No. 24 April 2016

Arbitration Bulletin

Young Arbitration

Court of Arbitration
at the Polish Chamber of Commerce in Warsaw

Redaktor Naczelny
Andrzej Kąkolecki

Sekretarz redakcji
Łucja Nowak

ISSN 1896-7124

Wydawca:

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Druk i oprawa: Elpil, Siedlce

Druk ukończono w marcu 2016 roku

Nakład 300 egz.

Arbitration Bulletin – *Young Arbitration*

PART TWO

Dear All:

During the conference on Arbitral Secretaires last year, Ms. Ulrike Gantenberg one of the co-authors of the Young ICCA Guidelines on Arbitral Secretaires, expressed her regret that the Arbitration Bulletin – Young Arbitration was published only in Polish. We have taken this kind suggestion into consideration and now it is my pleasure to provide you with the very first English issue of the Arbitration Bulletin – Young Arbitration. Our aim is to provide – via the Bulletin – a platform of communication for young lawyers which would allow them to share their views on arbitration, not only with the Polish arbitration community, but also with the arbitration community Europe and worldwide.

This first issue consists of two parts. The first one encompasses articles which cover important aspects associated with arbitral secretaries and is a continuation of last year's conference. The second part comprises articles which touch upon interesting aspects of arbitration in general, where articles were sent on a call-for-paper basis.

We do hope that you will find this issue as interesting as we did and that you will become our regular readers.

Anna Tujakowska
Chief editor ad interim

PART ONE

Arbitral Secretaries – Responsibilities and Appointment

Alicja Zielińska*

Contemporary business relations tend to be extremely complex. This can be observed both in their objective and subjective scope. Consequently, also disputes arising out of or relating to business relations feature a considerable degree of complexity. On the one hand, this applies to legal issues involved, while on the other – to the facts of cases and the evidence submitted by the parties. Commercial cases that ultimately find their way to arbitration frequently involve the work of teams comprising of a number of lawyers supported, *inter alia*, by private experts in the fields of damage appraisal and in disciplines that are relevant to the outcome of a specific dispute, translators, interpreters and office staff. As is expected by the arbitration users, the case prepared by such team should be resolved efficiently, at the lowest possible cost and, above all, fast by an arbitral tribunal usually consisting of three arbitrators or a sole arbitrator.

The arbitration rules, national legislation and international agreements, to the extent they are applicable to arbitration, provide for a number of mechanisms intended to increase the attractiveness of arbitration by, *inter alia*, establishing procedures and time limits for nomination of arbitrators, implementing instruments that facilitate the proceedings, such as schedules or flexible fees, and, last but not least, the effective procedure for recognition and enforcement of the arbitration award. The practice of the international commercial arbitration indicates that the appointment of a secretary to the arbitral tribunal is also considered conducive to the accomplishment of the expectations of arbitration users.[1]

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[1] *Vide*, *inter alia*: C. Partasides, N. Bassiri, U. Gantenberg, L. Bruton, A. Riccio, *"Arbitral Secretaries" in*: *International Commercial Arbitration – The coming of a New Age?* ICCA Congress Series, The Hague 2013, No 17, pp. 327–368, in: Annex A to Young ICCA Guide on Arbitral Secretaries, pp. 26 and 27; available at: http://www.arbitration-icca.org/media/0/14054083023530/aa_arbitral_sec_guide_composite_12_march_2014.pdf, accessed on: 18 November 2014; E. Leimbacher, *"Efficiency under the New ICC Rules of Arbitration of 2012: first glimpse at the new practice",* ASA Bulletin, vol. 31, No 2 of 2013, pp. 302–303; D. Jones, *"Ethical implications of using paralegals and tribunal secretaries",* AMINZ-IAMA Dispute Resolution Conference 2013, 25–27 July 2013, Auckland, Australia, pp. 251–262; available at: http://www.victoria.ac.nz/law/nzacl/PDFS/SPE-

Who is an arbitral secretary? What are the requirements for his/her appointment? How to define the scope of arbitral secretary's responsibilities? This article is intended to discuss the above issues.

Who is an Arbitral Secretary?

As the starting point for any further discussion, it is necessary to distinguish between two linguistically similar notions: the secretary general and the arbitral secretary. The former is used in the rules of a number of permanent arbitration courts to indicate one of the bodies of the court or its organisational unit for which specific competences are reserved in the relevant act establishing the arbitration institution (statute) or in the rules of arbitration. As an example, the term "Secretary General (of the Court)" is used in the Rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw[2] of 2007, and the new PCC Rules which came into force on 1 January 2015; a similar term is used in the provisions of other arbitration rules, including the Rules of the Court of Arbitration at the Polish Banks Association of 2012 ("Court Secretary"), the Rules of the Court of Arbitration at the Polish Confederation Lewiatan of 2012 ("Secretary-General"), the Rules of Arbitration of the International Chamber of Commerce of 2012[3] ("Secretary General") and the Arbitration Rules of the German Arbitration Institute (DIS) of 1998[4] ("DIS Secretary General").

The notion of an arbitral secretary, a secretary to the arbitral tribunal, within the meaning adopted for the purpose of this analysis, i.e., a person nominated to assist the tribunal (court) or chair of the arbitral tribunal, has not been defined in any of the aforesaid arbitration rules. Moreover, said rules also contain no provisions defining the manner of appointment and the scope of responsibilities of the arbitral secretary, the requirements to be met by a prospective secretary, or provisions on the fee for performing the duties of a secretary. An exception in this respect are the Swiss Rules of International Arbitration of 2012[5], where Article 15(5) provides that "*The arbitral tribunal may, after consulting with the parties, appoint a secretary. Articles 9 to 11 shall apply to the secretary"* (i.e., articles concerning the independence, impartiality and challenge of arbitrators). Also, the Netherlands Arbitration Institute Rules of 2010[6] regulate the issue of appointment of the arbitral secretary and of appropriate application of the provisions on independence and impartiality with respect to the secretary (Article 39 *ibid.*).[7]

CIAL%20ISSUES/HORS% 20SERIE%20VOL%20XVII/19%20Jones.pdf, accessed on: 18 November 2014; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, "*Secretaries to international arbitral tribunals", in*: The American Review of International Arbitration, vol. 17, No 4 of 2006, pp. 575–592, hereinafter also the "Report".

[2] Hereinafter also as the "PCC Rules".

[3] "*Rules of Arbitration of the International Chamber of Commerce*"; hereinafter also the "ICC Rules".

[4] "*Schiedsgerichtsordnung der Deutschen Institution für Schiedsgerichtsbarkeit e.V. (DIS)*".

[5] "*Swiss Rules of International Arbitration*", hereinafter also as "SRIA".

[6] "*Netherlands Arbitration Institute Arbitration Rules*", hereinafter also as the "NAI Rules".

[7] The original version: *„Article 39 – Tribunal Secretary; Technical Assistance; 1. At the request of the arbitral tribunal, the Administrator shall arrange for the presence of a*

The legal commentaries indicate that an arbitral secretary is a person whose role "*is to assist the tribunal with administrative and similar tasks.*"[8] Such support, even in proceedings administered by an arbitration institution, was described as "*extremely valuable*" in the commentary by Professors A. Redfern and J.M. Hunter.[9] It should be emphasized that the secretary is not a member of the arbitral tribunal and may not perform tasks related to dispute resolution, which are reserved to the exclusive competence of arbitrators. As indicated in the comment to Article 15(5) of SRIA, quoted above, the responsibilities of the secretary are limited to tasks of administrative nature and although the secretary may participate in meetings and support the arbitral tribunal in preparation of the award, he or she may not influence the decision-making process leading to granting award.[10]

Clarification is made in the UNCITRAL Notes concerning the organisation of arbitral proceedings of 1996 that:

> *"Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them."*[11]

In the UNCITRAL Rules of Arbitration of 2010, we can find regulations that may be deemed to refer *inter alia*, to secretaries. Article 16 [Exclusion of Liability] provides that "*[s]ave for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration*", where the expression "*any person appointed by the arbitral tribunal*" is meant to include the secretary of the arbitral tribunal.[12] Likewise, reference can be made to Article 40 [Definition of costs], whose para. 2 c) says "*[t]he term "costs" includes only (…) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal"*, which means the costs of administrative services in-

lawyer who acts as the secretary to the arbitral tribunal. The provisions of Articles 10 and 11 shall apply accordingly to the secretary. 2. The arbitral tribunal may request the Administrator to arrange for technical assistance in the arbitral proceedings."

[8] G.B. Born, *International Commercial Arbitration*, The Hague 2014, p. 2042.

[9] A. Redfern, J.M. Hunter, N. Blackaby, C. Partasides, Redfern and Hunter on International Arbitration, Oxford 2009, p. 301; the original version: "Even in an administered arbitration, many detailed arrangements still fall to be made by the arbitral tribunal itself and the assistance of a secretary is extremely valuable."

[10] M. Lazopoulos in: *Arbitration in Switzerland. The Practitioner's Guide*, M. Arroyo (edit.), The Hague 2013, p. 452, para. 34.

[11] UNCITRAL Notes, item 4, para. 26.

[12] P. Nowaczyk, A. Szumański, M. Szymańska, Regulamin Arbitrażowy UNCITRAL. Komentarz (UNCITRAL Arbitration Rules. Commentary), Warsaw 2011, comments to Article 16 of the UNCITRAL Arbitration Rules, p. 243, *vide* also: C. Partasides, N. Bassiri *et al., op.cit.*, after: Annex A to Young ICCA Guide on Arbitral Secretaries, p. 24.

cluding the assistance of a secretary, required by the arbitral tribunal.[13] Some authors also refer to Article 5 of the UNCITRAL Arbitration Rules [Representation and assistance] to indicate that since "*each party*" may be assisted by persons chosen by it, then also the arbitral tribunal may appoint a secretary to assist it.[14]

Certain guidelines concerning the possibility and rules for appointing a secretary are also provided in other soft law instruments drawn up by arbitral institutions. The ICC's Note on the Appointment, Duties and Remuneration of Administrative Secretaries of 2012,[15] which replaced the earlier 1995 version of the Notes, directly indicates that whilst the ICC Rules do not provide for issues relating to appointment and function of a secretary, the secretary "*can provide a useful service to the parties and Arbitral Tribunals in ICC arbitration*".[16] The ICC Notes on secretaries indicate that while principally engaged to assist three-member arbitral tribunals, an administrative secretary may also assist a sole arbitrator. Additionally, it is explained that administrative secretaries can be appointed at any time during the arbitration, but the engagement of an administrative secretary should not pose any additional financial burden on the parties (the secretary's fee, apart from reimbursement of any reasonable costs, should be paid from the funds intended for payment of remuneration to the arbitrators).[17] The latest publication concerning secretaries of arbitral tribunals, being of *soft law* nature, titled "Young ICCA Guide on Arbitral Secretaries"[18], indicates that a secretary may be appointed to support the arbitral tribunal if such appointment results in "*resolving the dispute effectively and efficiently*".[19]

The absence of a clear regulation of the status of an arbitral secretary in the majority of arbitration rules is not an obstacle in the practice of international commercial arbitration, where arbitral secretaries are quite common. According to the research carried out by *Queen Mary School of International Arbitration* and White&Case in 2012, the assistance of secretaries was sought in as many as 35% of arbitration proceedings. Their appointment was more popular in the case of civil law arbitrations: in this case, secretaries were engaged in 46% of arbitration proceedings. In common law arbitrations, secretaries were used in 24% of arbitrations.[20]

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[13] P. Nowaczyk, A. Szumański, M. Szymańska, *op.cit.*, comments on Article 40 of the UNCITRAL Arbitration Rules, p. 513, *vide* also: C. Partasides, N. Bassiri *et al., op.cit.*, after: Annex A to Young ICCA Guide on Arbitral Secretaries, p. 24.

[14] *Vide*: C. Partasides, N. Bassiri *et al., op.cit.*, after: Annex A to Young ICCA Guide on Arbitral Secretaries, p. 24.

[15] "*ICC Note on the appointment, the duties and the remuneration of administrative secretaries"* of 2012, hereinafter also as the "ICC Notes on Secretaries".

[16] ICC's Notes on secretaries, item 1;

[17] *Vide*: E. Leimbacher, *op.cit.*, pp. 302–303.

[18] "*Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries*"; hereinafter also as the ICCA Guide; available at: http://www.arbitration-icca.org/media/0/14054083023530/aa_arbitral_sec_guide_composite_12_march_2014.pdf, accessed on: 18 November 2014.

[19] Article 1(1) of the ICCA Guide.

[20] Figures provided after: *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, by Queen Mary University of London – School of International Arbitration and White&Case, p. 11; available at: http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf, accessed on: 18 November 2014.

The Scope of Responsibilities of an Arbitral Secretary

As indicated above, the possibility and purposefulness of the appointment of an arbitral secretary raises no major controversies as such, from the perspective of meeting the arbitration users' expectations. However, one must recognise that the debate on the scope of responsibilities of the secretary is still open, seeking the answers to such questions[21] as:

- Can a secretary to an arbitral tribunal be requested to prepare the preliminary draft of procedural orders or a part of the award?
- Can an arbitral tribunal or any of its members – arbitrators – discuss substantive aspects of the case with an arbitral secretary?
- Can a secretary to an arbitral tribunal be present during meetings, hearings and/ or deliberations of the arbitral tribunal?
- Should arbitral institutions adopt closed lists of tasks that can be delegated to an arbitral secretary?

These issues were identified in the UNCITRAL Note concerning the organisation of arbitral proceedings, drawn up as early as in 1996, which indicate:

> *"To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal."*[22]

This conclusion, closing the cited fragment of the UNCITRAL Notes, is of particular significance. The fact that arbitrators may not delegate to the secretary any of their competences to decide on the dispute, even in part, must not raise any doubts.[23] Thus, regardless of any discrepancies existing between the pub-

[21] *Vide*: D. Jones, *op.cit.*, pp. 251–252 and literature referenced therein (pp. 261–262).
[22] UNCITRAL Notes, sec. 4, para. 27.
[23] *Vide*, *inter alia*: G.B. Born, *op.cit.*, pp. 2043–2044; A. Redfern, J.M. Hunter *et al., op.cit.,* pp. 300–302; A. Szumański in: System Prawa handlowego, Arbitraż Handlowy, Tom 8, (Commercial Law System. Commercial Arbitration. Volume 8) A. Szumański (edit.), Warsaw 2010, p. 405, paragraphs 124–125; E. Onyema, "*The role of the international arbitral tribunal secretary*" in: The Vindobona Journal of International Commercial Law and Arbitration, vol. 9, No 1 of 2005, pp. 106–107; C. Partasides, "*The fourth arbitrator? The roles of secretaries to tribunals in international arbitration"* in: Arbitration International of 2002, vol. 18, No 2, pp. 147–164 and literature referenced therein.

lished commentaries and the practice of the international arbitration as to the exact scope of competences of the arbitral secretary, one must assume that their competences end where the decision-making functions of the arbitral tribunal are to be exercised. As indicated above, the secretary is not a member of the arbitral tribunal and may not replace the arbitrators in the conduct of the evidence taking procedure, analysis and evaluation of the parties' substantive positions, or in issuing the award.[24] This follows from the nature of the arbitrator's authorisation which, being based on the motion of particular confidence of the parties in a private arbitrator, is *intuitu personae*.

This finds its direct reflection in, *inter alia*, the ICC Notes on secretaries which indicate that an arbitral tribunal must take great care not to delegate any part of their decision-making function to the secretary and may not rely on the secretary's work in performing any of their essential duties.[25] This issue is also addressed in the ICCA Guide. Article 1(4) of the Guide provides that each of the arbitrators shall be responsible for ensuring that no third party, including the arbitral secretary, is requested to perform the responsibilities included in the arbitrator's personal mandate. In this context, it can also be referred to the provisions of Article 1(2) of the Code of Ethics of the Court of Arbitration at the Polish Chamber of Commerce, which provide that an arbitrator is obliged to perform its functions in person.

The author believes that, subject to certain conditions, it is possible to accept that an arbitral secretary performs not only the non-controversial tasks of an administrative nature, but also other tasks, including participation in meetings, hearings and/ or deliberations, making summaries of the case materials and the hearings, including testimonies of witnesses, experts or parties, drafting correspondence, legal reviews, or even participation in preparation of parts of the statement of reasons for the award. This is also the view of the authors of the ICCA Guide (Article 3 *ibid.*) which have a favourable view on granting some competences beyond strictly administrative tasks to arbitral secretaries.

Some of these tasks, as remaining within the list of entitlements of the arbitral secretary, are also explicitly mentioned in the ICC Notes on secretaries. This applies to: transmitting documents and communications on behalf of the Arbitral Tribunal, organizing the Arbitral Tribunal's file and locating documents, organizing hearings and meetings, attending hearings and meetings, taking notes or minutes or keeping time, e.g. of oral statements, conducting legal or similar research, proofreading and checking citations, dates and cross-references in procedural orders and awards as well as correcting typographical, grammatical or calculation errors.[26] It is emphasized in this respect that a request by an arbitral tribunal to a secretary to prepare written notes or memoranda shall in no circumstances release the arbitral tribunal from its duty to personally review the file and/or to draft any decision of the arbitral tribunal. In this context it is raised that the scope of the aforesaid "*organisational and administrative tasks*" to be assisted by secretaries was formulated by the ICC in an excessively re-

[24] G.B. Born, *op.cit.*, pp. 2043–2044.
[25] ICC Notes on Secretaries, item 2; the original wording: "*Under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary. Nor should the Arbitral Tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator*." Cf.: A. Redfern, J.M. Hunter *et al., op.cit.,* pp. 300–302.
[26] ICC Notes on Secretaries, item 2.

strictive manner.[27] It must be remembered, however, that it is not a part of the ICC Rules, and, in principle, it is not a closed list. When in doubt as to the tasks that can be performed by a secretary, the secretary himself or herself or arbitrators should refer to the ICC Secretariat.[28]

To sum up this part of the review, it needs to be stated that the responsibilities of an arbitral may generally be divided into three groups:[29] The first covers tasks of administrative nature, such as transmission and location of documents on file, coordination and update of the arbitrators' timetable, handling the accounting and financial matters relating to the arbitration proceedings, arranging for rooms required to hold hearings, as well as booking flights or other means of transport, accommodation, translations, transcriptions, etc. This set of tasks raises no doubts, but it needs to be emphasized that with regard to institutional arbitrators, the duties of a secretary to the arbitral tribunal should not overlap with the arbitration administrative service that is provided by the arbitral institution. The second set of responsibilities (tasks) related to the course of arbitration includes, without limitation, participation in organisational, procedural and substantive meetings, preparation of draft correspondence on organisational matters and draft procedural orders. Also this group of duties currently raises no doubts save for, in certain situations, the last of the tasks mentioned above. The third set of secretarial duties is related to substantive aspects of relevance for the outcome of the case and preparation of the award. These include: drafting memoranda summarizing the parties' submissions, revising translations and assistance in interpretative issues, researching questions of law and researching positions taken in the case law or commentaries, attending arbitrators' meetings, drafting parts of the statement of reasons for the award. For obvious reasons, it is the latter set of responsibilities that is most controversial.[30]

It needs to be emphasized that the open list of tasks to be handled by secretaries, as proposed in the ICCA Guide (Article 3 *ibid.*), includes, without limitation, researching questions of law, drafting procedural orders and drafting appropriate parts of the award, as well as attending the arbitral tribunal's deliberations. Thus, the ICCA Guide of 2014 should be considered much more liberal than the ICC Notes on secretaries of 2012. Moreover, in the research carried out by *Queen Mary School of International Arbitration* and White&Case of 2012, only 10% of arbitrators said that tribunal secretaries appointed in their cases prepared drafts of substantive parts of awards, but as many as 70% of arbitrators said that tribunal secretaries prepared drafts of procedural orders and non-

[27] *Vide*: E. Leimbacher, *op.cit.*, p. 303; As a side comment, it is worth mentioning a rather emotional polemics regarding the previous ICC Notes on Secretaries of 1995 between Professor Pierre Lalive, who criticised the Notes, and the Secretary General of the ICC Court at the time, Mr Eric Schwartz (cf. E.A. Schwartz, *On the subject of "Administrative Secretaries": A reply by Mr Eric Schwartz, Secretary General of the ICC Court, ASA Bulletin*, vol. 14, No 1 of 1996, pp. 32–34 and the publication indicated therein authored by P. Lalive).

[28] ICC Notes on Secretaries, item 2.

[29] *Vide*: Annex to the Report "*Checklist of issues prospective appointment of a secretary*", *op.cit.,* pp. 593–594.

[30] *Vide*: C. Partasides, N. Bassiri *et al., op.cit.*, after: Annex A to Young ICCA Guide on Arbitral Secretaries, pp. 27–29, 44–45, Annex B 2012 Survey Results, pp. 62–63, charts 16–17 and Annex C 2013 Survey Results, pp. 76–80, charts 18–32.

substantive parts of awards. Requesting secretaries to do the latter set of tasks should be considered as increasingly well received by arbitration representatives: as many as 72% of respondents believe that tribunal secretaries should be allowed to prepare such drafts of procedural orders and non-substantive parts of awards.[31]

Appointment of a Secretary to the Arbitral Tribunal

Before going any further with the analysis, two situations need to be distinguished: the first in which, in international arbitrations, the court of arbitration, taking into account the circumstances of the case, considers it purposeful to engage a secretary for assistance, and the second where it is the arbitration institution that appoints a secretary for the case. The latter situation occurs, e.g., in ICSID arbitrations where the Secretary General nominates a secretary and the secretary is perceived as an employee of the International Centre for Settlement of Investment Disputes. However, any further deliberations in this respect are beyond the assumed framework of this analysis, which focuses on the first of the aforesaid situations.

In practice, it is not infrequent that arbitrators, particularly lawyers of large law firms, use the assistance of their younger colleagues to do a number of tasks related to the arbitration, starting from having them handle the organisation of the case file and coordinate the incoming submissions, correspondence, and exhibits, through legal review, up to drafting parts of the award. Thus, the duties often go beyond purely administrative tasks. The person performing, in line with the instruction and under the supervision of an arbitrator, tasks related to arbitral proceedings in a specific case, remains anonymous for the parties to the proceedings, and frequently also for the other arbitrators. In fact, the person has the function of an informal secretary supporting the arbitral tribunal or the chair of the arbitral tribunal.

It seems that for the sake of transparency of arbitration proceedings, and the best possible implementation of the key arbitration principles, including confidentiality of the proceedings or personal performance of obligations by arbitrators, it should be postulated that courts of arbitration were more enthusiastic about the use of formally engaged arbitral secretary. How to accomplish this?

Law on arbitration as well as arbitration rules usually grant broad competence to the arbitral tribunal in shaping the procedure at the arbitrators' discretion. This is obviously a systemically purposeful solution, since it permits flexibility of the arbitration proceedings while taking account of the circumstances of each individual case and the need for fair, efficient and not excessively costly resolution of a dispute. As an example, §4(1) of the new Rules of PCC indicate that "*[i]n matters not addressed in the Arbitration Rules and unless otherwise agreed by the parties, the Arbitral Tribunal shall conduct the proceeding as it deems proper."* Further on, the Rules stipulate that "*[t]he parties may agree at any time, in a manner binding on the Arbitral Tribunal, on rules of procedure different from those provided in the Arbitration Rules, so long as they do not violate mandatorily applicable legal norms."* (§4(2) of the new PCC Rules).

[31] Figures provided after: *2012 International Arbitration Survey, op.cit., p*. 12.

Consequently, in the absence of provisions of arbitration rules (or agreement between the parties) on the possibility and manner of the appointment of a secretary to the arbitral tribunal, one may, with a certain degree of caution, assume that the arbitral tribunal is entitled to appoint a secretary with no explicit consent from the parties, and even, which raises more serious objections, with an objection from one of the parties.[32]

In this context, analysis should be made of the international standards and good practice of the appointment of secretaries.

The SRIA, which in Article 15(5) explicitly provide for the possibility to appoint a secretary, introduce the requirement of a "*consultation*" with the parties prior to such appointment. Based on this regulation, some doubts are raised in Swiss literature concerning the possibility to appoint a secretary if both parties to the proceedings have not consented to this proposal of the arbitral tribunal.[33] In light of the principle of autonomous will of the parties, which is fundamental for arbitration, it should be assumed that in the event of objections to the appointment of a secretary expressed by both parties to the proceedings, the arbitration court should abandon this step even if in theory it is entitled to do so within its discretion to manage the proceedings.

The solutions concerning secretaries, as described in the ICC Notes, go further than the SRIA requirements. They indicate that, despite the absence of the procedure for the appointment of an arbitral secretary in the ICC Rules, the arbitral tribunal should inform the parties of its proposal in this respect and make clear that they may object to such proposal. Moreover, the document provides that "*an administrative secretary shall not be appointed if a party has raised an objection.*"[34] According to the Report of the *International Commercial Disputes Committee* and *Committee on Arbitration of the New York City Bar Association*,[35] the conditions necessary for arbitrators to use the assistance of an arbitral secretary are: (i) disclosure of this intention to the parties and (ii) their consent for the appointment of the secretary and the scope of functions to be performed by the secretary.[36] The parties' consent to appoint a secretary is also required under the ICCA Guide which provides that the "an arbitral secretary should only be appointed with the knowledge and consent of parties" (Article 1(2) *ibid.*) (similar view is presented in the JAMS International *Guidelines for use of clerks and tribunal secretaries in arbitrations*[37]).

The research carried out for the purpose of the aforesaid Report indicates that among arbitrators with international experience, it is the chair of the tribunal

[32] *Vide*: G.B. Born, *op.cit.*, p. 2044; the original version: "*Absent such a provision or other contrary agreement by the parties, it is very likely that an arbitral tribunal would have the inherent power to appoint a secretary over one party's objection, although such a step would obviously need to be taken only exceptionally and with great care*."
[33] M. Lazopoulos, *op.cit.,* p. 452, para. 33 and literature referenced therein.
[34] ICC Notes on secretaries, item 1; the original version: "*The Arbitral Tribunal shall make clear to the parties that they may object to such proposal and an Administrative secretary shall not be appointed if a party has raised an objection.*"
[35] Report, *op.cit.,* pp. 575–592.
[36] Report, *op.cit.,* p. 576.
[37] "*Guidelines for use of clerks and tribunal secretaries in arbitrations*"; available at: http://www.jamsinternational.com/wp-content/uploads/JAMS-International-Clerks-Secretaries-in-Arbitrations.pdf; accessed on: 18 November 2014.

that usually takes the initiative in raising the issue of the appointment of a secretary, and, in particularly complex arbitrations, this step usually occurs at the beginning of the proceedings, often prior to the scheduling conference. Arbitrators usually request the consent of the parties prior to the appointment of the secretary. However, the research revealed that secretaries are often appointed without party consent, and one interviewee admitted having appointed a secretary over the objection of the parties.[38] The identity of the secretary is most often disclosed, and sometimes the disclosure also includes the resume of the prospective secretary. However, the Report indicates that some arbitrators prefer to appoint the secretary unilaterally.[39]

The review of the aforesaid solutions clearly indicates that the basis for the authorisation of a secretary to the arbitral tribunal is his or her selection by the tribunal which is to issue an award on a specific case.[40] It is the arbitrators' decision on the purposefulness of the appointment of a secretary that underlies a number of other acts, including: (i) in principle, consultation with the parties to seek their consent to the appointment;[41] (ii) selection of the nominated prospective secretary;[42] (iii) satisfaction by the secretary of the requirements set by the arbitrators, parties or the arbitration institution, including in particular obtaining the relevant statements on impartiality and independence,[43] and finally (iv) informing the parties of the appointment of the secretary. It seems, due to the roles and scope of duties of a secretary, which includes the fact that he or she takes actions based on the arbitrators' instructions and under their supervision, that the initiative in respect of the appointment of a secretary should be with the arbitrators and not the parties, although an exception to this rule was identified in foreign literature.[44]

The above policy has significant consequences. It may lead to the conclusion that no separate legal relation arises between the parties to the proceedings and the secretary to the arbitral tribunal. From the point of view of the legal position of the parties, a secretary to the arbitral tribunal would act as a "subcontractor" for the arbitrators. The contractual relation would exist between the arbitral secretary and the arbitral tribunal or one of its members[45] and it would be shaped by, e.g., a contract of employment (which will usually occur if assistance is used of an employee of the law firm which the arbitrator cooperates with) or a service agreement.[46]

[38] Report, *op.cit.,* p. 584.
[39] Report, *op.cit.,* p. 584. It needs to be mentioned that there is a handy appendix to the Report containing a checklist of issues to be considered before the appointment of a secretary; Appendix to the Report: *"Checklist of issues prospective appointment of a secretary"*, *op.cit.,* pp. 593–594.
[40] *Vide* also Notes to Article 39 of NAI Rules in: B. van der Bend, M. Leijten, Marc Ynzonides, *A guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law*, The Hague 2009, p. 173.
[41] *Vide*: ICCA Guide, Article 1(2) and (3) *ibid.*
[42] *Vide*: ICCA Guide, Article 2(1) and (2) *ibid.*
[43] *Vide*: ICCA Guide, Article 2(3) *ibid.*
[44] E. Onyema, *op.cit.,* pp. 100 and 101, where the author explains that pursuant to Article 749, Book VI of the Argentinian National Civil and Commercial Procedural Code of 1981, there is a possibility for the parties to appoint a secretary.
[45] *Vide*: E. Onyema, *op.cit.,* pp. 107–108.
[46] The issue of liability of an arbitral secretary is beyond the scope of this study.

To sum up the foregoing, it needs to be said that the first step towards regulating the status of arbitral secretaries, in the absence of any regulations to the contrary in the arbitration rules, agreements between the parties or *lex loci arbitri* – should consist in considering the possibility to appoint an arbitral secretary as an issue to be consulted with the parties during the case management conference,[47] or during another, initial event attended by the parties. It should be considered a good practice to record the result of the consultations and the fact of appointment of the secretary in the procedural order or to regulate it in the rules for arbitration.

As part of consultations, apart from the scope of responsibilities to be entrusted to the secretary, the following issues should also be considered, without limitation: [48]

- Extending the requirements for impartiality and independence (applicable not only to arbitrators but usually also to the bodies of a permanent court of arbitration) to include the arbitral secretary, and consequently also the application of the procedure of challenging an arbitrator to secretaries. It should be emphasized that the requirements in this respect have been explicitly set out in, e.g., SRIA (Article 15(5)), NAI Rules (Article 39(1)), ICC Notes on Secretaries (item 1) and ICCA Guide (Article 2(3));
- Competences and experience required of a prospective arbitral secretary. In the research carried out by C. Partasides, N. Bassiri, U. Gantenberg, L. Bruton, A. Riccio, appointment of a junior lawyer to act as an arbitral secretary found most supporters, with trainee lawyers, experienced layers and young arbitrators coming next, at a similar level, followed by law students and paralegals with much lower support, and assistants and secretaries ranking last;[49]
- Remuneration for tasks performed by a secretary to the arbitral tribunal;
- The exclusion (or limitation) of the arbitral secretary's liabilities towards the parties to arbitration.

Last but not least, consideration should be given to the issue whether the regulations on the manner of appointment, scope of responsibilities or remuneration of a secretary to an arbitral tribunal should be regulated and if so – in what form. In this respect, it is helpful to refer to the survey discussed in the study by C. Partasides, N. Bassiri, U. Gantenberg, L. Bruton and A. Riccio[50], which shows that the majority of respondents (57.4%) are in favour of the inclusion of an additional regulation on the arbitral secretary, but the vast majority supported such regulations as non-binding guidelines or a good practice guide (78.5% of respondents), rather than as arbitration rules (only 13.8% of respondents). In principle, the author believes that the former position expressed by the majority of respondents should be considered justified.

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[47] Article 1(3) of the ICCA Guide provides that an arbitral tribunal should inform the parties of its intention to appoint an arbitral secretary at its earliest convenience.
[48] *Vide*: E. Onyema, *op.cit.,* pp. 100–104.
[49] C. Partasides, N. Bassiri *et al., op.cit.,* after: Annex A to Young ICCA Guide on Arbitral Secretaries, p. 47 and Annex B 2012 Survey Results, p. 57, charts No 6.
[50] C. Partasides, N. Bassiri *et al., op.cit.,* after: Annex A to Young ICCA Guide on Arbitral Secretaries, p. 34 and Annex B 2012 Survey Results, p. 67, charts Nos 26–28.

There is a number of arguments to support the use of an arbitral secretary's assistance by arbitral tribunals or chairs of arbitral tribunals, and, in the first place, to substantiate the benefits involved in such appointment. Appointment of a secretary is particularly purposeful in large disputes, especially of an international nature, which involve a number of entities on each side of the dispute, particularly complex facts underlying the case, or else the case involves complex legal issues linked with various law orders. In such situations, even in arbitrations administered by arbitration institutions, the assistance of an arbitral secretary properly supervised by the arbitrators may considerably contribute to making the arbitration more efficient, its acceleration or reduction of its overall costs. The justification for the appointment of a secretary should, however, always be sought considering the circumstances of each individual case, including the standpoint of the parties, which should be perceived as a recommended practice.

The possibility to appoint an arbitral secretary should be considered advantageous both from the perspective of arbitrators who may then focus on examining the relevant (substantive) issues and on resolving the dispute with no need to engage additional means and measures, e.g. in intensive correspondence with the parties before hearing (usually involving the technical and organisational matters),[51] and for arbitration users who have another person to ensure proper course of arbitration. Formal appointment of an arbitral secretary contributes to increased transparency of arbitration, unlike a situation where arbitrators, without informing the parties and frequently also without the knowledge of the other members of the arbitration team, entrust tasks of not only strictly administrative but also substantive nature to other individuals.[52] Attention should of course be paid to the concerns that the appointment of an arbitral secretary, a quasi "fourth arbitrator", [53]could lead to dilution of the arbitrator's mandate. However, they should not dominate the benefits for the arbitration tribunal and the parties to the proceedings, flowing from engagement of a secretary, provided that certain conditions are met, including in the first place the accurate execution of the process of prospective secretary selection and proper supervision over the tasks he or she performs.

An additional aspect that needs to be considered as an advantage of the practice of appointing arbitral secretaries is the educational value of this instrument.[54] In the study quoted above, 21.6%[55] of respondents indicated that the appointment of a secretary is intended to prepare a young lawyer to perform the function of an arbitrator and to offer an opportunity to acquire first hand experience in arbitration. In view of the findings of the said study, one should wish young lawyers and arbitration apprentices an increasing number of appointments to the functions of arbitral secretaries.

[51] *Vide*: A. Redfern, J.M. Hunter *et al., op.cit.,* p. 302.
[52] *Vide*: C. Partasides, N. Bassiri *et al., op.cit.,* after: Annex A to Young ICCA Guide on Arbitral Secretaries, pp. 26–29.
[53] *Vide*: C. Partasides, "*The fourth arbitrator…" op.cit.*, pp. 147–164.
[54] *Vide*, *inter alia*: A. Redfern, J.M. Hunter *et al., op.cit.,* p. 263; E. Onyema, *op.cit.,* p. 109.
[55] C. Partasides, N. Bassiri *et al., op.cit.,* after: Annex A to Young ICCA Guide on Arbitral Secretaries, after: Annex B 2012 Survey Results, p. 56, chart No 3.

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Admissibility of Witness Preparation in arbitration Proceedings – international and Polish Perspectives

Piotr Bytnerowicz*
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1. Introduction

Research reveals that the style in which a witness testifies affects the value of his or her testimony, regardless of its contents. For example, witnesses' credibility might be affected by the tone of their voice, posture, eye contact, or the conciseness and precision of their statements.[1] Testimony given by witnesses who know how an examination looks like and which issues are relevant to the case come across as more credible.[2]

Therefore, there is no doubt that proper preparation of a witness may have a positive impact on the force of his or her testimony. For this reason, witness preparation in arbitration proceedings has become popular. However, it lacks explicit rules, which raises doubts as to the scope in which witness preparation in arbitration proceedings is admissible and whether uniform rules exist which are binding in all arbitration proceedings and for all attorneys. Opinions on this issue vary depending on the jurisdiction. In Poland witness preparation in arbitration proceedings has not been presented in any detailed study yet.

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[1] See for example: T.M.S. Neal, *Expert Witness Preparation: What does the Literature Tell Us?*, The Jury Expert 2009, p. 45ff.

[2] M.T. Boccaccini, T. Gordon, S.L. Brodsky, *Effects of witness preparation on witness confidence and nervousness*, Journal of Forensic Psychology Practice, 3, 2004, p. 39–51 (cited from:) T.M.S. Neal, *Expert Witness Preparation: What does the Literature Tell Us?*, The Jury Expert 2009, p. 44ff.

This article is an attempt to summarize the predominant opinions and views on witness preparation in arbitration proceedings from the practical point of view, considering both the international and Polish perspectives.

2. International Perspective

Witness preparation has become a standard procedure in international arbitration practice, to a large extent as a result of the influence of common law systems. It has become common to meet with witnesses in order to prepare written testimony or prepare them for examination (sometimes limited to cross-examination).[3] In the meantime, lawyers all over the world use diverse witness preparation standards. Probably, this is one of the main reasons why this issue is regulated in the IBA Rules on the Taking of Evidence.[4] Under Art. 4.3 of the Rules:

> *„It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them*."

The IBA Guidelines on Party Representation in International Arbitration[5] also allow witness preparation. Under Guideline 20, a party representative may assist witnesses in the preparation of written statements. Moreover, Guideline 24 provides that a party representative may meet or interact with witnesses in order to discuss and prepare their prospective testimony provided that the given evidence should reflect the witness's own account of the facts of the case. This rule is supplemented by Guideline 23, according to which a party representative cannot invite or encourage a witness to give false evidence.

The commentary to the IBA Guidelines indicates that a party representative may assist a witness in preparing his or her testimony to be given during an examination, including by practicing questions and answers.[6] Witness preparation may also "[…] *include a review of the procedures through which testimony will be elicited and preparation of both direct testimony and cross-examination."*[7] However, in each case it is emphasised that witness preparation cannot affect the authenticity of the provided testimony.[8] In summary, according to the approach taken in the IBA Guidelines, party representatives may discuss testimony techniques with witnesses (such as the tone and pace of statements, eye

[3] For example, J. Jenkins indicates that so-called mock cross-examinations are a routine practice, J. Jenkins, *International Construction Arbitration Law*, Arbitration in Context Series, vol. 3, 2nd edition, chapter 12: *The Conduct of the Hearing*, Kluwer Law International 2013, § 12.04 [B]; see also: D. Roney, *Effective Witness Preparation for International Commercial Arbitration*, J. Intl. Arb. 20, 429, 430, Kluwer Law International 2003, p. 430, who points out that: „[…] it is clear that few, if any arbitral tribunals would consider proper witness preparation to be objectionable."; with respect to witness testimony see also: G. von Segesser, *Witness Preparation in International Commercial Arbitration*, 20 ASA Bulletin, no. 2, 2002, p. 222–223.

[4] IBA Rules on the Taking of Evidence in International Arbitration of 29 May 2010.

[5] IBA Guidelines on Party Representation in International Arbitration of 25 May 2013.

[6] IBA Guidelines on Party Representation in International Arbitration of 25 May 2013, p. 15.

[7] *Ibidem*.

[8] *Ibidem*.

contact, etc.) as well as ask them questions, or even discuss answers. However, party representatives must not try to change the substance of a witness's testimony (testimony should reflect a witness's own knowledge and not information or suggestions given by a representative).

Also, arbitration rules of certain institutions explicitly admit witness preparation. For example, Art. 20.5 of the LCIA Arbitration Rules stipulates that:

> *„Subject to the mandatory provisions of any applicable law, rules of law and any order of the Arbitral Tribunal otherwise, it shall not be improper for any party or its legal representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal or producing such person as an oral witness at any hearing*."[9]

At the same time, the LCIA Arbitration Rules point out that it is necessary to take into consideration the mandatory provisions of applicable national law *("Subject to the mandatory provisions of any applicable law"*). This issue is also underlined in Art.1.1 of the IBA Rules on the Taking of Evidence and Guideline 1.3 of the IBA Guidelines, which provide that they are "[…] *not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules* […]."[10]

Meanwhile, in different legal systems the above-mentioned mandatory laws and professional rules sometimes take diametrically opposed approaches on witness preparation. Such differences may affect the manner in which attorneys from different jurisdictions prepare witnesses in arbitration proceedings. One can distinguish three main trends in the approach to witness preparation. In accordance with the American approach, witness preparation is admissible in a broad scope, generally limited only by the prohibition on encouraging a witness to give false evidence. The English system adopts a more moderate approach which allows general witness preparation for giving testimony, but does not allow witness "coaching" in providing testimony in a given case. In turn, some continental systems (for example, the Swiss or French system) generally oppose witness preparation, but allow it in arbitration proceedings.

2.1. American Approach

The American approach is illustrated well in the Opinion of the Bar of the District of Columbia:

> „A lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may – indeed, should – do whatever is feasible to prepare his or her witnesses for examination."[11]

[9] LCIA Arbitration Rules of 1 October 2014.
[10] IBA Guidelines on Party Representation in International Arbitration of 25 May 2013, Application of Guidelines, Guideline 1.3.
[11] D.C. Bar Opinion 79 (1979) reprinted in D.C. Bar Code of Professional Responsibility and Opinions of the D.C. Bar Legal Ethics Comm. 138, 139 (1991) (cited from:) G. Born,

Therefore, in the American practice, an attorney may, and even should, undertake all actions aimed at proper preparation of a witness for examination. Attorneys are only forbidden to encourage a witness to give false evidence. Consequently, in the USA broad cooperation between party representatives and witnesses is a common practice. This has resulted in the development of a separate industry of trial consultants having knowledge of psychology and sociology who specialise in preparing witnesses for examination.[12] Apparently, the origins of the industry can be traced to the success of sociologists assisting defence counsel during the jury selection in the *Harrisburg Seven* case. In that case, a group of anti-war activists opposing the US involvement in the Vietnam War was accused, among others, of conspiracy to kidnap Henry Kissinger, the then US National Security Advisor. The trial was held in Harrisburg in Pennsylvania, which is known as a politically conservative town.[13] The defence counsel engaged a group of sociologists who prepared a demographic analysis of Harrisburg. The defence counsel then selected jurors based on the collected data and profiles prepared by the sociologists. In the end, the defendants were acquitted, which is attributed, among others, to the sociologists' work.[14]

Nowadays, American trial consultants are engaged to an extent which goes far beyond jury selection assistance. Their services include, for example, advice on such issues as a witness's manner of speaking and clothing.[15] Trial consultants also prepare potential questions and answers, familiarise witnesses with the course of proceedings, and arrange mock trials.[16]

In the USA, some believe that such witness preparation methods (regardless of whether used by consultants or lawyers) not only do not hinder the administration of justice, but even support it. As the Supreme Court of North Carolina stated in its decision in the case of *State v McCormick*:

> *„It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the*

International Arbitration: Law and Practice, chapter 14: *Legal Representatives and Professional Responsibility in International Arbitration*, Kluwer Law International 2012, p. 265–266.

[12] N. LeGrande, K. E. Mierau, *Witness preparation and the trial consulting industry*, Georgetown Journal of Legal Ethics 17 (2004), p. 947–960; the authors indicate that in 2005 in the USA there were already approximately 700 trial consultants and approximately 600–800 companies specializing in trial consultancy – see p. 947. Trial consultants are affiliated with the American Society of Trial Consultants (ASTC), which, for example, adopted a code of ethics and organizes conferences and seminars.

[13] F. Strier, D. Shestowsky, *Profiling the profilers: A study of the trial consulting profession, its impact on trial justice and what, if anything, to do about it*, 1999 Wis. L. Rev. 441 1999, p. 444.

[14] *Ibidem*. See also the sociological study of J. Schulman, who supervised the group of the Harrisburg specialists: J. Schulman et al., *Recipe for a Jury*, Psychology Today 1973, p. 37–44, p. 77–84.

[15] *Ibidem*, p. 445.

[16] N. LeGrande, K.E. Mierau, *Witness preparation and the trial consulting industry*, Georgetown Journal of Legal Ethics 17, 2004, p. 947–960.

> *most effective manner that he can. Such preparation is the mark of a good trial lawyer […] and is to be commended because it promotes a more efficient administration of justice and saves court time*."[17]

Apart from the issues indicated in the case of *State v McCormick*, other advantages gained from the cooperation between a party representative and a witness are also relevant. First of all, questioning a witness enables a party representative to verify the witness's knowledge of the relevant facts and, consequently, determine the usefulness of a given witness. As a result, a party representative may make an informed and prudent choice of witnesses that he or she intends to call in the case. Thus, in the United States it is rather the failure to prepare a witness (and not the preparation of a witness) that may breach professional rules:

> "[…] *lawyers who fail to conduct jury research or engage in other trial preparation techniques could leave themselves open to malpractice claims*."[18]

2.2. English Approach

The Court of Appeal of England and Wales presented a different approach in the case of *R v Momodou.*[19] The court distinguished witness coaching, which it found inadmissible, from admissible witness familiarisation with the specifics of giving testimony.

In that case, the court found that the prohibition on witness coaching is a logical consequence of the trial rule according to which a witness cannot know another witness's testimony.[20] The aim of this rule is to prevent witness testimony from being distorted as a result of conversations with other persons (*„The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations*"[21]). In the court's opinion, the risk of distorting testimony is inherent in witness preparation:

> *„An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be 'improved' […] Recollections change. Memories are contami-nated*."[22]

The court indicated that coaching may result in witnesses, intentionally or unintentionally, altering their testimony so that in fact it is no longer their testi-

[17] Decision of the Supreme Court of North Carolina of December 4, 1979, *State v McCormick*, 259 S.E.2d 880, 882, N.C. 1979.
[18] M. Neil, *Practice Makes Perfect: Mock Trials Gain Ground as a Way to Get Inside Track in Real Trial*, 89 A.B.A.J. 34, 2003 (cited from:) N. Legrande & K.E. Mierau, *Witness preparation and the trial consulting industry*, Georgetown Journal of Legal Ethics, p. 948.
[19] Decision of the Court of Appeal of England and Wales (Criminal Division) in the case of *R v Momodou* of 2 February 2005 [2005] EWCA Crim 177.
[20] *R v Momodou*, 61.
[21] *Ibidem*.
[22] *Ibidem*.

mony. Thus, in the court's opinion, witness coaching may have a negative effect on the evidential value of testimony. For these reasons, the court found that witness coaching in connection with a given case is forbidden in criminal proceedings (*„So we repeat, witness training for criminal trials is prohibited"*).[23]

On the other hand, the court found it admissible to familiarise witnesses with the examination procedure. The court stated that such preparations are useful as they may help a witness reduce examination-related stress or avoid being surprised by the course of the examination.[24] According to the guidelines provided in the decision, admissible witness familiarisation may include, for example, familiarising a witness with a courtroom's layout or examination order, or explaining roles of participants in the proceedings. It is also admissible, for example, to discuss testimony techniques, including tone of voice, conciseness of statements, proper posture, and clothing. Thus, this concerns preparations which help a witness deal with the examination and have a positive impact on the style of his or her statement, but do not affect the contents of the testimony. The court underlined that witness preparation cannot be carried out in the context of pending or potential court proceedings:

> "*The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it*."[25]

The guidelines specified in the decision in the case of *R v Momodou* are reflected in the English rules of professional conduct. Article 705a of the Code of Conduct of the Bar Council of England and Wales prohibits witness coaching in the context of evidence proceedings in a given case.[26] It was indicated in the 2005 guidelines relating to witness preparation that mock trials or rehearsals of particular lines of questioning are inadmissible:

> "*Mock cross-examination or rehearsals of particular lines of questioning that counsel proposes to follow are not permitted… [A Barrister's] duty is to extract the facts from the witness, not to pour into them; to learn what the witness does know, not to teach him what he ought to know.*"[27]

The decision in the case of *R v Momodou* was issued in criminal proceedings. Moreover, in the grounds for the decision the court expressly stated twice that training or coaching for witnesses is not allowed in criminal proceedings (see ¶ 61 of the decision). Nevertheless, since there are no decisions distinguishing the rules applicable in this respect in civil and criminal proceedings, item 11 of

[23] *Ibidem*.
[24] *Ibidem*, 62.
[25] *Ibidem*.
[26] Code of conduct of the Bar Council of England and Wales, Vol. II, Art. 705a: "A Barrister must not rehearse, practice or coach a witness in relation to his evidence."
[27] Guidance on Preparation of Witness Statements – Preparing Witness Statements for Use in Civil Proceedings – Dealings with Witnesses, October 2005 – English Bar (cited from:) E. Lewis, *Witness preparation: What is ethical, and what is not*, Litigation v. 36, no. 2, 2010, p. 41.

the guidance of the English professional standards committee[28] provides that the general rules set forth in that decision should also apply to civil proceedings. The potentially far-reaching consequences of the decision in the case of *R v Momodou* for civil proceedings were also pointed out in the jurisprudence.[29] Therefore, although there is no indication in the *R v Momodou* decision that the rules set forth therein should apply beyond the scope of criminal proceedings (rather to the contrary), it provides guidance to English attorneys in both criminal and civil proceedings (including arbitration).

2.3. Continental Approach

In the practice of some countries in continental Europe, witness preparation was prohibited by applicable laws for a long time (for example, contact with witnesses was not allowed[30]) or considered as violating the rules of professional ethics.[31]

In France, the prohibition on witness preparation stems from the legal tradition in which a judge played an inquisitorial role and independently uncovered the truth, for example by examining witnesses.[32] In such model, witness preparation was not desirable. On the other hand, Art. 12(a) of the Swiss federal law on free movement for lawyers[33] includes a general clause according to which attorneys should exercise their duties conscientiously and with diligence. Pursuant to the case law addressing this clause, a party representative's meetings with a witness are admissible only in the most exceptional circumstances when a party representative cannot otherwise obtain information on the case or assess the risk of calling a given witness.[34] Likewise, Art. 7 of the Swiss Rules on Professional Ethics provides that witness preparation is not allowed.[35]

[28] Guidance on Witness Preparation of the Professional Standards Committee of the Bar Council.
[29] C. Lightfoot, C. Benson, *Wanted: An Ethical Compass*, v. 1, no. 3, Global Arbitration Review 2006.
[30] B. Hanotiau, *The conduct of the hearings*, (in:) L.W. Newman, R.D. Hill, *The Leading Arbitrators' Guide to International Arbitration*, 2d,Huntington Juris Publishing 2008, p. 359–365.
[31] See, for example, Art. 13 of the Code of Professional Ethics of the Geneva Bar, Art. 8 of the Rules on Professional Practice, Supervision of Lawyer Duties and Legal Trainee Trainings of the Austrian Bar Council (cited from:) D.P. Roney, *Effective Witness Preparation for International Commercial Arbitration*, KluwerArbitration 2003; in French law the prohibition is derived from case law – see Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, Am. Rev. Int'l. Arb. 214, 216, 1992 (cited from:) D.P. Roney, *Effective Witness Preparation for International Commercial Arbitration*, KluwerArbitration 2003.
[32] F. von Schlabrendorff, *Interviewing and Preparing Witnesses for Testimony in International Arbitration proceedings: The Quest for Developing Transnational Standards of Lawyers' Conduct*, Kluwer Law International 2010, item 2.3.
[33] Federal Act on the Freedom of Movement for Lawyers of 23 June 2000, 935.61 (English version available on-line: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_switzerland_feder1_1188890158.pdf).
[34] F. von Schlabrendorff, *Interviewing and Preparing Witnesses for Testimony in International Arbitration proceedings: The Quest for Developing Transnational Standards of Lawyers' Conduct*, Kluwer Law International 2010, item 2.6 (citing:) decision ZR95/1 996 no. 43, 131–132 E.1; see also decisions cited therein.
[35] Swiss Rules on Professional Ethics (cited from:) C. Oetiker, *Witness before the International Arbitral Tribunal*, Kluwer Law International 2007, footnote 61 – author indicates that this prohibition does not apply to international arbitration.

However, since witness preparation was becoming an increasingly popular practice in international arbitration, the continental approach changed and witness preparation in arbitration began to be allowed.[36] For example, on 26 February 2008, the Paris Bar adopted a resolution in which it allowed French attorneys to prepare witnesses in arbitration proceedings:

> "*Within the scope of international arbitration proceedings before tribunals situated in France or in other countries, a lawyer shall evaluate the appropriateness and trustworthiness of the testimony given in order to support his client's action by observing all applicable rules of procedure.*
>
> *In the same context, the manner in which a lawyer prepares a witness for a hearing shall not be contrary to the code of conduct of the legal profession and shall be in line with established and accepted practice in proceedings in which a lawyer acts in this capacity as a defence counsel."*[37]

The Swiss approach was also moderated. It is indicated that the limitations set forth by Swiss law on contacts with witnesses apply only if and when they do not conflict with appropriate arbitration rules.[38] This rule derives, for example, from Art. 182(2) of the Swiss private international law, which provides that an arbitration tribunal should use its own discretion in determining the rules of proceedings, and also from Art. 7 of the Code of Professional Ethics, under which appropriate arbitration rules apply to witness preparation. Art. 25.2 of the Swiss Rules of International Arbitration is a good example of such rules. It explicitly provides that: *„It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses, potential witnesses, or expert witnesses*."[39]

On the other hand, this issue is not regulated in the German legal system (previous regulations[40] in this regard were repealed). At this moment, neither federal laws on the legal professions (*Bundesrechtsanwaltsordnung*) nor the rules of professional ethics (*Berufsordnung der Rechtsanwälte*) include any detailed provisions on this issue.[41] The question of witness preparation is also not the subject of any broad discussions in the German doctrine. Some commentators say that since provisions of law and rules of ethics lack any limitations, contacts with witnesses are allowed.[42] A similar approach is taken in Austria where re-

[36] P. Bienvenu, M.J. Valasek (in:) D. Bishop, E.G. Kehoe (edit.), *The art of advocacy in international arbitration*, 2nd edition, Juris Net (citing:) B. Hanotiau, *The conduct of the hearings*, (in:) L.W. Newman, R.D. Hill, *The Leading Arbitrator's Guide to International Arbitration*, 2d, Huntington Juris Publishing, 2008, p. 359–365.
[37] Cited from: F. von Schlabrendorff, *Interviewing and Preparing Witnesses for Testimony in International Arbitration Proceedings: The Quest for Developing Transnational Standards of Lawyers' Conduct*, Kluwer Lar International 2010, item II.2.3.
[38] Cited from: F. von Schlabrendorff, *Interviewing and Preparing Witnesses for Testimony in International Arbitration proceedings: The Quest for Developing Transnational Standards of Lawyers' Conduct*, Kluwer Lar International 2010, item II.2.6.
[39] Swiss Rules of International Arbitration of 2012.
[40] Grundstätze des anwaltlichen Standesrechts 1973.
[41] Cited from: F. von Schlabrendorff, *Interviewing and Preparing Witnesses for Testimony in International Arbitration proceedings: The quest for Developing Transnational Standards of Lawyers' Conduct*, Kluwer Lar International 2010, item II.2.4.
[42] *Ibidem*.

strictive rules on contacts with witnesses were in force until 2005 but subsequently were significantly changed. According to Art. 8 of the Austrian Code of Professional Ethics amended in 2005 (*Richtlinien für die Ausübung des Rechtsanwaltsberufs*), Austrian attorneys may contact witnesses before and during a trial, but they must not exert an inappropriate influence on them.[43]

3. Polish Perspective

3.1. Introductory Comments

No detailed regulations exist in Poland on witness preparation in arbitration proceedings. Thus, one can say that the situation in Poland is similar to the current situation in Germany. [44]

Neither the Code of Ethics for Advocates[45] nor the Code of Ethics for Legal Advisors[46] includes any explicit provisions on witness preparation. Also Part 5 of the Civil Procedure Code relating to arbitration as well as the general provisions of the Civil Procedure Code remain silent on this matter. The same relates to the rules of arbitration courts, such as the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, the Court of Arbitration at the Polish Confederation Lewiatan, or the Court of Arbitration at the Polish Advocates' Bar and the Arbitration Court at the Regional Chamber of Legal Advisors in Warsaw.

Court decisions on contacts between attorneys and witnesses, which, as it seems, have caused some to believe that meetings with witnesses are not allowed, are 50 years old and relate strictly to criminal proceedings. For this reason, the opinions expressed therein do not fit in with arbitration proceedings (as discussed below). Witness preparation has also not been the subject of any detailed analyses in the doctrine and practitioners' views on this issue seem to be varied.[47]

3.2. Opinion on Inadmissibility of Contacts between Advocates and Witnesses

3.2.1. Disciplinary Decisions

In the 1960s, several disciplinary decisions were issued which, broadly speaking, stated that contacts between advocates and witnesses were inappropri-

[43] *Ibidem*, item II.2.5.
[44] See above.
[45] The consolidated text of the Rules of Ethics for Advocates and the Dignity of the Profession (Code of Ethics for Advocates) published in the notice of the Executive Committee of the Supreme Bar Council of 14 December 2011 issued based on the Supreme Bar Council resolution no. 52/2011 of 19 November 2011.
[46] The consolidated text of the Rules of Ethics for Legal Advisors published by the resolution of the Executive Committee of the National Council of Legal Advisors no. 8/VIII/2010 of 28 December 2010.
[47] See for example: *Pouczanie świadków: codzienność na bakier z zasadami etyki adwokackiej. Co zmieni nowy model procesu karnego?* (*Witness preparation: everyday practice contrary to the rules of ethics? What changes will the new model of criminal procedure bring?*), Gazeta Prawna, 24 January 2014 (http://prawo.gazetaprawna.pl/artykuly/772935,pouczanie-swiadkow-codziennosc-na-bakier-z-zasadami-etyki-adwokackiej-co-zmieni-nowy-model-procesu-karnego.htm).

ate.[48] By way of illustration, in the judgment of 23 November 1968 the Supreme Court found that:

> "*Conversations on the case between an advocate and witnesses before the hearing, and in particular formulating a witness's statement (dictating a letter) or advising a witness on the justification of a withdrawal or alteration of testimony, which prevents uncovering the objective truth, constitutes an unacceptable form of defence practice*." [49]

Moreover, in the disciplinary judgment rendered on 25 January 1964, the Supreme Court pointed out that:

> "*Discussions between the defendants' attorney and a witness called by the prosecution on the content of a statement or application which such witness is to submit to the court for the purposes of defending the advocate's client constitute a serious offence, which blatantly conflicts with the advocates' rules of professional dignity and ethics*."[50]

The most far-reaching opinion was given in the decision of the Supreme Court dated 24 November 1962, in which the court found that a mere invitation (or "summons", as the court named it) to the advocate's office addressed to persons who are to provide testimony as witnesses, in order to have a discussion with them "[…] *creates the impression that the advocate »is tempering« with the witnesses or trying to exert influence on the course of the proceedings, which is contrary to the applicable legal order."*[51]

The above-mentioned disciplinary decisions of the Supreme Court were justly criticised in the contemporary jurisprudence, for example in the following statement: „[…] *after all, the mere fact that an advocate formulates a witness's statement does not satisfy the conditions of any offence against the administration of justice*".[52] Thus, there is nothing unethical in contacts with witnesses before the hearing. To the contrary, as A. Bojańczyk indicates:

> "*It is difficult to consider an action lawfully undertaken by an advocate to protect a client's interests as an act satisfying the conditions of a disciplinary offence. It should be underlined that there is nothing reprehensible in out-of-court contact between an advocate (legal advisor) and a witness, even when he »discusses« or »formulates« some parts of the witness's deposition as long as such »discussion« or »formula-*

[48] See the decision of the Superior Disciplinary Board of 18 March 1961, WKD 139/60, Palestra, no. 5, 1961, p. 133; Supreme Court judgment of 24 November 1962, case file no. R. Adw. 29/62, Palestra, no. 3, 1963, p. 87; Supreme Court judgment of 25 January 1964, case file no. R. Adw. 75/63, Palestra, no. 6 (78), 1964, p. 79; Supreme Court judgment of 23 November 1968, case file no. RAD 15/68, Palestra no. 3 (135), 1969, p. 79.
[49] Supreme Court judgment of 23 November 1968, case file no. RAD 15/68, Palestra, no. 3 (135), 1969, p. 79.
[50] Supreme Court judgment of 25 January 1964, case file no. R. Adw. 75/63, Palestra, no. 6 (78), 1964, p. 79.
[51] Supreme Court judgment of 24 November 1962, case file no. R. Adw. 29/62, Palestra, no. 3, 1963, p. 87.
[52] A. Bojańczyk, *Dowód prywatny w postępowaniu karnym w perspektywie prawnoporównawczej* (*Private evidence in criminal procedure in comparative perspective*), Lex 2011, chapter 2, item 10.2.

tion« does not enter the sensitive sphere of hindering or frustrating criminal proceedings."[53]

In our opinion, the theses formulated in the discussed decisions of the Supreme Court, which after all related to concrete, detailed factual circumstances, were too broad and far reaching, which gives room for overinterpretation. The issue of violation of rules of ethics must be analysed individually taking into account the facts of a given case. It is possible that some (or all) actions which were the basis for the above-mentioned decisions of the Supreme Court today could also be considered as violating the rules of ethics (although this is not the subject of our analysis), but not because the advocate contacted a witness. Only by way of illustration, it follows from the grounds for the judgment of 23 November 1968 that the advocate dictated to a witness (who probably was also an injured party) a statement on withdrawal of a crime notice against his client, without consulting on its content with that witness. In the course of the proceedings, the witness testified: " […] *the advocate told my mother to leave the room and then dictated almost the entire statement to me* […]. *The attorney did not ask me anything* […]. *I, writing as he dictated, did not object; during the whole process I provided information to the attorney only once* […]." Therefore, if the rules of ethics were violated in this case, such violation did not result from the meeting with the witness or the formulation of her statement. The violation of the rules of ethics would instead have been related to the fact that the witness's statement was formulated for the purposes of the case, without considering the opinion or interests of the person concerned, and the fact that some sort of legal assistance was provided to a person whose interests conflicted with the interests of the attorney's client.

Moreover, the above-mentioned decisions were issued in criminal proceedings. Given that the nature and aim of criminal proceedings and arbitration are utterly different, opinions expressed in criminal cases cannot be applied to arbitration without any reflection. Additionally, these decisions were issued approximately 50 years ago. Similar opinions will not be found in more recent disciplinary decisions of the Superior Disciplinary Board, the Superior Disciplinary Court, and the Supreme Court, published in the Bar Information Service. In our opinion, this means that the views expressed by the Supreme Court in the aforementioned disciplinary decisions have become obsolete. This statement may also be confirmed by the fact that some judiciary representatives express opinions opposite to those presented in the above-mentioned decisions of the Supreme Court; for example, Teresa Mróz, a Court of Appeal judge, said in a statement to *Gazeta Prawna* that she did not think that *„*[…] *any professional attorney would leave a witness to their own devices."*[54]

[53] *Ibidem*.

[54] *Pouczanie świadków: codzienność na bakier z zasadami etyki adwokackiej. Co zmieni nowy model procesu karnego?* (*Witness preparation: everyday practice contrary to the rules of ethics? What changes will the new model of criminal procedure bring?*), Gazeta Prawna, 24 January 2014, (http://prawo.gazetaprawna.pl/artykuly/772935,pouczanie-swiadkow-codziennosc-na-bakier-z-zasadami-etyki-adwokackiej-co-zmieni-nowy-model-procesu-karnego.htm).

For these reasons, the aforementioned disciplinary decisions do not lead to a conclusion that contacts between advocates and witnesses or some degree of witness preparation in arbitration proceedings violates the rules of professional ethics applicable in Poland.

3.2.2. Article 264 of the Civil Procedure Code

An argument against the admissibility of witness preparation in arbitration proceedings also cannot be justified by Art. 264 of the Civil Procedure Code. This Article stipulates a rule based on which the Court of Appeal of England and Wales in the case of *R v Momodou* concluded that witness "coaching"[55] was not allowed, i.e., witnesses who have not yet testified may not be present at the examination of other witnesses. There are at least two reasons for such opinion.

Firstly, pursuant to Art. 1184 § 2 of the Civil Procedure Code, arbitration tribunals are not bound by provisions on court proceedings (and thus by Art. 264 of the Civil Procedure Code). Therefore, Art. 264 of the Civil Procedure Code does not prevent an arbitration tribunal from determining, for example in a procedural order, the scope in which parties may prepare witnesses they have called.

Secondly, the purpose of the rule expressed in Art. 264 of the Civil Procedure Code was not to prohibit contacts between attorneys and witnesses, but rather to limit a possible suggestion which could result from testimony provided earlier by other persons.[56] A mere meeting between an attorney and a witness does not create such a risk. Given the purpose of Art. 264 of the Civil Procedure Code, one can at most argue that, when preparing witnesses, an attorney should not familiarise them with the statements made earlier by other witnesses. Although in arbitration proceedings sometimes it may be justified or even necessary to make exceptions in that respect (regardless of the fact that as a rule this provision does not apply to arbitration proceedings in accordance with Art. 1184 § 2 of the Civil Procedure Code). Exceptions to this rule may be necessary, for example, in a situation where, in accordance with an agreed schedule, two rounds for the exchange of written witness statements are to take place before the hearing. In such case, both parties' witnesses make written statements, then review the statements of the other party's witnesses, and again make statements in which they reply to the statements made by the witnesses of the opposite party (so-called reply witness statements). If such procedure is adopted, for obvious reasons it is necessary to provide witnesses with written statements made by the witnesses of the opposite party. Moreover, pursuant to the aforementioned Art. 1184 § 1 and 2 of the Civil Procedure Code, parties may agree on the rules of arbitration proceedings and the arbitrators, if parties did not agree otherwise, may conduct proceedings in a manner which they deem appropriate (without

[55] See item 2.2 above.

[56] B. Kaczmarek-Templin (in:) Ł. Błaszczak, K. Markiewicz, E. Rudkowska-Ząbczyk (edit.), *Dowody w postępowaniu cywilnym* (*Evidence in civil procedure*), C.H. Beck, Warsaw 2010, p. 469. See also: A. Zieliński, K. Flaga-Gieruszyńska (edit.), *Kodeks postępowania cywilnego. Komentarz* (*Civil Code. Commentary*), komentarz do art. 264 k.p.c., 7th edition, Warsaw 2014.

being bound by the provisions of the Civil Procedure Code on court proceedings). Therefore, nothing prevents parties or arbitrators from deciding that witnesses will be able to review statements made by the opposite party's witnesses, as long as they find it advisable.

3.3. Contacts with Witnesses – Practical Necessity

The view that attorneys may not contact witnesses is also inaccurate from a practical point of view. In today's market, this view should be considered as outdated. Were it accepted, in many cases this would make it virtually impossible to properly litigate a case. Where parties in arbitration disputes are mostly legal entities often having many employees, contact with witnesses or potential witnesses is in fact unpreventable.

In the context of arbitration proceedings with the participation of legal entities, attorneys often have to maintain contacts with future or potential witnesses from the first days of running a case. When preparing a request for arbitration, statement of claim or a reply to such pleadings, an attorney has to contact the client's employees engaged in a given case in order to establish the facts and arguments supporting the represented party's position. The same situation occurs when further pleadings are exchanged and the attorney and the client's representatives have to agree on the counter arguments and defences which the client may use to defend itself against the arguments of the opposite party. For obvious reasons, persons with whom the attorney is cooperating in preparing the client's legal position in the dispute and who have the broadest knowledge on the case will often testify as witnesses.

Moreover, in order to designate witnesses that the attorney is planning to call in the course of proceedings, it may be necessary to have discussions with persons engaged in the case to determine which of them have the broadest knowledge on the circumstances relevant for the outcome. Otherwise, there is a risk that persons whose testimony will not contribute to the resolution of the case will be called as witnesses. Holding such discussion is also valuable if more than one person may potentially testify on a given fact. This gives the possibility of selecting the person who has the broadest knowledge or makes the most eloquent statements, which also serves to streamline the proceedings.

Moreover, as M. Jamka justly indicates, since arbitration tribunals seated in Poland themselves have no coercive measures to make a witness appear at a hearing, a party that would like to introduce evidence in the form of a witness' testimony generally needs to address such witness directly, describe the circumstances of the ensuing dispute and persuade the witness to appear before the arbitration tribunal.[57] In such cases, it is also necessary to establish contact with the witness. Contacts with witnesses are virtually unpreventable during the preparation of witnesses' written statements, the submission of which is envisaged by the Arbitration Rules of the Court of Arbitration at the Polish

[57] M. Jamka, *Dowód z zeznań świadka w krajowej i międzynarodowej praktyce arbitrażowej* (*Witness evidence in the Polish and international arbitration practice*), (in:) *Księga Pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, Warsaw 2010, p. 185.

Chamber of Commerce (§ 31.1), which entered into force on 1 January 2015, or the Rules of the Court of Arbitration at the Polish Confederation Lewiatan (§ 26.3, letter c).

In arbitration proceedings, attorneys often contact witnesses well before the hearing is scheduled. Therefore, it is not unusual that circumstances which will be the subject of the testimony are repeatedly discussed when the legal position in the dispute is being prepared. In that context, the thesis that attorneys may not contact witnesses before the hearing and again discuss with them the same circumstances has no rational or logical justification.

3.3.1. Witness Preparation in the Context of the Polish Rules of Professional Ethics

Based on the above-mentioned reasons, in our opinion there are no doubts that in Poland attorneys in arbitration proceedings may contact witnesses. The question is only to what extent attorneys may prepare witnesses for examination. As already mentioned, there are no rules in the applicable Polish codes of professional ethics that would prevent witness preparation in arbitration proceedings.[58] Therefore, similarly to the German system[59], one should assume that witness preparation in arbitration is admissible in Poland. The determination of the admissible scope of preparation remains an open and important issue.

It is obvious that attorneys must not urge witnesses to make false statements or conceal issues that are relevant for the facts of the case. This prohibition stems from the fundamental ethical rules, the pursuit of truth, which should be the basic aim of evidentiary proceedings, and from Art. 233 of the Criminal Code, which sets forth penalties for making false statements.[60] Applicable provisions and regulations lack guidelines as to the scope of possible preparation. Therefore, one should use general rules expressed, for example, in the Code of Ethics for Advocates, which stipulates in § 6 that all actions undertaken by an advocate should be aimed at the protection of a client's interests. However, § 8 of the same code provides that attorneys should perform their professional duties to the best of their abilities and knowledge, with fairness, diligence, and eagerness. Attorneys shall also make sure not to exceed the boundaries of proper representation of clients' interests (§ 7 of the Code of Ethics for Advocates).

In this respect, conscientious and diligent case preparation may, and even should, include the preparation of a witness which does not violate the principles of fairness (in particular is not aimed at hindering the establishment of the objective truth), and contributes to the improvement of his or her personal effectiveness. In other words, preparations should be aimed at improving the quality of testimony rather than improving its substance.

[58] See above.
[59] See above.
[60] Concerning the controversy whether Art. 233 of the Criminal Code also penalises the submission of false testimony in arbitration proceedings, see M. Jamka, *Dowód z zeznań świadka w krajowej i międzynarodowej praktyce arbitrażowej* (*Witness evidence in the Polish and international arbitration practice*) (in:) *Księga Pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, Warsaw 2010.

3.4. Why Witness Preparation should be (is) allowed in Poland

3.4.1. Practical Reasons

As indicated at the beginning, the manner in which witnesses testify significantly affects the perception of their testimony. A witness's credibility is affected, for example, by the tone of voice, eye contact, and the conciseness and preciseness of his or her statements.[61] It is also said that the use of phrases such as "*I think*", "*I believe*" or "*in my opinion*" makes testimony less convincing.[62] Likewise, witnesses who speak hesitantly, are overly polite, or often use interjections such as "hmm", are considered to be less competent, intelligent, trustworthy or convincing than witnesses whose tone of voice and narrative style is firm and confident.[63] A rising pitch at the end of a sentence is regarded as a sign of uncertainty.[64]

Moreover, research shows that witnesses familiarised with the examination procedure and who know what the case is about are more convincing than witnesses who do not have such basic information or experience.[65] Research participants were less nervous during subsequent examinations, even when they were not prepared for them in any way.[66] In other words, the more experienced a witness is, the more convincing his/her testimony becomes.

There are a number of factors affecting the perception of witness testimony regardless of its contents. Therefore, without any negative impact on the objective truth, by drawing their attention to such factors, attorneys may help witnesses reinforce the power of their statements. In particular, they may inform witnesses what the case is about and advise them on the importance of maintaining correct posture, eye contact or avoiding specialist jargon, unnecessary digressions or speculations, etc. It is also advisable to inform a witness about the rules of the examination, for example that answers should be addressed to arbitrators or that if the witness finds some questions incomprehen-

[61] T.M.S. Neal, S.L. Brodsky, *Expert witness credibility as a function of eye contact behavior and gender*, Criminal Justice and Behavior, 2008, 35, p. 1515–1526; See also: M.T. Boccaccini, *What Do We Really Know about Witness Preparation?*, Behavioral Science and Law, 20, 2002, p. 161–189; E.A. Lind, B. Erickson, J.M. Conley, W. O'Barr, *Social attributions and conversational style in trial testimony*, Journal of personality and social psychology 1978, 36, p. 1558–1567; R.W. Frick, *Communicating emotion: the role of prosodic features*, Psychological Bulletin 1985, 97, p. 412––429; L.G. Smith, L.A. Malandro, *Courtroom Communication Strategies*, New York, Kluwer, 1985.

[62] M.T. Boccaccini, *What Do We Really Know about Witness Preparation?*, Behavioral Science and Law, 20, 2002, p. 161–189.

[63] E.A. Lind, B. Erickson, J.M. Conley, W. O'Barr, *Social attributions and conversational style in trial testimony*, Journal of personality and social psychology 1978, 36, p. 1558–1567.

[64] R.W. Frick, *Communicating emotion: the role of prosodic features*, Psychological Bulletin 1985, 97, p. 412–429.

[65] M.T. Boccaccini, T. Gordon, S.L. Brodsky, *Effects of witness preparation on witness confidence and nervousness*, Journal of Forensic Psychology Practice, 3 2004, p. 39–51 (cited from:) T.M.S. Neal, *Expert Witness Preparation: What does the Literature Tell Us?*, The Jury Expert, March 2009, p. 44ff.

[66] *Ibidem*.

sible or improper, he or she should turn to the presiding arbitrator instead engaging in polemics with the attorney.

Polish ethical rules do not prevent attorneys from asking witness questions (of course, without instructing him or her on the answers they expect). This will make it possible for an attorney to prepare questions for the hearing in an order that will allow the witness to provide logical and dynamic testimony and that will prevent unnecessary questions.

The preparation for a hearing in the above scope, performed by an attorney in a diligent and honest manner, will not have effect on the substance of the testimony, but may contribute to streamlining the proceedings and to better clarification of the circumstances relevant for the outcome. A properly prepared witness should make statements in a precise, concise, understandable and unambiguous manner, leaving no room for overinterpretation of his/her opinion. In this context, witness preparation may contribute to the better administration of justice, in particular where testimony might seem to be implausible due to specific characteristics of a witness's personality, examination-related stress or lack of experience in public speeches:

> "*When a witness owes a poor performance not to the content of his or her testimony or the position taken but to quirks of personality, the stress of testifying, or an inadequate stage presence, a witness preparation consultant may well be serving justice*."[67]

3.4.2. Procedural Reasons

Procedural rules applicable to arbitration in Poland not only do not prohibit witness preparation, but provide a legal framework in which witness preparation can be conducted in a fair, professional and transparent manner. Given parties' autonomy and the arbitrators' powers to establish rules of proceedings, resulting from Art. 1184 § 1 and 2 of the Polish Civil Procedure Code, it is for the parties and the arbitrators to make sure, that the rules for witness preparations are transparent, uniform and abided by.

It is advisable that in each case the rules for witness preparation be determined at the beginning of the proceedings (for example, by way of a procedural order). It is in the interests of the parties and the arbitration tribunal to determine such rules in the most precise manner. The more precise the rules are, the less room there will be for the parties to present divergent interpretations and the greater possibilities the arbitration tribunal will have to control the compliance with such rules.

It would also be advisable to introduce provisions to the rules of arbitration courts operating in Poland modelled on Art. 25.2 of the Swiss Rules of International Arbitration[68] or Art. 20.5 of the LCIA Rules of Arbitration[69], both of which explicitly stipulate that preparatory witness interviews are not improper.

[67] N.J. Kressel, D.F. Kressel, *Stack and Sway*, West-view Press 2004 (cited from:) E. Lewis, *Witness preparation: What Is Ethical, and What Is Not*, Litigation, v. 36, no. 2, 2010, p. 56.
[68] Swiss Rules of International Arbitration of 2012.
[69] LCIA Arbitration Rules of 1 October 2014.

4. Concluding remarks

Nowadays witness preparation is common practice in arbitration. Attorney's cooperation with witnesses often is also a practical necessity (in particular if attorneys need to contact future witnesses to learn the relevant facts of the case or to arrange for written witness statements). If done properly, witness preparation serves efficient conduct of proceedings. Internationally, the IBA Rules on the Taking of Evidence and the IBA Guidelines on Party Representation in International Arbitration provide proper framework for witness preparation. In Poland, there are no procedural or ethical counter-indications for witness preparation. Therefore, prohibiting witness preparation would be contrary to established market practice, impractical (or even unrealistic) and would not serve a valid purpose. What is required with respect to witness preparation are rules and transparency – not prohibitions.

As one of the main advantages of arbitration is its flexibility, in our opinion rules for witness preparation should not be imposed by way of national legislation or rules of arbitral institutions. In order to respect cultural differences and adjust to the requirements of a given case (taking into account in particular the legal cultures of the parties and the law applicable at the seat of arbitration), rules for witness preparation should be determined for each case individually (while, obviously, similar patterns may be suitable for many cases). Therefore, notwithstanding whether arbitration proceedings are conducted in Poland or any other jurisdiction, the most appropriate document to fix the rules for witness preparation is a procedural order (ideally, agreed by the parties).

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Cost Allocation in Arbitration under the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce

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Arbitration users are increasingly complaining about the volume and unpredictability of arbitration costs. This is all the more understandable given that under the prevailing rule the losing party must cover its opponent's costs. This article discusses whether these concerns should apply to cost allocation under the rules of arbitration of the Court of Arbitration at the Polish Chamber of Commerce (SAKIG) against the backdrop of the rules of major arbitration institutions and the principles underlying cost allocation.

Categories of Arbitration Costs

Arbitration costs can be divided into two groups: the costs of the arbitration panel and case administration, and party costs.

The first category comprises costs such as arbitration and registration fees, administrative costs of the arbitration court or the institution administering the dispute, remuneration and expenses (e.g. travel costs, accommodation, service costs) of the arbitrators or costs of appointing an expert witness, translator, transcriber etc. The types and volume of these costs usually do not trigger a hot debate in the Polish or international arbitration community: the numbers either result from given rules of arbitration, or are specifically agreed on by the parties. As a matter of fact, the arbitration rules of various arbitration institutions routinely provide for tables of costs or tariffs, which set out the costs of the arbitration court and administration. Similarly, regarding *ad hoc* arbitration, Art. 40 of the 2010 UNCITRAL Rules[1] sets out all the categories of arbitration costs and the method of their calculation.

The party costs are less obvious, although they routinely constitute the prevail-

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[1] General Assembly resolution 65/22 UNCITRAL Arbitration Rules as revised in 2010.

ing part of all the costs.[2] This category comprises the cost of lawyers (remuneration and expenses), but also other costs, which often are not specifically addressed in the arbitration rules.[3] Leaving aside for now the reasonableness of costs, these include party-appointed experts or advisors, witnesses (including witness statements and witness preparation), the expenses of experts and witnesses, research costs, communication costs (phone calls, mail etc), translations[4] or costs of related state court proceedings.[5] There are controversies as to costs borne by the parties themselves.[6] At the beginning of the 90s, in several ICC arbitrations the arbitral panel held that the costs of a party and its employees, including its in-house counsel, cannot be claimed in arbitration,[7] however in more recent awards the tribunals conceded that the costs of an in-house counsel, in certain conditions, can be considered arbitration costs.[8] Likewise, as referred by A. Olszewski and E. Czerniawko, in ICC case No. 15282, which involved the Polish State Treasury Solicitors' Office, a tribunal deemed as costs of arbitration the costs which were calculated by the Office in reference to its budget for the relevant years, reduced to reflect its involvement in this particular case.[9]

In a similar vein, the rules of Polish leading arbitration courts expressly list only the legal costs and do not refer to any other costs. In this context, it is worth

[2] See in the context of investment arbitration M. Hodgson, *Counting the costs of investment treaty arbitration*, Journal of Global Arbitration Review, vol. 2/2014.

[3] E.g. the ICC Rules of Arbitration in Art. 37.1 refers to "the reasonable legal and other costs incurred by the parties for the arbitration"; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules") in Art. 44 refer to „any reasonable costs incurred by another party, including costs of legal representation, having regard to the outcome of the case and other relevant circumstances."

[4] B. Hanotiau, *The Parties' Costs of Arbitration*, Transnational Dispute Management 1/2010, p. 214–217; see also M. Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, ASA Bulletin 2/2004, s. 272–276; in the Polish doctrine see P. Pietkiewicz, *Koszty postępowania przed sądem polubownym* (*Arbitration costs*), in: A. Szumański (ed.), *System prawa handlowego*, v. 8, *Arbitraż handlowy* (*Commercial arbitration*), Warsaw 2009.

[5] See P. Pietkiewicz, *Koszty postępowania przed sądem polubownym* (*Arbitration costs*), in: A. Szumański (ed.), *System prawa handlowego*, v. 8, *Arbitraż handlowy* (*Commercial arbitration*), Warsaw 2009, s. 548–549; for a different view see A.W. Wiśniewski, *Międzynarodowy arbitraż handlowy* (*International Commercial Arbitration*), Warsaw 2011, pp. 436–437.

[6] See B. Hanotiau, *The Parties' Costs of Arbitration*, Transnational Dispute Management 1/2010, s. 214– 217; A. Olszewski, E. Czerniawko, *Zasądzanie kosztów prawników wewnętrznych w arbitrażu* (*Allocation of in-house lawyers' fees in arbitration*), e-Przegląd Arbitrażowy (Arbitration e-review) 1/2012, pp. 40–44.

[7] See e.g. ICC Case 6293 (1990), ICC Case No. 5029 (1991), ICC Case No. 5896 (1992), ICC Bulletin, vol. IV, 1993, pp. 32, 37, 43.

[8] ICC Case 6564 (1993), vol. IV, 1993, p. 46; see also Y. Derains, E. Schwartz, *Guide to the ICC Rules of Arbitration*, 2nd edition, Kluwer Law International 2005, p. 365; See also ICC Case 15282, which is referred to by A. Olszewski, E. Czerniawko, *Zasądzanie kosztów prawników wewnętrznych w arbitrażu* (*Allocation of in-house lawyers' fees in arbitration*), e-Przegląd Arbitrażowy (Arbitration e-review) 1/2012, p. 44.

[9] *„Te koszty i wydatki na obsługę prawną zostały obliczone w odniesieniu do budżetu Prokuratorii Generalnej w stosownych latach i pomniejszone w sposób odzwierciedlający proporcję czasu poświęconą na pracę przy niniejszej sprawie. Zgodnie z dokumentacją dostarczoną przez pozwanego w dniu 15 marca 2010 r., Trybunał Arbitrażowy nie ma powodu, aby stwierdzić, że dana kwota jest nadmierna lub nieuzasadniona"*, see: A. Olszewski, E. Czerniawko, *Zasądzanie kosztów prawników wewnętrznych w arbitrażu* (*Allocation of in-house lawyers' fees in arbitration*), e-Przegląd Arbitrażowy (Arbitration e-review) 1/2012, p. 44.

mentioning the former rules of SAKIG, which were in force between 1 January 2007 and 31 December 2014 („Former SAKIG Rules"), which in § 43(4), when discussing the decision on costs as part of the arbitration award, refer to „attorney's fees per one legal representative, according to his or her workload". The new rules, which came into force on 1 January 2015 („SAKIG Rules"), provide that *„When resolving the costs of the proceeding, the Arbitral Tribunal shall take into account the justified costs of legal representation and other justified costs …"*. Similarly, the rules of the Lewiatan Court of Arbitration dated 1 March 2012 („Lewiatan Rules") in § 47 draws a distinction between *„the reasonable costs of the parties' legal representation; as well as other reasonable costs incurred by the parties*".

Apparently, the party's costs are less controversial in the Polish doctrine as far as they refer to the costs of in-house counsel: a legal advisor or an attorney of the State Treasury Solicitors' Office. This can result from the practice of Polish arbitrators drawing from their experience with the state courts and the related rules applicable to cost recovery of the fees of legal advisors who have the status of an employee (in accordance with the Regulation of the Minister of Justice dated 28 September 2002 regulating the issue of fees for legal advisors' activities and the State Treasury incurring the costs of unpaid pro bono legal aid[10]).[11]

The Allocation of Costs: Loser pays or pay your own Way

When deciding on the allocation of costs, an arbitral tribunal can go in two directions: decide that each party must bear its own costs (referred to as the *American rule*), or decide that the losing party should cover part or all of the other party's costs (referred to as *loser pays* or *costs follow the event*).[12] In practice, the second option entails two variants: winner recovers all costs or the costs are apportioned based on the relative success in the dispute. These rules can be divided into different nuanced approaches;[13] a tribunal may also apply different rules to different categories of costs: the parties' costs and other arbitration costs.[14]

When it comes to the American rule, which is followed in the US, with some exceptions,[15] in the practice of federal and state courts, each party is responsi-

[10] Unified text J. L. 2013, item 490.
[11] As claimed by A. Olszewski oraz E. Czerniawko in: *Zasądzanie kosztów prawników wewnętrznych w arbitrażu* (*Allocation of in-house lawyers' fees in arbitration*), e-Przegląd Arbitrażowy (Arbitration e-review) 1/2012, p. 43, in their practie as attorney at the State Treasury Solicitors' Office they have not come across a tribunal which refused to grant these costs with referrence to the Regulation (*„Nie zdarzył się jeszcze ani jeden przypadek, aby takie uzasadnienie żądania kosztów zastępstwa procesowego, z powołaniem się na analogię do rozporządzenia Ministra Sprawiedliwości, nie zostało uwzględnione*").
[12] M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, Transnational Dispute Management, vol. 11/2014, p. 2.
[13] R. Kreindler list seven version of this rule, see R. Kreindler, *Final Rulings on Costs: Loser Pays All?*, Transnational Dispute Management, vol. 7/2010, s. 2.
[14] See M. Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, ASA Bulletin 2/2004, p. 261.
[15] The loser pays rule operates in Alaska and between 1980–1985 it was in force in Florida regarding medical malpractice cases, see M. Gryphon, *Assessing the Effects of a "Loser Pays" Rule on the American Legal System: An Economic Analysis and Proposal for Reform*, 8 Rutgers Journal of Law & Public Policy, vol. 8:3 (Spring 2011), pp. 595–602.

ble for their own costs, unless the parties agreed otherwise or one of the parties acted in bad faith.[16] This rule is rooted in the US litigation traditional policy, according to which one should not be penalized for defending or bringing a lawsuit.[17] It can also be explained by the need to remove entry barriers (ie the risk of having to bear all the litigation costs) in bringing claims which stand a chance of succeeding, but are not obvious.[18] In this sense, this rule can be traced back to the American philosophy of private enforcement.[19] It is also understood as a component of the right to fair trial, which could be distorted by the risk that a party with better resources could shift the litigation costs to the loser.[20] Finally, American courts seem to think that the application of the loser pays rule could lead to delays, increased costs and complicating the evidentiary process.[21]

The American rule applies in some other countries, notably Japan and China,[22] as well as in inter-state disputes, as per Art. 64 of the Statute of the International Court of Justice.[23] It is also relatively common in investment arbitration, which is rooted in public international law.[24] In the context of inter-state disputes the American rule can be seen as a matter of international comity.[25]

The loser pays rule in its different variants forms part of the civil procedure in Continental Europe as well as in England and Wales. In England and Wales, the

[16] *Alaskan Pipeline Serv. v. Wilderness Society*, 421 U.S. 240 (1975) ("A court may assess attorneys' fees ... when the losing party has acted in bad faith"), accessible at: http://law.justia.com/cases/federal/appellate-courts/F2/963/378/243482/; see also J.Y. Gotanda, *Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations*, in: M.A. Fernández-Ballesteros, D. Arias (ed.), *Liber Amicorum Bernardo Cremades*, Wolters Kluwer España; La Ley 2010, pp. 543–545.

[17] J.F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, American University Law Review 42, vol. 4 (Summer 1993), pp. 1634–1635.

[18] See R. Kreindler lists seven versions of this rule, see R. Kreindler, *Final Rulings on Costs: Loser Pays All?*, Transnational Dispute Management, vol. 7/2010, p. 4.

[19] J.C. Coffee Jr, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working*, Maryland Law Review 42 (1983), pp. 215, 217.

[20] See U.S. Supreme Court judgment in a case *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) ("In support of the American rule, it has been argued that, since litigation is, at best, uncertain, one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. Cf. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, at 379 U.S. 235 (1964); id. at 379 U. S. 236–239 (concurring opinion of Mr. Justice Goldberg). Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney fees would pose substantial burdens for judicial administrations. *Oelrichs v. Spain*, *op.cit.*, at 82 U. S. 231.), accessible at: https://supreme.justia.com/cases/federal/us/386/714/case.html.

[21] J.Y. Gotanda, *Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations*, in: M.A. Fernández-Ballesteros, D. Arias (ed.), *Liber Amicorum Bernardo Cremades*, Wolters Kluwer España; La Ley 2010, pp. 543–544.

[22] M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, Transnational Dispute Management, vol. 11/2014, p. 2.

[23] Statute of the International Court of Justice, 24 October 1945.

[24] As reported by M. Hodgson, in 56% of the awards reviewed, the tribunals applied the American rule, M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, Transnational Dispute Management, vol. 11/2014, p. 2.

[25] M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, Transnational Dispute Management, vol. 11/2014, p. 3.

costs follow the event principle traditionally was applied as a simple alternative, ie that the winner would be able to recover all its costs no matter the degree of success (irrespective of the proportion of the awarded amount).[26] Today, it has become less rigorous. Firstly, due to detailed rules on settlement (formalised as Part 36 offer under the Civil Procedure Rules in England and Wales), which penalizes a party, by shifting the cost allocation among others, which refuses to settle and subsequently receives a less favourable judgment than the rejected settlement terms.[27] Secondly, due to the implementation of an ex-post review of costs and official tariffs of legal fees in certain matters.[28] It is also worth mentioning the recent reform of the English civil procedure, inspired by a report by Rupert Jackson (the Jackson Report[29]), which introduced incentives for judges to allocate costs not in accordance with the overall outcome but specific issues (*issue-based costs orders*).[30]

Many counties of Continental Europe, including Germany, Austria, Switzerland, Sweden[31] and Poland, adopted a different version of the loser pays rule, according to which the winner can recover litigation costs in proportion to its success (this general rule is further supplemented by specific rules aimed at promoting cost-efficient litigation).[32] In a simple scenario, this rule would suggest that if a claimant asked for ten, and the court awarded only five, each party was only partially successful and thus should bear equal parts of the total litigation costs. This simple formula is applied in Germany.[33] It is also reflected, although slightly less restrictively, in Art. 100 of the Polish Code of Civil Procedure:

"Where only a part of claims are awarded, costs shall be reciprocally exclusive or proportionally shared. However, the court may oblige one of the parties to reimburse all costs if the adverse party lost only a minor part of its claims or where the amount due to the latter party depends on reciprocal calculation or evaluation by the court."

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[26] See M. Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, ASA Bulletin 2/2004, p. 263.

[27] Part 36 Civil Procedure Rules; the consequences of submitting a settlement offer on the costs of proceedings are set out in Sections 36.10, 36.11 and CPR 36.14. A.; see also M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, Transnational Dispute Management, vol. 11/2014, p. 3, although the author seems to regard the rules applicable in England and Wales the same as those applicable in the Continental Europe, whereas they differ in many details.

[28] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, London 2010, accessible at: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf, see also C. Hodges, S. Vogenauer, M. Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study*, LEGAL RESEARCH PAPER SERIES Paper No 55/2009, accessible at: http://ssrn.com/abstract= 1511714.

[29] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, London 2010, accessible at: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

[30] See M. O'Reilly, P*rovisions on costs and appeals: an assessment from an international perspective*, Arbitration 4/2010, p. 709.

[31] M. Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, ASA Bulletin 2/2004, s. 262; see also C. Hodges, S. Vogenauer, M. Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study*, LEGAL RESEARCH PAPER SERIES Paper No 55/2009, accessible at: http://ssrn.com/abstract= 1511714.

[32] See Arts 99–105 of the Code of Civil Procedure.

[33] § 92.1 ZPO in connection with § 91 ZPO.

The costs follow the event principle can be explained in several ways. Firstly, it is intended to secure the right to a fair trial as a claimant cannot be denied its right to seek justice simply because of the litigation costs (this is a different aspect of the right to a fair trial than that invoked in defence of the American rule). In this way, the rules of civil procedure safeguard the civil rights of citizens.[34] Secondly, this rule can also be interpreted as securing full indemnification of the claimant's damage, which under this concept would also include the costs of exercising rights before a court: an injured party should not be denied part of the damages simply because it had to bring the matter to a state or arbitration court.[35] The indemnity principle does not explain, however, the basis for the respondent being able to claim the costs of proceedings if the claim was dismissed. Thirdly, the loser pays rule incentivises the filing of meritorious claims and discourages frivolous claims, thus promoting cost efficiency.

Cost Allocation in selected Legal Systems and Arbitration Rules

Legal Systems

The UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ("UNCITRAL Model Law")[36] does not address the costs of arbitration. This was done on purpose, as reported by the working group on the new law:

> „107. In preparatory work for the UNCITRAL Model Law on International Commercial Arbitration, there was wide support for the view that questions concerning the fees and costs of arbitration were not appropriate matters to be dealt with in a model law".

Similarly, this is not dealt with in the arbitration laws of many countries.[37] This includes the Polish Code of Civil Procedure, inspired by the UNCITRAL Model Law, which refers to arbitration costs only in the context of an agreement between the parties and the arbitrators regarding the fees and costs of the arbitrators (Art. 1179), which is relevant to *ad hoc* arbitrations.[38] Likewise, the arbitration costs are not regulated in the Swiss act on private international law, the US *Federal Arbitration Act* or the French *Code de procédure civile.*[39]

This is different in England and Germany. The English *Arbitration Act 1996* contains a separate chapter on the costs of arbitration (Sections 59–65). According to Section 61.2 of the *Arbitration Act 1996*,

[34] B. Hanotiau, *The Parties' Costs of Arbitration*, Transnational Dispute Management 1/2010, p. 213.
[35] M. Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, ASA Bulletin 2/2004, p. 251.
[36] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
[37] See e.g. Swiss Private Internation Law Act, US Federal Arbitration Act or French Code de procédure civile.
[38] T. Ereciński, K. Weitz, *Sąd Arbitrażowy* (*Arbitration court*), Warsaw 2010, p. 334.
[39] Gary B. Born, *International Commercial Arbitration*, Second Edition, Kluwer Law International 2014, p. 3088; see also Y. Derains, L. Kiffer, *National Report for France (2013)*, in: J. Paulsson (ed.), *International Handbook on Commercial Arbitration* 1, 64 (1984, 2013).

> „Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs".

When speaking of the „general principle", this refers to the rules of civil procedure, which dictate that the loser pays all litigation costs.

German *Zivilprozessordnung* („ZPO") regulates arbitration costs in its § 1057. According to § 1057.1 (first sentence), an arbitral tribunal is allowed to decide on the allocation of costs at its own discretion, however taking into account the circumstances of the case, including the outcome of the proceedings.[40]

Apparently, in both of these cases the statutory criteria regarding arbitration costs replicate the legislators' preferences regarding litigation costs.

Arbitration Rules

When it comes to arbitration rules, the decisive point in time for the establishment of a prevailing cost allocation principle was the adoption of the UNCITRAL Arbitration Rules in 1976. In Arts 38 and 40, they provide for the loser pays rule:[41]

> „Article 38
>
> The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
>
> […] (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.
>
> Article 40
>
> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. […]"

[40] "*Hierbei entscheidet das Schiedsgericht nach pflichtgemäßem Ermessen unter Berücksichtigung der Umstände des Einzelfalles, insbesondere des Ausgangs des Verfahrens*."
[41] The US and India sought to advance the pay your own way principle, see *Travaux préparatoires UNCITRAL Arbitration Rules* (1976), A/CN.9/9/C.2/SR.14 (23 April 1976).

Today, most leading arbitration institutions, including ICC, LCIA, VIAC and SCC, have followed suit. The American Arbitration Association does not make it the default rule, however it expressly allows for the allocation of costs:

> "Article 34: Costs of Arbitration
>
> The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.
>
> Such costs may include:
>
> […] d. the reasonable legal and other costs incurred by the parties; […]"

Loser pays: Limits on recoverable Costs

The determination of what costs can be recovered from the other party are the essential element of the loser pays rule, in any of its versions. This is obviously not the case with the American rule. A situation, where a party would be able to shift any costs to the other party, no matter their amount, whether they were necessary, reasonable etc., could lead to unwanted results. Firstly, a more resourceful claimant could get an incentive to inflate the costs and act inefficiently, thus increasing the respondent's exposure beyond reasonable limits. Secondly, a claimant could decide not to pursue claims in less obvious disputes fearing the need to indemnify the other party for an unpredictable amount of costs.[42] This is true for both litigation and arbitration. There seem to be three main methods that legislators use to address these problems.

The first regulatory strategy is to regulate the costs *ex ante*: set the limits, which the parties may recover if they are successful. The official tariffs and tables of attorneys' fees in litigation are a case in point. Apart from Poland, such tariffs apply in a number of EU countries such as Austria, Belgium, the Czech Republic, Denmark, Estonia, Germany, the Netherlands and Spain.[43] However, these can hardly be found in arbitration laws and rules. A notable exception among arbitration rules are the Former SAKIG Rules which introduced caps on attorney fees (the cap depended on the arbitration fee, thus on the amount in dispute)[44] and the Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, which refers to tariffs applicable in litigation.[45] When it comes to arbi-

[42] The Dutch case of implementation of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights shows that the increased risk of cost shifting in favour of the respondent may have a significant impact on the ability to pursue claims in court: see P.M.M. van der Grinten, *Challenges for the Creation of a European Law of Civil Procedure*, accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392006.

[43] C. Hodges, S. Vogenauer, M. Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study*, LEGAL RESEARCH PAPER SERIES Paper No 55/2009, accessible at: http://ssrn.com/abstract= 1511714, p. 20.

[44] § 43(4) of the former SAKIG Rules, just like the Estonian legislator and unlike the other list, imposes only a maximum tariff.

[45] § 55.2 Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic from 2012 (the same applies in the newly adopted rules, in effect since 1 October 2015).

tration laws, official tariffs apply under the Hong-Kong Arbitration Ordinance (Arts 74–75).

Official tariffs have the advantage of predictability, as each party knows from the very beginning its maximum potential exposure to the costs of proceedings. On the other hand, they may lead to a gap between the recovered costs and the actual expenditures (the *recoverability gap*), which in practical terms paradoxically leads to a partial application of the American rule.[46] The more complex a dispute, the greater the recoverability gap is likely to be.

The second strategy for reducing the risk for the loser and increasing the predictability of costs is applied *ex ante* by reviewing the costs of proceedings against a certain standard.[47] This strategy is adopted by many legislators and arbitration institutions, which often prescribe the maximum recoverable costs by resorting to the standard of whether the costs are proportionate,[48] justified[49] or reasonable.[50] Such restriction can be found in the ICC, LCIA and UNCITRAL Rules, or the SAKIG Rules and the Lewiatan Rules.

From their very nature, such standards are of little help when it comes to predicting the legal costs and defining financial exposure to such costs. As a result, in complex matters involving extensive evidentiary proceedings (eg many witnesses, extensive disclosure or expert reports), the loser may end up having to cover the legal costs of the other party, which may often form a significant part of the total burden. On the other hand, these standards allow for more flexibility when assessing whether particular items of costs were necessary. This makes it possible for a party to expect that if it wins, as long as it has engaged professional attorneys who lead the case in a cost-efficient manner, it will be able to shift all its costs to the other party. This standard has gained popularity around the world for the very reason that arbitration costs (notably legal fees) in complex matters cannot easily be quantified *ex ante* and thus standardization by imposing tariffs of costs seems inappropriate. There may be another, more controversial, explanation for the popularity of this standard, ie rent-seeking by the arbitration lawyers' lobby, who may be interested in keeping the arbitration costs, and thus their remuneration, subject to as few limits as possible.

A good illustration of interplay between both of the above regulatory strategies to control the amount of recoverable costs are the arbitration rules of the Hong Kong International Arbitration Centre (HKIAC). The basic rules, ie HKIAC Administered Arbitration Rules, from 2013 aim at controlling costs by reference to the

[46] See M. Zachariasiewicz's comments on the former SAKIG Rules: M. Zachariasiewicz, *Koszty postępowania arbitrażowego w świetle postanowienia § 43(4) Regulaminu arbitrażowego SA KIG – kilka uwag z perspektywy porównawczej* (*Arbitration costs in light of § 43(4) of the SA KIG Rules – some remarks from the comparative perspective*), in: *Międzynarodowe prawo handlowe* (*International commercial law*), accessible at: http://miedzynarodoweprawohandlowe.wordpress.com/2013/07/23/koszty-postepowania-arbitrazowego-w-swietle-postanowienia-§-43-pkt-4-regulaminu-arbitrazowego-sakig-kilka-uwag-z-perspektywy-porownawczej/.

[47] For a general discussion of the rules versus standards see L. Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke Law Review 557 (1992).

[48] See CPR rule 44.3(5).

[49] § 48.2(4) of the SAKIG Rules.

[50] § 47.1 of the Lewiatan Rules; Art. 38(e) and Art. 40 of the UNCITRAL Rules, Art. 37.2 of the ICC Rules, Art. 28.3 of the LCIA Rules (2014), § 1057.1 ZPO.

reasonableness standard.[51] Whereas HKIAC Small Claims and 'Documents Only' Procedures, which applies to less complex disputes, imposes a general limit on costs which each party is entitled to recover at HKD 30,000.[52] As the above example shows, HKIAC adopts different approaches arguably depending on the expected possibility of the parties predicting the likely costs of the proceedings.

A third strategy, which is really a combination of the two previous strategies, is the possibility to impose caps on recoverable costs in the course of proceedings (a cap imposed by the arbitrators who know the case and the likely hurdles for each party). This has been adopted in Section 65 of the Arbitration Act,[53] which empowers arbitrators to impose a cap on the costs at any stage of the proceedings:[54]

> "Section 65: Power to limit recoverable costs.
>
> (1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.
>
> (2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account".

The above rules have the advantage of flexibility as they allow the limits on recoverable costs to be adjusted to the circumstances of a particular case. This seems to work better in curbing excessive costs than an all-encompassing tariff of costs; however, it may not work as well when it comes to the predictability of costs.

The Force of Habit

Practice suggests that the loser pays rule is dominant in commercial arbitration. This is reflected in the "Current and Preferred Practices in the Arbitral Process" report from 2012, which suggests that the American rule is used in only 20% of all cases. In the remaining 80% of cases, tribunals shift all the costs to the loser or allocate costs in proportion to the relative success of each party.[55] The loser pays rules has also seemed to gain popularity in investment arbitration in the last few years, although the American rule was still applied in 56% of cases scrutinised by M. Hodgson.[56] This notwithstanding, arbitration practitioners often complain about many arbitration rules lacking specific provi-

[51] See Art. 33.1–2. See also Art. 33.3, which provides that: "With respect to the costs of legal representation and assistance referred to in Article 33.1(e), the arbitral tribunal, taking into account the circumstances of the case, may direct that the recoverable costs of the arbitration, or any part of the arbitration, shall be limited to a specified amount."
[52] See Art. 8.
[53] See also Art. 75–75 of the Hong-Kong Arbitration Act.
[54] Chartered Institute of Arbitrators, Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration, point 6.3.
[55] Accessible at: http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf.
[56] See M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, Transnational Dispute Management, vol. 11/2014.

sions and guidelines on the cost decisions. Apparently, even where tribunals allocate costs according to one version of the loser pays rule, the specific outcome and awarded amounts cannot be easily predicted.[57] This is facilitated by the wide discretion which most arbitration rules give the arbitrators regarding the decision on costs.[58]

It may be the case that different decisions and assumptions of the arbitral tribunals are dictated by different experiences drawn from the arbitrators' practice in their home jurisdiction and the related parties' expectations, also inspired by their home rules. The practice of referring to local rules and habits can be traced in some of the reported arbitration awards.[59] The shifting of costs to the losing party, no matter the degree of success, and the practice of sealed offers (modelled after Part36 offer), both inspired by the state courts; practice, can be found in arbitrations seated in England.[60] Another example of the local court practices penetrating into arbitration is the practice of US enforcement courts which consider the allocation of costs without the explicit consent of the parties as possible grounds for setting aside an arbitral award, which in turn may have an influence on the arbitrators' approach to costs *ex ante.*[61] Obviously, apart from direct references to local court practices and regulations, there may be more elusive inspirations. One can assume that arbitrators unconsciously draw from their experience with the law of the jurisdiction in which they practice.[62]

In this context, it is worth mentioning the new LCIA Rules which attempt to loosen its ties with the local regulatory framework to enhance the arbitration court's attractiveness to international parties. Art 28.3 of the LCIA Rules provides that: *„The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority*".

In sum, one may argue that as long as the arbitration rules of a particular court do not provide for specific guidelines, the arbitrators will have a natural inclination to resort to their home regulations and guidelines and experience with their local courts.

The Allocation of Costs under the Rules of the Court of Arbitration at the Polish Chamber of Commerce

Against the backdrop of the above discussion, it is worth taking a look at arbitration rules of the SAKIG: what rules of cost allocation and the related prereq-

[57] M. Hodgson, *Counting the costs of investment treaty arbitration*, Journal of Global Arbitration Review, vol. 2/2014; M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, Transnational Dispute Management, vol. 11/2014.
[58] M. Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, ASA Bulletin 2/2004, p. 256.
[59] See e.g. ICC Case 6345 (1991), 6282 (1992), ICC Bulletin, vol. 4/1993, pp. 42–45; ICC Case 6962 (1994), Yearbook of Commercial Arbitration 19 (1994), p. 193.
[60] P. Anjoshoaa, *Costs awards in international arbitration and the use of 'sealed offers' to limit liability for costs*, International Arbitration Law Review 2/2007.
[61] See awards referred to by R. Kreindler, *Final Rulings on Costs: Loser Pays All?*, Transnational Dispute Management, vol. 7/2010 p. 5.
[62] M.L. Smith, *Costs in International Commercial Arbitration*, Dispute Resolution Journal, vol. 56/2001; M. Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, ASA Bulletin 2/2004, p. 256.

uisites do they incorporate? Are they inspired by the Polish Code of Civil Procedure? The answers to these questions may offer a hint of the predictability and level of costs in arbitration proceedings under those rules, as well as their attractiveness to international parties. To present the analysis in a broader perspective, I start with the rules which were in force for 8 years and were replaced only recently by the new rules which came into force on 1 January 2015.

Former SAKIG Rules

The Former SAKIG Rules were very brief in regulating the costs of arbitration while at the same time imposing quite detailed limits on the legal fees in para. 43:

> „§ 43: Contents of an award
>
> An award should: [...]
>
> 4) contain a decision on the costs of the proceedings and attorney's fees per one legal representative, according to his or her workload, up to the maximum amount of half of the arbitration fee in the case – however, not to exceed PLN 100,000,00 or the equivalent thereof in another currency – to be determined according to the average foreign exchange rate of the PLN to other currencies, announced by the National Bank of Poland on the day preceding the award;
>
> 5) at the request of a party – it should contain a decision on the costs of travel and accommodations of the arbitrators, which encumber the said party and which are deducted from the advance payment with which it was charged by the Court to cover arbitration costs.".

This regulation was quite unusual and directly inspired by the rules of cost allocation set out in the Code of Civil Procedure. All its essential elements: reference to fees of one attorney only, the maximum tariff of legal fees construed as a proportion of the amount in dispute and a specific cap on recoverable costs reflect the rules applicable in litigation before Polish courts. When this is coupled with anecdotal evidence as well as a limited number of published cases, one may argue that the practice regarding cost allocation of arbitral tribunals acting under the Former SAKIG Rules is deeply rooted in the local rules and practices applicable in state court litigation.[63]

A limit on the recoverable costs of arbitration by a reference to the fees of one attorney seems to be an outright archaism. This cannot be claimed as easily with the maximum tariffs, as almost every rule provides for some set of principles which ought to place limits on the recoverable costs. However, the Former SAKIG Rules were unusual in adopting a one size fits all approach by imposing a cap (maximum tariff) on legal fees. If one compares these tariffs to the official tariffs applicable in state court litigation (see § 2 in connection with § 6 of the Regulation of the Minister of Justice dated 28 September 2002 regulating

[63] See Award dated 17 August 2009 r., SA 227/08, Biuletyn Arbitrażowy (Arbitration Bulletin) 2/2010, p. 123; see also A. Olszewski, E. Czerniawko, *Zasądzanie kosztów prawników wewnętrznych w arbitrażu* (*Allocation of in-house lawyers' fees in arbitration*), e-Przegląd Arbitrażowy (Arbitration e-review) 1/2012, p. 43.

the issue of fees for advocates' activities and the State Treasury incurring the costs of unpaid pro bono legal aid and the Regulation of the Minister of Justice of 28 September 2002 regulating the issue of fees for legal counsels' activities and the State Treasury incurring the costs of unpaid pro bono legal aid), it turns out that the maximum fee for an attorney acting before a SAKIG tribunal was higher than under the state court tariffs (at a maximum 600% of the basic fees set by reference to the amount in dispute) only when the amount in dispute wss between one and ten million PLN (§ 8(5)) Tariff of Fees of the Court of Arbitration at the Polish Chamber of Commerce). If one takes into account that Polish tariffs of attorneys' (ie advocates and legal advisors) fees are among the lowest in Europe,[64] the Former SAKIG Rules seemed overly rigorous when it comes to curbing costs of legal representation.

The Former SAKIG Rules' approach to costs had two main advantages: it provided for a high level of predictability of costs and accommodated the preferences of local arbitration users drawn from the Polish court practice. The strict limits on recoverable costs may therefore have provided for higher cost efficiency by imposing a pay your own way rule beyond a certain threshold (in this sense, M. Zachariasiewicz concludes that the cost allocation rules under the Former SAKIG Rules led to a partial application of the American rule[65]). The main disadvantages of these rules were the lack of flexibility and its non-standard character. In other words, the Former SAKIG Rules went against the trends and preferences of many users of international commercial arbitration. As a result, these rules seemed inappropriate in complex disputes, which involve extensive evidentiary proceedings or require instructing a large team of specialised lawyers. In such disputes, the gap between the costs actually incurred for legal representation and the costs recoverable from the other party may be so wide as to undermine the very essence of the loser pays rule.

SAKIG Rules

The SAKIG Rules, which replaced the Former SAKIG Rules, adopted a different approach to costs by switching from a cap on legal fees to a standard of reasonable and justified costs. The arbitration cost are now regulated in a separate chapter (§ 48–51). § 48 and 51 provide the following:

> „§ 48: Costs of arbitration proceeding
>
> 1. Upon application of a party, the Arbitral Tribunal shall resolve the costs of the arbitration proceeding in the ruling ending the proceeding, reflecting the result of the proceeding and other relevant circumstances.

[64] C. Hodges, S. Vogenauer, M. Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study*, LEGAL RESEARCH PAPER SERIES Paper No 55/2009, accessible at: http://ssrn.com/abstract= 1511714, p. 56.

[65] M. Zachariasiewicz, *Koszty postępowania arbitrażowego w świetle postanowienia § 43(4) Regulaminu arbitrażowego SA KIG – kilka uwag z perspektywy porównawczej* (*Arbitration costs in light of § 43(4) of the SA KIG Rules – some remarks from the comparative perspective*), in: *Międzynarodowe prawo handlowe* (*International commercial law*), accessible at: http://miedzynarodoweprawohandlowe.wordpress.com/2013/07/23/koszty-postepowania-arbitrazowego-w-swietle-postanowienia-§-43-pkt-4-regulaminu-arbitrazowego-sa-kig-kilka-uwag-z-perspektywy-porownawczej/.

2. The costs of the arbitration proceeding shall include: [...]
   4) justified costs of the parties connected with conducting the proceeding, [...]

§ 51: Costs of the parties

1. When resolving the costs of the proceeding, the Arbitral Tribunal shall take into account the justified costs of legal representation and other justified costs incurred by a party in connection with the proceeding.
2. *When resolving the costs of legal representation, the Arbitral Tribunal shall take into account the reasonable amount of the attorney's fee, considering in particular the result of the proceeding, the work input of the attorney, the nature of the case, and other relevant circumstances."*

Formally speaking, it seems inconsistent to refer to the outcome of the proceedings when assessing the reasonableness of costs. This is appropriate in § 48, which incorporates the loser pays rules, but seems confusing in § 51.2 as it suggests that reasonableness depends on the final outcome of the case, which presumably was not the intention. In consequence, theoretically this could lead to the loser being penalized twice: when assessing the allocation rule and when assessing the amount and reasonableness of costs.

Leaving aside these comments, the SAKIG Rules fit well within the tendency towards uniformisation of the arbitration rules worldwide, which now routinely refer to general standards rather than imposing caps. When it comes to cost allocation, the SAKIG Rules are still less liberal than the ICC Rules or the VIAC Rules, which give the arbitrators unrestricted discretion in deciding on costs, whereas § 48.1 of the SAKIG Rules contains a formulation of the loser pays rule, although it does not specify its preferred version.[66] Given the established practice of the SAKIG tribunals resorting to cost allocation rules applicable in state court litigation, arguably this could be understood as incorporating the loser pays rule as reflected in the Code of Civil Procedure.

When it comes to the standard of „justified costs of legal representation", it remains to be seen if the arbitrators acting under the new rules will continue the habit of drawing from their experience with the state courts and whether they will resort to the limits on costs set out in the former rules. This would seem inappropriate, given that the new rules expressly opted for the loser pays principle and removed the limited version of the American rule which was in place in the Former SAKIG Rules. Keeping this practice alive would not be fair to parties instructing professional (and thus, often expensive) advisors or could prevent parties from instructing such lawyers, which would not enhance the professionalization of arbitration in Poland. When it comes to legal fees, arbitrators should limit themselves to eliminating unprofessional or abusive conduct and not to try to set any kind of standard rates for legal services in arbitration or resort to market average.

One could argue that the elimination of a cap on legal fees may encourage some lawyers, who may be used (just as many arbitrators are) to inefficient

[66] The wording of § 48.1 is almost identical to Art. 43.5 of the SCC Rules.

practices from the Polish judicial system, to inflate their fees. Even so, instead of imposing limits on fees, such practices can be curbed by removing from the equation any costs which are unreasonable (unjustified) at first glance or by allocating costs.

Of course, these general rules will not bring results if inefficiencies are caused by the managers of the dispute, ie arbitrators. Anecdotal evidence points to the recurrent practice of scheduling hearing days with several-month gaps between them, little control over the order of pleadings and evidence motions, avoiding a narrowing down of a dispute to agreed issues, inefficient email communication etc. The role of a professional advisor is to improve or suggest methods to improve the efficiency of the proceedings.

Finally, one must note that the new rules did not introduce a small claims procedure, which makes up a significant part of all SAKIG cases.[67] Pursuing such claims in arbitration may be inefficient, absent any limit on attorneys' fees.[68] This is because the value of the claims should not in itself decide as to whether the incurred costs were reasonable: there are complex disputes over small amounts as well as straightforward disputes over large amounts. Therefore, there is a case for introducing a special procedure on small claims containing some form of more explicit restrictions on the total costs of proceedings, such as the right for arbitrators to impose a cap once they have learned the nature of a particular dispute.

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[67] See European Arbitration Group. Report Poland (October 10, 2008), Biuletyn Arbitrażowy (Arbitration Bulletin) 9/2009, p. 31.

[68] C. Hodges, S. Vogenauer, M. Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study*, LEGAL RESEARCH PAPER SERIES Paper No 55/2009, accessible at: http://ssrn.com/abstract= 1511714, pp. 23–24.

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Conference of Arbitrators: practical Issues

Jan Rysiński*

Regardless of the rules governing the arbitration proceedings, the conference of arbitrators is an indispensable element of any arbitration heard by more than one arbitrator.[1]

In the course of the arbitrators' conference, the resolution of the case takes shape, and therefore it is particularly significant from the point of view of the final result of the proceedings. This is why it is stated in the legal literature that the arbitrators' conference furthers the principle of equality of the parties to the case and due process.[2] It is even stated that it is a right of the parties for an arbitrators' conference to be held, stemming from the general right to be heard.[3] E. Gaillard and J. Savage take the view that conducting a proper conference is a requirement of the international legal order,[4] infringement of which may lead to setting aside the arbitral award.[5]

Regardless of the key significance of the arbitrators' conference to resolving the dispute, it rarely is the subject of detailed regulation. Neither the UNCITRAL Model Law[6] nor the Polish Civil Procedure Code[7] deals with it particularly closely. Many rules of leading arbitration institutions lack detailed regulations on

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1 T. Ereciński, K. Weitz, *Sąd polubowny* (*Arbitration*), Warsaw 2008, p. 330.

2 T. Wiśniewski, A. Hauser-Morel, in: A. Szumański (ed.), *System prawa handlowego. Tom 8. Arbitraż handlowy* (*System of Commercial Law. Vol. 8, Commercial Arbitration*), Warsaw 2010, pp. 501–502.

3 T. Ereciński, K. Weitz, *op.cit.*, p. 330; B. Berger, F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2006, p. 475.

4 T. Schwarz, C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria*, Kluwer Law International 2009, p. 641; Y. Derains, E.A. Schwartz, *A Guide to the ICC Rules of Arbitration*, Kluwer Law International 2005, p. 307; E. Gaillard, J. Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International 1999, pp. 745–746.

5 E. Gaillard, J. Savage, *op.cit.*, pp. 745–746.

6 Model Law on International Commercial Arbitration by United Nations Commission on International Trade Law of 1985 as amended in 2006 (http://uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

7 But see Art. 1185 of the Polish Civil Procedure Code, which indicates freedom on the place of conducting the conference, and Art. 1195, which regulates issues connected with voting.

issues connected with the arbitrators' conference, and the same is true of the UNCITRAL Arbitration Rules.[8]

The Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce of 14 October 2014, in force from 1 January 2015 (the "PCC Rules"),[9] include in §40(3) the rule of secrecy of the conference, and in subsequent provisions, rules pertaining to voting and issuance of an award by an incomplete panel.

The current PCC Rules differ in this regard substantially from PCC Rules of 1 January 2010, in force until 31 December 2014, which provided in §42(2),[10] apart from the secrecy rule and the procedure for issuing an award by an incomplete panel, two stages for the conference, namely the discussion and voting on the ruling, as well as "if necessary" on the fundamental grounds for the ruling. Against the above background, such detailed regulation was an exception.

Regardless of the regulation model adopted, it is clear that rendering an arbitral award does not consist only in carrying out the voting on upholding or denying the claim immediately after the hearing is closed. Resolving the case requires a detailed review of its essentials, even if just to clarify what should be the subject of the voting. It therefore seems natural that preparation for voting would require prior discussion of the reasons for the award. Only this would allow formulation of possible resolutions and voting on them.

The method of carrying out the conference should also serve the fundamental goal of the arbitration proceedings, which is the just resolution of the case.[11] Organization of the conference and cooperation between the arbitrators should take into account the fundamental rules of due process, as mentioned in the introduction, inseparably bound with this goal.

In light of these considerations, problematic issues of the arbitrators' conference should be analyzed, and in particular the issues of the time, place and manner of conducting the conference, the subject matter of the conference, voting methods, and secrecy.

1. Place and Time of the Conference

The first practical issue is the place and time of the conference.

It should first be pointed out that there is no requirement to hold the conference immediately after the hearing is closed or that it last continuously until an award is agreed upon.[12] In the matter of "where and when," there seems to be a certain amount of latitude.

[8] UNCITRAL Arbitration Rules of 1976 as amended in 2010 (http://uncitral.org/uncitral/en/uncitral_texts/arbitration/2010 – Arbitration_rules.html).
[9] English text at http://sakig.pl/uploads/pdf/regulaminy/arbitration_rules.pdf.
[10] Polish text at http://sakig.pl/uploads/pdf/regulaminy/regulamin-styczen2007.pdf.
[11] T. Wiśniewski, A. Hauser-Morel, *op.cit.*, p. 502.
[12] Some practitioners recommend, however, conducting at least the first conference session as soon as possible after the last hearing, or even immediately after the hearing is adjourned. L.Y. Fortier, *The Tribunal's Deliberations*, in: *The Leading Arbitrators' Guide to International Arbitration*, Juris Publishing 2008, pp. 479–480, cited in A. Redfern, M. Hunter, N. Blackaby, C. Partasides, *Redfern and Hunter on International Arbitration*, Oxford University Press 2009, p. 569.

1.1. Place of the Conference

One may say that it is impossible to determine abstractly where the conference should be held. There is no general rule describing the right place for the conference, and in particular there is no rule that the conference must be held at the place of arbitration. Some of the regulations, for example Art. 16(2) of the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (the "Swiss Rules")[13] and Art. 20(2) of Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules")[14] expressly provide that the conference may be held at any place, irrespective of the place of arbitration. A similar rule is provided in Art. 1185 of the Polish Civil Procedure Code. Respective provisions of national law may regulate this issue differently.[15]

Another aspect of this issue is the absence of a regulation providing that the only proper procedure for the arbitrators' conference is for all of the arbitrators to meet in one place.[16] It would therefore not violate the duty to carry out a conference for the arbitrators to decide not to meet in person but instead to hold a teleconference or conduct the discussion and voting by correspondence, including e-mail correspondence (see below).[17] Undoubtedly, electronic correspondence will be one of the most convenient tools for communications between arbitrators, not only when the panel consists of arbitrators from different countries, enabling the necessary arrangements to be completed quickly and efficiently.

1.2. Timeframe

To a certain extent the timeframe for the arbitrators' conference may be controlled by the rules of the particular arbitration court. For instance, §40(2) of the PCC Rules provides that the award should be issued within 30 days after the hearing closes. Within this timeframe, the wording of the ruling should be agreed upon, the justification prepared, and the award signed and delivered to the parties. On the other hand, according to the SCC Rules, the award should be issued within six months after the case is passed to the tribunal.

Apart from the necessity to comply with the guidelines of the particular arbitral institution, the arbitrators are free to decide when to carry out the conference – and in particular, as noted, it is not necessary to hold the conference right after the hearing closes.

A more important issue is determining when the conference starts and (particularly) when it ends.

This issue is of particular practical significance when considering whether there is any specific moment in the conference up to which the arbitrators are enti-

[13] Text of 1 June 2012 at https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf.
[14] Text of January 2010 at http://www.sccinstitute.com/dispute-resolution/rules/.
[15] For example, T. Wiśniewski and A. Hauser-Morel (*op.cit.*, p. 502) indicate that Swedish law provides that the conference should be held at the place of arbitration.
[16] A. Redfern et al., *op.cit.*, p. 568.
[17] T. Ereciński, K. Weitz, *op.cit.*, p. 329.

tled to exchange views and remarks on the content of the award and particular substantive issues, after which point it is no longer possible, and any delayed remarks could not affect the content of the award or the justification but would have to be reserved for a dissenting opinion.

Answering this question requires a consideration of the subject matter of the conference, and especially the role of the reasons for the ruling.

2. Subject Matter of the Conference

As mentioned above, most of the rules of the leading foreign arbitral institutions do not explicitly address the need to conduct a discussion of the award. Those rules are limited to stating that if the panel is composed of more than one arbitrator, the award is made by a majority decision, as well as providing the rules for issuance of awards by an incomplete panel. A similar mode of regulation is adopted by the PCC Rules in force from 1 January 2015.

The PCC Rules in force prior to 1 January 2015 expressly provided that the award should be issued after a conference including discussion and voting on the award, and "if necessary" also on the material reasons for the award. This issue is regulated similarly by the Rules of the Court of Arbitration at Polish Confederation Lewiatan (the "Lewiatan Rules"),[18] which also stress the necessity of holding a closed conference and distinguish between the stage of discussion and voting on the award and the reasons for the award.

It seems natural that voting would require prior discussion of the ruling, at least to clarify what the voting would actually concern. Otherwise, the arbitrators' role would be limited to voting on upholding or denying the claim, which would clearly fall short of the purpose which the arbitrators' conference should serve.

Thus the subject matter of the arbitrators' conference seems essential. Particularly interesting is whether the discussion should concern only the operative part of the award, or the operative part together with the general grounds for the award, or – going further – also the details of the justification.

2.1. Reasons for the Award

In practice it does not seem possible that first only the operative part of the award, i.e. upholding or denying the claim, would be discussed and voted on, and only then the arbitrators would discuss and vote on the reasons for the ruling. Clearly, determination of the operative part of the award follows from identifying and resolving the material issues of the case, that is, the reasons for the ruling.

In Polish civil procedure legal literature it is indicated that the order of the discussion among the judges before issuing a judgment should cover all the basic elements of the judgment:

[18] Rules of 1 March 2012 at http://www.sadarbitrazowy.org.pl/en/podstrony/rules-of-the-court-of-arbitration.html.

1) Establishing the facts, based on the evaluation of the evidence
2) Selection of the applicable provisions of law and their interpretation
3) Application of law to facts.[19]

B. Bladowski stresses that the discussion of the judgment should be exhaustive and should cover all factual and legal issues pertaining to the resolution of the main claim and accessory claims, as well as procedural issues. This should result in working out the basic reasons for the judgment.[20]

These principles should fully apply to the arbitrators' conference in arbitration proceedings. The reasons for the award are therefore a key subject matter of their discussion.

The PCC Rules in force through 31 December 2014 provided that the reasons for the award should be discussed "if necessary." This wording could raise serious doubts. Even in cases that do not involve complex legal issues, it appears necessary at least to establish the facts of the case and the issues in dispute – which is tantamount to discussing the reasons for the award. Moreover, even in unusual circumstances, for example if the respondent does not present a defence, it is necessary to discuss the reasons for the award – at least to determine whether the factual grounds for the claims were proved.

2.2. Reasons and Justification of the Award

From the point of view of the subject matter of the conference it should be considered how the notion of "reasons for the award" should be understood, specifically, what its relation is to the justification of the award as a whole or even to the award alone. The question then is whether the wording of the justification of the award is the subject of the arbitrators' conference, or the discussion concerns only the main issues that will frame the justification.

In some legal systems, the reasons for the award are regarded as an integral part of the award.[21] In the literature it is indicated that the presentation of the reasons for the award does not necessarily have to meet the same requirements as in state court proceedings, and in particular it is not essential to indicate the legal basis of the award.[22] However Art. 1194 §1 of the Polish Civil Procedure Code requires the arbitral tribunal to specify in the justification what facts the tribunal relied on, the circumstances found to be material to the resolution of the dispute, and whether the award was issued on the basis of the law or general principles of law and equity.

[19] B. Bladowski, *Metodyka pracy sędziego cywilisty* (*Working Method of a Civil Judge*), Zakamycze 2005, p. 231; cf. K. Piasecki, *Procesowotechniczne i psychologiczne oraz logiczne aspekty tworzenia wyroku* (*Technical/Procedural, Psychological and Logical Aspects of Reaching a Judgment*), in: *Wyroki sądów pierwszej instancji, sądów apelacyjnych oraz Sądu Najwyższego w sprawach cywilnych, handlowych i gospodarczych* (*Judgments of Courts of First Instance, Appellate Courts and the Supreme Court in Civil, Commercial and Economic Matters*), Oficyna 2007, Lex no. 59301.
[20] B. Bladowski, *op.cit.*, p. 232.
[21] T. Wiśniewski, A. Hauser-Morel, *op.cit.*, pp. 507–508; T. Ereciński, K. Weitz, *op.cit.*, p. 332; likewise the Warsaw Court of Appeals in the judgment of 13 May 2013, Case I ACa 1298/12, Lex no. 1362923.
[22] T. Ereciński, K. Weitz, *op.cit.*, p. 333.

In practice, apart from the grounds for the award, the award typically includes a number of different elements, such as identification of the parties to the dispute, the attorneys and arbitrators, a review of the constitution of the arbitral tribunal, identification of the place and language of the arbitration, an indication of the arbitration clause, the applicable law, and the selected arbitration rules.[23] It is indicated that one of the elements of the award is the justification, which should include, among other things, a brief presentation of the facts of the case, the parties' positions and claims, and a review of the proceedings in light of adopted rules and the parties' agreement.[24] It is also good practice to review the evidence submitted by the parties and the tribunal's evidentiary decisions, and to enumerate the issues disputed between the parties.

This suggests that a strict distinction between the judgment and the justification, as known in Polish civil procedure, is not useful in the case of arbitration awards. The reasons for the award, or the justification in the larger sense, should rather be treated as an integral and essential part of the award itself. Then it would follow that the subject matter of the arbitrators' conference is the award as a whole, that is, everything that will be reflected in the final document written, signed and issued in accordance with the formal regulations.

2.3. Drawing up the Justification

The right moment for commencing work on the justification appears to be when the arbitrators agree on the main reasons for the award and vote on the operative wording of the award. Here the question arises whether at that time the arbitrators' conference closes, and from this point the arbitrators can no longer debate the substance of the award?

It might seem that as the main grounds for the award should be discussed and agreed in detail before the arbitrators begin drafting the justification, from the time they vote on the operative wording the award should be considered established and can no longer be amended.

Nonetheless, formal issuance of the award appears to be the more significant moment, and this, rather than the voting on the award, is in fact the culmination of the arbitrators' conference.

It is commonly recognized – contrary, for example, to the rules that apply to issuance of judgments by a Polish state court – that an arbitration award is issued at the time it is signed by the arbitrators (usually at least by a majority of them, as discussed below). Only upon signing is the award binding on the arbitrators. As T. Ereciński and K. Weitz indicate, it may be admitted that because the arbitration award is not announced, but only served on the parties, up until that moment the arbitral tribunal may change its earlier adopted resolution.[25]

This demonstrates unequivocally that the conference may continue even after the voting on the operative section of the award and may, or even should, last over the course of the work on the justification. Since the justification is an integral part of the award, it is necessary for the approval and signatures of the ar-

[23] T. Wiśniewski, A. Hauser-Morel, *op.cit.*, p. 508.
[24] *Id*.
[25] T. Ereciński, K. Weitz, *op.cit.*, p. 333; T. Wiśniewski, A. Hauser-Morel, *op.cit.*, p. 502.

bitrators to cover both the resolution and the justification – the justification as a whole, not limited to the basic reasons agreed before drafting the justification.

This seems both natural and reasonable from a practical point of view: the work on the justification may sometimes reveal issues that are essential for resolution of the case which were not discussed earlier between the arbitrators, omission of which could expose the award to a risk of being set aside. In some cases, revealing such matters could even lead to amendment of the operative wording of the award, including which party prevails.

An additional argument stems from entirely pragmatic reasons. It is a common practice for the draft justification of the award to be drawn up by one of the arbitrators, most often the presiding arbitrator.[26] Formally, however, it is the tribunal and not the presiding arbitrator or other designated arbitrator who is the "author" of the justification or the award as a whole, which makes it indispensable for the wording of the justification to be accepted by the remaining arbitrators. The author of the draft is not in any way privileged compared to the remaining arbitrators. Further, the draft should be presented to the remaining arbitrators for their remarks. Preventing an arbitrator from presenting remarks to the draft justification, or preventing further discussion of the content of the award, would be contrary to the common practice of rendering arbitral awards.

Interestingly, Art. 33 of the ICC Rules provides that before the award is signed by the arbitrators, the draft should be presented to the court (that is the ICC International Court of Arbitration, the institution under whose auspices the particular arbitral tribunal is formed), which is entitled to suggest modifications as to the form, and, without influencing the liberty of the tribunal's decisions, may point out material issues. The arbitral award cannot be issued before its form is approved by the court.

It may happen that even when there have been detailed discussions on the grounds of the resolution of the case, the draft justification may deviate in some respect from what was agreed, for example by omitting certain issues or by displaying differences in the arbitrators' views not revealed in earlier discussions. The arbitrators' conference therefore lasts as long as any issues are being discussed, after which the case should be considered resolved, even if that happens after voting on the operative wording of the award, and not only during the work on the justification, but even after the justification is ready – until the award is signed.

It would therefore be unacceptable to prevent further discussion of material issues in the case which were not discussed before the voting or not included in the justification, or as to the content of the justification itself. Omissions in this respect could in some cases even undermine the stability of the award if an application is made to set it aside.

3. Order of the Conference

As mentioned above, nothing prevents conducting the conference via telecommunications, i.e. in the form of a teleconference or videoconference.

[26] Cf. G. Hanessian, L.W. Newman, *International Arbitration Checklists*, JurisNet 2009, p. 175.

It is naturally permissible to waive direct discussion in favour of correspondence, particularly by e-mail, in which the arbitrators present their views on the resolution of the case.

If an alternative method for coming to agreement on the content of the justification is selected, especially in the case of correspondence, for practical reasons and to avoid potential misunderstandings it may be helpful to agree on the order of circulation of correspondence and expression of opinions on the particular issues by the arbitrators, including in particular determination of the material issues, disputed issues, and other matters that require discussion and potentially voting.[27] Here an important organizational role of the presiding arbitrator may come to light, as it may fall to him or her to propose the manner of proceeding or draft an outline of the issues to be considered during the conference.[28]

Arbitration regulations sometimes adopt the solution that the presiding arbitrator may solely adopt decisions on procedural matters when there is no majority or he is authorized to do so by the remaining arbitrators (Art. 33(2) of the UNCITRAL Model Law, Art. 35(2) of the Vienna International Arbitral Centre Rules (the "Vienna Rules"),[29] Art. 35(2) of the SCC Rules). It appears, however, that particularly at the key moment of agreeing on organizational matters, the arbitrators should aim at adopting decisions unanimously, and even if the presiding arbitrator is given authorization, the rule that decisions are made by the majority should prevail.

4. Conference with an Incomplete Panel

Regardless of the manner of proceeding adopted by the arbitrators, whether the conference is conducted during a single session or multiple sessions, with participation of all the arbitrators, a remote conference or conference by correspondence, it is vital that throughout the whole conference (that is until the award is signed) all the arbitrators have detailed knowledge of the current actions of the tribunal and all the arbitrators are allowed to take part in them. For example, it would be unacceptable for two out of three arbitrators to conduct discussions without notifying the third. If the third arbitrator gives his prior consent to conducting the conference without his participation, it is acceptable to hold a conference of the incomplete panel, however it appears necessary that the absent arbitrator be immediately informed of the content of the conference and its details and decisions, if any.[30]

Under the same principle, if arrangements are made by correspondence or e-mail, it would be contrary to the rules for conferences to have the correspondence circulated and the ruling agreed on by only two out of three arbitrators, leaving out the third one, in particular if aimed at agreeing on the award and the justification with complete omission of the arbitrator not included in the

[27] A. Redfern et al., *op.cit.*, pp. 568–569, and in particular L.Y. Fortier, *op.cit*., cited in A. Redfern et al., *op.cit.*, p. 569.
[28] A. Redfern et al., *op.cit.*, p. 569.
[29] Rules of 1 July 2013 at http://www.viac.eu/en/arbitration/arbitration-rules-vienna.
[30] A particular case would be an arbitrator refusing to take part in the conference without giving any reason.

correspondence, preventing him from expressing his opinion on the wording of the operative section of the award or the draft justification.

Moreover, if the conference is carried out by exchanging letters or e-mails, the organizational abilities of the presiding arbitrator may prove vital. The presiding arbitrator should ensure effective circulation of the correspondence, set the timeframe for presenting remarks on the draft justification, and ensure that every arbitrator is allowed to express his or her opinion on the material issues, while keeping the correspondence within reasonable bounds (for example in order to comply with the deadline for issuing an award, as stipulated e.g. in the PCC Rules).

5. Voting

An important part of the arbitrators' conference is undoubtedly also the act of voting on the ruling as such.

The rule adopted by most arbitration regulations is that awards are made by a majority (e.g. the UNCITRAL Model Law, the PCC Rules, the ICC Rules, the Swiss Rules, the SCC Rules, the Arbitration Rules of the London Court of International Arbitration (the "LCIA Rules"),[31] the Vienna Rules). The parties' agreement may require a simple majority or even require that the decision be unanimous. Alternative voting rules may apply particularly when the case is resolved by panels other than one or three persons.

Considerable differences in the voting models appear in the context of the inability to reach the required majority. Some regulations do not include any particular provisions for such event (UNCITRAL Model Law, UNCITRAL Arbitration Rules). The arbitrators in such case are forced to continue the conference until a decision is reached by the required majority.[32]

A different system is proposed in the ICC Rules, as Art. 31(1) provides that in case of lack of a majority, the award is rendered individually by the presiding arbitrator. A similar solution is followed for example in the LCIA Rules (Art. 26.5). The PCC Rules in force from 1 January 2015 provide in §40(4) that in case of lack of a majority, the presiding arbitrator has the decisive vote.

Yet another solution is provided by the Polish Civil Procedure Code. Under Art. 1195(4), if the required unanimity or majority cannot be reached for issuance of an award as to all or part of the subject matter of the dispute, the arbitration agreement lapses in this respect.

Detailed provisions on voting procedures are rare in arbitration regulations: the sequence of casting votes, or in the case of rules that do not envisage an alternative to rendering decisions by a majority, rules for how a majority is built comparable to the rules in the Polish Civil Procedure Code for state courts (Art. 342 §2).[33] Such rules are however included for example in the Rules of the Arbitration Court at the Economic Chamber of the Czech Republic and the Ag-

[31] Rules of 1 October 2014 at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.
[32] A. Redfern et al., *op.cit.*, p. 570.
[33] B. Bladowski, *op.cit.*, p. 232, K. Piasecki, *op.cit.*, p. 19.

ricultural Chamber of the Czech Republic,[34] which provide in Art. 40(2) that if there are more than two opinions on the amount that should be awarded or denied by the tribunal, the vote for the highest amount should be added to the vote for the second-highest amount. Detailed rules in this respect may of course be agreed by the parties.

T. Ereciński and K. Weitz propose that in the absence of specific rules on the order of voting, the arbitrators should vote by order of age, the youngest to the eldest, with the presiding arbitrator at the end.[35] In the Polish civil procedure legal literature it is stated that the reason for such a voting order in the state courts is to ensure the independence of the youngest judge from the elder ones and the presiding judge, highlighting, however, the vote of the reporting judge.[36] It is even underlined that in the discussion on the content of the ruling the presiding judge should refrain from suggesting his or her opinion at the beginning of the discussion, and first hear the view of the youngest judge.[37] However, in arbitration there is no similar interdependence between the arbitrators, in particular official interdependence or interdependence stemming from professional tenure, hence there is little need to apply such rules. Another view is proposed for example by the former LCIA chair L. Yves Fortier, who states that in the discussion during the conference, the presiding arbitrator should ensure that every arbitrator has a sense of free exchange of opinions and the possibility of "thinking out loud" in the presence of the other arbitrators.[38]

In contrast to state court proceedings, where the rule is that none of the judges can refrain from the duty of taking part in the discussion and voting (or even abstain from voting),[39] if an arbitrator refuses to take part in the voting, the arbitration rules frequently provide for the possibility of carrying out the voting and signing the award without the participation of that arbitrator (see §40(5) of the PCC Rules, Art. 26.6 of the LCIA Rules, Art. 36(3) of the Vienna Rules). The SCC Rules provide however that only the unjustified absence of an arbitrator from the conference allows the remaining ones to adopt a decision.

6. Secrecy of the Conference

The secrecy of the arbitrators' conference is stressed in the current PCC Rules (§40(3), as in the former PCC Rules, as well as for example in the Lewiatan Rules (§40(1)).

A similar principle is usually not expressly stated in the rules of foreign arbitration institutions, but the importance of the secrecy of the tribunal's deliberations is underlined in the literature.[40] T. Ereciński and K. Weitz state that the secrecy of the conference is a standard in international arbitration.[41] In the

[34] Rules of 1 July 2012 at http://en.soud.cz/rules.
[35] T. Ereciński, K. Weitz, *op.cit.*, p. 330.
[36] P. Telenga, in: A. Jakubecki (ed.), *Kodeks postępowania cywilnego. Komentarz* (*Civil Procedure Code: Commentary*), Warsaw 2008, p. 451.
[37] B. Bladowski, *op.cit.*, p. 231.
[38] L.Y. Fortier, *op.cit.*, cited in: A. Redfern et al., *op.cit.*, p. 569.
[39] B. Bladowski, *op.cit.*, p. 231; K. Piasecki, *op.cit.*, p. 19.
[40] A. Redfern et al., *op.cit.*, p. 568; E. Gaillard, J. Savage, *op.cit.*, p. 749; P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, Tübingen 1989, p. 381.
[41] T. Ereciński, K. Weitz, *op.cit.*, p. 330; see also literature mentioned *id.* in footnote 187.

French literature it is pointed out that secrecy of the conference is a fundamental rule of arbitration, as it is in all of the court's decisions.[42] Indeed, in France the secrecy of the arbitrators' conference is guaranteed by law (Art. 1469 of the French Civil Procedure Code).[43] Maintaining of secrecy by the arbitrators appears essential also from the point of view of the trust that the arbitration institution should enjoy.

The question of the range of this secrecy should be posed. The first answer that comes to light is an absolute prohibition against revealing the content of the conference, to the parties or to the arbitration institution (arbitration court). The same pertains to the arbitrators' notes and the correspondence circulated by the arbitrators in the course of their conference. In particular, it seems obvious that the deliberations of the arbitrators or the results of their votes should not be included in the justification of the award or subsequent comments, formal or informal, by the arbitrators.

The only exception from the secrecy principle should be the dissenting vote of an arbitrator who does not agree with the majority in the voting on the award. Then, in the dissenting opinion, the difference of opinions between the arbitrators may be revealed. However, only the dissenting arbitrator should be able to make comments in this regard, particularly considering that when a dissenting opinion is issued, the remaining arbitrators are not entitled to reply to it.

Another particularly complex issue may arise concerning the possibility of summoning an arbitrator as a witness in civil or criminal proceedings. Especially in proceedings to set aside an award or for enforcement of the award, it may be tempting to seek information directly from the arbitrators.[44]

Under Polish law, there are no specific provisions governing the status of arbitrators in court proceedings. The general rule under the procedure regulations is that a person who is summoned as a witness is obliged to appear and testify. Therefore it cannot be excluded that an arbitrator will be summoned as a witness to facts surrounding the arbitration proceedings.[45] Meanwhile, the rules of the arbitration institution or the parties' agreement may expressly require confidentiality of the arbitration proceedings. This generates tension between the needs of arbitration practice and the general rules of Polish court proceedings. A particularly sensitive point in this regard is undoubtedly the secrecy of the arbitrators' conference.

W. Jurcewicz, in seeking the grounds for protection of the secrecy of arbitration proceedings in court proceedings, points out that confidentiality is one of the characteristic features of arbitration, meaning that the inviolability of the secrecy connected with performance of the arbitrators' duties could be deduced from the very essence of the arbitration. But he also points out that in many cases the secrecy principle is not unconditional,[46] and therefore it is at least

[42] M. de Boisseson, *Le Droit Français de l'Arbitrage National et International*, 1990, p. 296, cited in: A. Redfern et al., *op.cit.*, p. 567.
[43] A. Redfern et al., *op.cit.*, p. 567; W. Jurcewicz, *Arbiter jako świadek w postępowaniu sądowym* (*An Arbitrator as a Witness in Court Proceedings*), PPH 7/2013, 24–25.
[44] W. Jurcewicz, *op.cit.*, p. 21.
[45] *Id.*, p. 21.
[46] *Id.*, pp. 24–25.

arguable whether secrecy is an inherent characteristic of arbitration.[47] As a consequence, it is difficult to recognize it as a sufficient basis for protection of the secrecy of the arbitrators' deliberations under the regulations applicable to witnesses testifying in court proceedings.

The concept has therefore been presented that the rules on testimony by state court judges as witnesses should be applied analogously to arbitrators.[48] Such a concept appears in the French and German legal systems.[49] It has also been accepted in the Polish case law. In the judgment of 10 December 2008, the Warsaw Court of Appeals underlined the importance of an arbitrator's duty to maintain secrecy as to the content and the manner of proceeding during the arbitrators' conference, which inclined the court to share the view taken in the legal literature that an arbitrator's duty to maintain secrecy excludes the arbitrator from testifying in court as to circumstances the arbitrator learned of while serving in that function. As a consequence, the court held that testimony by an arbitrator on the circumstances of the conference was inadmissible.[50]

Accepting this concept could mean that if it were necessary to summon an arbitrator to testify, the parties to the arbitration proceedings would have to release the arbitrator from his duty of confidentiality in order for him to testify.[51] The rule that the circumstances pertaining to the content of the conference are not to be examined in any case would have to be accepted as essential to this concept, with the possibility of introducing certain flexibility if all the parties and arbitrators agree.[52]

One concept that deserves consideration is based on the relevance and weight of the evidence for resolution of the case in which it is submitted. In proceedings to set aside an arbitration award, a decision on whether to admit testimony by an arbitrator concerning the course of the arbitrators' conference should first consider the aim and nature of the proceedings and the grounds for setting aside the award as provided in Art. 1206 of the Polish Civil Procedure Code. In this context, it seems that everything the arbitrators need to communicate about the award should be reflected in the justification for the award. As a rule, the only significant source of information in this regard is the justification itself. The arbitrator's testimony as to how the award was reached would generally be irrelevant to a decision on the application to set aside the award.

7. Conclusions

The arbitrators' conference, as the stage of the proceedings in which the resolution of the case takes shape, constitutes a means toward achieving the principal aim of the arbitration proceedings, that is, a just resolution of the dispute. The manner of conducting the conference may significantly influence the quality of the arbitral tribunal's ruling, and as a consequence the stability of the

[47] For example, the ICC Rules allow the proceedings to be kept secret, but only upon motion of one of the parties.
[48] W. Jurcewicz, *op.cit.*, p. 25.
[49] A. Redfern et al., *op.cit.*, p. 567; W. Jurcewicz, *op.cit.*, pp. 24–25.
[50] Case I ACa 655/08, published at www.arbitraz.laszczuk.pl (as of 20 October 2014).
[51] W. Jurcewicz, *op.cit.*, pp. 25–26.
[52] *Id.*, p. 26.

award. As a rule, arbitrators may freely decide on the time, place and form of the conference, but should aim at covering all the issues material to the ruling. The arbitrators should ensure that each of them can take part in discussion, voting, and – particularly important – drafting the award. The content of the conference should be kept secret, except as needed to support a dissenting opinion.

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Rendering an Award under Polish Arbitration Law

Karolina Pasko*
Agnieszka Zarówna**

1. Introduction

An arbitral award is the final product of the work of an arbitral tribunal;[1] it constitutes the aim and the essence of arbitration proceedings. It is also the most time-consuming and challenging task for arbitrators. The quality of the arbitral award demonstrates the quality of the proceedings, and of arbitrators who – being called by the parties to resolve the dispute and being remunerated by them – have a duty to issue an effective judgment.[2] Arbitral awards are the subject of close attention, not only from those directly affected, but also from the perspective of practitioners and academics. The quality of arbitral awards, both as to their merits and procedural correctness, has an essential impact on the widespread perception of arbitration as a whole, and its positive or negative assessment as an alternative dispute resolution mechanism.

On the other hand, an arbitral award is subject to – limited – subsequent control in the post-arbitration proceedings in state courts. A positive result of such control gives an arbitral award the binding force equal to a state court judgment. A negative result may prevent the parties from their efforts to resolve their dispute through arbitration. An arbitral award might be seen as a link be-

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[1] G.M. Beresford Hartwell, *The Reasoned Award in International Arbitration. Arbitration Award Course 2003*, http://www.nadr.co.uk/articles/published/arbitration/ReasonedAward.pdf, accessed on 21 November 2015.

[2] M.L. Moses, *The Principles and Practice of International Commercial Arbitration, New York 2008*, p. 184; see M. Platte, *An Arbitrator's Duty to Render Enforceable Awards*, Journal of International Arbitration No 20(3) 2013, pp. 309–311, who specifies that it is rather a duty to make all efforts to make the award effective. In Polish literature see Ł. Błaszczak, *Wyrok sądu polubownego w postępowaniu cywilnym* (*Arbitral Award in Civil Proceedings*), Warsaw 2010, p. 174; T. Ereciński, K. Weitz, *Sąd arbitrażowy* (*Arbitration*), Warsaw 2008, pp. 216 et seq.

tween the private resolution of a dispute and public recognition of that resolution. It is an expression of the autonomy of an arbitral tribunal, but at the same time it ought to be compatible with the contract, the rules of proceedings and the applicable *lex arbitrii*.[3] All this makes arbitral awards an interesting subject of study, both on theoretical and practical levels.

Each of the elements of an arbitral award reflects a specific aspect of arbitration – the course of the proceedings, the taking of evidence, the evaluation of the facts by the arbitral tribunal and the grounds for rendering the judgment. The general question about the differences between an arbitral award and a state court verdict seems to go far beyond the scope of one article. Therefore, it is reasonable to extract several issues and analyse them in order to present some aspects of the specific nature of arbitral awards.

From this point of view, the elements of an arbitral award that look purely technical, are in fact of a great importance and worthy of attention. Although they have certainly caused many debates and controversies in literature and jurisprudence, the parties to arbitral proceedings themselves usually give little attention to them and often do not consider their importance well in advance. It is worth taking a deeper look at such elements of arbitral awards as the place and the date of rendering the judgment, the signature of the arbitrators, the reasoning of the judgment, the dissenting opinions or the decision on arbitration costs. In post-arbitral proceedings, the 'technicalities' of this kind often become crucial in the assessment of an arbitral award by the state court.[4]

The idea of this paper is to discuss these elements of an arbitral award that are most visibly exposed in the award itself. Other interesting issues, such as the course and the character of the arbitrators' deliberation,[5] the grounds for rendering the judgment, the time-limits in arbitration or the interpretation and the correction of an award, as well as all aspects of the post-arbitral proceedings, are therefore not included in the analysis below.

2. Legal Framework

Although arbitration proceedings are less formal than litigation, this does not give the parties to arbitration unlimited discretion. Both the conduct of the proceedings and the rendering of an award should comply with certain minimum standards. Those standards are contained in Book V of the Polish Code of Civil Proceedings (hereinafter 'PCCP'),[6] with special emphasis on Article 1197 of the PCCP regulating arbitral awards. Due to the principle of party autonomy, parties may agree on certain aspects of rendering of an award, including such details as determining a deadline for and a place of issuing an award, or the manner of delivering an award to the parties.

[3] M. Platte, *op.cit.*, p. 312. Non-compliance of an arbitral award with the arbitration clause, the rules of proceedings or the applicable *lex arbitrii* may result in dismissing the motion for recognition or in setting aside the award in the post-arbitration proceedings, Articles 1205 *et seq.* of the Polish Code of Civil Proceedings apply.

[4] B.M. Cremades, *The Arbitral Award*, in: *The Leading Arbitrators' Guide to International Arbitration*, Lawrence W. Newman, Richard D. Hill (eds.), New York 2004, p. 398.

[5] On this topic see J. Rysiński, *Conference of Arbitrators: Practical Issues,* above.

[6] Act of 17 November – Code of Civil Proceedings, Journal of Laws of 1964, No. 43, item 296 with subsequent amendments.

Although certain issues may be included *in extenso* in an arbitration agreement, the parties are more likely to choose a specific set of arbitration rules, which would govern many aspects in more detail than is practicable to include in an arbitration agreement. Often the parties and an arbitral tribunal agree on the technical elements of the proceedings only once arbitration proceedings have commenced; such provisions are typically dealt with in procedural orders or in terms of reference.

Further, if the parties intend to obtain an award that will be enforceable abroad, they should ensure that an award complies with requirements provided for in international conventions on the recognition and enforcement of arbitral awards. [7]

3. Rendering an Award

There are several issues on rendering an award that are regulated in Article 1197 of the PCCP, i.e. written form, signatures of arbitrators, place and date of issuing an award, and the requirement to deliver the award to the parties.

3.1. Form of an Award

Further to Article 1197 of the PCCP, the arbitral award must be in writing. Written form is a constitutive feature of an award.[8] Every element of an award must be in writing, including its reasoning, as it constitutes its integral part (see section 5 below). Contrary to court proceedings (Article 326 § 3 of the PCCP), an arbitral tribunal cannot put down solely the operative part of an award in writing and choose to provide the reasoning orally. An award cannot either be supplemented by way of an arbitral tribunal's comments.[9]

Under the PCCP, an oral publication of an award, without putting it down in writing, has no legal effect.[10] According to Ł. Błaszczak, a written award that is drawn up subsequently to an oral publication of an award is also a non-existing award.[11] However, as written form is a constitutive element of an award, an oral publication does not result in rendering an award at all. Therefore, the argument that an "oral publication" results in invalidating a subsequent written award seems unsubstantiated.

3.2. Signing an Award

Another constitutive element of an award is signing it by the arbitrators that rendered an award. An award is rendered by all the arbitrators, even if any of

[7] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10.06.1958, Journal of Laws of 1962 No. 9 item 42 (hereinafter as "New York Convention"); European Convention on International Commercial Arbitration Geneva, 21.04.1961, Journal of Laws No. 31.84.648.
[8] Ł. Błaszczak, *Wyrok arbitrażowy nieistniejący w postępowaniu o uznanie i stwierdzenie wykonalności (wybrane zagadnienia)* (*Arbitral Award in Post-Arbitration Proceedings (Certain Issues)*), ADR Arbitraż i Mediacja 2009, No. 1, p. 31.
[9] K. Piasecki, *Komentarz do art. 1197 k.p.c.* (*Commentary to Article 1197 of the PCCP*), LEX 2013.
[10] R. Morek, in: E. Marszałkowska-Krześ, *Komentarz do art. 1197 k.p.c.* (*Commentary to Article 1197 of the PCCP*), Legalis 2013.
[11] Ł. Błaszczak, *Wyrok arbitrażowy nieistniejący…*, p. 30.

them voted against the award, or dissented. A dissenting arbitrator may indicate this fact next to their signature (Article 1195 of the PCCP).

Further to Article 1197 of the PCCP, it is not necessary for all the arbitrators to sign the award (although it is preferable) – in the case of panels comprising at least three members, it suffices if an award is signed by a majority. If an award was issued by a sole arbitrator or a two-member panel, then the sole arbitrator or both arbitrators must sign it. Under Polish law, the presiding arbitrator is not entitled to sign an award on their own (contrary to several other jurisdictions[12]). Importantly, if not all the arbitrators sign an award, then the reason for the missing signatures must be explained.[13]

It is not necessary for an award to be signed simultaneously by all the arbitrators. The signatures do not even need to be placed on the same copy of the award.[14] Thus, it seems that the only reason for a missing signature is the arbitrator's refusal to sign it.[15] If an arbitrator's refusal to sign the award results in the award not being enforceable, then that arbitrator may be liable to the parties for any losses they incur due to that fact; he also forfeits his right to be remunerated.[16] An arbitrator refusing to sign an award may also be dismissed by the parties.[17]

Further to certain arbitration rules, persons other than arbitrators may also be required to sign the award. Under § 41(3) of the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce,[18] the Secretary General and the President of the Court must also sign the award. This is because their signatures attest that the arbitral tribunal was constituted in compliance with the SAKIG Arbitration Rules, and that the arbitrators' signatures are authentic. A similar provision is contained in § 40 of the Arbitration Rules of Lewiatan Arbitration Court in Warsaw from 1 March 2012.[19] Having the arbitration institution's officials sign the awards corroborates the control exercised by that institution over the awards.

Contrary to a requirement that the judges sign their judgment under its operative part (Article 324(3) of the PCCP), there is no provision indicating where arbitrators should sign an award. The order of elements that together form an award is not legally relevant.[20] As the reasoning of an award constitutes its integral part, then arguably the arbitrators should sign an award at the end of the

[12] See e.g. France (Article 1513(3) of the French Code of Civil Proceedings) and Switzerland (Article 189 of the Swiss Private International Law).
[13] A. Zieliński, *Komentarz do art. 1197 k.p.c.* (*Commentary to Article 1197 of the PCCP*), Legalis 2014.
[14] J. Lew, L. Mistelis, et al., *Comparative International Commercial Arbitration*, Kluwer Law International 2003, p. 643.
[15] A. Jakubecki, *Komentarz do art. 1197 k.p.c.* (*Commentary to Article 1197 of the PCCP*), LEX 2013.
[16] A. Jakubecki, *op.cit.* together with the sources there indicated.
[17] R. Morek, in: E. Marszałkowska-Krześ, *Komentarz do art. 1197 k.p.c*. (*Commentary to Article 1197 of the PCCP*), Legalis 2013.
[18] New Rules entered into force on 1 January 2015 (hereinafter 'SAKIG Arbitration Rules').
[19] Hereinafter 'Lewiatan Arbitration Rules'.
[20] T. Uliasz, *Komentarz do art. 1197 k.p.c.* (*Commentary to Article 1197 of the PCCP*), Legalis 2008.

document comprising both the operative part and the reasoning.[21] This practice was endorsed by the Court of Appeals in Warsaw.[22]

Once an award is signed by the required majority of arbitrators, it becomes legally binding.[23] The fact that an award is legally binding does not mean it has an effect equal to a court judgment; an award must first be recognised or declared enforceable.

3.3. Date of an Award

Further to Article 1197 § 3 of the PCCP, an arbitral award must be dated. The PCCP does not regulate which date should be deemed the date of issuing of an award. Some arbitration rules indicate that an award should be deemed issued on the date when the required majority of arbitrators signed it (see § 41(4) SAKIG Arbitration Rules).

The date of issuing of an award is not of importance for periods prescribed for taking actions to correct or to set an award aside – those periods are calculated from the date of a party receiving an award.

Therefore, the date of issuing of an award is conventional[24] and has a purely organisational character. Often it reflects the date of the arbitrators voting on the award, or date of drafting it – not necessarily the date when it becomes legally binding. Therefore, the date is not a constitutive element of an award and if it is missing it does not result in a non-existing award.[25] Some authors claim that if a date is missing, it should be supplemented.[26] However, further to a broadly accepted[27] award of the Supreme Court of 13 March 1931 (Case No. I C 2357/30), a witness cannot be heard for this purpose and any subsequent statements by arbitrators are of no legal importance.[28]

3.4. Place of an Award

Further to Article 1197 § 3 of the PCCP, another element of an award is the place of issue. While the date of issuing of an award has shown to be of little

[21] This is however not a unanimous practice. In Poland, many arbitrators choose to place their signatures below the operative part of an award, similarly to judges in domestic judgments. On the other hand, the arbitral award rendered by arbitrators coming from Common law jurisdictions tend to be signed at the very bottom of the document, comprising both the reasoning and an operative part.

[22] Award of 13.05.2013, Court of Appeals in Warsaw, Case No. I ACa 1298/12.

[23] R. Morek, in: E. Marszałkowska-Krześ, *Komentarz do art. 1197 k.p.c.* (*Commentary to Article 1197 of the PCCP*), Legalis 2013; A. Zieliński, *op.cit.*; A. Jakubecki, *op.cit*.

[24] See e.g., Article 31(1) of the ICC Rules, the award should be deemed to made on the date stated therein.

[25] Conversely, according to M. Tomaszewski, lack of a date constitutes a violation of a fundamental rule of arbitral proceedings (M. Tomaszewski, *Skutki prawne wyroku sądu polubownego* (*Legal Implications of an Arbitral Award*), in: J. Gudowski, K. Weitz (eds.), *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, v. II, Warsaw 2011, p. 1906).

[26] A. Jakubecki proposes that Article 1201 of the PCCP should be applied *per analogiam*, A. Jakubecki, *op.cit*.

[27] For critical comment see K. Piasecki, *Komentarz do art. 1197 k.p.c.* (*Commentary to Article 1197 of the PCCP*), LEX 2013.

[28] S. Dalka, *Sądownictwo polubowne w PRL* (*Arbitration in People's Republic of Poland*), Warsaw 1987, p. 116.

importance, the place of issuing an award proves to be far more significant. Questions including: the applicability of Book V of the PCCP (Article 1155 § 2 read with Article 1154 of the PCCP); the competence of the Polish courts (Article 1155 § 2 of the PCCP); and the qualification of an award as a domestic or as an international one for purposes of Article 1215 of the PCCP, all hinge upon where an award was issued. Thus, the territoriality principle applies, whereby arbitration proceedings are connected to the legal system of the jurisdiction where the proceedings were conducted or where an award was rendered.[29]

The place of rendering an award does not depend on the place where the proceedings were conducted, or where hearings or deliberations took place – those can be different locations.[30] T. Ereciński points out that if the parties agreed on a seat of arbitration, then an award may only be rendered in that place; any other interpretation of Article 1155 read with Article 1197 § 3 of the PCCP could lead to difficulties in setting aside proceedings of an award rendered in proceedings seated abroad.[31]

The place of rendering an award does not depend on where it is signed by the arbitrators. If the arbitrators sign an award in different countries, then, further to Article 1197 § 3 of the PCCP, the arbitral tribunal decides which place is deemed to be the place of rendering an award (unless it was previously agreed upon by the parties). Therefore, the place of rendering an award, similarly to the date of issuing it, is merely conventional. It does not necessarily reflect the actual place of rendering it,[32] but it results in a constitutive finding that may not be questioned.[33] If the place of rendering an award is not defined in it, then, according to T. Ereciński, a domestic court should be entitled to establish it after an evidentiary hearing, or – applying a principle accepted in international arbitration – to deem an award rendered where the presiding arbitrator is domiciled.[34]

Further to Article 1197 § 3 of the PCCP *in fine*, the place where the award is to be rendered may be agreed upon by the parties. This agreement may be reflected in the arbitration agreement:[35] the parties may explicitly indicate a selected place, or choose arbitration rules that will govern this issue.

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[29] T. Ereciński, *Postępowanie o stwierdzenie wykonalności zagranicznego wyroku arbitrażowego (zagadnienia wybrane*), ADR Arbitraż i Mediacja 2009, No. 1, p. 65; J. Szpara, *Miejsce wydania wyroku a miejsce arbitrażu (w kontekście uznawania i wykonywania zagranicznych orzeczeń arbitrażowych) (Place of the award and the seat of arbitration (in the context of recognition and enforcement of foreign arbitral awards)*), ADR Arbitraż i Mediacja 2009, No. 2, p. 75; A.W. Wiśniewski, *Arbitraż międzynarodowy w prawie polskim: podstawowe problemy* (*International Arbitration in Polish Law: Basic Aspects*), e-Przegląd Arbitrażowy 2010 No. 1, p. 13.

[30] R. Morek, in: E. Marszałkowska-Krześ, *op.cit.*; J. Żak, *Miejsce arbitrażu – jego znaczenie i wyznaczenie* (*Seat of Arbitration – Its Implications and Determination*), ADR Arbitraż i Mediacja 2008, No. 3, p. 155.

[31] T. Ereciński, *Postę□powanie o stwierdzenie wykonalności…*, p. 66.

[32] J. Szpara, *Miejsce wydania wyroku…*, p. 78; T. Ereciński, *Postępowanie o stwierdzenie wykonalności…*, p. 66.

[33] A.W. Wiśniewski, *op.cit.*, p. 13.

[34] T. Ereciński, *Postępowanie o stwierdzenie wykonalności…*, p. 67.

[35] R. Morek, *Mediacja i Arbitraż (art. 183^1–183^{15}, 1154–1217 k.p.c.). Komentarz (Mediation and Arbitration (Articles 183^1–183^{15}, 1154–1217 of the PCCP). Commentary*), Warsaw 2006, p. 240.

3.5. Service of an Award

Under the PCCP, an arbitral tribunal is not obliged to publish its awards, nor to register them with a domestic court, as in some other jurisdictions.[36] On the other hand, further to Article 1197 § 4 of the PCCP, an award must be delivered to the parties. This provision is of an imperative character.[37] Although the provision requires that "the award" be delivered to the parties, in practice the parties receive copies of an award, with the original award forming part of the case file. If a party was represented by a counsel, the award will be delivered to that counsel. An award must be delivered to all the parties, including those that refused to participate in the proceedings.

As mentioned above, the date of delivering an award is of importance for the calculation of deadlines for several actions, including an application to set an award aside. As parties may receive awards on different dates, their respective deadlines may also lapse on different dates.

Therefore, in order to be able to prove that a certain deadline was complied with, parties should aim at being able to document that fact. The PCCP does not provide for any specific type of proof of receipt of an award. In practice, an award is most often delivered by mail or in person, either way with registered receipt. A receipt slip should be attached to the case file.[38]

Serving an award on parties is connected with an award obtaining *res iudicata,*[39] and becoming formally legitimate[40] (the latter feature is not recognised by some authors[41]).

4. The Structural Elements of an Arbitral Award

Similar to the requirements concerning the place and the date and the delivery of an arbitral award, the provisions on the content and the structure of an arbitral award may stem not only from statutory law. If the arbitration takes places in Poland then, according to Article 1154 of the PCCP, an arbitral award must be compliant with the minimum requirements for the form and the content laid down in the Book V of the PCCP. At the same time, in the agreement or the specific rules of proceedings, the parties may imply further standards concerning an arbitral award,[42] which should be applied by the arbitrators while rendering an award. Another thing is that – as mentioned above – an arbitral award is a kind of a certificate of the quality of the work of the arbitral tribunal, as well as of the quality of arbitration in general. Therefore it is important that

[36] E.g. Belgium (Article 1713(8) of the court code) and the Netherlands (Article 1060 of the code of the civil procedure). The requirement under Article 1204(1) of the PCCP to file an *ad hoc* arbiral award together with the case file with a domestic court does not affect the validity of the award – see R. Morek, in: E. Marszałkowska-Krześ, *Komentarz do art. 1204 k.p.c.* (*Commentary to Article 1204 PCCP*), Legalis 2013.
[37] A. Zieliński, *op.cit*.
[38] A. Zieliński, *op.cit*.
[39] R. Kulski, *Glosa do wyroku SN z 11.7.2001 r., V CKN 379/00*, Państwo i Prawo 2002, No. 11, p. 101.
[40] T. Ereciński, K. Weitz, *op.cit.*, p. 337.
[41] Ł. Błaszczak, *Wyrok sądu…*, Warsaw 2010, p. 414.
[42] M.L. Moses, *op.cit.*, p. 184; B.M. Cremades, *op.cit.*, p. 399.

the structure and the content of the judgment correspond with good practice in arbitration and represent the highest level not only in merits, but also in terms of language and formal correctness. The following analysis of the essential elements of an arbitral award takes into consideration the regulations of Polish arbitration law.

Article 1197 of the PCCP sets outs the minimum requirements for the content of an arbitral award. Apart from the fact that it has to be in writing and be signed by at least the majority of the arbitral tribunal (see point 3 above), it has to indicate the parties of the arbitration and the members of the arbitral tribunal, as well as the place and the date of rendering the award. It has also to mention the arbitration clause under which the proceedings took place and the reasoning of the judgment. In the Polish doctrine, it is underlined that the parties cannot exclude any of these elements by way of an agreement.[43] The provision of Article 1197 of the PCCP is considered mandatory in this aspect. [44]

Although it does not stem directly from Article 1197 of the PCCP, the decision on the parties' claims is also considered to be an obligatory element of an arbitral award.[45] A part of the doctrine derives it from the wording of Article 1194 of the PCCP, according to which "the tribunal will decide the dispute."[46] Many arbitration rules at the arbitration courts in Poland explicitly provide for such an element. For example, according to the SAKIG Arbitration Rules, an arbitral award should contain the decision on the parties' claims.[47] A similar provision can be found in the Lewiatan Arbitration Rules.[48] The decision on the parties' claims should be unequivocal and definitive. Only an award that does not create any ambiguity as to the judgment could then be effectively executed. The issue of the decision on the parties' claims brings into question also the problem of the substantive limits of the arbitration clause. If an arbitral tribunal oversteps such limits, this may constitute grounds for dismissing the motion for recognition or for setting aside the arbitral award.[49]

In practice, it is essential to determine the obligatory or non-obligatory character of a missing element of an arbitral award. If the element is proven to be one required by applicable *lex arbitrii* provisions (Article 1197 of the PCCP), then – according to part of the doctrine – an arbitral award that does not contain it is considered to be in breach of a fundamental principle of the proceedings.[50] At the same time, it is proposed that only serious deficiencies in an award that enable the existence of the award to be determined from a procedural point of

[43] Ł. Błaszczak, M. Ludwik, *op.cit*., p. 187.
[44] T. Ereciński, K. Weitz, *op.cit.*, p. 333.
[45] T. Ereciński, K. Weitz, *op.cit.*, p. 334, Ł. Błaszczak, *Wyrok sądu …*, p. 194, according to whom the decision on the parties' claims is a sort of *essentialia negotii* of an arbitral award.
[46] Ł. Błaszczak, M. Ludwik, *op.cit.*, p. 187.
[47] See § 41 comma 1 point 1 of SAKIG Arbitration Rules.
[48] See § 40 comma 3 of Lewiatan Arbitration Rules. On the other hand the decision on the parties' claims is not explicitly mentioned as an element of an arbitral award neither in UNCITRAL Rules nor in ICC Rules and Swiss Rules.
[49] M.L. Moses, *op.cit.*, p. 186; B.M. Cremades, *op.cit.*, p. 402.
[50] If one treats all principles deriving from the mandatory provisions of Part Five of the PCCP as the fundamental ones, see M. Tomaszewski, *op.cit.*, pp. 1905–1906.

view could result in treating the award as non-existent.[51] Other defects may, in theory, result in challenging the award.[52] It has been underlined in the Polish doctrine that only a breach of the fundamental principles of due process that had a direct impact on the judgment could serve as a basis for setting aside the arbitral award. In addition, in foreign literature the prevailing view is that the lack of certain elements (especially if they are required by the arbitration clause or the rules of proceedings, and not by *lex arbitrii* itself) would not, as a rule, affect the validity and effectiveness of an arbitration award.[53] The breach of certain procedural rules that are of fundamental importance could, however, be treated as a breach of the public policy clause, and therefore be claimed as the basis for setting aside or dismissing the enforcement of an arbitral award.[54]

The last structural element of an arbitral award is usually the decision on arbitration costs. There are different opinions as to whether it is necessary to include the decision on costs in the award. Since Article 1197 of the PCCP does not mention it as one of the constitutive element of an arbitral award, the decision on costs is rather considered to be an optional element of an award.[55] However, the obligatory character of the decision on costs may be derived from the content of the arbitration clause or from the rules of proceedings that apply in the case.[56] Another view has been expressed whereby, even if there are no provisions in regard of costs, the arbitrators should still resolve the issues of costs in the award.[57] A part of the doctrine recognises the decision on costs as a mandatory part of every arbitral award.[58] The former opinion seems more reasonable, as the lack of the decision on costs should not, in general, have an impact on the effectiveness of the award. The lack of a decision on costs can be also relatively easily removed by supplementing the arbitral award.

5. Reasoning

Another issue that raises certain controversies in legal writing concerns the reasoning of arbitral awards. The same question arises – whether the lack of reasoning may result in setting the award aside (dismissing the motion for the recognition and enforcement of the award).[59] Providing an award with the reasoning of the judgment has become a general practice throughout the development of arbitration, and it is currently indicated as a structural element of an

[51] Ł. Błaszczak, *Wyrok sądu…*, pp. 183–186, according to whom the written form of an award and the signatures of arbitrators should be treated as the obligatory elements of an arbitral award and therefore a lack of any of them prevents from treating the award as existing.
[52] Ł. Błaszczak, M. Ludwik, *op.cit.*, p. 279.
[53] M.L. Moses, *op.cit.*, p. 184. Another question is the hypothetical liability of arbitrators or arbitral institutions for failing to issue an effective and valid award.
[54] Ł. Błaszczak, M. Ludwik, *op.cit.*, p. 282; however, in a judgment of 28 November 2013 (IV CSK 187/13) the Polish Supreme Court stated that since the Polish legislator treated in Article 1206 of the PCCP the breach of the fundamental principles of procedure as a separate ground for setting an award aside, this should be excluded from the scope of application of the public policy clause.
[55] Ł. Błaszczak, M. Ludwik, *op.cit.*, p. 187.
[56] See Article 38 of the Swiss Rules, Article 37 p. 4 of the ICC Rules.
[57] T. Ereciński, K. Weitz, *op.cit.*, pp. 334–335.
[58] A. Jakubecki, *op.cit.*; B.M. Cremades, *op.cit.*, p. 403.
[59] T. Ereciński, K. Weitz, *op.cit.*, p. 403.

arbitral award in many national laws on arbitration.[60] According to Article 1197 of the PCCP, an arbitral award should include the reasoning of the judgment.[61] However, it does not answer questions such as how the judgment should be defined in in arbitration, whether the requirements are similar to the reasoning of the judgment of a state court, and to what extent the reasoning falls into the scope of the post-arbitration control of an arbitral award.

The common view is that the reasoning in an arbitral award does not have to meet the same requirements as the reasoning provided by a state court in civil proceedings.[62] The reasoning in an arbitral award should present the facts that constituted the basis for the judgment[63] and indicate whether the arbitral tribunal applied the substantive provisions of national law or the decision was made according to *ex equo et bono* rule or general principles of law.[64] A detailed justification of the judgment and an indication of individual provisions of law or the principles applied by the arbitrators is not considered necessary. No specific form or style of reasoning is required.[65] The same, in theory, applies to the quality of the reasoning. However, an increasing tendency towards lengthy and detailed reasoning can be observed in arbitration. A part of the arbitration community expresses some skepticism towards this practice.[66] It has to be admitted that the length of a reasoning or too sophisticated language used therein may successfully discourage some addressees from its careful lecture and its understanding. Undoubtedly, such negative effect should be avoided by the arbitrators.

The Polish legislator does not specifically provide any time-limit for preparing the reasoning of the arbitrators' decision. Article 1195 § 3 of the PCCP states that the reasoning of a dissenting opinion should be provided by the arbitrator within two weeks from providing the reasoning of the judgment. An interpretation *a contrario* of this provision has been proposed whereby the reasoning of the judgment does not necessarily have to be provided and signed together with the sentence of the judgment.[67] However, the wording of Article 1197 of the PCCP is rather clear in treating the reasoning as a structural element of an arbitral award.[68] Moreover, there are no specific provisions on providing the reasoning that could support such an interpretation. The relevant provisions of arbitration rules of major arbitration courts and UNICTIRAL arbitration rules

[60] See T.H. Webster, *Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication*, Arbitration International, vol. 22(3) 2006, pp. 431–432; B.M. Cremades, *op.cit.*, p. 402.
[61] Polish law differs in this regard from Article 31 p. 2 of UNCITRAL Model Law, according to which the parties may contractually exclude the obligation of the arbitrators to give a reasoning of an award, see UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf , accessed on 3 December 2015.
[62] T. Ereciński, K. Weitz, *op.cit.*, p. 333.
[63] Ł. Błaszczak, M. Ludwik, *op.cit.*, p. 187.
[64] T. Ereciński, K. Weitz, *op.cit.*, p. 333.
[65] A. Jakubecki, *Komentarz do art. 1197 k.p.c.* (*Commentary to Article 1197 of the PCCP*), LEX/el. 2013.
[66] See on this matter P. Lalive, *On the Reasoning of International Arbitral Awards, Journal of International Dispute Settlement*, vol. 1(1) 2010, pp. 55–56, who, however, does not share this view, at least with regards to international investment arbitration.
[67] A. Jakubecki, *op.cit*.
[68] The Warsaw Court of Appeal judgment of 13 May 2013 (I ACa 1298/12), LEX n. 1362923.

also seem to treat the reasoning as an inherent part of an arbitral award.[69] The technical solution of signing the sentence of the award and the reasoning of the judgment separately should not be excluded. Nevertheless, the situation of delivering the sentence of the award and then separately the written reasoning of the judgment should be avoided. It might obviously create difficulties in light of defining a time-limit for commencing post-arbitration proceedings. For example, according to Article 1208 § 1 of the PCCP, a claim for setting aside an arbitral award can be pursued within three months from the day of delivering the award itself (not the reasoning).

Once the post-arbitration control is initiated, there arises the question as to what extent the state court may evaluate the reasoning of the arbitral award. According to the prevailing opinion, the state court should not generally verify the substantive parts of the judgment; in particular, it should not control the factual motives of the arbitrators' decision or assessing whether the judgment reflects the facts presented in the written reasoning of the arbitral award.[70] Of course this raises the problem of the scope of application of the public policy clause. It is observed that a breach of the public policy clause may only concern the sentence of the judgment, as only the sentence (unlike the motives of the judgment) may create defined results in private legal relationships.[71] This view seems to appropriately reflect the general principle of autonomy in arbitration. Therefore, at least in theory, the deficiencies of the reasoning of the judgment should not have impact on the state court's decision with regards to the post-arbitration control of an arbitral award.[72] However, given the obvious logical link between the sentence and the reasoning, the influence of the assessment of the reasoning over the assessment of the award itself becomes natural and is quite often seen in practice.

During the post-arbitration control, the reasoning of the judgment may, in many situations, be an important support for the arbitral award. The wording of the reasoning may bring the state court's attention to certain circumstances that could otherwise have been omitted or misunderstood. From this point of view, it also seems probable that a total lack of the reasoning of the arbitral award (or so many deficiencies in the reasoning that it is worthless) may, in some situations, result in the award being set aside (or in its recognition and enforcement being dismissed),[73] especially if the lack of or low quality of the

[69] See Article 34 p. 3 of UNCITRAL Arbitration Rules, Article. 32 p. 3 of Swiss Rules, Article 31 p. 2 of ICC Rules, § 43 p. 3 of SAKIG Arbitration Rules or § 40 p. 3 of Lewiatan Arbitration Rules.

[70] The Polish Supreme Court judgment of 15 May 2014 (II CSK 557/1), Legalis n. 1048697; see also the Polish Supreme Court judgments of 21 December 2004 (I CK 405/04), unpublished, 8 December 2006 (V CSK 321/06) unpublished, 11 May 2007 (I CSK 82/07), OSNC 2008, n. 6, pos. 64 and 3 September 2009 (I CSK 53/09), unpublished.

[71] The Warsaw Court of Appeal judgment of 13 May 2013 (I ACa 1298/12), LEX n. 1362923.

[72] On the scope of control of the reasoning in the post-arbitration proceedings before state courts see T.H. Webster, *op.cit.*, pp. 436–438, and the judgments mentioned there.

[73] See M. Rubino-Sammartano, *International Arbitration. Law and Practice*, New York 2014, pp. 1170–1174, who underlines that the lack of reasoning may constitute a reason for setting an arbitral award aside and that the insufficient or self-contradictory reasoning may be treated equally with the lack of the reasoning. However, the author notes that recently a more benign interpretation might be observed in the case law of many countries.

reasoning in a way confirms that certain major procedural deficiencies have taken place before the arbitral tribunal.

6. *Votum separatum*

The possibility for a member of an arbitral tribunal to issue a dissenting opinion[74] is similar to the right of judges in international public law jurisdictions, or in national laws of civil proceedings. However, given the specific nature of arbitration, in particular the fact that the arbitrators are (at least indirectly) appointed by the parties to a dispute, the issue of *votum separatum* in arbitration is much more controversial and has been the subject of divergent opinions in legal writing.[75]

Polish arbitration law recognises the mechanism of issuing dissenting opinions. According to Article 1195 § 1 of the PCCP, if the arbitral tribunal deciding on the case is formed by more than one arbitrator, the award is made by a majority decision, unless the parties' agreement (or the arbitration rules chosen by the parties) provides otherwise.[76] The parties may, for example, agree that, if there is no majority decision then the award is made by the president of the arbitral tribunal.[77] In every case where an arbitral tribunal does not have to be unanimous, an arbitrator who votes against the majority can – when signing the award – make a remark stating that he expresses a dissenting opinion. Article 1195 § 3 of the PCCP states that a written reasoning of a dissenting opinion should be prepared within two weeks from preparing the reasoning of the award by the arbitral tribunal. The reasoning of the dissenting opinion has to be attached to the files of the case.

Many other national laws do not specifically regulate the issue of dissenting opinions. Despite the lack of explicit regulations (also in UNCITRAL Model Law),[78] it is commonly approved that arbitrators have the right to issue a dissenting opinion.[79]

Voting against a majority decision, or refraining from making a vote[80] does not

[74] A dissenting opinion has to be distinguished from a concurring opinion which is an alternative reasoning given by an arbitrator that agrees with the judgment but not with the reasoning provided by the arbitral tribunal, see M.L. Moses, *op.cit.*, p. 185. In Polish arbitration law only the dissenting opinions have been expressly regulated but it does not seem to exclude the possibility of issuing a concurring opinion.

[75] See i.a. A. Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, Arbitration International vol. 20, No 3/2004, pp. 223 *et seq.* and the views presented therein.

[76] A similar solution is adopted in Article 29 of UCITRAL Model Law. A majority decision is provided as a rule also in UCITRAL Arbitration Rules (Article 33 p. 1) and most of arbitration rules of the major arbitration courts (see Article 31 p. 1 of ICC Rules, Article 31 p. 1 of Swiss Rules).

[77] See e.g. Article 31 p. 1 of ICC Rules according to which "[i]f there is no majority, the award shall be made by the president of the arbitral tribunal alone". The same solution can be found in Article 31 p. 1 of Swiss Rules and § 40 of SAKIG Arbitration Rules.

[78] E.g. ICC Rules, Swiss Rules or UNCITRAL Arbitration Rules. Differently, see § 40 p. 6 of SAKIG Arbitration Rules.

[79] J.D.M. Lew, L.A. Mistelis, S. Kroll, *op.cit.*, p. 641.

[80] It is underlined in the literature that an arbitrator should not in general refrain from giving a vote as voting falls into the scope of arbitrators' duties emerging from their consent to the appointment as arbitrators, see A. Jakubecki, *Komentarz do art. 1195 k.p.c.* (*Commentary to Article 1195 of the PCCP*), LEX/el. 2013.

automatically imply on the arbitrator a duty to issue a dissenting opinion. An arbitrator who voted against an award can still sign it and not communicate his opinion. In international practice, it happens that the outvoted arbitrator may refuse to sign the arbitral award, and in this way he presents his objection to the judgment made by the tribunal.[81] However, signing an award seems to be one of the arbitrators' duties, so an arbitrator that refuses to sign an award could possibly be held liable for damage caused by this refusal (if the lack of his signature would somehow result in the inefficiency of the arbitral award. [82]

Under Polish law, the prevailing view is that an outvoted arbitrator is not released from his duty to sign the arbitral award.[83] In that case, it depends on him whether to issue a dissenting opinion or just not communicate his criticism.

Since, under Polish law, there is no theoretical possibility for an outvoted arbitrator to refuse to sign the award (according to Article 1195 § 2 of the PCCP, a remark that an arbitrator expresses a dissenting opinion can be made next to his signature on the award), it might become problematic whether the signatures made on the award regard only the remarks, or also the award itself. In one case that was analysed by the Polish Supreme Court, the arbitrators who issued dissenting opinions wrote them down on the document of the final award and they signed the document next to them. There was a question as to whether the arbitrators had in fact signed the award in the meaning of Article 1197 of the PCCP, or had only signed their dissenting opinions. The Polish Supreme Court ruled that the arbitrators had sufficiently expressed "their will to sign the arbitral award – criticised but decided by the arbitral tribunal – which is proven by the fact of their initials on each of ten pages of the award."[84]

With regards to the written reasoning of a dissenting opinion, the Polish legislator mentions it explicitly in Article 1195 § 2 of the PCCP.[85] However, in literature the view prevails that it is not a duty, but merely a right of the arbitrator who issued the dissenting opinion.[86] It is important to note that the parties' agreement or the applicable arbitration rules can regulate this matter differently from *lex arbitrii*. For example, according to § 40 p. 6 of SAKIG Arbitration Rules, "an arbitrator who dissented may submit a justification for the dissent within 14 days after the date of the award." Some controversy on when the 14-day time limit commences may arise if the reasoning of the award is not be issued together with the award. It seems reasonable to give primacy in this case to the explicit regulation of arbitration rules.

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[81] In international commercial arbitration a refusal to sign an arbitral award takes place, see M.L. Moses, *The Principles…*, p. 185; J.D.M. Lew, L.A. Mistelis, S. Kroll, *op.cit.*, p. 641.
[82] W. Głodowski, *Sytuacja prawna arbitra (uprawnienia i obowiązki)* (*The Legal Status of an Arbitrator (rights and duties)*), Kwartalnik ADR Arbitraż i Mediacja, N. 4(16)/2011, p. 144; Ł. Błaszczak, *Wyrok sądu…*, p. 173.
[83] Also under the laws which do not explicitly regulate the mechanism of dissenting opinions a view is expressed that an outvoted arbitrator is anyway obliged to sign the arbitral award, see A. Redfern, *op.cit.*, p. 224.
[84] The Polish Supreme Court judgment of 6 December 2005 (I CK 324/05), LEX n. 346057.
[85] M.P. Wójcik, *Komentarz do art. 1195 k.p.c.* (*Commentary to Article 1195 of the PCCP*), LEX/el. 2014.
[86] Ł. Błaszczak, *Wyrok sądu…*, p. 174; differently A. Kurowska, *Komentarz do zmiany art. 1195 Kodeksu postępowania cywilnego wprowadzonej przez Dz.U. z 2005 r. Nr 178 poz. 1478* (*Commentary to 2005 Amendment of Article 1195 of the PCCP*), LEX/el. 2005.

A written reasoning of a dissenting opinion is attached to the files of the case and the parties are entitled to get to know its content.[87] However, formally it does not constitute a part of the final arbitral award.[88] In theory, it should also not have any influence on the post-arbitration control. Nevertheless, it is clear that arguments presented by the dissenting arbitrator would be used by the party wishing to set the judgment aside, and would not therefore be omitted by the state court evaluating the award. Moreover, if the outvoted arbitrator describes in his *votum separatum* some serious deficiencies of arbitration proceedings (in particular, if he claims that the other members of the arbitral tribunal consulted the award without informing him about deliberations), the dissenting opinion may be of major importance in the post-arbitration proceedings.

It can be added that the motivation of an arbitrator who issues a dissenting opinion may be very different, and not always appreciable. In international arbitration, there has recently been heavy criticism towards dissenting opinions. The opponents of this mechanism claim that in most cases a dissenting opinion is issued by an arbitrator appointed by the losing party. This practice may essentially undermine the arbitrators' authority and the common belief in the impartiality and independence of arbitrators as the major principle and value in arbitration.[89] Additionally, critics warn that dissenting opinions revealing details of confidential deliberations of the arbitral tribunal may, even if they do not have a direct influence on the effectiveness of the award, seriously weaken the prestige and dignity of the tribunal and encourage the losing party to challenge the award.[90] The supporters of the *votum separatum* mechanism reply that the mere possibility of issuing a dissenting opinion results in improving the quality of the arbitrators' deliberations and the whole decision-making process as it is motivation for all members of the arbitral tribunal to hear each other's arguments and to render an award together.[91] It is probably impossible to unequivocally assess the advantages and disadvantages of dissenting opinions. It is a mechanism in the hands of every arbitrator, and much depends on how it will be used in the circumstances of a specific case.[92]

7. Settlements recorded in a Form of an Award

As the very aim of arbitration proceedings is to reach an amicable solution of a dispute, the arbitrators often choose to encourage parties to enter into a set-

[87] Another issue is whether the parties should have the dissenting opinion delivered despite the law does not explicitly provide it. It seems that the general principles of due process that should be applied by any arbitral tribunal would imply at least a duty to inform the parties about the issuance of a dissenting opinion and including it in the flies of the case, see A. Jakubecki, *Komentarz do art. 1195 k.p.c.* (*Commentary to Article 1195 of the PCCP*), LEX/el. 2013.

[88] M.L. Moses, *op.cit.*, p. 185.

[89] *A. Redfern, op.cit.*, pp. 224, 240–243. See also the criticism of dissenting opinions in investment arbitration A.J. van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in: *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Mahnoush Arsanjani et al. (eds.), Netherlands 2011, pp. 821–844. The author proposes to apply in case of party-appointed arbitrators a *nemine dissentiente* principle.

[90] M.L. Moses, *op.cit.*, p. 185.

[91] See B.M. Cremades, *op.cit.*, p. 405.

[92] A. Redfern, *op.cit.*, p. 239.

tlement. Some arbitral institutions provide for financial incentives for settling the disputes, e.g. the SAKIG Tariff of Fees provides in § 7(2) that the Court will refund half of the arbitration fee if the parties conclude a settlement prior to the first hearing.

Should the parties reach an agreement during pending arbitration proceedings, they may enter into a regular settlement agreement, or they may request the arbitral tribunal to issue an arbitral award encompassing the terms of the settlement.[93] In the first scenario, further to Article 1196 § 1 of the PCCP, the settlement is recorded in the minutes of the proceedings and the arbitral tribunal discontinues the proceedings.

However, as the legal consequences of a settlement agreement are different to the *res iudicata* reserved for judgments,[94] parties often choose to record their settlement in the form of an arbitral award. Further to Article 1196 § 2, of the PCCP, such an award has the same legal effect as any other arbitral award. It is worth noting that an arbitral award, as opposed to a court judgment, can be recognised and enforced under the New York Convention, which constitutes an additional incentive for parties to record their settlement as an award.

On a procedural note, a settlement may only be recorded as an award further to a party's request. An award must explicitly state that it is an award and comply with all requirements set out in Article 1197 of the PCCP, i.e. it must be in writing, signed by arbitrators, must contain the date and the place of issuing, and must be reasoned. However, referring to the fact of the parties reaching an agreement suffices as reasoning.[95] The tribunal should also decide on the costs of the proceedings.

The question stands whether the arbitral tribunal should record any settlement as an award, regardless of concerns it may raise, e.g. in reference to the public policy of the Republic of Poland. As the arbitrators are obliged to issue an award that will be enforceable, it seems that in such a scenario they may refuse to record a settlement as an award. Further to the PCCP, the tribunal "may" (and not "shall") record a settlement as an award, which indicates the discretionary power in that regard. The Lewiatan Arbitration Rules provide in § 43 that the tribunal "may" record a settlement as an award, and also lists reasons to refuse to do so, i.e. when parties (i) were involved in a fictitious dispute; (ii) may use the award to achieve an unlawful purpose or to harm a third party; or when (iii) the award otherwise violates the fundamental principles of public policy of the state in which the place of arbitration is located. Similarly, Article 32 of the ICC Rules and Article 36 of the UNCITRAL Rules provide for recording a settlement as an award only if it is so accepted by the tribunal.

8. Conclusion

An arbitral award, being the final work product of arbitrators and months or years of effort by the parties and their representatives, should be issued in a manner ensuring its enforceability. Many of the issues discussed above can be

[93] M. Hauser-Morel, T. Wiśniewski, *op.cit.*, p. 512.
[94] M. Hauser-Morel, T. Wiśniewski, *op.cit.*, p. 512.
[95] M. Hauser-Morel, T. Wiśniewski, *op.cit.*, p. 513.

agreed upon in detail already at the stage of entering into an arbitration agreement. Detailed directions regarding the procedural aspects of rendering an award may exclude uncertainty on matters that, at the stage of recognising and enforcing an arbitral award, may become of the utmost importance.

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"Surprise" of Parties at Legal Grounds Applied in the Arbitral Award as an Infringement of Party's Right to Present its Case

Maciej Orkusz*

1. Introduction

This article discusses parties' "surprise" at the legal grounds for a decision of arbitrators indicated in the statement of reasons of an arbitral award. The courts' power to independently identify the legal provision on which an award is based results from the *iura novit curia* (arbiter) principle, which is recognized in many national laws. However, the question arises as to whether in one-instance arbitration the arbitrators have the unfettered freedom to choose the legal grounds for the award and whether they can adjudicate on questions that were not really discussed by the parties during the proceedings. Will such practice be correct in all cases? Or will it only be correct if the arbitrators meet certain procedural requirements?

To the best of the author's knowledge, this issue has not to date been considered by the highest instance court in Poland. However, foreign state courts have on numerous occasions dealt with recourse against arbitral awards based on the assertions that arbitrators "surprised" parties' with legal concepts applied in their awards. The output of Swiss jurisprudence in this respect is particularly extensive, which is also why, having clarified the meaning of the *iura novit curia* principle, this article discusses the case law of the Swiss Federal Tribunal and examples of parties' "surprise" at the judgments of other (selected)[1] courts of foreign jurisdictions. After identifying adjudication tendencies abroad,

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[1] This article is limited to the judgments of the courts of those (selected) European states in which the *iura novit curia* principle applies. A broader list of the awards of foreign courts concerning the problem discussed here is given in *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, available at: http://www.uncitral.org/uncitral/en/case_law/digests/mal2012.html

it will be possible to consider whether Polish regulations on arbitration and setting aside the arbitral awards[2] justify the adoption of similar solutions.

2. Iura Novit Curia (Arbiter)

The *iura novit curia* is a judicial principle that is commonly recognized in continental law systems[3]. It requires courts to identify *ex officio* the legal norm appropriate to settle the case[4]. So, in view of the maxim *da mihi factum dabo tibi ius,* the parties are required only give the court the facts relevant to settle a dispute[5]. The parties are not required to identify and prove the law to the court as the court is obliged to know the law and apply it correctly *ex officio*. The court is not obliged to discuss the legal grounds for a judgment with the parties and when passing its judgments, it is not restricted by the provisions of substantive law relied upon by the parties. A judgment passed on grounds not relied on by the parties is not an *ultra petita* decision[6]. There is no doubt that the *iura novit curia* principle is one of the adjudication principles in Polish state court litigation[7]. However, this principle is usually not recognized by legal systems based on traditional *common law*, where the evidence of law is a subject of parties' legal submissions[8].

The question whether the *iura novit curia* principle (also known as the *iura novit arbitrator* principle) applies in arbitration gives rise to certain controversies[9]. In international arbitration, answer to this question depends mainly on the law of the place of arbitration (*lex arbitri*), as well as on the intent of the parties determining the rules of proceedings and the arbitrators themselves (whose origins may be decisive in this principle being either accepted or rejected)[10]. In national arbitration, the rule seems to be that this principle will be respected if it constitutes a judicial principle in a civil litigation system of a given state[11]. It

[2] Articles 1154–1217 of the Code of Civil Procedure of 17 November 1964 (consolidated text Journal of Laws of 2014, item 101).
[3] Cf. in this respect, e.g. P. Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, Arbitration International (2012) vol. 28, no. 2, pp. 174 and 182, G. Knuts, *Jura Novit Curia and the Right to Be Heard – An Analysis of Recent Case Law*, Arbitration International vol. 28 (2012), no. 4, p. 671.
[4] *International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Ascertaining Contents of the Applicable Law in International Commercial Arbitration*, Arbitration International (2010) vol. 26, no. 2, p. 194.
[5] *Ibidem.*
[6] Cf. e.g. H. Pietrzkowski, *Metodyka pracy sędziego w sprawach cywilnych* (*Methodology of work of a judge in civil matters*), ed. 4, Warsaw 2009, p. 404.
[7] This is supported by numerous arguments in Supreme Court case law, e.g. in judgments of 25 February 2010, case no. I CSK 194/08 (LEX no. 583721); of 15 May 2014, case no. II CSK 345/13 (LEX no. 1477432); of 16 September 2009, case no. II CSK 189/09 (LEX no. 564981); and the order of 15 February 2012, case no. I PK 131/11 (LEX no. 1215259).
[8] P. Landolt, *Arbitrators' Initiatives…*, p. 184, G. Knuts, *Jura Novit…*, p. 672.
[9] Cf. G. Knuts, *Jura Novit…*, p. 672, J. Waincymer, *International Arbitration and the Duty to Know the Law*, Journal of International Arbitration (2011) vol. 28, no. 3, pp. 201–242.
[10] Cf. G. Knuts, *Jura Novit…*, p. 670.
[11] In this respect see: J. Lew, *The Tribunal's rights and duties: Why they should be more involved in the Arbitral Process*, Dossier of the ICC Institute of World Business Law: Players' interaction in International Arbitration (2012), article available at: http://www.iccdrl.com, G. Kaufmann-Kohler, *Iura Novit Arbiter-Est-ce bien raisonnable?*, in: A.H. Lachat, L. Hirsch, *Réflexions sur le droit desirable en L'Honneur du Professeur Alain Hirsh*, Geneva 2004, pp. 71–78.

seems therefore that in arbitration proceedings governed by Polish law the *iura novit curia* principle applies accordingly[12].

3. Swiss Federal Tribunal's Case Law on Allegations that the Party's Right to be Heard had been Infringed by the Arbitral Tribunal when Passing an Award Based on a "Surprising" Legal Concept

In Switzerland, the issue of the possibility of demanding that an arbitral award be set aside if the parties are "surprised" at the effect of the arbitrators applying the *iura novit curia* principle has been raised several times in annulment proceedings before the Federal Tribunal. On each occasion the grounds for demanding that an award issued in international arbitration in Switzerland be set aside was Article 190(2)(d) of the Swiss Private International Law, according to which an arbitral award may be annulled if it is found that the right of the parties to be heard was violated.

3.1. Decision in Case no. 4P.100/2003

The first published[13] judgment of the Swiss Federal Tribunal on the problem of breach of a party's rights by a case being adjudicated within the meaning of the *iura novit curia* principle is that of 30 September 2003 (4P.100/2003[14]) on setting aside an award rendered by the arbitral tribunal in Zurich.

The dispute resolved in arbitration involved a licence agreement to produce and sell cigarettes in Croatia concluded between a Croatian company (licensee) and its foreign licensor. Around five years after the agreement was concluded, the Croatian anti-monopoly authority found that some of the agreement provisions were null and void. As a result of this decision and the licensee's steps, the licensor terminated the agreements, claiming that it was impossible for it to continue the contractual relationship. In the arbitration proceeding the licensee requested the arbitrators to find the termination unlawful and claimed compensation. The arbitral tribunal dismissed both the claim and the licensor's counterclaim.

The grounds for the civil law appeal filed by the licensee against the arbitral award was that the case had been adjudicated based on an argument that had not been raised by the parties and which had led to breach of the appellant's right to be heard, as the arbitral tribunal found that the anti-monopoly authority's decision constituted in effect withdrawal of the licence to conduct the business covered by the licence, giving grounds for the agreement being terminated pursuant to Articles 15 and 20 thereof, despite the licensor never having raised this argument during the proceeding. The licensor merely claimed in arbitration that the agreement was invalid in whole pursuant to

[12] Cf. T. Ereciński, K. Weitz, *Sąd arbitrażowy* (*Arbitration court*), ed. 1, Warsaw 2008, p. 324, though please note that an arbitral tribunal is not bound by the provisions on proceedings in state courts (article 1184 § 2 of the Code of Civil Procedure).
[13] For unpublished case law in this respect see A. Meier, Y. McGough, *Do Lawyers Always Have to Have the Last Word? Iura Novit Curia and the Right to Be Heard in International Arbitration: an Analysis in View of Recent Swiss Case Law*, ASA Bulletin 3/2014, p. 493.
[14] The judgment was marked ATF 130 III 35, publ. ASA Bulletin 3/2004, pp. 574–582.

Article 20(2) of the Swiss Code of Obligations ("**SCO**") and relied on the *rebus sic stantibus* clause.

When examining this claim, the Federal Tribunal made a general reference to a conflict between the right to be heard and the *iura novit curia* principle. The Tribunal stated that *in Switzerland, the right to be heard concerns particularly factual findings. The parties' right to be invited to express their position on legal issues is recognized only to a limited extent. Generally, according to the principle iura novit curia, state or arbitral tribunals are free to assess the legal relevance of factual findings and they may adjudicate based on different legal grounds from those submitted by the parties. Consequently, providing the arbitration agreement does not restrict the mission of the arbitral tribunal solely to the legal submissions made by the parties, these need not be heard specifically on the recognisable scope of legal provisions. Exceptionally, the parties must be invited to express their position if the court or the arbitral tribunal considers basing its decision on a provision or legal consideration, which has not been discussed during the proceedings and which the parties could not have suspected relevant*[15]. The Federal Tribunal referred to this formula in all the judgments discussed further on in this article, citing it at the beginning of its analysis of the allegation of breach of the right to be heard in relation to legal considerations.

When adapting this general formula to the facts of the case at hand, the Tribunal came to the conclusion that the arbitrators' analysis had nothing to do with the parties' arguments. Article 20 of the agreement (the legal grounds of the award) was mentioned only twice during the whole proceedings and was not the subject-matter of the dispute. Consequently, neither party could have expected the award to be passed based on this contractual provision. This finding justified the annulment of the arbitral award[16].

3.2. Decision in Case no. 4A_400/2008

In a judgment of 9 February 2009 (4A_400/2008[17]) the Tribunal decided upon the request for an annulment of an arbitral award passed in a case brought by a Spanish agent against a Brazilian footballer for payment of commission based on an agency agreement governed by FIFA rules and – subsidiarily – Swiss law.

In this matter, the arbitral tribunal of the Court of Arbitration for Sport in Lausanne ("**CAS**") dismissed the agent's claim based on a mandatory provision of Swiss labour law, prohibiting recruitment agency agreements being concluded on an exclusive basis. In the civil law appeal for the arbitral award to be set aside, the agent raised the point that the panel based its award on a legal reasoning which the parties could not have foreseen.

When deciding on the merits of the request for annulment the Federal Tribunal referred to the abovementioned formula presented in case 4P.100/2003 and explained that the exception to the *iura novit curia* principle described therein

[15] *Ibidem.*
[16] Summary of the statement of reasons for the judgment referred to herein was presented in A. Meier, Y. McGough, *Do Lawyers …*, p. 494.
[17] http://www.swissarbitrationdecisions.com/sites/default/files/9%20f%C3%A9vrier%202009%204A%20400%202008.pdf.

should be applied restrictively. Taking a different position could have led to arbitral awards being reviewed on the merits in post-arbitration proceedings before state courts. In the case discussed here, it was, however, of crucial importance that the provision cited by the arbitral tribunal applied only to job placement service conducted in Switzerland and abroad by agents based in Switzerland. Given that the place of business of the appellant/agent (his base) was Spain, the Tribunal granted the appeal, as the agent could not have foreseen that the arbitral tribunal would base its reasoning on a manifestly inapplicable provision. As neither of the parties invoked the provision in question, the arbitral tribunal – in the Federal Tribunal's view – should have at least questioned the parties on this issue and invited them to make submissions for or against the said provision being applied. The Tribunal deemed the arbitrators failure to do so as a breach of the right to be heard, giving grounds for the arbitral award to be set aside.

3.3. Decision in Case no. 4A_240/2009

Proceedings that ended in a judgment issued by the Federal Tribunal on 16 December 2009 (4A_240/2009[18]) concerned civil law appeal filed by two companies – respondents in arbitration proceedings conducted according to the ICC Rules of Arbitration issued by the International Chamber of Commerce in Paris („ICC") – against an arbitral award issued in a case brought by a US company for compensation for the appellant companies failing to perform a contract to supply raw materials from South Africa. The parties had agreed that their contract "[…] shall be construed and interpreted in accordance with the laws of Switzerland as applied between domestic parties […]". This choice of law meant in practice that the legal relationship between the parties was not governed by the Vienna Convention on Contracts for the International Sale of Goods of 11 April 1980 („Convention").

One of the main issues discussed during the arbitration was whether the US customer's refusal to pay two invoices issued by the appellant companies constituted a "material breach" of contract. Treating the said refusal as a material breach, the appellant companies terminated the contract and ceased further deliveries. In turn the US customer deemed the notice of termination ineffective and the failure to deliver goods as non-performance of the contract giving grounds for a claim for compensation. The arbitral tribunal established the meaning of the term "material breach" by reference to the interpretation of a similar term ("*fundamental breach*") used in Article 25 of the Convention and in Article 7.3.1 of the UNIDROIT Principles of International Commercial Contracts. The outcome was that the arbitrators came to the conclusion that the US customer had not been in "material breach" of the contract. The arbitral tribunal thus found the appellant companies' termination ineffective and the failure to continue supplies as non-performance of the contract.

In the civil law appeal against the arbitral award the appellant companies claimed (*inter alia*) that they could not have expected the arbitral tribunal, in its judgment, to interpret "material breach" by reference to the Convention, as

[18] http://www.swissarbitrationdecisions.com/sites/default/files/16%20decembre%202009%204A%20240%202009.pdf.

it was not to be correlated with Swiss law. Moreover, the arbitral tribunal did not address that issue in a procedural order and had not requested the Parties to argue it. When adjudicating the claim, the Federal Tribunal pointed out that there were no reasons for the legal grounds adopted by the arbitral tribunal to be deemed "surprising" to the parties. This is because the interpretation of "material breach" was one of the main issues in the dispute. This was sufficient incentive for the parties to put forward their position as regards the meaning of this term. As the concept of "material breach" is not usual in Swiss contract law and the parties were entities involved in international trade, the proper reference point in establishing the meaning of the phrase that they had used was terminology applied in international trade (embodied in the said Convention provisions and the UNIDROIT Principles). As a result, the Federal Tribunal rejected the appeal.

3.4. Decision in Case no. 4A_254/2010

A case that ended in a judgment being issued by the Federal Tribunal on 3 April 2010 (4A_254/2010[19]) concerned a request for an arbitral award passed by a sole arbitrator seated in Geneva to be set aside. The subject of the arbitration was a claim brought by a Spanish company against a Belgian company for payment of commission under a business consultancy agreement ("BCA"). The aim of the BCA was to provide the Belgian company with advice in a bidding process for a contract to build a gas storage facility in Spain. The parties agreed that the BCA would be governed by Swiss law.

Just before the construction contract was awarded, the Belgian company transferred some of its assets to a related company based in Germany. As a result, it was ultimately the German company that concluded the contract to construct the gas storage facility. After the contract was awarded, the German company signed on its own behalf a business consultancy agreement with the Dutch company with wording almost identical to that of the BCA. The Dutch company was represented in the transaction by the director of the Spanish company, who had previously signed the BCA on its behalf. Under this second business consultancy agreement the commission was paid to the Dutch company. The Spanish company did not receive payment under the BCA and so it initiated arbitration against the Belgian company. The Belgian company defended itself by stating that the second business consultancy agreement had replaced the BCA, with the outcome that the Spanish company was replaced by the Dutch company in the legal relationship. The arbitrator hearing the case found that the second business consultancy agreement was a simulated contract under the SCO and therefore found it void. The arbitrator stated that the aim of both the agreements (i.e. awarding the construction contract) had been achieved even before the second business consultancy agreement was signed and the Dutch company had been unable to provide the consultancy service described in the second agreement itself.

In the civil law appeal for the arbitral award to be set aside, the Belgian company argued that the legal grounds invoked by the arbitrator for declaring the

[19] http://www.swissarbitrationdecisions.com/sites/default/files/3%20aout%202010%204A%20254%202010.pdf.

second business consultancy agreement void was a surprise to the parties, as neither had argued that the second business consultancy agreement was void, either before or during the arbitral proceedings. The Federal Tribunal rejected the appeal and stated that the appellant – represented in the arbitration by Geneva counsel – had referred several times in its briefs to the concealment of the true nature of the second business consultancy agreement. It had been aware that the contents of the second agreement did not correspond to the parties' actual intentions. In turn the opposing party did not at any point admit that second agreement, to which it was not party, was of the same nature as the BCA or had an effect of assignment of the BCA. The arbitrators, similarly to state courts, should have *ex officio* take notice of concealment, when it is established, particularly as it resulted from the text of the second agreement and the explanations obtained from the party.

3.5. Decision in Case no. 4A_407/2012

In a case that ended in a judgment of 20 February 2013 (4A_407/2012[20]) the Federal Tribunal heard an appeal filed by two Austrian companies against an award issued by the arbitral tribunal under ICC Rules.

The dispute was over a share purchase and acquisition agreement concluded between the appellant Austrian companies (buyers) and a Dutch company (seller). The agreement, which was governed by Austrian law, was conditional – its performance was contingent on clearance to acquire the shares being obtained from the Austrian anti-monopoly authority. According to the agreement, the parties were to use their "best endeavours" to fulfill this condition. Clearance was not ultimately given in the deadline set in the agreement. As a result, the buyers withdrew from the agreement. The seller, assuming that the buyers had not used their best endeavours to obtain clearance, deemed the withdrawal as ineffective and itself withdrew from the agreement. The seller then initiated arbitration against the buyers for compensation. The arbitral tribunal partially upheld the seller's demand and dismissed the buyers' counterclaim in its entirety.

In the civil law appeal for the arbitral award to be set aside, the buyers argued that when interpreting the term "best endeavours" the arbitrators resorted to a "completely surprising legal construction", i.e. the theory of the removal of the business logic. When deciding on this allegation, the Federal Tribunal indicated that during the proceedings the parties had put forward totally divergent interpretations of "best endeavours". In the seller's view, "best endeavours" meant an unlimited duty for the parties to collaborate, while the buyers deemed that the obligation to use "best endeavours" merely purported to sanction bad faith frustration of the condition. The concept adopted by the arbitrators was very similar to the seller's, though in reality it fell somewhere between the extremes marked by the parties' positions. Although the Federal Tribunal had doubts as to whether the interpretation adopted by the arbitrators was correct, it found that it could not be said in the case that the parties had been "surprised", as the parties could have expected the arbitrators to take a "mid-way" position.

[20] http://www.swissarbitrationdecisions.com/sites/default/files/20%20fevrier%202013%204A%20407%202012.pdf.

3.6. Decision in Case no. 4A_476/2012

In a judgment of 24 May 2013 (4A_476/2012[21]) the Federal Tribunal heard a civil law appeal brought by a football club in Mexico against an award issued by a CAS arbitrator in a case brought by a Brazilian football player against the club for payment of a bonus under an employment contract.

The footballer first filed a claim with FIFA's Dispute Resolution Chamber, which found that it did not have jurisdiction to hear the case. The player then took the case to the Mexican Football Federation's Conciliation and Resolution of Controversies Commission ("**Commission**"). The Commission decided that it could not adjudicate the claim because the time limit to submit a claim, arising from Mexican employment law and the Commission's rules, had run out. The claimant appealed this decision to the CAS. When deciding on the appeal, the CAS sole arbitrator upheld the player's appeal and awarded the amount claimed.

In its civil law appeal against the arbitral award, the Mexican club claimed that it had been deprived of the right to be heard, as it was stated in the award that the involvement of the FIFA Chamber prevented the statute of limitations from running out. The legal arguments put forward by the arbitrator were not raised by the parties either during the previous proceedings or in the parties' positions during the arbitration. The arbitrator's actions were, in the club's view, "blatantly wrong". The Federal Tribunal did not uphold this contention, deeming, among other things, that the extent to which the club had been unable to put forward its position regarding application of the provisions of Mexican law on the statute of limitations had not been demonstrated. As the basis for the Commission's judgment had actually been this legal institution, the club could have expected that it would be of crucial importance to the case and that the arbitrator would have analysed it fully, not limiting itself to the legal arguments of the parties. The arbitrator's application of the law in the said scope could not, according to the Tribunal, be deemed "blatantly wrong". Neither could it have been a "surprise", which would have required it to hear the parties beforehand as regards the legal grounds for the award.

3.7. Decision in Case no. 4A_188/2013

In a judgment of 15 July 2013 (4A_188/2013[22]) the Federal Tribunal heard a civil law appeal against an award issued under the aegis of the Geneva Chamber of Commerce and Industry in a case brought by the Swiss purchaser of bank shares against the share sellers. The dispute centred on clauses in the purchase agreement concerning the manner of calculating the final price for the shares. According to the purchaser, these clauses were drawn up in an inaccurate manner, as they based the price calculated, among other things, on the value of fiduciary deposits that had nothing to do with setting the value of the goodwill of the bank whose shares were the subject-matter of the transaction. The Tribunal rejected the purchaser's main claim and partially upheld the sellers' counterclaim.

[21] http://www.swissarbitrationdecisions.com/sites/default/files/24%20mai%202013%204A%20476%202012.pdf.
[22] http://www.swissarbitrationdecisions.com/sites/default/files/15%20juillet%202013%204A%20188%202013.pdf.

In the civil law appeal against the arbitral award, the buyer claimed, among other things, that the arbitral tribunal had based its award on a legal argument that had not been raised by either party or discussed with them. This argument concerned the use of the principle of proportionality to assess whether the appellant had been entitled to terminate some of the fiduciary loans without their amount being included in the final price for the shares. The Federal Tribunal did not agree with this argument and deemed that the parties could not have been surprised at the grounds for the arbitrators' decision. The question of whether the purchaser could have terminated the said agreements so that their amount did not affect the price for the shares was the centre of the dispute between the parties. Therefore, all related legal issues were covered by the arbitrators' analysis. During the proceedings the purchaser was advised by specialists in banking law and should have assumed that the arbitrators would assess the purchaser's termination of the loans from various perspectives, including the proportionality principle. This stance was even more justified as exercising the right to terminate the loans gave the purchaser far-reaching benefits and led to a conflict of interests related to the possibility of thus unilaterally reducing the price for the shares. It should therefore have been expected that the arbitrators would examine the manner in which this right had been exercised.

4. French Case Law on Allegations that the Party's Right to be Heard had been Infringed by the Arbitral Tribunal when Passing an Award Based on a "Surprising" Legal Concept

4.1. Decision in the *Thyssen Stahlunion GmbH vs. Maaden* Case

In a decision of 6 April 1995[23] the Court of Appeal in Paris heard an appeal against an award issued by the arbitral tribunal of the ICC Court in Paris. The arbitration between the claimant (a Syrian company) and the respondent (a German company) involved a claim for payment in respect of improper performance of an agreement to supply steel bars. When upholding the claim, the arbitral tribunal awarded to claimant the amount of the principal claim and interest accrued at LIBOR.

One of the allegations raised by the respondent in the appeal to set aside the arbitral award[24] was that the party had not been heard as regards the legal grounds for setting the rate of interest on the principal amount, as the parties had not pleaded on this subject during the proceedings. The Court of Appeal found the allegation valid on the grounds that the arbitrators had ruled on interest despite neither party having commented on the legal grounds for setting the rate. The arbitral tribunal had therefore exceeded the scope of the dispute between the parties and had not allowed them to discuss on the legal grounds for the ruling on interest. Principle of contradictory trial requires arbitrators not to introduce new issues in fact or in law to a case without inviting the parties to comment on them beforehand, especially as the Convention applicable in the

[23] CA Paris, 6 April 1995, the text of the judgment is available at: http://cisgw3.law.pace.edu/cases/950406f1.html.
[24] The legal grounds for the allegation were Articles 1502–3 of the French Code of Civil Procedure.

case did not specify how the interest rate should be set. By adopting that trade practices justified interest being set at LIBOR without giving the parties the opportunity to comment, the arbitrators made an error, which justified the award being set aside as regards interest.

4.2. Decision in the *Engel Austria GmbH vs. Don Trade* Case

A claim that a party's rights had been breached due to the arbitral tribunal having applied the *iura novit curia* principle was also the basis of a judgment issued by the Court of Appeal in Paris on 3 December 2009[25]. The case involved an agreement between Austrian companies and a Serbian company to deliver an industrial system for fabricating moulds for plastic PET bottles. The parties were in dispute over whether the agreement had been duly performed, i.e. whether the delivered system met the agreed productivity levels. The arbitrators partially avoided the agreement based on the Austrian concept of *Wegfall der Geschaftsgrundlage*, although neither party had relied on it. According to the Court of Appeal in Paris, as the parties had not been heard as regards application of the said principle identified *ex officio* by the arbitrators, the award should have been set aside[26].

5. Case Law of Courts of Other States Concerning Allegations that the Party's Right to be Heard had been Infringed by the Arbitral Tribunal when Passing an Award based on a "surprising" Legal Concept

Individual decisions on allegations of the parties' "surprise" at the legal grounds for a ruling can also be found in the case law of other European states.

In Germany the main case[27] in this question is a judgment of 30 July 2010 issued by the Higher Regional Court ("**OLG**") in Stuttgart (1 Sch 03/10[28]). The OLG confirmed that the arbitral tribunal was obliged to ensure that the parties were heard if it intended to diverge from the previous legal interpretation put to the parties, and the parties – confident in the legal interpretation made to them by the arbitrators – did not raise any further arguments in a particular aspect of the dispute. However, in the case in question, the OLG saw no need for the arbitrators to take this step, as in this case, after the arbitrators had indicated the possible legal qualification of the contractual provision, the party that had relied on this qualification being upheld remained passive, while the other party, who contested the arbitrators' interpretation, put forward an argument for diverging from it and convinced the arbitrators to change their mind.

In Finland this issue was adjudicated in a judgment of 2 July 2008 in the *Werfen Austria vs. Polar Electro* case[29]. The Finnish Supreme Court did not at the

[25] CA Paris, pole 1, 1re ch., 3 Dec. 2009, no. RG 08/13618.
[26] Summary of the statement of reasons for the judgment given herein was made in G. Knuts, *Jura Novit…*, p. 678.
[27] This issue is also discussed in judgments issued by the OLG in Munich (34 Sch 12/09) and in Hamburg (11 Sch 01/01).
[28] The text of the judgment is available at: http://www.dis-arb.de/de/47/datenbanken/rspr/olg-stuttgart-az-1-sch-03-10-datum-2010-07-30-id1077
[29] See summary of case made by R. Morek, *Zasada iura novit arbiter w orzecznictwie*

time find that the parties had been deprived of the right to defend themselves where the arbitral tribunal had ruled pursuant to a provision that had not been cited by the parties (Article 36 of the Finnish contract law) authorising the court to „adjust" to provisions of an agreement deemed unfair. The Supreme Court found that the said provision applied in the case despite the parties not having cited it and issued a decision based thereon that did not exceed the parties' demands. The arbitral tribunal, ruling on the basis of the *iura novit curia* principle, had not therefore breached the parties' right to be heard despite not having consulted them over the legal grounds for the judgment.

6. Conclusions of Foreign Case Law Analysis

It can be concluded from the case law discussed above that in states where the *iura novit curia* principle applies, the arbitral tribunal is itself expected to identify the correct legal norm to resolve the dispute and to apply it regardless of whether the parties referred to it or not. The arbitral tribunal is under no obligation to point this out to the parties.

There is, however, an exception to this general rule, i.e. when the grounds adopted by the arbitral tribunal for the award could be deemed "surprising" for the parties. This exception is however interpreted quite restrictively. It seems that in order to conclude that the parties were „surprised" by the legal concept underlying the award, the following requirements should be met jointly:

1) the arbitral tribunal has based its decision on a legal argument that was not raised by the parties;
2) the argument falls outside the sphere of the issues discussed before the arbitrators during the proceedings[30] (which is also why, in the case law discussed above, it was no "surprise" that the arbitrators took a midway position between the extreme views of the parties as to a given legal institution[31] or contractual provisions[32], or changed the position that it had put earlier to the attention of the parties as a result of new submissions in the proceedings[33]);
3) the parties had no reason to expect that the legal argument on which the award was based would be applied in the case[34] (which is why a decision based on an institution that the lawyer representing a party could have expected based on the case file[35] or on the *ratio decidendi*

sądów zagranicznych (*Iura novit arbiter in judgments of foreign state courts*), in: M. Modrzejewska (ed.), *Prawo handlowe XXI wieku. Czas stabilizacji, ewolucji czy rewolucji. Księga jubileuszowa Profesora Józefa Okolskiego*, Warsaw 2010, pp. 623–624.

[30] Cf. Federal Tribunal award in case no. 4P_100/2003.

[31] Cf. Federal Tribunal award in case no. 4A_407/2012.

[32] Cf. Federal Tribunal award in case no. 4A_240/2009.

[33] Cf. judgment of the OLG in Stuttgart in case no. 1 Sch 03/10.

[34] In particular this can be the case where parties failed to raise a particular argument because both of them agree that a particular question can be determined in only one way.

[35] Cf. Federal Tribunal awards in case nos. 4A_254/2010, 4A_188/2013 and the judgment in the Finnish *Werfen* case.

at earlier stages of the dispute[36] cannot be a "surprise", though a judgment based on a provision that should not be applied in a case may be surprising[37]).

This exception does not deprive the arbitral tribunal of autonomy to identify the applicable legal grounds for its awards. It merely gives rise to the arbitrators having a procedural obligation to allow the parties to comment on the application of a specific legal argument (provision of law or legal institution) identified *ex officio* by the arbitrators before it is applied by them in their award[38]. This gives the parties the chance to convince the arbitrators to either accept or reject the argument.

This is also why in proceedings to set aside an arbitral award any allegation of "surprise" cannot be treated as grounds for challenging the merits of an arbitral award. Of course a state court's ruling on whether to set aside an arbitral award must consider whether a legal argument identified *ex officio* in the award could „surprise" the parties and in this respect one has to examine the substantive grounds of the award. However, it is not incorrect adjudication of a case but a failure to allow the parties to comment on an important legal argument a reason that underlies the possible annulment. So a merit-based analysis of the legal grounds for a award will not serve to review improper application of law by the arbitrators, but will allow to establish whether the party could objectively have been "surprised" at the legal grounds chosen by the arbitrators. If the arbitrators allowed the parties to comment on the legal grounds for the judgment identified (and then applied) by the arbitrators, the allegation of "surprise" could not have been effectively raised.

7. Allegation that the Parties were "Surprised" by the Legal Grounds for an Arbitral Award as a Basis for the Annulment of the Award in Accordance with Article 1206 of the Polish Code of Civil Procedure

In the context of the above, consideration should now be given to whether a "surprising" application of the law by the arbitral tribunal (in line with the iura novit curia principle) may constitute grounds for a request to set aside the award based on Article 1205 et seq. of the Polish Code of Civil Procedure ("CCP"). As the iura novit curia principle applies in the Polish legal system consideration should be given to whether the arbitrators, intending to base their decision on legal grounds not raised during the arbitral proceedings, are obliged to allow the parties to comment on the application in a given case of legal grounds identified ex officio by the arbitrators.

Of course, the parties may impose such an obligation on the arbitrators in the arbitration clause, based on Article 1184 § 1 of the CCP. A good example of this practice is § 6.2 of the new Rules of Arbitration of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw[39] in which it is stipulated that

[36] Cf. Federal Tribunal award in case no. 4A_476/2012.
[37] Cf. Federal Tribunal award in case no. 4A_400/2008.
[38] Cf. Federal Tribunal award in case no. 4P.100/2003.
[39] Adopted on 14 October 2014 by the Arbitration Council of the Court of Arbitration at the Polish Chamber of Commerce.

"*an award cannot be based on legal grounds different from those relied on by either of the parties, unless the Arbitral Tribunal notifies the parties in advance and gives them an opportunity to be heard concerning such legal grounds*".

However, in the absence of an agreement between the parties, the source of the obligation to allow the parties to comment on a legal argument perceived by the arbitrators as potentially giving grounds for the decision should be sought in the provisions on arbitral proceedings laid down in the law (as provided for in Article 1184 § 1 and 2 of the CCP). It seems that the key regulation in this respect is Article 1183 of the CCP, which lays on arbitrators the obligation to treat the parties equally, to hear them and to allow them to put forward their claims and supporting evidence.

In legal literature there is no doubt that Article 1183 of the CCP lays down the principles[40] of equal treatment of parties and the right to be heard, which are crucial to the arbitral proceedings. These principles (taken together) imply the obligation for the arbitrators to treat the parties fairly[41]. It is also stressed in legal literature that the principle of the right of the parties to be heard in arbitration covers the parties' right to refer to all key facts and any legal questions that arise during the arbitral proceedings[42]. Some commentators clearly state that the obligation to treat parties equally and to hear them as regards legal matters implies a ban on "surprising" the parties with the legal grounds for an arbitral award[43].

This interpretation must be accepted. It should be remembered that the principle *iura novit curia* (*arbiter*) is based on the presumption that an arbitrator knows the law and knows how to apply it correctly. This should also work the other way: an arbitrator who knows the law should know when legal grounds that he has identified *ex officio* may not be obvious to the parties and consequently when the award issued based thereon is "surprising". Therefore, if an arbitrator knows (or should know) that he/she will „surprise" the parties with his/her decision and despite this, decides to issue an award based on grounds that were not cited by the parties, then it could be deemed that this is not entirely "fair" to the parties, as the arbitrator thereby prevents the parties from putting forward reasons for which a specific legal argument should or should not be upheld. It is also difficult not to perceive that a party will never be "heard", if it is not aware that it is expected to present its standpoint on a particular issue.

"Surprises" at the legal grounds adopted in the arbitral award may have particularly severe effects in arbitration, which is generally one-instance proceeding. It is well known that state courts do not examine merit-based aspects of awards issued by arbitral tribunals[44] and cannot "correct" an incorrect legal

[40] Cf. T. Ereciński, K. Weitz, *Sąd arbitrażowy*, p. 279.
[41] Cf. *ibidem*, p. 280.
[42] *Ibidem*, p. 281.
[43] Cf. T. Ereciński, in: T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)* (*Civil Procedure Code. Commentary. International litigation. Arbitration*), Warsaw 2012, SIP Lexis.pl (commentary on Article 1183 of the CCP, Nb 4).
[44] In this matter, cf. e.g. statement of reasons to judgments of the Supreme Court of 12 September 2007, case no. I CSK 192/07 (LEX no. 488970) and of the Court of Appeal in

qualification adopted spontaneously by arbitrators. So the "independence" of the arbitrators in identifying legal grounds could have far-reaching consequences that are disadvantageous for the losing party. Interestingly, even as regards two-instance state courts of Poland, which follow the *iura novit curia* principle in its traditional meaning (i.e. without the judge being obliged to hear the parties, as regards the legal grounds for their procedural tasks), it is strongly recommended that state judges do not "surprise" the parties with the legal concept they adopt and fail to discuss with the parties[45]. This happens despite the full appeal model adopted in Polish civil procedure which makes it possible for an incorrect legal qualification to be corrected by a higher instance court. This concern was expressed at the time by a Committee for the Codification of Civil Law in a project[46] to introduce to the CCP a new Article 212^1, stipulating that "*§ 1. At a hearing, the court will discuss with the parties potential legal grounds for their demands. § 2. Judgment may be based on legal grounds that a party has not indicated or that it was not warned of only if the court has discussed it with the parties*"[47].

To sum up, there are strong arguments for an arbitral tribunal being obliged under Article 1183 of the CCP to inform the parties of legal grounds for the award identified *ex officio* and to allow them to comment on the application of these grounds in the case in question. This will only apply if a specific legal argument introduced in an arbitral award will be a "surprise" to the parties. It seems that the foreign state case law cited in this article accurately illustrates when it can be said that parties are "surprised", and when arbitrators can be expected to apply specific legal grounds for their decision even where the parties did not refer to them during the proceedings.

To wind up, the question needs to be asked as to whether breach by arbitrators of the obligation to hear the parties, as regards "surprising" legal grounds for a judgment, may give grounds for an arbitral award to be set aside. I am of the opinion that breach of this obligation, and any other manifestations of breach of the right to be heard[48], will deprive the parties of the opportunity to present their case and would justify an arbitral award being set aside pursuant to Article 1206 § 1(2) of the CCP.

Poznan of 3 April 2013, case no. I ACa 207/13 (LEX no. 1314835) in Katowice of 25 October 2005, case no. I ACa 1174/05 (LEX no. 196062) and in Warsaw of 31 January 2012, case no. VI ACa 759/11 (LEX no. 1164673).

[45] Cf. interesting interpretation made by A. Łazarska, in: A. Łazarska, *Rzetelny proces cywilny* (*Due process*), WKP 2012, SIP LEX, chapter 15 point 3 and statement of reasons to a Supreme Court judgment of 2 December 2011, case no. III CSK 136/11 (LEX no. 1131125), where it is indicated that decisions on claims based on legal grounds other than those indicated by a party, without information being given on this possibility before the hearing closes, leads to the proceedings being invalid due to a party having been deprived of the possibility to defend its case (Article 379(5) of the CCP).

[46] Bill of 4 November 2009 on Amendments to the Code of Civil Procedure and Certain Other Acts, constituting the basis for later amendments to the CCP made by way of the Act of 16 September 2011 (Journal of Laws no. 233, item 1381).

[47] This provision was finally removed from the bill during legislative work at the Ministry of Justice.

[48] M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz* (*Civil Procedure Code. Commentary*), Warsaw 2013, SIP Lexis.pl (commentary on Article 1206 of the CCP, Nb 6).

8. Summary

"Surprising" parties with an original legal concept identified and applied *ex officio* by the arbitrators in the arbitral award happens in foreign legal systems that recognise the *iura novit curia* principle as a procedural rule, to be qualified as breaching to the fundamental principles of arbitration and justifying the setting side of an arbitral award.

It seems that the allegation of the parties' "surprise" at the legal grounds for a judgment is only justified where the parties have not argued for the application of a specific provision of law or legal institution. Another requirement will be that the parties could not have foreseen that a specific provision of law or institution would be applied to adjudicate the case put before the arbitrators.

It could be said that the legal interpretations made in foreign case law could be a suitable point of reference for deciding on allegations of parties' "surprise" at the legal grounds for an arbitral award, raised in requests for setting aside awards rendered by the arbitral tribunals seated in Poland.

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Application of the Principle of *Res Judicata* to Domestic Arbitral Awards under Polish Law

Ewelina Wętrys*

Introduction

The concept of res judicata of arbitral awards has been extensively debated among international authors,[1] and more recently it has become a hot topic also among the representatives of Polish doctrine.[2] The latter, however, tend to

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[1] See e.g.: R.W. Hulbert, *Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration*, International Tax & Business Lawyer 1989, volume 7:155, p. 156 et seq.; B. Hanotiau, *The Res Judicata Effect of Arbitral Awards*, Special Supplement 2003: *Complex Arbitrations: Perspectives on their Procedural Implications*, p. 43 et seq.; V.V. Veeder, *Issue Estoppel, Reasons for Awards and Transnational Arbitration*, Special Supplement 2003: *Complex Arbitrations: Perspectives on their Procedural Implications*, p. 73 et seq.; S. Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited*, The American Review of International Arbitration 2005, volume 16, No. 1, p. 177 et seq.; A. Sheppard, *Res Judicata and Estoppel*, Dossier of the ICC Institute of World Business Law: *Parallel State and Arbitral Procedures in International Arbitration*, 2005/July, p. 219 et seq.; Ch. Söderlund, *Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings*, Journal of International Arbitration 2005, volume 22, issue 4, p. 301 et seq.; M.T. Redondo, *Preliminary Judgments, Lis Pendens and Res Iudicata in Arbitration Proceedings*, in: M.Á. Fernández-Ballesteros (ed.), D. Arias (ed.), *Liber Amicorum Bernando Cremades*, 2010, p. 1131 et seq.; G.L. Walters, *Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?*, Journal of International Arbitration 2012, volume 29, issue 6, p. 651 et seq.; G.B. Born, *International Commercial Arbitration*, 2014, p. 3732 et seq. Additionally the topic of res judicata has been analyzed by the International Law Association (ILA) in: Interim Report: "Res judicata" and Arbitration, within the framework of ILA conference in Berlin in 2004, and in: *Final Report on Res Judicata and Arbitration*, during ILA conference in Toronto in 2006, both reports available at: http://www.ila-hq.org/en/committees/index.cfm/cid/19.

[2] See: W. Popiołek, *O powadze rzeczy osądzonej w postępowaniu arbitrażowym* (*On Res Judicata in Arbitration*), in: P. Nowaczyk et al. (eds.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu* (*International and Domestic Commercial Arbitration at the Beginning of the XXI Century. Memorial Book Dedicated to Dr. Hab. Tadeusz Szurski*), 2008, p. 169 et seq.; M. Łaszczuk, J. Szpara, in: A. Szumański (ed.), *System prawa handlowego*. Tom 8. *Arbitraż handlowy* (*Commercial Law System*. Volume 8. *Commercial Arbitration*),

analyze it as a part of a wider problem comprising the effects of arbitral awards. Yet, the principle of res judicata occurs not only, or even primarily, as a purely theoretical matter, but – with the increased number of disputes of domestic or international nature subject to arbitration – it has become widely relevant for the arbitration practice. In fact, the judgments recently issued by the Polish Supreme Court prove that the concept of res judicata of arbitral awards is of great importance to arbitral proceedings pending in Poland.[3]

Although in the majority of cases the non-prevailing party voluntarily complies with the arbitral award,[4] there are cases where parties dissatisfied with the outcome of disputes attempt to limit the negative effects the awards may cause. Submitting the same claim before an arbitral tribunal may serve this purpose. Similarly, the losing party may attempt to ignore the award which has granted preclusive effect to issues in subsequent arbitral proceedings commenced between the same parties.

On the one hand, pursuant to Article 1212 § 1 of the Polish Code of Civil Procedure (hereinafter: "PCCP"), an arbitration award shall have legal effect equal to a court judgment or a settlement entered into before a court, only upon recognition or enforcement thereof by the court. On the other hand, the idea of arbitration – as a private method of dispute resolution – implies resolving a dispute without any state interference, through voluntary compliance with the

2010, p. 650 et seq.; K. Weitz, *Uchylenie wyroku sądu polubownego z powodu prawomocnego wyroku sądu (art. 1206 § 1 pkt 6 k.p.c.)* (*Setting Aside Arbitral Award due to Final and Binding Judgment (Article 1206 § 1 item 6 Civil Procedure Code)*), in: J. Okolski et al. (eds.), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie* (*Memorial Book of the 60th Anniversary of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw*), 2010, p. 691 et seq.; P. Lewandowski, *Zakres związania sądu arbitrażowego prejudycjalnymi skutkami wcześniejszego wyroku arbitrażowego lub orzeczenia sądu państwowego* (*How Arbitral Tribunal Is Bound by the Prejudicial Effects of Previous Arbitral Award or a Judgment*), in: M. Łaszczuk et al. (eds.), *Arbitraż i mediacja. Księga jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi* (*Arbitration and Mediation. Jubilee Book Dedicated to Dr. Andrzej Tynel*), 2012, p. 312 et seq.; S. Frejowski, *Związanie sądu arbitrażowego orzeczeniem sądu powszechnego, który uznał lub stwierdził wykonalność wcześniejszego wyroku sądu polubownego* (*How the Arbitral Tribunal Is Bound by the Judgment Enforcing or Recognizing Previous Arbitral Award*), Glosa (Gloss) 2013, No. 2, p. 63 et seq.; M. Tomaszewski, *Skutki prawne wyroku sądu polubownego* (*Legal Consequences of Arbitral Award*), in: J. Gudowski (ed.), K. Weitz (ed.), *Aurea praxis aurea theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego* (*Aurea praxis aurea theoria. Memorial Book in Honor of Professor Tadeusz Ereciński*), volume II, 2011, p. 1899 et seq.; Ł. Błaszczak, in: B. Gessel-Kalinowska vel Kalisz (ed.), *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian* (*Diagnosis of Arbitration. The Functioning of Arbitration Law and Directions of Proposed Changes*), 2014, p. 326 et seq.; A. Szczęśniak, *Glosa do wyroku Sądu Najwyższego z dnia 13 kwietnia 2012 r., sygn. akt I CSK 416/11* (*Gloss to the Judgment of the Supreme Court of 13 April 2012, Docket No. I CSK 416/11*), OSP 2014, No. 1, p. C1 3 et seq.

[3] See: judgment of the Supreme Court dated November 26, 2008, docket no. III CSK 163/08, *Lex no. 479315*; judgment of the Supreme Court dated April 13, 2012, docket no. I CSK 416/11, OSP 2014, No. 1 , p. 1 *et seq*., *Lex no. 1168731*.

[4] Pursuant to the report prepared jointly by Queen Mary University of London, School of International Arbitration and PwC, only 11% of arbitral cases lead to the commencement of recognition and enforcement proceedings while 49% of arbitral awards are voluntarily executed, 25% of cases are finished with a settlement before the award is issued, and 7% of cases are finished with a settlement followed by an award by mutual agreement of the parties; see: International Arbitration: Corporate attitudes and practices, 2008, available at: http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf.

award, and thus most arbitral cases may not result in any recognition or enforcement proceedings. In fact, it was as early as in 1935 when the Supreme Court indicated that "the intention of the legislator introducing the institution of arbitral tribunals [...] was to relieve the state courts and to facilitate the parties' pursuit of claims by entrusting a dispute to the persons being outside the group of professional judges."[5] The assumption that the arbitral awards will be complied with voluntarily lies therefore at the core of arbitration. Accordingly, a number of awards have never been formally introduced to the Polish legal system through their recognition or enforcement by the Polish state courts.

Hence, the question arises whether an award which has not yet been recognized or enforced by a state court, may be binding on the parties or the arbitral tribunal. This article seeks to answer that question by clarifying whether the principle of res judicata applies in Polish (domestic) commercial arbitration, and if so, by analyzing its meaning, nature, grounds, and effects. This article also seeks to determine whether the subsequent award rearbitrating the same matter between the same parties prior to the former award's recognition or enforcement may be set aside, and which grounds referred to in Article 1206 PCCP should be invoked.

The scope of this article is limited to domestic (Polish) arbitral awards settling the case as to its merits, and thus excludes an analysis of any other types of awards that could potentially have res judicata. Furthermore, the present publication is only focused on the mere res judicata, and relations between awards granting preclusive effect to issues are outside its scope. The conclusions of this article may, however, contribute to a discussion on the role of such awards in arbitration. Lastly, this article does not examine whether the occurrence of circumstances which would justify the resumption of civil proceedings (e.g. the award is based on a forged document; facts or evidence that could have affected the outcome of the case are only discovered once the award is issued) may have any impact on the award.[6] The aforementioned problem, although extremely interesting both for the practice and theory of arbitration, requires a separate study.

1. The Concept of *Res Judicata* of Court Judgements in Polish Law – Introductory Remarks

The concept of res judicata of court judgements has been widely analyzed by courts and authors.[7] Accordingly, only some background information on res judicata in civil law proceedings will be provided as a brief introduction to the analysis of res judicata of arbitral awards found in the following sections.

[5] Decision of the Supreme Court dated October 22, 1935, docket no. II C 984/35, OSN(C) 1936/7/268*, Lex no. 374049.*

[6] See e.g.: N. Voser, A. George, *Revision of Arbitral Awards*, in: *Post Award Issues*: ASA Special Series No. 38, 2011, p. 43 et seq.

[7] See: Z. Resich, *Res iudicata*, 1978; W. Broniewicz, *Prawomocność orzeczeń w postępowaniu cywilnym* (*Substantive Validity of Judgments in Civil Proceedings*), Studia Iuridica (Iuridica Studies) 1976, volume V, p. 75 et seq.; Z. Resich, in: Z. Resich (ed.), *System prawa procesowego cywilnego. Postępowanie rozpoznawcze przed sądami pierwszej instancji* (*System of Civil Procedure Law. First Examination of Civil Law Cases Before the Court of First Instance*), 1987, p. 400 et seq.

Res judicata is a widely recognized basic principle deemed to bear fundamental significance for the protection of public policy.[8] The trust in law, legal certainty and stability of the legal situation, as well as the process economy (i.e. the effective use of time, energy and resources by the parties, as well as the court), and the wish to avoid conflicting decisions lie at the root of this concept.

Yet, Polish law does not provide for any definition of res judicata but in Article 366 PCCP determines its scope stating that a non-appealable judgement shall have the force of res judicata only insofar as it relates to what the subject-matter of adjudication was with respect to the cause of action, and only between the same persons. A "*triple identity test*" is thus applicable to determine whether res judicata applies. The test requires the identity of the parties (yet, the parties do not need to appear in the same procedural role as previously), the claim and the grounds on which the claim is based.[9] Those prerequisites of res judicata are universal, and there is no reason why they should be interpreted differently in the context of res judicata of domestic arbitral awards.

Polish doctrine and jurisprudence generally accept that res judicata covers the ultimate determination of a judgement (i.e. operative part of a judgment) but not the motives found in its reasoning. The latter may, however, be used to determine the exact scope of res judicata.[10] Whereas Article 199 § 1 point 2 PCCP sets forth the effect of res judicata, ordering the court to dismiss the statement of claim concerning the same claim between the same persons that has already been decided in a non-appealable judgment, under pain of nullity of the proceedings (Article 379 point 2 PCCP).[11]

Articles 365 § 1 and 366 PCCP regulate the substantive validity of a judgement. Specifically, Article 365 § 1 PCCP comprises its positive effect indicating that a final decision shall be binding not only on the parties as well as the court that has issued the ruling but also on other courts, other state and public administration authorities, as well as on other persons as may be provided for in the PCCP. Article 366 PCCP provides for the negative effects of substantive validity[12] stipulating that the subject-matter of adjudication with respect to the cause of action which has finally been resolved in a judgement cannot be rearbitrated in subsequent proceedings between the same parties.

A court judgement to produce positive and negative effects as referred to in Articles 365 § 1 and 366 PCCP and, consequently, to have (among other things) res judicata, should be legally binding in the meaning of Article 363 § 1 PCCP, i.e. should not be subject to any appeal or to any other legal remedy (so-called formal validity of a judgment).[13]

[8] Z. Resich, *Res iudicata* (*Res Judicata*), 1978, p. 5.
[9] P. Grzegorczyk, in: T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze* (*Code of Civil Proceedings. Commentary. First Examination of Civil Law Cases*), volume II, ed. 4, 2012, p. 138 and p. 145–150, p. 160.
[10] *Ibidem*, p. 146 and the doctrine and jurisprudence mentioned therein.
[11] I. Kunicki, *Związanie sądu wydanym orzeczeniem w procesie cywilnym* (*How the Court Is Bound by the Decision Issued in Civil Process*), 2010, p. 279.
[12] See: Z. Resich, *Res iudicata*, 1978, p. 43, p. 115; J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie cywilne* (*Civil Proceedings*), 2009, p. 467; P. Telenga, in: A. Jakubecki (ed.), *Kodeks postępowania cywilnego. Komentarz* (*Code of Civil Proceedings. Commentary*), 2008, p. 489.
[13] P. Grzegorczyk, *op.cit.*, p. 127–132.

2. *Res Judicata* of an Arbitral Award Prior to its Recognition or Enforcement by a State Court

On the one hand, the primary purpose of arbitration is to finally resolve a dispute that has arisen between the parties and has been subject to arbitration. If, however, an award issued in the course of arbitration would not be binding and the parties could freely commence new arbitration for disputes already settled by arbitral tribunal, the purpose of arbitration will not be achieved and the mere clause subjecting the disputes to a non-final and non-binding settlement of an arbitral tribunal will not constitute an arbitration agreement. After all, a constitutive element of any arbitration agreement is the willingness of the parties to submit a legal dispute to the binding settlement of the arbitral tribunal.[14] Inherent in arbitration is the notion that an arbitral tribunal has the competence to adjudicate a case in an award which is final and binding on the parties. Such a notion distinguishes arbitration from any other method of dispute resolution.[15]

On the other hand, Articles 365 and 366 PCCP which constitute the basis for res judicata do not apply directly or indirectly to arbitration.[16] In particular, there is no provision in the PCCP that would allow for Articles 365 and 366 PCCP to apply accordingly to arbitral awards.[17] In fact, arbitral tribunals are only bound by the mandatory provisions of Part Five of the Code of Civil Procedure, and thus any other provisions of the PCCP are irrelevant for the arbitral tribunals to operate.[18]

[14] See: M. Tomaszewski, in: A. Szumański (ed.), *System prawa handlowego*. Tom 8. *Arbitraż handlowy* (*Commercial Law System*. Volume 8. *Commercial Arbitration*), 2010, p. 295; T. Ereciński, K. Weitz, *op.cit.*, p. 101.

[15] The Supreme Court has indicated many times that an agreement which does not provide the tribunal with the competence of the settlement of the dispute does not constitute an arbitration agreement, see e.g.: judgement of the Supreme Court dated July 11, 2001, docket no. V CKN 379/00, OSNC 2002/3/37, Lex no. 48071; decision of the Supreme Court dated August 8, 2003, docket no. V CK 486/02, Lex no. 172836. In the judgement of May 11, 2007, docket no. III CSK 82/07 (Lex no. 259065), the Supreme Court indicated that the awards of arbitral tribunals are binding, and the state court – except for the cases stipulated directly in the statute – does not have the power to review a case resolved in the award on its merits.

[16] See: W. Popiołek, *O powadze rzeczy osądzonej w postępowaniu arbitrażowym* (*On Res Judicata in Arbitration*), in: P. Nowaczyk et al. (eds.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu* (*International and Domestic Commercial Arbitration at the Beginning of the XXI Century. Memorial Book Dedicated to Dr. Hab. Tadeusz Szurski*), 2008, p. 175–176.

[17] W. Popiołek represents the view that Article 365 PCCP may apply to arbitration once the parties – acting pursuant to Article 1184 § 1 PCCP – in common will decide to apply the aforementioned provision to arbitration proceedings pending between them. Such a view should, however, be rejected. Although some of the effects referred to in Article 365 PCCP are produced already by the fact that the parties are bound by the arbitration award, one cannot accept that this applies to all effects of the substantive validity of a court judgement. In particular, it would be difficult to agree with the assumption that only by the power of their common will the parties can make the award become binding on a state court and other authorities mentioned in Article 365 § 1 PCCP. See: W. Popiołek, *op.cit.*, p. 175.

[18] Article 1184 § 2 PCCP states directly that the arbitral tribunal shall not be bound by the provisions on procedure before the court. See e.g.: decision of the Supreme Court dated

In addition, Article 1212 item 1 PCCP indicates that the arbitration award shall have legal effect equal to a court judgement only upon its recognition or enforcement (equating an arbitration award with court judgment means that the former has the same legal effects as the latter).[19] Furthermore, since 3 May 2012 (i.e. the entry into force of the amendment of the Code of Civil Procedure),[20] an arbitral award does no longer constitute a writ of execution since in the legislator's view an arbitration award only has the legal nature of a private document.[21]

Consequently, under the Polish legal system an arbitration award – being a decision issued by a private tribunal not entrusted with public authority – may (at least potentially) produce only those effects which have been granted by the legislature. The legislator, however, has subjected a number of effects of an arbitration award to its recognition or enforcement and thus its formal introduction to the Polish legal system by a state court decision issued after a state court reviews the arbitration award on the grounds referred to in Article 1214 § 3 of the PCCP, i.e. examines whether a dispute resolved in the award is arbitrable and whether the award is consistent with the fundamental principles of the legal order of the Republic of Poland.

Before one may answer the question posed at the beginning of this article, it is therefore necessary to determine the effects of an arbitration award that have been conditioned upon its recognition or enforcement by a state court. In particular, a close examination whether only those awards that have been recognized or enforced are granted res judicata, is required.

2.1. Review of the Doctrine

Under Article 1212 § 1 PCCP at least three stances have emerged. The first one provides that an arbitral award prior to its recognition or enforcement does not have res judicata. According to the second view represented by the vast majority of the Polish authors, an arbitral award may produce some effects already

April 2, 2003, docket no. I CK 287/02, OSNC 2004/6/100, Lex no. 106555; T. Ereciński, in: J. Ciszewski, T. Ereciński, *Kodeks postępowania cywilnego. Komentarz*. Część czwarta. *Przepisy z zakresu międzynarodowego postępowania cywilnego*. Część piąta. *Sąd polubowny (arbitrażowy)* (*Code of Civil Proceedings. Commentary.* Part Fourth. *Provisions on International Civil Proceedings.* Part Fifth. *Arbitration*), 2006, p. 412.

[19] See e.g.: M. Łaszczuk, J. Szpara, in: A. Szumański (ed.), *System prawa handlowego*. Tom 8. *Arbitraż handlowy* (*Commercial Law System.* Volume 8. *Commercial Arbitration*), 2008, p. 651; T. Ereciński, K. Weitz, *Sąd arbitrażowy* (*Arbitration*), 2008 r., p. 338, p. 349 and p. 351; B. Kordasiewicz, W. Sadowski, *Postępowanie w sprawach o uznanie i stwierdzenie wykonalności orzeczeń sądów polubownych w Polsce. Uwagi na tle nowelizacji kodeksu postępowania cywilnego* (*Proceedings with respect to Enforcement and Recognition of Arbitral Awards in Poland. Comments in light of Amendments to the Code of Civil Proceedings*), KPP 2007, issue 2, p. 537; Ł. Błaszczak, M. Ludwik, *Sądownictwo polubowne (arbitraż)* (*Arbitration*), 2007, p. 198; R. Morek, *Mediacja i arbitraż (art. 183[1]–183[15], 1154–1217 KPC). Komentarz* (*Arbitration and Mediation. Articles 183[1]–183[15], 1154–1217 Code of Civil proceedings. Commentary*), 2006, p. 277 *et seq*.

[20] Statute dated September 16, 2011 on the amendment of the statute – Code of Civil proceedings and other statutes (Journal of Laws 2011 No. 233, item. 1381).

[21] The substantiation of the draft amendment of the statute – Code of Civil Proceedings and other statutes, Sejm RP VI cadency, print no. 4332, p. 31–32, available at: http://orka.sejm.gov.pl/Druki6ka.nsf/0/46931DF8C9071DE8C12578B1003FF809/$file/4332.pdf.

at the time of its issuance, or at least at the moment it is served upon the parties, e.g. the award is binding on the parties prior to its recognition or enforcement. Pursuant to the third view, even an award that has been recognized or enforced by a state court, has no res judicata.

Accordingly, Ł. Błaszczak indicates that "*it would be a fiction not supported by any clear legal norm*" to accept "*that an arbitration award even before its recognition or enforcement has res judicata, which allows a plea of ne bis in idem to be raised in the proceedings before the arbitration court*".[22] The author observes that prior to the recognition or enforcement there is no basis to apply – even by analogy – the relevant provisions of the PCCP.[23] Similarly, Ł. Błaszczak asserts that an award not recognized or enforced by a state court may not have any preclusive effect in another arbitration.[24] In the author's opinion, res judicata is only granted to a domestic award once the award is recognized or enforced.[25]

T. Ereciński and K. Weitz represent an opposing view to Ł. Błaszczak. The authors maintain that an arbitration award that has not been recognized or enforced produces the effect of substantive validity between the parties and thus it should be binding in subsequent arbitration proceedings between the same parties.[26] The authors fail, however, to provide any wider reasoning for their conclusion. While M. Łaszczuk and J. Szpara focus their attention on the binding nature of the arbitral award, they note that it is not the purpose of arbitration to issue awards which require recognition or enforcement with the use of state coercion, and explain that the parties agree to execute the award already by submitting a dispute to arbitration.[27] The authors assert that the arbitration award even prior to its recognition or enforcement activates the parties' commitment to execute the award, which the authors define as "*the commitment result of the award*" ("*skutek zobowiązaniowy wyroku*").[28] Furthermore, M. Łaszczuk and J. Szpara find unjustified the concept which limits the binding effect of an arbitral award only to a new arbitration pending between the same parties, as such a concept reflects the view which recognizes the arbitration award as a procedural measure, and arbitration – as a type of civil proceedings.[29]

M. Tomaszewski points to the intent of the parties expressed in the arbitration agreement, while he examines the basis for the arbitral award to be binding on the parties.[30] The author, however, finds the legal grounds for the binding nature of the arbitration award primarily in Article 1157 PCCP. In the author's view, the legislator having allowed the parties to submit certain disputes to arbitration, presumes that the arbitration award should be binding on the parties.[31] M. Tomaszewski further indicates that there is no provision which subject the binding effect of the arbitral award between the parties to the recognition

[22] Ł. Błaszczak, *op.cit.*, p. 333.
[23] *Ibidem*.
[24] *Ibidem*.
[25] *Ibidem*, p. 338.
[26] T. Ereciński, K. Weitz, *Sąd arbitrażowy* (*Arbitration*), *op.cit.*, p. 337–338.
[27] M. Łaszczuk, J. Szpara, *op.cit.*, p. 651–652.
[28] *Ibidem*, p. 652.
[29] *Ibidem*, p. 652, reference 3.
[30] M. Tomaszewski, *op.cit.*, p. 1917.
[31] *Ibidem*, p. 1917–1918.

or enforcement of the award by the state court.[32] Yet, M. Tomaszewski sets two particular conditions for the arbitration award to be binding on the parties: the arbitrability of the dispute resolved in the award, and the compliance of the award with fundamental principles of the legal order of the Republic of Poland.[33] According to the author, the arbitral award may be deprived of its effects only once it is set aside[34] (yet, it seems that by the term "*effects*" the author understands only the binding effect of the award on the parties). In M. Tomaszewski's opinion, an arbitration award prior to its recognition or enforcement produces effects between the parties corresponding to those produced by the substantive validity of a court judgment.[35]

R. Kulski considers that the award is granted with the substantive validity as well as with res judicata already once it is served upon both parties. In the author's view there is therefore no need for the award to be recognized or enforced by the state court.[36]

W. Popiołek asserts that the arbitration award dismissing a claim does not have res judicata even after it is recognized or enforced.[37] In the author's view the aforementioned conclusion is justified by the fact that the essence of the judicial system is the freedom and autonomy of parties' actions, and thus there is no impediment for a party to object to the scope of subsequent arbitration.[38]

2.2. The Binding Effect and Finality of Arbitral Award

The views of the representatives of the Polish doctrine that presume that the arbitral award produces at least some effects prior to its recognition or enforcement are more convincing. The opposing views seem to ignore the fact that the execution of the award not in every case requires its recognition or enforcement by a Polish court. In fact, at the root of arbitration lies the assumption[39] that the arbitration award will be voluntarily executed. In such a case, the award will never be recognized or enforced, and therefore pursuant to Article 1212 § PCCP will never have the legal force equal to a court judgment. This should not mean, however, that such an award produces no effect at all and can be ignored by the parties.

Moreover, under the PCCP the concept of the recognition and enforcement of an arbitral award manifests the perception of the essence of arbitration as the consent of the state to resolve a specific category of disputes by private courts.

[32] *Ibidem*, p. 1916.
[33] *Ibidem*, p. 1918.
[34] *Ibidem*, p. 1916.
[35] *Ibidem*, p. 1924.
[36] R. Kulski, *Glosa do wyroku Sądu Najwyższego z 7 listopada 2001 r., sygn. akt V CKN 379/00* (*Gloss to the Judgment of the Supreme Court of 7 November 2001, Docket No. V CKN 379/00*), PiP 2002, issue 11, p. 102.
[37] W. Popiołek, *op.cit.*, p. 177–179.
[38] *Ibidem*, p. 177.
[39] See: A. Zielony, *Wprowadzenie wyroku sądu polubownego do krajowego porządku prawnego na przykładzie wybranych obcych systemów prawnych* (*Implementation of the Arbitral Award into the State Legal Order Based on Selected Foreign Legal Systems*), in: J. Gudowski (ed.), K. Weitz (ed.), *Aurea praxis aurea theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego* (*Aurea praxis aurea theoria. Memorial Book in Honor of Professor Tadeusz Ereciński*), volume II, 2011, p. 2005–2007.

Such a concept exposes procedural consequences of the awards,[40] and ignores their effects in the sphere of substantive law. The effects of the arbitration award, however, go beyond the realm of procedural effects.

Specifically, arbitration is a private method of dispute resolution based on the parties' consensus reached in an arbitration agreement or compromise. By virtue of their common intent, the parties to an arbitration agreement decide to submit future or existing disputes that may or have arisen between them with respect to a particular legal relationship to arbitration, and agree that future awards will be binding, final and voluntarily executed. Such a commitment should be considered as a constitutive element of every arbitration agreement which distinguishes arbitration from any other alternative methods of dispute resolution (ADR), e.g. mediation. In contrast to arbitration, the rulings issued as a consequence of ADR, do not bind the disputing parties.[41] Thus, if the "*agreement does not provide the arbitral tribunal with the competence to [finally] resolve the disputes, such an agreement does not constitute an arbitration clause*".[42] The above-mentioned assumption lay at the core of the concept of arbitration: the parties were willing to submit the dispute to the resolution of private individual whose experience and judgment they trusted and who would decide their dispute once the parties were heard.[43] The decision issued in such a way was final and binding on the parties, and not because of the potential threat of the use of state power, but because the intent of the parties was that such a decision should be binding.[44] The Polish legislator acknowledges the aforementioned intent of the parties by allowing in Article 1157 PCCP the submission of a certain category of disputes to the resolution of a private court while in Article 1165 § 1 PCCP precluding the examination of a case falling under an arbitration clause or compromise by the state court, provided that the defendant asserts the plea of the arbitration agreement before joining the issue on the merits of the case. Furthermore, the Polish legislator acknowledges the intent of the parties to submit a dispute to final resolution in arbitration by allowing a domestic arbitration award to be set aside by the state court only in exceptional circumstances expressly provided in Article 1206 PCCP, as well as by equating the consequences of recognized or enforced arbitral awards with a court judgment. Yet, the aforementioned provisions do not alter the source of the competence of the arbitral tribunal, which remains the intent of the parties, and not the state's decision to transfer part of its powers to a private court.[45]

The final and binding effects of a forthcoming arbitral award are often stipulated directly in the model arbitration clauses proposed by the courts of arbitration.[46] Similar provisions are also included in most arbitration rules. For exam-

[40] See: M. Łaszczuk, J. Szpara, *op.cit.*, p. 651.
[41] See: A. Szumański, in: A. Szumański (ed.), *System prawa handlowego*. Tom 8. *Arbitraż handlowy* (*Commercial Law System. Volume 8. Commercial Arbitration*), 2010, p. 23.
[42] Judgement of the Court of Appeal in Poznań dated July 3, 2006, docket no. I ACa 46/06, *Lex no. 278461*. See also: judgement of the Supreme Court dated July 11, 2001, docket no. V CKN 379/00, *Lex no. 48071*.
[43] A. Redfern, M. Hunter et al., *Redfern and Hunter on International Arbitration*, ed. 4, 2009, p. 1–2.
[44] *Ibidem*.
[45] See: W. Popiołek, *op.cit.*, p. 175.
[46] See: model arbitration clauses proposed by: International Court of Arbitration at the International Chamber of Commerce (ICC) ("*All disputes arising out of or in connection*

ple, § 40.1 of the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, which entered into force on 1 January 2015, indicates explicitly that "*The award is binding on the parties. The parties shall voluntarily carry out the award.*"[47] Similarly, the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce (ICC) states in Article 34 item 6 that: "*Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*".[48] Article 26.8 of the Arbitration Rules of the London Court of International Arbitration (LCIA) goes even further by stating directly that "*Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.*"[49]

Consequently, it follows already from the mere nature of arbitration, as well as the parties' conclusion of the arbitration agreement that the disputing parties are obliged to comply with the award issued in accordance with such arbitration agreement, regardless of whether the outcome of the case is favorable for a given party or not. The arbitral award exists in fact only because it has been issued by a private court which has been provided with the competence to adjudicate by the mere parties. Namely, it was no one else but the parties who had agreed in the arbitration agreement or the compromise that a tribunal appointed by those parties should decide their disputes. Unless the parties reserved a second instance, they agreed to the fact that the future award would be final. It is therefore due to the intent of the parties, i.e. the desire to have the dispute finally settled, that the parties are bound by the consequent award. Moreover, the parties' commitments both to accept the finality of the award and to execute the award are generally reflected in the provisions of the vast ma-

with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.", available at: http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/); LCIA ("*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.*", available at: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx); SCC ("*Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.*", available at: http://www.sccinstitute.com/english-14.aspx).

[47] Available at: http://sakig.pl/uploads/pdf/regulaminy/arbitration_rules.pdf. Pursuant to § 41 item 1 of the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce dated January 1, 2007: "*The award shall be binding upon the parties, which undertook to execute it by submitting the dispute for resolution to the Court of Arbitration at the PCC.*", available at: http://sakig.pl/uploads/pdf/terms.en.pdf.

[48] Available at: file:///C:/Users/wetryse/Downloads/ICC%20865-2%20ENG%20Arbitration_Mediation%20Rules.pdf.

[49] Available at: http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

jority of arbitration rules commonly adopted by the parties as procedural rules governing arbitration.

Furthermore, finality of arbitral award and its binding effect are not altered by the statutory right to file a petition to set aside the award before the state court as the finality of the award should be understood as the lack of appeal in arbitration. Hence, if the parties agreed for two-instance arbitration,[50] only the award of the second instance will be final and binding on the parties. The finality of award constitutes the equivalent of a formal validity within the meaning of Article 363 § 1 PCCP[51] since the latter provision cannot apply directly to arbitral award prior to its recognition or enforcement.

A petition to set aside the award regulated in Article 1205 *et seq.* PCCP, does not constitute an ordinary form of appeal.[52] Therefore, as long as a final court decision does not set aside the arbitral award, the latter is final and binding on the parties. Setting aside an award eliminates the award from the legal system with an *ex tunc* effect.[53] The arbitration award therefore cease to bind the parties and cease to constitute a final settlement of the parties' dispute. This consequently activates the parties' obligation to submit the dispute resolved in quashed award to arbitration since the arbitration agreement does not expire,[54] as it is explicitly indicated in Article 1211 PCCP. The future of the dispute is therefore again subject only to the intent of the parties, and particularly to the intent of the plaintiff. Only the latter will decide whether to commence the proceedings before the state court or arbitral tribunal,[55] or forbear himself from pursuing his/her claims. The award issued as the result

[50] Pursuant to Article 1184 § 1 PCCP the parties may agree upon the rules and procedure before the arbitral tribunal. It is therefore for the parties to agree whether the arbitration should have one instance or the award should be subject to appeal before the tribunal. Such a competence of the parties is further confirmed by Article 1205 § 2 PCCP. Yet, in practice one-instance proceedings dominate. This may be explained by the fact that one of the reasons why the parties choose arbitration is to avoid the multi-instance proceedings before state courts. Consequently, it is generally not the intent of the parties to introduce multi-level arbitral proceedings.

[51] See also: M. Tomaszewski, *op.cit.*, p. 1909; T. Ereciński, K. Weitz, *Sąd arbitrażowy* (*Arbitration*), *op.cit.*, p. 337 (the authors uses the term "arbitral formal legitimacy" ("*prawomocność formalna arbitrażowa*"). Similarly: M. Łaszczuk, J. Szpara, *op.cit.*, p. 578.

[52] See: M. Łaszczuk, J. Szpara, *op.cit.*, p. 568; T. Ereciński, K. Weitz, *Sąd arbitrażowy* (*Arbitration*), *op.cit.*, p. 392; Ł. Błaszczak, M. Ludwik, *Sądownictwo polubowne (arbitrażowe)* (*Arbitration*), *op.cit.*, p. 267; *R. Morek, Mediacja i arbitraż…* (*Mediation and Arbitration…*), *op.cit.*, p. 253; A. Zieliński, in: A. Zieliński (ed.), K. Flaga-Gieruszyńska (ed.), *Kodeks postępowania cywilnego. Komentarz* (*Code of Civil Proceedings. Commentary*), ed. 7, 2014, Legalis Legal Database.

[53] See: M. Łaszczuk, J. Szpara, *op.cit.*, p. 639.

[54] The parties may decide in the arbitration agreement that once an award is set aside, the arbitration agreement shall no longer be in force.

[55] When the award has been set aside due to a fact that there was no arbitration agreement, the right path to pursue claims would be a state court, unless the parties agree to conclude a compromise covering their dispute. The state court should also have jurisdiction over a dispute when the award was set aside due to the dispute being nonarbitrable (yet, the arbitrability is assessed as of the date of the court decision on the setting aside petition or the request for the recognition or enforcement, so there may appear cases where a dispute was previously not arbitrable but subsequently becomes arbitrable). Finally, the state court would also have jurisdiction when the arbitration award has been set aside on other grounds then already mentioned but the opponent does not raise the plea of arbitration agreement before going into the merits of the case.

of the subsequent arbitration proceedings would not constitute the rearbitration of the same case.

Lastly, since the essence of arbitration are the autonomy and intent of the parties, one may wonder whether the effects of arbitral award may become cancelled by the parties themselves prior to the recognition or enforcement of the award, and whether the parties may subsequently commence new arbitration in the same case. Without any doubt Article 365 § 1 PCCP should not constitute any impediment to such a solution, since the arbitral award not yet recognized or enforced does not produce any effects to external entities stipulated therein. Whereas the rights and duties covered by such an award still remain at the disposal of the parties. It seems unjustified therefore to oblige the parties to file a petition to set aside the award which both parties are dissatisfied with. Additionally, the grounds for the set aside are limited to certain deficiencies expressly specified in Article 1206 PCCP, and thus not very award may be set aside by the court. Consequently, it is difficult to find sound reasons to deprive the parties with a right to cancel the effects of the arbitration award on the basis of their own will. The Polish authors support such a conclusion although they presents two slightly different positions in this respect. Some authors allows for the contractual setting aside of the award, emphasizing that the award is subject to the disposal of the parties until it is formally recognized or enforced.[56] The others acknowledge the parties' right to set aside the effects of the award comprising the parties' commitments both to comply with the award and execute it, but excludes the right to contractually set aside the award.[57]

2.3. The Consequences of the Binding Effect and Finality of Arbitral Award

The analysis undertaken in the previous sections proves that inherent in arbitration is that an award is final and binding even prior to its recognition or enforcement by the state court. Consequently, and unless the parties agree otherwise, no one may commence arbitration proceedings in the same case between the same parties. There is no basis, however, to apply Articles 365 § 1 and 366 PCCP to arbitral awards.

Accordingly, if the principle of res judicata should only be understood as the concept of Polish procedural law regulated in Article 366 PCCP, the question posed in the introduction to this publication should be answered negatively, i.e. the award prior to its recognition or enforcement has no res judicata, as referred to in Article 366 PCCP since the aforementioned provision does not apply to that award.

Res judicata should not, however, be understood as a purely statutory concept. After all, there should be no doubt that the principle of res judicata has a universal character, and is widely recognized not only by the Polish, but also the

[56] T. Ereciński, K. Weitz, *Sąd arbitrażowy* (*Arbitration*), *op.cit.*, p. 338; M. Tomaszewski, *op.cit.*, p. 1918–1920.

[57] M. Łaszczuk, J. Szpara, *op.cit.*, p. 568 and p. 652 reference 6; in this spirit also: K. Siedlik, *Charakter prawny umowy arbitrażowej w prawie niemieckim i polskim* (*Legal Nature of Arbitration Agreement in German and Polish Law*), Przegląd Ustawodawstwa Gospodarczego (*Review of Commercial Legislation*) 2000, No 2, p. 23, but the author limits herself to the statement that the parties may exclude the effects of the award and commence new arbitration in the same case.

international legal order. In fact, references to res judicata could already be found in the Roman law and ancient Hindu texts[58]. The res judicata doctrine has existed for many centuries in various legal cultures and, consequently, it is said to be a clear example of a general principle of law accepted by civilized nations.[59] The principle of res judicata is therefore not restricted to the concept set forth in Article 366 PCCP. Quite the contrary, res judicata has a universal character, and means that an earlier and final decision is conclusive in subsequent proceedings involving the same subject matter, the same grounds and the same parties.[60] Notably, the principle of res judicata understood in the aforementioned way constitutes an inherent feature of any arbitral award prior to its recognition or enforcement as such an award is final and binding on the parties. In this case, however, the source of res judicata of an arbitral award may not be found in Article 366 PCCP, but in the intent of the parties expressed in the arbitration agreement.

Accordingly, the finality and binding effect of an arbitral award (res judicata of arbitral award), prior to its recognition or enforcement by the state court, should be considered differently than the substantive validity of court judgments. Namely, while the binding effect of the latter (being one of the consequences of the substantive validity) stems directly from the provisions of the PCCP, the source of a binding effect of an arbitral award is particularly found in the common intent of the parties manifested in the arbitration agreement, but not in the PCCP. Since the parties have decided that the award issued in accordance with the arbitration agreement concluded by those parties will be final and binding, the parties should comply with their undertakings in line with the "*pacta sunt servanda*" principle. Consequently, the parties have not only a contractual but also legal[61] obligation to comply with the award and to execute it. They cannot therefore ignore the arbitral award by commencing new proceedings fulfilling the "triple test identity", unless such is their common intent. This way of understanding the binding effect of the arbitration award explains also why an award issued in one state may also have effects on the territory of another state.

Lastly, an arbitral award not recognized or enforced by the state court has res judicata only between the parties. In particular, in such a case res judicata may not apply to third parties (i.e. entities that are not parties to the given arbitration) as there is no legal provision allowing for such an effect to take place.

3. The Grounds of a Petition to Set Aside an Arbitral Award Contrary to Another Arbitral Award not yet Recognized or Enforced by a State Court

The conclusion reached in the previous sections that the arbitral award is final and binding on the parties even prior to its recognition or enforcement means that, in the absence of the common intent of the parties, the dispute resolved

[58] See: International Law Association Interim Report: "*Res judicata*" and Arbitration, *op.cit.*, p. 2.
[59] *Ibidem*.
[60] *Ibidem*.
[61] As it was already indicated, the PCCP supports the voluntary execution of the awards by the parties, implementing among other things limited grounds for the setting aside procedure.

in that award should not be subject to subsequent re-evaluation by a new arbitral tribunal. The below section clarifies potential consequences of the tribunal's decision to rearbitrate the same claim between the same parties (i.e. when the "triple identity test" is met) when the previous arbitral award has not yet been recognized, enforced or executed. In particular, this section analyzes whether, in such a case, a party may invoke one of the grounds which justify setting aside the subsequent arbitration award.

The catalogue of circumstances which justify the award being set aside is closed and provided in Article 1206 PCCP. While the prerequisites mentioned in Article 1206 § 1 PCCP are taken into account by the court only once they are raised by a petitioner, the court is obliged to examine the grounds specified in Article 1206 § 2 PCCP *ex officio*. Of particular importance in the analyzed case are the premises set forth in Article 1206 § 1 point 1 (i.e. no arbitration agreement, or the arbitration agreement is invalid, ineffective or no longer in force), point 4 (i.e. failure to observe the fundamental rules of procedure before the arbitral tribunal, arising under statute or specified by the parties), and point 6 (i.e. the existence of legally final court judgment issued in the same matter between the same parties) PCCP and in Article 1206 § 2 point 2 PCCP (i.e. arbitral award being contrary to fundamental principles of the legal order of the Republic of Poland).

Already a *prima facie* review shows that the ground provided in Article 1206 § 1 point 6 PCCP should be excluded from a potential basis for setting aside a subsequent award rearbitrating the case already decided in a previous award not yet recognized or enforced. This is firstly due to the fact that the aforementioned provision refers to a "*final court decision*", while the arbitration award prior to its recognition or enforcement does not equal a final court judgment. Secondly, under Article 1206 § 1 point 6 PCCP the term "*court*" should be interpreted in accordance with Article 1158 § 1 PCCP and, thus should be understood as a state court which would have had jurisdiction if the parties had not entered into an arbitration agreement.[62] Nevertheless, the ground set forth in Article 1206 § 1 point 6 PCCP should apply once the previous award is recognized or enforced by the state court,[63] as such an award shall have legal effect equal to a court judgment.[64]

[62] See: K. Weitz, *op.cit.*, p. 699; W. Popiołek, *op.cit.*, p. 178; the judgement of the Supreme Court of November 26, 2008 r., docket no. III CSK 163/08, *op.cit.*

[63] The issue when exactly the recognition or enforcement should take place to justify the setting aside of the award under Article 1206 § 1 point 4 PCCP falls outside the scope of this publication. For more on this topic, see: K. Weitz, *op.cit.*, p. 703–704.

[64] See: K. Weitz, *op.cit.*, p. 700; K. Weitz, T. Ereciński, *Sąd arbitrażowy* (*Arbitration*), *op.cit.*, p. 398; M. Łaszczuk, J. Szpara, *op.cit.*, p. 605; R. Morek, *op.cit.*, p. 265; Ł. Błaszczak, M. Ludwik, *op.cit.*, p. 280; T. Zbiegień, *Skarga o uchylenie wyroku sądu polubownego* (*Petition for the Setting Aside of Arbitral Award*), in: P. Nowaczyk et al. (eds.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu* (*International and Domestic Commercial Arbitration at the Beginning of the XXI Century. Memorial Book Dedicated to Dr. Hab. Tadeusz Szurski*), 2008, p. 308; K. Piasecki, *Kodeks postępowania cywilnego. Komentarz* (*Code of Civil Proceedings. Commentary*), volume 3, 2007, p. 323; A. Zieliński, in: A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz* (*Code of Civil Proceedings. Commentary*), 2010, p. 1804; D. Kała, *Skarga o uchylenie wyroku sądu polubownego* (cz. II) (*Petition for the Setting Aside of Arbitral Award (*Part II)), Radca Prawny 2010, No. 3, p. 62*;* Ł. Błaszczak, *Postępowanie o stwierdzenie*

Article 1206 § 1 point 1 justifies setting aside the award if (among other things) the arbitration agreement is ineffective. The Polish authors provide that the arbitration agreement becomes ineffective when the dispute is resolved,[65] meaning that the arbitration agreement ceases to produce the intended effects. In this context, M. Łaszczuk and J. Szpara indicate that the consequence of the issuance of an award is that the arbitration clause becomes exhausted with respect to the matters decided in that award.[66] Whereas M. Tomaszewski claims that the arbitration clause becomes ineffective with respect to the dispute decided in the award[67], T. Ereciński and K. Weitz emphasize that "*assuming that the invalidity of the arbitration clause comes into play when the clause violates the mandatory provisions of the law, and consequently does not produce and cannot produce any legal effects from the very beginning, one may accept that the ineffectiveness occurs under Polish law when the arbitration clause ceases to produce the intended effect as a result of events occurring after its conclusion, and they are not events that cause the arbitration to lose its power (expires).*"[68] In the opinion of T. Ereciński and K. Weitz the issuance of the award would constitute an event falling in the latter category.[69] The application of the author's view on an ineffective arbitration agreement to the analyzed circumstances would mean that a subsequent arbitration award would be issued in the same matter between the same parties although the arbitration clause would have become ineffective in that scope. Such an infringement would fulfil the basis for setting aside the arbitration award referred to in Article 1206 § 1 point 1 PCCP. The aforementioned view seems, however, to be unfounded. After all, the concept of an ineffective arbitration clause presumes that such a clause does not produce any intended effect. In the analyzed case, however, the arbitration clause produces some effects. Namely, the arbitration clause encompasses finality and a binding effect which entails the parties' obligation to accept the award and execute it (in other words, the parties' obligation to recognize the final and binding effects of the arbitration award). Such a new obligation has replaced the parties' commitment to submit a given dispute to arbitration which expired following the issuance of the award. The arbitration

wykonalności krajowego i zagranicznego wyroku sądu polubownego (wybrane zagadnienia) (*Proceedings for the Enforcement and Recognition of the National or Foreign Arbitral Award (Selected Issues)*), Radca Prawny 2012, No. 6, p. 15.
Differently: W. Popiołek, *op.cit.*, p. 179; W. Popiołek, *Odmowa uznania (wykonania) zagranicznego orzeczenia arbitrażowego na podstawie art. V Konwencji Nowojorskiej* (*Refusal to Recognized (Enforced) of Foreign Arbitral Award on the Basis of Article V of the NEW York Convention*), in: J. Gudowski (ed.), K. Weitz (ed.), *Aurea praxis aurea theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego* (*Aurea praxis aurea theoria. Memorial Book in Honor of Professor Tadeusz Ereciński*), volume II, 2011, p. 1084 and next; A.W. Wiśniewski, *Międzynarodowy arbitraż w Polsce. Status prawny arbitrażu i arbitrów* (*International Arbitration in Poland. Legal Status of Arbitration and Arbitrators*), 2011, copy from the Legal Database Lex.

[65] See: T. Ereciński, K. Weitz, *op.cit.*, p. 157; M. Łaszczuk, J. Szpara, *op.cit.*, p. 597–598, p. 652.

[66] M. Łaszczuk, J. Szpara, *op.cit.*, p. 597–598. The authors point out that on the issue of "consummation" of the arbitration agreement as a result of the settlement of a dispute covered by this agreement, and, consequently, on the inability to rearbitrate the case, was indicated as early as in the judgment of the Supreme Court dated October 26, 1936, docket no. II C 1371/36, *Lex No. 363,367*.

[67] M. Tomaszewski, *op.cit.*, p. 1921.

[68] T. Ereciński, K. Weitz, *op.cit.*, p. 157.

[69] *Ibidem*.

agreement is therefore effective, which excludes the ground for its setting aside referred to in Article 1206 § 1 point 1 PCCP.

Instead, rearbitrating a case which has already been adjudicated in the previous award not yet recognized or enforced, against the intent of at least one party to that arbitration, fulfills the prerequisite for setting aside the award referred to in Article 1206 § 1 point 4 PCCP (i.e. a failure to observe the fundamental rules of procedure before the arbitral tribunal specified by the parties). The arbitration agreement comprises not only the parties' consent to submit a dispute to arbitration but also the parties' consent to apply a certain procedure to settle that dispute. This procedure presumes the finality of the arbitration award and its binding effect on the parties.[70] Such a procedure thus excludes commencing – against the intent of the parties – another arbitration and consequently the issuance of a new award in a dispute already decided by the arbitral tribunal. While concluding the arbitration agreement the parties have not agreed to conduct the arbitral proceedings in a manner allowing for rearbitration. Rather, the parties have agreed that a potential award would be final and binding on the parties. Issuing a subsequent award in the same case thus violates that fundamental principle of arbitration.

Lastly, one may wonder whether the contradiction of a subsequent arbitration award with a previous arbitration award rendered in the same matter between the same parties may constitute a violation of public policy, referred to in Article 1206 § 2 point 2 PCCP. In a substantiation of the decision of November 26, 2008 the Supreme Court suggests that the public policy ground may be invoked in the event where the claims already settled in one arbitral award are being rearbitrated in another award. Yet, this approach raises serious concerns. In particular, as rightly pointed out by K. Weitz,[71] it is difficult to find sound reasons why the contradiction of an arbitration award with a final court judgment should be taken into account by the court only once pleaded by the party, but the court should take *ex officio* the contradiction of arbitration award with another arbitration award, and therefore regardless of whether the party has raised any such objection whatsoever.[72]

4. Summary

The provisions of the Code of Civil Procedure on substantive validity, including the provisions on res judicata, do not apply to arbitral awards not recognized or enforced by a state court. Such a conclusion does not, however, entail that arbitral awards have no res judicata at all. Yet, this is not the res judicata referred to in Article 366 PCCP. The principle of res judicata should not be limited to Article 366 PCCP. Quite the opposite, the principle of res judicata is universal and generally means that a final decision binds the parties. Each final arbitration award is binding on the parties, and therefore has res judicata within the

[70] This assumption is true, unless the parties provided for the appellate stage in arbitration. In the latter case, as it has already been mentioned, only the award issued by the second instance would be binding and final.

[71] K. Weitz, *op.cit.*, p. 699–700, reference no. 37.

[72] Only as a side note one should indicate that the state court would generally have no information as to the existence of any other award, unless the party itself would bring the court's attention to that award.

broad meaning of this term. The binding nature of arbitral awards is inherent in arbitration, and distinguishes this method of dispute resolution from all other non-binding forms of ADR.

It is not the statutory provision but the common intent of the parties expressed in the arbitration agreement that constitutes the source of finality and binding effect of the award. As long as the arbitration award is not set aside by the state court or deprived of its binding force by the parties themselves, it is binding on the parties and excludes (against the intent of the parties) the same case to be rearbitrated. Recognition or enforcement of an arbitration award that equates the award with a court decision is irrelevant for the parties to be bound by the award or for the award to have res judicata. Nevertheless, the award prior to its recognition or enforcement is binding only between the parties. In particular, it does not bind the external entities referred to in Article 365 § 1 PCCP, because there is no adequate legal basis for such an effect to take place. Such an effect will only be caused by the recognition or enforcement of arbitration award by a state court.

Res judicata of an arbitration award, understood broadly (i.e. not limited to the statutory concept of civil procedural law envisaged in Article 366 PCCP), generally prohibits the case meeting the "triple identity test" being rearbitrated against the parties' will. The breach of such a prohibition would justify the subsequent award to be set aside pursuant to Article 1206 § 1 point 4 PCCP, i.e. due to a failure to observe the fundamental rules of procedure before the arbitral tribunal specified by the parties. Such a fundamental rule of procedure comprises a principle agreed by the parties in the arbitration agreement that the arbitral award issued in accordance with this arbitration is final and binding on the parties, and thus the case should not be rearbitrated.

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Legality of Investments and Investors' Actions in the Context of the Yukos Case

Monika Diehl*

1. Introduction

"*The Russian Federation will pay the highest awarded damages in the history of investment arbitration*" was the most frequent commentary that appeared in the media in association with the arbitral awards concerning the Russian oil concern Yukos, delivered on 18 July 2014 in three arbitration proceedings held in The Hague[1] (further referred to as the *Awards*). The Awards are of historical importance not only because of the amount of the damages awarded, but also because they may have a significant impact on the shape of the future jurisprudence of arbitral tribunals adjudicating on the basis of international treaties on the protection of foreign investments.

The many-year-long arbitration proceedings in the Yukos case, taking into account the very extensive hearing of evidence, has been followed by the world media with impatience. First and foremost, because of the detention of one of the most prominent Russian businessmen, the former CEO of Yukos, Mikhail Khodorkovsky, but also due to the potential possibility of the Russian Federation being held accountable on the international arena. This possibility, upon the delivery of the Awards, has become quite real.

The investors' counsel, Emmanuel Gaillard, at a press conference held after the Awards were delivered called their delivery "a great day for the rule of

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[1] The three former shareholders of the OAO Yukos Oil Company: Veteran Petroleum Limited headquartered in Cyprus, Hulley Enterprises Limited headquartered in Cyprus, and Yukos Universal Limited headquartered on the Isle of Man (further referred to jointly as *Yukos*) filed parallel actions in 2005 against Russia on the basis of the Energy Charter Treaty. The three arbitration proceedings were held concurrently before the same arbitral tribunal sitting in a bench composed of L. Yves Fortier, Charles Poncet and Stephan M. Schwebel. On 18 July 2014, the arbitral tribunal passed three basically identical arbitral awards in these cases, awarding damages to the claimants on account of the expropriation of an investment. The references made in this article to individual sections refer directly to the numbering of the sections in the final award in the *Yukos Universal Limited v. Russia* case.

law", proving that such a powerful state like the Russian Federation may be held accountable by an independent arbitral tribunal for infringement of international law.[2]

As it was pointed out by the arbitral tribunal in the Awards, the Russian Federation, through its actions, justified by an alleged evasion of taxes by Yukos, within no more than a few years brought the concern to a decline and proceeded to a takeover of its assets by entities linked with the State Treasury, and, with regard thereto, qualified the actions of the Russian Federation as actions having an expropriation or a nationalisation effect.[3] According to the Tribunal, the "attack" of the Russian Federation on Yukos consisted in, among other things, the imposition on the concern of huge tax burdens, the goal of which, however, was in fact not taxation but bringing the concern to a decline. An indication of this was to be, among other things, the procedure of forced sale by the state of the most important, core asset of Yukos – the Yuganskneftegaz company – which was bought by way of a tender by a shell company, belonging in fact to the State Treasury-controlled Rosneft company, at a reduced price, and, furthermore, the statements made by Vladimir Putin, revealed in the course of the proceedings, indicating the necessity of finding a solution for the lack of oil in Rosneft's resources.[4] Therefore, the arbitral tribunal awarded the former Yukos's shareholders $50 billion in damages, being a record high sum exceeding several times the highest damages awarded until then in investment arbitration, namely the substantial amount of $1.7 billion in damages awarded in the *Occidental Petroleum v. Ecuador* case in 2012.[5]

Although in the course of the arbitration proceedings numerous claims of the investors and allegations of the Russian Federation were considered, an analysis of the Awards draws attention to the arbitral tribunal's approach to the so-called "unclean hands" doctrine. The Russian Federation argued that during the creation and management of the investment Yukos allegedly acted in a manner contradictory to Russian law. According to the Russian Federation, the "unclean hands" and bad faith of entities controlling Yukos manifested themselves in several dozen actions consisting in, among other things, avoidance of taxation by means of depositing funds in regions of Russia having lower taxation and in abuse of the Double Taxation Agreement between the Russian Federation and Cyprus.[6]

The arbitral tribunal reviewed the impact of the investors' allegedly illegal actions on their protection under the relevant treaty on the protection of foreign investments, i.e. the Energy Charter Treaty (further referred to as the *ECT*), and also on the sum of the damages owed. By admitting that the tax evasion constituted an infringement of Russian law,[7] the arbitral tribunal found that these actions could not deprive the investors of protection provided for in the

[2] A. Ross, *Yukos investors win record sum against Russia*, Global Arbitration Review, 15 August 2014.
[3] *Yukos Universal Limited v. Russia*, para. 1580.
[4] A. Ross, *Yukos investors win record sum against Russia*, Global Arbitration Review, 15 August 2014.
[5] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, Award of 5 October 2012.
[6] *Yukos Universal Limited v. Russia*, para. 1281 et seq.
[7] *Ibidem*, para. 1611.

ECT, yet at the same time they could not remain indifferent to the arbitral tribunal's decision. By the same token, the arbitral tribunal found that since by evading taxation Yukos contributed to its losses (the so-called contributory fault), the damages owed need to be appropriately reduced, and, consequently, reduced them by one fourth.[8]

It seems that in times when actions of business entities such as corruption or tax evasion are not rare, the question to what actions of an investor should the arbitral tribunal react in a case filed against a state is as valid as possible. It is essential whether a foreign investor should bear the consequences of its illegal actions in the host state and, if yes, what kind of consequences. What has been increasingly visible in investment cases is not so much the problem of the making of an investment in a manner which does not conform with the law of the host state (such as, for instance, the obtaining of a licence to conduct activity in the host state with an infringement of public tender regulations), but also, thereafter, its performance with an infringement of the local regulations and rules by means of a more sophisticated activity, such as in the Yukos case, long-term tax evasion.

The present article attempts to answer questions about the potential consequences of illegal actions of foreign investors in a host state; whether the illegal nature of such actions may have an impact on the jurisdiction of the arbitral tribunal to hear a case or whether it should rather result in a decision on the inadmissibility of the claim or in its dismissal; and, finally, whether one of the methods of imposing sanctions on the illegal actions of investors may be a reduction of the damages owed, as had place in the Yukos case. Below the article briefly presents the conclusions of the current jurisprudence of investment arbitration tribunals with regard to how the non-conformity of an investment with the national law affects the protection of foreign investors under investment protection treaties, and the method of using contributory fault as a condition to reduce the damages awarded. Thereafter, the article describes the conclusions of the arbitral tribunal in the Yukos case and their potential impact on the future investment case law.

2. The Requirement of Conformity of an Investor's Investments and Actions with the Law in the Present Case Law

Investment arbitration cases demonstrate that the illegality of investments, i.e. their non-conformity with the law of the host state may constitute a significant barrier in claiming damages by foreign investors on the basis of international treaties on foreign investment protection. This is envisaged in the known principle of international law, the so-called principle of "clean hands" according to which illegal activity blocks the possibility to claim damages on the international arena.[9] This principle found reflection already at the beginning of the 20th

[8] *Ibidem*, para. 1637.

[9] I. Brownlie, *Principles of Public International Law*, Ed. 7, Oxford University Press, 2008, p. 503; R. Moloo, *A Comment on the Clean Hands Doctrine in International Law*, Transnational Dispute Management, Volume 8, No. 1, February 2011, p. 6; K. Lim, *Upholding Corrupt Investors' Claims Against Complicit or Compliant Host States – Where Angels Should Not Fear to Tread*, (2012) Yearbook on International Investment Law & Policy 2011/2012, pt. 15.

century in the jurisprudence of the International Court of Justice (further referred to as *the ICJ*)[10] and was underlined in the dissenting opinion of Justice Stephen M. Schwebel (adjudicating by the way also in the Awards) to the judgment of the ICJ relating to the military and paramilitary activity in and against Nicaragua.[11] The application of the "clean hands" doctrine is justified by the principle that the one who seeks justice must have "clean hands", just like one who seeks justice should be just himself.[12] Although the ICJ has never relied on the "clean hands" principle in its jurisprudence, neither has it also ever questioned it as a binding principle of international law.[13]

The "clean hands" principle is ever more frequently invoked by states sued as a form of defence against the claims of foreign investors. Although it seems reasonable, and the character of this principle as a principle of international law is generally not undermined, since it is not firmly rooted in international law and the jurisprudence of the ICJ, its application poses a certain amount of difficulty to international investment tribunals. This does not mean, however, that it has not found a reflection in investment case law. Quite to the contrary, many investment treaties express this principle by means of clauses requiring the conformity of the investment with the law in order to grant it protection under a treaty.[14] It has also been pointed out that even in the event of a lack of an explicit reference to the requirement of legality in the definition of an investment under a treaty, such a requirement may be implied from its preamble or from the provisions relating to the material obligations of states-parties.[15]

At the same time, where a reference to the conformity of an investment with the law of the host state has been placed in a treaty may more often than not determine how the arbitral tribunal will react to this lack of conformity, and, thus, whether it will handle the issue during the jurisdiction or the merits phase. It appears that if a specific investment protection treaty contains an explicit reference to the legality requirement, the arbitral tribunal will have a greater ease in recognising that in the case of non-conformity of the investment with the law of the host state, an investment case will not fall within the arbitral tribunal's jurisdiction or under treaty protection (which, however, is not a rule).

[10] *Case relating to the Diversion of the Water from the Meuse (Holland v. Belgium)*, Award of June 28, 1937, PCIJ Series A/B, No. 70.

[11] In this case Nicaragua sued the United States for an alleged armed attack on the territory of Nicaragua, which in Justice Schwebel's opinion was a response to Nicaragua's armed attack on Salvador. The ICJ did not find a direct causal link between the attacks on Salvador and the armed actions of the United States in Nicaragua and by a majority of votes complied with Nicaragua's claims. However, in his dissenting opinion Justice Schwebel underlined that since Nicaragua was, as a matter of fact, itself an aggressor in this case and thus had "unclean hands", its claims against the United States should be dismissed in their entirety. Cf. *The Case of Military and Paramilitary Activity in and against Nicaragua (Nicaragua v. The United States)*, Judgment of 27 June 1986, dissenting opinion of Justice Stephen M. Schwebel, ICJ Reports 1986.

[12] See Justice Gerald Fitzmaurice, cited by R. Hofman et. al, *Max Planck Institute for International Law World Court Digest 1986–1990*, Springer-Verlag 1993, p. 5.

[13] R. Moloo, *op.cit.*, p. 4.

[14] See, for example, the investment protection treaty between the Italian Republic and the Kingdom of Marocco; the investment protection treaty concluded between Canada and the Republic of Argentine.

[15] T. Obersteiner, "*In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors*, Journal of International Arbitration, Kluwer Law International 2014, Volume 31, No. 2, p. 268.

This does not mean, however, that in the event where a treaty does not contain any reference to the legality of an investment or even *prima facie* does not allow for an interpretation that such legality is required, an arbitral tribunal will not have a possibility of depriving an illegal investment of treaty protection.

Although many international investment protection treaties provide that in order to grant protection under their umbrella, the investment should be made in accordance with the host state law, the interpretation of the principle of legality of an investment by investment tribunals varies greatly. To a great extent the way the illegality of an investment will be addressed by an arbitral tribunal depends on the wording of a specific clause in the relevant investment protection treaty, and incidentally in accordance with the principles of interpretation expressed in the Vienna Convention on the Law of Treaties of 1969 (further referred to as the *VCLT*). In particular, in the context of the Yukos case what compels attention is the fact that the ECT does not contain a requirement for an investment to be "legal".

2.1. What Does the Concept of an "Illegal" Investment Mean?

First of all, it needs to be assessed when are we dealing with an "illegal" investment within the meaning of international investment law. Salient in this context are the observations of the case law and commentators relating both to the seriousness of the infringement of national law and to the moment when the illegal activity was performed by the investor.

2.1.1. The Weight of the Infringement

The concept of illegality in international investment law is construed very broadly and covers the non-conformity of an investor's actions related to an investment with the law of the host state.[16] There should rather be no doubt that "illegal", within the meaning of international investment law, will be investments that cover business activity which directly fails to conform with the law, in which illegal assets are used or is tainted with corruption.[17] A certain hint as to what an illegal investment actually is may be provided by the situations invoked in the *Teinver v. Argentine* case, such as the lack of proper consent to sign a contract, fraud in a tender procedure, corruption or failure to meet public procurement requirements.[18] The above list, however, will not be particularly useful in the event of a necessity to qualify an investor's activity as legal or illegal when it is linked to some kind of activity actually conforming with the law.

At the same time, the investment arbitration case law seems to be more or less unequivocal in recognising that arbitral tribunals should not deny investors protection in situations where certain minor infringements of national law occurred, for instance with regard to bureaucratic requirements. As the arbitral tribunal has demonstrated in the *Tokios Tokeles v. Ukraine* case, excluding an

[16] *Ibidem*, p. 265.
[17] *Ibidem*, p. 276.
[18] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine*, Decision on Jurisdiction of 21 December 2012, para. 327.

investment from treaty protection on account of a minor infringement such as, for instance, registration of a company under an incorrect name is out of the question.[19] A similar reason was stated by the arbitral tribunal in the *Metalpar v. Argentine* case with regard to a belated registration of a company.[20] Hence, it seems that a reason to recognize an investment as illegal (and, accordingly, to apply the consequences described below to the claims arising therefrom) should, by way of principle, represent a rather significant infringement of the fundamental principles of national law.[21]

2.1.2. The Moment of the Infringement

In the context of the scope of the concept of an "illegal" investment another problem that seems particularly crucial is whether this illegality should refer only to the making of an investment or whether it should refer to its performance. In the *Teinver* case, the arbitral tribunal underlined that the moment at which the legality of an investor's actions is essential for the jurisdiction of an arbitral tribunal depends on the wording of a specific clause in the relevant treaty.[22] For instance, in this particular case the treaty clearly indicated that the legality requirement refers to the acquiring or effecting of an investment, which, according to the arbitral tribunal meant that it was necessary only to examine whether the investment conformed with the law at the initial stage. Similar conclusions were reached by the arbitral tribunal in the *Fraport v. Philippines* award, which underlined that what is crucial is the conformity of an investment with the law at the initial stage, and infringements that take place thereafter cannot deprive the arbitral tribunal of jurisdiction with regard to disputes arising from the investment.[23] This problem was also emphasised by the arbitral tribunal in the justification of the Awards.[24]

At the same time, in the event the investments have been made legally, and only their performance and supervision thereof fails to conform to the law, the grounds are no longer so safe. It is assumed in the legal doctrine that the issue of performance and supervision of an investment in accordance with the law does not affect the jurisdiction inasmuch as it should rather be heard during the merits phase of the arbitration proceedings.[25] One may even encounter state-

[19] *Tokios Tokelės v. Ukraine*, Award of July 26, 2007, para. 86.
[20] *Metalpar S.A. and Buen Aire S.A. v. Argentine*, Decision on Jurisdiction of 27 April 2006, para. 84.
[21] *LESI, S.p.A. and Astaldi, S.p.A. v. Algeria*, Decision on Jurisdiction of 12 July 2006, para. 83; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan,* Award of 29 July 2008, para. 168*; Desert Line Projects LLC v. Yemen,* Award of 6 February 2008, para. 104.
[22] *Teinver S.A., Transportes de Caranías S.A. & Autobuses Urbanos del Sur S.A.v. Argentine*, ICSID Case No. ARB/09/1, Decision on Jurisdiction of 21 December 2012, para. 318.
[23] *Fraport AG Frankfurt Airport Services Worldwide v. Philippines,* Award of 16 August 2007, paras. 344–345. Similar conclusions were reached by the arbitral tribunal in the *Vannessa Ventures v. Venezuela* award of 16 June 2013, para. 167.
[24] For more on this see point 4 of this article.
[25] C.A. Miles, *Corruption, Jurisdiction and Admissibility in International Investment Claims*, Journal of International Dispute Settlement, July 2012, 3:2, 329–369, p. 361; Z. Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID Review – Foreign Investment Law Journal (OUP: 2013), p. 2.

ments that it is hard to expect such conduct of foreign investors that would be in continuous conformity with each provision of national law as this would be unfeasible. Hence, investors should not be deprived of treaty protection on account of any infringements of the national law as this would contradict the goal of the treaty.[26] At the same time, there are cases which show that also the legality of an investment's supervision is important for the jurisdiction of an arbitral tribunal. This was pointed out by the arbitral tribunal in the *Alasdair Ross Anderson v. Costarica* case, which underlined that while analysing its jurisdiction it concluded that it should first investigate whether an investment exists, and, thereafter, whether it was acquired and is supervised in accordance with the law.[27] The prevailing view, however, is that within the meaning of an investment protection treaty, an investment can be "illegal" only when it was made in a manner contradictory to the host state law.

2.2. What Can Be the Consequences of the Illegality of an Investment or Illegal Actions of an Investor?

One of the first arbitral awards in investment cases that considered the definition of an investment and indicated the impact of the criterion of an investment's legality on treaty protection in greater detail was the award in the *Salini v. Marocco* case, the source of the often applied so-called "Salini criteria" that should characterise an investment to establish the arbitral tribunal's jurisdiction.[28] In this award, the arbitral tribunal concluded that the aim/purpose? of the requirement of an investment's legality stipulated under an investment protection treaty is to deprive illegal investments of treaty protection.[29]

As shown in investment arbitration awards, the illegality of an investment may as a rule be a reason to deny a foreign investment protection by way of (i) denying jurisdiction, (ii) considering the claim inadmissible, or (iii) dismissing the claim. What still remains unclear is which of the above consequences of an investment's illegality should apply. This, for one thing, is demonstrated by the fact that all these charges were also alternatively raised by the Russian Federation in the Yukos case and were considered in the Awards.[30]

2.2.1. Lack of Jurisdiction

International investment law commentators take the view that if the respondent state proves that an investment infringes the law of the host state, the international arbitral tribunal should deny its jurisdiction to hear the case.[31]

[26] T. Obersteiner, *op.cit*., pp. 279–280.
[27] *Alasdair Ross Anderson et al. v. Costarica*, Award of May 19, 2010, para. 47.
[28] The Salini criteria cover a pecuniary or non-pecuniary contribution, an expectation of earnings or a profit, an assumption of the presence of risk, a fixed time of duration of an investment and a contribution to the growth of the host state.
[29] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Marocco*, Decision on Jurisdiction of 23 July 2009, para. 46.
[30] For more on this see pt. 4 of this article.
[31] Z. Douglas, *The International Law of Investment Claims 53*, Oxford University Press 2009, p. 106.

This is exactly how the illegality of an investment was dealt with by the arbitral tribunal in the *Fraport v. Philippines* case where the applicable investment protection treaty contained a legality requirement in the definition of an investment. The arbitral tribunal declined acknowledging jurisdiction with regard to Fraport's investment in a passenger terminal at the Manila airport because in its opinion Fraport bypassed the requirement arising from the Philippines' constitution, namely that public projects should be performed mostly by Philippines entities, while Fraport concluded shareholders' agreements with local companies which it in fact controlled.[32]

A similar approach was presented by the tribunal in the *Phoenix Action v. The Czech Republic* award, despite the fact that the applicable investment protection treaty did not contain a legality-related clause (whereas the applicable Germany-Philippines treaty applicable in the *Fraport* case did). The arbitral tribunal went even one step further by stating that although the applicable ICSID Convention does not mention the requirement of an investment's legality, this requirement, nonetheless, does exist.[33] By the same token, the tribunal pointed in fact to a new "Salini criterion" characterising an investment in cases under the ICSID Convention, namely, the requirement of making the investment in good faith which, by the way, reflects the basic principles of international public law.[34]

Incidentally, in the *Phoenix Action* case the arbitral tribunal drew on the conclusions of the arbitral tribunal formulated in the *Inceysa v. Salvador* case where the applicable investment protection treaty also did not contain the requirement of an investment's legality. Thus, it was not an isolated case. In this case the investor fabricated essential financial information and did not disclose a conflict of interest owing to which he won a tender for servicing motor vehicles. The arbitral tribunal declined to acknowledge its jurisdiction on account of the investment having been made illegally, by pointing out that it was not necessary to have this requirement formulated within the definition of an investment since it might be implied from other treaty provisions and general principles of international law, and in particular from (i) the principle of good faith, (ii) the principle of inadmissibility of drawing profit from conduct that is in contravention of the law or morality (*nemu auditor propriam turpitudinem allegans*), and also of (iii) the principle of public order.[35]

The above conclusions were criticised by the arbitral tribunal in the *Saba Fakes v. Turkey* case, which underlined that although in the case of illegal investments the investment protection treaty is not applicable,[36] nonetheless, imply-

[32] *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award of August 16, 2007, para. 401. The award in this case was reversed in December 2010, however, not on account of denial of jurisdiction but on account of an infringement of the right to defence. The *ad hoc* committee, when hearing Fraport's motion for annulment of the decision on jurisdiction stated that by refusing to acknowledge its jurisdiction the arbitral tribunal did not exceed its competences, see *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Decision on Annulment of 23 December 2010, para. 118.
[33] *Phoenix Action v. Czech Republic*, Award of April 15, 2009, para. 101–102.
[34] C.A. Miles, *op.cit.*, p. 363.
[35] *Inceysa Vallisoletana S.L. v. Salvador*, Award of August 2, 2006, para. 240, 257.
[36] *Saba Fakes v. Turkey*, Award of 14 July 2010, para. 115. The arbitral tribunal in the *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Bolivia* case came to the same conclusions, Decision on jurisdiction of 27 September 2012, para. 255.

ing the criterion of good faith from the ICSID Convention constitutes abuse of the competences arising from Art. 31 Section 1 of the VCLT, because the criterion of good faith cannot be interpreted in the same way as other "Salini criteria" the explicit placement of which in the treaty would be much more difficult.[37] It is also worth mentioning the dissenting opinion of Bernardo M. Cremades to the award in the *Fraport* case, in which he underlined that the above approach of the arbitral tribunal is dangerous because it carries a threat of excluding from the arbitral tribunal's jurisdiction other essential claims, whereas the question of an investment's legality is a question of the merits and not a procedural one.[38]

Hence, regardless of whether the criterion adopted will be called a criterion of legality or good faith, a denial of jurisdiction on the basis of a failure to meet a criterion of conformity with the law is present in the awards issued by investment tribunals, even when the relevant treaty itself does not impose such a requirement,[39] and particularly if the treaty contains any provisions allowing to state whether the intention of the sides was to limit the consent to arbitration to investments that were effected or conducted in accordance with the law of the host state.

2.2.2. Inadmissibility of a Claim

An alternative solution for those arbitral tribunals that find that there is no possibility to deny jurisdiction in the case where an investment is illegal, is considering that the claim made by the investor is inadmissible,[40] which is possible even if the arbitral tribunal has jurisdiction to hear the case.[41] If the arbitral tribunal decides that it has jurisdiction to hear the case, it may still refuse to hear the investor's claims on account that they are "tainted" with illegality (although not necessarily) according to the "clean hands" principle invoked earlier. Considering a claim inadmissible based on the fact that the investment was illegal will mean denying it protection under the treaty in the final award on the merits.

This is the way the question of an investment's illegality was approached by the arbitral tribunal in the *World Duty Free v. Kenya* case where an investor obtained a licence to run duty-free shops at airports in Kenya in return for a bribe. The arbitral tribunal stated that in the light of domestic and international anticorruption regulations and the "transnational" public order there is no possibil-

[37] C.A. Miles, *op.cit.*, p. 366.
[38] *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award of 16 August 2007, Dissenting opinion, para. 37.
[39] Cf. also G*ustav F W Hamester GmbH & Co KG v. Ghana*, Award of 18 June 2010, para. 123–124; *Teinver S.A., Transportes de Caranías S.A. & Autobuses Urbanos del Sur S.A. v. Argentine*, ICSID Case No. ARB/09/1, Decision on jurisdiction of 21 December 2012, para. 317.
[40] Just like it may take place, for example, on account of the statute of limitations for a claim.
[41] J. Paulsson, *Jurisdiction and Admissibility, Global Reflections on International Law*, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner, ICC Publishing; A. Newcombe, *The Question of Admissibility of Claims in Investment Treaty Arbitration*, available at www.kluwerarbitrationblog.com on 4 October 2014.

ity to enforce a contract concluded by way of corruption[42] and recognised the investor's claims as inadmissible.[43]

Likewise, in one of the most well-known cases relating to illegal investments - *Plama v. Bulgaria,* the investor through buying a decisive majority of shares of a Bulgarian oil concern presented himself as a member of a consortium of entities possessing an extensive number of assets, whereas in reality the investor was controlled by a natural person possessing no significant assets, which infringed upon the legal requirements. This case (just like the Yukos case) was heard on the basis of the ECT, which does not contain a requirement of an investment's legality. The arbitral tribunal stated that in the event of a lack of this requirement, it cannot refuse to recognise its jurisdiction to hear the case because the definitions of an investment and an investor in the ECT are very broadly formulated and the illegality of an investment can in no way deprive the parties' consent to arbitration of its validity.[44] Thereafter, however, after the hearing on the merits, it pointed out (incidentally, on the basis of the conclusions of the awards in the *Inceysa* and the *World Duty Free* cases) that since an investment was deliberately acquired by an investor in a manner contradictory to Bulgarian law, granting it protection on the basis of the ECT would be contradictory to, among other things, the *nemu auditor propriam turpitudinem allegans* principle, the principle of good faith existing in Bulgarian law and the principle of public order.[45] The arbitral tribunal also underlined that in accordance with the preamble of the ECT, the aim of the treaty is to strengthen the rule of law. Hence, protection of illegal investments would fail to conform with the ECT.

Consequently, even if an arbitral tribunal recognises its jurisdiction to hear a case, the investment may still be deprived of protection when the investor's claims are deemed inadmissible. In such a case, the treaty protection standards are not applicable to claims raised by the investor.

2.2.3. Dismissal of a Claim

It is also possible that an arbitral tribunal will recognise that the claimed breach of the treaty standard of protection was not infringed upon by the state at all because the interference of the state in the investor's activity was justified by the latter's illegal activity.

In such cases arbitral tribunals recognised that actions of the state infringing upon the investment were justified by the fact that the investor acted illegally, which necessitated the reaction of the state. For instance, in the *Thunderbird v. Mexico* case, a Canadian investor operated in Mexico in the gambling sector being aware of the fact that gambling was banned in Mexico. When the state closed down the facilities belonging to the investor in response to which he raised treaty claims, i.a. an infringement of justified expectations, the arbitral tribunal dismissed them, underlining that awareness of illegal activity excluded

[42] *World Duty Free v. Kenya*, Award of 4 October 2006, para. 185.
[43] *Ibidem*, para. 157.
[44] *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction of 8 February 2005, para. 128 f.
[45] *Plama Consortium Limited v. Bulgaria*, Award of August 27, 2008, para. 143.

any justified expectations of an investor.[46] Likewise, in the *Genin v. Estonia* case, the state withdrew a banking licence granted to an investor on account of numerous infringements of the banking law, which the arbitral tribunal did not find to be a violation of the treaty standard.[47]

Thereby a path was cleared in the jurisprudence of investment tribunals according to which the lack of the requirement of an investment's legality in an investment protection treaty does not always have to mean that an illegal investment will be granted treaty protection. An investor's "unclean hands" may have various consequences when it comes to obtaining treaty protection. Irrespective of whether this consequence will be deprivation of jurisdiction or admissibility or the dismissal of the claim, in each case these consequences lead *de facto* to depriving an investor of treaty protection.

International investment tribunals generally seems to confirm that even if a specific treaty clause referring to the legality of an investment is missing, an investor acting in contravention of the law of the host state does not deserve protection, and any different approach to this issue would contradict the purposes of investment protection treaties. To a large extent, however, this conclusion depends on the wording of a specific treaty and it rather refers to investments made in contravention of the law and not necessarily to those that were affected by illegality afterwards.

3. The Issue of an Investor's Contributory Fault in the Existing Case Law

With regard to the consequences of the illegality of an investor's actions, it is also worth noting the consequences of an investor's contributory fault. This issue and its impact on damages awarded is a problem that is strictly related to an investment's legality and the investor's actions. The issue of contributory fault is, as a rule, analysed by arbitral tribunals specifically in cases where the law was infringed upon by foreign investors or their behaviour was either negligent or irrational.[48]

Pursuant to Article 39 of the International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (further referred to as the *ILC Articles*), the faults of an aggrieved entity should be taken into account in calculating the damages for the state's action. According to the commentary to the ILC Articles, this refers to a situation where a state infringed upon international law, but the aggrieved party contributed significantly to the loss inflicted on it by culpable action.[49] "Culpable" actions need to be construed as those that are characterised by an investor's clear negligence.[50] The principle that in a situation where an investor significantly contributed to a loss in-

[46] *International Thunderbird Gaming Corporation v. Mexico*, Award of 26 January 2006, paras. 164–165; para. 208.
[47] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia*, Award of 25 January 2001, paras. 348–365.
[48] S. Ripinsky, *Assessing Damages in Investment Disputes: Practice in search of perfect*, Journal of World Investment and Trade, vol. 10, no. 1, 2009, p. 16.
[49] Commentary to Article 39 of the ILC Articles, pt. 1.
[50] *Ibidem*, pt. 5.

flicted by the state's action the amount of the applicable damages may be adequately reduced by the arbitral tribunal was connected with the fact that the state should be held accountable only for its own actions.[51]

One of the first arbitral awards in which the problem of contributory fault was analysed and the principle expressed in Article 39 of the ILC Articles was applied was the *MTD v. Chile* case.[52] The investor in question invested, within a short period of time, in the construction of a city on the basis of designs approved by the authorities of Chile responsible for foreign investments. As it turned out, the designs could not be implemented because they did not conform with the local master plan and, as a result, the investor who did not obtain a building permit and lost huge funds, sought damages for the infringement of the standard of equal and fair treatment before an international tribunal. The tribunal took the view that although the treaty was infringed upon, MTD's expectations with regard to the possibility of implementing the designs were not justified, in spite of their approval by the competent state entity. Therefore, when awarding the damages the tribunal, recognising the fact that the investor failed to conduct a proper *due diligence* in the course of making the investment, reduced the damages owed by the state by 50%. The award was then subject to the ICSID annulment proceedings, i. a. on the basis of the lack of a justification for the statement that the state and the investor should be held accountable for the infringement of a standard to the same degree. Upon an analysis of the award, the *ad hoc* committee pointed out that the application of Article 39 of the ILC Articles was justified in this case because MTD's contributory fault was significant.[53] The *ad hoc* committee's decision indicated that in order for damages to be reduced, an investor's contributory fault should first of all be significant and relevant. Yet, at the same time, the tribunal exercised discretion in determining the level of guilt of both parties.[54] Thereby, the *MTD* case set the standards for applying the doctrine of contributory fault in investment arbitration.

The above approach was applied also by the arbitral tribunal in the *Occidental Petroleum v. Ecuador* case (in which, by the way, L. Yves Fortier, the chairman of the tribunal in the Yukos case, was an arbitrator), where the investor in contravention of Ecuadorian law (without the required approval of the competent ministry) concluded an agreement for the transfer of rights under a state contract for oil exploration to another entity, failing to inform the representatives of the state about this. The investor's actions made Ecuador terminate the contract with the investor and take over control of the investor's assets. By stating that Ecuador infringed the treaty, the arbitral tribunal came to the conclusion that the amount of damages owed to the investor may be reduced in the event of the investor's contributory fault (for which he should be held at least partly accountable) and reduced the damages awarded to Occidental by 25%.[55] Moreover, the arbitral tribunal indicated that the practical application of the con-

[51] S. Ripinsky, *op.cit.,* p. 15.
[52] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile,* Award of 24 May 2004.
[53] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, Decision on Annulment of 21 March 2007, para. 101.
[54] *Ibidem*, para. 101; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador,* Award of 5 October 2012, para. 670.
[55] *Ibidem*, para. 678.

tributory fault doctrine requires not only the occurrence of an act of the state that fails to conform with international law, but also a contribution to the damage by the wilful or negligent act or omission of an investor, which should be linked by a causal link to the damage incurred by the investor.[56] According to the arbitral tribunal's award, the commentary to Article 31 of the ILC Articles clearly indicates that in each case where it is only possible to identify the part of the damage that is related by a causal link to the actions of an entity other than a state (or whose actions may be ascribed to the state), the state should not be held accountable for that particular part.[57]

Thus, when an investor significantly contributes to the causing of the damage, for instance by an illegal action, and this action is related to the damage by a causal link, the arbitral tribunal may reduce the damages awarded.

4. The Application of the Above Principles in the Yukos Case

An analysis of the potential consequences that a foreign investor may encounter in connection with conducting unlawful activity in the context of the above standards makes it possible to pose the following question: may the reduction of damages on account of the investor's contribution to the damage by way of an unlawful activity become a certain kind of "sanction" in the event that the applicable treaty on investment protection does not foresee the requirement of an investment's legality? On the basis of the tribunal's justification of the Awards rendered in the Yukos case, it appears that the answer is yes. To elucidate the above conclusion, the conclusions of the tribunal reached by analysing both the doctrine of "unclean hands" and Yukos's contribution to the damage caused by the Russian Federation should be analysed.

4.1. "Unclean Hands"

The allegation that Yukos acted illegally in the course of the making and performance of its investment was one of the main claims raised by the Russian Federation in the arbitration proceedings. The Russian Federation raised a claim of infringement by Yukos of Russian law in total on 28 counts. The particular claims regarding Yukos's allegedly illegal activity could be grouped as follows: (i) illegal activities in the course of the privatisation of Yukos, among others through conspiracy and bid rigging; (ii) tax evasion by means of the DTA concluded between the Russian Federation and Cyprus; (iii) creation of a tax optimisation scheme, the aim of which was to evade taxation by taking advantage of low taxation in various regions of the Russian Federation; and (iv) actions taken to hinder the enforcement of the state's tax claims.[58]

The Russian Federation argued that the above infringements alternatively caused: (i) the lack of the tribunal's jurisdiction over the claims of Yukos's

[56] W. Sadowski, *Yukos and Contributory Fault*, Transnational Dispute Management, October 2014, p. 3.
[57] Commentary to Article 31 of the ILC Articles; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador,* Award of 5 October 2012, para. 668.
[58] *Yukos Universal Limited v. Russia*, para. 1282 f.

shareholders, or (ii) the inadmissibility of those claims, or (iii) the need to dismiss them since they were tainted with illegality and not protected under the ECT. The arbitral tribunal submitted each aspect of these claims to an apparently quite in-depth analysis whereupon it came to the conclusion that the arguments raised by the Russian Federation do not find any substantiation in the ECT which constituted the basis for Yukos's claims.[59]

The basic argument of the Russian Federation was the lack of protection under the ECT for investments tainted with illegality, despite the lack of a clear requirement for the investment to be in conformity with the law. In particular, the Russian Federation relied on the *Plama* award which was issued under the ECT and in which, as indicated above, the arbitral tribunal concluded that the ECT implies the requirement of legality of the investment and found the investor's claims tainted with illegality as inadmissible. Alternatively, the Russian Federation also raised the argument that the "clean hands" principle is a universally recognised principle of international law.

The arbitral tribunal basically agreed with the argumentation that the purpose of the ECT and other investment protection treaties is the protection of legal investments,[60] despite the lack of an explicit provision whereby it implicitly confirmed the conclusions of the award in the *Plama* case. However, since the majority of the claims referred to actions that took place already after the making of the investment (and not like in the *Plama* case actions connected with the initiating phase), in the justification the arbitral tribunal clearly focused on an analysis whether the requirement of legality affecting jurisdiction or the admissibility of claims also covers such actions or only the mere making of the investment. The arbitral tribunal in fact expressed an explicit, categorical protest against this argument of the Russian Federation by clear underlining that an investor may be deprived of the possibility of invoking the protection of an investment stipulated under the ECT only when the illegality pertained to the making of the investment, and not to its performance.[61] Moreover, the arbitral tribunal found that awards such as in the *Plama* or *Fraport* cases, even if they in some way supported the argumentation forced by the Russian Federation, they did so in far too general terms to sanction the evasion of responsibility by the state.[62]

Next, the arbitral tribunal analysed whether given the lack of the requirement of legality of an investment in the ECT, this requirement can be found among the general principles of international law. It arrived at the conclusion that the requirement of "clean hands" to obtain treaty protection does not arise from international law because the universal principles of international law require universal recognition, whereas the Russian Federation pointed out a rather controversial aspect of this doctrine by providing as examples only dissenting

[59] Incidentally, already in the decision on jurisdiction in response to the claim regarding the lack of its jurisdiction on account of Yukos's allegedly being "a criminal organisation", the arbitral tribunal stated that *prima facie* it does not see reasons to recognise that Yukos's actions could have allegedly caused the necessity of recognition of the lack of its jurisdiction to adjudicate in this case. Cf. *Yukos Universal Limited v. Russia*, para. 1276.

[60] *Yukos Universal Limited v. Russia*, para. 1352.

[61] *Ibidem*, para. 1354 f.

[62] *Ibidem*, para. 1356.

opinions to the judgments of the ICJ, and not the majority decisions.[63] Hence, the Awards seem to confirm the hitherto prevailing thesis that an investor's activity already after the making of the investment (given the lack of an explicit clause in the treaty as it is the case, for example, in the ECT) did not affect the protection of the investment under the treaty.

Finally, the arbitral tribunal underlined that even the actions which the Russian Federation presented as being an infringement of the law by Yukos at the time of the making of the investment would not qualify to deprive Yukos's claim of treaty protection because they were not sufficiently connected with the transaction initiating the investment, i.e. the purchase of Yukos's shares (which in itself was found legal), and merely preceded it.[64] Therefore, it appears that the arbitral tribunal underlined that illegal activity of an investor must basically lead to the making of the investment since any illegal activity that only "surrounded" the making of the investment is not sufficient to deprive the investor of treaty protection.

By admitting that Yukos's activity could have been partly illegal, the arbitral tribunal recognised however that it did not qualify for depriving Yukos of protection under the ECT, apparently mainly due to the placement of this activity in time.

4.2. Contributory Fault

Nonetheless, this did not prevent the arbital tribunal from applying another mechanism that imposed sanctions on Yukos's activities. As an alternative argument, the Russian Federation raised the issue that the damages owed to the investors should be reduced specifically on account of the illegal activity of Yukos and its representatives. The Russian Federation's allegations were based on Article 39 of the ILC Articles. The arbitral tribunal based it analysis also on Article 31 of the ILC Articles, indicating that a causal link between damage and an investor's activity that contributed to it is necessary to reduce the damages owed to the investor.[65]

The Awards confirm the conclusions of the award issued in the *Occidental Petroleum* case, namely that for determining the amount of damages, the investor's contributory fault needs to be of a significant nature, and yet, on the other hand, that the arbitral tribunal exercises discretion in ascribing the fault to both sides.

In the Yukos case the arbitral tribunal pointed out that most of the Russian Federation's allegations could not have contributed to the fall of Yukos, but some of them, including in particular tax evasion, potentially could fulfil the prerequisites set out in the ILC Articles and provide the basis for the reduction of the damages.[66]

[63] *Ibidem*, para. 1358 f.
[64] *Ibidem*, para. 1370. The arbitral tribunal indicated that what was essential was the legality of the transaction of the investment's purchase, and not the actions that preceded it.
[65] *Ibidem*, para. 1597 f.
[66] *Ibidem*, para. 1608.

The arbitral tribunal found that Yukos's tax evasion was against Russian law, and, what is more, it occurred even before Russian Federation's authorities took numerous measures against Yukos.[67] The arbitral tribunal similarly treated the abuse of the DTA between the Russian Federation and Cyprus by Yukos.[68] It then arrived at the conclusion that it cannot entirely ignore the infringement of Russian law by Yukos, when it in fact permitted the Russian Federation to invoke those infringements and to justify with them any actions taken against Yukos. In addition, while recognising that the infringement of the tax law by Yukos was merely a pretext used by the Russian Federation to bring about the fall of Yukos, the arbitral tribunal underlined that there was a sufficient causal link between these two events.[69]

The critics of the above conclusion indicate that since tax issues served merely as a pretext used by the Russian Federation for Yukos's expropriation, they should not be recognized as Yukos's contributory fault.[70] It seems, however, that in this case the arbitral tribunal did not recognise that the Russian Federation used, as a pretext, the actually legal actions of Yukos (which under normal circumstances it would have never paid attention to), inasmuch as it indicated that without the infringements of the tax law, the damage inflicted upon Yukos could have been smaller or the Russian Federation would have had to find another reason or other methods in order to cause the demise of the concern.[71] The arbitral tribunal simply considered that just because Yukos's actions served merely as a pretext for the measures taken by the state does not mean that those actions should not be sanctioned on the international plane.

Nonetheless, one needs to agree with the statement that the Awards do not provide an extensive justification for the method of calculating the reduction of the damages awarded,[72] as its analysis fails to clearly indicate why the arbitral tribunal took the view that Yukos's tax evasion accounted for as much as one-fourth of the concern's loss. Since the application of the contributory fault by an investor should not be abused, an abridged justification brings in an element of uncertainty.

5. Conclusions

The illegal activity of an investor or the illegal making of an investment may have at least two kinds of consequences for claims raised by an investor on the international arena. Firstly, they may lead to the investor being deprived of treaty protection (either through a denial to recognise the jurisdiction by the arbitral tribunal or through the recognition of the claim as inadmissible or groundless on account of its illegality). Secondly, even if the investor's claims, in the arbitral tribunal's view, are justified, international law foresees the pos-

[67] *Ibidem*, para. 1611 f.
[68] *Ibidem*, para. 1621.
[69] While considering the infringement of the ECT by the Russian Federation, the arbitral tribunal indicated also that Yukos should have expected that by evading taxation it faced the risk of adequate measures being taken by the state, which affected Yukos's substantiated expectations.
[70] W. Sadowski, *op.cit.*, pp. 12–13.
[71] *Yukos Universal Limited v. Russia*, para. 1615.
[72] W. Sadowski, *op.cit.*, p. 34.

sibility of reducing the damages for the infringement of a treaty in proportion to the level of the investor's fault.

These consequences are very serious and may affect not only investors who conducted extensive illegal activity in a host state, but also those who infringed the provisions of law only once and this did not result in serious consequences or whose activity might be defined as "borderline legal".

However, since a precise definition of a specific kind of illegal activity of the host state which would qualify as illegal within the meaning of international law would be marred by difficulties, it seems that the development of mechanisms serving the preservation of the balance between the interests of states and investors deserves a positive welcome. Such an attempt was made by the arbitral tribunal in the Yukos case. The Awards enhance the argumentation, until then present only in a few arbitral awards, that in the event of an investor's illegal activity which significantly infringed the law of the host state and which was linked by a causal link with the damage incurred, the investor may become exposed to sanctions. This is the case even if the applicable treaty does not contain the requirement of the legality of the investment to grant it protection. This mechanism may also represent a certain kind of response to the issue of abuse of treaty protection by investors. Nonetheless, it is beyond doubt that since it constitutes a limitation, this mechanism should be used with caution. It remains to be seen whether and how future jurisprudence will invoke the application of this method by an arbitral tribunal in this "biggest" case in the history of investment arbitration.

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PART TWO

Key Considerations for Drafting Effective Arbitration Agreements in the Context of Poland and China

Monika Prusinowska*

The business exchange between Poland and China has been slowly, but steadily growing over the last years. For China, the Polish market is also a gate to the whole European market and for Poland the Chinese dragon is a chance for producing and exporting own goods to potentially reach 1,3 billion Chinese consumers. More interest in each other can be observed. In 2011, the Polish government initiated a special program called "Go China"[1] with the purpose of strengthening the presence of Polish business in China. In 2012, major players from the Chinese banking sector – Bank of China and the Industrial and Commercial Bank of China opened their branches with the aim of supporting financing of Chinese investors.[2] Yet, in the author's eyes, there is still a huge space for improvement and learning about each other.

More business exchange means a higher risk of disputes between the business partners. Unfortunately, Chinese courts do not enjoy a good reputation among foreigners and the vision of having to proceed before the Chinese court can deter potential investors. Also, Polish courts and their procedures are rather unknown to Chinese business. Therefore, arbitration, as an alternative to unknown waters of national court proceedings in far-distant countries, can be an answer to the problem of how to handle potential cross-border disputes.

There are several advantages of arbitration over litigation for Chinese-Polish partners, to mention just a few: possibility of conducting the proceedings in a selected language, wide choice of arbitrators, who could decide the dispute, and the fact that both Poland and China are the signatories to the New York Convention – it all can greatly facilitate business between the two countries.

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[1] See more about the initiative: http://www.gochina.gov.pl/strategia_GoChina (last visited: 11 Nov 2015).

[2] See for the general analysis of business exchange between Poland and China in: The Polish Institute of International Affairs & KPMG, *Poland–China: Assessment of Polish Enterprises' Cooperation with China* (2013), available at: http://www.kpmg.com/PL/pl/IssuesAndInsights/ArticlesPublications/Documents/2013/Polska-Chiny-Ocena-wspolpracy-gospodarczej-polskich-przedsiebiorstw-z-Chinami.pdf (last visited: 11 Nov 2015).

Although cross-border arbitration with its flag concept of parties' autonomy allows for referring to arbitration in a third neutral country, yet on the one hand, there are some limitations to that freedom, as it will be presented below, and on the other hand, arbitrating in a country of one of the parties can be beneficial, such as for the issues of obtaining interim measures.

Accordingly, the main goal of this article is to bring more light to the area of arbitration as a method of resolving disputes between business partners in Poland and China. It will specifically take a closer look at the starting point of any potential arbitration proceeding – the arbitration agreement, and will deal with some key considerations that arise when negotiating and drafting the arbitration agreement. First, the relevant legal framework of Poland and China will be introduced. Next, the article will move to a discussion on the requirements of a valid arbitration agreement and the peculiarities of the two systems. Additionally, some of the arbitration mechanisms of the biggest arbitration institutions in both countries – the China International Economic and Trade Arbitration Commission (CIETAC) for China and the Court of Arbitration at the Polish Chamber of Commerce (the Court of Arbitration at the PCC) for Poland will be discussed.

Legal Framework

Poland is a country with a continuously developing awareness of and infrastructure for arbitration. There are already few well established arbitration commissions, such as the Court of Arbitration at the Polish Chamber of Commerce handling domestic and international disputes.[3]

Polish arbitration, both domestic and international, is regulated by the 5th Part of Code of Civil Procedure (CCP, Articles 1154–1217).[4] The current version of 2005 is based on the UNCITRAL Model Law without the changes of 2006. Furthermore, most recently, in 2015, the new Law on Promoting Amicable Dispute Resolution Methods amended some of the provisions of the Polish arbitration legal framework.[5] The changes are believed to move Polish standards toward more arbitration-friendly solutions and among them are: limiting the procedure for challenging the arbitral award to one instance, shortening the deadlines for an application to set aside the award, as well as discontinuation of the practice that the declaration of bankruptcy will render an arbitration clause null and void and stop any ongoing arbitration proceedings. The changes are effective as of 1st of January 2016.

[3] The official website of the Court of Arbitration at the PCC: https://www.sakig.pl/en/about-court/general-information – the Court of Arbitration handles around 350–450 cases each year (around 20–25% of them are international cases), see M. Kocur & J. Kieszczyński, *The Court of Arbitration at the Polish Chamber of Commerce Adopts New Rules*, Kluwer Arbitration Blog, 5 Dec 2014, available at: http://kluwerarbitrationblog.com/2014/12/05/the-court-of-arbitration-at-the-polish-chamber-of-commerce-adopts-new-rules/ (last visited: 11 Nov 2015). It recently revised its arbitration rules, which are effective from 1 Jan 2015.

[4] Act of the Amendment of the Code of Civil Procedure from 28 Jul 2005, effective from 17 October 2005 [hereinafter: the Code of Civil Procedure (CCP)].

[5] Act of the Amendment of Some of the Acts in accordance with Promoting Amicable Dispute Resolution Methods from 10 Sep 2015, effective from 1 Jan 2016.

For the sake of the discussion about Chinese legal environment, it is important to notice that China Mainland and Hong Kong, legally speaking, compose "a one country, two systems" and that accordingly, the arbitration systems of the two are also separate. This article deals only with arbitration in Mainland China.

The basis of the current legal environment of Chinese arbitration is China Arbitration Law (CAL) from 1995.[6] Over the last 20 years, China has experienced a tremendous development of arbitration. Efforts have been undertaken, especially by the Supreme People's Court of China (SPC), to modernize the Chinese environment ever since the promulgation of China's Arbitration Law. Also, Chinese arbitration commissions flex their muscles to gain more international recognition. The main player for the Sino-foreign disputes in China these days – CIETAC has one of the biggest caseloads in the world[7], and the major arbitration institutions frequently revise their arbitration rules trying to live up to international standards.[8]

In addition to Chinese Arbitration Law, there are other legal sources that contribute to the arbitration system of China. Among the most important are: Civil Procedural Law,[9] Contract Law of the PRC[10] and numerous documents, such as Interpretations, Opinions and Replies issued by the Supreme People's Court with the purpose of improving the local arbitration environment.[11]

One of the major atypical characteristics of the Chinese system is the division into domestic, foreign-related and foreign arbitration and awards. "Foreign arbitration" means arbitration handled by a foreign arbitral tribunal. "Foreign-related arbitration" according to Article 304 of the Civil Procedure Law Opinions, should contain any of the elements: (1) either or both parties are foreign nationality or stateless, or a company or organization is located in a foreign country; (2) legal facts establishing, altering or terminating the civil legal relationship between the parties occurs in a foreign country; (3) the subject matter of the dispute is located in a foreign country. "Domestic arbitration" is arbitration between two or more Chinese parties that does not contain any of the elements mentioned above.[12]

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[6] Arbitration Law of the People's Republic of China from 31 Oct 1994, effective from 1 Sep 1995 [hereinafter: China Arbitration Law].

[7] See G. B. Born, *International Commercial Arbitration* (2nd edition), Alphen aan den Rijn 2014, p. 94 for detailed statistics comparing caseload of particular arbitration institutions.

[8] CIETAC has its newest rules effective as of 1 Jan 2015; another major Chinese arbitration commission – the Beijing Arbitration Commission (BAC) – from 1 Apr 2015. Both commissions incorporated new mechanisms, such as joinder of additional parties or consolidation of arbitrations. See more: Z. Jie, *Competition Between Arbitral Institutions in China – Fighting for a Better System?*, Kluwer Arbitration Blog, 16 Oct 2015, available at: http://kluwerarbitrationblog.com/blog/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system/ (last visited: 11 Nov 2015).

[9] Promulgated by the NPC and effective from 9 April 1991, subsequently revised on 28 Oct 2007 and 31 Aug 2012, effective from 1 Jan 2013.

[10] Promulgated by the NPC on 15 Mar 1999 and effective from 1 Oct 1999.

[11] Among numerous sources produced by the SPC for the issues discussed in this article, the most important are: Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China" Fa Shi [2006] No. 7 and Notice of the Supreme People's Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by People' Courts Fa Fa [1995] No. 18.

[12] J. Tao, *Arbitration Law and Practice in China*, Alphen aan den Rijn 2012, p. 117–118.

An important observation in light of the above distinction is that being a foreign-invested enterprise (FIE), such as Sino-foreign joint venture or even a wholly foreign-owned enterprise registered under Chinese law does not constitute a foreign element for the understanding of a foreign-related dispute. As a consequence, even a dispute between two FIEs will be still seen as a domestic dispute and thus, some limitations, such as inability to settle the dispute outside of China, will be applicable.[13] Further, only contracts that are foreign-related (and the test is the same as above) are allowed to adopt non-PRC law as governing law and the domestic contracts have to apply Chinese law.[14] Finally, it also impacts the scope of review of arbitral award, it being more extensive for domestic award and ability to have additional protection of arbitration agreements and awards containing foreign elements, such as the Prior Reporting System, discussed below.[15]

Requirements for a Valid Arbitration Agreement

Both in Poland and China an arbitration agreement can be concluded before or after the dispute arises. Furthermore, in both countries an arbitration agreement must be made in writing and must specify the subject matter of the dispute or legal relationship from which the dispute may arise or has arisen. Yet, there are few noteworthy particularities of the two systems.

One of the peculiarities of the Polish system is that as for the institutional arbitration, Polish law provides that in case parties wish to have arbitration proceedings in accordance with the rules in force as of the date of commencement of arbitration, they should expressly provide so in the arbitration agreements. Otherwise, the arbitration rules in force as of the date of concluding arbitration agreement will be applicable.[16] Due to the frequent changes of arbitration rules of arbitration institutions, this should be kept in mind.

Moreover, under Polish law, arbitration agreement must ensure the equality of the parties in the arbitral proceeding. Hence, any provision contrary to the equality principle, in particular entitling only one of the parties to file a request to commence arbitral proceeding, will be invalid.[17]

In China, Article 16 of China Arbitration Law provides that an arbitration agreement must designate an arbitration institution in order to be valid, which is not required under Polish law. As a consequence, *ad hoc* arbitration is not allowed in China. However, foreign *ad hoc* awards will be recognized and enforced in China as provided by the New York Convention. In case the parties failed to

[13] A group of provisions, mainly Article 128 of PRC Contract Law and Article 255 of PRC Civil Procedural Law, together with the SPC's documents and cases prove accordingly; see more J. Tao, *Salient Issues in Arbitration in China*, American University International Law Review, vol. 27, no. 4, Washington 2012, p. 826–827.
[14] J. Tao, *Arbitration Law...*, p. 111–112.
[15] J. Tao, *Salient Issues in Arbitration in China*, American University International Law Review, vol. 27, no. 4, Washington 2012, p. 820–823 & 829–830.
[16] Article 1161 §3 of CCP.
[17] Article 1161 §2 of CCP, see more T. Szurski & A.W. Wiśniewski, *National Report for Poland (2012)*, in: J. Paulsson and L. Bosman (eds), *ICCA International Handbook on Commercial Arbitration*, Alphen aan den Rijn 2012, p. 10–11.

designate the institution in their arbitration clause, the defect can be remedied by the subsequent supplementary agreement of the parties.[18]

Another difference between China and Poland, is the status of foreign arbitration institutions in both countries. Whereas foreign institutions are allowed to provide services in Poland, in China their status remains unclear, with the tendency to rather claim that they cannot provide arbitration services within Mainland China.[19] This particular issue in China is to be watched, especially in light of the recent case "Longlide" with the award issued by ICC in an arbitration seated in Shanghai and enforced (and thus, to some extent endorsed by the Supreme People's Court) in Mainland China.[20] However, in order to minimize the risks, it is safer to avoid choosing foreign arbitration institutions for an arbitration seated in China.

Another interesting point for drafting an arbitration agreement in the Chinese context relates to the chaos caused by the CIETAC split and resulting declaration of independence by CIETAC's former Shanghai and Shenzhen sub-commissions in 2012. The split and the subsequent change of names by the previous sub-commissions, paired with CIETAC opening new sub-commissions in Shanghai and Shenzhen, resulted in lack of certainty as for the issues of jurisdiction and validity of arbitration agreements. Most recently, in 2015, the SPC has finally provided the long-expected clarification and the situation seems to be stable now. Nevertheless, the drafters should be careful when deciding what commission specifically they want to choose. The use of model clauses provided by the relevant arbitration institution is thus recommended.[21]

Scope of Arbitrable Disputes

Under Polish law, in principle proprietary or non-proprietary disputes that can be subject to court settlement, excluding claims for alimony, are arbitrable. In light of this "test for arbitrability", what still remains controversial in Poland is arbitrability of some corporate disputes, especially whether actions aimed at

[18] Articles 16 & 18 of CAL.

[19] *See more J. Tao & C. von Wunschheim, Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institution*, Arbitration International, vol. 23 issue 2, Oxford 2007, p. 309 and K. Fan, *Prospects of Foreign Arbitration Institutions Administering Arbitration in China*, Journal of International Arbitration vol. 28 no. 4, Alphen aan den Rijn 2011, p. 343–353.

[20] Longlide Packing and Printing Co. Ltd. v. BP Agnati S.r. case refers to arbitration administered by ICC in Shanghai. The SPC ruled that the arbitration clause was valid, yet, the status of ICC as a foreign institution providing arbitration services within Mainland China itself was not addressed. See, for example: A. Dong, *Does Supreme People's Court's Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?*, Kluwer Arbitration Blog, 15 Jul 2014, available at: http://kluwerarbitrationblog.com/blog/2014/07/15/does-supreme-peoples-courts-decision-open-the-door-for-foreign-arbitration-institutions-to-explore-the-chinese-market/ (last visited: 11 Nov 2015).

[21] M. Townsend, *New Judicial Guidance on the CIETAC Split – Closure After Three Years of Uncertainty?*, Kluwer Arbitration Blog, 5 Aug 2015, available at: http://kluwerarbitrationblog.com/blog/2015/08/05/new-judicial-guidance-on-the-cietac-split-closure-after-three-years-of-uncertainty/ (last visited: 11 Nov 2015).

annulment or setting aside resolutions of shareholders' meetings of Polish companies can be resolved in arbitration.[22]

One of the long-awaited decisions on the Polish side is discontinuation of the practice that the declaration of bankruptcy will render an arbitration clause null and void and ongoing arbitration proceedings should be stopped – as the things used to be in the past. This is a very recent issue and the relevant provisions of Polish Bankruptcy Law will be effective as of 1st January 2016.[23]

Under Chinese law, in principle, disputes of both contractual and non-contractual nature relating to rights and interests in property between the parties are arbitrable. The disputes concerning personal rights and administrative disputes cannot be arbitrated.[24]

Who Can Serve as an Arbitrator?

Both in Poland and China, there are few issues to be taken into consideration when considering the choice of arbitrators, especially in case of the wish of the parties to designate a specific person (which in general, would not be often recommended) or setting concrete criteria for an arbitrator in an arbitration agreement.

In Poland, the parties are free to choose arbitrators and the only limitation relates to the judges holding the office. The parties are also free to designate a number of arbitrators and, in case there is no choice by the parties, the dispute should be handled by three of arbitrators. As mentioned above, provisions of an agreement granting one of the parties more rights at the appointment of the arbitral tribunal will be ineffective under Polish law. The parties are also free to agree on a procedure for appointing arbitrators and the Code of Civil Procedure provides for a set of default rules. In case of the assistance needed for the composition of the tribunal, the state court will provide such help.[25]

In China, there are few more restrictions to be taken into consideration. As for the question of who can serve as an arbitrator, there are two different sets of criteria relating to Chinese and foreign nationality arbitrators respectively. The requirements for Chinese arbitrators are relatively strict and are connected with the amount of experience expressed in years.[26] Moreover, China has a practice of the lists of arbitrators provided by the arbitration commissions and the arbitrator out of the list has to be approved by the chairman of the arbitration commission.[27] Hence, the designation of any specific arbitrator in the arbitration clause may not be workable in China. The arbitration panels in China should consist of one or three arbitrators. Importantly, since other than in Po-

[22] W. Sadowski, *The Changing Face of Arbitration in Poland*, European and Middle Eastern Arbitration Review 2011, London 2011, p. 68–69.
[23] M. Orecki, *Does the Polish Arbitration Law Finally Move toward International Standards?*, Kluwer Arbitration Blog, 27 May 2015, available at: http://kluwerarbitrationblog.com/blog/2015/05/27/12526/ (last visited: 11 Nov 2015).
[24] Articles 2 & 3 of CAL.
[25] Art. 1169–1171 of CCP.
[26] Compare Art. 13 and 67 of CAL.
[27] For example Art. 26 of CIETAC Arbitration Rules 2015.

land, the state courts are not involved in the procedures of composition of arbitral tribunal, the chairman of the arbitration commission makes such default decision.[28]

Language of Proceeding

For cross-border disputes, the issue of language is of great importance, here especially bearing in mind that neither Chinese nor Polish belong to the easiest and commonly spoken languages.

As for the language of proceeding, in Poland, the parties are free to agree on the language in which the proceedings will be conducted and in the absence of such agreement, the arbitral tribunal will determine the language. According to the arbitration rules of the Court of Arbitration at the PCC, unless otherwise agreed, the language of the proceeding shall be Polish. However, taking into consideration the positions of the parties and the circumstances of the case (particularly the language of the parties' agreement and other documents which are evidence in the case, and the language of witnesses, experts and the parties) the arbitral tribunal may decide that another language will be the language of the proceeding for specific activities.[29]

China Arbitration Law is silent on the language issue. The CIETAC rules provide that where the parties have agreed on the language of arbitration, their agreement will prevail and in the absence of such agreement, the language of arbitration to be used in the proceedings will be Chinese. Yet, CIETAC may also designate another language as the language of arbitration having regard to the circumstances of the case.[30]

Thus, the general advice for Poland and China arbitration agreements, is to clearly indicate the desired language of proceeding.

Concerns on the Validity of Arbitration Agreement

One last question to be discussed is what to do when "something goes wrong" with the arbitration agreement and who has the voice to decide the issue.

Both countries recognize the international principle of separability of the arbitration agreement, which means that the fate of an arbitration clause does not depend on the fate of an underlying contract.[31] However, the approach to another international principle of competence–competence referring to the authority to decide the jurisdictional issues differs in the two countries.[32]

Poland fully recognizes the principle of competence–competence, which means that the arbitral tribunal itself will rule itself both own jurisdiction, including existence and validity of arbitration agreement.[33]

[28] Art. 30–32 of CAL.
[29] Art. 13 of Arbitration Rules of the Court of Arbitration at the PCC 2015.
[30] Art. 81 of CIETAC Arbitration Rules 2015.
[31] A. Redfern, M. Hunter et al., *Redfern and Hunter on International Arbitration* (5th edition), Oxford 2009, p. 117–119.
[32] *Ibid.*, p. 347–349.
[33] Art. 1180 of CCP.

In China, the principle of competence–competence is not fully recognized and in case one of the parties applies to the arbitral tribunal and other to the state court for a clarification, judicial review is given the priority and moreover, the state court will declare the stay of proceeding until making its own decision.[34] Yet, there are some mechanisms aimed at protecting foreigners against the local protectionism, such as so called "Prior Reporting System". The Prior Reporting System is intended to not allow state courts to easily disregard effective arbitration agreements and awards involving foreign interest. The mechanism provides that if basic level court determines that an arbitration agreement in a foreign-related case is invalid, or refuses to enforce arbitral award both in a foreign-related and a foreign case, such refusal has to be reported to the court of higher level for approval. In case the higher instance court upholds the decision of the lower instance court, the Supreme People's Court is eventually designated to decide the issue.[35] It needs to be noted that the use of this mechanism is limited to foreign-related arbitration only and the example involving the two FIEs given above will not render arbitration a foreign-related one in eyes of Chinese law.

Summarizing, both arbitration systems have own individualities, which need to be given due attention when negotiating and drafting an arbitration agreement for Poland and China. Especially in light of the efforts of the two systems to walk toward more arbitration-friendly venues, more understanding of arbitration as an alternative to resolve the disputes in both countries is hoped to further facilitate the business between the Polish eagles and the Chinese dragons.

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[34] The China Arbitration Law itself contains contradictory provisions in distributing powers between judges and arbitrators (Article 5, Article 20 and Article 26 of CAL). See: J. Tao, *Salient Issues...*, p. 813–814.

[35] J. Tao, *Arbitration Law...*, p. 203–205.

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On the Admissibility of Conciliation Proceedings under Articles 184–186 of the Code of Civil Procedure and their legal Effectiveness in the Event of a Plea referring to an Arbitration Agreement

Ivo Kucharczuk

I. Introduction – General Notes

In Polish law, matters of arbitration are regulated in Book V of the Code of Civil Procedure (hereinafter: CCP).[1] Pursuant to CCP Article 1161(1), an arbitration agreement is an act determining that specified claims are to be resolved by arbitration. The jurisdiction of the courts is then excluded as a result of the parties' intention to provide for an alternative method of dispute resolution. To ensure the enforceability of such an agreement, a special mechanism is provided in CCP Article 1165(1). Accordingly, if a case is brought before a court in a matter which is subject to an arbitration agreement, the court should reject the application to commence proceedings, on condition that a party makes an appropriate plea before submitting his first statement on the substance of the dispute.

However, it must be noted that the aforementioned provision refers expressly only to a statement of claim or an application to commence non-contentious proceedings, both of which are specifically defined in the CCP. Controversy has therefore arisen as to the court's obligation to reject other types of pleadings that are not mentioned in CCP Article 1165(1).[2] The most important of these is the "call for settlement", which has the purpose of initiating conciliation proceedings as regulated in CCP Articles 184–186. Discussion arises particularly in

[1] Act of November 17, 1964, Code of Civil Procedure (consolidated text Dz.U. 2014, Item 101).

[2] See e.g. statement of reasons for the reference of a legal issue to the Supreme Court, registered March 3, 2015 (III CZP 30/15), http://www.sn.pl/sprawy/SiteAssets/Lists/Zagadnienia_prawne/EditForm/III-CZP-0030_15_p.pdf; D. Bryndal, M. Robenek, *Zapis na sąd polubowny przeszkodą do skutecznego zawezwania strony do próby ugodowej przed sądem powszechnym* (*The Arbitration Clause as an Impediment to Effective Call for Settlement Before a Common Court*), e-Przegląd Arbitrażowy 2012, No. 3–4, p. 32.

relation to the provisions of the Polish Civil Code (hereinafter: CC)[3] on limitation periods for property-related claims. Under the general rule of CC Article 117, such claims become barred by the statute of limitations. Following the expiry of the limitation period, the respondent may make an appropriate plea and avoid satisfying the claim. However, CC Article 123 states that the limitation period is interrupted by any action before a court or other authority appointed to hear cases or enforce claims of the type in question, or before an arbitration tribunal, if that action is taken directly to assert, establish, satisfy or secure the claim. By virtue of CC Article 124(1), following any interruption to a limitation period, it commences afresh. The filing of a call for settlement is commonly considered to constitute such an action.[4] Indeed, in many cases it is done solely for this purpose.[5]

It is accepted, however, that a rejected pleading has no effect on the limitation period.[6] This is of great importance, since CC Article 118 provides a relatively short limitation period of three years for claims for periodic performances and business claims. Moreover, CC Articles 554, 646 and 751 provide an even shorter limitation period, of just two years, for claims relating to contracts of sale, mandate, performance of services and for specific works, if made within the scope of the seller's, the mandatary's or the contractor's business activity.

In view of the aforementioned constraints, it is crucial to determine whether conciliation proceedings before a court are admissible despite the existence of an arbitration agreement, and whether the pleading aimed at initiating such proceedings (the call for settlement) results in interruption of the limitation period. This question can be analyzed by two different approaches: from the perspective of procedural regulations, and in terms of performance of the arbitration agreement understood as a contract.

II. Procedural Approach

As has already been pointed out, CCP Article 1165(1) obliges a court to reject an application to commence proceedings if the other party makes an appropriate plea citing the existence of an arbitration agreement before defending on the merits of the case. In the absence of such a plea, the conciliation hearing may take place in the normal course of procedure, and no doubts arise as to its legal effectiveness.

[3] Act of April 23, 1964, Civil Code (consolidated text Dz.U. 2013, Item 121).
[4] See e.g. judgment of the Supreme Court of June 3, 1964 (II CR 675/63), OSNC 1964, No. 2, Item 34; SC decision of April 11, 2008 (II CSK 612/07), Legalis No. 156396; SC judgment of November 25, 2009 (II CSK 259/09), Legalis No. 304088. See also S. Kazimierczak, *O możliwości przerwania przed sądem powszechnym biegu przedawnienia roszczeń podporządkowanych kognicji sądu arbitrażowego* (*On the Admissibility of Interrupting Before Common Courts the limitation Period of Claims that Are Subject to Jurisdiction of Arbitration Court*), Biuletyn Arbitrażowy 2010–2011, No. 4, p. 83–86.
[5] See S. Kazimierczak, *op.cit.*, p. 88–90; D. Bryndal, M. Robenek, *op.cit.*, p. 28–29.
[6] See M. Jędrzejewska, *Wpływ czynności procesowych na bieg przedawnienia* (*The Impact of Procedural Steps on the Course of the Statute of Limitations*), Warsaw 1984, p. 37–50; S. Dmowski, K. Kołakowski, in: K. Piasecki (ed.), *Kodeks postępowania cywilnego. Komentarz do artykułów 1–366* (*Code of Civil Procedure. Commentary on the Articles 1–366*), Vol. I, Warsaw 2010, p. 1164; D. Bryndal, M. Robenek, *op.cit.*, p. 34.

The matter should be considered in the light of international agreements and soft law instruments concerning the standardization and unification of arbitration. Poland has signed and subsequently ratified a number of these treaties, including the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the NY Convention).[7] This is the most important instrument for the matter under discussion, and the regulations on arbitration contained in the CCP conform with its provisions.[8] The Polish laws are also strongly influenced[9] by the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: the Model Law).[10] Hence both the NY Convention and the Model Law should be considered to be useful sources for interpretation of the provisions of the CCP.

Article II(3) of the NY Convention reads as follows: "*The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*" This provision was added in the final drafting stage, as a result of the so-called "Dutch proposal".[11] To ascertain the intent of the Contracting States, we must resort to historical interpretation. The NY Convention had the aim of promoting the settlement of international disputes by arbitration. To that end, it was crucial to ensure that the courts of the Contracting States would provide enforcement not only for the arbitral award, but also for the parties' agreement to arbitrate. Before the "Dutch proposal" was presented and subsequently accepted, the draft provided only for the enforcement of foreign arbitral awards. Including a provision for the enforcement of arbitration agreements was therefore considered to make the Convention more effective.[12] The Contracting States aimed to ensure that the parties' agreed intent to have disputes settled by arbitration would not be disregarded in the event of submission of a dispute to a domestic court.

The conditions under which a domestic court must refer the parties to arbitration are set out in Article II(1) and (2) of the NY Convention. According to those provisions there are situations in which a national court may challenge the validity of an arbitration agreement. The referral to arbitration is carried out in accordance with national procedural law. Therefore it may be understood as meaning either a stay of the court proceedings during arbitration, or dismissal of the claim on the ground of lack of jurisdiction.[13] Moreover a court shall refer

[7] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958 (Dz.U. 1962, No. 9, Item 41).
[8] P. Pietkiewicz, *Legal and Organizational Framework of Arbitration in Poland*, in: *Arbitration in Poland*, Warsaw 2011, p. 22–23.
[9] P. Pietkiewicz, *op.cit.*, p. 22–23 and 28–29.
[10] See: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. The Model Law is a soft law instrument. Therefore it is not legally binding, but individual states may incorporate its provisions into their domestic laws on arbitration.
[11] See N. Kaplan, G. Kaufmann-Kohler, G. Tawil, K. Rooney, M. Paulsson, *ICCA's Guide to the Interpretation of the 1958 New York Convention: Handbook for Judges*, The Hague 2011, p. v.
[12] *Ibid*., p. vi.
[13] *Ibid*., p. 38.

the parties to arbitration only at a party's request – it will not be done *ex officio*. The NY Convention does not set a deadline for requesting the referral to arbitration; however, such a deadline may be determined in national regulations on arbitration or procedural law.[14] If a party fails to make a proper plea in a timely manner, it may be considered that he has waived the right to arbitration and thus the arbitration agreement becomes inoperative.[15] Most national laws provide that the referral to arbitration must be requested before any defense on the merits of the case.

The Model Law deals with the matter in Article 8(1). Concerning the enforcement of an arbitration agreement, the Model Law establishes that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests, no later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Accordingly, it places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject matter, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Article 8.1 of the Model Law mostly follows the text of Article II(3) of the NY Convention. However the Model Law establishes that the request is to be made "*no later than when submitting his first statement on the substance of the dispute*".[16]

Another interesting provision of the Model Law is set out in Article 9, which provides that any interim measures of protection that may be granted by courts are to be considered compatible with an arbitration agreement. If a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as an act of waiving of the arbitration agreement.[17] In Poland, this principle is adopted in CCP Article 1166(1), which states that the referral of a dispute to an arbitration tribunal shall not exclude the possibility of seeking protection for the claims before a national court. This should be considered an exception to the general rule, set out in CCP Article 1159(1), that in matters subject to the rules on arbitration, the court may only take actions when specifically provided for by the Code.[18] There is no such provision referring to conciliation proceedings pursuant to CCP Articles 184–186; this may be interpreted as implying the court's lack of jurisdiction in that regard if the matter of dispute is subject to an arbitration agreement.[19]

A call for settlement is a pleading that commences a special type of judicial proceedings known as conciliation proceedings, as regulated in CCP Articles

[14] *Ibid*., p. 41.
[15] See UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 – Explanatory Note, Vienna 2008, p. 29.
[16] *Ibid*., p. 29.
[17] *Ibid*., p. 29.
[18] See T. Ereciński, K. Weitz, *Sąd Arbitrażowy* (*Arbitration*), Warsaw 2008, p. 54.
[19] D. Bryndal, M. Robenek, *op.cit.*, p. 30. Other authors have pointed out that the conciliation procedure is similar to the security for claims procedure, and thus the former should be considered admissible on grounds of analogy; see statement of reasons for the reference of a legal issue to the Supreme Court, registered March 3, 2015 (III CZP 30/15), http://www.sn.pl/sprawy/SiteAssets/Lists/Zagadnienia_prawne/EditForm/III-CZP-0030_15_p.pdf.

184–186. This takes place before the filing of a formal lawsuit. The purpose of the procedure is to furnish the complainant and respondent with a hearing conducted by a state judge, before whom they may attempt to reach a settlement. If such a settlement is reached, the court will examine whether it is compliant with provisions of the law and social norms, and is not intended to circumvent the law. If it is found not to be compliant, the court must rule the settlement inadmissible.

The provisions of CCP Articles 184–186 do not provide for any other ruling by the court conducting conciliation proceedings. If the parties are not able to reach a settlement, or a settlement is reached and found to be admissible, the court shall accordingly report the former circumstance or place the wording of the settlement in the record of the conciliation hearing, without issuing any ruling. According to CCP Article 13(1), in matters provided for in the CCP, the court hears cases according to the provisions concerning particular types of proceedings. However, by virtue of Article 13(2), the provisions relating to general litigious proceedings apply accordingly to any other types of proceedings, including conciliation proceedings. This would suggest that CCP Article 199, concerning the rejection of a statement of claim, also applies to a call for settlement intended to initiate conciliation proceedings.

In this context it should be noted that CCP Article 184 refers not to all disputes, but only to those that involve property rights or non-property rights which may be resolved by a court settlement. Therefore it may be assumed that conciliation proceedings are admissible only if the case presented in the call for settlement complies with that requirement. Otherwise the court should apply CCP Article 130(1), which lays down procedure in the event that a pleading cannot be duly processed due to failure to comply with the formal conditions. In that case the court should order the party to correct or supplement the pleading within one week, failing which it is to be returned to the party. However, if the call does not refer to a case that may be resolved by a court settlement, and that defect has not been corrected, there is no need to schedule a hearing, since its purpose – conclusion of a settlement – would be inadmissible. The court should then apply CCP Article 199(1)(1) and reject the call for settlement, as the case does not qualify for that legal route. This conclusion leads to the question of whether it is possible to apply accordingly other grounds for rejection, including that set forth in CCP Article 1165(1).

CCP Article 185(1) requires that a call for settlement should briefly present a case. At the same time, according to CCP Article 1162, an arbitration agreement should be made in writing, specifying the matter at issue or the legal relationship from which a dispute arose or could arise. This requirement is also met if the agreement is included in letters exchanged between the parties or statements made by means of remote communication which enable their content to be recorded. Reference in a principal agreement to a schedule containing a decision to bring a dispute to arbitration also complies with the requirement concerning the form of an arbitration agreement, provided that it is made in writing and the reference provides that the schedule is an integral part of the agreement. These factors theoretically make it possible for a court to examine whether a matter of dispute is subject to an arbitration agreement. Therefore in the first place the court must determine whether the dispute is arbitrable and

arises out of a defined legal relationship that the parties intended to have settled by arbitration, and whether the agreement is evidenced in writing. *Prima facie* this approach is similar to that provided by CCP Article 34 *in fine*, which refers to examination of the territorial jurisdiction of a court in actions related to contracts. The key to the establishment of jurisdiction is the place of performance of a contract; in case of doubt, this place should be confirmed by a document.

On the other hand, CCP Article 1165 provides that Article 1165(1) shall not apply if the arbitration agreement is null and void, ineffective, unenforceable or has expired, or if the arbitration tribunal declines jurisdiction. This regulation complies with the provisions of the aforementioned international acts on arbitration. Modeled on Article II(3) of the NY Convention, Article 8(1) of the Model Law places any court under an obligation to refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Therefore the court must examine whether the agreement exists, is substantively valid, and remains binding on the parties to the dispute. In many cases it may be necessary to take evidence, which may require scheduling a hearing in order to question the parties and any witnesses.[20] Nonetheless, in Polish doctrine and numerous court judgments the opinion has prevailed that the court conducting conciliation proceedings cannot examine the merits of the case, as its role is limited to facilitating the conclusion of a settlement. This would mean that CCP Article 1165(1) does not provide grounds for the rejection of a call for settlement.[21] However, there are also some who take the view that it is obligatory to establish the facts that determine the admissibility of the said proceedings.[22]

To summarize, it should be concluded that there are no procedural obstacles to the determination of grounds for rejection of a call for settlement as set forth in CCP Article 1165(1) as well as exceptions thereto. However, such a conclusion would be incomplete and premature without taking into account the analysis in terms of contractual performance, as set out in the following section.

III. Contractual Performance Approach

As has already been mentioned, the decision to decline jurisdiction and refer the parties to agreed arbitration is not automatic, but must be requested by an interested party. This is so because the obligatory nature of the arbitration agreement derives from the parties' will. They may agree to take their disputes to court even after having previously agreed to enter into arbitration. It may

[20] See: decision of the Supreme Court of October 10, 2011 (I CO 49/11), LEX No. 964452; resolution of the Supreme Court of March 28, 2014 (III CZP 3/14), Biul. SN 2014, No. 8, Item 395, where such a conclusion was drawn in reference to examination of the international jurisdiction of domestic courts.

[21] See judgment of the Court of Appeal in Warsaw of January 8, 2013 (I ACa 960/12), decision of the District Court in Szczecin of June 13, 2013 (VIII Gz 139/13), both at http://orzeczenia.ms.gov.pl; S. Kazimierczak, *op.cit.*, p. 92–95.

[22] See J. Turek, *Cywilne postępowanie pojednawcze* (*Civil Conciliation Proceedings*), Palestra 2004, No. 1–2, p. 58; decision of the Supreme Court of January 22, 1980, IV PZ 80/80, Legalis No. 22415; decision of the District Court in Warsaw of January 5, 2014 (XXIII Gz 1256/12), http://orzeczenia.ms.gov.pl.

therefore be presumed that the power of an arbitral tribunal to resolve a dispute must result from an agreement of the parties, being of a contractual nature. Therefore, in analyzing what impact a plea citing an arbitration agreement has on the admissibility of conciliation proceedings, it is important to determine the legal nature of that agreement under Polish law.

The CCP does not give an explicit definition of an arbitration agreement, but such a definition can be derived from Article 1161(1). According to this provision, the term should be understood to mean the submission of a dispute to be resolved by arbitration, mentioning the subject matter of the dispute or a legal relationship from which the dispute may arise or has already arisen. Such an understanding generally complies with the NY Convention and the Model Law. According to Article II(1) of the NY Convention, an arbitration agreement is an agreement under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The Model Law defines the term similarly, in Article 7(1), as an agreement to submit to arbitration all or certain disputes which have arisen or which may arise between the parties thereto in respect of a defined legal relationship, whether contractual or not.

None of the cited definitions determine the legal nature of the arbitration agreement. However, some clues may be derived from other provisions of the aforementioned instruments, as well as those of the CCP. The NY Convention and the CCP set forth constitutive elements that any arbitration agreement should contain for it to be valid, as well as requirements regarding its form. The regulation of arbitration agreements in international and Polish law is designed to be as exhaustive as possible, and fails to expressly specify the general nature of such an agreement. Consequently this issue remains a source of conflicting opinions in Polish legal doctrine.[23] Debate centers around the question of whether an arbitration agreement is governed by civil law (i.e. the CC),[24] the law regulating civil procedure (i.e. the CCP),[25] is of mixed

[23] See e.g. J. Skoczylas, *Charakter prawny zapisu na sąd polubowny a autonomia regulacji prawnej arbitrażu* (*po nowelizacji z 2005 roku*) (*The Legal Nature of the Arbitration Agreement and the Autonomy of Legal Regulation of Arbitration as Amended in 2005*), in: J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, E. Wardyński, S. Włodyka (eds.), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie* (*Commemorative Book of the 60th Anniversary of the Court of Arbitration at the Polish Chamber of Commerce*), Warsaw 2010, p. 136; M. Hałgas, *Charakter prawny zapisu na sąd polubowny* (*The Legal Nature of the Arbitration Clause*), PUG 2007, No. 7, p. 2; P. Lewandowski, *Arbitration Agreement*, in: *Arbitration in Poland*, Warsaw 2011, p. 51–52.

[24] See e.g. K. Siedlik, *Charakter prawny umowy arbitrażowej w prawie niemieckim i polskim* (*The Legal Nature in the Polish and German Regulations*), PUG 2000, No. 2, p. 21 *et seq.*; M. Hałgas, *op.cit.*, p. 2 *et seq.*; P. Wrześniewski, *Charakter prawny zapisu na sąd polubowny* (*The Legal Nature of Arbitration Clause*), Warsaw 2010, p. 242 *et seq.* See also the resolution of the Supreme Court of November 15, 1970 (III CZP 63/70), OSN 1971, No. 5, Item 78.

[25] See e.g. A. Świderska, *Sądownictwo polubowne w perspektywie zmian* (*zagadnienia wybrane*), (*Arbitration in View of the Changes, Selected Issues*), Palestra 1992, No. 1–2, p. 43; M. Tomaszewski, *Umowa o arbitraż, podstawowe problemy prawne* (*Arbitration Agreement, Core Legal Problems*), PUG 1994, No. 1, p. 15–16; *idem*, *Umowa o arbitraż* (*Arbitration Agreement*), in: A. Szumańskiego (ed.), *System prawa handlowego. Arbitraż handlowy* (*System of the Commercial Law. Commercial Arbitration*), Vol. 8, Warsaw 2010, p. 285–288; T. Kurnicki, *Znowelizowane postępowanie przed sądem polubownym*

character,[26] or is a *sui generis* contract.[27] However, it can be observed that it is the first two of these theories that prevail in practice.[28]

The first concludes that an arbitration agreement is governed by substantive civil law. CCP Article 1157 states that the parties may bring disputes involving property rights, or disputes relating to non-property rights which can be resolved by a court settlement, except for maintenance cases, before an arbitration tribunal. This provision may lead to the conclusion that the scope of an arbitration agreement is restricted to matters that are subject to the contractual freedom of the parties under CC Article 353^1. Adoption of this position plays a leading role for determining the admissibility of stipulating time limits and conditions for the commencement or cessation of the consequences of an arbitration agreement.[29] Another important issue is whether a party to the agreement may avoid its effects by citing defects in his declaration of intent as regulated in CC Articles 82–88.

According to the second prevailing theory, an arbitration agreement should be qualified as a procedural instrument, similar to agreements concerning courts' territorial jurisdiction under CCP Article 46(1) or the international jurisdiction of domestic courts pursuant to CCP Articles 1104(2) and 1105(6). Importantly, this approach does not preclude the application of the aforementioned provisions of substantive law or those concerning legal capacity and representation

(*Amended Arbitration Proceedings*), MoP 2005, No. 22, p. 1121; R. Kulski, *Charakter prawny umów procesowych* (*The Legal Nature of Procedural Agreements*), PiP 2002, No. 1, p. 60–63; T. Ereciński, in: J. Ciszewski, T. Ereciński (eds.), *Kodeks postępowania cywilnego. Komentarz. Część czwarta – Przepisy z zakresu międzynarodowego postępowania cywilnego. Część piąta – Sąd polubowny* (*arbitrażowy*), (*Code of Civil Procedure, Commentary. Part Four – The Rules in the Scope of International Civil Procedure. Part Five – The Court of Arbitration, Arbitration*), Warsaw 2006, p. 367; T. Ereciński, K. Weitz, *op.cit.*, p. 85, 86–87; Z. Resich, in: J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie cywilne* (*Civil Proceedings*), Warsaw 2009, p. 278.

[26] See e.g. E. Marszałkowska-Krześ, in: H. Mądrzak (ed.), *Postępowanie cywilne* (*Civil Proceedings*), Warsaw 2003, p. 395; A. Budniak, *Charakter prawny oraz dopuszczalność zawarcia zapisu na sąd polubowny w prawie polskim i niemieckim* (*cz. I*), (*The Legal Nature and Admissibility of the Execution of the Arbitration Clause in the Polish and German Regulations, part I*), Rejent 2008, No. 9, p. 42 *et seq.* See also resolution of the Supreme Court of March 8, 2002 (III CZP 8/02), OSNC 2002, No. 11, Item 133; SC decision of February 22, 2007 (IV CSK 200/06), OSNC 2008, No. 2, Item 25.

[27] See e.g. M. Pazdan, *Prawo właściwe do oceny zapisu na sąd polubowny* (*Law Applicable to the Assessment of the Arbitration Clause*), Rejent 2003, No. 10, p. 176; S. Frejowski, *Umowa o międzynarodowy arbitraż handlowy* (*International Commercial Agreement*), MoP 2007, No. 9, p. 526–527; A. Wiśniewski, *Charakter prawny instytucji arbitrażu w świetle nowelizacji polskiego prawa arbitrażowego* (*The Legal Nature of the Arbitration Institution in the Light of the Amendments to Polish Arbitration Law*), ADR 2008, No. 2, p. 53 *et seq.*, J. Zrałek, W. Kurowski, *Wpływ przelewu wierzytelności na klauzulę arbitrażową* (*The Impact of the Claims Assignment on the Arbitration Clause*), ADR 2008, No. 3, p. 139.

[28] See P. Lewandowski, *op.cit.*, p. 51–52; A. Budniak, *Zastrzeżenie warunku lub terminu a charakter prawny zapisu na sąd polubowny* (*The Stipulation of Time Limits or Conditions and the Legal Nature of the Arbitration Clause*), in: J. Mazurkiewicz (ed.), *Księga dla naszych kolegów. Prace prawnicze poświęcone pamięci doktora Andrzeja Ciska, doktora Zygmunta Masternaka i doktora Marka Zagrosika* (*Book for our colleagues. Legal work dedicated to the memory of Dr. Andrzej Cisek, Dr. Zygmunt Masternak and Dr. Marek Zagrosik*), Wrocław 2013, p. 64–65.

[29] For more on this see *ibidem*, p. 63–69.

to conclude an agreement.[30] While the legal effects of an arbitration agreement are mainly of a procedural nature, they still give rise to certain obligations of the parties. Pursuant to CC Article 353, an obligation consists in the fact that a creditor may demand performance from a debtor and the debtor shall render the performance, where the performance may consist in acting or in refraining from acting. CC Article 353 specifies that the debtor shall perform an obligation according to its content and in a manner corresponding to its social and economic purpose and to the principles of communal coexistence, and in a manner corresponding to any customs that exist in that regard. In this undertaking the creditor is obliged to cooperate in the same manner.

Consequently, in the event of a dispute, the parties should take all necessary steps to initiate and conduct arbitration proceedings that are legally effective. At the same time they are obliged to refrain from doing anything that would impede, delay or disrupt that purpose. This, however, is merely a general rule which requires conclusive and clear directions in order to be applied. To achieve that aim, one must analyze the very nature of dispute resolution by arbitration, both in general and in terms of how it is regulated in a specific agreement. On the general view, it should be noted that a number of potential advantages appertain to arbitration which are important for the assessment. First of all, this alternative method of dispute resolution allows the parties to choose their own tribunal, which is especially important when the subject matter of the dispute requires a particular degree of expertise. Moreover, arbitration is commonly considered to be faster, less expensive and more flexible than court litigation. What is more, arbitral proceedings and their results are generally non-public, and can be made confidential by the parties. In most legal systems there are very limited ways of appealing an arbitral award, which may in some situations be regarded as an advantage, as it limits the period of the dispute and thus of any liability associated with it. Last but not least, by virtue of the NY Convention, arbitration awards are usually easier to enforce in other legal jurisdictions than judgments of national courts.

These advantages should be taken into account when assessing whether a call for settlement before a court may be categorized as non-performance or improper performance of the arbitration agreement. What is more, to establish a breach of that agreement by one of the parties, it must be determined whether it results in such detriment to the other party as to deprive him of what he is entitled to expect under the contract. Therefore it should be examined which of the advantages were decisive for the parties' entering into the arbitration agreement. If the reason was to provide a fast, comprehensive and complete procedure of dispute resolution, then bringing the case before a court in order to seek a settlement does not at first sight appear to contravene those goals. It should be noted, however, that when a dispute arises out of a legal relationship it creates uncertainty and suspense between the parties. By concluding an arbitration agreement, the parties have adopted a specific procedure to shorten the duration of a dispute. From this point of view, the filing of a call for settlement before a court may be classified as a breach of the covenants given.

[30] See T. Ereciński, K. Weitz, *op.cit.*, p. 81; D. Bryndal, M. Robenek, *op.cit.*, p. 25; P. Lewandowski, *op.cit.*, p. 52.

This is particularly manifest when the agreed dispute resolution procedure includes out-of-court mediation or negotiations prior to formal commencement of litigation. As has already been mentioned, there are many reasons for excluding the jurisdiction of national courts. In some cases the parties to the arbitration agreement seek to secure the confidentiality of their relations, and consider that any interference by a national court poses a risk of disclosure. The resolution of some legal disputes, even by way of a settlement, requires the assistance of a person who has a particular degree of expertise or is simply trusted by the parties. Finally, as was noted above, the NY Convention means that arbitration awards and settlements are usually more easily enforceable in other legal jurisdictions.

Therefore the argument that conciliation proceedings under the provisions of the CCP are fast and cheap is not necessarily of the essence. As noted above, a call for settlement is commonly considered to be an action that causes interruption of the limitation period for a claim, and effectively leads to an extension of that period. Therefore it is no doubt beneficial to the position of the party seeking redress. However, from the point of view of the other party it lengthens the period of uncertainty and suspense, as it prevents the lapse of the limitation period.

It should be pointed out, however, that if a case is brought before a court to seek settlement, the responding party ought to make a plea that the dispute has been excluded from the court's jurisdiction and submitted to arbitration before submitting his first statement on the substance of the dispute. Otherwise it may be considered that the party does not regard such action as constituting non-performance or improper performance of the arbitration agreement, or has waived the right to invoke the breach.[31] If the case is brought before an arbitration tribunal, the respondent may avoid the duty to satisfy the claim by asserting that the conciliation hearing had no impact on the limitation period. Pursuant to a general rule adopted in Polish civil law, no one should benefit from his non-performance or improper performance of an obligation, especially when he invokes his own guilt for that purpose.[32]

The legal grounds for such a decision of an arbitration tribunal may derive from CC Article 5 in combination with Article 117 or CCP Article 3, depending on the circumstances of a given case. According to CC Article 5, one may not use one's right in a manner which would be contrary to its social and economic purpose or to the principles of communal coexistence. Any such act or omission by the entitled party shall not be treated as exercise of the right and shall not be protected. This is consistent with CCP Article 3, which imposes on the parties to and participants in proceedings a duty to take procedural steps truthfully and in accordance with good practice. Therefore, if the filing of a call for settlement

[31] See T. Ereciński, K. Weitz, *op.cit.*, p. 81; D. Bryndal, M. Robenek, *op.cit.*, p. 32; resolution of the Supreme Court of March 8, 2002 (III CZP 8/02), OSNC 2002, No. 11, Item 133.

[32] See A. Kacprzak, J. Krzynówek, W. Wołodkiewicz, *Regulae iuris, łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczpospolitej Polskiej* (*Regulae Iuris, Latin Inscriptions on the Columns of the Supreme Court of the Republic of Poland*), Warsaw 2006, p. 27; M. Kaliński, *Odpowiedzialność odszkodowawcza* (*Civil Liability*), in: A. Olejniczak (ed.), *System prawa prywatnego, Prawo zobowiązań – część ogólna* (*System of Private Law, Law of Obligations – General Part*), Vol. 6, Warsaw 2009, p. 177.

was contrary to the arbitration agreement, an arbitral tribunal should refuse to acknowledge its effect on the limitation period for a claim, on condition that the respondent made an appropriate plea at the correct time during the conciliation proceedings and invoked the lapse of the limitation period as its defense before the tribunal.

The regulation of CC Article 117(1) may give grounds for such an assessment only if examination of the circumstances of the case shows that the filing of a call for settlement cannot be qualified as an act before a court of law taken directly to pursue, establish, satisfy or secure a claim. Such an assessment would be justified if, during the conciliation proceedings, no proposals for settlements or mutual concessions were presented by the initiating party, or if that party failed to appear for a scheduled hearing without presenting a reason or refused to negotiate with the other party. Another example of such a situation is where a settlement concluded before a court would not be legally binding or enforceable in the jurisdiction where it is to be recognized, this being the reason for taking the case to arbitration. Finally, this approach should also be adopted if for the resolution of a given dispute even by way of a settlement the parties require the assistance of experts, and that was provided for in the arbitration agreement.

IV. Conclusions

The foregoing analysis leads to conclusions that may be recapitulated in two statements. Firstly, there are no formal or practical obstacles to the determination of grounds for rejection of a call for settlement as set forth in CCP Article 1165(1) as well as exceptions thereto. Secondly, even if the call for settlement was not rejected, the respondent may ask an arbitral tribunal to refuse to acknowledge its effect on the limitation period for a claim if the seeking of a settlement before a court constituted non-performance or improper performance of the arbitration agreement. This is, however, contingent on the respondent's making an appropriate plea during the conciliation proceedings and invoking lapse of the limitation period as its defense before the tribunal.

V. Executive Summary

This paper deals with the issue of the admissibility of conciliation proceedings pursuant to CCP Articles 184–186 and their legal effectiveness in the event of a plea referring to an arbitration agreement. According to CCP Article 1165(1), if a case is brought before a court in a matter relating to a dispute which is subject to an arbitration agreement, the court shall reject the pleading, on condition that a party requests referral to arbitration before submitting his first statement on the substance of the dispute. The cited provision refers only to a statement of claim or an application to commence non-contentious proceedings.

Controversy therefore arises as to whether a court should reject other types of pleading that are not mentioned in that article. The most important of these is the so-called call for settlement, which according to CC Article 123 is an action that may cause extension of the statutory limitation period. However, it is accepted that a rejected pleading has no effect on the limitation period.

The matter is analyzed both from a procedural perspective and in terms of contractual performance. The procedural approach leads to the conclusion that the court potentially conducting conciliation proceedings should reject the call for settlement on the grounds set forth in CCP Article 1165(1).

The approach based on contractual performance leads to the conclusion that even if the court did not reject the call for settlement, the respondent may ask the arbitral tribunal to refuse to acknowledge its effect on the limitation period if the seeking of a settlement before a court constituted non-performance or improper performance of the arbitration agreement. This is, however, contingent upon the respondent's making an appropriate plea during the conciliation proceedings, and invoking the lapse of the limitation period as its defense before the tribunal.

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Świderska A., *Sądownictwo polubowne w perspektywie zmian* (*zagadnienia wybrane*), (*Arbitration in View of the Changes, Selected Issues*), Palestra 1992, No. 1–2, p. 43 *et seq*.
M. Tomaszewski M., in: A. Szumański (ed.), *Umowa o arbitraż* (*Arbitration Agreement*), in: *System Prawa Handlowego. Arbitraż handlowy* (*System of the Commercial Law. Commercial Arbitration*), Vol. 8, Warsaw 2010, p. 285–288.
Tomaszewski M., *Umowa o arbitraż, podstawowe problemy prawne* (*Arbitration Agreement, Core Legal Problems*), PUG 1994, No. 1, p. 15 *et seq*.
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Enforceability of Multi-tiered Dispute Resolution Clauses under Polish Law

Anita Garnuszek
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Introduction

During recent decades different forms of alternative dispute resolution, such as negotiation, mediation and arbitration, have been gaining increasing support among lawyers and business counterparties. Similarly, intensified use of combined dispute resolution clauses has been observed.[1]

Multi-tiered dispute resolution clauses usually provide for separate escalating steps for resolution of disputes between the parties.[2] Typically these clauses stipulate that before pursuing arbitration, the parties will try to settle their dispute in negotiation and/or in mediation.

The aim of these initial steps is to enable the parties to find an amicable solution to their dispute and avoid arbitration.[3] A particular "cooling-off" period, during which the parties have a possibility to reconsider their positions and try to find mutually satisfactory solutions to the business problems they have encountered, is highly beneficial for businesses, whose primarily goal in many instances is to continue fruitful cooperation despite certain misunderstandings.

However, multi-tiered dispute resolution clauses, also known as multi-step or escalation clauses, raise certain concerns among lawyers. The main question posed in the legal literature and case law of different jurisdictions is whether such clauses are enforceable. Enforceability is understood as the possibility of raising a successful defence based on non-fulfilment of pre-arbitration requirements agreed by the parties, either before an arbitral tribunal or before a state court.

[1] R. Rana*, The Rise in the Use of Multi-Tiered Dispute Resolution Clauses Culminating in Arbitration*, in: B. Gessel-Kalinowska (ed.), *The Challenges and the Future of Commercial and Investment Arbitration. Liber Amicorum Professor Jerzy Rajski*, Warsaw 2015, p. 530.
[2] *Ibidem,* p. 532.
[3] A. Jolles, *Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement*, 72 Arbitration 329 (2006), no. 4, p. 329.

The subject of the analysis in this paper is multi-tiered dispute resolution clauses as defined above. The authors also focus on their enforceability and the consequences thereof.

The main purpose of the authors is to answer the question whether multi-step dispute resolution clauses are enforceable under Polish law, and if so, what their effect on arbitration proceedings is. Thus, the analysis concentrates on the possibility of raising a defence of non-fulfilment of pre-arbitration requirements before an arbitral tribunal. It must be indicated at the outset that there are significant differences in approach to the enforceability of multi-tiered dispute resolution clauses across different jurisdictions.[4] There is hardly any global consensus with respect to the nature of such clauses,[5] and no 'supranational' rules or even common solutions to the issue exist.[6] Therefore, in the authors' view, it is not possible to address the question of enforceability of multi-step clauses in the abstract. Rather, the issue must be considered within the context of the particular legal system.

In the first part of the paper, the current state of debate in the foreign literature and case law is presented,[7] and in the subsequent parts the authors discuss their position on enforceability of multi-tiered dispute resolution clauses in the light of Polish law. Therefore, the following considerations are based on the assumption that Polish substantive law is applicable to the assessment of the dispute resolution clause in its entirety. It is also assumed that the seat of arbitration is in Poland and in consequence Polish *lex arbitrii* applies.

The main hypothesis of this paper is that the question of whether multi-tiered dispute resolution clauses are enforceable under Polish law depends on their wording and the intention of the parties which can be discovered through interpretation. Another hypothesis is that there are two potential areas in which such enforceable clauses may exert legal effects: the jurisdiction of the arbitral tribunal, when a pre-arbitration requirement is interpreted as a condition within the meaning of Civil Code Art. 89; or admissibility of claims (as a matter of substantive law), when a pre-arbitration requirement is interpreted as a *pactum de non petendo*. Accordingly, non-fulfilment of the pre-arbitration requirement will result either in a decision by the arbitral tribunal declining jurisdiction (in case of the jurisdictional approach) or in dismissal of claims (in case of the admissibility approach).

These hypotheses will be tested in the following parts of the paper.

[4] R. Rana, *op.cit*., p. 533.

[5] A.J. Belohlavek, *Arbitration Agreement, MDR Clauses and Relation thereof to Nature of Jurisdictional Decisions on the Break of Legal Cultures*, in: J. Okolski (ed. in chief), A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka (eds), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie* (*A Commemorative Volume for 60 years of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw*), Warsaw 2010, p. 426.

[6] A. Jolles, *op.cit.*, p. 336.

[7] The authors do not discuss all potential approaches to the problem adopted in different jurisdictions and they did not intend the paper to constitute a comprehensive overview of foreign judgments. Such overview can be found in e.g. R. Morek, *Wielostopniowe klauzule rozwiązywania sporów w praktyce kontraktowej i orzecznictwie wybranych systemów prawa kontynentalnego* (*Multi-Step Dispute Resolution Clauses in Contractual Practice and Case Law of Selected Systems of Continental Law*), in: J. Okolski (ed. in chief), A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka, *op.cit.,* Warsaw 2010.

Main theoretical Problems and current State of debate in foreign Literature and Case Law

An analysis of the foreign literature and case law tends to lead to the conclusion that there are different possible approaches to assessment of multi-tiered dispute resolution clauses and their enforceability. The main positions are the following.

Firstly, it is generally questioned by some authors whether such clauses are in principle enforceable. Due to the consensual character of negotiation and mediation, which are contingent upon the will of the parties, some scholars claim that clauses of this kind are not enforceable at all.[8] Others emphasize the non-determinative nature of negotiation and mediation.[9] However, the opposing view is that if the parties clearly agreed on a multi-tiered dispute resolution system, such clause should be given legal effect.[10]

Secondly, assuming that the clauses are enforceable, the question arises whether non-fulfilment of pre-arbitration requirements is a procedural or a substantive issue. Opinions have been expressed that agreements to mediate or negotiate before pursuing arbitration are agreements of a substantive nature, similar to other contractual provisions. In consequence, a violation of the first-tier obligation, i.e. failing to initiate mediation or negotiation, would be treated as a breach of contract with standard remedies available, but with no adverse effect on the arbitral tribunal's competence to hear the case (jurisdiction) or on the admissibility of claims.[11]

However, the consequences of non-compliance with these obligations would be either unsatisfactory or unreasonably harsh, mainly because the party suffering injury would most likely be unable to establish the quantum of damages.[12] Conversely, failure to comply with a mediation or negotiation commitment may be treated as a procedural issue.

Thirdly, those who perceive this as a procedural issue deliberate whether it undermines the tribunal's competence to hear the case—therefore, whether it is a question of the jurisdiction of the arbitral tribunal, or rather whether non-fulfilment of a pre-arbitration requirement affects the admissibility of claims.

Supporters of the jurisdictional theory assert that pre-arbitration requirements (negotiation or mediation) bar recourse to arbitration until the negotiation or mediation process has been complied with, and are therefore a type of condition precedent.[13]

[8] See presentation of different views in the paper of M. Pryles, *Multi-Tiered Dispute Resolution Clauses*, in: A.J. van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series (2000), Vol. 10, p. 25.
[9] See presentation of different views in the paper of D. Kayali, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, 27 J. Int'l Arb. (2010), issue 6, p. 551.
[10] *Ibidem*.
[11] A. Jolles, *op.cit.,* p. 329; Cassation Court of the Canton of Zurich, 15.03.1999, published in ZR 99 (2000) no. 29, quoted by A. Jolles, *op.cit.,* p. 330.
[12] A. Jolles, *op.cit.*, p. 336.
[13] D. Kayali, *op.cit.,* p. 550; À. López de Argumedo Piñeiro, *Multi-Step Dispute Resolution Clauses*, in: M. Fernández-Ballesteros, D. Arias, La Ley (eds), *Liber Amicorum Bernardo Cremades,* Madrid 2010, p. 734.

In the well-known *Vekoma v. Maran* case,[14] the contract provided that arbitration should be initiated within 30 days after it was agreed that the difference or dispute could not be resolved by negotiation. The Swiss Federal Tribunal upheld the challenge to the award, stating that the arbitration agreement was subject to a condition subsequent, the 30-day limit, and the claimant had failed to satisfy it. As a consequence, the court held that the arbitrators lacked competence to hear the case because the arbitration agreement had lost its effectiveness.[15] Thus, the arbitration award was set aside.

The jurisdiction theory has also been met with a certain degree of criticism. There are scholars who claim that it is simply impractical.[16] Others, including J. Paulsson, suggest that the Swiss Federal Tribunal erred in its decision because it misunderstood the nature of the challenged arbitral decision. The arbitrators decided on the admissibility of the claim and not their jurisdiction, and thus the Swiss court was not entitled to review the award. [17] The distinction between admissibility and jurisdiction is explained *inter alia* in the dissenting opinion to *Waste Management, Inc. v. United Mexican States*:[18] "jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it".[19]

It appears that courts in Germany and France have treated the issue as procedural in nature, by finding that claims brought to the court before fulfilment of the mediation or negotiation procedure were inadmissible.[20]

Pre-arbitration requirements have also been considered to be a *pactum de non petendo*, a temporary waiver of the right to commence arbitration until negotiation or mediation has been undertaken.[21]

Finally, scholars have considered whether as a consequence of finding that a multi-tiered dispute resolution clause was enforceable, the arbitral tribunal could decide that it has no jurisdiction, the claim is inadmissible, or the proceeding should be stayed until completion of the precedent steps or at least until their initiation.

Many scholars suggest that the most efficient solution would be to stay the proceeding,[22] although other consequences, such as a negative decision on

[14] *Transporten Handelsmaatschappij 'Vekoma' BV v. Maran Coal Corporation,* Bundesgericht, I. Zivilabteilung, 17 August 1995, ASA Bulletin 4/1996, 673 *et seq*.
[15] *Ibidem.*
[16] Ch. Boog, *How to Deal with Multi-Tiered Dispute Resolution Clauses-Note-June-2007-Swiss-Federal-Supreme-Court*, 26 ASA Bulletin (2008), p. 108.
[17] J. Paulsson, *Jurisdiction and admissibility*, in: G. Aksen, K.-H. Böckstiegel, M.J. Mustill (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner*, Paris 2005, p. 602.
[18] *Waste Management, Inc. v. United Mexican States*, ICSID Case no. ARB(AF)/98/2, dissenting opinion, 30.04.2004.
[19] *Ibidem*, para. 58.
[20] Ch. Boog, *op.cit*., p. 107; see judgments invoked therein including decision of the German BGH, 23.11.1983, NJW 1984, 669/670; *Poiré v. Tripier,* Cour de cassation (Ch. mixte), 14.02.2003, Rev. de l'Arb. 2003, issue 2, pp. 403-404.
[21] K.P. Berger, *Law and Practice of Escalation Clauses*, 22 Arb. Int'l 1(2006), p. 5.
[22] A. Jolles, *op.cit.,* pp. 336-337; C. Boog, *op.cit.,* p. 108; À. López de Argumedo Piñeiro, *op.cit.,* p. 743; R. Morek, *op.cit.,* p. 64; E. Kajkowska, *Wielostopniowe klauzule rozstrzygania prawa w świetle wybranych obcych porządków prawnych* (*Multi-Tiered Dispute Resolution Clauses in the Light of Selected Foreign Legal Systems*), p. 313 *et seq*., https://depotuw.ceon.pl/handle/item/765, 6.10.2014.

jurisdiction or dismissal of the claim, are also possible, depending on the qualification of the issue.

Unenforceable Multi-tiered Dispute Resolution Clauses under Polish Law

As indicated above, some authors claim that negotiation and mediation clauses are unenforceable by definition. Similar position can be found also in the case law of the Polish state courts.[23] These arguments ignore the fact that the procedure to be followed in case of a dispute is determined by the parties themselves within their autonomy, which is one of the fundamental principles of both contract law and arbitration.[24] As stated in *Alco Steel Pty Ltd. v*. *Torres Strait Gold Pty Ltd* by Justice Giles, "what is enforced in these procedures is not co-operation and consent but participation in a process from which cooperation and consent may come."[25]

Thus, if there is a clear requirement for the parties to initiate negotiation or mediation, arbitral tribunals should decide that the clause is enforceable unless applicable law states to the contrary. A relevant question is whether the parties' obligations and the implications for arbitration are sufficiently clear and certain to be given legal effect.[26] It is also believed that time restrictions make negotiation or mediation clauses enforceable.[27]

These conclusions also hold under Polish law. Civil Code Art. 60 provides: "Subject to exceptions provided for by statute, the intention of a person performing a legal action may be expressed by any behaviour of that person which manifests the person's intention sufficiently, including intent expressed in electronic form (declaration of intent)."

Commentators explain that only behaviour aimed at exertion of legal effects, such as creation, modification or termination of a legal relationship, can be perceived as a declaration of intent. It must affect the existence and scope of the parties' legal duties.[28]

A declaration of intent depends on the parties' will to cause certain legal effects, such as an obligation to initiate mediation before pursuing arbitration.[29] If the

[23] See judgment of the Court of Appeal in Łódź dated 8.05.2015, docket no. I ACa 255/15 which states that: „The contractual clause stipulating the parties' duty to negotiate before pursuing claims in arbitration is not a clause which may invalidate the arbitration clause. [...] It is obvious that, firstly the parties try to settle their dispute amicably and, only in case they fail do so, they turn to adjudication." However, the Court of Appeal did not analyze if such clause has any other legal effects.
[24] D. Kayali, *op.cit.*, p. 568.
[25] (1992) 28 NSWLR 194 at 206, quoted by M. Pryles, *op.cit.,* p. 27.
[26] *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors* (2012), EWHC 3198 (Ch) (14 November 2012), para. 60, http://www.bailii.org/ew/cases/EWHC/Ch/2012/3198.html, 15.11.2015.
[27] Judgment of 6.06.2007. 4, A_18/2007, ASA Bulletin 2007, no. 1, pp. 87-102; Ch. Boog, *op.cit.,* p. 105; C. Klaus, M. Liatowitsh, *Mediation*, in: G. Kaufmann-Kohler, B. Strucki (eds), *International Arbitration in Switzerland*, The Hague 2004, p. 234.
[28] P. Machnikowski, *Commentary to Article 60 of the Civil Code*, in: E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz* (*Civil Code. Commentary*), 6th ed., Legalis.
[29] Judgment of the Supreme Court dated 21.1.2003 r., docket no. III RN 6/02, Legalis no. 94235.

parties agree that they 'will attempt to settle the case amicably', such declaration does not include the intention to create legally binding obligations and therefore it cannot be treated as a declaration of intent as defined above. It is a declaration of a different kind, merely stating that the parties will make an effort to resolve their dispute on their own, without any legal consequences.

To sum up, whether a multi-tiered dispute resolution clause is enforceable depends on the particular construction of the clause. These clauses are subject to interpretation like any other kind of contractual provision, in accordance with the rules set forth in Civil Code Art. 65. If it is sufficiently clear that the parties intended mediation or negotiations to be commenced before pursuing arbitration, then the clause constitutes a declaration of intent exerting legal effects in accordance with Civil Code Art. 60. Therefore, it should be deemed enforceable.

Enforceable Multi-tiered Dispute Resolution Clauses under Polish Law

The concepts of the effects of multi-tiered dispute resolution clauses will be analyzed on the basis of two examples of such clauses referring disputes to arbitration in accordance with the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce ("PCC Arbitration Rules") and stating particular pre-arbitration requirements.

Clause No. 1

Any disputes arising out of or related to this agreement shall be finally settled under the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce. No party may commence any arbitration in relation to any dispute arising out of or related to this agreement until it has attempted to settle the dispute by mediation in accordance with the Mediation Rules of the Court of Arbitration at the Polish Chamber of Commerce.

Clause No. 2

In the event of any dispute arising out of or in connection with the present agreement, the parties shall initiate negotiations. If the dispute has not been settled within 45 days following the invitation to negotiate, such dispute shall be finally settled under the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce.

Admissibility: pre-arbitration Requirement as a *Pactum de non Petendo*

The concept of assessing the effects of multi-tiered dispute resolution clauses as a matter of admissibility may also be found in the Polish literature.[30] However, the admissibility approach under Polish law seems to be understood in

[30] E. Kajkowska, *op.cit.*, p. 282 *et seq*.; T. Wiśniewski, M. Hauser-Morel, *Postępowanie arbitrażowe* (*Arbitration Proceedings*), in: A. Szumański (ed.), *System prawa handlowego. Arbitraż handlowy* (*The System of Commercial Law. Commercial Arbitration*), Vol. 8, Warsaw 2015, p. 564; M. Tomaszewski, *Umowa o Arbitraż* (*Arbitration Agreement*), in: A. Szumański (ed.), *op.cit.*, p. 380,

quite a different manner than in the international literature. Namely, it appears that admissibility is regarded as a substantive matter.[31]

M. Tomaszewski proposes that an arbitration agreement made under the condition that the parties attempt to negotiate the dispute for a particular period of time, like Clause No. 2, should be qualified as a "particular type of *pactum de non petendo*").[32] According to this concept, the respondent may raise a defence that the claim is premature as the parties have not been involved in negotiations. Such a defence pertains to the merits of the dispute and leads to dismissal of a claim without any adverse effect as to jurisdiction of the arbitral tribunal.

However, there is a concern that such a *pactum de non petendo*, limiting the claimant's right to seek redress in arbitration for a particular period of time, is contrary to a mandatory provision of Polish law (Civil Code Art. 119) prohibiting shortening of limitations periods by the parties' agreement. As a consequence, it exceeds the scope of the freedom of contract (Civil Code Art. 353^1) and may not be deemed to be enforceable.[33] Taking this into consideration, M. Tomaszewski seems to give no effect to the clause regarding the duty to negotiate for a particular period of time (Clause No. 2) as neither affecting the jurisdiction of the arbitral tribunal nor being enforceable as a contract.

This theory is worth examining in detail. It takes its origin from German law, to which the Polish legal system is similar. *Pactum de non petendo (Stillhalteabkommen)* is accepted in the German case law and literature as a contractual mechanism which freezes the right to pursue particular claims before state courts until an ADR procedure is followed. Breach of such an agreement would lead to dismissal of a claim as being inadmissible.[34]

It should be noted that under Polish law *pactum de non petendo* is used in the context of release from debt, which is regulated in Civil Code Art. 508. Scholars describe it as an agreement whereby a creditor will not file a suit for payment of a debt which is acknowledged by the debtor for a particular period of time.[35] Such an agreement is commonly accepted as permissible under freedom of contract.[36] Acknowledgement of the debt, which is said to be an inherent part

[31] See M. Tomaszewski*, op.cit.*, p. 380 who concludes "*Pactum de non petendo* is of substantive law character and therefore creates a basis only for the debtor to bring before an arbitration court a substantive law pleading that the creditor's pursuing a claim before the lapse of the period for a tentative settlement is premature".
[32] *Ibidem*.
[33] *Ibidem.*
[34] A. Loos und M. Brewitz, *Hindert eine Mediationsvereinbarung an der Klage? – Wie lange?* (*Does Mediation Agreement Undermine Bringing an Action? – How Long?*), SchiedsVZ 6/2012, p. 305 *et seq*.; A. Hacke, *Der ADR-Vertrag. Vertragsrecht und vertragliche Gestaltung der Mediation und anderer alternativer Konfliktlösungsverfahren* (*Agreement On ADR. The Contract Law and the Form of Agreements to Meditate or to Pursue Other Alternative Dispute Resolution Methods*), Heidelberg 2001, p. 116 quoted by E. Kajkowska, *op.cit*., p. 127.
[35] K. Zagrobelny, *Commentary to Article 508 of the Civil Code*, in: E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz* (*Civil Code. Commentary*), 6th ed., Legalis.
[36] M. Pyziak-Szafnicka, *Wygaśnięcie zobowiązań* (*Termination of Obligations*), in: A. Olejniczak (ed.), *System prawa prywatnego. Prawo zobowiązań - część ogólna* (*The System of Private Law, The Civil Law – General Part*), Vol. 6, Warsaw 2014, pp. 1615-1616 and literature referred therein; judgment of the Supreme Court dated 16.10.2009, docket no.

of *pactum de non petendo*, interrupts the running of the limitations period in accordance with Civil Code Art. 123 §1(2).

There is also an interesting question regarding the consequences of breach of a *pactum de non petendo*. The only publicly available judgment[37] on point states that "breach of such an agreement can result in neither dismissal of the statement of claim (*odrzucenie pozwu*) nor denial of the claim as inadmissible (*oddalenie powództwa*), but only in contractual liability of the debtor.[38] However, Polish scholars accept the idea of *pactum de non petendo* as a defence against admissibility of the dispute, as it means that the claim is not yet ripe.[39]

In case of multi-tiered dispute resolution clauses, a *pactum de non petendo* involving negotiation or mediation does not include acknowledgement of the claim being pursued by the claimant. The concern regarding its inconsistency with Civil Code Art. 119 is justified when the clause provides for an obligation to negotiate or involves any procedure other than mediation (Clause No. 2). The authors agree with M. Tomaszewski's conclusion that a *pactum de non petendo* which makes the right to pursue claims in arbitration conditional upon negotiation is not enforceable under Polish law and affects neither the jurisdiction of the arbitral tribunal nor its decision on the merits of the claim.

The situation is different in the case of mediation. Under Civil Code Art. 123 §1(3), commencement of mediation interrupts the limitations period, and thus Clause No. 1 can be enforceable under Polish law as a *pactum de non petendo*. The effect of this qualification is twofold. Firstly, in arbitration commenced without the attempt to settle the dispute in mediation (Clause No. 1), the respondent can raise a defence that the claim is premature, which would result in its dismissal on the merits. Secondly, the respondent can seek damages for breach of contract under Civil Code Art. 471.

The decision of an arbitral tribunal to dismiss a claim may be subject to review in a proceeding to set aside the award or for recognition or enforcement of the award. But if the state court agrees with the qualification of a pre-arbitration requirement as a *pactum de non petendo*, it can only consider dismissal of the claim under the public policy clause (Civil Procedure Code Art. 1206 §2(2)). It is highly unlikely that a decision to give effect to a *pactum de non petendo* as a defence to admissibility of a claim would be found contrary to fundamental principles of Polish public policy. It would rather be qualified as a matter of interpretation of substantive law, which cannot serve as a basis for finding a public policy violation.[40] Even if a state court reviewing the award supports the

I PK 89/09, Legalis no. 288284; judgment of the Court of Appeal in Łódź dated 20.05.2014, docket no. I ACa 1501/13, Legalis no. 1024035 – however both judgement state that enforceability of *pactum de non petendo* may be questioned in cases which regard debts that are guaranteed by law, e.g. employee's remuneration (on the basis of Article 58 § 1 of the Civil Code in connection with Article 84 of the Labour Code).

[37] As of 15.11.2015.

[38] Judgment of the Court of Appeal in Łódź dated 20.05.2014, docket no. I ACa 1501/13, Legalis no. 1024035.

[39] K. Zagrobelny, *Commentary to Article 508 of the Civil Code*, in: E. Gniewek, P. Machnikowski (eds), *op.cit.*, 6th ed., Legalis.

[40] Judgment of the Supreme Court dated 13.02.2014, docket no. V CSK 45/13, Legalis no. 993320; judgment of the Supreme Court dated 15.05.14, docket no. II CSK 557/13, Legalis no. 1048697.

jurisdictional approach to multi-step dispute resolution clauses, the respondent's failure to raise a timely objection to the jurisdiction of the arbitral tribunal during the arbitration proceedings would most likely prevent the court from reviewing the award under Civil Procedure Code Art. 1206 §1(1).[41]

Furthermore, E. Kajkowska, who in principle is a supporter of the admissibility approach, proposes that breach of an undertaking to fulfil a pre-arbitration requirement should result in the arbitral tribunal's decision to stay the proceedings.[42] This solution has its origin in common-law systems and is said to better suit the nature of arbitration.[43] Proponents of this concept argue that there is no point in dismissal of claims, as the proceeding will have to be commenced again if the parties are unsuccessful in returning to the stage of mediation (Clause No. 1) or negotiations (Clause No. 2).[44] The authors of this paper suggest that it is possible to employ the concept of staying the proceedings in case of inadmissibility of claims in arbitration under the PCC Arbitration Rules. §36(3) of the PCC Arbitration Rules provides that the arbitral tribunal may stay the proceeding if there are circumstances preventing its continuation. The broad wording of this provision gives the arbitrators the power to stay the proceeding also in case of non-fulfilment of pre-arbitration requirements stipulated in the agreement. A decision to stay the proceeding will not be found to be a basis for ruling against an award in post-arbitration litigation, as it was made upon the rules of procedure agreed by the parties.

When the proceeding is stayed, a claimant who has a vital interest in resumption of the proceeding should initiate mediation by filing an application for mediation in accordance with the PCC Mediation Rules and pay the mediation fee (Clause No. 1) or make an attempt to negotiate with the respondent (Clause No. 2).

In the case of Clause No. 1, the respondent's refusal to participate in mediation does not preclude the claimant from seeking a decision from the tribunal to resume the proceeding. As mediation is a voluntary process (Civil Procedure Code Art. 183), the claimant's application for mediation can be deemed enough to satisfy the pre-arbitration requirement set out in Clause No. 1.[45] Therefore, the tribunal can order resumption of the proceeding in accordance with § 36 (4) of the PCC Arbitration Rules as the reason for staying the proceeding.

In case of Clause No. 2, the claimant should invite the respondent to negotiate the dispute e.g. by sending an e-mail or a letter. After the lapse of a 45-day period, in which no settlement is concluded, even if the respondent did not answer the invitation, the claimant can ask the tribunal to order resumption of the proceedings.

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[41] Resolution of the Supreme Court dated 21.1.2009, docket no. III CZP 136/08, Legalis no. 11499, see also M. Łaszczuk, J. Szpara, *Postępowania postarbitrażowe* (*Post-Arbitartion Proceedings*), in: A. Szumański (ed.), *op.cit.*, p. 700.
[42] E. Kajkowska, *op.cit.*, p. 313 *et seq*.
[43] A. Jolles, *op.cit.,* pp. 336–337.
[44] *Ibidem*.
[45] See ICC award no. 8445 in which the tribunal stated that the parties do not have to engage in "fruitless negotiation" *Manufacturer* v. *Manufacturer*, Final Award, ICC Case no. 8445, 1994, in: Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2001,* Volume XXVI, pp. 167–180.

Jurisdiction: pre-arbitration Requirement as a Condition under Civil Code Art. 89

It is commonly accepted in the Polish literature that an arbitration agreement can be made conditional upon a contingent future event.[46] The parties can stipulate either a condition precedent, fulfilment of which activates the legal effects of the arbitration agreement, or a condition subsequent as a result of which the agreement ceases to be in force.[47]

The justification for this position depends on the particular theory of an arbitration agreement. Namely, proponents of the notion of an arbitration agreement as a substantive law agreement *sensu stricto* apply the Civil Code provisions relating to conditions directly, whereas proponents of the purely procedural character of an arbitration agreement accept application of substantive law as relevant, only as a matter of exception.[48]

A multi-tiered dispute resolution clause providing for an obligation to fulfil pre-arbitration requirements can be interpreted as a conditional agreement, where initiation of mediation (Clause No. 1) or engaging in negotiations (Clause No. 2) is a condition precedent.[49]

The fact that both mediation and negotiations require consent does not undermine their qualification as a legally binding condition in the meaning of Civil Code Art. 89. According to the contemporary literature,[50] it is consistent with

[46] T. Ereciński, K. Weitz, *Sąd arbitrażowy* (*Arbitration*), Warsaw 2008, p. 104; R. Kulski, *Umowy procesowe w postępowaniu cywilnym* (*Procedural Agreements in Civil Proceedings*), Warsaw 2006, LEX; M. Tomaszewski, *op.cit*., p. 350; K. Potrzobowski, W. Żywicki, *Sądownictwo polubowne. Komentarz dla potrzeb praktyki* (*Arbitration. Commentary for the Purpose of Practice*), Warsaw 1961, p. 20; W. Siedlecki, *O tzw. umowach procesowych* (*On Procedural Agreements*), in: Z. Radwański (ed.), *Studia z prawa zobowiązań* (*The Studies on Obligation Law*), Warsaw 1979, p. 174; S. Dalka, *Sądownictwo polubowne* (*Arbitration*), Warsaw 1987, pp. 66–67; A. Monkiewicz, *Zapis na sąd polubowny* (*Arbitration Agreement*), Radca Prawny 2001, no. 5, p. 45; E. Samsel, *Treść umowy arbitrażowej* (*The Content of the Arbitration Agreement*), Radca Prawny 2004, no. 1, p. 110; R. Morek, *Mediacja i arbitraż* (*art. 183[1]–183[15], 1154–1217 KPC). Komentarz* (*Mediation and Arbitration (Art. 183[1]–183[15], 1154-1217 CPC). Commentary*), Warsaw 2006, pp. 134–135; Ł. Błaszczak, M. Ludwik, *Sądownictwo polubowne* (*Arbitration*), Warsaw 2007, p. 120; see also judgment of the Supreme Court dated 27.11.2008, docket no. IV CSK 292/08, Legalis no. 117886 and judgment of the Court of Appeal in Warsaw dated 18.06.2015, docket no. I ACa 1822/14, orzeczenia.ms.gov.pl, 14.11.15 which regard a condition subsequent only.

[47] T. Ereciński, K. Weitz, *op.cit.*, pp. 104-105.

[48] *Ibidem*.

[49] *Ibidem.*

[50] R. Trzaskowski, *Właściwość (natura) zobowiązaniowego stosunku prawnego jako ograniczenie zasady swobody kształtowania treści umów* (*The Nature of Obligation as the Limition of the Freedom of Contract*), Kwartalnik Prawa Prywatnego 2000, no. 2, pp. 360–361; Z. Radwański, *Treść czynności prawnej* (*The Content of the Legal Acts*), in: Z. Radwański (ed.), *System prawa prywatnego*. *Prawo cywilne - część ogólna* (*The System of Private Law. The Civil Law – General Part*), Vol. 2, Warsaw 2008, p. 265; M. Pazdan, *Commentary to Article 89 of the Civil Code*, in: K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz* (*Civil Code. Commentary*), 8th ed., Legalis; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne* (*Civil Law*), Warsaw 1998, p. 324; A. Janiak, *Commentary to Article 89 of the Civil Code*, in: A. Kidyba (ed.), *Kodeks cywilny. Komentarz. Część ogólna* (*Civil Code. Commentary. General Part*), Vol. I. LEX; J. Zawadzka, *Warunek w prawie cywilnym* (*Condition in civil law*), Warsaw 2012, p. 204.

the essence of a condition to make the consequences of a legal act contingent upon a potestative condition, understood as making the effectiveness of a legal act contingent upon an event whose occurrence or non-occurrence has been left at the sole discretion of a party or the parties to that legal act. However, a potestative condition should be distinguished from a *si voluero* clause (purely potestative condition), which is not considered a condition under Civil Code Art. 89. In the case of a potestative condition, the decision on fulfilment of the condition is not connected with the decision to assume the obligation—these decisions are therefore not necessarily linked, whereas in the case of a *si voluero* clause the effects of a legal act depend on the declaration of a party as to whether it wishes to be bound by the consequences of the legal act.[51]

Mediation and negotiation are, indeed, events separate from the declaration of intent which forms the arbitration agreement, and thus their occurrence can be made contingent upon a party or the parties' consent.

In order to conclude that a pre-arbitration requirement stipulated in a multi-step clause constitutes a condition, one should pursue interpretation of the agreement in accordance with Civil Code Art. 65. Thus, such a conclusion will be based on the assumption that the parties intended to exclude arbitration in case of non-fulfilment of the ADR procedures set out in the agreement. Resignation from the pre-arbitration requirement annuls the negative effect of the arbitration agreement[52] and takes the dispute back before the state court.

An arbitration agreement that is made conditional upon mediation or negotiations has no legal effect until the condition stipulated in the agreement is met. Consequently, if the respondent objects to the jurisdiction of the tribunal, the tribunal should rule that it is not competent to resolve the dispute. Non-fulfilment of the conditions upon which an arbitration agreement was concluded is an example of the arbitration agreement being ineffective in the meaning of Civil Procedure Code Art. 1206 §1(1).[53]

However, the strict nature of the jurisdictional theory can be remedied in two ways. Firstly, in the case of clauses in which an action of a single party is enough to fulfil the agreement (Clause No. 1—application for mediation), the arbitral tribunal should consider issuing an order to stay the proceeding (again, on the basis of §33 of the PCC Arbitration Rules) to encourage the claimant to fulfil the procedural step agreed by the parties.

Secondly, in a situation in which a multi-tiered clause requires cooperation of both parties without any time restriction (if Clause No. 1 stated, "No party may commence any arbitration in relation to any dispute arising out of or related to this agreement until they have attempted to settle the dispute by mediation…") and the respondent does not give its consent to mediation, in order to prevent arbitration, application of Civil Code Art. 93 §1 can be considered. If a party interested in non-fulfilment of a condition impedes fulfilment of the condition in violation of principles of community life, the effect will be as if the condition had been fulfilled.[54] Thus, if the respondent's refusal to consent to mediation is

[51] J. Zawadzka, *op.cit.*, pp. 204-205.
[52] See M. Tomaszewski, *op.cit.*, pp. 330-331.
[53] M. Łaszczuk, J. Szpara, *op.cit*., p. 700.
[54] Z. Radwański, *op.cit.*, pp. 271-273.

found to be in violation of principles of community life, the arbitral tribunal can proceed with the case, treating the arbitration agreement as having become effective.

The jurisdictional theory is applicable also in the case of multi-step clauses involving a restriction of a particular period of time for performance of pre-arbitration procedures (term) as stipulated in Clause No. 2. As a rule, if the statement of claim was filed after an effective application for mediation was made but before the end of the given term, the tribunal will uphold the respondent's objection and find itself incompetent to resolve the case. However, in such circumstances, it would also be practical to stay the proceeding because it is only a matter of time before a period of, for example, 45 days lapses, the arbitration agreement becomes effective, and the tribunal will be able pursue the proceeding.

Conclusions

This analysis led the authors to the following conclusions. Under general rules of interpretation stemming from the Civil Code, only clauses that are clearly worded and intended to exert legal effects by creating an obligation to fulfil pre-arbitration requirements are enforceable.

In order to ensure the enforceability of such clauses, it is advisable to stipulate a term in which a specifically described ADR procedure should be conducted. The authors of this paper recognize that under Polish law there are two theories regarding the legal effects of multi-step clauses: the first concerning admissibility of claims, which are said to be premature, and the second theory pertaining to the jurisdiction of the arbitral tribunal if a condition precedent is not fulfilled.

The concept of claims being premature as a result of a *pactum de non petendo* is a purely substantive law notion, which is usually applicable in the context of release of debt. It seems to be the only solution under Polish law justifying the concept of admissibility, which is widely recognized in international arbitration. But it can be used only to enforce multi-tiered clauses involving mediation (Clause No. 1).

On the other hand, the jurisdictional approach takes its origin from the assumption that arbitration agreements can be conditional, which is supported by both the case law and the literature. Until the pre-arbitration requirements (mediation or negotiations) are met, the arbitration agreement is ineffective within the meaning of Civil Procedure Code Art. 1206 §1(1), and thus an award rendered in such circumstances can be set aside. The jurisdictional approach is based on the strong presumption that in case of non-fulfilment of ADR procedures, the parties intend to exclude arbitration and have their case resolved by a state court, which in many instances may be unrealistic. The severity of the jurisdictional approach can be mitigated by applying Civil Code Art. 93, which may be a remedy in a situation where the respondent wilfully refuses to participate in mediation or negotiations, which is required by the agreement as a condition to pursue arbitration.

The acceptance of the first theory would result in dismissal of claims which are deemed to be premature on the basis of *pactum de non petendo*. On the other

hand, adoption of the jurisdictional approach would result in a ruling by the arbitral tribunal that it lacks jurisdiction. However, from the practical point of view, it may be suggested that if the pre-arbitration requirements are not met, the arbitral tribunal should issue an order staying the proceeding. This solution encourages the parties to really use the dispute resolution mechanism which they created in their agreement.

Finally, the authors recommend that when drafting multi-tiered dispute resolution clauses, the parties should pay careful attention to their clarity and the expected outcomes. To prevent attempts at avoiding arbitration, the parties should include in their agreement a specific restriction that "the obligation to pursue negotiations (or mediation) is without prejudice to commencement of arbitration."

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The Looming Threat of Judicialization of Arbitration and Means of Combating it – Remarks on the Current Statistics and Trends

Kuba Gąsiorowski*

I. Reasons to be concerned – current Landscape of International Arbitration

In his opening remarks at 2015 Vienna Arbitration Days, Peter Rees asked whether arbitration can still deliver. Subsequently Mr. Rees said that while arbitration lawyers promise to businesses fast, affordable and good quality dispute resolution, in reality those promises are often not fulfilled. In fact, this concern has been voiced repeatedly in the academic and professional literature on the international commercial arbitration for over the last thirty years.[1] Even more disturbingly, the newest joint Queen Mary and White & Case *2015 International Commercial Arbitration Survey* ("*QM Survey*") clearly shows that fifteen years into 21st century widely repeated formula about benefits of arbitration (the famous "trio": speed, costs, quality) has become nothing more than a cliché. The summary of the *QM Survey* even goes as far as to state that: "«cost>» is seen as arbitration's **worst feature, followed by** «lack of effective sanctions during the arbitral process», «lack of insight into arbitrators efficiency» and «**lack of speed**» [emphasis added]".[2]

Some authors attempt to downplay that issue by stating that lengthy and costly arbitral proceedings take place only in complicated commercial cases[3] – how-

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[1] A. Redfern, M. Hunter, N. Blackaby, C. Partasides, *Law and practice of international commercial arbitration,* 4th ed., Sweet & Maxwell, London 2004, p. 288.

[2] *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at: http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015.pdf

[3] A. Karwowska, *Arbitration as a reply to challenges of modern market,* Education of economists and Managers, issue 3/2011 (*Sądownictwo arbitrażowe jako odpowiedź na wyzwania współczesnego rynku*, Edukacja ekonomistów i menadżerów, nr 3/2011), p. 169.

ever it is precisely for that kind of cases that arbitration promises to improve over state courts. Arbitration is rarely viewed as alternative dispute resolution process for simple cases involving relatively modest amounts of money. In such cases, arbitration users presumably prefer state court proceedings, such as Polish various expedited court proceedings for orders for payment (e.g. article of 484[1] and subsequent of Polish Code of Civil Procedure[4]). Moreover, another source, a 2012 report prepared for the European Commission ("*EC Survey*"), shows that even in "smaller" international arbitration cases the expenses are substantially higher than in state courts. In cross-border disputes companies spent on average 13.000 euros when they used a state court compared to 21.300 euros when they used an "arbitration style ADR scheme".[5]

Against this background arbitration in Poland appears to be in a relatively healthy situation. Poland remains a popular arbitration jurisdiction. There were years during which the Court of Arbitration at the Polish Chamber of Commerce accepted more cases than the renowned ICC Court in Paris.[6] As reported, an arbitration case takes on average eight months to solve in one of the Polish leading arbitration institutions.[7] In terms of costs – if one compares the fees for leading Polish arbitration permanent courts and state courts, arbitration in some cases may be more expensive, however one has to keep in mind that the costs of arbitral institutions provide for fracture of overall costs of arbitration.[8] What is important, is that Polish arbitration community represents an honest pragmatic approach to the situation of arbitration, believing that the advantages of arbitration should not be exaggerated and parties have to be informed both about positive and negative aspects of that ADR process.[9]

Still that does not solve the problem which contributes in Poland to a sense of a "glass roof" for arbitration that cannot be penetrated. In first place that phenomenon is linked to deficit of information about availability of arbitration on the part of businesses.[10] This seems to be supported to certain extent by the EC Survey, according to which 17% of business did not use "arbitration-style ADR" because they had no knowledge of its existence. However a higher percentage of answers was allocated to lengthiness of proceedings (19%) and to relative too high costs as compared to amounts involved (19%).[11] In result, to paraphrase Alexander Hamilton – the founding father of American financial supremacy – arbitral community may lose its breath while preaching businesses about arbitration without gaining a single convert, if arbitration itself does not live up to its promises.

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[4] As restated and amended in Journal of Laws 2014.101.
[5] *Business-to-Business Alternative Dispute Resolution in the EU*, November 2012, p. 8, available at: http://ec.europa.eu/public_opinion/flash/fl_347_en.pdf.
[6] P. Nowaczyk, *Perspectives for development of arbitration in Poland*, ADR Quarterly, no. 1/2009 (*Perspektywy rozwoju sądownictwa polubownego w Polsce*, Kwartalnik ADR, nr 1/2009), p. 145–146.
[7] A. Karwowska, *Arbitration…*, p. 172. It remains however unclear whether this refers also to cross-border disputes.
[8] See J.C. Najar, *Inside out: a user's view of International Arbitration*, p. 3, available at: https://www.claytonutz.com/ialecture/2008/transcript_2008.html.
[9] J. Zandberg Malec, *Arbitration not for small ones* (*Arbitraż nie dla małych*), available at: http://www.codozasady.pl/arbitraz-nie-dla-malych/.
[10] P. Nowaczyk, *Perspectives…*, p. 147.
[11] *EU Survey...*, p. 35.

II. Judicialization of International Arbitration

There are several threats that are impeding the development of international arbitration in Poland and other countries, which can be jointly labeled as "judicialization of arbitration".[12] In other words, international arbitration is increasingly starting to resemble to litigation before state courts. The arbitration is becoming more complicated, with extensive written submissions and lengthy evidentiary proceedings, with more and more emphasis on fixed rules.

By some, this is viewed as a positive development which leads to greater predictability of awards and better safeguards for due process.[13] It seems that for proponents of judicialization, arbitration's role is not to be an alternative for court system but a court's equivalent,[14] only neutral in terms of national affiliations, or at times better prepared to solve the dispute due to arbitrators' knowledge of particular business. Others consider it a threat that is about to destroy the very fabric of arbitration as alternative to state court system: its flexibility and informality, leading to faster and cheaper dispute resolution.

The truth, as usual, lies in-between. Judicialization as such undoubtedly brings some positive aspects to arbitration – first and foremost more professionalism on part of arbitrators and counsels which leads to better, more just conduct of proceedings and better decisions. The true difficulty concerns balancing advantages of judicialization, without sacrificing speed and affordability of arbitration.

The main issue with judicialization seems to be the increasing unnecessary complication of the proceedings, something that the respondents to the QM survey referred to as "overlawyering".[15] As ICC points rightly out, there is a correlation between this unwanted complicating of arbitration and increase of costs and time for resolution of the dispute: "the increasing […] complication of the proceedings seems to be the main explanation of the long duration and high costs of many international arbitrations. The longer the proceedings, the more expensive they will be".[16] This observation leads to a common sense conclusion that the major way to make arbitration less expensive and lengthy is to simplify the procedure itself.

However such "simplification" should not be read as a call for cutting the rules of arbitral institutions. The rules of the most important institutions are rela-

[12] P. Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice*, Kluwer Law International 1999, p. 22.
[13] See for summary of that position: E. Leahy in: E. Leahy, C.J. Bianchi (ed.), *The Changing Face of International Arbitration*, Journal of International Arbitration, Vol. 17, Issue 4, p. 19–62.
[14] G. Horvath calls that phenomenon a "private litigation" – see: G.J. Horvath, *The judicialization of International Arbitration: Does the increasing introduction of litigation-style practices, regulations, norms and structures into International Arbitration risk a denial of justice in international business disputes?*, in: S. Kröll, L.A. Mistelis et. al (ed.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Kluwer Law International 2011, p. 258.
[15] *QM Survey...*, p. 8.
[16] *ICC Commission Report: Controlling Time and Costs in Arbitration,* p. 6, available at: http://www.iccwbo.org/Data/Policies/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration,-2012/.

tively brief compared to national procedural regulations for state courts – it is simply as short as it can get for proper examination of a dispute. It is rather the way those rules are applied and how the proceedings are administered – by arbitrators, by parties' counsels and by arbitral institutions along with arbitral community. In result, it is worth to examine all of the above three perspectives in terms of their shortcomings in conducting the arbitration and means for improvement.

III. The Role of the Arbitrators

The first phase at which prospective arbitrator may help to make arbitration cost- and time-effective is the moment of his appointment. In most instances, the judge with hundreds of cases on his docket has no choice whether he can or not take another case as compared to arbitrator. Therefore arbitrators should avoid turning themselves into the very creatures they complain about – i.e. "overloaded judges". If a candidate for an arbitrator does not have time – due to professional, academic or personal obligations – to take part in the case, the appointment should be turned down without hesitation. An arbitrator who is snowed down under work at his own law firm or at the university will be a liability for the proceedings, impeding with the tribunal's ability to resolve the dispute.[17]

Secondly, arbitrators (although it is increasingly being also expected of judges, see article 10 of the Polish Code of Civil Procedure) are required to actively engage in settlement facilitation.[18] The only reasonable limit for tribunal's effort to facilitate settlement is enforceability of its award.[19] An arbitrator with a history of successful settlement attempts will surely be more often chosen for resolving disputes in the future.

The third issue regards case management. The QM Survey provides a description of arbitrators' handling of case which could easily fit as a pattern for state court's judges behavior (also in Poland): "Many interviewees described situations where deadlines were repeatedly extended, fresh evidence was admitted late in the process, or other disruptive behavior by counsel was condoned due to what was perceived to be a concern by the tribunal that the award would otherwise be vulnerable to challenge".[20] Such conduct was labeled as "reluctance by tribunals to act decisively" and "due process paranoia".[21] Surprisingly, those are the exact features of a judge that arbitrators surely complain about when they act on the other side of the bench as counsels in litigation before state courts. In other words, it turns out that arbitrators imitate judge-like behavior.

However as far as challenge of an award before Polish courts is concerned there seem to be enough reasons for arbitrators not to worry if they want to handle

[17] As indicated by J. Paulsson, N. Rawding, L. Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts*, Kluwer Law International 2011, s. 88: "Many users of arbitration, and practitioners, have complained about increasing delays in the process. Among the reasons for this is a difficulty in securing time in the diaries of busy arbitrators to attend hearings and deliberations, and to write awards".
[18] G.J. Horvath, *The judicialization …*, p. 263.
[19] *ICC Commission Report…*, p. 11.
[20] *QM Survey...*, p. 10.
[21] *QM Survey...*, p. 2.

the case decisively, as Polish case law recognizes need for flexible and expedite manner of proceedings in arbitration. In one decision the Polish Supreme Court noted: "There is a great autonomy of arbitral proceedings which fully conforms with the law".[22] In a different decision the Appellate Court in Warsaw stated that an arbitral tribunal may refuse to admit evidence if it considers it not useful for the case.[23]

The means for expediting the arbitration and making it more of a valuable experience for the parties are already in place – the most important of them being:

a) a preparatory conference between arbitrators and the parties to organize the proceedings, determine the main issues, order, number and length of written submission, dates and order of introducing the evidence – this gives the parties a sense that the tribunal has a plan for the case,
b) the terms of reference or a schedule of the proceedings, which "codifies" what was agreed to during the preparatory conference,
c) sanctioning counsels for dilatory tactics, for example by refusing late evidence or changes in the terms of reference or by cutting their fees in the award.

All of the above suggestions made it to "top 5" of the technics for controlling times and cost in arbitration in QM Survey.[24] This shows that arbitrators should make active use of existing tools. In managing the proceedings it might also be useful for the arbitrators to turn to UNCITRAL's "Notes on Organizing Arbitral Proceedings" or the ideas contained in the ICC's "Commission Report on Controlling the Time and Costs in Arbitration". It can be added, that arbitrators always need to be aware of counsels with litigation background who may try to import litigation technics into arbitration. Any such attempts should be cut short at their very outset. Arbitrators have to use "intelligent firmness", as G. Bernini called it.[25] Arbitrators should not be reluctant of decisive case management out of fear that this may impair their future appointments – parties will presumably be more willing to appoint such arbitrator for their other cases than the one who allowed the proceedings to last far too long. In fact, parties who experience bad case management in arbitration are far more likely to never again use this type of ADR at all.

Tribunal's should also utilize – with help of the arbitral institutions – modern technologies. A hearing can be arranged by a video-conference which will both reduce time and costs (for example travel expenses of arbitrators and parties' counsels) or the tribunal may sent hearing notifications to the parties by e-mail. The arbitral tribunals should not mimic the removed and formal communication between the judges and counsels at the state courts.

[22] Decision of the Polish Supreme Court of 9th July 2008, V CZ 42/08, LEX no 465913.
[23] Decision of the Appellate Court in Warsaw of 10th December 2008, I ACa 655/08, Apel.-W-wa 2010/3/21.
[24] *QM Survey...*, p. 25.
[25] G. Bernini, *The Future of Arbitration: Flexibility or Rigidity?*, in: J. Lew, L.A. Mistelis (ed.), *Arbitration insights. Twenty years of the Annual Lecture of the School of International Arbitration Sponsored by Freshfield Bruckhaus Deringer,* Kluwer Law International 2007, p. 55.

All of the above mechanisms will surely allow for better administration of arbitration without sacrificing due process and fairness of the award.

IV. The Role of Counsels

While it cannot be said – as C. Florescu states – that counsels are primary to blame for turn of arbitration towards judicialization, still it is true that while arbitral lawyers call for "the speed of others" (arbitrators and institutions) they themselves often are responsible for raising costs and duration of the proceedings.[26] However, efficient procedure requires good faith collaboration of all of the involved persons.[27]

Thus, to begin with, counsels with litigation background have to avoid brining their habits from the state court proceedings into arbitration.[28] Second, parties' representatives need to be more pro-active in the proceedings both towards the tribunals and opposing counsels. In this case, "pro-activity" is not an empty phrase as the respondents from the QM survey themselves explicitly pointed out where they would like their counsels to be more active.

It begins with "stronger pre-appointment scrutiny of prospective arbitrators' availability".[29] Counsels are thus expected to conduct more in-depth inquiry whether they selected candidates for arbitrators will have time to examine the case. Subsequently, 66% of respondents would like their lawyers to work closer with the opposing counsel to narrow the issues of the case, followed by 62% for the same request in terms of document production (which can be applied in general to gathering of evidence in absence of production). 60% of respondents indicated that lawyers should work more towards achieving a settlement.

There are a few things that could be added to that list. In state court – as contrasted with arbitration – a counsel has little influence over the management of the case by the judge, so lawyers should make every use of the opportunity that arbitration gives in that regard. Counsels ought to begin with making sure that arbitrators they recommend to their clients have strong case management skills.[30] Subsequently, in the course of the proceedings counsels should act as their clients' "watch-dogs" and ensure that the tribunal and opposite counsel complies with the procedural schedule, as far as it concerns deadlines and allowed activities (e.g. oppose when the other party's lawyer files additional brief which was not provided for in the terms of reference). It has to be remembered that counsels are not defenseless in case of tribunal's violations of the terms of reference and it may happen that tribunal will have to be tactfully reminded of that. Should the tribunal violate the "rules of the game" agreed upon at the outset of arbitration in a manner which would amount to unequal treatment of

[26] C. Florescu, *The Arbitration Agreement and Arbitrability, Towards Achieving Efficiency in International Arbitration*, in: G. Zeiler, I. Welser *et al*. (eds.), *Austrian Yearbook on International Arbitration 2015*, Austrian Yearbook on International Arbitration, Volume 2015, p. 55–56.
[27] C. Florescu, *The Arbitration Agreement…*, p. 56.
[28] G.J. Horvath, *The judicialization…*, p. 259–260.
[29] *QM survey...*, p. 25.
[30] *ICC Commission Report…*, p. 8.

the parties of have influence on the outcome of the case, then this may constitute grounds for a challenge of the award.[31]

V. The Role of Arbitral Institutions and Arbitral Community

Finally, there is also a role for the arbitral institutions to play. Some of them – like the Court of Arbitration at the Polish Chamber of Commerce – has a list of permanent arbitrators. Perhaps it is worth to consider requiring the permanent arbitrators to participate in seminars on management of cases in arbitration. As was indicated previously, most of the tools for effective administration of the disputes are already present, the real problem is that arbitrators do not use them.

For one more useful clue for improvement of international arbitration by arbitral institutions once again it is worth to turn to QM Survey. Respondents indicated that they would welcome any statistics published by the institutions on how long it took particular arbitrators to issue their decisions from their appointment to rendering of the award in the previous cases.[32] This could prove a useful guide for parties in their appointments and provide incentives for arbitrators for better case management.

Given modern tendency to overregulate it is only matter of time before arbitration falls prey to this trend. The arbitral community ought to keep a watchful eye on any lawmakers' attempts to introduce new statutory regulations and make sure it is passed only when the deficiencies of arbitral process cannot be remedied in any other way. The popularity and effectiveness of IBA rules shows that arbitration is able to adapt and answer need for standards of proceedings by soft-law institutions without need for statutory regulation.

On the other hand, it is advisable that practitioners newer loose from sight flexible, informal and non-binding nature of soft-law rules and apply them with appropriate dose of common sense without unnecessary rigidness or formality.

VI. Conclusion

QM Survey can be treated as the final alarm for the arbitral community. Arbitration seems to be steadily losing its main advantages (affordability and speed) and lack of those features is being increasingly voiced by arbitrations users. It

[31] In Polish law, see for example, article 1206 section 1 point 4 of the Polish Code of Civil Procedure, which provides that an award may be set aside if the tribunal did not "observe […] basic rules of proceedings before court of arbitration, following from the statue of agreed upon by the parties". Those "basic rules" include "material rules", which "influence examination and resolution of the case as to its merits and […] parties' right to equal treatment" – see A. Jakubecki in: H. Dolecki (ed.), *Code of Civil Procedure. Commentary. Vol. 5. Articles 1096–1217 (Kodeks postępowania cywilnego. Komentarz. Tom V. Artykuły 1096–1217*), Lex 2013, commentary to article 1206, side number 6. A similar standard applies for example in cases for recognition and enforcement of awards under the New York Convention of Recognition and Enforcement of Foreign Arbitral Awards of 1958 and its Article IV (b) – see: C. Borris, R. Hennecke in: R. Wolff (ed.), *New York Convention. Commentary*, C.H. Beck 2012, p. 345.

[32] *QM survey...*, p. 22.

is the responsibility of arbitration practitioners to address those concerns and take arbitration back to its roots as business are not out of alternatives. In certain areas arbitration has fallen to third place in terms of chosen ADR, preceded by mediation and early case assessment.[33] Some of the arbitral institutions are answering those calls by improving their rules to include more fast-track proceedings and it is now up to arbitrators and counsels to make use of tools that are put into their hands.

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[33] J.C. Najar, *Inside out…*, p. 3.

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The EU Competition Law and Arbitration – Is It Really a "War of the Worlds"?

Marek Szolc

1. Introduction

The question what role competition law plays in arbitral proceedings is certainly a controversial one. It sparked debates in many jurisdictions, Poland included.[1] Arbitrability of competition law disputes, although almost unimaginable two or three decades ago due to public interest considerations,[2] has been since then approved (more explicitly in the USA,[3] less with regard to the EU competition law[4]) and seems to be a rather well-established standard from a theoretical perspective.[5] However, it is merely the tip of an iceberg. Confirmation that arbitral tribunals are competent to apply competition law gave rise to a completely new range of still unaddressed, yet important issues.

Problems related to competition law and its application may arise in an arbitral proceedings due to a variety of reasons.[6] They are probably less likely to occur in regular commercial disputes, related e.g. to a straightforward sale-purchase

[1] See for example a recent polemic: P. Nowaczyk, Sz. Syp, *Arbitraż a prawo konkurencji – wybrane zagadnienia teoretyczne i praktyczne*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny (The Online Regulatory and Antitrust Quarterly) 2013, Issue 5(2), with and a subsequent rebuttal in: T. Bagdziński, *Arbitraż a prawo konkurencji – głos w dyskusji (artykuł polemiczny)*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny (The Online Regulatory and Antitrust Quarterly) 2015, Issue 4(4) and a surrebuttal to the article in: Sz. Syp, *Arbitraż a prawo konkurencji – w odpowiedzi doktorowi Tomaszowi Bagdzińskiemu*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny (The Online Regulatory and Antitrust Quarterly) 2015, Issue 5(4).

[2] *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F. 2d 821 (2d Cir. 1968).

[3] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[4] *Eco Swiss China Time Ltd. v. Benetton International NV,* C-126/97 (1999).

[5] M. Szpunar, *Stosowanie prawa konkurencji Unii Europejskiej przez sądy arbitrażowe*, in: *Księga Pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie* (*Book to the Memory of the 60th Anniversary of the Court of Arbitration at the Polish Chamber of Commerce*), Warsaw 2011, pp. 617–618. However, arguments against are also put forward: T. Bagdziński, *Arbitraż…*, pp. 70–71.

[6] P. Nazzini, *A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as Amici Curiae and the Status of Their Decisions in Arbitral Proceedings*, in: G. Blanke, *Arbitrating Competition Law Issues*, European Business Law Review Special Edition, The Hague 2008, p. 89.

transaction. However, arbitration is the go-to option for the majority of businesses operating in an increasingly globalized world.[7] Its role is steadily increasing[8] along with the complexity of commercial and business relationships. The ones which are long-term and complicated by definition, like license, franchise, joint-venture or shareholding often contain arbitration clauses as well. This is where competition law will more likely be used by both parties and tribunals as a source of claims or legal protection.

This article will elaborate on the application of competition law in arbitration, paying special attention to the EU competition law and how arbitral tribunal may contribute to its effective enforcement.

2. Reconciling the Irreconcilable in the Field of Competition Law and Arbitration

The source of controversy that initially precluded competition law issues from being arbitrated and continues to trouble many stakeholders is most likely the diverging origin of both legal orders. Therefore, the relationship between them two can only be described as special and calling for scrutiny greater than usual while analyzing.[9] The fact it took many years of academic and judicial debate before it was reluctantly admitted in the two major competition law systems (namely, the USA and the EU) that arbitral tribunals play a role in enforcing competition law confirms it.

In most general terms, the fact an arbitral proceedings occurs constitutes an emanation of power of the parties over their own dispute. Their consent constitutes grounds for a decision of an independent and impartial tribunal. The freedom individual businesses and people enjoy is vast and encompasses the choice of seat, rules, law, language and arbitrators. The parties most often opt for finality of the award,[10] so that their strictly private dispute is solved in the most effective way.

Competition law comes from an entirely different realm. This set of rules of public origin shields every free-market economy against conduct of businesses harmful to competition that stimulates growth, innovation and efficiency at the same time securing interests of consumers. Mechanisms envisaged in every modern competition law system rather limit and regulate for the sake of public interest[11] than create new opportunities. Competition law is so significant that

[7] White & Case 2015 International Arbitration Survey: *Improvements and Innovations in International Arbitration*, available at: http://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations, p. 5.
[8] M. Pazdan (red.), A. Tynel, J. Funk, W. Chwalej, B. Fuchs, *Międzynarodowe prawo handlowe* (*International Trade Law*), ed. II, Warsaw 2006, p. 331; A. Szumański (red.), *Arbitraż handlowy. Tom 8. System prawa handlowego* (*Commercial arbitration. Book 8. Commercial Law Sytem*), C.H. Beck, Warsaw 2010.
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[10] B. Pankowska-Lier, D. Pfaff, *Arbitraż gospodarczy: praktyka i wykonywanie wyroków*, C.H. Beck, Warsaw, 2000, pp. 3–4.
[11] A. Jones, B. Sufrin, *EC Competition Law. Text, Cases & Materials*, Oxford 2007, p. 3.

in most states courts consider it part of the public policy,[12] the core of legal system that must be strictly followed.

However, recent years brought remarkable changes in the previously rigid system of competition law applied and enforced by more or less powerful state institution. Instead, the burden of making sure all the players on the market act fairly is being transferred on the competitors themselves. The idea of private enforcement, well-established within the USA, is only beginning to achieve recognition within the EU.

Despite the fact the Court of Justice of the European Union (CJEU) confirmed long ago that articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are directly applicable,[13] the process of privatizing competition law disputes was slow and only recently gained pace. Nevertheless, its role will only increase. This is an area where arbitration and competition law may either clash or synergize.

A recent directive aimed at fostering private enforcement of the EU competition law specifically mentions alternative dispute resolution and arbitration as tools that can be used by individuals to assess damages for competition law infringements.[14] The directive's aim was to ensure additional mechanisms, like arbitration, are introduced to shoulder the burden of guarding competition in the market.

Consequently, the question whether the aforementioned differences can be reconciled slowly becomes irrelevant. What matters is an increasing need on the part of arbitral tribunals to apply competition law on one hand and a growing need of public policymakers to address potential controversies on the other. Within the EU, this challenge is further complicated by the fact there are 28 national competition law and arbitration systems. Even though largely similar, they are applied separately by domestic court and their interpretation might vary from one jurisdiction to another.

3. Practical Aspects of applying Competition Law by Arbitral Tribunals

Assessing the position of arbitration towards the EU competition law is a difficult task owing to the fact the CJEU has always remained succinct and reserved in addressing issues arising in connection with arbitral proceeding. Even the *Eco Swiss* case, a landmark decision from the perspective of competition law,

[12] G. Monti, *EC Competition Law*, Cambridge 2007, p. 21.

[13] *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, Judgment of the Court of 20 September 2001, C-453/99 (2001); *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA*, Judgment of the Court of 13 July 2006, C-295/04 to 298/04 (2006); *Pfleiderer AG v. Bundeskartellamt*, Judgment of the Court of 14 June 2011, C- 360/09 (2011); *Europese Gemeenschap v. Otis NV and others*, Judgment of the Court of 6 November 2012, C-199/11 (2012).

[14] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, points 5, 48 and Art. 18.

provides very general grounds for any conclusions. In fact, what one can learn is that competition law forms part of the public policy of the EU (and consequently, its member states), what may give grounds to refuse awards' recognition under the New York Convention[15] and find confirmation that arbitral awards should be subject to a limited review[16]. It is not sure whether the judges intended such conclusions to be drawn, but *Eco Swiss* seems to imply an obligation of arbitral tribunals to apply competition law in order to ensure award is enforceable in the first place.

State courts responded to this analysis by the CJEU with their own interpretation. *Thales v. Euromissile* case decided by the Paris Court of Appeal[17] constitutes a good example that principled approach on the level of the EU law is not universally affirmed. Thales and Euromissile concluded a contract which violated the EU competition law. Thales was held liable for unlawful breach of that contract with Euromissile, but did not argue that arrangements between them and Euromissle were null and void pursuant to Article 101 of TFEU. The effect the tribunal gave to a legally inexistent contract infringed upon prohibition of restrictions of competition laid down in the EU law. Therefore, Thales sought to annul the award on the grounds that the award's recognition or enforcement would be contrary to public policy. The Paris Court of Appeals noted that the parties did not put forward the issue of the conformity of their contract with Article 101 in arbitration. However, Thales could still challenge the conformity of its contractual arrangements to the extent that the enforcement of the award would result in a violation of Article 101. The court stressed the fact it scrutinized the award in order to determine whether its recognition or enforcement would breach the French legal order "in an unacceptable manner". The court stated that violation of its essential principle must be "manifest, actual and specific" ("*flagrante, effective et concrete*"), what definitely seems to be a higher threshold than the one proposed by the CJEU in *Eco Swiss*. Finally, the Paris Court of Appeals held that in the context of annulment proceedings it could not conclude whether the arrangements between Thales and Euromissile constituted breach of Article 101. Though it was within its powers to make a determination in fact and in law, it could not determine the merits of a complex dispute regarding the possible illegality of a contract that had never been argued by the parties and never assessed by the arbitrators. Consequently, it affirmed an arbitral award that failed to apply competition law correctly.

This situation demonstrates how complex the relationship between the CJEU, domestic court and arbitral tribunals alone may be. We must not forget arbitral tribunals are not "courts" from the EU law standpoint[18] and therefore may not seek guidance on the EU law from the CJEU like domestic courts. Even if they had such status, it is doubtful the confidential nature of arbitration would allow them to involve third parties, unless the parties to a particular dispute agreed. Potential involvement of national competition authorities and the European Commission further blurs the picture.

[15] *Eco Swiss...*, para. 39.
[16] *Ibid*., para. 35: "[…] *it is in the interests of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances*".
[17] *Thales Air Defense SA v. Euromissile G.I.E.*, Paris Court of Appeals, 18 November 2004.
[18] *Nordsee v. Reederei Mond,* Judgment of the Court of 23 March 1982*,* C-102/81 (1982).

Taking into consideration the abovementioned, we can distinguish three situation where arbitral tribunals need to apply competition law. Firstly, it happens when the parties make submissions based on competition law regulations, especially when they claim damages (probably the most common situation).[19] Secondly, and probably less likely, arbitral tribunals will deal with a competition law dispute autonomously and decide whether an infringement happened or not. Thirdly, an arbitral tribunal might decide to apply competition law *ex officio,* regardless of what the parties argue, when arbitrators believe without it is impossible to solve a dispute and uphold an award under the state court's scrutiny.

From the first point of view, competition law of the EU may be viewed simply as a part of applicable substantive law. Following *Eco Swiss* conclusions, to ensure compliance with the EU public policy, it should be applied at least in two cases: when the law chosen by the parties or determined by the arbitral tribunal is the law of any of the EU member states or when arbitration is seated within the EU.[20] It is also possible to apply competition law of the EU despite the fact other aspects of a contract are subject to different law.[21] Conversely, it seems impossible to derogate the EU competition law and replace it with another if the award is going to be relevant for the territory of the EU. This would constitute an illegitimate attempt at circumventing imperative rules that form part of public policy and should be ignored by arbitrators.[22]

Another case where arbitral tribunals should apply the EU competition law is when the seat of arbitration is located in one of the EU member states. It is then entirely independent from the substantive law.

By choosing the seat of arbitration the parties subject their proceedings to a specific arbitration law (divergence here is extremely rare) and to review by domestic courts of the country where the award is rendered. By agreeing on a specific seat within the EU, the parties accept consequences derived from the fact competition law forms part of the EU's public order. This contention is true not only with regard to purely domestic context, but also within the scope of the New York Convention or the purpose of enforcement abroad.[23]

Scholars argue the parties are fully competent to raise issues related to the EU competition law in case future award could even potentially be enforced within the EU.[24] It seems indispensable for tribunals to take such submission into account at that stage of the proceedings in order not to risk unenforceability. Despite the fact the law of the enforcement country might be entirely unrelated to the substantive law governing the dispute, from a practical standpoint it is a sound remark. Tribunals are aware they need to safeguard the parties' interest in obtaining a workable and enforceable award and decided to apply, or at least analyse the case in the light of the EU competition law to ensure it is either not an issue or their award complies with it.

[19] A. Komninos, *Arbitration and EU Competition Law*, UCL Working Paper Series, 2009, p. 6; J. Kociubiński, *op.cit.*, p. 161.
[20] ICC Award No. 10704, 2001.
[21] ICC Award No. 9240, 1998.
[22] Y. Derains, *The Basis for Applying EU Competition Law from a Continental Perspective*, in: G. Blanke, *op.cit.*, p. 504; J. Kolber, *op.cit.,* p. 69.
[23] *Eco Swiss…*, para. 39.
[24] P.J. Slot, *The Enforcement of EC Competition law in Arbitral Proceedings*, Legal Issues of European Integration 1996, 1(1), p. 104.

The abovementioned points are more relevant in case where competition law is just the background for a dispute, but may still influence its outcome. However, it seems equally feasible for arbitral tribunals to solve certain purely competition law disputes. None of the EU member states decided to ban clauses that subject competition law disputes to arbitration. The parties, free to choose their arbitrators, might then appoint an expert panel which will guarantee a correct, well-reasoned decision. The problem in this field will be most likely potential obstacles to jurisdiction. For the CJEU, it is not even evident that arbitral tribunals can decide on claims for damages resulting from competition law infringements. Such conclusions can be drawn from the *CDC v. Akzo Nobel* case.[25] A German court asked the CJEU whether, under its obligation to effectively apply the EU competition law, it should force the parties claiming damages in private enforcement following a Commission's decision on infringement to arbitrate them pursuant to arbitration clauses contained in contracts with respondents who were found to have formed a cartel. The CJEU decided not to mention arbitration in its judgement, even though it was explicitly asked to. Nevertheless, its reasoned in the context of jurisdictional clauses that they usually may not be applied to cartel damages. By default, no party can envisage its business partner forms a cartel with other suppliers to exploit the distorted market conditions. Arbitration clause, a type of jurisdictional clause, would need to be extremely specific in this context to leave no doubt regarding its scope. According to the CJEU, it is not enough to effectively agree on jurisdiction for the competition law infringement claim by using a most usual clause pointing to a dispute arising out of or in connection with a particular contractual relationship. Consequently, as in the opinion of the CJEU, arbitration clauses referring to a contractual relationship are insufficiently specific to arbitrate tortious claims arising in connection with particular contracts. *CDC v. Akzo Nobel* forces the parties to explicitly mention compensation for competition law infringement, what constitutes highly unlikely and uncommercial approach. It is despite the fact domestic courts in jurisdictions like France[26] or Italy[27] within the EU took a more flexible approach not to multiply forums where disputes between two particular parties are resolved. The CJEU's judgement seems to go along positions presented more commonly jurisdictions more sceptical towards arbitration, like Poland. Despite the fact available jurisprudence focuses mainly on slotting fees, these claims may be pursued in arbitration as long as the arbitration clause is worded in a sufficiently wide way. Nevertheless, it still seems there are no obstacles for arbitral tribunals to decide on the competition law issues.[28]

Lastly, it is worth mentioning arbitral tribunals may find it appropriate to apply competition law of their own accord. Being fully aware that the CJEU gave domestic courts strong grounds to review awards in the context of compliance with the EU public policy, some tribunes might wish to look at their decisions through the lens of competition law and modify them despite the fact the parties might not have made submissions in this regard. Under such circumstances, it seems to dangerously limit the parties' right to present their case and to

[25] *Cartel Damage Claims Hydrogen Peroxide SA v. Akzo Nobel NV and others*, Judgment of the Court of 21 May 2015, C-352/13 (2015).
[26] *Société Aplix v. Société Belcro*, Paris Court of Appeals, 14 October 1993.
[27] *Soc. Coveme v. Compagnie Française Isolants S.A.*, Bolonia Court of Appeals, 11 October 1990.
[28] P. Nowaczyk, Sz. Syp, *op.cit.*, p. 86.

increase the risk of surprising them with reasoning supporting certain parts of award. The most effective and procedurally safest solution on the part of tribunals would be to request the parties, in case it is necessary, to make certain submissions on the points of competition law questions.

4. Concluding Remarks

It seems that application of competition law in disputes resolved by arbitral tribunals will remain a controversial issue. A number of conflicting interests arbitrators have to take into account while deciding on competition law issues is significant. On the one hand, it seems that ignoring competition law is a straight way to annulment of an award or at least impeded recognition. On the other, a private tribunal constituted to solve a particular dispute might lack competence or tools to effectively apply it. The matter is further complicated by potential incoherence between decision of competition authorities, domestic courts and arbitral tribunals deciding on the same case or a particular violation. Addressing these issues with a new regulatory framework uniform enough to suit the needs of the single market seems extremely difficult. From a commercial and public standpoint, application of competition law in arbitral proceedings and proactive role of arbitral tribunals in enforcing competition law should bear fruit and bolster competitiveness. However, in order for this to happen, the current legislation that does not encourage any form of cooperation must be changed, for instance, in line with the solutions proposed in the 2014/104/EU directive. The core problem would be to reconcile arbitration's confidential nature and flexibility with the need of cooperation with competition authorities. Furthermore, it is likely arbitrators will be more and more often asked to determine what competition law they should apply and how. A clearer, more consequent position taken by the CJEU and the EU policymakers towards arbitration in general will help answer all the abovementioned questions and stabilize a rather rogue state of affairs we are facing nowadays.

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The Court of Arbitration for Sport at the Polish Olympic Committee v The Court of Arbitration for Sport (CAS) – Background, Powers and Authority

Eligiusz Krześniak

I. Introduction

"The courts should rightly hesitate before intervening in disciplinary hearings held by private associations [...]. Intervention is appropriate only in the most extraordinary circumstances [...]. The courts should not intervene in the merits of the underlying dispute," concluded the judge who heard the *Harding v. U.S. Figure Skating Ass'n* case.[1] This statement can be considered a brief summary of the position of the U.S. judicature regarding sports disputes – courts are allowed to intervene but as rarely as possible.

This position is not unusual at all. Courts in other countries take a similar view.[2] Practically the entire world of sport is of the opinion that the fewer cases that end up in a common court, the better.[3] The Polish government and parliament have acknowledged this, as is demonstrated by the addition of the statement that 'international sports federations rule out the possibility of referring cases (namely settlements of court disputes – added by EJK) to state courts in their bylaws' in the justification of the Polish Sports Act.[4] Therefore, a whole host of

[1] *Harding v. U.S. Figure Skating Ass'n*, 851 F. Supp. 1476 (D. Or. 1994).

[2] Compare, e.g. position of one of the UK courts: "Sport would be better served if there was not running litigation at repeated intervals by people seeking to challenge the decisions of the regulating bodies." *Cowley vs. Heatley (1986)*, Times, 24 July, CA. A summary of the UK legal theory and judgments in this respect can be found in C. Giles, J. Taylor, *Sports governance,* in: *Sport: Law and Practice*, ed. A. Lewis, J. Taylor, *Haywards Heath*, p. 83–89.

[3] Compare the positions of German sports activists and German legal theory in U. Haas, D.-R. Martens, *Sportrecht – eine Einführung in die Praxis* (*Sports law – an introduction to the practice*), Zürich, p. 89–91.

[4] Uzasadnienie do ustawy z dnia 23 lipca 2015 r. (Dz.U.2015.1321) zmieniającej ustawę o sporcie z dniem 22 września 2015, Sejm VII kadencji (Justification to the Act dated 23 July 2015 [Dz.U.2015.1321] amending the Sports Act as of 22 September 2015, the Polish Sejm of the 7th term of office), Nr druku 3161 (Form No. 3161).

instruments has been developed, resulting in very few cases related to the playing and organizing sports appearing before common courts. The main measure here is the obligation imposed on the interested parties to benefit from arbitration dedicated to sports issues. This article discusses two such standing arbitration courts – The Court of Arbitration for Sport in Lausanne, Switzerland (CAS) and The Court of Arbitration for Sport at the Polish Olympic Committee.

My objective is to present the origins and method of operation of these two institutions. I would like the arbitrators and the people appearing before one of these two arbitration courts to be able to have an idea about the functioning and organization of the other after reading this article. As a Polish lawyer, I am interested in the extent to which the solutions used at CAS – as a court reputed to be a model arbitration court in sports – have been imported into Polish law and legal practice. I am also using this opportunity to comment on the solutions recently introduced (technically speaking: reinstated) into Polish law on the Court of Arbitration for Sport at the Polish Olympic Committee, in particular the controversial principle of compulsory arbitration (also described as obligatory arbitration). It is also worth considering whether this type of legal regulation is needed at all in the Polish legal system. This last issue has been the subject of debate for a long time among legal theorists, so it is worthy of further scrutiny.

II. The Court of Arbitration for Sport in Lausanne (CAS)[5]

Let us start with the court in Lausanne.

[5] In the Polish literature on CAS compare *inter alia* P. Cioch, B. Krzan, *Jurysdykcja Trybunału Arbitrażowego ds. Sportu* (*Jurisdiction of Court of Arbitration for Sport*), in: *Sport w prawie europejskim, współczesne wyzwania dla teorii i praktyki* (*Sport in European law, today's challenges for legal practitioners and theorists*), Warsaw 2014, p. 191–209; P. Cioch, *Trybunał Arbitrażowy ds. Sportu w Lozannie* (*Court of Arbitration for Sport in Lausanne*), Kwartalnik ADR, No. 4(8) of 2009, p. 71–94, P. Cioch, *Krajowe i międzynarodowe sądownictwo polubowne w sporcie profesjonalnym* (*National and international arbitration in professional sport*), in: Pogonowski, Cioch, Gapska, Nowińska, *Współczesne przemiany postępowania cywilnego* (*Contemporary changes in civil procedure*), Warsaw 2010, p. 346–369. For CAS' powers in disciplinary matters, compare: A. Wach, *Alternatywne formy rozwiązywania sporów sportowych* (*Alternative ways of settling sports disputes*), Warsaw 2005, p. 161–165 and P. Cioch, *Orzeczenie Sądu Arbitrażowego ds. Sporu w sprawie A/1480/Pistorius przeciwko IAAF z 16.5.2008*, Kwartalnik ADR, No. 1 (9) of 2010, p. 57–72 (*Decision of Court of Arbitration for Sport in Postorius v IAAF*). In the far more extensive English language literature, it is mentioning the book by the first President of the *ad hoc Division* Gabrielle Kaufmann-Kohler, G. Kaufmann-Kohler, *Arbitration at the Olympics. Issues of fast-track dispute resolution and sports law*, Hague, 2001 or interesting descriptions of the method of operation and landmark cases handled at CAS in: W.T. Champion, *Sports Law in a Nutshell,* Houston 2009. Compare a number of interesting articles in the monumental edition edited by I.S. Blackshaw, R.C.R. Siekmann, J. Soek, *The Court of Arbitration for Sport 1984–2004*, The Hague 2006. In the German language literature, B. Haslinger, *Die Rechtsprechung der CAS zur Haftung bei Zuschauerausschreitungen vor dem Hintergrund statuarischer Regelungen internationaller Verbände* (*Jurisprudence of CAS regarding the liability with respect to spectators riots against the background of statutory regulations of international associations*), in: *Verantwortlichkeiten und Haftung im Sport* (*Responsibilities and liability in sport*), Baden-Baden, 2012, p. 25–42 is worth considering.

II.1 CAS, Background

CAS is the chief arbitration body in the world of sports. It is the only arbitration court in the world with global coverage, established to settle exclusively sports disputes, including primarily international disputes.[6] CAS was established in 1983, although the first mentions of the need for such an institution date back to 1981, when the then Head of the International Olympic Committee, Juan Antonio Samaranch decided that this institution was needed in the world of sport. This idea was brought to life; although initially, there were no signs of today's success of the CAS – this arbitration court occasionally heard property-related cases related to sport and these were only of the sports federations headquartered in Switzerland.[7] The change took place in 1992––1994.

Initially, a CAS Panel issued a decision in 1992 in *Gundel v FEI,*[8] sanctioning the German equestrian, Elmar Gundel, for an offence. The CAS Panel applied the rules of the International Equestrian Federation (FEI). Gundel filed an appeal before the Swiss Federal Tribunal, arguing that the CAS award should not be recognised by the courts because the very nature of CAS and its direct association with the International Olympic Committee means that CAS is not independent nor impartial. Dismissing the complaint, the judges of the Swiss Federal Tribunal held that CAS was an actual arbitration court.[9] This decision alone resolved many doubts and certainly boosted this court's popularity.

However, in its judgement in the Gundel case, the Swiss Federal Tribunal simultaneously held that the verdict could have been different in all these cases where the IOC itself would have been a party.[10] This prompted the IOC to remodel CAS so as to rule out the possibility of such allegations being made in the future. Therefore, the CAS organizational model was changed in 1994. Supervision and the financing of the court were moved to a newly-founded body, the International Council of Arbitration for Sport (ICAS). Also, the rules of proceedings before CAS were changed in order to better model them on similar rules of other arbitration courts. The changes were then accepted by the President of the IOC, as well as by the Association of Summer Olympic Federations, Winter Olympic Federations and the national Olympic Committees. As a result, CAS currently operates as a foundation, governed by the laws of Switzerland, being independent (from a legal and formal, as well as factual standpoint) of any other organizations which are active in the area of sport, including the IOC itself.

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[6] Compare M. Beloff, U. Haas, *The Court of Arbitration For Sport*, in: *Sport: Law and Pratice*, red. A. Lewis, J. Taylor, Haywards Heath, p. 1036.

[7] As in: A. Wach, *Miedzynarodowy i krajowy arbitraż sportowy* (*National and international sports arbitration*), in: *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie* (*The Arbitration Court at the National Chamber of Commerce Commemorative 60th Anniversary Book*), Warsaw 2010, p. 86–87 and M. Beloff, U. Haas, *The Court of Arbitration* [...], p. 1036–1037.

[8] *Gundel v FEI* or *G v FEI* CAS 92/63, award dated September 10, 1992, CAS Digest I, p 115.

[9] A. Wach, *Międzynarodowy i krajowy arbitraż sportowy* (*National and international sports arbitration*), in: *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, Warsaw 2010, p. 87.

[10] As in: M. Beloff, U. Haas, *The Court of Arbitration* [...], p. 1037.

Two arbitration divisions were introduced at this point, the Ordinary Arbitration and the Appeals Arbitration, and a new Code of Sport-related arbitration was adopted. The Code underwent several changes in the subsequent years, but its foundations remained unchanged.

CAS has had its branches in New York, USA since 1996 (previously in Denver) and in Sidney, Australia.

II.2 The Powers of CAS and the Arbitrators

CAS undertakes to settle all disputes which are somehow related to sport. Different rules will apply depending on whether the dispute is a disciplinary, civil or commercial dispute.

After the introduction of these changes in the operation of CAS and the adoption of the Code of Sport-related Arbitration, in the following years, international sports federations acknowledged that CAS should be the arbitration court which finally settles cases that have already been settled by bodies within particular federations. It was mainly this that resulted in CAS experiencing a surge of cases filed with it. However, this did not happen without complications and it cannot be said today that there is full consensus among international sports federations. For instance, it can be mentioned that the decisions of the International Basketball Federation (FIBA) and Fédération Internationale de Football Association (FIFA) have followed the exact opposite routes. The Rules of the standing arbitration court at FIBA do not currently envisage the option of appealing to CAS. Appeals against these decisions can only be filed with the Swiss Supreme Court under Art. 190 of the Swiss Civil Procedure Code. However, it was possible to file an appeal with CAS until 2010. Meanwhile, the situation is the opposite with FIFA – an appeal could not be filed with the CAS against decisions of its bodies until 2004, but this is currently possible.[11]

Another factor contributing to the increased number of cases brought before CAS was the introduction of the rule that CAS performs the function of the central and final instance in doping cases settled on the basis of the World Anti-Doping Code (WADC).[12]

The list of CAS arbitrators stands at around 270 people.[13] When choosing their arbitrators, parties are allowed to use only those on the list,[14] which has various reactions among legal theorists. Some authors think that this excessively limits the freedom of choice for the parties, while others argue that this secures the consistency of CAS decisions.[15] The Swiss Federal Tribunal held that this solution is fully admissible.

[11] Compare: M.F. Pereira Borges, *Verbandsgerichtsbarkeit und Schiedsgerichtsbarkeit im internationalen Berufsfußball unter Berücksichtigung der verbandsinternen FIFA-Rechtsprechung in Bezug auf die lex sportiva* (*Associations jurisdiction and arbitral jurisdiction in the international professional football in consideration of the inter-associative jurisprudence of FIFA with regard to lex sportiva*), Frankfurt am Main 2009, p. 71–74.
[12] U. Haas, D.-R. Martens, *Sportrecht – eine Einführung in die Praxis* (*Sports law – an introduction to the practice*), Zürich, p. 129.
[13] Available at www.tas-cas.org.
[14] Art. S3 of the CAS Rules, available at www.tas-cas.org.
[15] More details on this in: M. Beloff, S. Netlze, U. Haas, *The Court of Arbitration for Sport*, in: *Sports: Law and…*, A. Lewis, J. Taylor, p. 1041.

II.3 Types of Procedures

CAS has the following procedures:

1. Appeal arbitration procedure. Under this procedure, CAS reviews the decisions of sports organizations (in the broadest possible sense of the word) and decides whether those decisions are right or wrong. This encompasses all appeals against disciplinary decisions. These constitute the majority of cases at CAS. Legally, this type of procedure – contrary to its name – is a single-instance procedure conducted by a standing arbitration court, namely CAS.
2. Ad hoc Division proceedings. Proceedings conducted during some of the most important sports events – the Olympics, Commonwealth Olympics and World and European Football Championships. These disputes are heard by a special unit of CAS, the so-called *ad hoc Division*. The seat of the *ad hoc Division* is Lausanne, but proceedings actually take place at the venue of the given sports event. The *ad hoc Division* was first established for the Olympics in Atlanta in 1996 and hears cases in consultation with the organizer of the sports event. During the summer Olympics, the panel of arbitrators has 12 people and slightly fewer during other events. The number of cases heard is no more a dozen or so during a single Olympic event.[16] The *ad hoc Division* currently has a good reputation in sports circles.[17]
3. O*rdinary arbitration procedures*. This includes all other disputes which do not fall into the first two categories. However, even in this case, the requirement is still that a case must always be a sports-related dispute. Examples include sports-related commercial disputes, such as liability disputes arising from accidents during sports events, or cases related to the use of an athlete's image.

III. Court of Arbitration for Sport at the Polish Olympic Committee

III.1 Introduction

A dozen or so years from its creation, the Arbitration Court for Sport at the Polish Olympic Committee[18] comprising 24 arbitrators,[19] alongside CAS discussed above, the Canadian Tribunal ADR Sport RED, the Italian Sports Chamber of Arbitration and Conciliation and the second Polish standing arbitration court for sport – the Football Arbitration Court,[20] came to be regarded as one of

[16] No case has yet been heard by the *ad hoc* Division during football championships. However, during the Olympic Games, the number of cases ranges from a dozen or so to several dozen.
[17] Compare: G. Kaufmann-Kohler, G. Kaufmann-Kohler, *Arbitration at the Olympics. Issues of fast-track dispute resolution and sports law*, Hague, 2001, p. 3–39.
[18] According to the wording of the English version of the website, the Polish Olympic Committee is hereinafter referred to as POC Court of Arbitration for Sport.
[19] Appointed by the Board of the Polish Olympic Committee, previously half of the members were appointed by the Board and half by the minister of sport.
[20] Operating within the Polish Football Association (Polski Związek Piłki Nożnej).

the world's largest and best organized arbitration courts.[21] In terms of the number of cases, both Polish arbitration courts were positioned just behind CAS until 2010.[22] In the case of the Football Arbitration Court, the large number of cases primarily arises from the fact that football, arguably the most popular sport in Poland, generates large numbers of cases, which, in turn – under the respective rules of FIFA, UEFA[23] and PZPN[24] – must be heard. Why such popularity of the POC Court of Arbitration for Sport?

III.2 Compulsory / Obligatory Arbitration

The answer to the question posed in the previous point is simple. This is primarily due to the Polish lawmakers, who gave this institution adjudication powers from 2001 – under a specific legal provision – for appeals against the most significant disciplinary and rules-related decisions of the Polish sports associations. Therefore, quite unlike the classic arbitration court, a specific statutory provision awarded the right to appeal to the POC Court of Arbitration for Sport against specific decisions of clubs and sports associations. The Act on Qualified Sports 2005[25] gave a list of such decisions: (i) about the exclusion of a player, referee/umpire or sports activist from a sports association, club or other sports organization, (ii) about the exclusion or removal of a club from a sports association or the disqualification of coaches, (iii) the disqualification of players and referees,[26] (iv) stripping a player or sports team of a national championship title, (v) relegating a sports team to a lower division, and (vi) a ban on representing Polish sport in an international competition.

It is easy to imagine that such a legal rule gives rise to a significant increase in the numbers of cases brought before the POC Court of Arbitration for Sport. However, credit must be given to the people involved in the organization and management of the POC Court of Arbitration for Sport because they rose to the challenge of organizing (together with the minister of sport) a team of select high class experts who agreed to take on the function of arbitrators. In the case of the POC Court of Arbitration for Sport, this is significant because the number of arbitrators was and still is 24, which seems a small number compared to CAS' 200 arbitrators.

A substantial number of legal theorists in Poland believe that such legal norms are in breach of the rules of arbitration and breached the general rules of Polish law.[27] These authors argued that the jurisdiction of the POC Court of Arbitration for Sport was extended to cover cases which, under Polish law, could not be

[21] See A. Wach, *Spór o spory sądowe* (*Dispute about sports disputes*), Rzeczpospolita, 9 June 2010.
[22] See A. Wach, *Spór o spory sądowe* (*Dispute about sports disputes*), Rzeczpospolita, 9 June 2010.
[23] Union of European Football Associations.
[24] Polish Football Association.
[25] Journal of Laws no. 155, item 1298 as amended.
[26] From a formal point of view, also decisions regarding the disqualification of a sports activist were subject to appeal before the POC Court of Arbitration for Sport, but it is difficult to imagine how a 'disqualification' of an activist could take place, as this is a person who is not personally a competitor or directly involved in any sport (such as a referee).
[27] For example: F. Zedler, *Postępowanie polubowne w sporcie* (*Arbitration proceedings in sport*), in: *Ustawa o sporcie* (*Sports Act*), Poznań 2011, p. 47–61.

subjected to arbitration at all (including disciplinary cases which are not arbitrable cases). In their opinion, such provisions were in gross breach of the applicable legal regulations on arbitration and gave rise to serious doubts about their compliance with the right to court enshrined in the Polish constitution.[28] Meanwhile, transferring such cases to the POC Court of Arbitration for Sport amounted to the actual deprival of the interested parties of this right.

However, the contrary could also be argued. First of all, there is a practical argument. Common courts in Poland were and still are (albeit to a much lesser extent than previously) sluggish to act, while arbitration courts act much faster. It is not an overstatement that time is of the utmost importance in sport. An athlete's career is short-lived, a dozen or so years at the most. Athletes have the opportunity to take part in major sports competitions, such as the Olympics or world championships just several times in their lifetime. In team sports, league matches start each year at the same time and if a player is not enlisted in the team at the right time, he misses the entire season.[29] Disputes between players and clubs, clubs and sports federations and players and federations both national and international, must be resolved quickly. It was also indicated that certain relevant regulations envisaged the possibility to challenge certain decisions of the POC Court of Arbitration for Sport before the Supreme Court by way of a cassation.[30] Some authors even expressly concluded that the repeal of the provisions on the POC Court of Arbitration for Sport from the Sports Act, despite being theoretically correct, did not work out in practice.[31]

III.3 Change of regulations regarding POC Court of Arbitration for Sport and current legal situation

I could also essentially name this section "the volatility of the Polish law makers" or something similar. The theoretical disputes presented above between the proponents and opponents of including provisions on arbitration in sport into the Polish legal regulations, namely, in fact, a dispute about the *de facto* and *de iure* compulsory arbitration, is a veritable legislative rollercoaster. At first, the proponents of a practical approach had the upper hand – the provisions introducing compulsory arbitration by the POC Court of Arbitration for Sport and setting out organizational aspects regarding this arbitration court, such as the manner of appointing arbitrators and their number, were introduced into the Polish law and were in force for several years. Next, the proponents of the 'purist' approach had the upper hand. This was an approach where the phrase 'compulsory arbitration' was an oxymoron – something is either arbitration or it is mandatory, not both. Consequently, all the rules regarding the POC Court of Arbitration for Sport and other arbitration courts were removed from the still-binding Act on Sports. However, only for five years. De-

[28] F. Zedler, *Postępowanie polubowne w sporcie* (*Arbitration proceedings in sport*), in: *Ustawa o sporcie* (*Sports Act*), Poznań 2011, p. 52–53.
[29] This rule is commonly applied worldwide, including in Poland – the purpose is to prevent disruption of sports competitions during the season, e.g. transfers of players just before key championship/title competitions.
[30] For example in: A. Wach, *Spór o spory sądowe* (*Dispute about sports disputes*), Rzeczpospolita, 9 June 2010.
[31] For example in: A. Wach, *Sportowe spory dyscyplinarne* (*Disciplinary disputes in sport*), Rzeczpospolita, 3 October 2015.

spite objections from some of the legal profession, the provisions on the POC Court of Arbitration for Sport were introduced into the Sports Act in 2015. To a large extent, they are a repetition of the solutions described above.

Furthermore, the POC Court of Arbitration for Sport is again directly legally appointed to hear appeals against the final decisions of sports associations (Art. 45a of the Sports Act). This time, however, such an appeal is allowed against all types of disciplinary decisions without exception, not only the most important ones. In turn, this causes legal theorists to raise concerns about whether this could paralyze the functioning of this arbitration court.[32] It is hard to predict how the future practice will look. We need to wait and see the effects of the "new/old" legal situation.

III.4 Types of Procedures before the POC Court of Arbitration for Sport

The POC Court of Arbitration for Sport deals with two (2) types of procedure:

1. Amicable procedures, namely classic arbitration proceedings. This procedure extends to disputes over an athlete's image, disputes regarding the organization of a sports event, licensing cases, issues of managerial contracts and, overall, all matters regarding the economic standing of players. The rules of the POC Court of Arbitration for Sport (par. 1 (1) of the Rules) and the bylaws of this court (Art. 5 (1) therein) classifies these as arbitration cases.
2. The hearing of complaints against disciplinary decisions or rules-related decisions of the relevant bodies of Polish sports associations or other sports organizations.

The POC Court of Arbitration for Sport has consistently stood by its view that cases listed under point 2 above are not arbitration cases and are not subject to rules regarding arbitral awards. For example, the Code[33] which is still in force provides that judgments of the Court are final – and unlike awards of all other arbitration courts – are not challengeable before a common court (Art. 23 of the Court's Rules).

III.5 The Position of the Constitutional Tribunal and the Role of the Supreme Court

The Polish Constitutional Tribunal has expressed its views regarding the role of the Arbitration Court. In its judgement of 19 October 2010,[34] the Constitutional Tribunal mentioned something quite obvious – that the Arbitration Court does not belong to any of the branches of authority within the meaning of Art. 10 of the Constitution and, in particular, it cannot be classified as part of the judiciary. It is a standing arbitration court, of the nature of an internal court of

[32] Such concerns raised by A. Wach, *Sportowe spory dyscyplinarne* (*Disciplinary disputes in sport*), Rzeczpospolita, 3 Oct 2015 .
[33] The Code will soon be amended due to newly adopted regulations. It transpires from information I have obtained from the Polish Olympic Committee that the work on adaptation of the Code to the new legal changes in ongoing. Situation as at 12 November 2015.
[34] Ruling of the Constitutional Tribunal of 19 October 2010, P 10/10, Legalis No. 254427.

sports associations, operating exclusively in matters falling under its jurisdiction based on an arbitration clause and in matters set out by the Sports Act.[35]

The Supreme Court will have an important role to play in the practical application of the new regulations. This is because there is a right of cassation before the Supreme Court in the event of a gross breach of the provisions of the law or a judgement that is obviously unjust passed by the Court of Arbitration for Sport. It is clear here that the grounds for appeal have been defined narrowly in the amended Sports Act – only *a gross* breach of the legal regulations or an *obviously unjust* judgment give hope that an appeal will be successful. So what should be done if a breach is not gross or a judgement is not unjust? A cassation complaint will not stand a chance of success in such a case. In other words, in this way, we allow for a situation where the arbitral award sanctions an illegal decision of a sports association, as a result of which an athlete or a sports club suffers actual and specific damage to property (for instance, when a team is relegated to a lower division)[36] or a penalty of disqualification, including life-long disqualification[37] (which, in practice, is tantamount to a player being deprived of the right to work in his profession, and therefore, *de facto* a loss of earnings). Similarly, no state court will have the power to modify such decisions. Because of the limitations of this article, I cannot expand on this interesting issue, but it is also worth mentioning certain doubts in this respect.

IV. Summary

The analysis of the bylaws and rules of CAS and the POC Court of Arbitration for Sport shows that the latter was modelled upon CAS, although significant differences arising from Polish law and Polish legal theory were preserved. In particular, the idea that proceedings held before the Arbitration Court regarding appeals against rules-related and disciplinary decisions are neither arbitration procedures nor (in this case there is no dispute as the issue is obvious) procedures conducted within the structure of common courts, is controversial to say the least. In effect, it led to a situation where the decisions of this Court were not subject to any verification by the common courts until the amendments to the Sports Act were passed in 2015, even though they definitely affected the legal status of parties to the proceedings. At present, they are subject to such control albeit to a limited extent, that is, only in the event of a *gross* breach of the regulations or an obviously *unjust* judgement.

In the case of CAS, the situation is different. The powers of CAS to 'finally' settle sports disputes, including disciplinary and rules-related disputes, do not mean that the powers of any national courts are completely ruled out in this respect. According to the Rules of CAS, its judgements cannot be challenged before a Swiss court if neither party has its registered office or domicile and does not conduct business in Switzerland, while, simultaneously, the parties

[35] The Constitutional Tribunal mentioned the Act on Qualified Sports because the legal analysis was done on the basis of legal situation reflecting/incorporating this last piece of legislation; however, the provisions pointed out by the Tribunal were largely transferred to the Sports Act.
[36] Disciplinary penalty referred to in Art. 45b sec. 5 subsec. 6.
[37] Art. 45b sec. 5 subsec. 4.

have expressly excluded the possibility of challenging a CAS judgement before the state courts in an arbitration agreement (or an agreement with similar content entered into after the emergence of a dispute). However, in practice, it is almost always possible to take a verdict to a higher instance authority[38] for reasons which, due to the nature of this article, would take up too much space to present in detail.

The background of both courts is also interesting. Both were set up on the initiative of key personalities of the Olympic world – the head of IOC (International Olympic Committee) in the case of CAS and the head of the Polish Olympic Committee in the case of the Polish Court. Also, only the intervention of the lawmakers (in the case of the POC Court of Arbitration for Sport) and international sports federations (in the case of the CAS) ordering these institutions to hear certain categories of cases has led to a substantial increase in the number of cases considered and a related increase in the importance of both institutions in the worlds of sports and law.

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[38] Compare, e.g. judgement of the Swiss Supreme Court (Swiss Federal Tribunal) of 22 March 2007, ATF 133 III 235, p. 1082.

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ARBITRATION RULES
OF THE COURT OF ARBITRATION
AT THE POLISH CHAMBER OF COMMERCE

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Chapter I
Introductory provisions

§ 1
Court of Arbitration

1. The Court of Arbitration at the Polish Chamber of Commerce (the "**Court of Arbitration**") is a permanent arbitration court.
2. The Court of Arbitration is an independent, distinct organizational unit of the Polish Chamber of Commerce, established for the purpose of administering arbitration proceedings conducted under the Arbitration Rules adopted by the Arbitral Council (the "**Arbitration Rules**").
3. A dispute shall be resolved by an arbitral tribunal appointed in accordance with the Arbitration Rules (the "**Arbitral Tribunal**"). The Arbitral Tribunal shall comprise three arbitrators, including the presiding arbitrator.
4. Provisions concerning the Arbitral Tribunal shall apply as relevant to a sole arbitrator. The sole arbitrator shall exercise the rights and duties of the Arbitral Tribunal and of the presiding arbitrator.
5. Any reference in the Arbitration Rules to proceedings before the Court of Arbitration shall be understood to mean proceedings conducted under the Arbitration Rules and administered by the Court of Arbitration.
6. The Court of Arbitration may act as a body for default appointment of arbitrators in arbitration proceedings which are not conducted under the Arbitration Rules.
7. The Court of Arbitration may administer *ad hoc* arbitration proceedings.
8. The seat of the Court of Arbitration is Warsaw.
9. The Court of Arbitration shall charge the fees specified in the Tariff of Fees of the Court of Arbitration at the Polish Chamber of Commerce (the "**Tariff of Fees**").

§ 2
Authorities of the Court of Arbitration

1. The authorities of the Court of Arbitration are the President of the Court of Arbitration, the Arbitral Council, and the Secretary General. The authorities of the Court of Arbitration shall perform the actions specified in the Arbitration Rules.
2. The organization, method of appointment and removal, and competencies of the authorities of the Court of Arbitration are specified by the Statute of the Court of Arbitration adopted by the Presidium of the Polish Chamber of Commerce.

§ 3
Jurisdiction of the Arbitral Tribunal

1. The Arbitral Tribunal has jurisdiction to resolve a dispute which according to law may be submitted to arbitration, if:
   1) the parties are bound by an arbitration agreement submitting disputes which have arisen or may arise between them in connection with a specified contractual or non-contractual legal relationship to resolution under the Arbitration Rules, or
   2) the respondent served with a copy of the statement of claim with the claimant's application for resolution of the dispute under the Arbitration Rules has consented in the proper form to such resolution of the dispute.
2. If the parties agreed in an arbitration agreement that a dispute shall be resolved in accordance with the Arbitration Rules, or indicated the Court of Arbitration, unless otherwise provided, the Arbitral Tribunal in a proceeding conducted under the Arbitration Rules and administered by the Court of Arbitration shall be deemed to have jurisdiction to hear the dispute.
3. The Arbitral Tribunal shall rule on its own jurisdiction, including the existence, validity and effectiveness of the arbitration agreement, upon an objection asserted at the latest in the statement of defence.

§ 4
Arbitration Rules

1. In matters not addressed in the Arbitration Rules and unless otherwise agreed by the parties, the Arbitral Tribunal shall conduct the proceeding as it deems proper.
2. The parties may agree at any time, in a manner binding on the Arbitral Tribunal, on rules of procedure different from those provided in the Arbitration Rules, so long as they do not violate mandatorily applicable legal norms. The provisions of the Arbitration Rules concerning the competencies of the authorities of the Court of Arbitration and the rules for appointment of the sole arbitrator or presiding arbitrator provided in § 16(3), as well as

the provisions of the Tariff of Fees, cannot be the subject of different rules agreed by the parties.

3. Unless otherwise provided by the parties, the Arbitration Rules in force on the date of commencement of the proceeding shall apply.
4. If an objection of violation of provisions of the Arbitration Rules or other rules of procedure agreed by the parties is not asserted by a party promptly, the party shall be deemed to have waived assertion of the objection.

§ 5
Principles of due diligence and liability

1. The Court of Arbitration and the Arbitral Tribunal shall perform actions connected with the arbitration proceeding with due diligence, seeking in particular to assure that the ruling issued is effective and enforceable.
2. The arbitrators, the Polish Chamber of Commerce, the Court of Arbitration, their staff and the members of the authorities of the Polish Chamber of Commerce and the Court of Arbitration shall not be liable for any loss arising as a result of acts or omissions connected with conduct of an arbitration proceeding, unless the loss was caused intentionally.

Chapter II
General provisions

§ 6
Grounds for resolution of dispute

1. The Arbitral Tribunal shall resolve the dispute in accordance with the law mutually indicated by the parties. In the absence of such indication, the law most closely connected with the legal relationship being considered shall be applied.
2. An award may not be based on legal grounds different from those relied on by either of the parties, unless the Arbitral Tribunal notifies the parties in advance and gives them an opportunity to be heard concerning such legal grounds.
3. The Arbitral Tribunal may resolve the dispute according to general principles of law or equity (*ex æquo et bono*) if the parties have expressly authorized it to do so.
4. In any event, the Arbitral Tribunal shall take into consideration the agreement between the parties and the established customs applicable to the legal relationship.

§ 7
Principles for proceeding

1. The Arbitral Tribunal shall conduct the proceeding in a manner assuring the equal treatment of the parties and the right of each party to be heard and to present its allegations and the evidence supporting them.
2. The parties to the proceeding shall act in good faith and seek to make the proceeding speedy and efficient and to avoid unnecessary costs.
3. The Arbitral Tribunal shall seek to ensure that the proceeding is speedy and efficient and to avoid unnecessary costs.

§ 8
Confidentiality

Unless otherwise provided by the parties, the arbitrators and the Court of Arbitration and its staff and the members of its authorities are required to maintain the confidentiality of all information concerning the proceeding.

§ 9
Consolidation of proceedings

1. Two or more proceedings being conducted between the same parties under the Arbitration Rules may, upon application of a party, be consolidated into one proceeding if the composition of the Arbitral Tribunal in each of the proceedings is the same and:
   1) the parties' claims in the proceedings subject to consolidation are based on the same arbitration agreement, or
   2) the parties' claims in the proceedings subject to consolidation are related, even if based on different arbitration agreements.
2. Proceedings in which the parties are not identical may also be consolidated if the composition of the Arbitral Tribunal in each of the proceedings is the same, the condition set forth in par. 1 (1) or (2) is met, and the parties to all of the proceedings consent.
3. The Arbitral Tribunal shall issue an order in each of the proceedings undergoing consolidation indicating the proceedings that are consolidated.
4. In issuing the order on consolidation of proceedings, the Arbitral Tribunal shall take into account all material circumstances and be guided by the interests of the parties, including in particular the need to assure that the proceeding is conducted efficiently.
5. Unless otherwise provided by the parties, the proceeding shall be conducted under the Arbitration Rules in force on the date of consolidation of the proceedings.

§ 10
Joinder of additional party

1. If on the basis of the arbitration agreement a third party may pursue claims against a party or parties to a proceeding conducted under the Arbitration Rules, or if a party to the proceeding may pursue claims against a third party, the Arbitral Tribunal may, upon application of a party and upon consent of the opposing party, or upon application of the third party and upon consent of the parties, order that the third party be admitted to participate in the pending proceeding as a party.
2. The Secretary General shall serve the party's application to admit a third party to participate in the proceeding on the third party, specifying an appropriate period of no less than 14 days for notification in writing whether it wishes to join the proceeding as a party.
3. A third party's joining the proceeding is deemed to mean its consent to the composition of the Arbitral Tribunal.
4. The Arbitral Tribunal shall specify an appropriate period for a third party pursuing claims against a party or a party pursuing claims against the third party to file a statement of claim. § 25, § 26 and § 27 of the Arbitration Rules shall apply as relevant.
5. If the arbitration fee and registration fee are not paid within the specified period, the third party shall not be admitted to participate in the proceeding.

§ 11
Service

1. A written communication to the Court of Arbitration or to a party to the proceeding shall be served in person, against acknowledgement of receipt, or dispatched by certified post, courier post or other method enabling documentation of dispatch.
2. A written communication is deemed served if delivered to the addressee personally or delivered to the addressee's registered office, place of habitual abode, or postal address indicated by the addressee.
3. If the addressee is a business or other entity entered in a court register or other public register, a written communication is also deemed to be served if it reaches the address indicated in the register, unless the party provided another address for service.
4. If none of the places mentioned in the foregoing paragraphs can be determined, a written communication is deemed to be served if it reached the last known address of the registered office or the last known place of habitual abode of the addressee.
5. If a party has appointed an attorney or an attorney for service, written communications to the party shall be served on the attorney. An attorney for more than one person shall be served one copy of the written communication and enclosures. If a party has appointed more than one attorney,

service is made on only one attorney. The party may indicate the attorney on whom a written communication shall be served.

6. During the course of the proceeding, a party shall file a written communication with the Court of Arbitration with copies for the arbitrators and shall serve a copy of the written communication with enclosures directly on the opposing party. In the written communication the party shall confirm service thereof or mailing to the opposing party in the manner indicated in par. 1.
7. The Arbitral Tribunal may order service of written communications during the course of the proceeding in some other way. More specifically, the Arbitral Tribunal may order that written communications be served additionally, or at the consent of the parties exclusively, by email. Service using telecommunications such as email or fax may be made only to the address indicated for such service.
8. The parties and their representatives are required to notify the Court of Arbitration of any change of address. If this obligation is neglected, a written communication dispatched in the manner specified in par. 1 and to the last known address shall be deemed served.
9. A written communication shall be deemed served on the date it is received by the addressee, or if the addressee refuses receipt of the written communication, on the date of the refusal. If the addressee failed to collect a written communication dispatched by certified post or courier post, the written communication is deemed served on the last day when the addressee could have collected it.
10. A written communication transmitted by email or other means of telecommunications is deemed served on the date of transmission, unless it did not reach the addressee.

§ 12
Calculation of periods under the Arbitration Rules

1. The deadline for submitting a written communication is met if the written communication is served on the addressee or dispatched to the addressee in the manner specified in § 11 before the deadline.
2. The period for a party to perform an action shall begin to run from the day following service of the written communication on the party. If however the day following service of a written communication is a state holiday or other non-working day, the period begins to run on the first business day following that date. If the last day of the period is a state holiday or other non-working day, the period ends on the first business day following that date.

§ 13
Language of proceeding

1. The parties may agree on the language of the proceeding. Unless otherwise agreed, the language of the proceeding shall be Polish.

2. Taking into consideration the positions of the parties and the circumstances of the case, particularly the language of the parties' agreement and other documents which are evidence in the case, and the language of witnesses, experts and the parties, the Arbitral Tribunal may decide that another language will be the language of the proceeding for specific activities.

§ 14
Place of arbitration

1. Unless otherwise agreed, the place of arbitration shall be Warsaw.
2. After seeking the opinions of the parties, the Arbitral Tribunal may order that specific activities be conducted at a place other than the place of arbitration.

Chapter III
Arbitrators

§ 15
Qualifications of arbitrator

1. By accepting appointment, an arbitrator undertakes to serve in accordance with the Arbitration Rules.
2. An arbitrator must be independent and impartial for the entire duration of the arbitration proceeding.
3. An arbitrator shall accept appointment by submitting a written statement to the Secretary General on acceptance of the appointment, the arbitrator's independence and impartiality, and availability of the time necessary to perform the duties of arbitrator. In the statement, the arbitrator shall undertake to properly perform the duties of arbitrator. The arbitrator must also disclose any circumstances which may raise doubts as to his or her independence or impartiality.
4. Failure to submit the statement referred to in par. 3 within the period specified by the Secretary General shall be deemed to be refusal to accept the appointment.
5. The Secretary General shall promptly serve copies of the written statement referred to in par. 3 on the parties and the other arbitrators.
6. The case file shall be delivered to the arbitrator promptly after he or she submits the statement referred to in par. 3.
7. If circumstances referred to in par. 3 arise or become known to an arbitrator after he or she has assumed office, the arbitrator is required to promptly disclose them in writing to the Secretary General, who shall promptly serve a copy of the communication on the parties and the other arbitrators.

8. In the event of refusal to accept appointment as an arbitrator, the person nominated to serve shall promptly notify the Secretary General in writing.

§ 16
List of Arbitrators

1. The Court of Arbitration maintains the List of Arbitrators Recommended by the Court of Arbitration at the Polish Chamber of Commerce (the "**List of Arbitrators**").
2. The rules and procedure for establishment of the List of Arbitrators are specified by the Statute of the Court of Arbitration.
3. The sole arbitrator or presiding arbitrator may be appointed only from among persons included in the List of Arbitrators. However, upon mutual application of the parties or the arbitrators made within the period specified in § 19 (2) or (3), the Arbitral Council may consent to selection of a sole arbitrator or presiding arbitrator from outside the List of Arbitrators, particularly if justified by the specific nature of the dispute or the qualifications of the arbitrator.
4. A party appointing an arbitrator from outside the List of Arbitrators shall provide the arbitrator's first and last name, profession, residential address, telephone number and email address.

§ 17
Restrictions on serving as an arbitrator or attorney for a party

1. The Secretary General, the Assistant Secretary General and staff of the Court of Arbitration may not serve as an arbitrator in a proceeding conducted under the Arbitration Rules. The President of the Court of Arbitration and the members of the Arbitral Council may not be appointed to serve as an arbitrator under a default appointment.
2. An arbitrator included in the List of Arbitrators, the President of the Court of Arbitration, the members of the Arbitral Council, the Secretary General, the Assistant Secretary General and staff of the Court of Arbitration may not appear in a proceeding before the Court of Arbitration as an attorney for a party.
3. Unless otherwise provided by the parties, a person who served as a mediator in a dispute covered by the same proceeding may not serve as an arbitrator or an attorney for a party in a proceeding before the Court of Arbitration.

§ 18
Number of arbitrators

1. Subject to par. 2, disputes shall be resolved by an Arbitral Tribunal comprising three arbitrators appointed in accordance with the parties' agreement and the Arbitration Rules.

2. Disputes shall be subject to resolution by a sole arbitrator:
   1) if the parties have so agreed, or
   2) if the amount in dispute does not exceed PLN 40,000.00, unless the parties agreed to hearing of the dispute by an Arbitral Tribunal.
   3) if the Arbitral Council so decided ex officio, provided that such decision is warranted by the circumstances of the case or on the justified motion of any of the parties.

§ 19
Method of appointment of arbitrators

3. If the dispute is to be resolved by an Arbitral Tribunal comprising three arbitrators, the Secretary General shall send the List of Arbitrators to the parties and summon each of them to appoint one arbitrator within a specified period of no less than 14 days. When summoning the respondent to appoint an arbitrator, the Secretary General shall notify the respondent of the appointment of an arbitrator by the claimant. If an arbitrator is not appointed by the party within the specified period, the arbitrator shall be appointed by the Arbitral Council pursuant to § 20.
4. The Secretary General shall summon the arbitrators to appoint a presiding arbitrator within 14 days. If the arbitrators do not appoint a presiding arbitrator within this period, the presiding arbitrator shall be appointed by the Arbitral Council pursuant to § 20. Upon application by the arbitrators made before the end of that period, the Secretary General may for valid cause extend the period by no more than 14 days. If a party challenges an arbitrator prior to appointment of the presiding arbitrator, the period for appointment of the presiding arbitrator shall begin to run anew from notification of the arbitrators of denial of the challenge of the arbitrator.
5. If the dispute is to be resolved by a sole arbitrator, the Secretary General shall summon the parties to agree on and appoint an arbitrator within 14 days. If the parties do not appoint an arbitrator within this period, the arbitrator shall be appointed by the Arbitral Council pursuant to § 20.
6. If the parties have agreed that an arbitrator or presiding arbitrator is to be appointed by a third party, but the third party does not make an appointment within the period specified by the parties or the parties did not specify a period, the Secretary General shall summon the person to make the appointment within a period of no less than 14 days from the summons. If the arbitrator or presiding arbitrator is not appointed within this period, the arbitrator shall be appointed by the Arbitral Council pursuant to § 20.
7. If more than one person appears on the side of the claimant or the respondent, such persons shall jointly appoint one arbitrator within the period specified in par. 1. If the arbitrator is not appointed within this period, the arbitrator shall be appointed for this side by the Arbitral Council pursuant to § 20.

8. A party may appoint a reserve arbitrator in case the arbitrator refuses to accept the appointment or his or her appointment terminates.
9. In the event of the arbitrator's refusal to accept the appointment or failure to submit the statement referred to in § 15(3), the Secretary General shall again summon the party, parties or arbitrators to appoint an arbitrator pursuant to par. 1. If the arbitrator was appointed through the procedure for default appointment, the arbitrator shall be appointed by the Arbitral Council.
10. If an arbitrator appointed pursuant to par. 7 refuses the appointment or fails to submit the statement, the arbitrator shall be appointed by the Arbitral Council.

§ 20
Default appointment of arbitrators

1. The Arbitral Council shall appoint an arbitrator in instances specified in the Arbitration Rules, pursuant to the following rules.
2. The Arbitral Council shall appoint an arbitrator from among the persons included in the List of Arbitrators. When appointing an arbitrator, the Arbitral Council shall take into consideration the qualifications which the arbitrator should have in accordance with the agreement of the parties, as well as other circumstances which may be relevant for appointment to this office.
3. In appointing an arbitrator in a dispute between parties who are citizens of different countries or have their residence or registered office in different countries, the Arbitral Council shall take into consideration in particular the citizenship, residence and other connections to these countries of the person to be appointed, seeking to ensure that the presiding arbitrator or sole arbitrator is not connected with any of these countries, unless otherwise provided by the parties.

§ 21
Termination of arbitrator's appointment

1. In the event of termination of an arbitrator's appointment before the arbitrator has completed performance of the function entrusted to the arbitrator, in the event of his or her death, resignation, challenge or removal by the parties or by the Arbitral Council, a new arbitrator shall be appointed using the procedure provided in § 19.
2. The Arbitral Tribunal shall decide in the form of an order on repetition of all or part of the proceeding with the participation of the new arbitrator.
3. If after completion of the admission of evidence the appointment of an arbitrator appointed by a party terminates or the arbitrator fails to perform the duties of the office, the Arbitral Council may order that the dispute be resolved by the remaining arbitrators in the Arbitral Tribunal. In issuing such order, the Arbitral Council shall consider the positions of the parties and the remaining arbitrators.

§ 22
Challenge of arbitrator

1. If there are circumstances raising justified doubts as to the independence or impartiality of an arbitrator, or if the arbitrator does not have the qualifications specified in the agreement of the parties, the Arbitral Council may, upon written challenge of a party, remove the arbitrator.
2. A party challenging an arbitrator shall file a written challenge with the Arbitral Council, via the Secretary General, stating the circumstances justifying the challenge (the grounds for challenge), together with copies for the other party and the arbitrators.
3. A party may challenge an arbitrator within 14 days after learning of the grounds for challenge. After this period has passed, the party shall be deemed to have waived its right to challenge the arbitrator on this basis.
4. A party may challenge an arbitrator whom the party itself appointed or participated in appointing only on grounds which it learned of after appointment of the arbitrator.
5. The Secretary General shall forward a copy of the challenge of an arbitrator to the other party and to the arbitrator in question so that they may respond to the challenge within a specified period of no more than 14 days.
6. If the chair of the Arbitral Council deems it helpful, the other arbitrators may be permitted to take a position on the challenge.
7. If the challenge concerns more than one arbitrator, the Arbitral Council shall issue a separate order with respect to each arbitrator.
8. Filing of a challenge of an arbitrator shall not affect the course of the proceeding unless the Arbitral Tribunal orders otherwise.

§ 23
Resignation and removal of arbitrator

1. An arbitrator may resign at any time by filing a written statement with the Secretary General providing the reasons for resignation.
2. The parties may remove any of the arbitrators at any time by submitting a mutual statement in writing to the Secretary General.
3. Any party may apply to the Arbitral Council, via the Secretary General, to remove an arbitrator who is not properly performing his or her duties, and in particular when it is obvious that the arbitrator will not perform actions within the appropriate time or is delayed in performing them without valid cause. § 22(5) shall apply as relevant.
4. If arbitrators appointed by the same party resign or are removed by the parties or the Arbitral Council twice, the other party may, within 7 days after learning of the resignation or removal of the arbitrator, demand default appointment of the arbitrator by the Arbitral Council. This provision shall apply as well to a subsequent resignation or removal of the arbitrator.

Chapter IV
Proceeding

§ 24
Commencement of proceeding

An arbitration proceeding shall be commenced by filing of a statement of claim or a request for arbitration with the Court of Arbitration.

§ 25
Statement of claim

1. The statement of claim shall contain:
   1) identification of the parties to the proceeding, with their addresses and if possible also their email addresses and telephone numbers;
   2) an indication of the arbitration agreement or an application referred to in § 3(1)(2);
   3) an indication of the amount in dispute; and
   4) a precise statement of the relief demanded together with justification therefor and an indication of the evidence in support of factual allegations.
2. The statement of claim may also indicate the arbitrator appointed by the claimant.
3. The following shall be enclosed with the statement of claim:
   1) a copy of the arbitration agreement or other document justifying the jurisdiction of an Arbitral Tribunal appointed in accordance with the Arbitration Rules;
   2) in the case of appointment of an attorney, the original or a copy of the power of attorney and the first and last name, address, telephone number and email address of the attorney;
   3) the evidence, particularly documentary evidence, unless the nature of the evidence prohibits enclosure of the evidence; and
   4) copies of the statement of claim and enclosures for each of the arbitrators, the respondent, and the Court of Arbitration.

§ 26
Payment and curing deficiencies in statement of claim

1. After a statement of claim is received, the Secretary General shall summon the claimant, within a specified period of no less than 14 days, to pay the

registration fee and the arbitration fee determined according to the Tariff of Fees in force on the date of filing of the statement of claim.

2. If the statement of claim does not meet the requirements set forth in § 25 (1) and (3), the Secretary General shall summon the claimant to cure the deficiencies within a specified period of no less than 14 days.

3. If the deficiencies in the statement of claim are not cured or the registration fee and arbitration fee are not paid in full within the specified period, the statement of claim shall be returned. The returned statement of claim shall not exert any legal effects.

4. If an arbitrator is not appointed in the statement of claim even though the claimant is entitled to do so, the Secretary General shall summon the claimant to appoint an arbitrator pursuant to § 19.

5. If the statement of claim raises doubts whether an Arbitral Tribunal appointed in accordance with the Arbitration Rules will have jurisdiction to resolve the dispute, the Secretary General shall, prior to summoning the claimant to cure any deficiencies in the statement of claim and to pay the registration fee and the arbitration fee, and without ruling on the existence, validity, effectiveness or enforceability of the arbitration agreement, promptly draw this to the attention of the claimant, summoning it to take a position in writing within a specified period of no more than 14 days. If the claimant maintains its demand that the dispute be heard by an Arbitral Tribunal appointed in accordance with the Arbitration Rules, or if the deadline is not met, the Secretary General shall summon the claimant to cure the deficiencies in the statement of claim pursuant to par. 2 or pay the registration fee and arbitration fee pursuant to par. 1.

6. If the Arbitral Tribunal finds that the amount in dispute indicated by the claimant is lower than the actual amount, it may establish the actual amount in dispute. In such situation, the Secretary General shall summon the claimant to supplement the fees by paying the difference in the fees calculated on the amount in dispute determined by the Arbitral Tribunal and the fees paid by the claimant. Par. 1 and 3 shall apply as relevant.

§ 27
Statement of defence

1. If the statement of claim meets the requirements set forth in § 25 (1) and (3) and was duly paid for, the Secretary General shall promptly serve a copy of the statement of claim together with the Arbitration Rules on the respondent, summoning it to file a statement of defence within a specified period of no more than 30 days. In a justified case the Secretary General may, upon application of the respondent filed before the end of such period, extend the period for filing of a statement of defence.

2. When serving a copy of the statement of claim on the respondent, the Secretary General shall summon it to appoint an arbitrator in accordance with the Arbitration Rules, unless the respondent is not entitled to do so.

3. The statement of defence shall contain:

1) identification of the parties to the proceeding, with their addresses and if possible also their email addresses and telephone numbers;

2) the respondent's position on the jurisdiction of an Arbitral Tribunal appointed pursuant to the Arbitration Rules, and more specifically an objection of the lack of an agreement to arbitrate under the Arbitration Rules, if the respondent asserts such objection; and

3) the respondent's position with respect to the relief demanded by the claimant together with justification therefore and an indication of the evidence in support of factual allegations.

4. The statement of defence shall also indicate the arbitrator appointed by the respondent, if the respondent is entitled to do so.

5. The following shall be enclosed with the statement of defence:

1) in the case of appointment of an attorney, the original or a copy of the power of attorney and the first and last name, address, telephone number and email address of the attorney;

2) the evidence, particularly documentary evidence, unless the nature of the evidence prohibits enclosure of the evidence; and

3) copies of the statement of defence and enclosures for each of the arbitrators and for the Court of Arbitration.

6. The lack of a statement of defence shall not stay the proceeding.

§ 28
Request for arbitration and response to request for arbitration

1. An arbitration proceeding may also be commenced by filing of a request for arbitration with the Court of Arbitration.

2. The request for arbitration shall contain:

1) identification of the parties to the proceeding, with their addresses and if possible also their email addresses and telephone numbers;

2) an indication of the agreement to arbitrate under the Arbitration Rules or an application referred to in § 3(1)(2);

3) a summary of the subject of the dispute; and

4) an indication of the amount in dispute.

3. If the proceeding is commenced by a request for arbitration, the respondent may file a response to the request for arbitration within a period specified by the Secretary General of no more than 30 days.

4. The response to the request for arbitration shall contain:

1) identification of the parties to the proceeding, with their addresses and if possible also their email addresses and telephone numbers; and

2) the respondent's position.

5. If the proceeding is commenced by a request for arbitration, the Arbitral Tribunal shall establish the time for filing of the statement of claim and the statement of defence.
6. The request for arbitration is subject to the registration fee and the arbitration fee in the amounts and under the rules for a statement of claim.
7. The provisions of the Arbitration Rules concerning a statement of claim and a statement of defence shall apply as relevant to the request for arbitration and the response to the request for arbitration.

§ 29
Counterclaim and setoff

1. The respondent may file a counterclaim with the statement of defence.
2. The Arbitral Tribunal may also permit filing of a counterclaim at a later time or consider a counterclaim asserted after the period specified in par. 1 if it would not excessively prolong the proceeding.
3. The provisions of the Arbitration Rules concerning a statement of claim shall apply as relevant to a counterclaim.
4. The respondent may assert the defence of setoff. However, the Arbitral Tribunal may refuse to consider a defence of setoff asserted later than at the first session if it would excessively prolong the proceeding, unless the respondent could not assert the defence earlier. The defence of setoff is subject to the fee specified in the Tariff of Fees.

§ 30
Interim relief to secure claim or evidence

1. Upon application of a party which has substantiated its claim and legal interest, the Arbitral Tribunal may order such interim relief as it deems proper to secure the claim in light of the subject of the dispute.
2. Upon application of a party, the Arbitral Tribunal may order interim relief to secure evidence if necessary under the circumstances of the case.
3. An order on interim relief to secure a claim or evidence shall be issued after enabling the opposing party to take a position.
4. Upon application of a party, an order on interim relief may be amended or vacated as appropriate to the circumstances.

§ 31
Schedule of proceeding

1. As quickly as possible, after seeking the opinions of the parties, the Arbitral Tribunal shall establish a schedule for the proceeding by issuing an order in this respect. The schedule for the proceeding may, in particular, specify the order and the dates for written submissions, the dates for submission and

admission of evidence, the dates of hearings, and the anticipated date for issuance of a ruling concluding the proceeding. The order may also specify particular rules of procedure, including more specifically the manner and dates for preparation and presentation of written witness statements and opinions of experts. The Arbitral Tribunal may decide not to establish a schedule if it determines that it is unnecessary to do so in light of the nature of the dispute.

2. The Arbitral Tribunal may order an organizational session to discuss issues with the parties which may be included in the schedule of the proceeding, as well as other issues concerning the proceeding. An organizational session may also be conducted using telecommunications.

§ 32
Amendment or withdrawal of claim

1. The claimant may extend its claim until the closing of the hearing, unless the Arbitral Tribunal finds that extension of the claim would excessively prolong the proceeding.
2. The claimant may withdraw its statement of claim at any time, unless the respondent objects and the Arbitral Tribunal finds that the respondent has a justified interest in a final resolution of the dispute.
3. Refusal to permit extension or withdrawal of the claim shall require an order by the Arbitral Tribunal.
4. Extension of the claim is subject to a fee pursuant to the Tariff of Fees. § 27 (1) and (3) shall apply as relevant.

§ 33
Evidence

1. A party bears the burden of indicating evidence to prove facts from which it derives legal consequences.
2. The Arbitral Tribunal shall rule on the evidentiary applications of the parties. Refusal to admit evidence indicated by a party shall require issuance of an order. Depending on the circumstances, the Arbitral Tribunal may amend its order in this respect.
3. The Arbitral Tribunal may specify a period for assertion of evidence after which the parties' applications to admit evidence will not be considered.
4. Upon application of a party, the Arbitral Tribunal may require the opposing party to present a document or other form of evidence which is in its possession.
5. The Arbitral Tribunal may admit evidence from documents, witnesses, expert opinions and other evidence indicated by the parties which it deems relevant for clarification of the case.
6. The Arbitral Tribunal shall assess the credibility and weight of the evidence in its own judgment, on the basis of a thorough consideration of the col-

lected material. The Arbitral Tribunal shall also assess on this basis the significance to be ascribed to a party's refusal to present evidence or obstacles a party raises to taking evidence.

7. If there is a need to take evidence away from the place of arbitration, the Arbitral Tribunal may entrust this task to one of the arbitrators. The parties and their attorneys shall have the right to participate in taking of evidence by the designated arbitrator.

8. The Arbitral Tribunal shall decide on the method for taking evidence. More specifically, it may order that evidence from a witness be taken in two stages: first on the basis of a written statement by the witness and then by supplementary questioning at a hearing. Upon consent of the parties, the Arbitral Tribunal may take evidence from a witness solely on the basis of the witness's written statement.

9. A party shall ensure the appearance at the hearing of a person it has named to testify as a party, witness or expert.

10. Specific rules for presentation and admission of evidence may be determined by the Arbitral Tribunal in an order. In particular, the Arbitral Tribunal may specify in detail the form and manner of preparation of statements referred to in par. **Błąd! Nie można odnaleźć źródła odwołania.**, the order in which the parties will question witnesses, or the time allowed for the parties to question a witness or all of the witnesses.

11. The Arbitral Tribunal may appoint an expert or experts by commissioning them to prepare an opinion. The Arbitral Tribunal may admit evidence from an opinion commissioned by a party or parties.

12. Upon application of a party or if the Arbitral Tribunal deems it proper, after presentation of his or her opinion an expert shall participate in the hearing in order to provide clarifications and respond to questions. Other experts and witnesses may also take part in the hearing if the Arbitral Tribunal deems it proper.

§ 34
Hearing

1. The Arbitral Tribunal shall consider the dispute at a hearing. Upon consent of the parties, the Arbitral Tribunal may resolve the dispute without scheduling a hearing, on the basis of the parties' allegations set forth in their written submissions and the documents or other evidence submitted by them, if it finds that the dispute is sufficiently clarified.

2. The hearing shall be held without the attendance of the public, but upon consent of the parties the Arbitral Tribunal may permit third parties to attend the hearing. The President of the Court of Arbitration, the Secretary General and a member of the Arbitral Council may attend the hearing.

3. The hearing shall be held at the time provided in the schedule adopted by the Arbitral Tribunal or specified by the presiding arbitrator.

4. Before the hearing, the presiding arbitrator may issue orders to prepare for the hearing so that the dispute is resolved as quickly as possible.
5. The hearing shall be led by the presiding arbitrator.
6. Absence from a hearing by a properly notified party or its attorney shall not stay the proceeding.

§ 35
Record

1. A record shall be prepared of the course of the hearing and other actions by the Arbitral Tribunal or actions performed by the arbitrator designated by the Arbitral Tribunal pursuant to § 33(7). The recording clerk shall be appointed by the Secretary General.
2. The record shall be signed by the presiding arbitrator and the recording clerk.
3. The course of actions for which a record is prepared may be recorded using an audio or video device, which all persons participating in the activity shall be informed of before the device is turned on. Upon application of a party, the Court of Arbitration may provide the party a carrier containing the recording of an activity. Upon request of a party and for an additional fee provided in the Tariff of Fees, the Court of Arbitration shall provide a party with a transcript of the recording made using an audio or video recording device. After consulting with the parties, the Arbitral Tribunal may order that the course of the hearing also be recorded in some additional way.
4. Upon application of the parties or their attorneys, the Court of Arbitration shall issue them copies of the record and permit them to review the case file.
5. A party may request correction or supplementation of the record, but no later than at the next session, or in the case of the record from the session at which the hearing was closed within 14 days after service on the party of a copy of the record.

§ 36
Stay of proceeding

1. The Arbitral Tribunal shall stay the proceeding upon mutual application of the parties.
2. The Arbitral Tribunal may stay the proceeding upon application of a party if the resolution of the dispute depends on the result of another pending proceeding.
3. The Arbitral Tribunal may also stay the proceeding when there are circumstances preventing continuation of the proceeding.
4. Upon application of a party, the Arbitral Tribunal shall order resumption of a proceeding stayed at the mutual application of the parties, and in other instances when the reason for staying the proceeding has ceased.

5. An order staying the proceeding before appointment of the Arbitral Tribunal shall be issued by the President of the Court of Arbitration.

§ 37
Closing of hearing

1. The presiding arbitrator shall close the hearing after the evidence has been taken and the Arbitral Tribunal finds that the case has been sufficiently clarified for a resolution.
2. If the Arbitral Tribunal deems it necessary, the presiding arbitrator may reopen a closed hearing.

§ 38
Discontinuance of proceeding

1. The Arbitral Tribunal shall discontinue the proceeding in instances specified in the Arbitration Rules, and also if:
   1) the claimant withdraws its statement of claim, unless the respondent objects and the Arbitral Tribunal finds that the respondent has a justified interest in a final resolution of the dispute;
   2) the claimant fails to file a statement of claim within the period specified by the Arbitral Tribunal pursuant to § 28(5);
   3) continuation of the proceeding has become moot or impossible for other reasons; or
   4) a year has passed since stay of the proceeding pursuant to § 36(1) and none of the parties has applied for resumption of the proceeding.
2. In the event of withdrawal of the statement of claim before appointment of the Arbitral Tribunal, an order discontinuing the proceeding shall be issued by the President of the Court of Arbitration.

Chapter V
Rulings

§ 39
Orders

1. In matters not requiring issuance of an award, and in other matters specified in the Arbitration Rules, the Arbitral Tribunal shall issue an order. Moreover, when so provided by the Arbitration Rules, orders shall be issued by the President of the Court of Arbitration or by the Arbitral Council.
2. In matters concerning the organization of the proceeding, the presiding arbitrator may issue orders independently. Such an order may be vacated or amended by the Arbitral Tribunal.

3. A written justification shall be required for an order ending the proceeding in the case, and for an order on the jurisdiction of the Arbitral Tribunal, denial of a challenge of an arbitrator, continuation of the proceeding by an incomplete Arbitral Tribunal, or correction, supplementation or interpretation of an award.
4. Orders referred to in par. 3 shall be served on the parties together with the justification.
5. An order on securing of a claim or evidence, extension of the claim, withdrawal of the statement of claim, stay of the proceeding, determination of the actual amount in dispute, consolidation of proceedings, admission of a third party to participate in the proceeding as a party, refusal to consider a defence of setoff, or correction or supplementation of the record of the hearing shall be served on the parties together with a justification if issued outside of a hearing.
6. § 41, § 43, § 45 and § 46 of the Arbitration Rules shall apply as relevant to orders ending the proceeding.

§ 40
Award

1. The Arbitral Tribunal shall resolve the dispute by an award. The award is binding on the parties. The parties shall voluntarily carry out the award.
2. The award shall be issued within 9 months after commencement of the proceeding and no later than 30 days after closing of the hearing. At the Secretary General's own initiative or upon application of the presiding arbitrator, the Secretary General may extend either of these periods if justified by the complexity of the issues in the dispute or other important considerations.
3. The Arbitral Tribunal shall issue the award after conducting closed consultations.
4. If the dispute is resolved by more than one arbitrator, the award shall be issued by a majority of votes. If there is no majority, the vote of the presiding arbitrator shall prevail.
5. If an arbitrator fails to participate in the voting without valid cause, the other arbitrators may vote without his or her participation.
6. An arbitrator who did not vote with the majority may dissent, noting this with his or her signature on the award. An arbitrator who dissented may submit a justification for the dissent within 14 days after the date of the award.
7. The President of the Court of Arbitration may demand an explanation from the presiding arbitrator of the reasons for the Arbitral Tribunal's failure to issue a timely award.

§ 41
Content and form of award

1. The award shall contain:
   1) identification of the arbitrators and the parties,
   2) the date and place of issuance of the award,
   3) an indication of the grounds for the jurisdiction of the Arbitral Tribunal,
   4) the resolution of the relief demanded by the parties, and
   5) the reasoning guiding the Arbitral Tribunal in issuing the award.
2. The award shall be made in writing, with one original for each of the parties and two originals left with the Court of Arbitration. All of the arbitrators shall sign the award. The reason shall be stated for the absence of an arbitrator's signature.
3. By signing the award, the President of the Court of Arbitration and the Secretary General confirm that the Arbitral Tribunal was appointed in accordance with the Arbitration Rules and that the signatures of the members of the Arbitral Tribunal are authentic.
4. The date of the award is the date of signing of the award by the sole arbitrator, or if the Arbitral Tribunal comprises three arbitrators, the date of signing by the second of them.
5. Before signing the award, the President of the Court of Arbitration may, without interfering with the substance of the resolution, forward the award to the presiding arbitrator to make necessary formal corrections or to correct obvious errors.

§ 42
Partial or preliminary award

1. The Arbitral Tribunal may issue a partial award if only a portion of the demand or certain of the demands in the statement of claim or counterclaim can be resolved.
2. In the case of a counterclaim, the Arbitral Tribunal may also resolve the entirety of the demand in the statement of claim or the counterclaim by a partial award.
3. Upon application of a party, the Arbitral Tribunal may issue a preliminary award holding a claim to be justified in principle and continue the proceeding with respect to the disputed amount of the demand.

§ 43
Service of award

1. The award shall be served on the parties. If an arbitrator dissented when signing the award and submitted the justification for the dissent to the

case file, the parties shall also be served a copy of the justification for the dissent.

2. Service of a copy of the award on a party shall be made after the party has paid all fees and reimbursement of costs to the Court of Arbitration.

§ 44
Ruling in the event of settlement

1. If the parties reach a settlement after selection of the presiding arbitrator or sole arbitrator, the Arbitral Tribunal shall discontinue the proceeding. However, upon application of the parties, the Arbitral Tribunal may give the settlement the form of an award.
2. If the settlement is concluded before the Arbitral Tribunal, the terms of the settlement shall be included in the record and confirmed by the signatures of the parties.

§ 45
Correction or interpretation of award

1. Within 14 days after receipt of the award, a party may make an application, serving a copy thereof on the other party, for:
   1) resolution of doubts with respect to the content of the award (interpretation of the award), or
   2) correction in the text of the award of inaccuracies, typographical or computation errors or other obvious errors.
2. The Arbitral Tribunal may also correct the award on its own initiative within 30 days after issuance of the award.
3. A notation on correction of the award shall be made on the originals of the award and copies thereof. The correction shall be reflected in subsequent copies of the award.
4. An interpretation of the award made by an order of the Arbitral Tribunal constitutes an integral part of the award.

§ 46
Supplementary award

1. Within 30 days after receipt of the award, a party may make an application, serving a copy thereof on the other party, for resolution of a demand which the Arbitral Tribunal did not rule on in the award.
2. The Arbitral Tribunal shall issue a supplementary award also in the event of reopening the proceeding on the basis of an order of the common court considering a petition to set aside the award, for the purpose of eliminating the grounds for setting aside the award.

3. A supplementary award shall be issued within 30 days after filing of the application. The second sentence of § 40(2) shall apply as relevant.
4. The Arbitral Tribunal shall deny an application to supplement the award by an order.

§ 47
Publication of rulings

The Arbitral Council may consent to publication of a ruling in whole or part, ensuring its anonymity, if neither of the parties objects to publication within 14 days after service of the ruling on the party.

Chapter VI
Costs of proceeding

§ 48
Costs of arbitration proceeding

1. Upon application of a party, the Arbitral Tribunal shall resolve the costs of the arbitration proceeding in the ruling ending the proceeding, reflecting the result of the proceeding and other relevant circumstances.
2. The costs of the arbitration proceeding shall include:
   1) the registration fee,
   2) the arbitration fee,
   3) expenses, and
   4) justified costs of the parties connected with conducting the proceeding,

determined in accordance with the Arbitration Rules and the Tariff of Fees in force on the date of commencement of the proceeding.

3. A party may file an application for award of the costs of the proceeding, if necessary together with a list and proof of incurrence of the costs, until the closing of the hearing or within another period specified by the Arbitral Tribunal.

§ 49
Registration fee and arbitration fee

The rules for incurring of costs by the parties and the amount of the registration fee and the arbitration fee, as well as the rules for reimbursement of the arbitration fee, are specified in the Tariff of Fees in force on the date of commencement of the arbitration proceeding.

§ 50
Expenses

1. The parties shall bear the expenses connected with the activities of experts, translators, holding a session away from the seat of the Court of Arbitration, and other expenses arising during the course of the proceeding.
2. The Secretary General shall summon a party which applies for performance of activities which will entail the necessity to incur expenses to pay an appropriate advance against the expenses.
3. Advances shall be settled after the conclusion of the proceeding. On its own initiative, the Court of Arbitration shall refund to a party the difference between the amount of the advance and the actual expenses incurred.

§ 51
Costs of the parties

1. When resolving the costs of the proceeding, the Arbitral Tribunal shall take into account the justified costs of legal representation and other justified costs incurred by a party in connection with the proceeding.
2. When resolving the costs of legal representation, the Arbitral Tribunal shall take into account the reasonable amount of the attorney's fee, considering in particular the result of the proceeding, the work input of the attorney, the nature of the case, and other relevant circumstances.

Chapter VII
Concluding provisions

§ 52
Adoption and effective date of the Arbitration Rules

1. These Arbitration Rules were adopted by resolution of the Arbitral Council on 14 October 2014.
2. The Arbitration Rules shall enter into force on 1 January 2015.

MEDIATION RULES
OF THE COURT OF ARBITRATION
AT THE POLISH CHAMBER OF COMMERCE

MEDIATION RULES
OF THE COURT OF ARBITRATION
AT THE POLISH CHAMBER OF COMMERCE

§ 1
Introductory provisions

1. Prior to commencement of proceedings before an arbitration court or common court, or during the course of the proceedings, a party to the dispute may apply to the Court of Arbitration at the Polish Chamber of Commerce (the "**Court of Arbitration**") to conduct a proceeding seeking amicable settlement of the dispute presented in the application ("**Mediation Proceeding**").
2. If the parties to the dispute do not mutually specify other rules for proceeding, the proceeding shall be conducted in accordance with these Mediation Rules of the Court of Arbitration (the "**Mediation Rules**").
3. In the event of an order by the court directing the parties to mediation at the Court of Arbitration, the Mediation Rules shall apply in matters not covered by the provisions of the Civil Procedure Code on the court's directing the parties to mediation.

§ 2
Commencement of Mediation Proceeding

1. A Mediation Proceeding is commenced on the basis of an application for mediation, which shall contain:
   1) identification of the parties and their attorneys, if appointed, with their addresses and other contact details;
   2) a description of the circumstances of the dispute that has arisen between the parties;
   3) proof of payment of the registration fee and half of the mediation fee in the amount specified in the Tariff of Fees in force on the date of filing of the application;
   4) a list of enclosures; and

5) a copy of the mediation agreement, if the parties have made such an agreement in writing, and if an order was issued by the court directing the parties to mediation at the Court of Arbitration, a copy of the court order.

2. If the application for mediation is filed by both parties, it shall also contain proof of payment of the registration fee and the entire mediation fee in the amount specified in the Tariff of Fees in force on the date of filing of the application. The application may also include designation of a mediator from the List of Mediators.

3. If the application does not meet the requirements set forth in par. 1 or 2 above, the Secretary General of the Court of Arbitration (the "**Secretary General**") shall summon the applicant to cure the deficiencies within a specified period of no less than 14 days.

4. An application for mediation corrected or supplemented by the time specified pursuant to par. 3 above shall be effective from the date of filing of the application.

5. The Mediation Proceeding is commenced on the date of filing of an application for mediation. However, if the parties did not make a mediation agreement, or there is no court order directing the parties to mediation at the Court of Arbitration, the Mediation Proceeding is deemed to be commenced at the time the other party consents to mediation.

6. An application for mediation is deemed served on the date it is filed with the Court of Arbitration or dispatched by certified post, courier post or other method enabling documentation of dispatch.

§ 3
Summons to other party to participate in mediation

1. The Secretary General shall serve a copy of the application on the other party and summon it to submit a statement in writing on whether it consents to mediation and to pay half of the mediation fee within a specified period of no less than 14 days.

2. If the other party does not consent to mediation or the mediation fee is not fully paid on time, no Mediation Proceeding is deemed to have been commenced. The Secretary General shall notify the parties of the inability to conduct the mediation and return to the applicant the mediation fee it has paid.

§ 4
Mediator

1. The Mediation Proceeding shall be conducted by one mediator, unless the parties have agreed to appoint a group of two or more mediators. In that case, the provisions of the Mediation Rules concerning the mediator shall apply to each of the mediators.

2. After the mediation fee has been paid in full, the Secretary General shall summon the parties to mutually appoint a mediator within a period of no less than 14 days, at the same time sending them the List of Mediators.
3. If the parties do not mutually appoint a mediator, the mediator shall be appointed by the President of the Court of Arbitration from among the persons included in the List of Mediators.
4. The Secretary General shall promptly notify the person appointed to serve as mediator, summoning the person to submit the statement referred to in par. 5 within a specified time.
5. The mediator shall accept appointment by submitting a written statement to the Secretary General on acceptance of the appointment, the mediator's independence and impartiality, and availability of the time necessary to perform the duties of mediator. In the statement, the mediator shall undertake to properly perform the duties of mediator. The Secretary General shall promptly serve a copy of the statement on the parties.
6. The Secretary General shall promptly notify the parties of refusal to accept the appointment as mediator. Failure to submit the statement referred to in par. 5 within the period specified by the Secretary General shall be deemed to be refusal to accept the appointment.
7. The mediator must be independent and impartial for the entire duration of the mediation proceeding and must promptly disclose to the parties any circumstances which may raise doubts as to his or her independence or impartiality.
8. The Secretary General, the Assistant Secretary General and staff of the Court of Arbitration may not serve as a mediator in a Mediation Proceeding conducted on the basis of the Mediation Rules.

§ 5
List of Mediators

1. The Court of Arbitration maintains the List of Mediators Recommended by the Court of Arbitration at the Polish Chamber of Commerce (the "**List of Mediators**").
2. The rules and procedure for establishment of the List of Mediators are specified by the Statute of the Court of Arbitration.
3. The parties shall mutually appoint a mediator from the List of Mediators.

§ 6
Mediation Proceeding

1. The mediator shall conduct the mediation as he or she deems proper, guided by the principles of impartiality, neutrality and the voluntary nature of mediation. The parties and the mediator may together determine the most appropriate method for resolving their dispute.

2. The parties have a duty to cooperate in good faith with the mediator.
3. The mediator may communicate with the parties together, during mediation sessions or otherwise, or communicate with each party separately.
4. The mediator shall make efforts to ensure that the Mediation Proceeding is completed at the first session, unless otherwise agreed by the parties and the mediator.
5. The Mediation Proceeding is confidential. The parties and the mediator are required in particular to maintain the confidentiality of settlement proposals or other statements made during the Mediation Proceeding, and not to refer to them in arbitration or judicial proceedings.
6. The mediator shall prepare and sign minutes indicating:
   1) the place and time the mediation was conducted,
   2) the names and addresses of the parties and the mediator, and
   3) the result of the mediation.
7. If the parties reach a settlement before the mediator, the settlement shall be included in the minutes or annexed thereto, with the signatures of the parties.
8. A copy of the minutes shall be served on the parties.

§ 7
Completion of Mediation Proceeding

1. The Mediation Proceeding should be completed within 30 days after submission by the mediator of the statement referred to in §4(5), unless the parties consent to conduct the mediation longer.
2. The Mediation Proceeding shall end upon:
   1) signing by the parties of a settlement before the mediator, or
   2) the mediator's confirmation in the minutes that the mediation did not lead to a settlement.

§ 8
Appointment of mediator as arbitrator

3. Upon mutual application of the parties, the Arbitral Council may appoint the mediator as an arbitrator empowered to resolve the dispute or to give the settlement the form of an award. In that case the limitations pursuant to the first sentence of §16(3) and the first sentence of §20(2) of the Arbitration Rules shall not apply to the appointment of the arbitrator.
4. The Secretary General shall summon the parties to pay the arbitration fee, taking into account the mediation fees already paid, within a specified period of no less than 14 days. The amount of the arbitration fee is specified in the Tariff of Fees in force on the date of filing of the application.

§ 9
Costs of Mediation Proceeding

The costs of the Mediation Proceeding are specified by the Tariff of Fees.

§ 10
Adoption and effective date of Mediation Rules

1. These Mediation Rules were adopted by resolution of the Arbitral Council on 16 December 2014.
2. The Mediation Rules shall enter into force on 1 January 2015.

RULES FOR RESOLUTION OF .PL DOMAIN NAME DISPUTES OF THE COURT OF ARBITRATION AT THE POLISH CHAMBER OF COMMERCE

RULES FOR RESOLUTION OF .PL DOMAIN NAME DISPUTES OF THE COURT OF ARBITRATION AT THE POLISH CHAMBER OF COMMERCE

Chapter I
Introductory provisions

§ 1
Application of Rules

1. Disputes over infringement of rights resulting from registration of a ".pl" Internet domain name shall be resolved under these Rules for Resolution of ".pl" Domain Name Disputes (the "**Domain Rules**").
2. The Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce (the "**Arbitration Rules**") or the Mediation Rules of the Court of Arbitration at the Polish Chamber of Commerce (the "**Mediation Rules**"), respectively, shall apply to matters not addressed in the Domain Rules.
3. In a proceeding referred to in par. 1, it is impermissible to pursue other claims against the holder of a ".pl" Internet domain name, but this does not preclude pursuit of such claims in a separate proceeding.
4. The Domain Rules shall apply if at least one of the parties has its registered office or place of residence in the territory of the Republic of Poland.
5. If the parties to the dispute are exclusively natural or legal persons or organizational units without legal personality with their place of residence or registered office outside the territory of the Republic of Poland, the relevant provisions of the WIPO Expedited Arbitration Rules for Domain Name Dispute Resolution under .pl of the World Intellectual Property Organization with its registered office in Geneva, Switzerland, shall apply.

§ 2
Jurisdiction of the Arbitral Tribunal and grounds for resolution of dispute

1. If the parties have agreed that a dispute over infringement of rights resulting from registration of a ".pl" Internet domain name will be resolved in

accordance with the Domain Rules, or have indicated the Court of Arbitration, unless otherwise provided the Arbitral Tribunal appointed pursuant to the Domain Rules in a proceeding conducted under the Domain Rules shall be deemed to have jurisdiction to hear the dispute.

2. Disputes referred to in par. 1 shall be resolved in accordance with the law in force in the Republic of Poland.

§ 3
Language of proceeding

1. Unless the Arbitral Tribunal orders otherwise upon the mutual application of the parties, the language of the proceeding shall be Polish.
2. Unless the Arbitral Tribunal orders otherwise upon the mutual application of the parties, any documents made in languages other than Polish shall be accompanied by a Polish translation.
3. Awards and orders shall be issued in Polish.

§ 4
Service

1. Written communications and notices in proceedings conducted under the Domain Rules shall be served on the addressee by email unless the Domain Rules provide for service in another form.
2. An application for mediation, pre-arbitration application, statement of claim or statement of defence shall be served in writing.
3. Where written communications and notices may be served by email, service in another form is effective if:
   1) the parties agreed to service in that form,
   2) the Arbitral Tribunal or mediator so ordered, or
   3) the party acknowledged service as effective.
4. Written communications and notices sent by email or fax are deemed served upon transmission if the transmission does not indicate errors.
5. In an application for mediation, pre-arbitration application, statement of claim or statement of defence, and in legal submissions during the course of the proceeding, the email address, fax number or other address details of the parties and the parties' representatives necessary for service, and any change in these details, shall be provided.
6. If the Court of Arbitration is not informed of a change in the foregoing addresses or numbers, written communications or notices sent to the previous address or fax number are deemed served.
7. Regardless of the form of service, a party is required to serve written communications and notices on the Court of Arbitration and directly on the

other party, and, after receipt of notice of appointment of an arbitrator, on the arbitrator.

8. Unless otherwise provided by the Domain Rules, neither party or its representative may contact an arbitrator on matters concerning the proceeding without including the other party.

§ 5
Periods of time

1. Periods specified in the Domain Rules may be extended only in exceptional instances.
2. In consultation with the Arbitral Tribunal, the parties may agree to shorten or extend the periods specified in the Domain Rules.
3. Upon application of a party or at its own initiative, the Arbitral Tribunal may order the extension of periods specified in the Domain Rules.

§ 6
Representatives

In proceedings conducted under the Domain Rules, any natural person with full legal capacity may serve as the representative of a party.

Chapter II
Arbitrators and mediators

§ 7
List of Arbitrators and Mediators

1. The Court of Arbitration maintains a separate List of Arbitrators and Mediators recommended by the Court of Arbitration at the Polish Chamber of Commerce in disputes over infringement of rights resulting from registration of a ".pl" Internet domain name (the "**List of Arbitrators and Mediators**").
2. Natural persons possessing qualifications useful for service as an arbitrator or mediator in disputes over infringement of rights resulting from registration of a ".pl" Internet domain name and who have earned a degree in law and practise the profession of advocate, legal adviser or patent attorney or hold the academic title of professor or a postdoctoral degree in legal studies may be entered on the List of Arbitrators and Mediators.

§ 8
Qualifications of arbitrator

1. By accepting office, the arbitrator undertakes to perform the office in accordance with the Domain Rules.
2. No later than 3 days after receipt of notice of appointment, the arbitrator shall accept the appointment by submitting a written statement to the Secretary General on acceptance of the appointment, the arbitrator's independence and impartiality, and availability of the time necessary to properly perform the duties of arbitrator. The arbitrator must also disclose any circumstances which may raise doubts as to his or her independence or impartiality.
3. If the arbitrator refuses to accept the appointment or does not meet the deadline referred to in par. 1, the Secretary General shall promptly notify the parties.
4. If the parties do not appoint a new arbitrator within 3 days after receipt of the notice, the arbitrator shall be appointed by the President of the Court of Arbitration.
5. Par. 4 shall apply respectively if the Arbitral Tribunal is composed of three arbitrators and the arbitrators have failed to appoint the third arbitrator (presiding arbitrator).
6. A person consenting to serve as arbitrator is required to complete the arbitration proceeding within the time specified in the Domain Rules unless the circumstances of the given case require the proceeding to be conducted longer.

§ 9
Number of arbitrators

A dispute shall be resolved by one arbitrator unless the parties mutually provide for resolution of the dispute by three arbitrators. Provisions concerning the Arbitral Tribunal shall apply to both a single arbitrator and to three arbitrators hearing a dispute.

§ 10
Method of appointment of arbitrators

1. The claimant is required to indicate in the statement of claim an arbitrator from the List of Arbitrators and Mediators, and the respondent may consent in the statement of defence to appointment of the same arbitrator or indicate another arbitrator from the List of Arbitrators and Mediators. In that case, within 3 days after it is notified by the Secretary General of the indication of the arbitrator by the respondent, the claimant may consent to the appointment of the same arbitrator. Absent such consent, the parties may mutually renew their proposals for appointment of an arbitrator.

2. If an arbitrator is not appointed by the parties within 21 days after service of the statement of claim on the respondent or if the respondent or the claimant fails to take a position within that time on appointment of the arbitrator indicated by the other party, the arbitrator shall be appointed by the President of the Court of Arbitration pursuant to § 11.
3. The parties may mutually appoint as arbitrator a person from outside the List of Arbitrators and Mediators. Appointment of an arbitrator from outside the list must be made in writing.
4. If the parties have agreed that the Arbitral Tribunal will be composed of three arbitrators and have not agreed on a different method for their appointment, each of the parties shall appoint in writing an arbitrator from the List of Arbitrators and Mediators, and then the arbitrators appointed by the parties shall appoint a third arbitrator from the List of Arbitrators and Mediators. If an arbitrator is not appointed by a party within 14 days after the parties notify the Court of Arbitration that the Arbitral Tribunal will be composed of three arbitrators, or if the arbitrators appointed by the parties do not appoint the presiding arbitrator within 14 days after their appointment, the arbitrator shall be appointed by the President of the Court of Arbitration pursuant to § 11.

§11
Default appointment of arbitrator

1. In instances specified in § 10 (2) and (4), or if a party waives in writing the right to appoint an arbitrator, the President of the Court of Arbitration shall appoint an arbitrator under the following procedure:
   1) The Secretary General shall provide the parties a list with the names of at least three arbitrators indicated by the President of the Court of Arbitration, or if the Arbitral Tribunal is composed of three arbitrators, the names of at least nine arbitrators, in alphabetical order, with a brief description of their qualifications.
   2) Each party may strike from the list the names of persons whose appointment they oppose, and next to the names of the persons not stricken place numbers, beginning with 1, indicating the party's order of preference for appointment of the person to serve as arbitrator.
   3) Each party shall return the list with the names of arbitrators on the next business day after receipt of the list. If a party does not return the list, it shall be presumed that the party does not object to appointment of any of the persons in the list as arbitrator.
   4) Promptly upon return of the list by the party, and also in the event of failure to return the list on time, the President of the Court of Arbitration shall make a default appointment of the arbitrator, taking into account the objections and preferences submitted by the party, or if both parties object to all of the arbitrators on the list provided to them, then at the President's discretion from among the arbitrators included in the List of Arbitrators and Mediators.

2. The President of the Court of Arbitration shall appoint an arbitrator from the List of Arbitrators and Mediators under the procedure set forth in par. 1 also in the instances referred to in § 84)and § 85), and if following challenge of an arbitrator pursuant to § 12 the party or arbitrators do not appoint a new arbitrator or presiding arbitrator within 2 weeks following removal of the arbitrator.

§ 12
Challenge of arbitrator

1. A party challenging an arbitrator shall address a written challenge to the Court of Arbitration and directly to the other party and the arbitrator. The challenge of an arbitrator may also be made orally for inclusion in the record of the hearing.
2. Within 2 days after service of the challenge or assertion of the challenge at the hearing, the arbitrator and the other party may present their positions in writing to the Court of Arbitration and directly to the other party and the arbitrator.
3. The challenge of an arbitrator shall be decided by the President of the Court of Arbitration within 5 days after receipt of the written challenge or assertion of the challenge at the hearing.

Chapter III
Mediation

§ 13
Commencement of mediation proceeding

Prior to commencement of an arbitration proceeding, a party demanding that a holder of a ".pl" Internet domain name cease infringing its rights may file an application for mediation with the Court of Arbitration.

§ 14
Application for mediation

1. An application for mediation shall meet the requirements specified in § 2 of the Mediation Rules and indicate the mediator as well as the ".pl" Internet domain name which the dispute involves.
2. If the application does not meet these requirements, the Secretary General shall issue the summonses referred to in § 2(3) and § 3(1) of the Mediation Rules, specifying periods of no more than 7 days.
3. If the holder of the Internet domain name does not consent to mediation or does not respond to the proposal to conduct mediation within 7 days, or if

either of the parties fails to pay the fees due within 7 days after a summons to pay them, the application for mediation shall not be considered and the Secretary General shall notify the parties accordingly.

§ 15
Mediator

The provisions of § 10, § 11 and § 12 of the Domain Rules concerning arbitrators shall apply as relevant to mediators.

§ 16
Service during the course of mediation

During the course of the mediation, the Court of Arbitration and the mediator shall effect service upon and contact the parties in the form they deem proper under the circumstances of the case.

§ 17
Mediation proceeding

1. A mediation proceeding shall be completed within 30 days after the mediator accepts the appointment.
2. Time limits binding on the parties during the course of the mediation proceeding shall be specified by the mediator. The consequences of failure to comply with a specified time limit shall be borne by the party that failed to comply with the time limit.
3. If the parties do not consent to meet for a mediation session, the mediator may meet separately with each of the parties.

§ 18
Settlement during mediation proceeding

1. Depending on the results of the mediation, the mediator may propose to the parties that they reach a settlement concerning the ".pl" Internet domain name under specified terms, reflecting the justified interests of the parties.
2. A settlement concerning the Internet domain name reached by the parties in the mediation proceeding shall be signed by the parties and the mediator.

Chapter IV
Arbitration proceeding

§ 19
Commencement of arbitration proceeding

1. Before commencement of an arbitration proceeding, the party intending to file a statement of claim shall pay the registration fee in accordance with the Tariff of Fees in force and file a pre-arbitration application containing information about the intention to file a statement of claim and designating the party it will be filed against (the holder of a ".pl" Internet domain name) and the Internet domain name which the arbitration proceeding will concern.
2. Promptly after receipt of the application referred to in par. 1, the Secretary General shall request the parties to sign an arbitration agreement within a specified period of no more than 14 days and send them the List of Arbitrators and Mediators.
3. The Secretary General shall promptly notify the parties of receipt by the Court of Arbitration of the arbitration agreement signed by both parties.
4. If a party refuses to sign the arbitration agreement or the deadline referred to in par. 2 is not met, the Secretary General shall notify the other party and the proceeding shall end with the Secretary General's submission to the file of a statement that the arbitration agreement was not signed by both parties.

§ 20
Statement of claim

1. The statement of claim shall be filed and paid for by the claimant within 14 days after its receipt of notice of filing with the Court of Arbitration of the arbitration agreement signed by the parties.
2. The statement of claim must meet the requirements specified in § 25(1) of the Arbitration Rules and must also include an indication of an arbitrator and the name of the ".pl" domain name which the dispute involves and a demand for a finding that the respondent has infringed the claimant's rights as a result of registration of the domain name.

§ 21
Statement of defence

1. The respondent is required to file a statement of defence within 7 days after service upon it of the statement of claim, addressing it to the Court of Arbitration and directly to the claimant. Upon justified application of the re-

spondent, the Secretary General may extend the period for filing of a statement of defence for a specified period of no more than 21 days.

2. In the statement of defence, the respondent shall assert all objections raised together with the factual circumstances justifying them and reference to the evidence supporting them. The statement of defence shall also include a statement of the respondent's consent to resolution of the dispute by the arbitrator indicated by the claimant in the statement of claim or an indication of another arbitrator from the List of Arbitrators and Mediators.

§ 22
Evidence

1. The Arbitral Tribunal shall rule on the evidentiary applications of the parties in accordance with its own discretion, taking into consideration all of the circumstances of the case.
2. If justified under the circumstances of the case, the Arbitral Tribunal may also admit and consider evidence not applied for by the parties.

§ 23
Witnesses

If a witness fails to appear at the hearing, regardless of the reason for the witness's absence, the evidence from the testimony of the witness shall be disregarded, unless the Arbitral Tribunal orders submission of the witness's testimony in writing within a specified period. The testimony of the witness submitted in this form shall be promptly provided to the parties.

§ 24
Hearing

1. A hearing shall be held if necessary to take evidence from witnesses, the parties or an expert, and also upon demand of both parties.
2. The parties shall be notified of the scheduling of the hearing no later than 5 days in advance.
3. The Arbitral Tribunal shall consider issues of the jurisdiction of the Arbitral Tribunal, application of the Domain Rules, and any formal objections before taking up consideration of the merits of the case. Such objections shall be asserted in the statement of claim or statement of defence, or at the latest at the opening of the hearing.

§ 25
Completion of arbitration proceeding

1. The Arbitral Tribunal shall make efforts to complete the proceeding no later than 30 days after appointment of the Arbitral Tribunal. The Arbitral Tribunal shall promptly notify the Court of Arbitration and the parties of completion of the proceeding.

2. If the proceeding is not completed within the period specified in par. 1, the Arbitral Tribunal shall submit an explanation to the President of the Court of Arbitration in writing, describing the status of the arbitration proceeding and stating the anticipated date of completion of the proceeding, with a copy for each party. The Arbitral Tribunal is required to present a further explanation every 14 days until the proceeding is completed.

§ 26
Issuance of ruling

The award or other ruling ending the proceeding shall be issued promptly, but no later than 10 days after completion of the proceeding.

§ 27
Settlement

At any stage of the arbitration proceeding, the parties may reach a settlement before the Arbitral Tribunal, which shall confirm conclusion of the settlement by signing the text thereof together with the parties. The settlement shall be submitted to the file and originals provided to the parties.

§ 28
Discontinuance of proceeding

The Arbitral Tribunal shall issue an order discontinuing the arbitration proceeding if:

1) the claimant withdraws the statement of claim, unless the respondent objects and the Arbitral Tribunal finds that the respondent has a legal interest in obtaining a resolution of the merits of the dispute;
2) the parties mutually apply for discontinuance of the proceeding;
3) the parties reach a settlement; or
4) continuation of the proceeding has become moot or impossible for other reasons.

Chapter V
Execution of awards and settlements

§ 29
Notices to NASK

The Court of Arbitration shall notify NASK (Naukowa i Akademicka Sieć Komputerowa – Research and Academic Computer Network, R&D unit with its registered office in Warsaw) of:

1) receipt of an application for mediation or pre-arbitration application,
2) failure to comply with the deadlines referred to in § 14(2) and § 19(2) of the Domain Rules,
3) stay of the proceeding, and
4) issuance of an order ending the proceeding in the case,

in order for NASK to apply the relevant provisions of the rules governing registration and maintenance of ".pl" domain names.

§ 30
Transmission of awards and settlements to NASK for execution

1. Awards and settlements are binding on the parties.
2. The Court of Arbitration shall promptly transmit an original of an award or settlement to NASK in order for NASK to apply to the ".pl" domain name covered by the award or settlement the relevant provisions of the rules governing registration and maintenance of ".pl" domain names.
3. The Court of Arbitration shall publish awards and settlements in proceedings involving infringement of rights resulting from registration of a ".pl" Internet domain name.

§ 31
Effective date of Domain Rules

1. These Domain Rules were adopted by resolution of the Arbitral Council on 16 December 2014.
2. The Domain Rules shall enter into force on 1 January 2015.