diligence inherent in the professional nature of her business, and the reasonable assumptions presented by the representatives of the ASCO LLC. Therefore the waiver of claims shall be considered valid, and the lawsuit tackling the issue of breach of art. 15 of the Act of 16 April 1993 on Combating Unfair Competition, shall be considered as lacking basicity.