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P R A C T I C E   N O T E

A R B I T R A T I O N
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SELECTED SLOVAK COURT DECISIONS IN 2020 – 2022 IN NON-CONSUMER ARBITRATION MATTERS

In 2020 through 2022, Slovak courts rendered several decisions in non-consumer arbitration matters. Out of these decisions, we have selected those we consider the most important because they confirmed the existing case law, resolved several long-standing open issues, or departed from international arbitration practice.

(1) Slovak Supreme Court: arbitration in Slovakia is based on a so-called contractual theory with a limited interference by state courts

From the reasoning of the order of the Slovak Supreme Court dated May 31, 2022, docket no.: 5Obdo/52/2021, published in the Collection of the Supreme Court's Opinions and Courts' Decisions under no. 8/2023:

> "*85. Arbitration itself is a concept of private law, in which arbitrators, as private law persons, decide on disputes on the basis of a private act of the parties. By concluding an arbitration agreement or an arbitration clause, the parties voluntarily and knowingly waive their right to judicial protection exercised through the general ordinary courts and entrust it to the arbitral tribunal, which is a private-law person, since it cannot, considering its purpose and nature, be qualified among the organs of public authority. The Constitutional Court of the Slovak Republic has also noted that the parties to an arbitration agreement must be aware of the possible negative consequences of their decision to prefer the resolution of disputes arising between them through a private-law person – an arbitral tribunal – rather than through a judicial body of the Slovak Republic, as a result of which their fundamental right to judicial protection becomes somewhat limited by the scope ensuing from Section 40 of the Arbitration Act (inter alia, III. ÚS 335/2010, I. ÚS 143/2013, I. ÚS 234/2013). [...].*
>
> *88. In terms of its scope, the Arbitration Act is based on international concepts of arbitration and the standard acceptance of the range of legal relations that can be resolved by this form of out-of-court dispute*

resolution. Arbitration is qualified in the literature as an alternative dispute resolution method. Compared to the classical dispute resolution method, i.e. through the state court system, it has a number of specific features and characteristics. Arbitration is based on principles, some of which are identical to the principles of proceedings before a state court, and some of which are diametrically different. Common to both procedures is the objective of settling a dispute. However, the procedure itself and the outcome are different. In the settlement of a dispute through judicial proceedings, rights and obligations are settled through the state judicial apparatus. [...].

89. Civil litigation is defined as a method of settling relations implemented and guaranteed by state power exercised through judicial authorities. A number of principles characteristic for judicial proceedings follow from and are thus determined by it. By contrast, arbitration does not benefit from some of the advantages of being a judicial procedure covered by state power (in particular the lack of coercive power in the evidence-taking phase), and this is reflected in the formulation and characterisation of a number of fundamental principles inherent to the procedure (e.g. its non-public nature).

90. [...]. It is possible to agree with a view that an arbitrator (arbitral tribunal) does not find the law, but creates (settles, clarifies, fixes) the obligation relationship instead of the parties (parties to the arbitration). This authorization is not delegated by the sovereign state power, but is autonomous from it, as it comes from the parties' own private power (will), which they have entrusted to it through an arbitration agreement (similarly, the Constitutional Court of the Czech Republic, Pl. ÚS 37/08). If the law in force permits economic disputes to be decided by entities other than state entities (courts), it does not mean that they are public authorities, whereas the enforceability of an arbitral award does not guarantee an arbitrator the status of a public authority (cf. the Resolution of the Constitutional Court of the Czech Republic of February 6, 2007, docket no. IV.ÚS 224/07, also the Resolution of July 20, 2006, docket no. III. ÚS 32/06). Although an arbitral award, as a result of an arbitral tribunal's activity, can be defined as a certain act giving rise to the effects of res iudicata and constituting an execution title, it does not, however, lose its private law character in its essence, as a concept of private law through which the parties exercise their own contractual autonomy.

91. However, the aforementioned private law nature of an arbitration agreement and arbitration proceedings resulting in an arbitral award does not mean a complete exclusion of supervision over them by the state (according to Section 42 of the Arbitration Act, the provisions relating to the setting aside an arbitral award cannot be excluded by the parties to an arbitration agreement, except for the ground under Section 40(h) of the Arbitration Act). Equally, the private law nature of an arbitration agreement and arbitration proceedings resulting in an arbitral award does not mean a complete exclusion of their submission to the fundamental principles, on which they are based and on which the procedural rules characteristic for civil court proceedings and the decisions of state judicial authorities are based; these, however, are understood in terms of their appropriateness for arbitration. Such a fundamental principle is also the

right to a proper and fair trial under Article 36 of the Charter, Article 6(1) of the Convention, as well as Article 46(1) of the Constitution."

(2) Regional Court in Trnava: Slovak law recognizes positive and negative effects of the "Kompetenz-Kompetenz" doctrine, but state courts always have the "last word" on the arbitral tribunal's jurisdiction

From the reasoning of the order of the Regional Court in Trnava dated January 12, 2022, docket no.: 21Cob/112/2020:

> "*11.5 [...] The basis of modern arbitration law with an international element is the Kompetenz - Kompetenz doctrine, the "negative" effect of which is reflected in the fact that the primary assessment of whether or not the arbitral tribunal has jurisdiction to hear a case is made by the arbitral tribunal itself [...]. In other words, the arbitral tribunal has the primary competence to assess its own competence (this negative effect of the above-mentioned doctrine is also to some extent adopted by the legal system of the Slovak Republic). The doctrine is essential for a functioning arbitration because if the arbitral tribunal could not assess its own jurisdiction, a single objection of lack of jurisdiction, even a completely unfounded one, result in the need to stop or stay the arbitration for a long period of time. Such a procedure would effectively allow the defendant to interfere with the arbitration at any time. The court only assesses the arbitral jurisdiction upon the defendant's objection, whereas the raising of an objection gives rise to a duty of the court in the first place to examine whether the dispute should be heard or decided by arbitration. Pursuant to Section 7 of the CPC, the court shall disregard the objection and hear and decide the dispute itelf if the parties declare that they do not insist on the arbitration agreement, if the recognition of a foreign arbitral award has been denied in the Slovak Republic, if it finds that the dispute is not arbitrable (status matters, disputes over rights in rem in real property, etc.), and, finally, if the arbitral tribunal has refused to deal with the dispute. [...] For the sake of order, it should be added that the termination of proceedings under Section 6 of the CPC does not mean that the ordinary courts would waive the "last word" on the existence of arbitral jurisdiction. Although the assessment of arbitral jurisdiction will be made by the arbitral tribunal itself in the first place (the Kompetenz - Kompetenz doctrine), it will ultimately still be subject to judicial review, namely in a proceeding on an objection of lack of arbitral jurisdiction, in proceeding for the annulment of an arbitral award or, in case of arbitration with its place abroad, in proceeding for the recognition and execution of an arbitral award (Section 50 of the Civil Procedure Code - Act no. 244/2002 on Arbitration). However, the legislator did not consider it appropriate for this review to take place in the ordinary courts under the regime of Section 6 of the CPC before an arbitral tribunal has made a statement as to its jurisdiction. It can therefore be concluded that a court does not examine the validity, effectiveness or enforceability of an arbitration agreement following an objection under Section 6 of the CPC. Indeed, on the one hand, if the defendant is unable to refer to an arbitration agreement, which at least prima facie exists at the time of the objection, there is no reason for acourt to sustain the objection and terminate the proceeding, but on the other hand, referring to any agreement, which at least prima facie constitutes an arbitration agreement. is sufficient and the court has no*

> *jurisdiction to examine ts validity at that stage (except on the ground of objective non-arbitrability).*"

(3) Slovak Constitutional Court: an arbitral award ceases to have effects even without being set aside if a state court, after the arbitral award has been rendered, upholds an objection to the arbitral tribunal's jurisdiction filed after the arbitral tribunal has decided that it has jurisdiction

From the reasoning of the order of the Slovak Constitutional Court dated November 9, 2021, docket no.: IV. ÚS 553/2021:

> "*20. According to the district court's findings, the obligee used available legal means to object to the conduct of the arbitration under the Arbitration Act. The outcome of one of them (an application under Section 21(4) of the Arbitration Act), i.e. a judgment of an ordinary court upholding the challenge to the lack of jurisdiction of the arbitral tribunal, must produce adequate legal effects. The arbitral tribunal's (positive) decision on its jurisdiction was also binding on the execution court, which issued an authorization on that basis. However, Section 21(4) of the Arbitration Act explicitly provides for a possibility that a party to the arbitration challenge the arbitral tribunal's decision on the existence of its jurisdiction before an ordinary court. In the event of a subsequent decision of ordinary courts that the arbitral tribunal has no jurisdiction, the legal effects of the earlier (and challenged) decision of the arbitral tribunal on its jurisdiction cease to exist. It is therefore logical and rational for the district court to conclude that decisions rendered in the arbitration without the arbitral tribunal's jurisdiction are to lose their effects.*
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> *21. In the pending arbitration, the (final and binding) decision of an ordinary court on lack of the arbitral tribunal's jurisdiction should be reflected in a decision terminating the arbitration (Section 21(1) of the Arbitration Act with the consequences under Section 6(3) of the CPC). However, in reality, at the time of the decision of an ordinary court, the arbitration has already ended and the arbitral award issued is final and enforceable (Section 44(2) of the Arbitration Act). The question of the legal effects of the decision on lack of jurisdiction on the already existing arbitral decisions may therefore arise in enforcement proceeding. The Arbitration Act does not govern such situation. The District Court, as an execution court, concluded that the consequence of a decision of ordinary courts on lack of the arbitral tribunal's jurisdiction in relation to an execution title, which is an order rendered in arbitration, is the termination of the execution carried out for its enforcement.*
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> *22. The Constitutional Court, following the cornerstone argumentation of the District Court, did not find that the interpretation and conclusions of the District Court in the challenged order were arbitrary or manifestly unsubstantiated, nor did they imply such an application of the relevant provisions of generally binding legal regulations that woukd negate their essence and purpose. The District Court clearly and comprehensively explained the reasons for which it accepted the arguments put forward by the debtor in its complaint against the order of the senior court clerk of the District Court. In the light of the above, the Constitutional Court finds that the complainant's main ground of objections is unfounded. The reasoning*

> *of the District Court is sufficient for the Constitutional Court to conclude that there is no extreme inconsistency between the facts and the District Court's conclusions in the present case. In the Constitutional Court's view, it is primarily an issue of legality (an objection to an incorrect legal interpretation), not a constitutional issue. The interpretation used cannot be said to be manifestly inappropriate or to lead to an absurd result.*"

(4) Slovak Supreme Court: an arbitral award may only be set aside for defective reasoning if the defects amount to extreme violation of due process

Legal opinions from the order of the Slovak Supreme Court dated May 31, 2022, docket no.: 5Obdo/52/2021, published in the Collection of the Supreme Court's Opinions and Courts' Decisions under no. 8/2023:

> "*II. The principle of equality of parties within the meaning of Section 40(1)(g) in relation to Section 17 of Act No. 244/2002 Coll. on Arbitration, in force until December 31, 2014, also covers the requirement for a proper reasoning of a domestic arbitral award.*
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> *III. However, a violation of the principle of equality of the parties to the arbitration in terms of the comprehensiveness of the reasoning of a domestic arbitral award may only be found quite exceptionally, in cases constituting an extreme interference with the right to a fair trial (e.g. a complete absence of the reasoning of an arbitral award, which was not excluded from its requirements upon the parties' agreement, or a complete lack of addressing factual and legal objections of a party to the arbitration that are fundamental to the case) that would result in a complete denial or a manifest violation of the equality of the parties to the arbitration.*"

(5) Slovak Supreme Court: the subject-matter of a setting aside proceeding is not a review of an arbitral award on merits

Legal opinion from the order of the Slovak Supreme Court dated May 31, 2022, docket no.: 5Obdo/52/2021, published in the Collection of the Supreme Court's Opinions and Courts' Decisions under no. 8/2023:

> "*I. The proceeding before an ordinary court on an action for setting aside an arbitral award under Act No. 244/2002 Coll. does not follow on the arbitration and cannot be regarded as an additional appellate proceeding. The subject-matter of such proceeding before an ordinary court is not the substantive correctness of the arbitral tribunal's decision on merits. In the court proceeding for setting aside an arbitral award, the examination of the course of the proceeding before the arbitral tribunal and its award is the object of taking evidence by an ordinary court and thus a question of fact and consequently a question of law, but solely in terms of considerations of the procedural steps taken by the arbitral tribunal in the context of the grounds for setting aside an arbitral award under Act No. 244/2002 Coll. (similarly R 56/2020).*"

(6) Regional Court in Bratislava: Slovak law provisions on contractual penalties are not part of Slovak public policy

From the reasoning of the order of the Regional Court in Bratislava dated July 14, 2020, docket no.: 2CoR/11/2019:

> "*36. The concept of violation of public policy was introduced as a ground for setting aside into the Arbitration Act by Amendment No. 336/2014 Coll., but this concept was defined in Section 36 of Act No. 97/1963 Coll. on International Private and Procedural Law and its application is therefore also appropriate in proceedings commenced before the amendment came into force. The purpose of this ground for setting aside an arbitral award is to annul, in the public interest, an arbitral award that contradicts the main principles of Slovak law. The object of protection in the review is therefore not the legal position of the unsuccessful party, but the public policy of the Slovak Republic. The judicial review of compliance with public policy is in no circumstances intended to constitute a review of the arbitral award's merits. In principle, the courts do not have the power to review whether the arbitral tribunal has correctly applied the law (including mandatory rules), but only whether any incorrectness is contrary to public policy rules. This concept must be interpreted restrictively. This follows from the explanatory memorandum, in which the legislator stated that the concept of public policy should be "interpreted restrictively in accordance with international practice and with respect to the interest of promoting arbitration". The concept of public policy shall by no means cover all mandatory rules of the Slovak legal order. Not every contradiction with a mandatory rule is also a contradiction with public policy. These are only rules containing the basic socio-legal principles applicable in the Slovak Republic.*
>
> *37. The International Bar Association's 2015 report on the public policy exception (to which the claimant also refers) summarizes demonstrative rules that would supposedly amount to a violation of substantive public policy. Among other things, it mentions the prohibition of punitive damages and the prohibition of disproportionate interest, which the claimant considers relevant for deciding the present case. According to the claimant, Section 301 of the Commercial Code protects the principle of the Slovak legal order that private law concepts must not have a disproportionately sanctioning character. If they do have such character, it is for the court or arbitral tribunal to moderate the contractual penalty; a failure to take that principle into account constitutes, in its view, a breach of public policy. The appellate court is of the opinion that the rules governing contractual penalties in the Slovak legal order (Section 544 et seq. of the Civil Code and Section 300 et seq. of the Commercial Code) do not qualify as the aforementioned rules. These are different concepts, moreover, in the case of punitive damages, it is a concept not governed by the Slovak legal order, and it is a sanctioning damage compensation that does not primarily serve to compensate the injured party, but is intended to impose a sanction on the injured party and to deter him and other potential perpetrators from future defective conduct. A contractual penalty under the Slovak legal order is a sum of money set by a written agreement that the debtor is obliged to pay to the creditor in the event of a breach of an obligation, the performance of which results from the secured contract.*

The contractual penalty is primarily a security measure, thus fulfilling a preventive function and also a reparation and sanction function. It is a standalone claim that must be explicitly agreed by the contractual parties. To consider the granting of the respondent's right to payment of the contractual penalty by an arbitral award from the point of view of a violation of public policy would undoubtedly lead to a substantive review of the case because, according to the claimant, the violation of public policy constitutes a violation of the provisions of Section 301 of the Commercial Code (the power of the court or arbitral tribunal to reduce the contractual penalty). If the arbitral tribunal granted a claim, which is in accordance with the law, and the arbitral tribunal has stated in its reasoning that it considers it to be proportionate, even a possible incorrectness does not reach a level of interfering with legal certainty."

(7) Slovak Supreme Court: fundamental principles of Slovak procedural law, including the right to due process, are part of Slovak public policy

From the reasoning of the order of the Slovak Supreme Court dated January 27, 2021, docket no.: 5ECdo/16/2017:

"*19. [...]. In the context of the application of the public policy exception, a legal rule of a foreign state is not examined and evaluated, but the effects of the application of that rule are evaluated in terms of whether they would contradict public policy of the domestic state, or the procedural effects related to the recognition of a foreign decision are evaluated. From the point of view of the assessment of the public policy exception, fundamental human rights and freedoms are also relevant as fundamental rules, the observance of which must be insisted upon without any doubt and the application of which cannot exclude or jeopardize the effects of a foreign decision, resulting from international conventions, the Constitution of the Slovak Republic and other laws. The case-law in the field of recognition of foreign decisions concurs that there must be such principles, upon which it must be insisted without reservation, i.e. such principles, the observance of which is directed towards the satisfaction of fundamental interests of the society. It should also be emphasized that not all mandatory provisions of the domestic legal order are protected.*

20. The issue of the public policy exception is also addressed in the provision of Section 64(f) of Act No. 97/1963 Coll. on International Private and Procedural Law, which states that a foreign decision cannot be recognized or enforced if the recognition would contradcit the Slovak public policy. The commentary to this provision states that the public policy constitutes such fundamental principles of social and state system, upon which the Slovak Republic insists without reservation and which cannot be in any way undermined or violated. The concept of procedural public order is to be understood as the fundamental principles of procedural law, which may include the right to a fair trial, etc. This means that a conflict in relation to the procedural public order would arise if any

> *of the above principles was undermined. On the other hand, a mere difference of the Slovak procedural law from the procedural law of another state would not constitute such conflict and, therefore, would not be a ground for a refusal to recognize a foreign decision. This means that if a competent authority of a foreign state would have acted in accordance with its own law when rendering the decision (even if it was different from Slovak law), this would not, as a rule, amount to a ground to refuse the recognition a foreign decision.*"

Note: The case at hand concerned the recognition and enforcement of an arbitral award of an arbitral tribunal of the Geneva Chamber of Commerce and Industry made under Swiss substantive and procedural law. In this respect, the Slovak Supreme Court applied a public policy exception stipulated in Article 1(2) of the Convention between the Czechoslovak Republic and Switzerland on the Recognition and Enforcement of Judgments and its Supplementary Protocol concluded on December 21, 1926 in Bern.

(8) Slovak Constitutional Court: the very filing of a set aside petition against an arbitral award "guarantees" the suspension of execution in execution proceedings commenced before April 1, 2017

Legal opinion from the award of the Slovak Constitutional Court dated November 24, 2020, docket no.: II. ÚS 317/2019, published in the Collection of Awards and Orders of the Slovak Constitutional Court under no.: 39/2020:

> "*Section 56(5) of the Execution Code, in force until March 31, 2017, does not refer in its text to the 'Consumer Arbitration Act'. The addressee of the right may thus legitimately rely on the court to grant the suspension of execution if the obligor files an action to set aside the arbitral award within the time limit for filing objections to execution. There is no prima facie interpretation technique or method that gives "hope" for acceptability of a different interpretation.*"

Note: Execution proceedings commenced before April 1, 2017 are governed by the Execution Code in force until March 31, 2017, which provides in Section 56(5) that "[t]he court shall grant the suspension of execution if the obligor, within the time limit for filing objections to execution, files an action to set aside the arbitral award. If the court dismisses the action for setting aside the arbitral award, the execution shall continue after the decision has become final. If the court upholds the action and sets aside the arbitral award, the court shall terminate the execution under this Act." The Execution Code in force since April 1, 2017 does not contain similar provisions.

(9) Slovak Constitutional Court: an execution court is obliged, even on its own motion and without having an explicit legal basis, to terminate execution based on an arbitral award if such award was rendered by an "unauthorized" or "non-existing" subject, even where the award debtor has not invoked its statutory means to object to such subject's jurisdiction

From the reasoning of the award of the Slovak Constitutional Court dated December 15, 2020, docket no.: I. ÚS 265/2020:

> "*17. [...] where the arbitration concerns a dispute arising out of a non-consumer legal relationship, the provisions of the Arbitration Act allowing a party to that proceeding to challenge the arbitral tribunal's lack of jurisdiction on the ground of the non-existence or invalidity of the arbitration agreement (Section 21(2)) and to seek, by an action brought before the competent court, the setting aside an arbitral award on the ground of the invalidity of the arbitration agreement, preclude the examination of the arbitral tribunal's jurisdiction in the execution proceeding. Those provisions reflect the classical Roman legal principle "vigilantibus iura scripta sunt" ("rights belong to the vigilant"). A failure to use the procedure under these provisions in non-consumer matters results in losing the possibility of reviewing and challenging the arbitration agreement and thus the jurisdiction of the arbitral tribunal in the arbitration because otherwise these provisions would lose their meaning - they would be redundant. [...]*
>
> *21. The right of a party to challenge the lack of jurisdiction of an arbitral tribunal under Section 21(4) of the Arbitration Act and the right to bring an action to set aside such arbitral award to a court of causal competence under Section 40 of the Arbitration Act, upon which the civil court designated by law is entitled and obliged to decide, do not allow for the examination of arbitral tribunal's jurisdiction by the execution court in the extent that belongs to a civil court. A failure to use the procedure under the Arbitration Act (objection of lack of jurisdiction and action for setting aside an award) in non-consumer matters results in losing the possibility of challenging the arbitration agreement in execution proceedings by the respondent party to the arbitration, who bears its procedural responsibility for a timely exercise of effective remedies afforded to it by the legal order (II. ÚS 298/2020). [...]*
>
> *25. Although it has been stated that the execution court is not entitled to examine the validity or existence of an arbitration agreement in disputes of a non-consumer nature, the Constitutional Court adds at the same time that even in this stage of the execution proceeding the district court is entitled (and also obliged) to examine ex officio whether all conditions for the lawful conduct of the execution proceedings are satisfied, in particular (in the circumstances of the case) whether the execution title was rendered by the authority authorized to render it. [...]*

25.2 In the event of a finding that an execution title was rendered by an unauthorized or non-existent subject, the district court, as an execution court, is obliged to take into account the found nullity of the act because, despite the fact that the decision at hand was not formally annulled, it is a decision suffering from such an extreme defect that it does not produce legal effects.

25.3 It is necessary to add that the Execution Code does not expressly provide for the possibility of terminating the execution ex officio, but the Constitutional Court is of the opinion that this may be done for certain reasons. In view of the concentration of the proceeding, it is clear that it is not permissible for the execution court to terminate the execution ex officio for a reason that is ascertainable only on the basis of a proper fulfilment of the obligation of the debtor to assert and submit evidence. However, such ground will be a legal circumstance that is ascertainable from the execution court's own activity or from judicial or public registers, that is to say, where the submission of allegations and evidence by the debtor is not required, which would also be the case here."

Note: The conclusions of the Constitutional Court cited in paragraphs 17 and 21 above also appeared in other decisions of the Constitutional Court in the period under review. These decisions include, for example, the Constitutional Court's award docket no. IV. ÚS 22/2020-67 of May 13, 2020 (paragraph 40), the Constitutional Court's award docket no. II. ÚS 298/2020-49 of November 5, 2020 (paragraph 22), the Constitutional Court's award docket no. IV. ÚS 282/2020 of November 10, 2020 (paragraphs 43 and 44), the Constitutional Court's award docket no. III. ÚS 148/2020-70 of March 9, 2021 (paragraphs 38 and 39), the Constitutional Court's award docket no. I. ÚS 228/2021-29 of June 1, 2021 (paragraph 21) and the Constitutional Court's award docket no. IV. ÚS 139/2021-81 of July 13, 2021 (paragraphs 39, 40 and 45). The conclusions of the Constitutional Court cited in paragraphs 25, 25.2 and 25.3 above did not appear in its other decisions during the period under review.

(10) Slovak Supreme Court: a bankruptcy trustee of an arbitral award debtor is entitled to deny the awarded claim by reference to either factual objections not raised by the debtor in arbitration or an absenting reasoning with respect to legal assessment; a bankruptcy court is obliged to review the merits of the awarded claim to the extent of such objections

From the reasoning of the order of the Slovak Supreme Court dated June 17, 2020, docket no.: 1Obo/1/2019:

"*16. [...]. A claim filed by a bankrupt creditor in a bankruptcy proceeding over the bankrupt's assets may be denied even if it is a claim recognized by an enforceable decision of a court or other competent authority (in the Slovak Republic or abroad). As a general rule, the existence of an enforceable execution title does not mean the end of the possibility to contest a claim granted by that execution title. The possibility of examining*

and contesting a claim based on an enforceable execution title is wider in insolvency proceedings than in execution proceedings. It is for a bankruptcy trustee ("the Trustee") to make an initial assessment of whether or not a claim filed by a bankruptcy creditor is enforceable. [...]. Only factual objections not raised by the debtor in the proceedings preceding the enforceable decision may be raised as grounds for contesting the basis or amount of the enforceable claim. Thus, it cannot be the legal assessment of the matter with the exception from this rule is where the enforceable decision of the competent authority granting the claim does not contain any legal assessment of the matter. [...]. The main reason for preserving the right to contest an enforceable claim is that in many cases an enforceable decision may be rendered without being preceded by any proceeding, in which evidence is taken to substantiate a conclusion on the existence and correctness of the amount of that claim. Thus, an enforceable execution title may be, for example, payment order or a default judgment, i.e. decisions which are not reasoned at all or only minimally.

17. In an incidental dispute, an enforceable claim denied by the bankruptcy trustee may also be examined due to circumstances that occurred after the decision on the claim was rendered (e.g. because the claim was assigned to the bankruptcy creditor by an invalid assignment agreement or because the claim has already been paid, etc.) or which do not explicitly follow from the operative part of the decision. The question whether an enforceable claim may be examined in an incindental dispute even as to its basis on the ground that it is unjustified from the outset appears to be a contentious issue. An examination of the claim in this respect amounts in essence to a retrial and should, in principle, be inadmissible, as it is prevented by the final decision estoppel. In the absence of detailed legal provisions in the Bankruptcy and Settlement Act, it is reasonable to conclude that an enforceable claim may be denied and examined in an incidental proceeding even as to its basis (for the reasons for which it was denied by the trustee) because the provision of Section 23(3) of the Bankruptcy and Settlement Act allows the bankruptcy trustee to deny an enforceable claim for essentially any reason. If the bankruptcy trustee denies an enforceable claim and asserts his or her denial by means of an action, the bankruptcy court is obliged to decide on the merits of this action and cannot terminate the proceeding on the grounds of the so-called final decision estoppel (it is not the same case because the party to the proceeding on the debtor's side is not the bankrupt, as in the original proceeding, but the bankruptcy trustee who denied the enforceable claim, i.e. the the parties are different)."

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