



ARBITRATION e-REVIEW

No. 3-4 (18-19)/2014



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Dear Readers,

Today, we present you a new issue of our magazine. On the beginning, we recommend you reading the three articles on the extensive problems.

The first one deals with issue of non-contractual claims examination, relating to the contract containing the arbitration clause. This is an exceptionally live issue in the light of the last numerous court decisions. The Authors, Wojciech Sadowski and Ewelina Wętrys, in addition to discussion on Polish legal order, make legal-comparative analysis and present their own conclusions. Maciej Zachariasiewicz analyzes the possible answers to the question of which law should be relevant to the assessment of the effects of an arbitration award issued abroad: the law of the country of origin or the law of its implementation. The Author does not confine himself only to the dogmatic analysis, universal for any effects of the court decisions, but also evaluates the specific effects of a judgment, in particular in the area of res judicata and limitation of claims identified by arbitration award. In the third article, Karol Zawislak analyzes the agreement to act as an arbitrator in comparison with the order agreement, which is a part of a bigger issue of the legal classification of the relationship between arbitrator and arbitrants. It is worth to look at a series of judgments SA Lewiatan, which stimulate a broader reflection, annotated practitioners and academics: Stanisław Drozd, Marcin Dziurda, Marek Jeżewski, Rafał Kos and Tomasz Stawecki.



**DR. BEATA GESSEL-
-KALINOWSKA
vel KALISZ**

President of the Lewiatan
Court of Arbitration

We wish you having a good reading,

Dr. Beata Gessel Kalinowska vel Kalisz

President of the Lewiatan Court of Arbitration

The arbitration clause in an underlying contract and non-contractual claims arising in connection with such contract

■ Dr. Wojciech Sadowski, Ewelina Wętrys LL.M.

Lawyers at K&L Gates Jamka law office

INTRODUCTION

There are a number of arbitration clauses to be found in business transactions, providing for submission to arbitration of any disputes “arising out of the contract” or “arising in connection with the contract.” The wording of such clauses frequently corresponds to that of the model clauses, recommended by permanent courts of arbitration. For example, the arbitration clause recommended by the Court of Arbitration at the Polish Confederation Lewiatan reads as follows: “Any dispute arising out of or related to this contract shall be finally settled by the arbitral tribunal at the Lewiatan Court of Arbitration in Warsaw in accordance with the Rules of that Court in effect on the date of commencement of proceedings.”¹ The Court of Arbitration at the Polish Chamber of Commerce in Warsaw recommends the following arbitration clause: “All disputes arising out of or in connection with this contract shall be settled by the Court of Arbitration at the

Polish Chamber of Commerce in Warsaw pursuant to the Rules of this Court binding on the date of filing the statement of claim.”² The model arbitration clause of the International Court of Arbitration at the International Chamber of Commerce in Paris provides that: “All disputes arising out of or in connection 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.”³ Whereas the Arbitration Institute of the Stockholm Chamber of Commerce suggests the following wording of a model arbitration clause: “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

1. Rules of the Court of Arbitration at the Polish Confederation Lewiatan; available at <http://www.sadarbitrazowy.org.pl/upload/Rules1032012.pdf>.

2. Model arbitration clause proposed by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw; available at <http://sakig.pl/pl/arbitraz/modelowe-klauzule-arbitra%C5%B4Cowe>.

3. Rules of Arbitration of the International Court of Arbitration at the International Chamber of Commerce in Paris; 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/>.

arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.”

When a dispute arises in connection with a contract containing such an arbitration clause, there can arise the question of whether or not such clause may serve as grounds for pursuing in arbitration also claims of non-contractual nature, and in particular claims in tort or impermissible or unjust enrichment claims. The case law of Polish courts on this point is yet to be fully established. Individual rulings differ among themselves and such differences can only partly be accounted for by the different facts of each such case, and in particular by different wording of the arbitration clauses. In addition, those rulings lack a systemic approach to and justification for the issue discussed in this paper.

The Polish literature on commercial arbitration also lacks a thorough and systematized analysis of the issue of whether and on what conditions an arbitration clause incorporated into a contract covers non-contractual claims relating to that contract. It is pointed out in the literature that an arbitration agreement provides, as a rule, grounds for the jurisdiction of a court of arbitration over tort or quasi-tort claims if the same concurrently constitute an instance of non-performance or improper performance of a contractual obligation.⁴ This view has undoubtedly emerged as a result of the

case law established by Polish courts⁵. However, it lacks a thorough justification.

It should be noted in this connection that a situation whereby a single event constitutes concurrently an instance of improper performance of a contractual obligation and a tort, actually consists in a co-occurrence of *ex delicto* and *ex contractu* claims. What distinguishes a contractual claim from a tort claim in such a case is the legal ground for the claim. This apparently trivial conclusion has, however, far-reaching consequences for an analysis of the scope *ratione materiae* of an arbitration agreement. If, under specific circumstances, the Polish case law and jurisprudence allow of a situation in which the parties to an arbitration agreement are permitted to switch from the contractual regime to the tort regime, such development is of a fundamental and qualitative nature. The question whether a typical arbitration agreement provides grounds for pursuing tort claims becomes irrelevant. This is so due to the fact that both the case law and the jurisprudence give, as a rule, an affirmative answer to this question. What becomes relevant, however, is the issue to what extent and under what circumstances tort claims are permitted to be pursued. It is indisputable that tort disputes are essentially arbitrable,⁶ and that the principles of contract interpretation set forth in Article 65 of the Civil

4. See Tomaszewski M., [in:] A. Szumański (ed.), *Arbitraż handlowy*. Tom 8, 2010, pp. 326-327; Ereciński T., Weitz K., *Sąd arbitrażowy*, 2008, p. 153; Wiśniewski A.W., *Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów*, 2011, p. 395; Prus P., [in:] M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz*, 2nd ed., 2013, p. 1761.

5. See Section 2.1 below.

6. See Tomaszewski M., [in:] A. Szumański (ed.), *Arbitraż handlowy*. Tom 8, 2010, p. 324; Ereciński T., Weitz K., *Sąd arbitrażowy*, 2008, p. 116.

Code apply also to the arbitration agreement.⁷ Therefore, one should consider whether the prevailing view according to which the admissibility of pursuing non-contractual claims before a court of arbitration is conditional upon the co-occurrence of contractual and tort claims is sufficiently supported and whether it is not an arbitrary view. In this paper, an attempt will be made to prove that this view is incorrect and based on incorrect assumptions.

The first part of this paper is a review of foreign legislation, jurisprudence and case law on arbitration. It reveals that a relatively consistent approach in favor of respecting the will of the parties to an arbitration agreement is being developed, along with a pro-arbitration interpretation of arbitration agreements. The second part presents Polish courts' case law on the issue in question, as well as the views expressed in this respect in the Polish literature. An analysis of the foregoing leads to the conclusion that the case law of the Supreme Court and the views expressed in the jurisprudence tend to follow the worldwide trend. However, the case law is inconsistent and partly incorrect, which may be the consequence of the absence of a systemic approach to the issue in question and of a detailed analysis thereof. Based on the foregoing, the third part of this paper calls for a change in the

prevailing approach adopted in the case law so far. This paper argues that there are no obstacles under Polish law preventing a change in and standardization of the approach adopted in the case law, in line with the trends followed by foreign systems of law, exercising the most potent influence on arbitration. The fourth part of this paper contains conclusions.

COMPARATIVE LAW ANALYSIS

1. International treaties

Multilateral international treaties have an important role to play in the practice of arbitration. As a rule, such treaties not only regulate enforcement of arbitral awards rendered in a contracting state but also oblige the contracting states to recognize the validity of arbitration agreements. The foregoing gives rise to the question whether and how the provisions of international treaties regulate the scope *ratione materiae* of arbitration clauses and their interpretation, and, in consequence, whether they contain any obstacles preventing non-contractual disputes from being submitted to arbitration.

Article I of the Protocol on Arbitration Clauses signed in Geneva on September 24, 1923 stipulates that "[e]ach of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any **differences that may arise in connection with such contract relating to commercial matters or to any other**

7. See resolution of the Supreme Court, dated March 8, 2002, III CZP 8/02, Lex No. 51699; decision of the Supreme Court, dated March 1, 2000, I CKN 1311/98, Lex No. 138641; judgment of the Court of Appeal in Poznań, dated July 3, 2006, I ACa 46/06, Lex No. 278461; Morek R., [in:] E. Marszałkowska-Krześ (ed.), *Kodeks postępowania cywilnego. Komentarz*, 2014, as available in the Legalis database; Piasecki K., *Kodeks postępowania cywilnego. Tom IV. Przepisy z zakresu międzynarodowego postępowania cywilnego. Sąd polubowny (arbitrażowy). Regulacje prawne Unii Europejskiej w sprawach transgranicznych. Komentarz*, 2013, p. 408.

matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject [emphasis added]”.⁸ It follows from the literal wording of the above provision that the contracting states are obliged to recognize the validity of arbitration agreements (i.e. compromises, arbitration clauses) under which entities submit to arbitration disputes which might arise from a contract and which relate to commercial or other issues. The wording of this provision does not preclude the contracting states from recognizing the validity of an arbitration agreement covering disputes of non-contractual nature.

A similar conclusion follows from the provision of Article 1.1(a) of the European Convention on International Commercial Arbitration, done at Geneva on April 21, 1961, which defines the arbitration agreement as “[an] (...) agreement concluded for the purpose of settling disputes arising from international trade [emphasis added] (...)”.⁹ Whereas Article II.1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958 (the “New York Convention”),¹⁰ explicitly orders the contracting states to recognize “an agreement in writing 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 [emphasis added]”.¹¹

In light of the above provisions of international conventions on arbitration, it should be concluded that there are no obstacles preventing an arbitration agreement from covering non-contractual disputes, including claims in tort. Just the opposite, the conventions referred to above either expressly permit execution of arbitration clauses which submit to arbitration non-contractual disputes or generally provide that arbitration agreements may cover any issues of commercial nature. The international conventions referred to above treat non-contractual disputes in the same way as those arising directly from a contract. The only requirement to be met by the scope *ratione materiae* of an arbitration agreement is, with respect to both contractual and non-contractual disputes, that such disputes be arbitrable.

However, the above conclusion itself does not determine whether arbitration clauses, and in particular the model ones, cover submission to arbitration of non-contractual disputes, including torts, in any specific set of circumstances. The provisions of international law do not contain any guidelines or binding norms explicitly regulating interpretation of the scope *ratione materiae* of an arbitration agreement, or listing the non-contractual disputes covered by a specific model arbitration clause. However, the absence of any additional criteria to be satisfied by non-contractual claims in order to be arbitrable suggests that the methods employed to construe arbitration

8. Protocol on Arbitration Clauses, done at Geneva on September 24, 1923, ratified by Poland, Dz. U. [Journal of Laws] of 1931 No. 84, Item 648.

9. European Convention on International Commercial Arbitration, done at Geneva on April 21, 1961, ratified by Poland, Dz. U. [Journal of Laws] of 1964 No. 40, Item 270.

10. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958, ratified by Poland, Dz. U. [Journal of Laws] of 1962 No. 9, Item 41.

11. the New York Convention, op. cit.

clauses with respect to contractual and non-contractual disputes should not be different either. And since they are not expressly provided for in internationally applicable regulations, one can only look for them in national laws.

2. The UNCITRAL Model Law

Numerous foreign arbitration laws draw upon the solutions adopted in the Model Law on International Commercial Arbitration developed by the United Nations Commission on International Trade Law (UNCITRAL) (the “UNCITRAL Model Law”).¹² When working in 2005 on an amendment to Part V of the Code of Civil Procedure,¹³ the Polish legislative authority also took into account the provisions of the UNCITRAL Model Law.¹⁴

Pursuant to Article 7.1 of the UNCITRAL Model Law, the arbitration agreement is “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, **whether contractual or not** [emphasis added]”.¹⁵ Article 1.1 of the UNCITRAL Model Law provides that the Law applies to international commercial arbitration, while footnote 2 to this article says that the term commercial should be construed so as to cover matters

arising from all relations of a commercial nature, whether contractual or not. And in the explanatory note on the UNCITRAL Model Law, it is pointed out that Article 1.1 calls for a broad interpretation of the term commercial.¹⁶

The foregoing authorizes several important conclusions. First, the UNCITRAL Model Law recognizes validity of arbitration agreements covering disputes of non-contractual nature. Second, the UNCITRAL Model Law does not introduce any special criteria to be satisfied by such disputes in order to be arbitrable. Third, the method of extensive interpretation is preferable when construing an arbitration agreement. Fourth, the UNCITRAL Model Law does not contain any binding instructions as to the methods of interpretation to be employed when determining the scope *ratione materiae* of an arbitration agreement. This means that the method of interpretation employed to construe an arbitration agreement may depend on the principles of contract interpretation adopted in specific legal systems. This should not strike us as surprising. And since the arbitration agreement is a declaration of its parties’ intent, its interpretation may, and even should, follow the same rules as interpretation of other contractual provisions. As it is pointed out further on in this paper, interpretation of the arbitration agreement is normally governed by the same rules which govern interpretation of contractual provisions under the applicable law.¹⁷

12. Adopted by the United Nations Commission on International Trade Law on June 21, 1985 and amended on July 7, 2006, UN documents A/40/17, annexes I and A/61/17, annex I.

13. Act of July 28, 2005 on Amendment to the Code of Civil Procedure, Dz. U. [Journal of Laws] of 2005 No. 178, Item 1478.

14. Statement of reasons to the draft Act on Amendment to the Code of Civil Procedure and to the Bankruptcy and Rehabilitation Law, Printed Matter No. 3434 of the 4th Sejm of the Republic of Poland; available at [http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/3434/\\$file/3434.pdf](http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/3434/$file/3434.pdf)

15. UNCITRAL Model Law, op. cit.

16. Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, Section 12.

17. See Redfern A., Hunter J. M. et al., Redfern and Hunter on International Arbitration, 2009, p. 109; Lew J. D. M., Mistelis L. A., Kröll S. M., Comparative International Commercial Arbitration, 2003, p. 150; Born G. B., International Commercial Arbitration, 2014, pp. 1320-1325.

Concurrently, the jurisprudence on international commercial arbitration is in favor of a broad and pro-arbitration interpretation of the scope *ratione materiae* of arbitration clauses, provided, however, that there are no concerns as to the existence of a valid arbitration agreement.¹⁸ The international jurisprudence recommends that arbitration agreements drafted in general terms (as is the case e.g. with model arbitration clauses) be construed broadly and assumed to cover any and all disputes relating to a given contract, regardless of whether or not the legal grounds therefor are to be found in contract, tort or statute.¹⁹ This view is a consequence of the adopted assumption (presumption) to the effect that it is not the parties' intention to split the jurisdiction of courts over claims resulting from a single legal relation holding between them. It is pointed out that the entrusting of such claims resolution to different courts (i.e. a court of arbitration and a state court) entails the risk of ending up with conflicting rulings.²⁰ And should the parties wish to exclude jurisdiction of a court of arbitration over a specific category of claims, they may do so by drafting the arbitration clause accordingly.²¹

18. Lew J. D. M., Mistelis L. A., Kröll S. M., *Comparative International Commercial Arbitration*, 2003, p. 151; Born G. B., *International Commercial Arbitration*, 2014, p. 1326.

19. Lew J. D. M., Mistelis L. A., Kröll S. M., *Comparative International Commercial Arbitration*, 2003, pp. 151, 152-153; McIlwrath M., Savage J., *International Arbitration and Mediation: A Practical Guide*, 2010, p. 16; Redfern A., Hunter J. M. et al., *Redfern and Hunter on International Arbitration*, 2009, pp. 108-109; Born G. B., *International Commercial Arbitration*, 2014, pp. 1343-1344; Gonzalez F., *The treatment of Tort in ICC Arbitral Awards*, ICC International Court of Arbitration Bulletin 2002, vol. 13, No. 2, pp. 45-46; E. Gaillard, J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, 1999, pp. 306-307.

20. Born G. B., *International Commercial Arbitration*, 2014, p. 1343.

21. McIlwrath M., Savage J., *International Arbitration and Mediation: A Practical Guide*, 2010, p. 16.

The proposals put forward by scholars in international arbitration jurisprudence are, as a rule, reflected in the case law established by common courts and courts of arbitration in individual states.

3. Foreign national laws

3.1 Austria

Article 581.1 of the Austrian Code of Civil Procedure²² repeats the regulation of Article 7.1 of the UNCITRAL Model Law and, as a result, permits submission to arbitration of disputes arising from a specific legal relation, regardless of whether such relation is of contractual or other nature.²³

As a rule, whether or not a given dispute is covered by the arbitration clause is determined under Austrian law by construing the arbitration clause pursuant to the general principles of contract interpretation.²⁴ Thus, it is not only the literal wording of the arbitration agreement, but also the mutual intention of the parties, the principles of commercial integrity, the commercial

22. Zivilprozessordnung of August 1, 1895, RGBI. No. 113/1895, as amended; available at <http://www.viac.eu/de/recht/83-recht/gesetze/196-oe-schiedsrecht-zpo-idf-2013-neu#Begriff>.

23. "Die Schiedsvereinbarung ist eine Vereinbarung der Parteien, alle oder einzelne Streitigkeiten, die zwischen ihnen in Bezug auf ein bestimmtes Rechtsverhältnis vertraglicher oder nichtvertraglicher Art entstanden sind oder künftig entstehen, der Entscheidung durch ein Schiedsgericht zu unterwerfen."; *ibidem*; translation ours.

24. See Welser I., Molitoris S., *The scope of Arbitration Clauses - Or "All Disputes Arising out of or in Connection with this Contract..."*, Austrian Yearbook on International Arbitration 2012, vol. 17, p. 18; judgment of the Oberster Gerichtshof [Supreme Court], dated March 30, 2009, rendered in C GmbH vs. S Aktiengesellschaft, 7Ob266/08f, Yearbook Commercial Arbitration 2010, vol. XXXV, p. 328.

practice established by the parties, and the subsequent conduct of the parties, that are of fundamental relevance to arbitration clause interpretation.²⁵ Furthermore, whenever arbitration clause interpretations might render divergent conclusions, one should go for the interpretation which sustains the validity of the arbitration agreement and recognizes the jurisdiction of a court of arbitration.²⁶

However, in one of its judgments, the Austrian Oberster Gerichtshof (Supreme Court) concluded that since the arbitration agreement is primarily procedural in nature, it should be construed as prescribed under the rules specific to procedural law.²⁷ It is only when the application of such rules proves not to be sufficient to produce any relevant result that one should apply by analogy the rules of substantive civil law.²⁸ This refers in particular to the rule according to which when construing contracts, one should not satisfy oneself with the literal meaning of the words used, but proceed to determine the intention of the parties and construe the provisions of the contract in a manner consistent with commercial integrity.²⁹ "If no common intention of the parties can be determined, the purpose of the

agreement is decisive. If the wording of the declaration of intent allows for two equally plausible interpretations, the interpretation which favours the validity of the arbitration agreement and its applicability to a certain dispute is to be preferred."³⁰

The Austrian Supreme Court is in favor of a broad interpretation of arbitration agreements, which validates jurisdiction of a court of arbitration whenever the mutual intention of the parties to submit disputes to arbitration raises no concerns and, concurrently, the jurisdiction of a court of arbitration over a given dispute is not explicitly excluded.³¹ It is irrelevant in this connection whether the arbitration agreement covers exclusively disputes "arising out of the contract" or extends to cover also the ones arising "in connection herewith."³² Even arbitration clauses whose scopes *ratione materiae* have been narrowly defined to cover exclusively "disputes resulting from the contract" are assumed to cover also tort claims, provided that the breach of the contract and the tort constitute a single event.³³ In particular, an arbitration agreement so drafted would cover disputes involving a breach of the competition law and

25. Schwarz F. T., Konrad Ch. W., *The Vienna Rules: A Commentary on International Arbitration in Austria*, 2009, pp. 37-38 and the case law cited therein.

26. *Ibidem*, pp. 37-39 and the case law cited therein.

27. Judgment of the Oberster Gerichtshof [Supreme Court], dated August 26, 2008, rendered in *R GmbH vs. O B.V., O Co Ltd. and others*, 4Ob80/08f, *Yearbook Commercial Arbitration* 2009, vol. XXXIV, p. 406.

28. *Ibidem*.

29. *Ibidem*, including note No. 1. See also Welser I., Molitoris S., *The Scope of Arbitration Clauses - Or "All Disputes Arising out of or in Connection with this Contract..."*, *Austrian Yearbook on International Arbitration* 2012, vol. 17, p. 19.

30. Judgment of the Oberster Gerichtshof [Supreme Court], dated August 26, 2008, rendered in *R GmbH vs. O B.V., O Co Ltd. and others*, 4Ob80/08f, *Yearbook Commercial Arbitration* 2009, vol. XXXIV, p. 405 [internal references omitted].

31. Welser I., Molitoris S., *The Scope of Arbitration Clauses - Or "All Disputes Arising out of or in Connection with this Contract..."*, *Austrian Yearbook on International Arbitration* 2012, vol. 17, pp. 21-22, and the literature and case law cited therein.

32. *Ibidem*, p. 25.

33. See *Ibidem*, p. 24; judgment of the Oberster Gerichtshof [Supreme Court], dated August 26, 2008, rendered in *R GmbH vs. O B.V., O Co Ltd. and others*, 4Ob80/08f, *Yearbook Commercial Arbitration* 2009, vol. XXXIV, pp. 406-407; Schwarz F. T., Konrad Ch. W., *The Vienna Rules: A Commentary on International Arbitration in Austria*, 2009, p. 19.

the antitrust law if the same bore a functional relation to the contractual claims.³⁴ However, the scope *ratione materiae* of such an arbitration clause leaves out non-contractual claims which only loosely relate to the contract.³⁵

3.2 Germany

The provision of Article 7.1 of the UNCITRAL Model Law is also repeated in Article 1029.1 of the German Code of Civil Procedure,³⁶ which permits submission to arbitration of disputes arising from a specific legal relation, regardless of whether such relation is of contractual or other nature³⁷. Reference to the literal interpretation of the above provision supports the conclusion that non-contractual claims may be covered by the arbitration agreement. The German jurisprudence specifically points out that any non-contractual relation which is arbitrable and originates in a statute may be submitted to arbitration.³⁸

34. Judgment of the Oberster Gerichtshof, dated August 26, 2008, rendered in *R GmbH vs. O B.V., O Co Ltd. and others*, 4 Ob. 80/08f, Yearbook Commercial Arbitration 2009, vol. XXXIV, p. 407.

35. See *ibidem*, pp. 406-407; Welser I., Molitoris S., The Scope of Arbitration Clauses - Or "All Disputes Arising out of or in Connection with this Contract...", Austrian Yearbook on International Arbitration 2012, vol. 17, p. 24.

36. Zehntes Buch der Zivilprozeßordnung (Book 10 of the Code of Civil Procedure); available at <http://www.dis-arb.de/de/51/materialien/deutsches-schiedsverfahrensrecht-98-id2>.

37. "Schiedsvereinbarung ist eine Vereinbarung der Parteien, alle oder einzelne Streitigkeiten, die zwischen ihnen in Bezug auf ein bestimmtes Rechtsverhältnis vertraglicher oder nicht-vertraglicher Art entstanden sind oder künftig entstehen, der Entscheidung durch ein Schiedsgericht zu unterwerfen."; *ibidem*; translation ours.

38. Münch J., [in:] Lüke G., Wax P., Münchener Kommentar zur Zivilprozeßordnung, 2001, p. 1033, [quoted after:] Budniak A., Treść zapisu na sąd polubowny w świetle przepisów polskiego i niemieckiego postępowania cywilnego - wybrane zagadnienia, ADR. Arbitraż i Mediacja 2009, No. 3, p. 22.

Under German law, the actual intention of the parties to a contract is of fundamental importance for the purposes of interpretation of the scope *ratione materiae* of an arbitration agreement.³⁹ However, if a valid arbitration agreement is in place, German courts are in favor of interpreting its scope *ratione materiae* in a liberal, i.e. broad, manner.⁴⁰ In particular, it is argued that "in case of doubt an arbitration clause is not to be interpreted restrictively, but rather extensively (...). It must always be taken into account that the parties to an arbitration agreement generally have decided for very well-considered reasons to exclude disputes arising out of a certain legal relationship from the national courts."⁴¹ It is also pointed out that it would be incorrect to assume that the parties' intention is to submit disputes of contractual nature to the jurisdiction of one court and disputes of non-contractual nature to the jurisdiction of another court, whether a common court or a court of arbitration.⁴² As a matter of fact, it is correctly argued in the context of international disputes that one of the fundamental reasons why parties decide to enter into an arbitration agreement is the reluctance of one of them to submit itself to the jurisdiction of the state courts competent for the other party, and the resultant

39. Trittman R., Hanefeld I., [in:] K.-H. Böckstiegel, S. M. Kröll, P. Nacimiento (eds.), *Arbitration in Germany: The Model Law in Practice*, 2007, p. 106 and the case law cited therein.

40. Born G. B., *International Commercial Arbitration*, op. cit., pp. 1332-1333.

41. Judgment of the Hanseatisches Oberlandesgericht [Court of Appeal] in Hamburg, dated February 17, 1989, Yearbook Commercial Arbitration 1990, vol. XV, p. 464.

42. Judgment of the Landgericht [Regional Court] in Hamburg, dated April 20, 1977, Yearbook Commercial Arbitration 1979, vol. IV, p. 262.

preference for a neutral court of arbitration.⁴³ It is only objective facts to the contrary that can disprove the assumption that the parties' intention was to comprehensively exclude jurisdiction of common courts.⁴⁴

Thus, German courts assume that standard arbitration clauses cover tort claims resulting from a breach of contract and unjust enrichment claims. To support this assumption, they argue that it is in the parties' interest to submit to arbitration all disputes arising between them since, by doing so, they will avoid proceedings before different courts.⁴⁵ One of the German courts of appeal expressed an opinion to the effect that since the claims for damages in connection with illegal price and interest inflation would not have arisen if the contract had not been executed, such claims undoubtedly related to the contract and have capacity for adjudication by a court of arbitration.⁴⁶

3.3 Switzerland

Pursuant to Article 177(1) of the Swiss Private International Law, "[a]ny dispute of financial

interest may be the subject of an arbitration."⁴⁷ In light of a provision so formulated, the potential scope of disputes that parties may submit to arbitration is broad. In particular, there are no obstacles preventing non-contractual disputes from being resolved in arbitration. Any controversies as to what specific disputes a court of arbitration has jurisdiction over are resolved through construing the arbitration clause.

An arbitration agreement is construed pursuant to the same rules which govern contract interpretation⁴⁸ and which are listed in Article 18.1 of the Swiss Code of Obligations. Pursuant to the provision referred to above, interpretation of contracts should lead to identification of the true and common intention of the parties.⁴⁹ Acting in this spirit, the arbitral tribunal pointed out, in the interim award rendered in ICC case No. 7929, that in accordance with Swiss law and the case law established by Swiss courts, "(...) an arbitral tribunal should construe the validity and scope of an arbitration clause in accordance with the general principles of the interpretation of contracts, i.e. seeking the real and common intent of parties, based on the wording of the clause, and the principle of confidence or good faith."⁵⁰ Thus, what is conclusive is the actual mutual

43. Judgment of the Oberlandesgericht [Court of Appeal] in Frankfurt, dated September 24, 1985, Yearbook Commercial Arbitration 1990, vol. XV, p. 670.

44. Ibidem.

45. See Trittman R., Hanefeld I., [in:] K.-H. Böckstiegel, S. M. Kröll, P. Nacimiento (eds.), *Arbitration in Germany: The Model Law in Practice*, 2007, p. 106 and the literature cited therein; Welser I., Molitoris S., *The Scope of Arbitration Clauses - Or "All Disputes Arising out of or in Connection with this Contract..."*, Austrian Yearbook on International Arbitration 2012, vol. 17, p. 19 and the literature cited therein; Kröll S. M., National Report for Germany (2007), [in:] J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, 1984, Supplement No. 48, 2007, p. 20.

46. Judgment of the Hanseatisches Oberlandesgericht [Court of Appeal] in Hamburg, dated February 17, 1989, Yearbook Commercial Arbitration 1990, vol. XV, p. 463.

47. Chapter 12 of the Swiss Private International Law of 1987; available at https://www.swissarbitration.org/sa/download/IPRG_english.pdf.

48. Judgment of the Swiss Bundesgericht [Supreme Court], dated August 6, 2012, 4A_119/2012, translation into English available at http://www.swissarbitrationdecisions.com/sites/default/files/6%20ao%C3%BBt%202012%204A%20119%202012_0.pdf.

49. Code of Obligations of March 30, 1911 (in force as at July 1, 2014); translation into English available at <http://www.admin.ch/ch/e/rs/2/220.en.pdf>.

50. Interim award of 1995, rendered in ICC case No. 7929, Yearbook Commercial Arbitration 2000, vol. XXV, p. 317.

intention of the parties to an arbitration agreement and not the agreement's literal wording.⁵¹

It is only where no evidence permitting identification of the intention of the parties to an arbitration agreement is available that one should refer to the objective interpretation of the provisions of the arbitration agreement and determine how the clause would be understood by persons acting reasonably.⁵² When construing declarations of intent in an objective manner, one should take into account the literal wording of the provision, its context and the facts of the case, including the recognized practice and the purpose of the agreement that the parties had in mind, as well as assume that the parties act reasonably.⁵³

So long as the parties executed a valid arbitration agreement, the scope of disputes covered by such agreement should be construed broadly.⁵⁴ In such a case, the Swiss Supreme Court assumes that the parties' intention was

that all disputes be covered by the arbitration agreement,⁵⁵ unless they explicitly excluded jurisdiction of a court of arbitration over a specific category of disputes or unless a given dispute is not arbitrable.⁵⁶

In Swiss law, it is argued in this context that clauses submitting to arbitration any and all disputes arising in connection with a contract cover disputes of not only contractual but also non-contractual nature.⁵⁷ In its judgment of August 6, 2012, the Swiss Supreme Court held that since the fact of execution by the parties of the arbitration agreement was not disputed in the case submitted for adjudication, there were no reasons why the scope *ratione materiae* of the agreement should be construed restrictively.⁵⁸ Furthermore, the Court decided that it was not the intention of parties executing an arbitration clause with a broad scope to submit disputes based on one legal ground to the jurisdiction of a court of arbitration and disputes based on another legal ground to the jurisdiction of a common court, so long as each such dispute related to the same contractual relation and was based on facts resulting from or directly relating to the same contract.⁵⁹ In the case under consideration, the Swiss Supreme Court decided

51. Bärtsch P., Petti A. M., [in:] E. Geisinger, N. Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2013, pp. 30-31.

52. Final award on jurisdiction rendered in ICC case No. 14581, *Yearbook Commercial Arbitration* 2012, vol. XXXVII, pp. 69-70 and the case law of Swiss courts cited therein (the law governing interpretation of the arbitration agreement was Swiss law). See also judgment of the Bundesgericht [Supreme Court], dated August 6, 2012, 4A_119/2012, op. cit.

53. Final award on jurisdiction rendered in ICC case No. 14581, *Yearbook Commercial Arbitration* 2012, vol. XXXVII, pp. 69-70 and the case law of Swiss courts cited therein (the law governing interpretation of the arbitration agreement was Swiss law). See also Müller Ch., [in:] M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2013, p. 67.

54. See Müller Ch., [in:] M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2013, p. 68; Bärtsch P., Petti A. M., [in:] E. Geisinger, N. Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd ed., 2013, pp. 30-31, 37.

55. Judgment of the Swiss Bundesgericht [Supreme Court], dated August 6, 2012, docket No. 4A_119/2012, op. cit.

56. Bärtsch P., Petti A. M., [in:] E. Geisinger, N. Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2013, pp. 30-31, 37. Likewise, the final award in ICC case No. 14046, *Yearbook Commercial Arbitration* 2010, vol. XXXV, p. 247 (the law governing interpretation of the arbitration agreement was Swiss law).

57. Judgment of the Swiss Bundesgericht [Supreme Court], dated August 6, 2012, 4A_119/2012, op. cit.

58. *Ibidem*.

59. *Ibidem*.

that the claims that had arisen “in connection with the Mandate and Trust Agreement” (under which a foundation had been established) and had been submitted to the court of arbitration included also claims concerning management of the founder’s assets, even if the same had originated in another contract, as well as claims concerning the acts undertaken by the foundation asset manager without a due authorization to do so but in connection with dissolution of the foundation.⁶⁰ How broadly the scope of a valid arbitration clause is construed by the Swiss Supreme Court and how important for the purposes of such scope interpretation the intentions of the parties are can be seen in the judgment, in which the Court decided that an arbitration clause incorporated into a boxing equipment licensing agreement covered also a claim for payment that had arisen from a contract on sale of boxing equipment, executed by those same parties.⁶¹ This conclusion was drawn by the Court based on the finding that the association which challenged in this case the jurisdiction of the court of arbitration had as a rule avoided having its disputes resolved by a common court and submitted all such disputes to arbitration.⁶²

3.4 Sweden

The Swedish arbitration law provides, as does the Polish arbitration law, that any disputes having capacity for court settlement may be

submitted to arbitration.⁶³ An additional requirement to be met in the case of disputes that can arise in the future is for them to result from the legal relation specified in the arbitration agreement.⁶⁴ In consequence, although it is noted that such relation may be of contractual or non-contractual nature and need not exist at all upon the arbitration agreement execution, the jurisprudence argues that, in practice, one can hardly conceive of arbitration clauses under which specific non-contractual disputes, e.g. torts, are directly submitted to arbitration.⁶⁵ The scope *ratione materiae* of an arbitration agreement is construed as prescribed under the general principles of contract interpretation, which say that in the case of any ambiguities, it is the intention of the parties, and not the provisions of the agreement, that prevails.⁶⁶

3.5 Great Britain

Pursuant to the provision of Section 6(1) of the English Arbitration Act, “an “arbitration agreement” means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).”⁶⁷ Thus,

63. The Swedish Arbitration Act (SFS 1999:116), Section 1: “Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. Such an agreement may relate to future disputes pertaining to a legal relationship specified in the agreement. The dispute may concern the existence of a particular fact.”; available at <http://www.sccinstitute.com/the-swedish-arbitration-act-sfs-1999121.aspx>.

64. *Ibidem*.

65. Reldén A., Nilsson O., [in:] U. Franke, A. Magnusson et al. (eds.), *International Arbitration in Sweden: A Practitioner’s Guide*, 2013, p. 62.

66. Hober K., *International Commercial Arbitration in Sweden*, 2011, p. 102.

67. English Arbitration Act 1996; available at <http://www.legislation.gov.uk/ukpga/1996/23/contents>.

60. *Ibidem*.

61. Judgment of the Swiss Bundesgericht [Supreme Court], dated September 20, 2011, 4A_103/2011, translation into English available at <http://www.swissarbitrationdecisions.com/sites/default/files/20%20septembre%202011%204A%20103%202011.pdf>.

62. *Ibidem*.

the literal interpretation of the above provision (which is of primary importance in English law) authorizes the conclusion that the English arbitration law too permits, as a rule, submission to arbitration of non-contractual disputes. This provides grounds for the assumption that the provisions of the arbitration agreement executed by the parties determine whether or not the same covers a specific non-contractual claim.⁶⁸ It should be noted, however, that in line with the predominant approach adopted by English common courts, jurisdiction of courts of arbitration is interpreted, especially in the case of international disputes, in a liberal and extensive manner. This trend originates in the ruling, quoted in the jurisprudence⁶⁹ and case law⁷⁰ on numerous occasions, rendered in *Fiona Trust & Holding Corp. vs. Privalov*.⁷¹ In this judgment, the English court of appeal adopted a pragmatic approach and focused on the premises and goals the parties (entrepreneurs) to the contract were likely

to have in mind when executing the arbitration agreement. In a frequently quoted passage from the above judgment, the court pointed out that an ordinary entrepreneur would be surprised to find what amount of time is devoted and what resources are employed to debate whether or not a given case fell within the scope *ratione materiae* of an arbitration agreement defined with the use of this or a similar set of words used in the agreement.⁷² In other words, the court decided that since entrepreneurs took pains to agree that disputes arising between them be adjudicated in arbitration, they aimed to have the issue of the competent forum resolved in a comprehensive manner, and not to create pretexts for expensive, lengthy and pointless disputes over jurisdiction.⁷³ So long as a clear and explicit wording of an arbitration clause does not produce conclusions to the contrary, one should assume that entrepreneurs intended to make the court of arbitration be the court competent to resolve any and all disputes arising between them.

However, manifestations of this principle are to be found already in previous rulings of English courts. In *Astro Vencedor Compania Naviera S.A. of Panama vs. Mabanaf G.M.B.H.*, the English court of appeal⁷⁴ decided that tort claims were covered by an arbitration agreement if their relation to contractual claims was

68. Judgment of the High Court of Justice, Chancery Division, in *Lonrho Ltd. vs. Companhia do Pipeline Mocambique Rodesia Sarl, The Shell Petroleum Company Ltd. and others*, dated January 31, 1978, *Yearbook Commercial Arbitration* 1979, vol. IV, p. 321.

69. See, for instance, Redfern A., Hunter J. M. et al., *Redfern and Hunter on International Arbitration*, 2009, p. 108; Born G. B., *International Commercial Arbitration*, 2014, p. 1333.

70. See, for instance, judgment of the England and Wales Court of Appeal in *Barclays Bank Plc vs. Nylon Capital LLP*, dated July 18, 2011, [2011] EWCA Civ 826, Section 27; judgment of the High Court of Justice, Queen's Bench Division, in *Enercon GmbH and Wobben Properties GmbH vs. Enercon (India) Ltd.*, dated March 23, 2012, [2012] EWHC 689 (Comm), Section 61.

71. Judgment of the England and Wales Court of Appeal in *Fiona Trust & Holding Corp. and others vs. Privalov and others*, [2007] EWCA Civ 20. The background of the case was a dispute as to whether or not a claim for declaring a contract invalid due to an alleged bribe given in connection with its execution was covered by the scope *ratione materiae* of the arbitration clause under which disputes "arising under this charter or out of this charter" were submitted to arbitration.

72. *Ibidem*, Section 17.

73. *Ibidem*.

74. The court was considering an appeal filed by charterers against a ruling dismissing a petition to declare that a claim for damages for wrongful arrest of a ship fell outside of the scope *ratione materiae* of the arbitration clause which, in this case, submitted to arbitration disputes arising in the course of performance of a ship charter contract.

sufficiently close.⁷⁵ In the case under discussion, the parties, i.e. the owner of the ship and the charterers, submitted to arbitration disputes that might arise in the course of performance of the ship charter contract.⁷⁶ After the ship had arrived at the port and unloading had begun but no bill of lading had been presented to the ship owners, the latter stopped the unloading under way, as a result of which the charterers suffered a loss. To secure their claims against the ship owners, the charterers applied for and obtained a ship detention order issued by the court. Despite a bank guarantee provided by the owners and despite the fact that unloading was completed and the ship released by the charterers, the charterers detained the ship again several months later, referring to defectiveness of the bank guarantee submitted to them. As a result, the ship owners brought before a court of arbitration *inter alia* claims for damages in connection with illegal ship detention, which were granted by the arbitral tribunal. When considering the case, the English common court did not sustain the plea to the jurisdiction of the court of arbitration and argued that the jurisdiction of the court of arbitration was not limited to a situation in which the claim referred to a tortious act which concurrently constituted an instance of contract non-performance. Quite the opposite, in order to establish jurisdiction of a court of arbitration, it is sufficient for the tort claim to be related to the contract closely enough. And it is irrelevant that, in the case at hand, the other claim did not arise in the period of the charter performance.⁷⁷

75. Judgment of the Court of Appeal in *Astro Vencedor Compania Naviera S.A. of Panama vs. Mabanft GmbH.*, dated March 18, 1971, [1971] 2 Q.B. 588.

76. *Ibidem*.

77. *Ibidem*.

A similar position was taken by the English court of appeal in *Woolf vs. Collis Removal Service*.⁷⁸ When making a decision as to staying civil proceedings on account of the arbitration agreement, the court held that regardless of the fact that a claim for damages in connection with loss of things entrusted for safekeeping due to the safekeeper's negligence is not (under English law) a claim "under the contract", it is nevertheless sufficiently closely related to the contract itself to fall within the scope *ratione materiae* of the arbitration agreement.⁷⁹ In the opinion of the court of appeal, it is only claims bearing no relation whatsoever to the transaction which is the object of the contract executed by the parties that are left outside of the broad scope of the arbitration agreement.⁸⁰

In *Lonrho Ltd. vs. Companhia do Pipeline Mocambique Rodesia Sarl, The Shell Petroleum Company Ltd. and others*,⁸¹ the court of appeal was to decide whether, in light of the facts of the case, the claim in connection with shippers' tort fell within the scope of the arbitration agreement which covered any and all disputes arising out of or in connection with the shippers' agreement.⁸² The court of appeal acknowledged

78. Judgment of the Court of Appeal in *Woolf vs. Collis Removal Service* of 1947, [1948] 1 K.B. 11.

79. *Ibidem*.

80. *Ibidem*. In the case under consideration, the arbitration agreement executed by the parties read as follows: "If the Customer makes any claims upon or counterclaim to any claim made by the contractors, the same shall in case of difference, be referred to the decision of two arbitrators (one to be appointed by each party)."

81. Judgment of the High Court of Justice, Chancery Division in *Lonrho Ltd. vs. Companhia do Pipeline Mocambique Rodesia Sarl, The Shell Petroleum Company Ltd. and others*, dated January 31, 1978, *Yearbook Commercial Arbitration* 1979, vol. IV, pp. 320-323.

82. The arbitration clause read as follows: "All claims or questions arising out of or in connection with this Agreement shall [...] be referred to arbitration in London [...]", *ibidem*, p. 321.

that a tort claim may be submitted to arbitration if it is sufficiently related to the contractual claim.⁸³ Furthermore, the court held that the tort claim in question bore a very close relation to the shippers' agreement. The interpretation of the contractual provisions determined whether the shippers committed a tort or acted within the limits of their contractual powers. Since the acts claimed to have been undertaken by the defendant in breach of the shippers' agreement concurrently provided grounds for a tort claim, then the tort claim was a claim arising out of or in connection with the contract.⁸⁴

An example of a different decision is to be found in *Chimimport Plc vs. G D'Alesio SAS*.⁸⁵ In this case, the English court was to decide whether tort claims (i.e. a claim for damages inter alia in connection with wrongful ship detention, abuse of legal process and malicious institution of civil proceedings) fell within the scope of the arbitration clause covering exclusively disputes resulting from the bill of lading. The court was of the opinion that the literal interpretation of the arbitration clause⁸⁶ indicated a narrow scope *ratione materiae* of the same, limited to contractual claims. In consequence, the court decided that even if the clause extended to cover certain tort claims, the plaintiff's claims referred to above would nevertheless not bear a sufficiently close relation to the contractual claims resulting from the bill of lading.

83. *Ibidem*, pp. 321-322.

84. *Ibidem*, p. 322.

85. Judgment of the Queen's Bench Division (Commercial Court) in *Chimimport Plc. vs. G D'Alesio SAS*, dated April 28, 1994, [1994] C.L.C. 459.

86. The court was analyzing differences in the scopes *ratione materiae* of arbitration clauses, resulting from the expressions used therein, such as "arising under the contract," "arising out of the contract" and "arising in connection with the contract," *ibidem*.

In order to make a decision as to the tort claims, the court was not required to construe the contract, which was an exclusively competence of the court of arbitration. In this case, there was no or very little overlap between the contractual and tort claims, which provided an additional argument supporting the decision that the tort claims raised by the plaintiff were not covered by the arbitration clause.⁸⁷

Summing up the case law discussed above, one can point out that English courts allow for tort claims to be covered by the arbitration clause incorporated into a contract if the arbitration clause is of a sufficiently general nature and the non-contractual claim pursued by the plaintiff bears a relevant relation to the contract. It is pointed out in this connection that, as a rule, it is not the parties' intention to split court jurisdiction and have various claims differing in the extent to which they relate to one another and resulting from the same or similar events adjudicated by separate courts.⁸⁸

3.6 The United States

In the U.S., arbitration is governed primarily by the Federal Arbitration Act which provides (in § 2) that any contractual provision to settle by arbitration a dispute involving commerce and arising out of a contract or transaction, or a refusal to perform such contract or transaction in whole or in part, is valid, irrevocable,

87. *Ibidem*.

88 See judgment of the England and Wales Court of Appeal in *Sulamérica Cia Nacional De Seguros S.A. and others vs. Enesa Engenharia S.A. and others*, dated May 16, 2012, [2012] EWCA Civ 638, Section 40.

and enforceable.⁸⁹ The above regulation does not explicitly say whether the scope *ratione materiae* of an arbitration agreement may extend to cover non-contractual disputes. The answer to this question should thus be sought in the case law established by U.S. courts.

In line with the U.S. case law, an arbitration agreement, including its *ratione materiae*, should be construed as prescribed under the general principles of contract interpretation.⁹⁰ The conclusive factor is the intention of the parties who executed the agreement.⁹¹ The scope *ratione materiae* of arbitration clauses tends especially strongly to be construed in a broad manner,⁹² so long, however, as the

fact of a valid arbitration agreement having been executed by the parties raises no concerns.⁹³ U.S. courts have on numerous occasions acknowledged in their decisions the federal policy in favor of arbitration, as established under the Federal Arbitration Act.⁹⁴ When referring to the Federal Arbitration Act, the jurisprudence and case law explicitly use the direct term pro-arbitration presumption, i.e. a presumption to the effect that, in the absence of any evidence to the contrary,⁹⁵ the parties' intention is to submit to arbitration any disputes arising between them,⁹⁶ especially if

89. Federal Arbitration Act, 9 U.S.C., § 2, which reads as follows: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

90. See judgment of the United States Supreme Court in *First Options of Chicago, Inc. vs. Kaplan and others*, dated May 22, 1995, 514 U.S. 938, Section 944; judgment of the United States Court of Appeals in *Equal Employment Opportunity Commission vs. Frank's Nursery & Crafts, Inc.*, dated April 23, 1999, 177 F.3d 448, Section 32; judgment of the United States District Court, S.D. New York in *Leo Haviland vs. Goldman, Sachs & Co. I* J. Aron & Co., dated May 8, 1990, 736 F.Supp. 507, Section 509.

91. See judgment of the United States Court of Appeals, Eleventh Circuit, in *Telecom Italia S.p.A vs. Wholesale Telecom Corp.*, dated April 18, 2001, 248 F.3d 1109, Section 1114; judgment of the United States Supreme Court in *Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Inc.*, dated June 2, 1985, 473 U.S. 614, Section 626.

92. See judgment of the United States District Court, E.D. New York, in *Meadows Indemnity Company Ltd. vs. Baccala & Shoop Insurance Services, Inc.*, dated March 29, 1991, 760 Supp. 1036, Section 1043; judgment of the United States Court of Appeals, Second Circuit, in *Collins & Aikman Products Co. vs. Building Systems Inc. and U.S. Commercial Floor System*, dated June 16, 1995, 58 F.3d 16, Section 21; judgment of the United States Court of Appeals, Eighth Circuit, in *Industrial Wire Products Inc. vs. Costco Wholesale Corp.*, dated August 6, 2009, 576 F.3d 516, Section 521.

93. See judgment of the United States Supreme Court in *First Options of Chicago, Inc. vs. Kaplan and others*, dated May 22, 1995, 514 U.S. 938, Section 944; judgment of the United States Supreme Court in *Granite Rock Co. vs. International Brotherhood Teamsters*, dated June 24, 2010, 130 S.Ct. 2847.

94. See, for instance, judgment of the United States Supreme Court in *Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Inc.*, dated June 2, 1985, 473 U.S. 614, Section 615; judgment of the United States Court of Appeal, Eighth Circuit, in *Hudson vs. Conagra Poultry Comp.*, dated April 4, 2006, 484 F.3d 496, Section 503; judgment of the United States Court of Appeals, Tenth Circuit, in *Kerry R. Hicks vs. the Cadle Company and others*, dated December 7, 2009, 355 Fed.Appx. 186, Section 192; judgment of the United States District Court, E.D. New York, in *Meadows Indemnity Company Ltd. vs. Baccala & Shoop Insurance Services, Inc.*, dated March 29, 1991, 760 Supp. 1036, Section 1043.

95. See judgment of the United States Court of Appeals, Tenth Circuit, in *Kerry R. Hicks vs. the Cadle Company and others*, dated December 7, 2009, 355 Fed.Appx. 186, Section 192; judgment of the United States Supreme Court in *First Options of Chicago, Inc. vs. Kaplan and others*, dated May 22, 1995, 514 U.S. 938, Sections 944-945; judgment of the United States Court of Appeals, Third Circuit, in *Century Indemnity Co. vs. Certain Underwriters at Lloyd's, London*, dated October 15, 2009, 584 F.3d 513, Section 524; judgment of the United States District Court, E.D. New York, in *Meadows Indemnity Company Ltd. vs. Baccala & Shoop Insurance Services, Inc.*, dated March 29, 1991, 760 Supp. 1036, Section 1043.

96. See Born G. B., *International Commercial Arbitration*, op. cit., pp. 1326-1331 and the case law cited therein; judgment of the United States Court of Appeals, Third Circuit, in *Century Indemnity Co. vs. Certain Underwriters at Lloyd's, London*, dated October 15, 2009, 584 F.3d 524, Section 556; judgment of the United States Court of Appeals, Tenth Circuit, in *Kerry R. Hicks vs. the Cadle Company and others*, dated December 7, 2009, 355 Fed.Appx. 186, Section 192.

the scope of the arbitration clause has been broadly formulated.⁹⁷ It is argued in this context that the intention of reasonable entrepreneurs executing an arbitration agreement in good faith is to have all disputes arising between them in the future resolved as part of a single proceeding, and not as part of several independent procedures, which can generate additional costs and delays and, moreover, entails the risk of conflicting decisions.⁹⁸

A party may not avoid the obligation to submit to arbitration a dispute under an arbitration agreement it executed simply by specifying tort, and not a breach of contract, as the ground for the claims it is pursuing. In *Cd Partners Llc and Cd Developers Lp vs. Jerry W. Grizzle*, it was held that what was decisive in such cases was how the alleged tort related to the subject matter of the arbitration agreement.⁹⁹ Since, in the case under consideration, the tort claims originated in the agreement, arouse therefrom and referred thereto, the court competent to adjudicate the same was the court of arbitration.¹⁰⁰

The pro-arbitration approach to interpretation of arbitration agreements is especially prominent in the case of disputes involving

international transactions.¹⁰¹ Such transactions are presumed to be within the jurisdiction of a court of arbitration, and in order to refute this presumption clear and unequivocal evidence is needed to prove that the parties' intention was to restrict the scope of the arbitration clause,¹⁰² e.g. by explicitly excluding jurisdiction of courts of arbitration over a specific category of disputes.¹⁰³ This approach is adopted with respect to both contractual and non-contractual disputes.¹⁰⁴

A decision as to whether a given non-contractual claim is covered by the arbitration agreement should be made on the basis of the

101. See judgment of the United States Court of Appeals, First Circuit, in *Sourcing Unlimited, Inc. vs. Asimco International, Inc. and John Perkowski*, dated May 22, 2008, 526 F.3d 38; judgment of the United States Court of Appeals, Second Circuit, in *David L. Threlkeld & Co. vs. Metallgesellschaft, Ltd.*, dated January 15, 1991, 923 F.2d 245, Section 248; judgment of the United States Supreme Court in *Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Inc.*, dated June 2, 1985, 473 U.S. 614, Section 631.

102. See judgment of the United States Court of Appeals, Tenth Circuit, in *Kerry R. Hicks vs. the Cadle Company and others*, dated December 7, 2009, 355 F.Appx 186; judgment of the United States Supreme Court in *First Options of Chicago, Inc. vs. Kaplan and others*, dated May 22, 1995, 514 U.S. 938, Sections 944-945; judgment of the United States Court of Appeals, Third Circuit, in *Century Indemnity Co. vs. Certain Underwriters at Lloyd's, London*, dated October 15, 2009, 584 F.3d 513; judgment of the United States District Court, E.D. New York, in *Meadows Indemnity Company Ltd. vs. Baccala & Shoop Insurance Services, Inc.*, dated March 29, 1991, 760 Supp. 1036, Section 1043.

103. See judgment of the United States Court of Appeals, Sixth Circuit, in *Solvay Pharmaceuticals, Inc. vs. Duramed Pharmaceutical, Inc.*, dated March 27, 2006, 442 F.3d 471, Section 482, reference 10; judgment of the United States Supreme Court in *AT&T Technologies, Inc. vs. Communications Workers of America*, dated April 7, 1986, 475 U.S. 643, Section 650.

104. See, for instance, judgment of the United States District Court, N.D. New York, in *Kuklachev vs. Gelfman*, 600 F.Supp.2d 437, Section 460; judgment of the U.S. Court of Appeals, Second Circuit, in *Collins Aikman Products Co. vs. Building Systems, Inc. and US Commercial Floor System*, dated June 15, 1995, 58F.3d 16;.

97. See judgment of the United States Court of Appeals, Sixth Circuit, in *Solvay Pharmaceuticals, Inc. vs. Duramed Pharmaceutical, Inc.*, dated March 27, 2006, 442 F.3d 471, Section 482, reference 10; judgment of the United States District Court, S.D. Florida, in *Mercury Telco vs. Empresa de Telecomunicaciones*, 670 F.Supp.2d 1350.

98. Born G. B., *International Commercial Arbitration*, op. cit., p. 1328.

99. Judgment of the United States Court of Appeals, Eighth Circuit, in *Cd Partners Llc and Cd Developers Lp vs. Jerry W. Grizzle*, dated September 23, 2005, 424 F.3d 795.

100. Ibidem.

facts of the case, including the provisions of the specific arbitration clause. It is assumed that tort claims are covered by the arbitration agreement on condition that they bear a direct relation to the contract. For instance, in *David Hudson and Donna Hudson vs. Conagra Poultry Company*, the U.S. court decided that an arbitration clause submitting to arbitration “all claims (...) relating in any way to performance of the contract” extended to cover as well tort claims resulting from the contract executed by the parties, unless there existed evidence proving that it was the parties’ intention to narrow down the scope of disputes submitted to arbitration.¹⁰⁵ In *Sears Authorized Termite and Pest Control, Inc. vs. Shelly J. Sullivan*, the Supreme Court of Florida held that the court of arbitration had been competent to decide the issue of legitimacy of non-contractual personal injury claims, as those claims resulted from a failure to perform contractual obligations.¹⁰⁶

Generally, U.S. courts assume that an arbitration agreement covers non-contractual claims if such claims result from circumstances to which the contract relates,¹⁰⁷ if they had not arisen should the party have complied with the contractual provisions,¹⁰⁸ if they originate in

the contract¹⁰⁹ or relate to material aspects of the contractual relation, which aspects should not, however, be construed as confined to the provisions of the contract¹¹⁰. Tort claims which bear no relation to the contract containing the arbitration agreement,¹¹¹ are not “an immediate foreseeable result of the performance of parties contractual duties”¹¹² or may be asserted without the need to invoke the contractual provisions¹¹³ were decided to be outside of the scope *ratione materiae* of arbitration clauses.

4. Arbitration case law

Some arbitral awards rendered in the past concluded that the scope *ratione materiae* of arbitration clauses should, as a rule, be construed narrowly.¹¹⁴ Nowadays, however, the arbitration case law proves that the prevailing approach is to construe the arbitration agreement in compliance with the principles

105. Judgment of the United States Court of Appeals, Eighth Circuit, in *David Hudson and Donna Hudson vs. Conagra Poultry Company*, dated April 4, 2007, 484 F.3d 496, Section 500.

106. Judgment of the Supreme Court of Florida in *Sears Authorized Termite and Pest Control, Inc. vs. Shelly J. Sullivan*, dated May 2, 2002, 816 So.2d 603, Sections 605-606.

107. Judgment of the United States Court of Appeals, Eighth Circuit, in *CD Partners LLC and CD Developers vs. Jerry W. Grizzle*, dated September 23, 2005, 424 F.3d 795.

108. Judgment of the United States Court of Appeals, Eleventh Circuit, in *H.S. Gregory, G.E. Benson, John C. Erber vs. Electro-mechanical Corporation*, dated May 21, 1996, 83 F.3d 382.

109. Judgment of the United States Court of Appeals, Seventh Circuit, in *Sweet Dreams Unlimited, Inc. vs. Dial-A-Mattress International Ltd.*, dated August 6, 1993, 1 F.3d 639.

110. *James E. Morgan vs. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (United States Court of Appeals, Eighth Circuit 1984).

111. Judgment of the United States Court of Appeals, Ninth Circuit, in *Mediterranean Enterprises, Inc. vs. Ssangyong Corp.*, dated June 23, 1983, 708 F.2d 1458.

112. See judgment of the United States Court of Appeals, Eleventh Circuit, in *Jane Doe vs. Princess Cruise Lines Ltd.*, dated September 23, 2011, 657 F.3d 1204; judgment of the United States Court of Appeals, Eleventh Circuit, in *Telecom Italia S.p.A. vs. Wholesale Telecom Corporation*, dated April 18, 2001, 248 F.3d 1109.

113. Judgment of the United States District Court, N.D. Ohio, in *Robert Fazio and others vs. Lehman Brothers, Inc. and others*, dated July 19, 2002, 268 F.Supp. 2d 865.

114. See, for instance, interim award rendered in ICC case No. 2321 of 1974, *Yearbook Commercial Arbitration* 1976, vol. I, p. 133; interim award rendered in ICC case No. 7920 of 1993, *Yearbook Commercial Arbitration* 1998, vol. XXIII, p. 82.

governing the interpretation of contracts. In particular, it is pointed out that "(...) it has been held that an arbitral tribunal should construe the validity and scope of an arbitration clause in accordance with the general principles of the interpretation of contracts, i.e. seeking the real and common intent of parties, based on the wording of the clause, and the principle of confidence or good faith."¹¹⁵ If the arbitration clause authorizes the conclusion that it was the parties' intention to submit to arbitration a specific category of disputes, this intention is decisive, even if the expressions used in the arbitration clause are imprecise or unclear.¹¹⁶ It is argued that, despite severability of the arbitration clause from the underlying contract in which it is contained, its interpretation should take into account all provisions of the contract, and not the provisions of its isolated part only.¹¹⁷

A further analysis of arbitral awards leads to the conclusion that what should be construed in an especially broad manner is the scope *ratione materiae* of arbitration clauses under which "all disputes arising in connection with the contract" are submitted to arbitration, as such wording expresses the parties' intention to submit to arbitration an especially broad

category of disputes.¹¹⁸ Such a category is not limited to contractual disputes only, but extends to encompass non-contractual disputes, including those resulting from tort. All that is required is a bridging link with the contract.¹¹⁹

In the interim award rendered in ICC case No. 9517 of 1998, it was explicitly stated that the standard arbitration clause suggested by ICC is very broad and covers any and all disputes which arise out of the contract directly or indirectly, regardless of whether specific claims are of contractual or tortious nature.¹²⁰ The arbitration clause covered "all disputes arising in connection with the contract." The arbitral tribunal decided that the clause extended to cover claims relating to the tortious acts allegedly committed by the respondent in the course of a previous arbitration proceeding conducted in connection with the contract containing the arbitration clause, governed by the ICC rules.¹²¹ This decision is not an isolated one.

118. Interim award rendered in ICC case No. 6474 of 1992, *Yearbook Commercial Arbitration* 2000, vol. XXV, p. 310 ("It is generally agreed by doctrinal writings and arbitral precedents alike that the terms 'all disputes' read in association with the terms 'in connection with' (rather than arising from the 'application' or 'relating to the interpretation or validity of the contract', etc.) express the common will of the Parties to give a wide scope to the arbitration clause.").

119. Award rendered in ICC case No. 6655 of 2011, *International Journal of Arab Arbitration* 2012, vol. 4, No. 2, pp. 186-187 ("According to the wide terms of the arbitration clause ("... any dispute arising out of or in connection with the present Agreement...") in the present arbitration, it is established that the Parties did not limit their claims under the arbitration clause to purely contractual disputes but intended possible tortious claims "in connection" with the Agreement also to be resolved through arbitration."), and the case law cited therein.

120. Interim award rendered in ICC case No. 9517 of 1998, *ICC International Court of Arbitration Bulletin* 2002, vol. 13, No. 2, pp. 87 ff.

121. *Ibidem*.

115. Interim award rendered in ICC case No. 7929, *Yearbook Commercial Arbitration* 2000, vol. XXV, p. 317. See also final award rendered in AIA case No. 41/92 of 1993, *Yearbook Commercial Arbitration* 1997, vol. XXII, pp. 179-180; interim award rendered in ICC case No. 19176/MHM of 2013, unpublished.

116. Interim award rendered in ICC case No. 4145 of 1983, *Yearbook Commercial Arbitration* 2000, vol. XXV, p. 100.

117. Interim award rendered in ICC case No. 3380, dated November 29, 1980, *Yearbook Commercial Arbitration* 1982, vol. VII, p. 118.

Foreign case law emphasizes the general and broad scope of the ICC model arbitration clause, which is also noted by the Secretariat of the International Court of Arbitration at the International Chamber of Commerce.¹²² As a result of this general scope of the model arbitration clause, jurisdiction of courts of arbitration adjudicating on the basis thereof is not limited to contractual disputes, but extends to cover also other disputes which bear a relation of any kind to the contract, regardless of their nature. This conclusion led, *inter alia*, a U.S. court of appeals to decide that, given the facts of the case it was considering, the scope *ratione materiae* of the ICC model arbitration clause covered claims relating, among other things, to unfair commercial practices, conspiracy, defamation and abuse of process.¹²³ Likewise, in its final award rendered in ICC case No. 6216, the arbitral tribunal decided that the broad scope of the arbitration clause, expressed through the wording “all disputes of any nature” and “arising in connection with the contract,” provided grounds for the jurisdiction of the court of arbitration to adjudicate the claimant’s tort claims in connection with trespassing to the claimant’s real estate

and conversion of its property. This was so due to the fact that the above disputes would not have arisen if the contract between the parties had not been executed.¹²⁴

A broad scope of the arbitration clause and a close relation borne by non-contractual claims (originating in alleged negligent misrepresentation by the other party) to the contract, as well as the fact that such claims resulted from the same circumstances as the contractual claims, all served as grounds for the court of arbitration to assume its jurisdiction in ICC case No. 7924 (tort of negligent misrepresentation)¹²⁵ and in ICC case No. 4367 (wrongful retention of money).¹²⁶ In turn, if narrowed down by the parties, the scope of the model arbitration clause can exclude jurisdiction of the court of arbitration over specific categories of non-contractual disputes. For example, the scope of the arbitration agreement narrowed down by the parties to disputes “concerning the interpretation and/or performance of any provision of this agreement” led the arbitral tribunal to decide, in ICC case No. 7893, that antitrust law claims were not covered by such arbitration agreement, as they did not relate to the contract performance.¹²⁷ The absence of a sufficiently close relation to

122. Fry J., Greenberg S., Mazza F., *The Secretariat’s Guide to ICC Arbitration*, 2012, p. 448 (“The standard clause for arbitration alone has been designed to offer maximum flexibility so as to lend itself to the precise circumstances of any dispute as and when it arises.”).

123. Judgment of the United States Court of Appeals, Fourth Circuit, in *J.J. Ryan & Sons Inc. vs. Rhone Poulenc Textile S.A.* and others, dated December 13, 1988, 863 F.2d 315 (“The International Chamber of Commerce’s recommended clause which provides for arbitration of “[a]ll disputes arising in connection with the present contract” must be construed to encompass a broad scope of arbitrable issues. The recommended clause does not limit arbitration to the literal interpretation or performance of the contract. It embraces every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute.”). See also Gonzalez F., *The Treatment of Tort in ICC Arbitral Awards*, ICC International Court of Arbitration Bulletin 2002, vol. 13, No. 2, pp. 39 ff.

124. Final award rendered in ICC case No. 6216 of 1991, ICC International Court of Arbitration Bulletin 2002, vol. 13, No. 2, pp. 58 ff.

125. Final award rendered in ICC case No. 7924 of 1995, ICC International Court of Arbitration Bulletin, vol. 13, No. 2, pp. 69 ff.

126. Interim award rendered in ICC case No. 4367 of 1984, *Yearbook Commercial Arbitration* 1986, vol. 11, pp. 138-139.

127. In addition, the arbitral tribunal pointed out that pursuant to the laws of New York, as the laws governing the arbitration agreement, adjudication of claims based on antitrust law was contrary to the principles of public policy. See interim award rendered in ICC case No. 7893 of 1994, *Yearbook Commercial Arbitration* 2002, vol. XXVII, pp. 146-151.

the contract served as grounds for a decision that the court of arbitration was not competent to decide claims concerning defamation and the resultant loss of an opportunity to execute a contract with another company.¹²⁸

5. Summary

A review of the solutions worked out within foreign systems of law and case laws established by courts of arbitration reveals a process of a relatively consistent approach being developed to the issue under analysis. It can be summed up in four points. First, jurisdiction of a court of arbitration to adjudicate disputes of non-contractual nature may, as a rule, follow from an arbitration agreement incorporated into an underlying contract. Second, the interpretation of an arbitration agreement and the reconstruction of the parties' intention determine whether or not a specific category of non-contractual claims is covered by a given arbitration agreement. An arbitration agreement is construed with the use of essentially the same interpretation methods that govern contract interpretation in a given legal system. Third, what prevails is an approach in favor of extensive interpretation of the arbitration agreement and a presumption that, while entering into an arbitration agreement, parties intended to comprehensively provide for the issue of the competent forum for deciding claims that might arise in connection with the contract. This presumption may be refuted by evidence proving the parties' intention to the contrary, manifested in particular through the exclusion of a specific category of disputes

from the scope of the arbitration agreement. Fourth, a relation is required to hold between a specific non-contractual claim and the contract. This relation is not restricted to a situation where norms meet and a single event may serve as a basis for claims of both contractual and non-contractual nature. It is rather the reasonableness test that appears to be conclusive here, as it provides an answer to the question whether separation of contractual claims from non-contractual ones and entrusting claims of each type for adjudication to different authorities is justified under the specific circumstances. The answer provided to that question can depend on a number of factors and circumstances, e.g. does the decision to accept or reject a non-contractual claim depend on the method employed to construe the contractual provisions? Does the fact or the method of the contract execution constitute a tort, or would a claim in tort have arisen if there had been no contract in place between the parties? What is the scope of the questions of fact and questions of law that require to be analyzed in the case of a non-contractual claim and what is the extent to which it overlaps with the scope of the issues required to be decided with respect to a contractual claim, etc.? As it seems, this issue is too dependent on the facts of the case to permit concise and synthetic conclusions. It is worth pointing out, however, that the primary purpose of the reasonableness test referred to above should be to determine what reasonable and pragmatic entrepreneurs would consent to. Considerations invoking strictly legalistic arguments, referring to the reliability of legal transactions, the public nature of procedural law norms, etc., appear to be of lesser importance.

¹²⁸. Interim award rendered in ICC case No. 19176/MHM of 2013, unpublished.

ANALYSIS OF THE POLISH SYSTEM OF LAW

1. Review and analysis of the case law

The issue of the arbitration clause incorporated into an underlying contract effectively extending to cover non-contractual claims was addressed by the Polish Supreme Court on several occasions. In its decision of February 5, 2009,¹²⁹ the Supreme Court held that submission of contractual claims to arbitration means that jurisdiction of the court of arbitration extends to cover any and all claims for contract performance, claims arising due to non-performance or improper performance of the contract, claims for reimbursement of undue performance which arise as a result of the contract invalidity or renouncement, as well as tort claims if resulting from an event which concurrently constitutes an instance of non-performance or improper performance of the contract.¹³⁰ The above decision was taken in a dispute arising out of a framework agreement on commercial cooperation, which provided for various fees in consideration of marketing and advertising services. The plaintiff argued that such fees were hidden fees for accepting goods for marketing, within the meaning of Article 15.1.4 of the Act of April 16, 1993 on Combating Unfair Competition. Interestingly, in this case, the arbitration agreement covered, in line with the statement of reasons to the Supreme Court's decision, disputes involving

interpretation of the commercial contract in place between the parties. The Supreme Court dismissed the cassation appeal based on arguments to the effect that the arbitration agreement covered contractual claims only, to the exclusion of claims in connection with acts of unfair competition. It decided that the plaintiff was claiming reimbursement of amounts which it paid to the defendant, in performance of the contract and as evidenced by invoices, in consideration of "marketing" and "advertising" services. This determination was not affected by the fact that the fees in question constituted, in the plaintiff's opinion, also an act of unfair competition. Thus, as a matter of fact, the above decision formulates a rule according to which a party to an arbitration agreement may not avoid the legal consequences of such agreement through bringing a claim in tort, if what it actually asserts is claims of contractual nature. The decision should thus be approved of, as an example of protection extended by the Supreme Court to the validity of an arbitration agreement. However, it seems that this decision cannot be treated as a thorough and exhaustive answer to the question under what circumstances an arbitration agreement permits assertion of tort claims.

A different view on the issue in question was taken by the Supreme Court in its decision of December 2, 2009.¹³¹ As in the case discussed above, the object of dispute was a claim in connection with fees charged allegedly in breach of Article 15.1.4 of the Act on Combating Unfair Competition. However, this time the Supreme Court concluded that: "The defendant's act of unfair competition,

129. I CSK 311/08, Lex No. 492144.

130. Incidentally, this decision is very laconic and lacks arguments supporting the conclusion that contractual disputes include those categories of disputes only. Thus, the decision has the qualities of arbitrariness.

131. I CSK 120/09, Lex No. 584183.

consisting in charging additional fees, was not related to the performance of those contracts and did not occur in connection with the performance thereof, but was committed only incidentally to the performance of those contracts, as correctly pointed out by the appellant. Therefore, the claim it is pursuing is not of contractual nature and bears no relation to the provisions of the contracts executed by the parties, but refers to an act of unfair competition committed by the defendant. One can hardly assume that, while executing the arbitration agreement referred to above, the parties were anticipating that one of them would commit an act of unfair competition and, therefore, submitted disputes in this respect to arbitration." In consequence, the plea of arbitration agreement raised by the defendant was not granted. In its subsequent decisions, the Supreme Court was justifying the different views taken in each of the above rulings with the differences in the facts. In particular, in its decision of October 24, 2012,¹³² the Supreme Court pointed out that in the case resolved under the decision of December 2, 2009, the scope of the arbitration agreement had been formulated narrowly, as it provided for "disputes arising out of the sales contract only," hence it did not cover in casu tort claims.¹³³

However, the above argument does not appear convincing. In the first place, there is an actual conflict between the Supreme Court's

decisions of February 5, 2009 and December 2, 2009. In its subsequent rulings, the Supreme Court rightly points out that the divergent decisions as to the scope *ratione materiae* of the arbitration agreement can result from the different facts of each of those cases, and in particular from the differences in the provisions of the arbitration agreements. However, this does not change the fact that the Supreme Court concluded in the decision of December 2, 2009 that an arbitration agreement covering all disputes arising out of a contract was too narrow to include tort claims. Meanwhile, in the case resolved under the decision of February 5, 2009, the scope of the arbitration agreement was much narrower, as it covered issues relating to the contract interpretation. This did not, however, prevent the Supreme Court from applying a broad, liberal interpretation, and as a result conclude that the arbitration agreement extended to cover a tort-based claim for payment.

The significance of the wording of the arbitration agreement was pointed out by the Supreme Court also in its decision of April 4, 2012,¹³⁴ issued, incidentally, also in a dispute involving an alleged breach of Article 15.1.4 of the Act on Combating Unfair Competition. The Supreme Court concluded there that, in accordance with the decision of February 5, 2009, the case decided therein involved a co-occurrence of the plaintiff's claims.¹³⁵ Furthermore,

132. III CSK 35/12, Lex No. 1232776.

133. Incidentally, in the case resolved under the decision of February 5, 2009, the scope of the arbitration agreement was even narrower, as it covered disputes relating to interpretation of the framework cooperation agreement, whereas the disputed issue was whether the fees charged by the defendant constituted remuneration in consideration of a certain type of services provided for in that agreement.

134. I CSK 354/11, Lex No. 1164720.

135. This determination appears to be incorrect. In the case resolved under the decision of February 5, 2009, there was no co-occurrence of claims. The plaintiff was pursuing claims in tort. The issue of interpretation of the commercial contract in place between the parties was of only prejudicial nature for the purposes of determining whether or not the fees charged by the defendant were justified by the provisions of that contract.

importantly, the wording of the arbitration agreement was different. The parties submitted to arbitration any and all disputes involving interpretation of the contract. And the issue in dispute was whether the fees charged by the defendant were covered by the concept of fees in consideration of “marketing” and “advertising” services. Whereas, in the case resolved under the decision of April 4, 2012, the act of unfair competition from which the plaintiff derives its claim served as a basis for a legal relation separate from the contract in place between the parties. It clearly follows from the arbitration agreements that they referred exclusively to disputes arising out of or in connection with the contract performance, and not to all disputes arising in the course of the contract performance.

In its decision of October 17, 2012,¹³⁶ the Supreme Court deemed the approach adopted in the decisions of December 2, 2009 and April 4, 2012 to be “rigorous.” It also decided that such approach did not apply in the case it was considering, as the arbitration agreement being analyzed by the Supreme Court covered any and all claims relating to the parties’ cooperation so far on the basis of the specific contracts they executed. The Supreme Court was of the opinion that the arbitration agreement in question extended to cover also claims arising in connection with the defendant’s act of unfair competition, as referred to in Article 15.1.4 of the Act on Combating Unfair Competition. The above decisions should be considered jointly with the decision of October 24, 2012.¹³⁷ In this decision, the

Supreme Court pointed out that it is the wording of the arbitration clause that predetermines whether or not claims under the Act on Combating Unfair Competition are covered by the arbitration agreement. The Supreme Court decided that, in the case it was considering, the arbitration agreement covered claims under Article 15.1.4 of the Act on Combating Unfair Competition, since the proceeding was concerned with a claim for reimbursement of fees charged in consideration of promotional services provided under one of the contracts executed by the parties. The Supreme Court decided that even if the fact of such contract execution had itself constituted an act of unfair competition, the claims arising therefrom had been precisely enough provided for in the arbitration agreement.

In this context, one should note the inconsistency between the decision of February 5, 2009 and the more recent decision of October 24, 2012. In the former, the Supreme Court held that contractual disputes fell into the four listed categories. As regards tort claims, the Supreme Court pointed out that they are covered by the arbitration agreement only if they arise out of an event which concurrently constitutes an instance of non-performance or improper performance of the contract. Meanwhile, in its decision of October 24, 2012, the Supreme Court concluded, in total disregard of its previous decisions in this respect, that an arbitration agreement forming part of a contractual relation extends to cover also tort claims, wherever the very fact of the contract execution constitutes tort. Undoubtedly, the above situations are not identical. A decision as to whether an obligation was not performed or was performed

136. I CSK 119/12, Lex No. 1242989.

137. III CSK 35/12, Lex No. 1232776.

improperly disregards the issue of legality of the legal transaction consisting in the contract execution and, just the opposite, it assumes that the contract execution did not constitute a tort. In turn, a hypothesis assuming that the very act of the contract execution was a tort disregards the issue of the method of the contract performance.

The case law established so far by the Supreme Court does not permit of an unambiguous interpretation. For one thing, it should be pointed out that, when allowing for the possibility of non-contractual claims being covered by an arbitration clause incorporated into a contract, this case law is following the correct path. What also deserves approval is the fact that the Supreme Court attaches increasingly more significance to the provisions of an arbitration agreement and that it emphasizes the need for a tort claim to bear a relation to the contract. The disadvantage of the case law being developed is to be found in its inconsistency and impermanence, caused probably by the lack of a thorough and systematized analysis of the issue in question. As a result, this case law appears to be a collection of rulings made *ad casum* and determined by the specific facts of a given case. Furthermore, although the Supreme Court is right to point out the need for a relation to hold between a non-contractual claim and the contract, the case law established so far makes it impossible, due to the reasons discussed above, to determine the nature of such relation.

It should also be noted that all the discussed decisions were made based on similar facts, in a context of relatively similar questions

of law and fact. All of them dealt with claims relating to fees in consideration of accepting goods for marketing, charged to manufacturers and wholesalers presumably by chains of large-format stores. The differences affecting the final decision in each of the above cases actually consisted in whether or not the charging of such fees was authorized under a contract, if only an apparent one. The other relevant factor was the differences in the wording of the arbitration agreements. The legal views expressed in those rulings are nonetheless formulated in a very general and uncompromising manner, hence they seem to establish rules intended to apply also to facts totally separate and different from those specific to slotting-fee disputes.

Furthermore, one should bear in mind the fact that all of the discussed rulings were made in disputes governed by the provisions of Polish law only. Essentially, they deal with interpretation of an arbitration clause in light of the provisions of the Code of Civil Procedure, and the implicit assumption is that the dispute will be resolved pursuant to the Polish substantive law. Such an assumption was reasonable for the disputes in the context of which it was made. However, in the hypothetical case of adjudication in Poland of an arbitration dispute governed by a foreign substantive law as the law applicable to the contractual relation, or tort relation, the relevance of the Supreme Court's arguments may be dubious.

2. Review of the literature

A review of the recent publications on commercial arbitration leads to the conclusion that the jurisprudence has not exhaustively

addressed the issue of whether and under what circumstances the scope *ratione materiae* of an arbitration agreement covers non-contractual claims. Although a number of authors assume that an arbitration clause formulated in a general manner provides grounds for jurisdiction of a court of arbitration to resolve tort and quasi-tort claims if they concurrently constitute an instance of non-performance or improper performance of an obligation, those authors fail to analyze their view in detail.

With reference to the foregoing, T. Ereciński and K. Weitz point out that it is the intention of the parties executing an arbitration agreement that is of fundamental importance when determining what disputes and what claims have been covered by the scope *ratione materiae* of the agreement.¹³⁸ Moreover, those authors note that, nowadays, arbitration clauses are ever more often construed broadly, while taking into account their purpose and meaning, which, in turn, is said to reflect the intention of the parties who, when entering into an arbitration agreement, assume that they have excluded jurisdiction of common courts over any and all disputes which have arisen or will arise between them in the future out of a specific legal relation.¹³⁹ Based on the comments made, the authors proceed to conclude that the submission to arbitration of contractual disputes includes, *inter alia*, adjudication of tort claims if the same arise out of events which concurrently constitute instances of non-performance or improper performance of

the contract.¹⁴⁰ And wherever the arbitration agreement is formulated in a broad manner and provides for submission to arbitration of all disputes arising out of or in connection with the contract, jurisdiction of the court of arbitration extends to cover also claims in connection with a fault that occurred upon the contract execution.¹⁴¹ Speaking in the same spirit, M. Zachariasiewicz argues, as a side note when discussing class arbitration, that it is only an arbitration clause worded in a sufficiently broad manner that may provide grounds for jurisdiction of a court of arbitration to decide tort claims.¹⁴² Whereas M. Tomaszewski argues that there are no obstacles to submitting to arbitration non-contractual claims, including claims in connection with torts, unjust enrichment or *negotiorum gestio*.¹⁴³ This author concludes that, if correctly construed, the scope *ratione materiae* of an arbitration agreement under which disputes “arising in connection with a given contract” were submitted to arbitration should extend to cover also tort claims co-occurring with contractual claims, provided that such co-occurrence of claims is permitted under the law governing the contract.¹⁴⁴

Likewise, A.W. Wiśniewski points out that the scope *ratione materiae* of an arbitration agreement should cover tort claims, wherever an instance of improper contract performance

138. Ereciński T., Weitz K., *Sąd arbitrażowy*, 2008, p. 152.

139. *Ibidem*. See also Lewandowski P., *Arbitration Agreement*, [in:] P. Pietkiewicz et al., *Arbitration in Poland*, 2011, p. 60.

140. *Ibidem*, pp. 152-153.

141. *Ibidem*, p. 153.

142. Zachariasiewicz M., *Kilka refleksji w odniesieniu do możliwości rozwoju postępowań grupowych w arbitrażu w Polsce*, *ADR. Arbitraż i Mediacja* 2014, No. 1, p. 56.

143. Tomaszewski M., [in:] A. Szumański (ed.), *System Prawa Handlowego. Tom 8. Arbitraż handlowy*, 2010, p. 326.

144. *Ibidem*, pp. 326-327.

is also a tort.¹⁴⁵ To support this view, the author refers to jurisprudence opinions according to which it would be unreasonable to assume, in the absence of any clear evidence to the contrary, that the parties' intention is to split jurisdiction over issues so closely related and entrust them to various courts.¹⁴⁶ In turn, P. Pruś finds confirmation of an identical view in the case law of the Supreme Court.¹⁴⁷

RECEPTION OF INTERNATIONAL SOLUTIONS INTO POLISH LAW

1. The legislation currently in force

The first part of this paper has argued that a common approach to the issue of extending the scope of an arbitration clause incorporated into a contract to cover non-contractual claims is being developed in international arbitration and in the legal systems of the foreign states who are leaders in arbitration. This approach is based on the following four assumptions: (1) arbitrability of non-contractual disputes, (2) examination of parties' intention in relation to an executed arbitration agreement, (3) liberal, pro-arbitration interpretation of the arbitration agreement, and (4) application of the reasonableness clause when determining whether a specific non-contractual claim bears a sufficient relation to the contract to authorize its adjudication by a court of arbitration.

The second part of this paper argues that in the Polish system of law, an approach to the issue under discussion is only being developed. The legislation currently in force lacks a uniform, consistent and systematic approach on the part of courts. The case law of Polish courts seems to depart from the internationally prevailing approach. In particular, the case law has not yet been dominated by the belief that there is a need to examine parties' intention in order to determine whether or not a specific tort claim is covered by the arbitration agreement. One can also be dubious whether the Supreme Court's approach to arbitration agreement interpretation is, in this context, of liberal and pro-arbitration nature. Lastly, in the current state of affairs, the relation holding between a non-contractual claim and the contract is not tested on the basis of the reasonableness clause requiring that evaluation be flexible and the facts of the case taken into consideration. The nature of that relation is rather imposed in an authoritarian manner, e.g. through the requirement that the contractual claim and the tort claim both result from a single event or that the very fact of the contract execution constitute a tort. It should be noted in this connection that the requirement of such claims co-occurrence is by no means provided for in statute and neither does it result from any special legal construct. It originates exclusively in a view expressed by the Supreme Court, which view, incidentally, was not further elaborated upon. What is more, this view was actually challenged thereafter, in the subsequent decisions of the Supreme Court, as discussed above, which also lacked a detailed analysis of the issue in question in dogmatic and pragmatic terms.

145. Wiśniewski A. W., *Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów*, 2011, p. 395.

146. Ibidem.

147. Pruś P., [in:] M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz*, 2013, p. 1761.

Therefore, one can be critical about the current approach to the discussed issue adopted in the Polish case law. Despite the limitations of the Supreme Court's case law, one can easily conceive of examples of disputes arising out of a contractual relation and involving non-contractual claims bearing a close relation to those arising out of the contract.¹⁴⁸ For instance:

- (a) a contract on international sale of goods, concerning Christmas tree decorations. A failure to timely deliver the contracted goods not only makes the customer suffer a property damage but also triggers a loss of its credibility among its clients and business partners, as well as unfavorable comments in business circles and social media. As a result, the customer asserts concurrently a claim for damages pursuant to the contract and a claim for compensation and redress of the injury consisting in the loss of reputation;
- (b) a distribution contract between a leading manufacturer and a local distributor. The distributor decides that the contract is invalid, as it is a manifestation of abuse of a dominant position prohibited under TFEU, and asserts claims for damages pursuant to Article 102 of the Treaty on the Functioning of the European Union or Article 9 of the Act of February 16, 2007 on Consumer and Competition Protection (Dz. U. [Journal of Laws] of 2007 No. 50, Item 331). The distributor raises a claim for redress of the damage inflicted by the

tort (i.e. distortion of the conditions of competition in the internal market); and

- (c) a contract on provision of telecommunications services. One of the parties realizes that so far the parties have been incorrectly interpreting the contractual provisions specifying the basis for mutual settlements of accounts. As a result, one of the parties has been making undue performances to the other. Such party asserts a claim for declaratory relief and a claim for reimbursement of an undue performance.

In each of the above cases there is a relation holding between the non-contractual claim and the contract in place between the parties. What is more, there is also a clear relation holding between the non-contractual claim and the contractual claim. Assessment of the non-contractual claim requires interpretation of the provisions of the contract and determination of the scope of the mutual rights and obligations of the parties, or evaluation of the contract validity. Recognition of the claim for damages based on abuse of a dominant position requires that the contract be declared invalid. Recognition of the claim in connection with loss of reputation as a result of a delayed delivery of gaudy baubles requires, in the first place, determination of the date of delivery agreed upon between the parties, as well as determination of whether or not the delay in delivery, if it indeed occurred, resulted in the supplier's liability in connection with improper performance of its obligation. And assessment of the amount of the undue performance received by the telecommunications company requires a prior interpretation of the contract and the settlement formula.

148. For the purposes of these examples, we omit to inquire whether the claims discussed below would be legitimate under the law applicable to them.

The Supreme Court relies on a theory of tortious acts which were committed “incidentally to” contract performance. The concept of a tort committed “incidentally to” contract performance was itself developed in relation to situations where theft or other similar tort was committed incidentally to contract performance. In this respect, the concept holds good. For example, contract execution is not necessary in order for theft to be committed, and the causative act itself essentially takes place independently of the contractual obligations. However, the situation is different with claims arising out of acts of unfair competition and with other above described examples of non-contractual claims asserted along with or in connection with contractual claims. In those cases, as well as in the case of claims for reimbursement of fees for goods acceptance and distribution, there is a direct relation holding between the fact of the contract execution, the provisions of such contract or the method of such contract performance, and the legitimacy of the claim based on non-contractual grounds. The very fact of the tort having been committed, the method in which it was committed and the value of the damage inflicted all bear a direct relation to the provisions of the contract and the method of its performance by the parties. Therefore, it is not the case that, as the Supreme Court’s decisions of February 5, 2009 and December 2, 2009 suggest, a tort either concurrently constitutes an instance of non-performance of improper performance of an obligation, or it is committed only “incidentally to” the contract performance. The examples given above contradict such a dichotomy. Such a dichotomy is also contradicted, for instance, by the Supreme Court’s decision of October 24, 2012, which

concludes that the very fact of contract execution can itself constitute a tort.

Furthermore, attention should be drawn to the adverse consequences of the approach prevailing nowadays in Poland. Numerous rulings rendered by the Supreme Court in disputes involving slotting fees prove that entrepreneurs wish to have unfair competition disputes covered by the arbitration agreements they executed. This is evidenced by the pleas of arbitration agreement raised in the disputes referred to above. In view of the recurrent nature of such disputes, one is all the more authorized to ask the questions whether the Supreme Court’s approach, which presupposes the narrowing of the scope of typical arbitration agreements down to only some tort claim categories, does not actually contradict the intention expressed by entrepreneurs who insist that such disputes be resolved through arbitration. Moreover, it should be stated that some of the Supreme Court’s rulings discussed above were rendered based on model arbitration clauses recommended by courts of arbitration. Such clauses, in turn, draw on the model clauses suggested by the leading international courts of arbitration. Therefore, if the Polish Supreme Court is of the opinion that Polish model clauses are drafted in a manner insufficiently broad to extend jurisdiction of a court of arbitration to cover broadly understood non-contractual claims relating to contract, then two conclusions must be drawn. Firstly, the approach adopted by the Polish Supreme Court cannot be reconciled with the international arbitration case law and the decisions of foreign courts, as discussed in Part 1 of this paper. Secondly, a Polish entrepreneur wishing to submit to arbitration all disputes

involving contractual and non-contractual claims in connection with a specific contractual relation should modify the arbitration clause recommended by the leading Polish permanent courts of arbitration. This is likely to result in further disputes over jurisdiction, which would be an adverse development.

By way of illustration, in the above example referring to a contract constituting abuse of a dominant position, it should be decided, *de lege lata*, that the claim for declaring the contract invalid falls within the scope of the arbitration agreement. Whereas the claim for damages in connection with the execution and performance of that contract, asserted pursuant to the tort regime, would not be covered by the arbitration agreement and would have to be pursued before a common court. This makes it necessary to hold two parallel proceedings, of which the one before the court of arbitration is actually of prejudicial nature with respect to the common court's decision. In addition, under such circumstances, the common court does not have a ground on which to stay the proceeding instituted before it until an award has been rendered by the court of arbitration and recognized by a common court. Thus, the common court has to proceed by making an evaluation and interpretation of the contractual provisions, which tasks were, however, entrusted by the parties to the arbitration agreement to the court of arbitration, to the exclusion of common courts. It cannot be ruled out either that the findings made by the common court and the court of arbitration will differ. As a result, court proceedings concerning the same issue are redundantly multiplied, which entails unnecessary expenses to the parties, and the final outcome may be two mutually exclusive decisions.

Undoubtedly, participants of business transactions, and in particular of professional business transactions, have a legitimate interest in concentrating adjudication of contractual and non-contractual claims arising from the same set of facts before a single authority. This offers the obvious advantage of saving time, energy and money, which is pointed out in the arbitration case law and the case law established by foreign common courts, as discussed in the first part of this paper. Also, this is a way to avoid conflicting decisions issued by various adjudicating authorities in a single dispute, and to decrease the likelihood of other anomalies resulting from skillful application by the parties of the available procedural measures and dilatory tactics.

Therefore, it is desirable that the approach predominant at present in the Polish legal system evolve towards the one discussed above, which prevails nowadays in other systems of law and in the arbitration case law. The latter approach accommodates both the legitimate interests of the parties to a dispute and the need for the system of administration of justice to operate efficiently. In particular, it makes it possible for a single authority to effectively adjudicate cases that relate to one another, thus preventing multiplication of court proceedings and the risk of contradictory decisions being made by the court of arbitration and the common court. It is beyond doubt that a decision as to whether or not a specific non-contractual claim is covered by the arbitration agreement requires an analysis of the parties' intention. In the absence of any clear indications of the parties' intentions, it seems necessary to examine whether, given the nature of the relation borne by a specific claim to the contract, the parties

intended to have such claim covered by the arbitration agreement. This approach is certainly much more consistent with the concept of the conclusive role of arbitration agreement interpretation than are the a priori imposed conditions for extending the scope of an arbitration agreement to cover non-contractual claims. Thus, one should be critical about the case law established by the Supreme Court, requiring a co-occurrence of tort and contractual claims, in the absence of clear indications by the parties that this is what their intention was upon the arbitration agreement execution.

Therefore, a desirable solution would be to change the approach prevailing nowadays in the case law of Polish courts. What remains to be done is to check whether there are any obstacles in the Polish legal system that would prevent or hinder evolution of the Polish arbitration law towards incorporating the pro-arbitration and liberal approach to arbitration clause interpretation with respect to non-contractual claims connected with the contractual relation as part of which the arbitration agreement was executed. As the analysis below reveals, there are no such obstacles. Polish law does not differ in any special way from the legal systems in place in other states whose arbitration laws draw upon the UNCITRAL Model Law. The Polish legal system has all the elements that make it possible to incorporate into Polish law the modification called for in this paper.

2. Arbitrability of non-contractual disputes and interpretation of the arbitration agreement

Pursuant to the provision of Article 1157 of the Code of Civil Procedure, arbitrable are not

only disputes involving claims originating in contract, but also, unless a special provision stipulates otherwise, all disputes which involve property rights or non-property rights and have capacity for court settlement, save for claims for alimony.¹⁴⁹ This means that there exists an entire group of disputes, arising e.g. from tort or unjust enrichment, that are arbitrable. This is confirmed by the case law. In its decision of December 2, 2009,¹⁵⁰ the Supreme Court explicitly held that "It is beyond doubt that, being a dispute which involves a property right, the claim for release of illegitimately obtained benefits referred to in Article 18.1.4 of the Act on Combating Unfair Competition is left to the parties' discretion, and may also be the object of a settlement they enter into (see Article 1157 of the Code of Civil Procedure)."

In consequence, there are no obstacles preventing parties from submitting disputes of this type to arbitration. Neither are there any obstacles to such submission being effected under the arbitration clause incorporated into the underlying contract executed by the parties. This refers especially to disputes arising out of events that occurred in connection with

149. For dispute arbitrability, see Sikorski R., [in:] B. Gessel-Kalinowska vel Kalisz (ed.), *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian*, 2014, pp. 40-47, pp. 53-67; Calus A., *Uwagi porównawcze w kontekście konstrukcji prawnej art. 1157 k.p.c.*, [in:] J. Gudowski (ed.), K. Weitz (ed.), *Aurea Praxis Aurea Theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego*. Tom II, 2011, pp. 1625 ff.; Poczuć J., [in:] A. Szumański (ed.), *System Prawa Handlowego*. Tom 8. *Arbitraż handlowy*, 2010, pp. 170 ff.; Ereciński T., Weitz K., *Sąd arbitrażowy*, 1st ed., 2008, pp. 116 ff.; Ereciński T., *Zdatność arbitrażowa (art. 1157 k.p.c.)*, [in:] P. Nowaczyk et al. (eds.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*, 2008, pp. 1 ff.

150. I CSK 120/09, Lex No. 584183.

the legal relation holding between the parties. It should be mentioned in this connection that the arbitration agreement is undoubtedly an agreement governed by the provisions of the Civil Code, including those on construing declarations of intent.¹⁵¹

The above rules considered jointly suggest an otherwise obvious conclusion that whether or not a given arbitration clause extends to cover specific non-contractual claims should be determined by its interpretation, made while taking into account not only its provisions but also, and more importantly, the mutual intention of the parties upon the arbitration agreement execution (Article 65 § 2 of the Civil Code). However, if this comes down to interpretation of individualized declarations of parties' intent made in arbitration clauses, we cannot talk about developing any binding guidelines resulting from established case law and prescribing how specific expressions used in arbitration agreements should be construed. Simply put, it is incorrect to conclude, on the basis of the case law established so far by the Supreme Court, that it follows from the expression "disputes arising out of or in connection with the contract" that the arbitration agreement does not cover tort claims or covers some tort claims only. Even if the above conclusion held true for each of the disputes handled by the Supreme Court, this can only mean that, as a result of an examination of the

evidence in each of those cases, facts were established to prove that it was not the parties' intention to submit tort claims to arbitration. This does not, however, authorize any conclusions for the future. In another case, it can turn out that the parties' intention upon the arbitration agreement execution was to submit to arbitration also disputes of non-contractual nature, even if the parties incorporated a standard model arbitration clause into the contract between them. Extrapolation on subsequent cases of the fact findings made in previous cases with respect to the scope *ratione materiae* of an arbitration agreement is incorrect in methodological terms and constitutes a gross, though perhaps not an obvious, violation of Article 233 § 1 of the Code of Civil Procedure. In each case, courts should undoubtedly make fact findings individually and anew, and construe the arbitration agreement in place between the parties in light of its wording and the general principles of contract interpretation. The fact that an arbitration agreement containing specific provisions was construed in other previous court decisions in a manner leaving certain tort claims outside of its scope can, at most, serve as a basis for a general, but not a binding, rule to the effect that, in such cases, parties normally aim for such and no other scope *ratione materiae* of such arbitration agreement. This does not mean, however, that in a subsequent case evidence proving parties' intention to the contrary and requiring that the specific arbitration agreement be construed differently is excluded. Previous court decisions issued in other cases can only affect the requirements concerning the burden of proof resting with the party intending to prove that, in a given case, the scope *ratione materiae* of the arbitration agreement is different. Therefore, the case law established so far by the Supreme Court

151. See resolution of the Supreme Court, dated March 8, 2002, III CZP 8/02, Lex No. 51699; decision of the Supreme Court, dated March 1, 2000, I CKN 1311/98, Lex No. 138641; judgment of the Court of Appeal in Poznań, dated July 3, 2006, I ACa 46/06, Lex No. 278461; Żmij G., [in:] B. Gessel-Kalinowska vel Kalisz (ed.), *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian*, 2014, pp. 102-105; Błaszczak Ł., Ludwik M., *Sądownictwo polubowne (arbitraż)*, 2006, p. 87; Zieliński A., [in:] A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz*, 7th ed., 2014, p. 1793.

deserves criticism for failing to clearly specify the restrictions on extrapolating the decisions made so far on future disputes. Thus, it seems, especially in the context of the rulings of 2012, that the Supreme Court does not see such restrictions when attempting to establish consistent case law.

Thus, concluding that the scope of the arbitration agreement should be determined on an individual basis and in the context of each case separately, we can move on to analyze another fundamental issue concerning the topic of our discussion. The combination of the above legal frameworks applicable to arbitration agreement interpretation gives rise to the question whether the principle of legal relation definiteness, as expressed in Article 1161 § 1 of the Code of Civil Procedure,¹⁵² affects the rules governing interpretation of declarations of intent, as provided for in the Civil Code. The point is that the provisions of the Civil Code do not require parties to a contract to define therein the contract object in a sufficiently clear manner. It is the actual consensus of the parties that is conclusive in this respect. However, it is required under Article 1161 § 1 of the Code of Civil Procedure¹⁵³ that the legal relation covered by the arbitration agreement be defined. This involves the issue of the degree of definiteness required by the legislative authority to be complied with by the arbitration

agreement, which is discussed below. At this point, the reasons for the requirement of definiteness as such need to be addressed.

The argument suggests itself that the requirement of contractual object definiteness does not hold for an ordinary civil law contract, as such contract is an inter partes transaction from which no third-party rights of obligations are derived (*acta tertiis nec nocent nec prosunt*). However, this does not seem to be the case with the arbitration agreement. The arbitration agreement binds not only its parties but also the common court which, wherever the existence of a valid and enforceable arbitration agreement is established and the defendant raises the relevant plea by the prescribed time limit, is under statutory obligation to reject the claim (Article 1165 § 1 of the Code of Civil Procedure).¹⁵⁴ On this ground, the arbitration agreement might be required to be more specific and definite than other civil law contracts. On second thought, however, this argument should be rejected as implausible. The common court procedure is excluded in favor of arbitration by virtue of the parties' intent. In the common court procedure, it is the court's duty to establish such intention. There is no reason why declarations of intent incorporated into arbitration agreements should be construed in a method different from that employed for other civil law contracts. Therefore, the practice of common courts approaching the plea of

152. See Tomaszewski M., [in:] A. Szumański (ed.), *System Prawa Handlowego. Tom 8. Arbitraż handlowy*, 2010, pp. 196 ff.; Ereciński T., Weitz K., *Sąd arbitrażowy*, 1st ed., 2008, pp. 103 ff.; Błaszczak Ł., Ludwik M., *Sądownictwo polubowne (arbitraż)*, 2007, pp. 117-118.

153. "Submission of a dispute to arbitration shall require an agreement of the parties, in which the object of the dispute or the legal relation from which the dispute may arise or has arisen should be specified (arbitration agreement)."

154. See Tomaszewski M., [in:] A. Szumański (ed.), *System Prawa Handlowego. Tom 8. Arbitraż handlowy*, 2010, pp. 279 ff.; Błaszczak Ł., Ludwik M., *Sądownictwo polubowne (arbitraż)*, 2007, pp. 120-121; Weitz K., *Cofnięcie zarzutu zapisu na sąd polubowny*, *Palestra* 2009, Nos. 9-10, pp. 231 ff.; Morek R., *Mediacja i arbitraż* (art. 1831-18315, 1154-1217 KPC). *Komentarz*, 2006, pp. 151 ff.; Kulski R., *Umowy procesowe w postępowaniu cywilnym*, 2006, pp. 233-242.

arbitration agreement as a preliminary issue which may be examined and decided upon exclusively on the basis of documents, to the exclusion of personal evidence proving the intention of the parties upon the arbitration agreement execution, should be challenged. Rather, it should be assumed that the requirement for the legal relation from which there may arise disputes submitted to arbitration to be definite follows from the fact that to enable parties to submit, as part of a single transaction, to the jurisdiction of a court of arbitration all future disputes arising out of not yet defined legal relations to hold between those parties in the future¹⁵⁵ might lead to a permanent exclusion of the common court jurisdiction over a scope of disputes which cannot be anticipated by the parties entering into the arbitration agreement and to which they might not consent upon executing the arbitration agreement.

In this context, one more potential problem is encountered, echoed in the case law of the Supreme Court. Namely, it is possible to argue that the arbitration agreement may not be construed extensively, as it is an exception to the rule of jurisdiction of common courts which operate under the norms of public law.¹⁵⁶ This argument does not appear to have legitimate grounds. It is true that the rules of civil procedure are of the nature of public law norms and provide for the procedure in the public interest from

which private entities may depart, as an exception to the general rules, only where this is permitted by the legislative authority.¹⁵⁷ However, in the case of arbitration, the Polish law system expressly permits exclusion of the common court procedure in favor of the arbitration procedure,¹⁵⁸ and the limits of such permitted derogation are specified in the provisions of Book V of the Code of Civil Procedure (in particular, Article 1157 of the Code of Civil Procedure, Article 1161 § 2 of the Code of Civil Procedure, and Article 1164 of the Code of Civil Procedure).¹⁵⁹ These are the limits within which parties enjoy their autonomy, granted by the legislative authority, to decide to execute an arbitration agreement in favor of the court of arbitration they select. In theory, parties may entrust to the court of arbitration all or only some of the disputes which are arbitrable in a given case. There are no grounds or arguments in support of the claim that the parties' decision in this respect should be construed restrictively. Rather, it should be assumed that it is an obligation imposed on state authorities to recognize and ensure enforceability of arbitration agreements within their actual scopes corresponding to the parties' intention, and not within the limits established with the application of stringent requirements and restrictive methods of construing declarations of intent. This

155. This view is generally recognized; see Żmij G., [in:] B. Gessel-Kalinowska vel Kalisz (ed.), *Diagnoza...*, op. cit., pp. 99 ff.; Zieliński A., [in:] A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz*, 7th ed., 2014, p. 1784; Tomaszewski M., [in:] A. Szumański (ed.), *System...*, op. cit., p. 296; Ereciński T., Weitz K., *Sąd arbitrażowy*, op. cit., p. 103; Morek R., op. cit., p. 133.

156. See decision of the Supreme Court, dated October 30, 2008, II CSK 263/08, Lex No. 508836, along with an approving gloss by R. Uliasz, LEX/el.

157. Kulski R., *Umowy procesowe w postępowaniu cywilnym*, 2006, pp. 33 ff.

158. See Błaszczak Ł., Ludwik M., op. cit., pp. 76 ff.

159. See Radzikowski W., *Z problematyki swobody stron i arbitrow w kształtowaniu zasad postępowania przed sądem polubownym*, [in:] M. Łaszczuk et al. (eds.), *Arbitraż i mediacja. Księga jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi*, 2012, pp. 481 ff.; Szpara J., Łaszczuk M., *Czy autonomia stron w ustaleniu reguł postępowania przed sądem polubownym jest ograniczona w czasie?*, [in:] J. Okolski et al. (eds.), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, 2010, pp. 280 ff.

obligation follows, for instance, from Article 1165 § 1 of the Code of Civil Procedure,¹⁶⁰ as well as from Article II of the New York Convention¹⁶¹ and Article 6.3 of the European Convention on International Commercial Arbitration, done at Geneva on April 21, 1961.¹⁶²

At this point, the concept of legal relation, as referred to in Article 1161 § 1 of the Code of Civil Procedure, deserves to be addressed. This concept has not been defined in the above provision of the Code of Civil Procedure. It is pointed out in civil jurisprudence that “Civil law relations should be understood to form the group of legal relations which are provided for by the norms of civil law.”¹⁶³ Civil law relations are also said to be characterized by the fact that one party holds a subjective right which correlates with a duty or duties imposed on the other party;¹⁶⁴ in a complex relation, rights and duties are held by/imposed on each party.¹⁶⁵

These definitions do not predetermine how the reference to the “definite legal relation” made in Article 1161 § 1 of the Code of Civil Procedure should be understood.¹⁶⁶ In light of the provision

of Article 1161 § 1 of the Code of Civil Procedure, the case law established by the Supreme Court when construing arbitration agreements covering “disputes arising out of or in connection with the contract” raises certain concerns. It should be assumed that the category of “disputes arising out of the contract” covers disputes involving claims that originate in the contract in place between the parties (*ex contractu* claims). More problematic is the category of disputes arising in connection with the contract. Undoubtedly, this category should include claims asserted, *inter alia*, in connection with the underlying contract invalidity or expiration e.g. as a result of the contract having been renounced by one of the parties. As we know, invalidity or ineffectiveness of the underlying contract does not affect the validity or effectiveness of the arbitration agreement.¹⁶⁷ In consequence, it should be assumed that invalidity or ineffectiveness of the underlying contract should not affect either the scope *ratione materiae* of the arbitration agreement. However, invalidity or expiration of the underlying contract prevents it from serving as a legal ground for the claims asserted in an arbitration proceeding. Hence, such claims are asserted pursuant to the norms of civil law set forth primarily in the Civil Code, on account of (in connection with) the contract which proved invalid (expired). The Supreme Court and common courts have no doubts that claims of such type may be pursued in arbitration.¹⁶⁸

160. See the works cited in footnote 154 above.

161. See Wiśniewski A. W., *Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów*, 2011, p. 97; Tomaszewski M., [in:] A. Szymański (ed.), *System...*, op. cit., p. 281.

162. Tomaszewski M., [in:] A. Szymański (ed.), *System...*, op. cit., p. 282.

163. Wolter A., Ignatowicz J., Stefaniuk K., *Prawo cywilne. Zarys...*, p. 99; likewise Grzybowski S., [in:] *System prawa cywilnego*, tom I, pp. 178, 179; Skowrońska-Bocian E., *Prawo cywilne. Część ogólna. Zarys wykładu*, 2005, p. 71.

164. See Radwański Z., *Prawo cywilne...*, p. 85.

165. P. Książek, M. Pyziak-Szafrnicka (eds.), *Kodeks cywilny. Komentarz. Część ogólna*, as available in the Lex database.

166. See the works cited in footnote 152 above.

167. See Tomaszewski M., [in:] A. Szymański (ed.), *System...*, op. cit., pp. 288 ff.; Ereciński T., Weitz K., *Sąd arbitrażowy*, op. cit., pp. 87 ff.; Pazdan M., *Bezkuteczność lub nieważność zapisu na sąd polubowny*, [in:] P. Nowaczyk et al. (eds.), *Międzynarodowy...*, op. cit., p. 109 ff.; Popiołek W., *W sprawie niektórych konsekwencji zasady autonomii umowy o arbitraż*, [in:] M. Łaszczuk et al. (eds.), *Arbitraż ...*, op. cit., pp. 444 ff.

168. Decision of the Supreme Court, dated October 24, 2012, III CSK 35/12, Lex No. 1232776.

The core of the problem is the question whether the concept of disputes “arising in connection with the contract” can extend to cover the various claims based on a legal ground other than the contractual one. By way of example, one could refer to tort claims, e.g. originating in an alleged breach of the provisions of the Act on Combating Unfair Competition, infringement of personal rights or the rules of competition law; or claims for reimbursement of undue performance. As pointed out above, the Polish Supreme Court’s position on this point is inconsistent. What is important, however, is that the Supreme Court allows for the possibility to extend the concept of disputes arising in connection with a contract to cover also *ex delicto* claims, even if to a limited extent. This means a transition from the contractual platform to a non-contractual platform. In such a case, however, the narrowing down of the scope of disputes covered by an arbitration agreement exclusively to claims involving torts arising from an event which concurrently constitutes an instance of contract non-performance or improper performance becomes an arbitrary decision. There is no reason why claims involving torts resulting from events such as contract execution; formulation of its provisions in a manner inconsistent with the rules of the competition law; prevention of the other party, in breach of the principles of commercial integrity, from attaining the economic goal of the contract, etc. should be left outside of this group too.

SUMMARY

Summing up, one should point out that a certain algorithm, to be followed in the procedure for determining whether or not a non-contractual

claim may be recognized as a claim arising in connection with a contract, results from the UNCITRAL Model Law and the international conventions by which Poland is bound. The point of departure for this analysis is the conclusion that non-contractual disputes are essentially arbitrable. And since they are arbitrable, they may be covered by an arbitration agreement. The issue of whether or not a given non-contractual claim is covered by the arbitration agreement has to be decided based on the arbitration agreement interpretation. What is more, since the arbitration agreement is a contract, it should not be analyzed in a dogmatic manner, with a presupposition as to the types of non-contractual claims it may cover. Instead, the general criteria of contract interpretation should be applied, which, under Polish law, refer to the mutual intention of the parties. And in the absence of any clear indications of the mutual intention of the parties, the applied method of the arbitration agreement interpretation should be that which will be objectively reasonable, given the facts of the case. Objective sense of reason means, especially in the context of economic disputes, a pragmatic evaluation of the legitimacy of a given contractual claim being entrusted to a court of arbitration. There are no arguments to prevent this approach from entering the Polish system of law. But there are a number of plausible arguments supporting the claim that the approach prevailing at present should be modified to follow this path. This is so due to the fact that this approach is haphazard and inconsistent, and the legal consequences it produces for legal transactions in Poland are clearly adverse.

The Law Applicable to the Effects of an Arbitral Award

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INTRODUCTION

The recognition and enforcement of foreign arbitral awards are, as a general rule, governed by the provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention,” “NYC”)¹. The Convention applies invariably whenever recognition or enforcement of an arbitral award rendered in another contracting state is sought² while the number of countries being NYC signatories exceeds at present hundred and fifty³. The New York Convention mandates

recognition (enforcement) of final arbitral awards, exhaustively listing the grounds, which authorize the courts to refuse recognition or enforcement. However, the Convention does not provide for procedural issues, i.e. the rules governing the recognition or enforcement proceeding. It rather leaves this matter to be governed by the law of the state in which recognition or enforcement is sought (Article III NYC). In this respect, the provisions of the Code of Civil Procedure⁴ (“k.p.c.”) apply.

Importantly for the purposes of the present article, the New York Convention is not conclusive as to the law applicable to the effects of an arbitral award (such as the preclusive effects of the award and whatever else effects which the award might produce). Thus, it does not provide an answer to the question whether the effects of an award should be determined under the law of the state in which the

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958 (Dz. U. [Journal of Laws] of 1962 No. 9, Item 41, as amended).

2. See, for instance, Kozłowski W., Jochemczak M., Kempa K., Poland, (in:) J. Carter (ed.), *The International Arbitration Review*, Law Business Research 2012, 3rd ed. Assuming that Poland has not made an effective declaration under Article I(3) NYC (which is disputed), the Convention also applies to arbitral awards rendered in other countries.

3. See the present ratification status of the convention is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

4. The Act of November 17, 1964 - Code of Civil Procedure (the consolidated text publ. in in Dz.U. of 2014, item 101, as amended).

arbitral award was rendered (the state of origin of the arbitral award) or the law of the state in which recognition or enforcement of the award is sought (the state of recognition or enforcement).

In addition to its unquestionable theoretical significance, the issue of the law applicable to the effects of an arbitral award implies also vital practical considerations. It decides about the rules according to which the effects of an arbitral award should be determined, either in the course of the recognition or enforcement proceeding or in other proceedings in which a party relies on a recognized arbitral award. This involves, in particular, a need to establish the scope of preclusive effects of an award. In the present paper, I will enquire whether Articles 366 and 365 k.p.c. apply or whether a foreign law should be consulted on this point. Moreover, other effects, such as relating to the limitation period for the claims adjudicated in an arbitral award, can also come into play.

The issue in question was the subject of a relatively lively debate in the Polish literature⁵. It was also addressed by the Supreme Court, which, however, did so in relation to a quite unique problem and without offering any in-depth

5. See Popiołek W., *Skutki zagranicznego orzeczenia arbitrażowego w Polsce*, PPH, 2014, No. 6, pp. 5 et seq.; Popiołek W., *The Effects of a Foreign Arbitral Award in Poland Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (in:) *Ius est ars boni et aequi. Fest. fur Stanisława Kalus*, Frankfurt am Main, 2010, pp. 429 et seq.; Olechowski M., *Prawo właściwe dla oceny skutków uznawanego międzynarodowego wyroku arbitrażowego*, (in:) *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy KIG w Warszawie*, Warsaw 2010, pp. 573 et seq.; Łaszczuk M., Szpara J., *System*, pp. 660-662. See Zielony A., *Istota prawna wyroku sądu polubownego*, *Polski Proces Cywilny* 2011, No. 1, p. 61.

justification⁶. The Court of Appeal in Warsaw had a chance to present its position as well⁷.

Generally, there are two competing views on the discussed point.

According to the first, recognition means to extend (transfer) the effects of an award produced in the state of its origin onto the territory of the state of its recognition. As a result, the effects produced by an arbitral award in the state of its origin may not be disregarded, and the effects that are absent in the state of origin may not occur in the state of recognition. Thus the effects of an arbitral award are governed by the law of the state of the origin of

6. See decision of the Supreme Court of 17.7.2007, III CZP 55/07, OSNC 2008, No. 9, Item 106 (in this case, the dispute resulted from the fact that the operative part of a foreign arbitral award mistakenly identified as the respondent an organizational unit lacking legal capacity and capacity to be a party in civil proceedings under the law applicable to it; the Supreme Court had to decide whether the award might be enforced against the entity against which substantive law claims had been raised, and which had erroneously been identified in the operative part of the arbitral award; the Supreme Court held that the capacity to be sued in a recognition or enforcement proceeding was vested in the entity against which the claimant (i.e. the creditor) might – under the law of the state of the origin of the award – refer to the award in order to have it enforced). Cf. comments on this decision: Popiołek W., *Skutki zagranicznego orzeczenia*, p. 6; Popiołek W., *The Effects of a Foreign*, pp. 429-430; Łaszczuk M., Szpara J., *System*, pp. 660-661, as well as my gloss in: B. Gessel (ed.), *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunku postulowanych zmian*, Wrocław 2014, pp. 468 et seq. See also the decision of 23.1.2013, I CSK 186/12, unpublished (the issue under consideration here was similar; more specifically, it referred to the correctness of the respondent identification in an arbitral award; the arbitral award did not identify the respondent as a natural person carrying out business activity but specified the business activity only; the Supreme Court assumed that the correctness and effectiveness of such identification should be assessed in light of the law of the state of origin of the award).

7. Decision of the Court of Appeal in Warsaw, dated 24.9.2009, I ACa 995/08, unpublished.

arbitral award⁸. Let us refer to this view as the “the extension of effects theory”⁹.

In line with the second view, recognition essentially implies conferring legal effects upon an arbitral award and, more specifically - in accordance with Article 1212 k.p.c.¹⁰ - conferring the effects produced under Polish law by judgments rendered by state courts¹¹. Thus, if recognition is an act of conferring effects, it is irrelevant what the law of the state of origin says on this point. The effects produced by an arbitral award are thus determined by the law of the state in which the award is recognized (enforced). I will refer to this view as the “the conferring of effects theory”^{12, 13}.

8. Advocates of this view include Łaszczuk M. and Szpara J., *System*, p. 662. See also the decision of the Court of Appeal in Warsaw, dated 24.9.2009, I ACa 995/08, unpublished. In the above mentioned decision of 17.7.2007, III CZP 55/07, the Supreme Court also tends to endorse this view.

9. See also Łaszczuk M., Szpara J., *System*, p. 660.

10. According to the prevailing view, Article 1212 k.p.c. applies both in domestic and international arbitration. See Popiołek W., *Skutki zagranicznego orzeczenia*, p. 5; Ereciński T. (in:) Ciszewski J., Ereciński T., *Kodeks postępowania cywilnego. Komentarz*. Tom 5, Warsaw 2007, p. 450; Ereciński T., Weitz K., *Sąd arbitrażowy*, Warsaw 2008, pp. 350, 363; Łaszczuk M., Szpara J., *System*, p. 661; Morek R., *Mediacja i arbitraż: Komentarz*, Warsaw 2006, p. 278; Kordasiewicz B., Sadowski W., *Postępowanie w sprawach o uznanie i stwierdzenie wykonalności orzeczeń sądów polubownych w Polsce. Uwagi na tle nowelizacji kodeksu postępowania cywilnego*, *Kwartalnik Prawa Prywatnego* 2007, No. 2, p. 538.

11. Article 1212 § 1 k.p.c. reads as follows: “an arbitral award or a settlement entered into before the arbitral tribunal shall, following their recognition or enforcement by the court, have the legal effect equivalent to that of a judgment rendered by or a settlement entered into before the court.”

12. See also Łaszczuk M., Szpara J., *System*, p. 660.

13. It was endorsed, inter alia, by Popiołek W., *Skutki zagranicznego orzeczenia*, pp. 5 et seq.; Popiołek W., *The effects*, pp. 429 et seq.; Olechowski M., *Prawo właściwe*, pp. 573 et seq.; Błaszczak Ł., *Głosa do wyroku Sądu Najwyższego z dnia 23 stycznia 2013 r. (I CSK 186/12)*, (in:) B. Gessel (ed.), *Diagnoza arbitrażu*, pp. 345 et seq. A. Zielony's reasoning also seems to follow this path (Zielony A., *Istota*, pp. 60-61).

Number of arguments were raised in support of each of the above views. Below I try to outline the most important ones, starting with those referring to the extension of effects theory and subsequently moving to those concerning the conferring of effects theory. However, already at this point I wish to note that, in my opinion, the latter view is more persuasive. The article deals with the question primarily from the point of view of Polish law. A comparative perspective is, however, also largely taken into account.

ARGUMENTS IN SUPPORT OF THE EXTENSION OF EFFECTS THEORY

It is quite clear that the extension of effects theory builds upon the rules of recognition and enforcement adopted with respect to foreign state court judgments¹⁴. The reasons for this are found in the past, since prior to the 2005 reform of the Code of Civil Procedure, the provisions on recognition and enforcement of judgments rendered by foreign state courts (Articles 1145-1149 k.p.c.) applied also to recognition and enforcement of foreign arbitral awards¹⁵ (there were no special provisions in place to independently govern arbitral awards¹⁶). Generally, as regards recognition and enforcement of foreign state court judgments, the prevailing view seems to be that it involves extension of the effects of a judgment

14. See the decision of the Supreme Court, dated 17.7.2007, III CZP 55/07; the decision of the Court of Appeal in Warsaw, dated 24.9.2009, I ACa 995/08, unpublished.

15. See Ereciński T., Weitz K., *Sąd arbitrażowy*, p. 349.

16. It is only domestic arbitral awards that were regulated separately from state court judgments (in the repealed Article 711 of the Code of Civil Procedure). See Ereciński T., Weitz K., *Sąd arbitrażowy*, p. 349.

produced in the state of its origin¹⁷. This view is considered legitimate especially in light of the EU uniform legal regime for recognition and enforcement of judgments, established under the Brussels I Regulation¹⁸ and the Lugano Convention^{19, 20}

Furthermore, advocates of the extension of effects theory argue that the arbitral award is rooted in the state in which it was rendered. It constitutes an emanation of the power to bindingly decide disputes, as vested by that state in an arbitral tribunal. Therefore, the effects produced by an arbitral award in that state may not be disregarded.

Finally, it is argued that the conferring of effects theory might bring about a situation in which a single award could produce different effects, depending on the state in which the party who obtained an arbitral award

favorable to it seeks to have it recognized or enforced²¹. This possibility is undesirable, as it leads to legal uncertainty. On the other hand, the advantage offered by the extension of effects theory is that an arbitral award produces, as a rule, the same effects, regardless of the state in which its recognition or enforcement is sought²².

THE EFFECTS PRODUCED BY FOREIGN JUDGMENTS AND ARBITRAL AWARDS IN THE U.S.

Let me embark at this point on a selective comparative law exercise. An observation can be made that, as is the case in Poland, the American legal system seems largely to accept the view that the effects of a foreign judgment are determined by the law of the state of its origin. There are, however, also important differences, because under American law view law of the state of the origin of the judgment will not always apply. Here, a distinction should be drawn between the two contexts in which a judgment is recognized or enforced, i.e. as between American sister states and internationally.

As regards judgments originating in sister states, it is assumed that they produce in the state of their recognition or enforcement effects at least equivalent to those produced in the state of their origin (naturally, mainly in terms of *res judicata*). What is more, a judgment does not concurrently produce any effects

17. See, in particular, Weitz K., *Pojęcie uznania orzeczenia zagranicznego*, *Przegląd Sądowy* 1998, Nos. 7-8, pp. 57 et seq. It is inter alia assumed that the law of the state of origin of the judgment determines whether a judgment is final and unappealable in formal terms, which, in turn, serves as a ground for its recognition. See the judgment of the Supreme Court of 6.2.1975, II CR 849/74, OSNC 1976, No. 1, Item 11; Piasecki K., *Skuteczność i wykonalność w Polsce zagranicznych cywilnych orzeczeń sądowych*, Warsaw 1990, pp. 64 et seq.

18. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1). See also the new Brussels I Regulation (recast), i.e. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

19. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano on 16.9.1988 (Dz. U. of 2000 No. 10, Items 132 and 133 (the "old Lugano Convention")).

20. This is the position taken by the Polish Supreme Court based on the old Lugano Convention in its judgment of 19.5.2005, V CK 783/04, OSNC 2006, No. 4, Item 72.

21. The comments expressed by the Supreme Court in its decision of 17.7.2007, III CZP 55/07, OSNC 2008, No. 9, Item. 106, also follow this line of reasoning.

22. Łaszczyk M., Szpara J., *System*, p. 660.

in excess of those it produces under the law of the state of its origin²³. This rule follows from the constitutional requirement of recognition and enforcement of sister-state judgments, known as the Full Faith and Credit Clause²⁴.

The question of the consequences of recognition or enforcement in the U.S. of judgments rendered in foreign countries is more complex. The American case law is divided on this issue²⁵. Some courts are in favor of application of the law of the origin of the judgment²⁶. Some other courts held, in turn, that the scope of *res judicata* and other effects of foreign decisions are determined by federal law or the law of the state in which recognition or enforcement is sought. However, in the commentary to § 481 of the Restatement (Third) of Foreign Relations Law (1987) it is pointed out that although, as a rule, a foreign court judgment produces in the U.S. the same effects as it does in the country of its origin, nothing stands in the way of awarding to such judgment a broader scope of preclusive effects (i.e. *res judicata*), in comparison to the effects, which are enjoyed by judgment in the country of its origin²⁷. One of the authors suggests, however, that it is only in exceptional

circumstances that there will be a reason for conferring upon a foreign judgment broader preclusive effects (i.e. *res judicata*) than it has under the law of the country of its origin²⁸. Such an exception is to be found where a defendant before a foreign state court, who is a resident of, or a person having his or her place of residence in the U.S., obtains a favorable judgment in such foreign state. The rules of equity require that such party be allowed to enjoy a broader scope of *res judicata*, as available under U.S. law²⁹.

For the purposes of this paper, it is worth making two comments with respect to the above comparative law observations. First, the rule requiring that the preclusive effects be determined pursuant to the law of the state of origin of the judgment seems to be more firmly established with respect to the sister-state judgments, than in case of judgments from foreign countries. This is because the Full Faith and Credit Clause applies exclusively to sister-state judgments. In terms of the range of influence and the extent to which it facilitates recognition and enforcement of judgments, the Full Faith and Credit Clause appears to go even further than the recognition and enforcement of judgments within the EU on the basis of the Brussels I Regulation. Nevertheless, both in the U.S. and the EU context, an important reason why the law of the state of origin has been made to govern the effects of a judgment, including *res*

23. See Restatement (Second) of Judgments (1982), §§18-20.

24. See Casad R., Issue Preclusion and Foreign Country Judgments: Whose Law?, *Iowa Law Review*, vol. 70, 1984, p. 55.

25. See Casad R., Issue Preclusion, p. 56.

26. See, for instance, *Pallen v. Allied van Lines*, 223 F.Supp. 394 (1963).

27. "No rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be given in the courts of that state". See the Restatement (Third) of Foreign Relations Law (1987), §481, comment c). See also Casad R., Issue Preclusion, p. 55.

28. Casad R., Issue Preclusion, pp. 75-76.

29. See Casad R., Issue Preclusion, p. 76. This rule does not work in the opposite direction, i.e. wherever the scope of preclusive effects is broader under the law of the country of origin (than under the law of a given U.S. state in which recognition or enforcement is sought), such effects will not be accepted.

judicata, is the trust given to the decisions of courts operating within a common regime of free movement of judgments.

Second, although generally the arbitral awards may produce in the U.S. effects similar to those of state court judgments, including *res judicata*, the rules governing state court judgments does not necessarily apply to the same extent to arbitral awards³⁰. Quite the opposite, under the draft U.S. Restatement of International Commercial Arbitration, the preclusive effects (both claim preclusion and issue preclusion) are to be governed by the law of the country in which the arbitral award is recognized or enforced, and in which the objection of *res judicata* is raised³¹.

The different treatment given in the U.S. to judgments of state courts and awards of arbitral tribunals casts doubt on the application of the extension of effect theory with respect to arbitral awards. We will return to this issue further in this paper.

ARGUMENTS IN FAVOR OF ACCEPTING THE CONFERRING OF EFFECTS THEORY

As mentioned above, the arguments raised in support of the conferring of effects theory are, in my view, more convincing. Let us identify the most important points, starting with the

need to disconnect the assessment of the arbitral awards and the state court judgments.

First, it is rightly pointed out that, for several reasons, it is not correct to refer to the rules governing recognition and enforcement of foreign state court judgments as a point of departure for the conferring of effects theory applied with respect to arbitral awards³². The very fact that, in 2005, the provisions governing recognition and enforcement of arbitral awards(including in particular the rule stipulated in Article 1212 § 1 k.p.c.) were established as a separate body of law, itself deprives the reference to the rules developed with respect to state court judgments of its normative legitimacy. Furthermore, it is pointless to refer to the rules adopted under the common EU law regime on the recognition and enforcement of state court judgments, set forth in the Brussels I Regulation and the Lugano Convention (such a line of reasoning was, however presented by the Supreme Court in its judgment of May 19, 2005).³³ This is so because the EU regime on free movement of judgments displays two features which recognition and enforcement of arbitral awards lack, namely, the automatic character of recognition (recognition takes place *ex lege*, by

30. Cf. Stier A., Preclusive Effects of An International Arbitral Award, *American Review of International Arbitration*, vol. 15, 2004, p. 330.

31. See the Restatement of the Law (Third): The U.S. Law of International Commercial Arbitration, Council Draft No. 3 (2011), §4-9(b) (with respect to claim preclusion) and §4-10(b) (with respect to issue preclusion).

32. Olechowski M., *Prawo właściwe*, pp. 578 et seq.

33. Judgment of the Supreme Court, dated 19.5.2005, V CK 783/04, OSNC 2006, No. 4, Item 72.

operation of EU law³⁴⁾³⁵, and the principle of mutual trust in the administration of justice in the Member States.

In the case of awards rendered by arbitral tribunals whose power to adjudicate results primarily from the consent of the parties and not from the imperium of a state, the

34. Pursuant to Article 33 of the Brussels I Regulation (44/2001), "A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required." Cf. Olechowski M., *Prawo właściwe*, p. 575, who discusses the automatic nature of recognition under the Brussels I Regulation and contrasts it with other procedures for a foreign judgment recognition. The conclusions drawn by Strumiłło T., *Skutki prawne wyroku arbitrażowego*, *Biuletyn Arbitrażowy*, 2010, No. 3, p. 108, who appears to suggest that the automatic nature of recognition applies also to arbitral awards, go too far. Rather, both the New York Convention (in its Article III) and the Model Law leave it to the national legislators to freely establish the procedural rules which specify the procedure to be employed when recognizing or enforcing an award. See UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (the "UNCITRAL MAL Digest"; available at: www.uncitral.org), p. 168, where it is concluded that "Proceedings for the recognition and enforcement of awards under article 35 are court proceedings, and the procedural rules of the country where recognition and enforcement is sought apply to such proceedings." This means that the law of the state of recognition or enforcement may either stipulate the requirement to obtain a decision of the court of recognition or enforcement, or abandon such requirement in favor of automatic recognition (declaration of enforceability). See also Kröll S., 'First Experiences', p. 568, where the author concludes, in relation to Austrian law, that it substantially differs from the Model Law in that the former introduces a rule under which an arbitral award has ipso jure the preclusive effect of a final and unappealable state court judgment. In turn, the view expressed in Brekoulakis S., Shore L., *Concise*, p. 651, appears to be ambiguous in that regard. Although the authors conclude that Article 35 of the Model Law provides for automatic recognition of an arbitral award, they only seem to mean that this refers to recognition of an award as binding between the parties. Thus, this view leaves open the question of whether a specific procedure is needed in order for an arbitral award to acquire preclusive effects equivalent to that of a judgment of the state court in the state of recognition or enforcement.

35. In the new Brussels I Regulation (recast), the declaration of enforceability also takes place ex lege. Pursuant to Article 39 of the recast Brussels I Regulation: "A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required."

recognition or enforcement effected pursuant to Article 1212 k.p.c. means to "confer" on the arbitral award the effects of a state court judgment³⁶. There is nothing automatic about it, in a sense that there is no ex lege effect. Furthermore, an arbitral award is not an act of a public authority, but rather a private procedural act, issued by a private tribunal.³⁷ It follows, that since an arbitral award is a product of a "private" dispute resolution body, one can hardly talk of any mutual trust between the system of administration of justice in the state of recognition and the system of administration of justice in the state of origin. It should be noted in this context that it is the arbitral award that is subject to recognition or enforcement, and not the decision of a state court, which might have been (but did not need to be) rendered in post-arbitration proceedings in the state of origin of the arbitral award³⁸.

36. Popiołek W., *Skutki zagranicznego orzeczenia*, p. 6; Popiołek W., *The Effects of a Foreign*, pp. 441 et seq.

37. See Popiołek W., *Skutki zagranicznego orzeczenia*, p. 6; Popiołek W., *The Effects of a Foreign*, p. 431. The arbitral award originates with a private tribunal (and not with an authority of the state system of administration of justice), even if one's point of departure is the so-called jurisdictional theory of arbitration (as in opposition to the contractual theory), which assumes that the arbitral award is a procedural act. However, one can quote at this point after the French jurisprudence that, as well demonstrated in the Polish jurisprudence by A. Zielony, what we have here is not a public authority act (*acte judiciaire*), but a procedural act originating with a dispute resolution body of another type (*acte juridictionnel*). See Zielony A., *Istota*, p. 53. While adopting such definition of an arbitral award, the French jurisprudence argued that an arbitral award may be enforced under state coercion only after an *exequatur* issued by a state court is obtained. See Zielony A., *Istota*, p. 54 and the works cited therein. With respect to Polish law, this author assumes that the arbitral award is an act of procedural nature, resembling the judgment of a state court, while concurrently referring to the French term *acte juridictionnel*. See Zielony A., *Istota*, p. 60.

38. For a more detailed discussion, see my gloss on the decision of the Supreme Court, dated 6.11.2009, I CSK 159/09, published (in:) B. Gessel (ed.), *Diagnoza arbitrażu*, pp. 446 et seq.

Neither the effects which such award might produce in the state of origin in accordance with the law of that state, are subject to recognition or enforcement.

Second, in the case of arbitral awards, the role of the law of the state in which the arbitral award is rendered is not so important as in the case of state court judgments. In other words, the arbitral award is not rooted in the law of the forum to the same extent as the state court decisions are. In the case of decisions originating from the state system of administration of justice, the law of the forum has a superior role. It specifies the system of courts, their jurisdiction, the admissible types of decisions and the effects of such decisions, as well as stipulates exhaustively and in detail the procedures applied before the courts.

The role envisaged for the law of the place of arbitration (the so-called *lex loci arbitrii*) with respect to proceedings before an arbitral tribunal is much narrower³⁹. It warrants the fundamental procedural safeguards and provides for the assistance to arbitral tribunals, which might be offered by state courts whenever it proves indispensable (e.g. in connection with appointment of a substitute arbitrator, challenge of an arbitrator, granting of interim measures or deciding on the arbitral tribunal's jurisdiction). Arbitral tribunals are not under obligation to follow the rules of procedure applicable to state courts, as set forth in the law of the state where the arbitration takes place. However, the law of the seat of

arbitration ensures judicial review of arbitral awards.⁴⁰ Nevertheless, the scope of such review is very narrow⁴¹. The role of the procedural law of the state where the arbitration takes place with respect to arbitration proceedings is thus substantially more limited than the role it plays with respect to the state proceedings under the general system of administration of justice.

It is also pointed out that in international arbitration, arbitrators do not have a forum in the full sense of the term⁴². Although the choice of the place of arbitration is determined to a large extent by the qualities of the legal regime existing therein⁴³, other factors also play an important role (such as neutrality of the forum towards the parties, its location convenient both to the parties and arbitrators, and the related logistical costs, the seat of the selected arbitration institution, etc.). For all these reasons, it should be concluded that an arbitral award rendered in a specific state is not a product of the system of administration

39. Olechowski M., *Prawo właściwe*, p. 580; Popiolek W., *The Effects of a Foreign*, pp. 436-437.

40. See, for instance, Poudret J.-F., Besson S., *Comparative*, p. 83; Gaillard E., *Enforcement of Awards Set Aside in the Country of Origin: the French Experience*, (in:) A.J. van den Berg (ed.), *Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention*. ICCA Congress Series 1998, Kluwer Law International 1999, p. 506; Schütze R. A., *Effektivität des Rechtsschutz vor den Schiedsgerichten* (in:) P. Gottwald (ed.), *Effektivität des Rechtsschutzes vor staatlichen und privaten Gerichten*, Bielefeld 2006, p. 183.

41. Such review is limited to an assessment of the validity and scope of the arbitration clause, and an examination of the compliance of the arbitral award with the fundamental rules of procedure (due process) and the provisions on arbitrability, as well as the public policy of a given state.

42. Olechowski M., *Prawo właściwe*, p. 580.

43. See the Report of PWC and Queen Mary University of London, *International Arbitration: Corporate Attitudes and Practices 2006* (available at: http://www.arbitrationonline.org/docs/IAstudy_2006.pdf).

of justice of that state in the same sense that a state court judgment is⁴⁴. Therefore, there is no reason why it should be awarded identical treatment in terms of the effects it produces in the state in which the award was rendered.

Third, the act of recognition or declaration of enforceability is an independent decision of an authority of the system of administration of justice in place in the state where the recognition or enforcement is effectuated. Obviously, Polish courts are under obligation to recognize or enforce arbitral awards pursuant to the New York Convention. However, this does not change the fact that, insofar as the Convention does not provide for certain results, courts should follow the rules of civil procedure, as set forth in their national legislation. This follows, on one hand, from Article III NYC and, on the other, from the general rule of conflict of laws of the *lex fori processualis*⁴⁵. *Lex fori processualis* is generally recognized across the world and accepted without reservations also in Poland. It implies that, as regards the broadly understood rules governing the procedural regime, the state court applies, as a rule, its own law⁴⁶. Furthermore, a recognized (enforced) arbitral award becomes part of the Polish legal order and, within that framework, will produce legal effects binding upon the participants of legal transactions and public authorities in

Poland. Thus, to make a foreign law govern such legal effects appears to amount to an incorporation of foreign elements into the system of administration of justice in place in the state of recognition. Such operation would have to follow from a relevant conflict of laws rule. The Code of Civil Procedure does not, however, contain any rule which would prescribe or authorize application of a foreign law in the course of determining the effects to be produced by an arbitral award recognized in Poland⁴⁷. In consequence, there is no sufficient justification for departure from the rule of *lex fori processualis*. What is more, there is no reason to abandon Polish courts' sovereignty in determining the effects that are to be produced by foreign arbitral awards on our territory⁴⁸.

Fourth, although the critics rightly point out that to assume the conferring of effects theory means that a single award might produce different effects in different states, this inconvenience does not seem to be of decisive importance. In the first place, such a state of affairs follows from the very nature of international arbitration and the multitude of national law regimes which can potentially govern the various aspects of the arbitration proceeding and the arbitral award, as well as the award recognition or enforcement. Such a disparity is accepted by the New York Convention, which to a certain extent prescribes common rules governing arbitral award recognition and enforcement, but leaves out numerous other issues, including the procedural matters referred to in Article III. In other words, since there is no uniform and complete law regime to

44. See Popiołek W., *Skutki zagranicznego orzeczenia*, p. 6; Bosch W., *Rechtskraft und Rechtshängigkeit im Schiedsverfahren*, Tübingen 1991, p. 156.

45. Popiołek W., *The Effects of a Foreign*, p. 440.

46. Cf. Ereciński T., (in:) Ciszewski J., Ereciński T., *Kodeks postępowania cywilnego. Komentarz. Część IV i V*, Warsaw 2006, p. 13; Piasecki K., (in:) K. Piasecki (ed.), *Kodeks postępowania cywilnego. Tom III*, Warsaw 2002, p. 463; Ereciński T., *Prawo obce w sądowym postępowaniu cywilnym*, Warsaw 1981, pp. 24-25; decision of the Supreme Court, dated 9.2.2000, III CKN 597/98, *Prok. i Pr.* 2000, No. 6, p. 31.

47. Popiołek W., *The Effects of a Foreign*, p. 441.

48. Cf. Popiołek W., *The Effects of a Foreign*, p. 440.

coordinate jurisdiction of arbitration tribunals, proceedings held before arbitrators, and post-arbitration proceedings, including the recognition and enforcement of arbitral awards⁴⁹, differences in the effects produced by an arbitral award in various countries are unavoidable. Thus, the inconvenience resulting from the foregoing is inherent in dispute resolution on the international forum.

Fifth, the conferring of effects theory better fits into the system established under the New York Convention. In this system, an arbitral award derives its “recognizability” not from the provisions of the law of the state of its origin but directly from the provisions of the Convention⁵⁰. The effects produced by an award in the state of its origin are irrelevant. The award is only required to be “binding” (Article V(1)(e) NYC), which is understood to mean either that the parties are bound by the arbitral award⁵¹ or that there is no ordinary recourse against the arbitral award⁵². From the point of view of NYC, the effects produced in the state of origin may (although do not necessarily need to) be conditional upon the satisfaction of certain further requirements, in addition to the fact that the award is binding (e.g. the need to hold the recognition or enforcement proceedings, as required in Poland

under Articles 1212 et seq. k.p.c.)⁵³. Moreover, according to a view expressed in the jurisprudence, when deciding whether or not an award is binding for the purposes of the New York Convention, the arbitration agreement should come first and the provisions of law of the state of origin should only come second⁵⁴.

Thus, NYC allows for a situation where an arbitral award does not produce in the state of its origin effects equivalent to those of a state court judgment (since its recognition or enforcement was not declared there, e.g. because it was never sought there), but is recognized or enforced in a foreign state and, in that foreign state, produces legal effects equivalent to those of a state court judgment. In such a case, one can hardly talk about the extension of effects arising in the state of origin into the territory of a foreign state. An assumption to the contrary, i.e. that effects may be produced in the state of recognition or enforcement only insofar as they exist in the state of origin, would produce consequences incompatible with the scheme of the New York Convention. This is because, it would make it necessary – whenever the state of origin makes legal effects of an arbitral award conditional upon the obtaining of a court decision on recognition or enforcement (as is the case

49. Such a largely uniform regime is achieved under the Brussels I Regulation.

50. Popiołek W., *Skutki zagranicznego orzeczenia*, p. 9.

51. See, for instance, Nazzini R., *The Law Applicable to the Arbitral Award*, *International Arbitration Law Review*, 2002, p. 189. As regards case law, see the decision of the Belgian Cour de Cassation of 5.6.1998 in *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, *Yearbook of International Commercial Arbitration*, 1999, pp. 603-614.

52. See Ereciński T., Weitz K., *Sąd arbitrażowy*, pp. 359 et seq.

53. Cf. Olechowski M., *Prawo właściwe*, p. 581. However, in Austria, for example, pursuant to §607 ZPO, an arbitral award has, as between the parties, ipso jure, effect of a final and unappealable state court judgment. §1(16) Exekutionsordnung expressly provides that an arbitral award constitutes an enforcement title. See Kröll S., ‘First Experiences’ with the New Austrian Arbitration Law, *Arbitration International*, 2007, No. 4, p. 568; Liebscher Ch., *Austria Adopts the UNCITRAL Model Law*, *Arbitration International*, 2007, No. 4, p. 532. However, in this respect, Austrian law seems to be in the minority as compared with other systems of law. See Kröll S., ‘First Experiences’, p. 568.

54. See Nazzini R., *The Law Applicable*, pp. 189-190.

in Poland under Article 1212 k.p.c.) – to get hold of such decision in the state of origin, prior to seeking recognition or enforcement of the award in a foreign state. Since in the state of recognition (enforcement) it is also, as a rule, necessary to obtain a decision in order for an award to produce legal effects in that state it would in practice mean that two decisions on recognition or enforcement need to be obtained (one in the state of origin and one in the state of recognition/enforcement). This would, in turn, contradict one of the fundamental objectives of the New York Convention, which is to abolish the “double exequatur” requirement⁵⁵.

Furthermore, what also deserves attention is the law to be applied to the requirements as to the authentication of an arbitral award, as set forth in Article IV NYC (which seems to be, at the same time, a question as to what state authorities are empowered to authenticate the award). Article IV was intentionally made not to specify the law which is to be applied when determining such requirements (hence, it also does not determine the state whose authorities would be competent to authenticate the award⁵⁶). The case law and the expressed views are divided over this issue⁵⁷, but the prevailing approach seems to assume that the law

applicable in this respect is that of the state of the recognition or enforcement of an arbitral award⁵⁸. Only few courts concluded that the law of the state of origin of the arbitral award should apply in that respect⁵⁹. The latter view was criticized for being in conflict with the assumptions on which the New York Convention is based⁶⁰. In the doctrine, it was proposed that it should be sufficient for purposes of Article IV NYC to satisfy requirements as to authentication of an arbitral award from either of the mentioned laws.⁶¹ Thus, it is possible to have an award authenticated either before the authorities of the state of origin or before the authorities of the state of recognition or enforcement⁶². It follows from the foregoing that for the purposes of satisfying the formal requirements set forth in Article IV NYC, the state of origin does not play a decisive role either.

Finally, Article V NYC permits recognition of an award which has been set aside in the state in which it was rendered, and thus deprived of any legal effects in that state⁶³. Although the meaning of the word may, as used in the English language version of Article V of the Convention, is subject to an ongoing debate in the international arbitration literature across

55. See Popiołek W., *Skutki zagranicznego orzeczenia*, p. 10; Olechowski M., *Prawo właściwe*, p. 584. For a general discussion of the abolishment of double exequatur, see e.g. Ereciński T., Weitz K., *Sąd arbitrażowy*, pp. 353-354. Cf., for instance, the decision of the German BGH of 2.7.2009, IX ZR 152/06, NJW 2009, pp. 2826 et seq.; the decision of the court of appeals in Brussels of 24.1.1997 in *Inter-Arab Investment Guarantee Corp. v. Banque Arabe et Internationale d'Investissements*, YB Int. Comm. Arb. 1997, pp. 643 et seq.

56. Ereciński T., Weitz K., *Sąd arbitrażowy*, p. 355.

57. Cf. Łaszczuk M., Szpara J., *System*, p. 695.

58. See the case law quoted in Scherer M., *New York Convention*, p. 211. Cf. the literature cited in Łaszczuk M., Szpara J., *System*, p. 695.

59. See the case law quoted in Scherer M., *New York Convention*, p. 211.

60. M. Scherer, *New York Convention*, s. 211.

61. See Scherer M., *New York Convention*, p. 212.

62. See Ereciński T., Weitz K., *Sąd arbitrażowy*, p. 355.

63. Popiołek W., *Skutki zagranicznego orzeczenia*, p. 10.

the world⁶⁴, it is beyond doubt that the New York Convention does not preclude recognition and enforcement of arbitral awards set aside in the state of their origin. This is at least so, if recognition or enforcement of the annulled awards is permitted under the law of the place of recognition or enforcement. The operation of national law to that effect, is accepted by the NYC, since in Article VII NYC allows for the application of the rules more favorable to recognition or enforcement. Awards set aside in the state of their origin are recognized and enforced in some countries, in particular in France⁶⁵. Leaving aside the fact that recognition or enforcement of an annulled award could – unless the European Convention⁶⁶ applies (see Article IX of that Convention) – be treated as controversial under the rules of the Polish Code of Civil Procedure (see Article 1215 § 2 point 5 k.p.c.), the foregoing means that, in light of NYC itself, it is possible for an arbitral award not to produce any effects in the

state in which it was rendered (as a result of it having been set aside there), but still be recognized or enforced elsewhere⁶⁷. Thus, the Convention allows of even such a radical divergence of effects produced by an arbitral award in different states.

VARIOUS EFFECTS PRODUCED BY AN ARBITRAL AWARD

The debate held in the Polish doctrine so far was dominated by attempts to identify a concept that would be most accurate from the dogmatic point of view. In particular, through the lenses of the effects which an arbitral award produces at the time it is rendered, a thorough interpretation of Article 1212 k.p.c. was carried out⁶⁸. While considering the issue of the law applicable to the effects of an arbitral award, an attempt was being made to develop a coherent concept that would make it possible to determine the law applicable to any and all types of effects that might potentially be produced by an arbitral award. However, it appears worth considering this issue also from the point of view of specific types of effects produced by an arbitral award. Moreover, it is worth doing so from the angle of the practical consequences that the extension of effects theory or the conferring of effects theory may trigger. It might even turn

64. See, in particular, Paulsson J., May or Must Under the New York Convention: An Exercise in Syntax and Linguistics, *Arbitration International*, 1998, No. 2, pp. 227 et seq.; Gharavi H., International Effectiveness of the Annulment of an Arbitral Award, *Kluwer Law International* 2002; Horvath G., What Weight Should be Given to the Annulment of an Award under the *Lex Arbitri*?, *Journal of International Arbitration*, 2009, No. 2, pp. 249 et seq. See also Poudret J.-F., Besson S., *Comparative Law of International Arbitration*, London-Zurich 2007, p. 829; Viscasillas P. Perales, Case Law on the Recognition and Enforcement of Arbitral Awards Under the UNCITRAL Model Law on International Commercial Arbitration, *International Arbitration Law Review*, 2005, No. 5, p. 195; van den Berg A. J., *The New York Arbitration Convention of 1958: Towards a Uniform Interpretation*, Kluwer 1981, p. 265.

65. See, for instance, Kessedjian C., Court Decisions on Enforcement of Arbitration Agreements and Awards, *Journal of International Arbitration*, 2001, No. 1, p. 9; Gaillard E., *Enforcement*, pp. 505 et seq. For Polish jurisprudence, see e.g. Zielony A., *Istota*, p. 61; Olechowski M., *Prawo właściwe*, p. 583.

66. European Convention (done at Geneva) on International Commercial Arbitration of 1961 (Dz. U. [Journal of Laws] of 1964 No. 40, Items 270 and 271).

67. Cf. Zielony A., *Istota*, p. 61; Popiołek W., *The Effects of a Foreign*, p. 448.

68. For the effects produced by an arbitral award in general (i.e. not in the context of attempting to identify the law applicable to them), see, inter alia, Tomaszewski M., *Skutki prawne wyroku sądu polubownego*, (in:) J. Gudowski, K. Weitz (eds.), *Aurea Praxis. Aurea Teoria. Księga pamiątkowa ku czci profesora Tadeusza Erecińskiego*, Warsaw 2011, pp. 1899 et seq.; Strumiłło T., *Skutki*, pp. 96 et seq.; Zielony A., *Istota*, pp. 46 et seq.

out that, despite the much stronger arguments in favor of the conferring of effects theory, for certain types of effects produced by an arbitral award it is appropriate to refer to the law of the state of origin of the award (which is not, however, suggested for any types of effects discussed in the present paper).

RES JUDICATA, ISSUE PRECLUSION AND "BINDING FORCE" OF THE AWARD

In the first place, it can be pointed out that the primary focus of the debate about the law applicable to an arbitral award has been on *res judicata* and the so called "binding force" of an award (as understood in the Polish procedural law). As a result, advocates of the conferring of effects theory argue that the preclusive effects of a foreign arbitral award are governed by Articles 366 and 365 k.p.c.⁶⁹

Let us now consider some of the consequences following from adoption of the extension of effects theory in that regard. As regards the issue under discussion, these would be that the scope of preclusive effects (*res iudicata*), as well as the "binding force" of an award should be determined under the law of the state of origin of the award. Leaving aside the practical difficulties involved in determining the

scope of the preclusive effects resulting from foreign law provisions on *res judicatae*, one can be faced with effects that would be hard to accept under Polish law.

Let us assume, for instance, that an arbitral award was rendered in U.S. or in England. As explained in the comparative law literature, in the countries of the common law tradition, the scope of preclusive effects of judgments is broader than at the Continent. In the former, an award (and a state court judgment alike) can also produce the effect known as issue preclusion or collateral estoppel, which appears to be alien to the legal systems drawing upon the civil law tradition, and in any case not known to them in the form adopted in common law countries⁷⁰. What is more, issue preclusion takes different forms in the specific common law countries, and differences are to be found even among the laws of the various U.S. states⁷¹.

Issue preclusion implies a possibility for a judgment to be binding upon the parties also in proceedings in which different claims are pursued (i.e. other than those adjudicated in a first judgment), with respect to the questions of fact or law which were litigated in the first proceeding and which were decided in the course of such proceeding, because their determination was necessary to the resolution

69. Popiołek W, *Skutki zagranicznego orzeczenia*, pp. 5 et seq.; Popiołek W., *The Effects of a Foreign*, p. 443. In foreign literature, under Article 35 of the Model Law, for a similar view see also Brekoulakis S., Shore L., (in:) L. Mistelis (ed.), *Concise International Arbitration*, Alphen aan den Rijn 2010, p. 650, who note that the *res judicata* effect of an arbitral award is governed by the law of the state in which the award is recognized and not by the law of the state of the seat of arbitration. For a general discussion of determining the effects produced by an arbitral award pursuant to Articles 366 and 365 of the Code of Civil Procedure, see Kordasiewicz B., Sadowski W., *Postępowanie*, p. 538; Morek R., *Komentarz*, p. 278.

70. See, for example, ALI/UNIDROIT Principles of Transnational Civil Procedure (available at www.unidroit.org), Comment P-28C (the ALI/UNIDROIT Principles as such assume a very limited issue preclusion, the application of which depends on the need to counteract bad faith of a party to a proceeding). See also, for example, Bermann G., *The UK Supreme Court Speaks to International Arbitration: Learning From the Dallah Case*, *American Review of International Arbitration*, 2011, p. 9, who notes that the issue preclusion is not applied in France.

71. See, for example, Casad R., *Issue Preclusion*, pp. 53 et seq.

of the prior action⁷². Significantly, in the U.S., issue preclusion may apply even to issues decided in the course of a proceedings that took place between different parties⁷³. However, this is the case only if the party against whom issue preclusion is invoked was offered a full and fair opportunity to contest that issue in the previous litigation⁷⁴. Moreover, issue preclusion is considered to be an equitable doctrine. This means that its application is each time preceded by a determination whether or not the person invoking issue preclusion in a specific case deserves protection from the point of view of the rules of equity⁷⁵.

In consequence, if, for example, a judgment was rendered in a proceeding between A and B, in which certain issues were settled, then, in a subsequent proceeding held between A and C, C would be allowed to invoke issue preclusion against A, provided that in the prior proceeding A was offered a full and fair opportunity to litigate such issues⁷⁶.

Under English law, issue preclusion may be invoked in a subsequent proceeding only if the parties to the first and the second proceedings are the same. The identity between the

72. See. B.A. Garner (ed.), *Black's Law Dictionary*, 8th ed.; West Thomson 2004, p. 279; *San Remo Hotel v. San Francisco*, 545 U.S. 323 (2005); *PenneCom v. Merrill Lynch*, 372 F. 3d 488 (2004). See also the *Restatement of the Law (Third) - the U.S. Law of International Commercial Arbitration*, Council Draft No. 3 [2011] (available at <http://arbitrateatlanta.org>), §§4-10, pp. 146 et seq.

73. Stier A., *Preclusive Effects*, pp. 323 et seq.; Casad R., *Issue Preclusion*, p. 63.

74. *PenneCom v. Merrill Lynch*, 372 F. 3d 488 (2004) under the laws of the State of New York. See also the commentary on this judgment: Stier A., *Preclusive Effects*, pp. 321 et seq. Cf. the *Restatement (Second) of Judgments* (1982), §29.

75. *PenneCom v. Merrill Lynch*, 372 F. 3d 488 (2004).

76. See the facts of the case decided by the United States Court of Appeals for the Second Circuit (New York): *PenneCom v. Merrill Lynch*, 372 F. 3d 488 (2004). The facts of the case are worth mentioning here, especially that the case involved a Polish thread. PenneCom executed with Elektrim an agreement to purchase shares in the Polish telecommunications company Pilicka. Elektrim refused to perform the agreement and PenneCom initiated arbitration proceedings before the ICC Court of Arbitration in London. Out of the USD 100 million claimed by PenneCom, the arbitral tribunal awarded damages of USD 38 million. The award was enforced in Poland. Subsequently, PenneCom brought an action in a New York against Merrill Lynch, who acted as an investment advisor to Elektrim, asserting the bank's tortious interference in the contractual relation between PenneCom and Elektrim. Moreover, it alleged that in the course of arbitration fraudulent evidence was submitted in favor of Elektrim. Merrill Lynch invoked issue preclusion, i.e. it argued that the New York court was bound by the findings made by the arbitral tribunal as to the grounds and amount of the damages already awarded to PenneCom. However, the court held that before it could be decided whether issue preclusion was effective, it was necessary to determine whether PenneCom had had a full and fair opportunity to argue the relevant issue in arbitration. And to this end, it was necessary to establish whether Merrill Lynch did present fraudulent evidence in the course of arbitration. Therefore, the Court of Appeals remanded the case to the court of first instance in order for it to establish evidence in that regard. If the allegations that fraudulent evidence was presented in arbitration proved correct, it would mean that PenneCom had not had a full and fair opportunity to argue its case in arbitration (it contended that it had learned about the fraudulent evidence only after the arbitration proceeding had been completed). Hence, issue preclusion could not be binding upon the court before this fact was established. As regards the question of the applicable law to be referred to when deciding the question of the issue preclusion, the New York court concluded only that since the parties had agreed that the law of the State of New York applies it would apply this law.

parties to the first and the second proceedings is, however, understood to include privies, i.e. the entities sharing legal interests with the parties.

Thus the scope of the issue preclusion in England seems to be narrower in terms of the parties to which it applies⁷⁷.

On the other hand, however, the scope of issue preclusion seems broader in England in terms of its subject-matter, since, unlike in the U.S., it is not required that the issues which are to be binding for the court in the second proceeding were actually litigated in first proceeding (in the sense of having been subject to taking of evidence and/or argued on the points of law). Issue preclusion extends in England to cover also the issues that were admitted in an express or implied manner, whenever this was necessary to make a decision (even though they were not actually disputed)⁷⁸.

As mentioned above, when it comes to judgments rendered by foreign state courts, the view prevailing in the U.S. is that the effects of a judgment in the state of recognition or enforcement do not, as a rule, extend beyond those that the judgment enjoys in the state of its origin. Moreover, as already pointed out, the scope of preclusive effects of judgments in the U.S. is relatively broad if compared with other legal systems, and in particular with the civil law jurisdictions. The difference lays in particular in the concept of the issue

preclusion. It follows that to accept the effects of a judgment as existing under the law of the state of origin does not trigger excessive consequences, since normally such effects would not go beyond those known to U.S. law. An opposite situation, i.e. when broader effects of a judgment are prescribed in the state of recognition or enforcement than in the state of origin, could however give rise to more controversies. It is with the latter scenario that one might be faced with in the proceedings before Polish courts.

The following reasoning might be applied for the purposes of the present discussion. Pursuant to Article 365 k.p.c., “a final and unappealable judgment shall be binding not only on the parties and the court which rendered the judgment, but also on other courts and other state and administrative authorities” (the so called “binding force” of a judgment). One might wonder whether the common law concept of issue preclusion would not to a certain extent resemble the binding force of a judgment stipulated under Article 365 k.p.c., at least if the latter is understood as providing for a binding nature of the prejudicial effect of a judgment (as is understood by many in Poland)⁷⁹. A detailed analysis of this question would be beyond the scope of the present article. However, if we assume, for the sake of the discussion, that the scope of the preclusive effects under the issue preclusion doctrine is broader than the one which might

77. See Casad R., *Issue Preclusion and Foreign Country Judgments: Whose Law?*, *Iowa Law Review*, vol. 70, 1984, pp. 62-63; Stier A., *Preclusive Effects*, pp. 323 et seq.

78. Casad R., *Issue Preclusion*, p. 62.

79. On the “binding force” of a judgment under Article 365 k.p.c. in general, see e.g. Jędrzejewska M., (in:) Ereciński T., Gudowski J., Jędrzejewska M., *Kodeks postępowania cywilnego. Komentarz. Część I i II*, Warsaw 2006, pp. 78-79; Piasecki K., (in:) K. Piasecki (ed.), *Kodeks postępowania cywilnego. Tom I. Komentarz do artykułów 1-366*, Warsaw 2010, pp. 1638 et seq.

result from Article 365 k.p.c., it seems questionable whether a judgment rendered, for example, in New York could produce American style issue preclusion effects in Poland (the latter being the state of recognition or enforcement of a judgment or arbitral award). Such an outcome could be surprising and unfair to the parties in subsequent proceedings held in Poland in which the issue preclusion effect of an American judgment or award would be invoked.

As suggested earlier, it would be easier to assume the application of the law of the state of origin in the opposite case, i.e. in the event that the scope of preclusive effects is narrower in the state of origin than in Poland as the state of recognition or enforcement. However, even here certain concerns arise. In particular, if the prejudicial effect has no binding nature at all in the state of origin, the question will arise whether or not application of the law of such state would be legitimate in a situation in which, under Polish law, a judgment might be binding pursuant to Article 365 k.p.c.

It is also worth considering the discussed issue from the point of view of the function played by *res judicata* and the "binding force" of judgments in the legal system. It is by no means the case that their role is confined to defining the properties of a decision of a judicial authority, as seems often to be assumed in the Polish doctrine of civil procedure. Their major purpose is to coordinate the acts undertaken within the system of administration of justice (and, more precisely in the discussed context, between the state court administration of justice and the system of arbitral - alternative dispute resolution) through preventing

repetitive litigation⁸⁰. This contributes to the efficiency of the administration of justice by making it possible to use resources economically. It protects parties from being forced to again defend their rights in connection with issues which were already resolved in a binding decision. Whether *res judicata* holds good in a given case or whether the previously made findings of prejudicial nature should be accepted is to be decided by the court before which an objection to that effect is raised (i.e. the court before which a subsequent proceeding is held). Considering this issue from a slightly different perspective, one can also say that *res judicata* (Article 366 k.p.c.) and the "binding force" of judgments (Article 365 k.p.c.) serve as instruments preventing conflicting court decisions within a given legal system. Therefore, there is no reason why this coordination should be left to be governed by the law of the state of origin of an arbitral award. In my opinion, in the discussed context, the preservation of cohesion and procedural efficiency of our own legal system⁸¹, including the uniformity of effects produced in Poland by arbitral

80. See, for instance, ALI/UNIDROIT Principles of Transnational Civil Procedure, Comment P-28A.

81. See Olechowski M., *Prawo właściwe*, p. 576, who points out that, when deciding the issue of the law applicable to the effects produced by an arbitral award, one should take into account the need to choose between two values, i.e. the respect for and trust in the foreign case law and the foreign legal system on the one hand, and the preservation of one's own legal system cohesion and security of legal transactions, on the other. The author considers the latter to be more important in the discussed context and endorses the conferring of effects theory. See also Ereciński T., *Prawo obce w sądowym postępowaniu cywilnym*, Warsaw 1981, pp. 24 et seq., who notes, although not in the context of recognition and enforcement of foreign decisions – that the security of legal transactions requires that the court apply the procedural law of its state unless an express provision of law (domestic law or international law in force in Poland) requires that a foreign procedural law be applied.

awards rendered in various foreign states⁸², should take priority over the need for maintaining an international harmony of the effects produced by an arbitral award in various states. This goal is ensured if we accept that it is the law of the state of recognition or enforcement that defines *res judicata* and other preclusive effects, as well as the "binding force" of an award.

STATUTE OF LIMITATIONS

One can also consider an example of yet another effect produced by an arbitral award, which might give rise to interesting practical controversies. Namely, the limitations periods for the enforcement of claims decided in arbitration may differ, depending on the legal system. In Poland, for example, pursuant to Article 125 of the Civil Code⁸³ ("k.c."), the limitation period for enforcement of claims adjudicated in the judgment or award is ten years (or three years for recurring claims).

It follows that it is a relevant question to ask what law determines the limitation period for claims decided in an arbitral award. Hypothetically, there are three options. First, the limitation period may be governed by the law of the state in which recognition or enforcement of an arbitral award is sought (*lex fori*). Second, it may be governed by the law of the state of origin of the arbitral award. Third, the law governing the limitation period for the

substantive claims in question (*lex causae*) might be found to apply.

The first option appears to be clearly prevalent across the world. Numerous countries have in place special limitation periods for claims adjudicated in arbitral awards subject to recognition or enforcement pursuant to the New York Convention⁸⁴. Since such limitation periods apply to foreign (because "Convention-based") arbitral awards, claims adjudicated therein are barred by the national statute of limitations in force in each such state (i.e. *lex fori*). The case law from various jurisdictions also predominantly seem to adopt *legis fori* when deciding the issue of time limitations in the recognition or enforcement proceedings⁸⁵. This point of view seems to prevail in the literature as well⁸⁶. It is especially well established in the common law countries, where the

84. See Bermann G., Recognition and Enforcement of Foreign Arbitral Awards: The Application of the New York Convention by National Courts [report to be presented at the IACL Congress 2014, draft of July 2, 2014; available at <http://www.iacl2014congress.com>], pp. 78 et seq. According to G. Bermann, those countries include the U.S., Great Britain, Canada, Hong Kong, Indonesia, Italy, Malaysia, the Netherlands, Norway, Romania, Russia and Turkey. A large group of other states use the general rules applicable to state court judgments. *Ibid*, pp. 78 et seq.

85. For the U.S., see e.g. *Seetransport Wiking Trader Schiffahrtgesellschaft GmbH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994); *Commission Import Export SS v The Republic of the Congo, Civ.*, 2013 WL 76270 (DDC 1.8.2013). In the U.S. case law on enforcement of foreign arbitral awards it was obvious that limitation of claims adjudicated in the awards was governed by *legis fori*, and more specifically, that such claims were subject to a three-year limitation period provided for in the Federal Arbitration Act (§207 FAA). However, see also numerous other judgments rendered in other states, as quoted by Scherer M., *New York Convention*, p. 199. See also the statement made in UNCITRAL MAL Digest (p. 168): "The law of the State where recognition and enforcement is sought is also relevant for the determination of time limits within which a party must apply for the relevant action."

86. Scherer M., *New York Convention*, p. 200 and the works cited therein.

82. Arbitral awards should all produce the same effects in the Republic of Poland (e.g. the preclusive effect within the meaning of Article 365 of the Code of Civil Procedure), regardless of the state in which they were rendered. See Popiolek W., *The Effects of a Foreign*, p. 444.

83. The Act of April 23, 1964 - Civil Code (the consolidated text publ. in Dz.U. of 2014, item 121, as amended).

limitation period as such (also for substantive law claims) is treated as a procedural issue. Therefore, by its very nature, it is governed by *legis fori processualis*. The application of *legis fori processualis* in the present context is sometimes justified under Article III NYC⁸⁷. A similar view is also frequently accepted in countries of the civil law tradition (e.g. in Germany), where limitation period is generally regarded as a substantive law institution⁸⁸. It is only in a few countries that the substantive law nature of limitation extends to cover limitation periods for claims adjudicated in an arbitral award⁸⁹. The author of the present article is not aware of any case law or opinions of the scholars, which would favor application of the law of the state of origin of an arbitral award with respect to the discussed issue⁹⁰.

Moving on to discussion of the relevant issue, one should begin by asking what is the nature of the limitation of claims adjudicated in a court judgment. Should it be considered procedural or substantive law issue? As such, limitation of private law claims is generally recognized in the civil law tradition as a substantive law issue⁹¹. Hence, the law applicable in this respect is identified by the conflict of laws rules of private international law of the forum, whatever that would prove to be in the given context (in Poland, Article 26 of the Act on Private

International Law⁹² would apply, pursuant to which limitation of a claims is governed by the law applicable to the claim in question).

It is submitted, however, that the law applicable to claims adjudicated in a court judgment or an arbitral award should not be identified by the conflict of laws rule stipulated in Article 26 of the Private International Law. This is so because the nature of limitation period changes when claims are decided by a judicial authority. Since that moment, it is no longer the impact of the lapse of time on the admissibility of claims being pursued before a court that is of relevance, but rather the impact of the lapse of time on the possibility to enforce the adjudicated claims⁹³. Along with this idea, in Poland, it is assumed that only the decisions which enjoy status of the enforcement titles benefit from special limitation period set forth in Article 125 k.c. (which generally would be longer than most regular, substantive law limitation periods)⁹⁴.

Assuming that limitation of claims adjudicated in a judgment should be treated as a procedural issue, one is left with the question whether it should be governed by the law of the state of origin of the arbitral award or the law of the state in which recognition or enforcement of the award is sought.

Analysis might conveniently begin by pointing at a view, that has been expressed under

87. See Bermann G., *Recognition and Enforcement*, p. 78.

88. Scherer M., *New York Convention*, p. 200.

89. See Bermann G., *Recognition and Enforcement*, p. 80, who gives the examples of the Czech Republic, Slovenia, Taiwan and Uruguay.

90. Bermann G., *Recognition and Enforcement*, pp. 78 et seq. does not refer to any such judgments or views either.

91. See, in particular, Zralek J., *Przedawnienie w międzynarodowym obrocie handlowym*, Kraków 2005.

92. Act of February 4, 2011 – Private International Law (Dz. U. No. 80, Item 432).

93. This difference is also pointed out by Scherer M., *New York Convention*, p. 200. See Kordasiewicz B., (in:) Z. Radwański (ed.), *System Prawa Prywatnego*. Tom 2. Prawo cywilne – część ogólna, 2nd ed., Warsaw 2008, pp. 590-591.

94. See Kordasiewicz B., *System*, p. 624.

Polish law, to the effect that Article 125 k.c. applies exclusively to arbitral awards that have been declared enforceable pursuant to Article 1212 k.p.c.⁹⁵ Thus, Article 125 k.c. does not yet operate at the time when the award is rendered by arbitrators. However, since the filing of a statement of claim with an arbitral tribunal interrupts the limitation period for the substantive law claims being pursued, one should assume that when an arbitral award is rendered, the limitation period starts to run once more (it would be impossible to assume that the limitations period was interrupted once and for all). As B. Kordasiewicz points out, the foregoing must necessarily refer to the limitation period applicable to the specific substantive law claim⁹⁶.

This reasoning reveals the relationship between the limitation period for claims adjudicated in an arbitral award and the recognition of such arbitral award or declaration of its enforceability pursuant to Article 1212 k.p.c. The legal effect such as benefiting from the special limitation period provided for in Article 125 k.c. is conferred by operation of Article 1212 k.p.c., at the moment when the arbitral award is recognized or when its enforceability is declared. The arbitrators' award as such does not yet enjoy the "procedural" limitation period set forth in Article 125 k.c.

Adopting the above as guidelines mandated by Polish *legis fori processualis*, the following propositions might be suggested.

First, the limitation period for claims adjudicated in a recognized arbitral award (or an

award declared enforceable) should be governed by the law of the state in which recognition or enforcement of the award is sought. If the award is recognized or enforced in Poland, the special limitation period set forth in Article 125 k.c. applies to claims adjudicated in a foreign arbitral award following recognition of the award or declaration of its enforceability in Poland. In this case, there is no reason to refer to the law governing limitation of the substantive law claims which were pursued in arbitration.

Considering limitation of claims adjudicated in an award to be a procedural issue governed by the law of the state of enforcement appears to be in line with the parties' expectations. Where parties pursue before a court claims based on the provisions of substantive law, it is natural for them to expect that the relevant substantive law will be applied. However, after they obtain a judgment and proceed to enforce the claims, their expectations as to the resuming of the limitation period will not typically refer to the substantive law which served as a basis for rendering the decision. Rather, they will look for how much time they have left to proceed with enforcement of the award in the law of the state in which the enforcement is sought.

Second, it seems more difficult to identify the law governing the limitation period for claims adjudicated in a foreign arbitral award before the recognition or declaration of its enforceability is obtained in Poland. On the one hand, minded of the role played by Article 1212 k.p.c., such limitation period might be considered governed by the law applicable to the substance of the dispute settled in arbitration. This conclusion appears to be in line with the essentially private nature of arbitrators'

95. Kordasiewicz B., *System*, p. 624; however, the author makes a reservation that his opinion refers to Polish arbitral awards only.

96. Kordasiewicz B., *System*, p. 624.

award being the outcome of an alternative method of dispute settlement.

However, on the other hand, to apply different laws depending on whether or not the award has already been recognized or declared enforceable under Article 1212 k.p.c., may be surprising to creditors enforcing their claims in Poland. Intuitively, they would normally anticipate that a single conflict of laws rule applies in both cases. Furthermore, if the enforcement of claims adjudicated in a foreign arbitral award is sought, the limitation period is of relevance mostly at the time after the award is rendered and before a request for its recognition (declaration of its enforceability) is made. After a decision in this respect is obtained, the relevance of the limitation period diminishes. Hence, if it would only be the recognition or declaration of its enforceability decision that would benefit from the special limitation period under Article 125 k.c., the scope of the application of the law of the state of recognition or enforcement would be reduced to a minimum. Finally, one can note that, if viewed in terms of an automatic recognition of a foreign arbitral award or declaration of its enforceability (which however not the case in Poland), the distinction under discussion loses its significance. In that last scenario, the arbitral award would constitute an enforcement title already at the moment when it would be rendered, and thus - at least in Poland - would benefit from the special statute of limitations period provided for in Article 125 k.c.

In the absence of any guidelines to be found in the Polish case law, it is difficult to decide which of the proposed solutions should be deemed correct. The issue remains open.

It is submitted however, that regardless of the foregoing substantive – procedural dilemma, there is no reason to apply the law of origin of the arbitral award to govern the limitation period for claims decided in the award. Only the law of the state of recognition and enforcement may apply in that respect.

SUMMARY

Given the arguments presented above, it is submitted that the effects of an arbitral award should be determined, as a rule, in light of the law of the state where the recognition or enforcement of an arbitral award is sought⁹⁷. What speaks in favor of this approach is primarily the system of recognizing and enforcing arbitral awards established under the New York Convention. The point of departure under the Convention is that an arbitral award is to a large extent (although admittedly, not fully) independent from the law regime of the place where it was rendered (and in this sense “autonomous”⁹⁸). Equally important is the need to maintain sovereignty in making decisions regarding coordination of judicial procedures within one’s own procedural system (especially through determination of the preclusive effects of the award). The proposed solution is also mandated by the *legis fori processualis* principle and

97. One can point out that an even more radical statement seems to be made in UNCITRAL MAL Digest, p. 169. It is claimed – while referring to the case law established by German and Canadian courts – that the law of the state of recognition or enforcement determines whether the arbitrators’ decision constitutes an arbitral award at all (“Whether a decision by an arbitral tribunal constitutes an arbitral award is determined primarily on the basis of the law of the State where recognition and enforcement is sought, according to several court decisions”).

98. See Zielony A., *Istota*, p. 61; Olechowski M., *Prawo właściwe*, p. 584; Popiolek W., *Skutki zagranicznego orzeczenia*, p. 10.

the wording of Article 1212 k.p.c. At the same time, there are no rules of international law that would require that foreign awards be given a different treatment (NYC contains no such requirement and no act of the type of the Brussels I Regulation is in place in this respect).

The contract with the arbitrator (receptum arbitrii) and the contract of mandate – a comparative analysis

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The contract with the arbitrator is the source of the legal relation holding between an arbitrator and arbitrants, setting forth their mutual rights and obligations. It has not been regulated under Polish law. It acquired its form in the practice of legal transactions. An analysis of the relations holding between its parties permits identification of the components determining its nature. In order to establish a broader legal framework identifying the essence of the legal relation holding between the parties to a dispute and the arbitrator, it proved necessary to make an attempt at classifying this type of contract as one of the nominate contract types. This paper presents a comparative analysis of the contract with the arbitrator and the contract of mandate, which, it is assumed, should provide an answer to the question whether it is admissible to conclude that *receptum arbitrii* satisfies the criteria for classification as a nominate type of contract.

INTRODUCTION

In line with the contractual theory of the arbitrator's legal position,¹ the legal relation

holding between the arbitrator and the parties to a dispute is established under a contract with the arbitrator². The arbitrator undertakes towards the parties to a dispute to conduct an arbitration proceeding and render an award deciding the dispute, and the parties to the dispute undertake to pay a fee to the arbitrator and reimburse him for the expenses he incurred in connection with performance of the duties entrusted to him³. As the contract with the arbitrator is not provided for under Polish law, it proved necessary to make an attempt at classifying this type of contract as one of the nominate contract types, in order to establish a legal framework identifying the essence of the legal relation holding between the parties to a dispute and the arbitrator. The contract with the arbitrator has acquired its form in the practice of legal transactions. An analysis of the relations holding between its parties authorizes the conclusion that the components determining its nature are, on the one hand, the obligation to personally examine and resolve a dispute (being one of the arbitrator's duties), and, on the other hand, the obligation

1. Cf. Platte M., *An Arbitrator's Duty to Render an Enforceable Award*, *Journal of International Arbitration*, vol. 20, No. 3, 2003, p. 308.

2. Cf. Rubino-Sammartano M., *International Arbitration Law and Practice*, The Hague, London, Boston, 2001, p. 312.

3. For a more detailed discussion of this issue, see Zawiślak K., *Receptum arbitrii*, Warsaw 2012, p. 12.

to pay a fee to the arbitrator and reimburse him for the expenses incurred in connection with the performance of his duties (being one of the arbitrating parties' duties)⁴. Thanks to identification of the properties specific to this type of contract, as developed in the practice of application of the law, it is possible to carry out a comparative analysis of the contract with the arbitrator and the contract of mandate, which, it is assumed, should provide an answer to the question whether it is admissible to conclude that the *receptum arbitrii* satisfies the criteria for classification as a nominate type of contract, i.e. the contract of mandate, and may thus be described as a contract of such type.

This paper refers to the essential passages from the publication entitled *Receptum arbitrii*, which discuss the possibility of classifying the *receptum arbitrii* as a contract belonging to the selected types of nominate contracts, and which are relevant to the issue outlined in its title.

THE ESSENTIAL COMPONENTS OF THE CONTRACT WITH THE ARBITRATOR

1. Introduction

To depict the issue discussed in this paper in a more comprehensive manner, it seems appropriate to outline, before moving on to

present the findings of a comparative analysis of both the contracts, the essential components of the contract with the arbitrator, and in particular to make more specific the list of rights and obligations granted to and imposed on each party to such contract.

2. The parties – an outline

A more detailed analysis of the essential properties of the parties to the *receptum arbitrii* will be presented in the section concerned with a comparison of both the analyzed contracts in terms of this aspect. At this point, one should focus on the specific nature of the relation holding between the parties to a dispute (the arbitrating parties) and the arbitrator, which makes it necessary to determine who and on what terms and conditions is awarded the status of a party, i.e. the entity having the rights and obligations involved in this relation, and thus to formulate the construct of a party to such contract. The contractual relation between the arbitrator and the parties to a proceeding is always a relation of the arbitrator towards both the parties⁵. This follows, in the first place, from the principle of the arbitrator's independence and impartiality. The arbitrator should be a person independent of the parties, and in particular of the party who appointed him⁶. Adoption of the concept according to which the parties act jointly towards the

4. Cf. Zawiślak K., *Skład sądu polubownego* [in:] Błaszczak Ł., Sikorski R., Zachariasiewicz M., Zawiślak K., Żmij G., *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian*, B. Gessel – Kalinowska vel Kalisz (ed.), Wrocław 2014, p. 180.

5. See Pazdan M., *Prawne aspekty funkcji arbitra*, PUG 1999, No. 2, p. 11; see also Poczubut J., [in:] *System Prawa Handlowego*, t. 8. *Arbitraż Handlowy*, A. Szumański (ed.), Warsaw 2010, p. 177; for a more detailed discussion, see Zawiślak K., *Receptum ... op. cit.*, p. 77.

6. Cf. El-Kosheri A.S., Youssef K.Y., *The Independence of International Arbitrators: An Arbitrator's Perspective*, [in:] *Independence of Arbitrators – 2007 Special Supplement ICC International Court of Arbitration Bulletin*, p. 44 and the works cited therein.

arbitrator and the established legal relation is one towards both the parties makes it possible to formulate the legal relation between the parties and the arbitrator in an identical manner with respect to each party to the arbitration agreement. It is only then that identical relations may be established with both parties to a dispute, preventing a situation in which the terms and conditions of undertaking and performing the duties involved in dispute resolution as proposed by one party could prove to be more favorable to the arbitrator than those proposed by the other party. The possibility for the provisions of a *receptum arbitrii* to be formulated in a manner resulting in closer bonds being established with one party or implying the arbitrator's partiality, is then eliminated⁷.

3. The object of the contract

3.1 Duties of the arbitrator

The arbitrator's fundamental duty, originating in the *receptum arbitrii*, is to adjudicate the dispute between the parties⁸. It should be noted that there are various views on how this fundamental duty should be performed and what its scope is. In the English literature, given the provision of Article 33 of the Arbitration Act, the scope of the arbitrator's major duty is broader. It extends to cover conducting the arbitration proceeding, taking decisions on matters of procedure and evidence, and exercising other powers conferred on the arbitrator, which duties should be

performed in a fair and impartial manner.⁹ In the German literature, it is pointed out that the arbitrator's duty is to cooperate in the course of the arbitration proceeding, which cooperation consists, *inter alia*, in participating in sessions and, in the case of the presiding arbitrator or the sole arbitrator, in conducting the proceeding, deciding on procedural matters as well as formulating and rendering an award in which the dispute between the parties to the proceeding is resolved.¹⁰ In the Polish literature, the scope of the discussed duty is also suggested to be broader. Under the *receptum arbitrii*, arbitrators are said to assume primarily the duty to "conduct the arbitration proceeding in line with the instructions contained in the arbitration agreement or a separate agreement concerning the procedure to be followed, and while taking into account the relevant norms of law (i.e. the norms of law made by the parties to govern the proceeding or the ones which are relevant in this respect pursuant to an applicable conflict of laws rule based on an objective connecting factor), and to render an award."¹¹

The common element and, concurrently, the core of the above views is that they perceive the arbitrator as being obliged towards the parties (under the contract with the arbitrator) to resolve the dispute between them. The other elements serve to make the method

7. For a more detailed discussion, see Zawiślak K., *Receptum ... op.cit.*, pp. 77 ff.

8. Cf. Lew J.D.M., Mistelis L.A., Kröll S.M., *Comparative International Commercial Arbitration*, The Hague, London, New York 2003, p. 279.

9. Cf. Sutton D.St.J., Gill J., Gearing M., *Russell on Arbitration*, London 2007, p. 154.

10. Cf. Lionnet K., Lionnet A., *Handbuch der Internationalen und Nationalen Schiedsgerichtsbarkeit*, Stuttgart, Monachium, Hannover, Berlin, Weimar, Dresden 2005, p. 262; Schwab K. H., Walter G., *Schiedsgerichtsbarkeit*, München 2005, p. 94.

11. See Pazdan M., *Umowa stron z arbitrem (arbitrami) w międzynarodowym arbitrażu handlowym*, *Problemy Prawne Handlu Zagranicznego*, vol. 11, Katowice 1987, p. 48.

of this duty performance more specific. Their presence ensures correct performance by the arbitrators of the duty to resolve the dispute. The supplementary duties, which form – as a rule – different aspects of the major duty performance, make the latter more specific. This group of arbitrator's duties might be said to include: the obligation to personally perform the duties, perform the same with due care, participate in the proceeding, adjudicate the dispute without undue delay and render an enforceable award, maintain confidential information obtained as part of the arbitration proceeding, be impartial, adjudicate the dispute in an objective manner and accord equal treatment to the parties, act in an independent and impartial manner also when communicating with the parties, including to disclose any facts calling the arbitrator's independence and impartiality into question¹².

3.2 Duties of the parties (the arbitants¹³)

The list of duties assumed by the arbitrating parties as a result of execution of the contract with the arbitrator is not extensive. Such duties are limited to making a financial performance for the benefit of the arbitrators¹⁴, consisting of arbitrators' fees in consideration of performance of their duties and reimbursement of

the expenses they incurred in connection with the performance of the same.¹⁵

Furthermore, there are also additional duties which, however, are more of an ethical responsibility, a standard of integrity, than a source for an arbitrator's actionable claim to arise from. A duty of such type is the parties' obligation to cooperate with the arbitrator,¹⁶ which is a correlate of the arbitrator's right to obtain from the parties as much information on the case as possible.¹⁷

A special form of the parties' duty to cooperate with the arbitrators, which is concurrently an equivalent of the arbitrators' duty to act independently and impartially, is the parties' obligation to refrain from undertaking acts that might contribute to the occurrence of circumstances raising concerns as to the arbitrators' compliance with the duties referred to above.¹⁸ In particular, it should be emphasized that the parties should refrain from making attempts to communicate with the arbitrators in a manner exceeding the scope set by the canons of ethics or the rules of arbitration pertaining to the scope of permissible communication.¹⁹

A COMPARISON OF THE TYPES OF ENTITIES

12. For a more detailed discussion, see Zawiślak K., *Receptum* ... op.cit., pp. 184 ff.

13. This term, used to refer to the parties to a dispute as the parties to the arbitration agreement and thus also to the contract with the arbitrator, was proposed by B. Gessel – Kalinowska vel Kalisz, [in:] Błaszczak Ł., Sikorski R., Zachariasiewicz M., Zawiślak K., Żmij G., *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian*, B. Gessel – Kalinowska vel Kalisz (ed.), Wrocław 2014, p. 27.

14. Cf. Lionnet K., Lionnet A., *Handbuch...*, op. cit., p. 267.

15. For a more detailed discussion, see Zawiślak K., *Receptum* ... op.cit., p. 159.

16. Cf. Ditchew A., *Le contrat d'arbitrage*, *Revue de l'arbitrage* 1981, No. 3, p. 403.

17. *Ibidem*, p. 401.

18. For a more detailed discussion, see Zawiślak K., *Receptum* ... op.cit., p. 160.

19. Canon III of the Code of Ethics for Arbitrators in Commercial Disputes (AAA).

PERMITTED TO BE PARTIES TO THE RECEPTUM ARBITRII AND TO THE CONTRACT OF MANDATE

The parties to the contract of mandate are the entity accepting an order (the mandatary) and the entity commissioning the performance of the same (the mandator). Polish law does not provide for the need for either one or both the parties to be a specific type of entity²⁰. Both “the mandator and the mandatary may belong to any category of civil law entities, including entrepreneurs and other types of entities.”²¹ In consequence, it should be concluded that both the mandator and the mandatary may be a natural person, a legal person or an organizational unit lacking legal personality but having legal capacity²².

In terms of the discussed aspect, the receptum arbitrii substantially resembles the contract of mandate. However, the provisions of the Polish arbitration law on the capacity to perform the duties of an arbitrator contain essential exclusions, thus limiting the list of entities having capacity to be a party to the contract with the arbitrator. Pursuant to Article 1170 of the Code of Civil Procedure, an arbitrator, and thus a party to the receptum arbitrii, may be a natural person of any citizenship, having full capacity to enter into legal transactions, who is not a state court judge in

active service. In consequence, the model of the requirements to be met by an entity in order to qualify as an arbitrator, as adopted in Polish law, excludes performance of the arbitrator’s duties by legal persons and organizational units which lack legal personality but have legal capacity under statute, as well as by natural persons who do not have full capacity to enter into legal transactions and persons who are state court judges in active service²³.

As regards the parties to a dispute (the arbitrating parties), although their legal position is qualified, as it is exclusively the entities executing an arbitration agreement that may be parties to the receptum arbitrii, such qualifications result from the nature of the institution and do not restrict the types of entities but are only a consequence of relating the receptum arbitrii to the realm of law within which it is executed and to the goal the attainment of which it is to serve. The capacity of arbitrating parties to be parties to the receptum arbitrii is the consequence of their capacity to enter into an arbitration agreement. Owing to the fact that the existence of an arbitration agreement is a prerequisite for the legal situation in which the receptum arbitrii is executed to emerge, capacity to be a party to the receptum arbitrii will be vested in entities having capacity to enter into the arbitration agreement²⁴. It should be noted in this connection that Polish law does not provide for any special restrictions on entities’ capacity to arbitrate.

20. Cf. Ogiełło L., [in:] *System Prawa Prywatnego*, t. 7, *Prawo zobowiązań – część szczegółowa*, J. Rajski (ed.), Warsaw 2004, p. 439.

21. See Machnikowski P., [in:] *Kodeks cywilny. Komentarz*, E. Gniewek (ed.), Warsaw 2008, commentary on Article 734 of the Civil Code, quoted after Legalis.

22. Cf. Kopaczńska-Pieczniak K., [in:] *Kodeks cywilny. Komentarz*. Tom III. *Zobowiązania - część szczególna*, A. Kidyba (ed.), commentary on Article 734 of the Civil Code, quoted after Lex.

23. Cf. Zawiślak K., *Skład sądu polubownego* [in:] Błaszczak Ł., Sikorski R., Zachariasiewicz M., Zawiślak K., Żmij G., *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian*, B. Gessel – Kalinowska vel Kalisz (ed.), Wrocław 2014, pp. 166 ff.

24. For a more detailed discussion, see Zawiślak K., *Receptum ... op. cit.*, p. 20.

trate²⁵. Thus, generally, every entity having capacity to be a party to the arbitration agreement (an entity having exclusively legal capacity or capacity to be a party to court proceedings) and capacity to execute the arbitration agreement (an entity having capacity to enter into legal transactions or capacity to undertake procedural acts)²⁶ may be a party to the contract with the arbitrator (an arbitrating party).

In the context of a comparative analysis of the types of entities that may be parties to each of the contracts, one should address the potential requirement which can be set with respect to both contract types, to the effect that the mandatary or the arbitrator, as applicable, have specific qualifications needed by the other party to the contract. Given the above requirements imposed on the arbitrator with respect to the capacity to perform the arbitrator's duties and, concurrently, the capacity to enter into the contract with the arbitrator, it should be pointed out that the consequences of the lack of the qualifications specified by the arbitrating parties should be distinguished from the situation in which the arbitrator does not meet the minimum requirements set forth in Article 1170 of the Code of Civil Procedure, and in particular the situation in which the arbitrator would be a legal person or a judge of a state court. In such a case, the *receptum arbitrii*, being in breach of the mandatory provisions of law²⁷, will be

invalid. The lack of the arbitrator's qualifications required by the parties to a dispute will result in the parties' right to challenge such arbitrator (Article 1174 of the Code of Civil Procedure) and, possibly, in such arbitrator's liability in connection with his failure to perform the contract executed with the parties.

As regards the contract of mandate, it is pointed out in the literature that the lack of "the mandatary's appropriate qualifications does not render the contract invalid, but should the contract not be performed due to this reason, it may serve as grounds for liability for damages."²⁸ One can also come across a view according to which execution of a contract of mandate the performance of which requires special qualifications with a person who does not have such qualifications makes the obligation unfeasible from the very start, which is tantamount to the contract invalidity²⁹. However, given the fact that the unfeasibility of the obligation is of subjective nature, one should endorse the former view. Thus, as a rule, it should be assumed that a failure to satisfy the requirement of special qualifications, such as an entry in the list of advocates or legal advisors, necessary to effectively perform the commissioned legal transactions, triggers with respect to a contract of mandate consequences corresponding to those triggered by the lack of the arbitrator's qualifications required by the arbitrating parties.

25. Cf. Wiśniewski A.W., *System Prawa Handlowego*, t. 8. *Arbitraż Handlowy*, A. Szumański (ed.), Warsaw 2010, p. 227.

26. Cf. Ereciński T., Weitz K., *Sąd Arbitrażowy*, Warsaw 2008, p. 109.

27. Cf. Piasecki K., [in:] *Kodeks cywilny. Księga pierwsza. Część ogólna. Komentarz*, K. Piasecki (ed.), Kraków 2003, commentary on Article 58 of the Civil Code, quoted after Lex.

28. See Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 734 of the Civil Code, quoted after Legalis.

29. Cf. Ogiegło L., [in:] *System Prawa Prywatnego*, t. 7..., op. cit., p. 439.

A COMPARISON OF THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO THE RECEPTUM ARBITRII AND TO THE CONTRACT OF MANDATE

1. Obligations of the parties

The contract of mandate is classified into the group of contracts in which the performance required from one party consists in performing specific acts for the benefit of another person³⁰. In this respect, the contracts under analysis show substantial resemblance. The nature of the receptum arbitrii also consists in performing acts for the benefit of another person. However, what is important in the case of the contract of mandate is the type of the acts the mandatary is obliged to perform. Under civil law, the object of the contract of mandate was narrowly specified³¹. The essence of the contract of mandate consists in the mandatary assuming an obligation to perform a specific legal act for the benefit of the mandator. As pointed out in the literature, "the term legal transaction extends to cover not only legal acts within the meaning of substantive civil law, but also procedural acts and acts undertaken in the course of voluntary jurisdiction proceedings."³² However, the scope of the contract of mandate does not cover performance of acts of any other type³³.

30. Cf. Machnikowski P., [in:] Kodeks cywilny..., op. cit., commentary on Article 734 of the Civil Code, quoted after Legalis.

31. Cf. Ogiełło L., [in:] Kodeks cywilny, t. II, Komentarz, K. Pietrzykowski (ed.), Warsaw 2003, p. 363.

32. See Ogiełło L., [in:] System Prawa Prywatnego, t. 7 ... op. cit., p. 437.

33. Cf. Kołakowski K., [in:] Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania, t. 2, G. Bieniek (ed.), Warsaw 2007, p. 405.

The fundamental duty of the mandatary is thus to perform a specific legal transaction for the benefit of the mandator. The possibility of performing this duty is conditional upon the mandatary's authorization to act on behalf of the mandator and upon the permissibility of such legal acts performance on behalf of a third party³⁴. Pursuant to Article 734 § 2 of the Civil Code, unless otherwise agreed upon by the parties in the contract of mandate, such contract contains an authorization to perform a act on behalf of the mandator.

Under the receptum arbitrii, the arbitrator agrees to conduct a proceeding and to render an award resolving the dispute which was submitted to arbitration. Thus, the arbitrator's duty does not consist in performing specific legal acts on behalf of the person who commissioned him to do so, but in undertaking any acts aimed to clarify the nature of the dispute and to resolve the same. The performance of the arbitrator's duties does not consist in making declarations of intent. Meanwhile, in the prevailing type of the contract of mandate, the mandatary is the mandator's attorney, acting on his behalf, and the mandatary's acts have an effect on the mandator's rights. In the event that the mandatary is an indirect representative, he performs the commissioned transaction for the mandator's account while acting in his own name, and subsequently transfers the acquired rights to the mandator who releases him from his obligations³⁵. It should be noted that this solution, if employed with respect to the receptum arbitrii, would be in conflict with the essence

34. Cf. Ogiełło L., [in:] System Prawa Prywatnego, t. 7..., op. cit., p. 446.

35. Cf. Machnikowski P., [in:] Kodeks..., op. cit., commentary on Article 734 of the Civil Code, quoted after Legalis.

of the legal relation and with the fundamental principles of arbitration. As a matter of fact, it would mean that the effects produced by the award rendered in a given case would refer to the legal situation of the arbitrator, and only as a result of a legal act entered into with a party to the dispute would they produce an effect with respect to that party's rights. Although the acts undertaken by the arbitrator produce effects with respect to the rights of the parties to a dispute, the arbitrator does not undertake any legal act, either on his own or on a third party's behalf. It is pointed out in the literature that despite the fact that the scope of objects of the contract of mandate is narrow under Polish law, the phrase "performance of a legal act" should be interpreted in a flexible manner³⁶ and extend to cover also the undertaking of acts aimed at producing effects with respect to the mandator's rights, including the pleading of cases before courts³⁷. However, it should be noted that although the arbitrator's acts have an effect on the legal situation of the parties, such effect takes place independently of their intention. It results from the performance by the arbitrator of his major duty to resolve the dispute between the parties. The grounds for such effect are to be found in the arbitration agreement, the provisions of law and the performance of the obligations provided for in the *receptum arbitrii*, and not in a legal act undertaken by the arbitrator on behalf of either one or both the parties. Such effect will not result from the acts undertaken by a person holding an authorization to represent a given party, but from the resolution of the dispute by independent persons appointed

by the parties to adjudicate the same³⁸. The arbitrator must not be an advocate for either party, which makes it impossible to assume that he might be either party's attorney³⁹. Thus, it should be concluded that with respect to the fundamental duty determining the nature of each of the discussed contracts, these contracts differ substantially.

This is also the case with other duties incorporated into the respective contract types. The first such duty is the obligation of personal performance, which, for the contract of mandate, does not have an absolute nature. Polish law does not prohibit the use of third party assistance in connection with the performance of a contract of mandate⁴⁰ or the entrusting of an order performance to a third party.⁴¹ Pursuant to Article 738 of the Civil Code, the mandatary may entrust the order performance to a third party only when this results from the contract or from custom, or when the mandatary is forced to do so by the circumstances. As regards the *receptum arbitrii*, it is only some administrative activities that may be entrusted to third parties who do not perform the arbitrator's duties.⁴² It is generally assumed that an arbitrator may perform the duties entrusted

38. Obviously, this does not rule out a situation in which the scope of effects specified in the award meets to some extent the expectations of either one or both the parties.

39. Cf. the Judgment of the Supreme Court of 9.1.1935, II C 2194/34, OSN(C) 1935, No. 7, item 289.

40. Cf. Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 738 of the Civil Code, quoted after Legalis.

41. Cf. Ogiełto L., [in:] *System Prawa Prywatnego*, t. 7..., op. cit., p. 446.

42. Cf. Inderkum H.-H., *Der Schiedsrichtervertrag nach dem Recht der nicht internationalen Schiedsgerichtsbarkeit der Schweiz unter Mitberücksichtigung der Schiedsordnung des IPRG*, Freiburg 1989, p. 117.

36. Cf. Ogiełto L., [in:] *Kodeks cywilny*, t. II..., op. cit., p. 364 and the works cited therein.

37. Cf. Czachórski W., Brzozowski A., Safjan M., Skowrońska-Bocian E., *Zarys wykładu*, Warsaw 2003, p. 461.

to him only personally⁴³. The reason for the need to personally perform the duties under the *receptum arbitrii*, including in particular the duty to render an award deciding the dispute on its merits, is said to be the fact that the contractual relation is based on the confidence placed by the parties in the person appointed to perform the arbitrator's duties. Furthermore, the choice of the arbitrator is determined by the intention that, while performing his duties, the arbitrator employ his knowledge both of the field of law and of other fields of science, which knowledge is considered by the parties indispensable to make a correct assessment of the case and a legitimate decision resolving the same.⁴⁴ As a consequence of the principle of personal performance of the arbitrator's duties, it is not possible to transfer the obligation to perform the same to a third party⁴⁵. Thus, in contrast to the contract of mandate, under the *receptum arbitrii* it is not possible and, what should be emphasized, permissible for the arbitrator to entrust the performance of his duties thereunder to a third party. Therefore, it is not possible for the arbitrator's duties to be performed by a representative designated by the arbitrator⁴⁶. It should be noted that incorporation into the *receptum*

arbitrii of provisions corresponding to those of the contract of mandate and stipulating the possibility of entrusting the contract performance to a third party would be in conflict with the nature of the legal relation and in breach of the principle of freedom of contract, and, as such, would be invalid.

One should note at this point that the identification of the difference in the above elements actually itself renders it impossible to classify the *receptum arbitrii* as a contract of mandate. However, it is pointed out in the jurisprudence that the provisions governing the contract of mandate may be applied per analogiam to the contract with the arbitrator.⁴⁷ Therefore, a further comparative analysis of the components of both the contracts is legitimate and necessary, to permit an identification of similarities between those contracts, which can serve as a benchmark for determining the solutions specific to the contract of mandate which might apply to the *receptum arbitrii* per analogiam.

Another duty imposed on the mandatary is the obligation to provide information on the course of the order performance and to submit a report. This obligation is provided for in Article 740 of the Civil Code, pursuant to which the mandatary should provide the mandator with the required information on the course of the order performance and, following completion of the order performance or termination of the contract prior to the expiration of the term thereof, submit a report to the mandator. The above obligation is

43. Cf. Pazdan M., *Umowa stron z arbitrem...*, op. cit., p. 46.

44. Cf. Inderkum H.-H., *Der Schiedsrichtervertrag...*, op. cit., p. 117.

45. Cf. Schwab K.H., Walter G., *Schiedsgerichtsbarkeit...*, op. cit., p. 95.

46. The institution of substitute arbitrator does not constitute an exception to the above rule, as such arbitrator is appointed if the arbitrator appointed a party dies, resigns or is disqualified. Hence, it is only after the expiration of an arbitrator's appointment that a substitute arbitrator may undertake performance of his duties, thus becoming a member of the arbitral tribunal upon the occurrence of the event in case of which he was appointed (cf. Wójcik M.P., [in:] *Kodeks postępowania...*, op. cit., commentary on Article 1171 of the Code of Civil Procedure).

47. Cf. Szumański A., *System Prawa Handlowego*, t. 8. *Arbitraż Handlowy*, A. Szumański (ed.), Warsaw 2010, p. 398; Pazdan M., *Umowa stron...* op. cit., p. 40.

correlated with the obligation to perform an order in line with the mandator's instructions, as stipulated in Article 737 of the Civil Code. It is pointed out in the literature that proper performance of the obligation to keep the mandator informed about the course of the order performance enables the mandator not only to monitor the course of action undertaken by the mandatary, but also to adjust the same by providing instructions⁴⁸. Thus, the above obligation is an essential structural component of the contract. Likewise, it is pointed out with respect to the *receptum arbitrii* that the obligation to keep the parties informed is a material element of the contract⁴⁹. In the case of the *receptum arbitrii*, it refers to issues relating to the stage of the proceeding⁵⁰, including the course the proceeding has taken so far, as well as to the duty to keep the parties informed about the acts planned to be undertaken⁵¹. The scope of the duty to keep the parties informed is limited by the arbitrator's duty of independence⁵². Owing to this fact, the duty to keep the parties informed should be performed towards both parties to a dispute, regardless of their situation and position, that is, to the same extent with respect to each of them. Unlike in the case of the contract of mandate, performance of the duty to keep the parties informed does not constitute an instrument with the use of

which the parties to a dispute can instruct the arbitrator as to the method of performance of the duties entrusted to him, as, while performing his duties, the arbitrator is independent and, as a rule, not bound by the instructions or suggestions made by the parties to a dispute⁵³. As for the obligation to submit a report required under the contract of mandate, it is noted that such obligation arises upon the completion of an order performance or termination of the contract of mandate prior to the expiration of the term thereof, that is, upon the order expiration. Such a report should contain the necessary information on the course of the order performance and a description of the acts performed, and be submitted upon the release of the mandator's documents⁵⁴. In the case of the *receptum arbitrii*, such report is assumed to take the form of bills proving the amount of expenses and a settlement of advance payments, required to be submitted by the arbitrator to the parties following the proceeding completion or expiration of the arbitrator's appointment⁵⁵. It should be pointed out that, in the case of the *receptum arbitrii*, one can hardly talk of an absolute nature of the duty under discussion. Such duty will or will not be in place, depending on the adopted manner of calculating and

48. Cf. Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 740 of the Civil Code, quoted after Legalis.

49. Cf. Inderkum H.-H., *Der Schiedsrichtervertrag...*, op. cit., pp. 54 ff., p. 141.

50. Cf. Münch J., *Münchener Kommentar zur Zivilprozessordnung*, München 2001, p. 1100.

51. Cf. Ereciński T., Weitz K., *Sąd...*, op. cit., p. 215.

52. Cf. Hoffet F., *Rechtliche Beziehungen zwischen Schiedsrichter und Parteien*, Zürich 1991, p. 236.

53. Cf. Voit W., *Kommentar zur Zivilprozessordnung*, H.J. Musielak (ed.), München 2005, p. 2514.

54. Cf. Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 740 of the Civil Code, quoted after Legalis. In addition, such a report should contain a specification of the expenses and revenues incurred and earned in the course of the order performance, along with any evidence thereof, and a settlement of the funds received from the mandator (cf. Ogiegło L., [in:] *Kodeks cywilny, t. II...*, op. cit., p. 370).

55. Cf. Voit W., [in:] *Kommentar...*, op. cit., p. 2514.

disbursing the fees due to the arbitrators⁵⁶. However, one should note that the *receptum arbitrii* may introduce the obligation to provide the parties with information on the current status of the case in the course of the conducted proceeding⁵⁷. Thus, in terms of this aspect of the discussed issue, the contracts under analysis differ substantially in the adopted structural solutions.

Similar comments would hold true for yet another of the mandatary's duties, stipulated in the provisions of the contract, that is, the obligation to follow the mandator's instructions, as provided for in Article 737 of the Civil Code. It is pointed out in the literature that the method of the order performance may be specified either upon the contract execution (original instructions) or in the course of its performance (subsequent instructions)⁵⁸. Instructions made in the contract itself are binding on the mandatary, whereas instructions as to the method of the commissioned acts performance made in the course of the contract performance are binding provided that they do not substantially change

the mandatary's duties. If performance of the mandator's subsequent instructions were to result in the nature of the service being modified, i.e. in the imposition on the mandatary of an obligation to perform an act in addition to or in place of the one set forth in the contract, such instructions are assumed not to be binding on the mandatary⁵⁹. Mandator's instructions can be of a detailed and imperative nature, but they can also be general and optional or demonstrative in nature⁶⁰. Thus, the scope of the mandatary's discretion in performing the obligations imposed on him will depend on how the nature of the instructions is specified in the contract⁶¹. As a consequence of the form which the institution of arbitration and its governing rules have taken, the legal relation established as a result of *receptum arbitrii* execution makes the arbitrator bound by the instructions of the parties, although the extent to which the arbitrator is under obligation to comply with such instructions is significantly limited. The arbitrator is to act not for one of the parties but for both of them⁶². Therefore, as is correctly pointed out, he may be bound exclusively by instructions made jointly by both parties to a dispute⁶³. Given the general duty of the arbitrator to be impartial and independent, it is highly questionable whether instructions, orders, guidelines addressed to the arbitrator by only one party to the arbitration agreement might be treated as statements made by a party to the

56. In the event that the arbitrator's fee is calculated based on the amount of time devoted to the case adjudication (cf. Redfern A., Hunter M., *Law and practice of International Commercial Arbitration*, London 2004, p. 270), the arbitrator is under obligation to submit a report containing a specification of the duties performed, indicating how much time was devoted to their performance. Where the arbitrator's fee is assessed with the use of the flat-rate method, it does not appear necessary to impose on the arbitrator the obligation to submit a report. However, the obligation to submit a report can always be imposed for the purposes of determining the amount of expenses to be reimbursed, obviously provided that this issue has not been settled with the use of the flat-rate method. It would hardly be possible to impose on the arbitrator an obligation to submit a report to the parties, where such obligation gets updated following completion of the duties provided for in the contract and disregards the fee issue.

57. Cf. Ereciński T., Weitz K., *Sąd...*, op. cit., p. 215.

58. Cf. Ogiegło L., [in:] *Kodeks cywilny, t. II...*, op. cit., p. 368.

59. Cf. Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 734 of the Civil Code, quoted after Legalis.

60. Cf. Ogiegło L., [in:] *Kodeks cywilny, t. II...*, op. cit., p. 368.

61. Cf. Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 737 of the Civil Code, quoted after Legalis.

62. Judgment of the Supreme Court, Civil Chamber, dated 9.1.1935, C II 2194/34, *Zb. Orz.* 1935, No. VII, item 289.

63. Cf. Ereciński T., Weitz K., *Sąd...*, op. cit., p. 216.

receptum arbitrii⁶⁴. It seems that, if made, such statements might only give rise to concerns as to the arbitrator's independence. Furthermore, it should be noted that, in the case of the receptum arbitrii, parties' instructions can refer exclusively to issues concerning the proceeding and the procedure to be followed. Instructions of another type, including in particular ones concerning issues directly or indirectly relating to the dispute resolution, if incorporated into the contract or subsequently made, would have to be deemed contrary to the nature of arbitration. Incorporation of such provisions into the receptum arbitrii would render the contract invalid. Such provisions would be in conflict with the nature of the legal relation and the principles based on which the arbitration proceeding has been modelled, especially due to their violating the principle of the arbitrator's independence and impartiality⁶⁵.

The last of the mandatary's essential duties is to release to the mandator everything that was obtained for the mandator's benefit in the course of the order performance. It is against the background of the above duty that the differences in contract structure between the contract of mandate and the receptum arbitrii are most clearly visible. Under the latter contract, the arbitrator does not acquire any rights whatsoever for the benefit of the other party to the contract. Therefore, incorporation of an obligation to that effect into the receptum arbitrii would be not only pointless but also in conflict with the nature of that contract⁶⁶.

2. Rights of the mandatary and of the arbitrator

A comparative analysis of both the contracts in terms of the major duties of the mandatary and of the arbitrator, which serve as the essential structural components of both the contracts, and of the additional duties, which supplement and make the method of the major duties performance more specific, should be supplemented with a comparative analysis of the rights granted to the mandatary and the arbitrator. Although the findings of an analysis of the major duties provided for by each contract alone authorize the conclusion that the contract with the arbitrator is not a contract of mandate, a comparison of the rights of the mandatary and of the arbitrator can also identify similarities between those two contracts and thus make it possible to identify solutions specific to the contract of mandate and referring to the mandatary's rights that might be used to define the rights of the arbitrator.

The literature specifies the following rights of the mandatary: the right to receive remuneration and reimbursement of expenditures and expenses, to be released from the assumed obligations and to receive an advance payment⁶⁷.

As a rule, both the contract of mandate and the receptum arbitrii are contracts for valuable consideration. Thus, in this respect, the contracts are substantially similar. Although pursuant to Article 735 § 1 of the Civil Code, the contract of mandate may stipulate that the order

64. Cf. Hoffet F., *Rechtliche...*, op. cit., p. 230.

65. For a more detailed discussion, see Zawiślak K., *Receptum...* op. cit., p. 269.

66. For a more detailed discussion, see *Ibidem.*, pp. 262 ff.

67. Cf. Ogiegło L., [in:] *System Prawa Prywatnego*, t. 7..., op. cit., pp. 444-446.

will be performed on a free-of-charge basis, in principle, this contract provides for consideration⁶⁸. Unlike in the case of the statutory construct of the contract of mandate, in the case of the *receptum arbitrii*, the Polish legislative authority has not provided for the possibility for the arbitrator's duties to be performed on a free-of-charge basis and, in consequence, for making the *receptum arbitrii* a free-of-charge contract. In light of the provision of Article 1179 of the Code of Civil Procedure, one should assume that, given the legislation in force, consideration is a characteristic feature of the *receptum arbitrii*. Thus, while consideration can be said to be optional in the contract of mandate, it is mandatory in the *receptum arbitrii*.

The right to receive remuneration is a fundamental, but not the exclusive, right of the mandatary and the arbitrator. Another right, corresponding to an obligation imposed on the other party to the contract, is the right to receive reimbursement of expenses. It is present in both the contracts. The obligation to reimburse the mandatary for his expenses is provided for under Article 742 of the Civil Code. It is the consequence of adopting the construct in which the mandatary acts for the mandator's account⁶⁹. This obligation is not conditional upon whether or not the contract is for valuable consideration or whether or not the mandator derived from the performance of the commissioned act the expected benefits⁷⁰. In accordance with the above provision, it is

exclusively expenses incurred in order to duly perform the order that are subject to reimbursement. It is pointed out in the literature that the category of expenses the purpose of which is to ensure proper performance of an order should include expenses without the incurring of which the order would have been impossible to perform, i.e. the necessary expenses, as well as expenses the incurring of which accelerated or facilitated the order performance or increased the likelihood of achieving the transaction effect desired by the mandator, i.e. the expedient expenses⁷¹. As regards the *receptum arbitrii*, given the provision of Article 1179 § 1 of the Code of Civil Procedure, which does not refer to the purpose of the incurred expenses but only requires that the same be related to the arbitrator's performance of his duties, the latter distinction may, if applied by analogy, be of limited and auxiliary nature only when determining what expenses the arbitrators should be reimbursed for. The mandatary's right to receive reimbursement of his expenses incurred in order to duly perform the order is completed by the mandator's duty to release the mandatary from the obligations he incurs to that end on his own behalf. Performance by the mandatary of legal acts for the mandator's account but in the mandatary's name necessitates a subsequent transfer of the acquired rights to the mandator and release of the mandatary from the obligations he assumed. The obligation to release the mandatary from the obligations he assumed, as provided for in the second sentence of Article 742 of the Civil Code, refers not only to the legal position of the indirect representative but also to any and all obligations the mandatary assumes in his

68. Cf. Szczerski J., [in:] *Kodeks cywilny. Komentarz*, Warszawa 1972, t. II, p. 1544.

69. Cf. Ogiełło L., [in:] *Kodeks cywilny*, t. II..., op. cit., p. 372.

70. Cf. Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 734 of the Civil Code, quoted after Legalis.

71. Ibidem, commentary on Article 742 of the Civil Code.

own name in order to duly perform the order, regardless of his legal position within the legal relation established as a result of the execution of the contract of mandate⁷². Performance of the duties provided for in the *receptum arbitrii* does not, as a rule, require the arbitrator to assume any obligations. It is true that adjudication of a dispute between the parties may necessitate the incurring of expenses of a certain type, but it follows from the provision of Article 1179 of the Code of Civil Procedure that any expenses relating to performance of the arbitrator's duties should be reimbursed by the parties. Although it is possible to argue that such reimbursement can be considered equivalent to release from the assumed obligations, it seems that such a construct would have not to differentiate between reimbursement of expenses and release from the assumed obligations. A comparative analysis of Article 1179 § 1 of the Code of Civil Procedure and Article 742 of the Civil Code also argues against this interpretation. The provisions referred to above show much resemblance, as both of them stipulate that the person undertaking to perform specific acts should be reimbursed for the expenses incurred in order to perform the contract. Thus, since the element stipulated in Article 742 in fine of the Civil Code, i.e. the duty to release from the obligations assumed as part of the contract performance, has been omitted from the provision of Article 1179 § 1 of the Code of Civil Procedure, it should be concluded that the legislative authority has ruled such situation out with respect to the *receptum arbitrii*.⁷³ Therefore, the right in

question is specific to the contract of mandate only and is the essential element in which the discussed contracts differ. Adoption for the *receptum arbitrii* of a legal construct as part of which the arbitrator is to assume obligations in his own name in order to duly perform his duties might result in his loss of independence and has thus to be deemed inadmissible.

The mandatary's right to receive an advance payment was explicitly provided for in Article 743 of the Civil Code. It is essentially correlated with the mandator's duty to reimburse the mandatary for the expenses and expenditures incurred in connection with the order performance⁷⁴. Therefore, the duty in question is of autonomous nature in relation to remuneration due in consideration of the order performance, and exists regardless of whether or not the contract provides for consideration⁷⁵. The above provision of law clearly specifies two conditions for the right to receive an advance payment to arise, namely, the necessity to incur the expenses in order to duly perform the order and the relevant request made by the mandatary to the mandator⁷⁶. What is debatable, however, is the possibility of pursuing in court a claim for advance payment to be made by the mandator. Some jurisprudence scholars are in favor of a solution of such type⁷⁷,

74. Cf. Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 743 of the Civil Code, quoted after Legalis.

75. Cf. Ogiegło L., [in:] *System Prawa Prywatnego*, t. 7..., op. cit., p. 446.

76. Cf. Machnikowski P., [in:] *Kodeks cywilny...*, op. cit., commentary on Article 743 of the Civil Code, quoted after Legalis.

77. Cf. Szczerski J., [in:] *Kodeks cywilny. Komentarz*, Warszawa 1972, T. II, p. 1551.

72. Ibidem.

73. For a more detailed discussion, see Zawislak K., *Receptum...* op. cit., p. 273.

while others are against⁷⁸. One should be rather inclined to concur with the view which refuses to recognize the mandatary's right as a claim for advance payment. Given how the conditions for its payment are formulated, it is rather to be considered in terms of performance of the mandator's duty to cooperate with the mandatary⁷⁹.

In the absence of any provisions of law governing the contract with the arbitrator, there are no normative grounds for the arbitrating parties' obligation to make an advance payment to the arbitrators⁸⁰. This refers both to an advance payment against expenses and to an advance payment against the arbitrator's fee.⁸¹ A claim for advance payment may arise in a legal relation holding between the parties to a dispute and the arbitrator if the obligation to pay the same is provided for in the *receptum arbitrii* or results from the applicable rules of arbitration of the competent permanent court of arbitration⁸².

SUMMARY

Summing up, one should conclude that the arbitrator acting in the capacity of a representative of the party who appointed him would be in conflict with the purpose and the fundamental rules of arbitration. The arbitrator must

not be an advocate for either party, which makes it impossible to assume that he might be either party's attorney. Furthermore, the parties to a dispute may not adjudicate such dispute on their own in a binding manner. Therefore, they may not authorize the arbitrator to do so in their name. In addition, the following properties specific to the *receptum arbitrii* support the claim that it should not be classified as a contract of mandate: the requirement to personally perform the duties; the obligation to be independent which, in particular, prohibits the arbitrator from following instructions of either party to the contract, and from representing either party; the principle saying that the arbitrator's obligation is for valuable consideration⁸³.

In conclusion, it should be assumed that the contract with the arbitrator does not qualify as a nominate contract of the type of the contract of mandate and is a construct separate from the same.

78. Cf. Nestorowicz M., [in:] *Kodeks cywilny z komentarzem*, J. Winiarz (ed.), Warsaw 1980, p. 675.

79. For a more detailed discussion, see Zawiański K., *Receptum ... op. cit.*, p. 274.

80. Cf. Pietkiewicz P., [in:] *System Prawa Handlowego*, t. 8. *Arbitraż Handlowy*, A. Szumański (ed.), Warsaw 2010, p. 537.

81. For a more detailed discussion, see Zawiański K., *Receptum ... op. cit.*, pp. 176 ff.

82. Cf. Nestorowicz M., [in:] *Kodeks ... op. cit.*, p. 675.

83. For a more detailed discussion, see Zawiański K., *Receptum ... op. cit.*, p. 315.

DISPUTE ARBITRABILITY AND THE ARBITRATION CLAUSE IN CORPORATE DISPUTES

■ Date of award: 2012
Place of award: Warsaw
Arbitral tribunal composed of: Three arbitrators

EXCERPT FROM THE STATEMENT OF REASONS:

In accordance with § NO.-X of the Statutes of Company XX, any and all corporate disputes are to be resolved by the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan. Acting pursuant to the above provision, the claimant filed against the respondent a statement of claim dated [...], 2012, requesting that Resolution NO.-Y of the Annual General Meeting of XX, dated [...], 2012, on increase in the company's share capital, be declared invalid.

In its statement of defense of [...] 2012, the respondent, acting in accordance with Article 1180 § 2 of the Code of Civil Procedure, made a plea to the jurisdiction of the Court of Arbitration.

The respondent argued that it was not all corporate disputes that might be submitted to the Court of Arbitration for resolution, but only those which were arbitrable. The respondent is of the opinion that disputes involving claims for repealing a general meeting's

resolution or declaring the same invalid are not arbitrable, i.e. they do not have capacity for court settlement. In consequence, they may not be submitted to the Court of Arbitration for resolution.

The arbitral tribunal considering the case at hand does not, as a rule, exclude jurisdiction of the Court of Arbitration over disputes involving the challenging of shareholders' resolutions. Nevertheless, it is of the opinion that this issue needs to be decided in concreto. This is so due to the fact that a decision on this point needs to take account of the measures to protect legal transactions, as provided for in the arbitration agreement. Therefore, the scope and manner of formulation of the arbitration agreement is of special relevance.

§ NO.-X of the Statutes of Company XX reads as follows: "1. Any and all corporate disputes shall be resolved by the Court of Arbitration at the Polish Confederation of Private Employers "Lewiatan." An award rendered by the Court shall be binding upon the Company and its shareholders. 2. Should a resolution of the General Meeting be

challenged by more than one shareholder of the Company, the arbitrator to be jointly appointed by such shareholders shall be selected for them from among those included in the list of arbitrators maintained by the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan by the Nominating Committee of that Court. 3. The provision of Section 2 shall apply accordingly to other corporate disputes in which more than one person acts as the claimant or respondent. 4. The provisions of Sections 1-3 shall apply accordingly wherever the party to a corporate dispute is a member of the Company's authority."

The arbitral tribunal has decided that § NO.-XX of the Company's Statutes does not provide the protection referred to above to a sufficient extent. In the Court's opinion, the minimum standard of such protection in the case of challenging shareholders' resolutions would require that the arbitration clause incorporated into the statutes provide for an obligation to notify all shareholders of the proceedings under way, in order to enable each shareholder to join the dispute.

Furthermore, the Court is of the opinion that, as part of the procedure set forth in the statutes, each shareholder should be notified of the institution and course of a proceeding. In such a case, disputes involving the challenging of resolutions could be dealt with jointly by a single arbitral tribunal. Persons authorized to challenge resolutions may decide not to join or institute such proceedings, but such an option should be expressly provided for in the arbitration clause. The purpose of appropriately formulated provisions of the arbitration clause is to prevent the state of uncertainty to

the shareholders, the authorities and other parties to transactions.

Owing to the fact that the conditions referred to above have not been satisfied, the Court has decided that it lacks jurisdiction over the case at hand.

Acting pursuant to Article 1180 §§ 2 and 3 of the Code of Civil Procedure and § 20.3 of the Rules of the Court of Arbitration at the Polish Confederation of Private Employers "Lewiatan," the Court has decided at a closed session to reject the statement of claim.

Commentary

■ Rafał Kos

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Both the summary of the ruling and the statement of reasons deserve thorough criticism. The Arbitral Tribunal's view that the arbitrability of disputes involving claims for declaring a resolution of a commercial company (in this case, a joint-stock company) invalid is conditional on circumstances which invariably require to be assessed in concreto, is clearly incorrect.

Such an assessment is always made in abstract terms, based exclusively on the statutory criteria, and not the facts relating to a specific arbitration agreement. A decision as to whether or not a corporate dispute¹ is arbitrable must always be made with reference to a category of the law or a category of the legal relation, and not the specific categories of the claims (or other "fractional" rights) resulting

from the same². Dispute arbitrability refers to specific legal relations perceived in abstract terms, and not to claims resulting from such relations (i.e. claims for performance, claims for determining or formulating a legal relation or right, which is the category of claims containing the claim for declaring a resolution of the company's general meeting invalid)³.

Contrary to the view expressed by the Arbitral Tribunal, dispute arbitrability has nothing to do with the issue of "the measures to protect legal transactions, as provided for in the arbitration agreement," which allegedly needs to be reflected in "the scope and manner of the formulation of the arbitration agreement."

1. According to the prevailing view, a corporate dispute is a conflict between the shareholders themselves, between the shareholders and the company, the company and its authorities or individual members of such authorities, or the company and persons who inflicted damage on the company in connection with their membership thereof (see Suliński G. [in:] *Dopuszczalność poddania sporu ze stosunku spółki pod rozstrzygnięcie sądu polubownego*, PPH 2005, No. 12, p. 29; see also Szumański A. [in:] *Zakres podmiotowy zapisu na sąd polubowny w sporze ze stosunku spółki kapitałowej ze szczególnym uwzględnieniem sporu powstałego na tle rozporządzania prawami udziałowymi*, Księga Pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu, p. 228).

2. See the decision of the Court of Appeal in Gdańsk, dated 29.03.2010, I ACz 277/10, <http://arbitraz.laszczuk.pl/orzecznictwo/344>. This decision deserves special attention, as it had correctly explained the need for a verification of arbitrability of a specific category of disputes in abstract terms, in isolation from the object of dispute in a specific proceeding, before the Supreme Court did so in an authoritative manner in its Resolution of September 23, 2010, III CZP 57/10, <http://arbitraz.laszczuk.pl/orzecznictwo/337>; this was also the position clearly taken by the Supreme Court in its Decision of June 18, 2010, V CSK 434/09, <http://arbitraz.laszczuk.pl/orzecznictwo/338>, and in its Decision of May 21, 2010, II CSK 670/09, <http://arbitraz.laszczuk.pl/orzecznictwo/337>.

3. The specific claims resulting from the relations holding between the company and its shareholders, such as the claim for declaring a resolution of the company's general meeting invalid, are not provided for in an arbitration agreement; see the decision of the Supreme Court of 18.06.2010, V CSK 434/09, <http://arbitraz.laszczuk.pl/orzecznictwo/338>.

The “security of legal transactions” is guarded by the mandatory provisions of substantive and procedural law. Parties entering into an agreement of any type, including an agreement on submission to arbitration of a dispute resulting from a specific legal relation (i.e. an arbitration agreement), are under obligation to formulate such a legal relation so that it will not be in conflict with those rules. This requirement is certainly satisfied wherever the articles of association of a commercial company contain a clause which is clearly consistent with the provision of Article 1163 of the Code of Civil Procedure. However, no provision of Part V of the Code of Civil Procedure contains an affirmative obligation to supplement a clause consistent with the provision of Article 1163 of the Code of Civil Procedure with any additional stipulations, including ones concerned with the rules of procedure before a court of arbitration in the event a corporate dispute arises. Neither does it follow from any provision of law that the absence of contractual rules of procedure before a court of arbitration is to result in the arbitration agreement being invalid or unenforceable (in full or in part).

The Arbitral Tribunal is also wrong when holding that the arbitrability of a resolution-involving dispute depends on whether or not the shareholders guaranteed the minimum standard of protection of “legal transactions” in the articles of association in the event a company resolution is challenged, and in particular on whether or not they included the obligation to notify all shareholders of a proceeding under way (in order to enable each shareholder to join the dispute) in the arbitration clause incorporated into the articles of associations.

Firstly, although the rules governing the proceedings before a court of arbitration are left to the parties to the underlying relation to decide, if the parties remain “silent” on this point, then it is the arbitrators (!) who are authorized to supply such rules⁴ (Article 1184 §2 of the Code of Civil Procedure).

It is the arbitrators who are, in such circumstances, under obligation to conduct the arbitration proceedings in a manner ensuring that the award they render will have entered legal transactions after being reviewed in the course of the recognition and enforcement procedure (Articles 1212 et seq. of the Code of Civil Procedure). And it is the arbitrators who are obliged to render their award in proceedings conducted in a manner ensuring that all parties were duly notified of the arbitrator’s appointment and of the institution of the proceedings before the court of arbitration. And it is also the arbitrators who are under obligation to render their award in proceedings conducted in a manner ensuring that all parties to the disputed legal relation are offered an opportunity to defend their rights (Article 1206 §1.2 of the Code of Civil Procedure). Finally, it is also the arbitrators who are under obligation to render their award in proceedings conducted in a manner ensuring that the requirements as to the composition of the arbitral tribunal are satisfied and that the fundamental rules of procedure before such tribunal, as resulting from the law or as agreed upon between the parties (Article 1206 §1.4 of the Code of

4. This refers to ad hoc arbitral tribunals. Permanent courts of arbitration have their own rules governing the proceedings they conduct in place, the rules of which are accepted by the parties through specifying a given permanent court of arbitration as the court competent to decide a specific dispute.

Civil Procedure), are complied with. It should be pointed out once more that the parties' silence about the rules to govern the proceedings before a court of arbitration does not release the court of arbitration from the obligation to conduct the proceeding in accordance with the provisions of Part V of the Code of Civil Procedure⁵, which also holds true for a dispute which might potentially involve a number of entities.

Secondly, it is certainly desirable that shareholders, acting in their own interest, regulate the issues ensuring that all of them are notified of the institution of proceedings for the declaration of a resolution's invalidity and have a chance to participate in such proceeding in the capacity of a party or an intervenor. They may do so in the statutes or in a separate agreement, or by reference to the rules of a permanent court of arbitration which contains such comprehensive regulations. If they do so, they are not in danger of facing a situation such as the one we deal with in the proceedings in question, namely, a situation in which the court of arbitration evades its obligation to formulate the rules of procedure, such that, in the absence of the relevant regulation by the parties, will guarantee the right to participate in the proceeding for declaring a company's resolution invalid to all parties to the relations between the company and its shareholders. However, the absence of such

regulation has nothing to do with the arbitrability of the resolution-involving dispute (i.e. a corporate dispute within the meaning of Article 1163 of the Code of Civil Procedure) considered in abstract terms. The absence of contractual rules which guarantee each shareholder's right to participate in an arbitration proceedings for the declaration of a resolution's invalidity gives rise to the risk that such rules will not be handled by the arbitrators. However, if the arbitrators indeed fail to ensure that all the shareholders participate in the proceedings for the declaration of a resolution's invalidity⁶, the award they render will not enter into the public domain, as equal to the award issued by public courts. The need to guarantee each shareholder's right to participate in the proceedings on equal terms (Article 1183 of the Code of Civil Procedure) results from the fact that an award rendered by a court of arbitration in proceedings for the declaration of a resolution's invalidity may affect the shareholders' rights attached to the shares, due to the broadened scope of the entities affected by an award invalidating a resolution (Articles 254 and 427 of the Code of Commercial Companies). Thus, the arbitrators' failure to comply with the above obligation exposes the award they render to the risk of either being set aside as a result of a petition to that effect (Article 1206 §1 Sections 2 and 4 of the Code of Civil Procedure) or refused recognition on the grounds of a breach of the public policy clause (Article 1214 §3.2 of the Code of Civil Procedure).

5. The provision of the second sentence of Article 1184 §2 of the Code of Civil Procedure, to the effect that the arbitral tribunal is not bound by the provisions governing the civil procedure, obviously does not refer to the mandatory provisions contained in Part V of that Code, as the Supreme Court rightly held in its judgment of 3.6.1990, I CR 120/87, OSN 1988 No. 12, Item 174, and as concurred with in the gloss by Dalka S., Pal. 1990, Nos. 2-3, p. 76, and the gloss by Tomaszewski M., PiP 1989, No. 7, p. 147.

6. It is essential that the shareholders be notified of the proceeding under way and guaranteed an opportunity to participate in the same.

It should be noted in this connection that the risk of proceedings for the declaration of a resolution's invalidity being conducted in breach of the shareholders' rights (regardless of the reason for such breach) has nothing to do with whether or not the resolution-involving dispute is arbitrable. By the same token, the capacity of a case for adjudication by a civil court (and thus the question of whether or not it has the nature of a civil case) is not determined by whether or not specific rules of procedure towards the parties are complied with in given proceedings. This issue is determined solely by whether or not the case fulfills the statutory criteria specified in abstract terms in the definition of a civil case contained in Article 1 of the Code of Civil Procedure. The same holds true for an "arbitral case," i.e. whether or not a case is arbitrable, is determined exclusively based on the criteria specified in abstract terms in Article 1157 of the Code of Civil Procedure. And, undoubtedly, the resolution-involving dispute satisfies those criteria⁷.

Finally, it is totally incomprehensible why the Arbitral Tribunal decided that the procedure stipulated in the company's statutes for notifying each shareholder of the institution and course of the proceedings would offer a chance of disputes involving the challenging of resolutions being dealt with jointly by a single arbitral tribunal, and would thus "prevent the state of uncertainty to the shareholders, the authorities and other parties to the transactions."

7. For a more detailed discussion, see Kos R., *Zdatność arbitrażowa sporów o ważność uchwał spółek kapitałowych*, PPH 2014, No. 3, pp. 28 ff.

This issue too has nothing to do with the arbitrability of resolution-involving disputes⁸. *Nota bene*, there are no rules governing the arbitration proceeding that would compel consolidation of proceedings in order to "prevent the state of [legal] uncertainty." What is more, no requirement to that effect is stipulated under the law (in the Code of Commercial Companies or the Code of Civil Procedure) in relation to the procedures for the declaration of the invalidity of a single resolution by the various entities having the right of action in this respect, and not even in the case such entities refer to a single reason for the resolution's defectiveness (!). Therefore, it is hard to understand why the Arbitral Tribunal considered this issue at all relevant. One can only surmise that this opinion was inspired by the view expressed based on German law by the German Federal Court of Justice (BGH)⁹, which deemed consolidation to constitute a condition for arbitrability of resolution-involving disputes. However, such an inspiration is obviously illegitimate, as, unlike the Polish law, the German law formulates such requirements with respect to resolution-involving disputes in an explicit manner¹⁰.

8. The issue under discussion relates to the concept of what A. W. Wiśniewski calls "conditional" arbitrability under the "model of extension of arbitration agreement" or the "model of extension of jurisdiction"; for a more detailed discussion, see Wiśniewski A. W., *Rozstrzyganie sporów korporacyjnych przez sądy polubowne w świetle nowej regulacji zdatności arbitrażowej sporów* [in:] P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*, Warsaw 2008, p. 273.

9. See the judgment of the BGH dated 06.04.2009, II ZR 255/08 (the so-called "BGH II").

10. See the first sentence of § 249.2 of the German Stock Corporation Act (*Aktiengesetz*).

As a side note, it is worth bearing in mind that all corporate disputes in a commercial company are arbitrable. Any dispute involving the protection of a right attached to a share in a company is actually invariably, regardless of the power exercised and the resultant type of the legal remedies requested (whether a claim for performance or a claim for determining or formulating a legal relation or right, and thus, for instance, a claim for declaring a resolution invalid), a dispute involving a property right of which shareholders may dispose¹¹.

Since shareholders are free to formulate the articles of association of a commercial company they execute¹² (obviously, within the limits set by the mandatory provisions of the law applicable to the specific types of companies), they may decide, by undertaking legal transactions to that effect¹³, to establish the relations holding between the company and themselves, modify or terminate the same.

11. As regards the submission of disputes to arbitration, any exceptions should, especially if referring to cases involving property rights, be specified explicitly under the law or justified with reasons of material importance. Any doubts in this respect should be construed in favor of a dispute's arbitrability; see the decision of the Court of Appeal in Gdańsk, dated March 29, 2010, I ACz 277/10, <http://arbitraz.laszczuk.pl/orzecznictwo/344>

12. It is worth noting at this point that some jurisprudence authors are of the opinion that the legal effect sought under a claim for declaring a general meeting's resolution invalid may not be achieved on the basis of the parties' intention alone and without a common court's judgment; see Ereciński T., Weitz K., [in:] *Sąd arbitrażowy*, Warsaw 2008, p. 122. In turn, M. Tomaszewski assumes that two mechanisms exist for rendering an applicable resolution invalid, i.e. the resolution may either be repealed under a new resolution adopted by the shareholders of a commercial company or appealed against to a state court, as a result of which a final and unappealable judgment will be obtained, declaring such resolution invalid; for a more detailed discussion, see Tomaszewski M., *O zaskarżaniu uchwał korporacyjnych do sądu polubownego - de lege ferenda*, *Przegląd Sądowy* 2012.

13. Certainly, within the limits set by the freedom of contract provided for in Article 3531 of the Civil Code.

Considered in abstract terms and in isolation from a specific context, such relations may always be the object of a court settlement¹⁴, hence disputes resulting therefrom are arbitrable¹⁵. Therefore, the respondent company's argument alleging that resolution-involving disputes do not have the capacity for settlement and are thus not arbitrable, is totally illegitimate. Although the Arbitral Tribunal disregarded this argument in the statement of reasons to its award, its critical analysis at this point is fully authorized.

The conclusion that all corporate disputes in a commercial company are arbitrable follows from no other fact but the one that all disputes of such type have a capacity for settlement¹⁶. As a matter of fact, parties to the relations holding between the company and its shareholders may (in theory) settle any dispute, including a claim for declaring a resolution invalid, as part of their autonomy to decide or through an amendment to the articles of association or the adoption of a relevant resolution which is the opposite of the one previously adopted.

14. After all, it is beyond doubt that a substantive law settlement may be entered into not only in a dispute involving the validity of a legal transaction, but also in a dispute involving a legal relation which actually does not exist between the parties; see judgment of the Supreme Court, dated June 24, 1974, III CRN 110/74, *OSPİKA* 1975/4/98; Szpunar A., [in:] *Ugoda w prawie cywilnym*, *Przegląd Sądowy*, 1995, No. 9, pp. 5 – 6.

15. Which obviously does not mean that, in concreto, the parties may execute any settlement whatsoever.

16. There are no special provisions in place to preclude settlement admissibility in the case of a resolution-involving dispute; see Uliasz R., *Zdolność arbitrażowa sporów wynikłych z zaskarżania uchwał zgromadzeń spółek kapitałowych*, [in:] *Arbitraż i mediacja jako instrumenty wspierania przedsiębiorczości*, "Ius at Administratio" *Zeszyt Specjalny*, Rzeszów 2006, p. 203.

The purpose of arbitration proceedings between the parties to a dispute involving a right resulting from the relations holding between the company and its shareholders is only for a shareholder to “force” the exercise of a specific right, the exercise of which might be procured by such a shareholder within the parties’ autonomy to decide (limited exclusively by the company type), should the remaining shareholders consent thereto and agree to cooperate¹⁷. The arbitral award (or the common court’s award) sought by the shareholder-claimant/plaintiff who aims to have the right attached to his share enforced compulsorily, is to actually “operate in place of” statements by the other shareholders who might make the same by amending the articles of association or by voting unanimously at a shareholders’ meeting, but refuse to do so.

Thus, corporate disputes are not disputes over which the state wishes to retain its jurisdictional monopoly¹⁸. Should the state wish so, the legal effects sought to protect a right attached to a share in a commercial company might not be obtained by way of either an agreement of the parties or their mutual cooperation within the company’s authorities (the shareholders’ meeting in a limited liability company or the general meeting in a joint-stock company). Ergo, an arbitral tribunal, “commissioned” by the intention of the parties, could not procure such effects under its award

either¹⁹. Thus, since shareholders are free to dispose of their property right by executing a relevant settlement which results in specific conventional acts being undertaken with a view to ending a resolution-involving dispute, they are all the more authorized to submit their dispute to arbitration. And it is for this reason that the arbitrability of corporate disputes should not raise any concerns whatsoever.

17. For a more detailed discussion, see the resolution of the Supreme Court, dated September 23, 2010, III CZP 57/10, <http://arbitraz.laszczuk.pl/orzecznictwo/337>.

18. That is, a monopoly of common courts to adjudicate, as is the case, for instance, with alimony cases.

19. See the decision of the Supreme Court, dated 21.05.2010, II CSK 670/09, “Biuletyn SN” 2010, No. 7, p. 11, <http://arbitraz.laszczuk.pl/orzecznictwo/337>.

Bankruptcy and dispute arbitrability

■ Date of award: 2013
 Place of award: Warsaw
 Arbitral tribunal composed of: Three arbitrators

EXCERPT FROM THE STATEMENT OF REASONS:

In its Statement of Claim dated [...], 2013, the Claimant requested adjudication from the Respondent company in favor of the Claimant of the amount of PLN [...], along with statutory interest accrued as of [...], 2011 until the payment date, as well as reimbursement of the cost of arbitration, including the cost of representation in the arbitration proceeding (the "Statement of Claim").

In the Statement of Claim, the Claimant argued that the jurisdiction of the Court of Arbitration at the Polish Confederation Lewiatan followed from the arbitration clause contained in § X of the Agreement entered into in 2010 by the Supplier with the Respondent. Concurrently, the Claimant stated that it acquired, under an agreement on assignment of receivables, dated [...], 2012 (the "Assignment Agreement"), and an annex thereto, dated [...], 2012, from the Official Receiver of the Supplier's Bankruptcy Estate (the "Official Receiver") a receivable of the Supplier from the Respondent, in the total amount of PLN [...]. The Claimant also referred to the fact that the District Court in P. declared

liquidation bankruptcy of the Supplier under its decision of [...], 2011, docket No. [...]. [...]

In the course of the teleconference held on [...], 2013, the parties' attorneys mutually represented that the parties did not raise any objections as to jurisdiction of the Court of Arbitration, including the validity of the arbitration clause.

Acting pursuant to the provision of Article 147 of the Act of February 28, 2003 – Bankruptcy and Rehabilitation Law (Dz. U. [Journal of Laws] of 2012, Item 1112, as amended, hereinafter referred to as the "Bankruptcy Law"), during the hearing held on [...], 2013, the Arbitral Tribunal set a time limit for the parties to provide a statement on submission of the dispute specified in the Statement of Claim to the jurisdiction of the Court of Arbitration at the Polish Confederation Lewiatan, in line with the statement made at the hearing. The Respondent signed the statement referred to above and submitted the same to the Court of Arbitration along with the cover letter of [...], 2013. In his e-mail message of [...], 2013, the Claimant's attorney said that the Claimant refused to sign the above statement. Furthermore, in its pleading of [...], 2013, the Claimant challenged

jurisdiction of the Court of Arbitration, concurrently arguing that its attorney ad litem representing it in this case was not authorized to make on the Claimant's behalf any statements with respect to the arbitration agreement.

In view of the foregoing, the Arbitral Tribunal has resolved as follows:

Pursuant to Article 147 of the Bankruptcy Law, "An arbitration agreement executed by the bankrupt shall expire as of the date of declaration of bankruptcy, and any proceedings already under way shall be discontinued."

This means that, as of [...], 2011 (the day on which the Supplier was declared bankrupt), and thus prior to the assignment of the Supplier's receivables from the Respondent made under the Assignment Agreement between the Claimant and the Official Receiver, the arbitration clause contained in § [...] of the agreement executed in 2010 between the Supplier and the Respondent, expired pursuant to Article 147 of the Bankruptcy Law. In other words, in its Statement of Claim, the Claimant directly specified, as the basis for jurisdiction of the Court of Arbitration at the Polish Confederation Lewiatan, an arbitration agreement which was invalid upon the filing of the statement of claim (as it had previously expired).

Bearing the foregoing in mind, the Arbitral Tribunal is of the opinion that the Court of Arbitration at the Polish Confederation Lewiatan is not competent to adjudicate the dispute submitted to it directly under an arbitration agreement which expired by virtue of the law. Therefore, pursuant to § 20.1 of the Rules of

the Court, as in force since February 15, 2005, the Statement of Claim shall be rejected.

Concurrently, the Arbitral Tribunal fully shares the Respondent's view that competence of the Court of Arbitration at the Polish Confederation Lewiatan may result from the procedural acts undertaken by the parties, especially if the claimant files a statement of claim and the respondent fails to raise by the prescribed time limit the plea to the effect that there is no arbitration agreement in place. In such a case, jurisdiction of the Court of Arbitration may follow from § 2.1 of the Rules of the Court of Arbitration, as in force since February 15, 2005, pursuant to which "The Court of Arbitration shall have jurisdiction to resolve disputes under a valid arbitration agreement between the parties (arbitration clause) or if the defendant has not raised the plea of the Court's lack of jurisdiction in due time." Thus, the Arbitral Tribunal concurs, in principle, with the position taken by the Court of Appeal in Warsaw in its judgment of August 23, 2012, docket No. I ACa 46/11, according to which the submission of a dispute to an arbitral tribunal for resolution is a form of the parties' instruction as to the method of pursuit of claims, and the parties may procure resolution of the dispute by the arbitral tribunal by the claimant instituting proceedings before that tribunal and the respondent refraining from raising a jurisdictional plea and engaging in the dispute on the merits.

However, the Court of Arbitration is of the opinion that what we deal with in the case at hand is not a voluntary submission of a dispute to arbitration by the Claimant and the absence of the relevant plea by the Respondent, but

submission of a dispute for resolution by the Court of Arbitration on the basis of a specific arbitration clause which has expired. The Arbitral Tribunal has decided that the statements made by the parties' attorneys in the course of the teleconference held on [...], 2013, to the effect that they do not challenge the competence of the Court of Arbitration, including the arbitration clause validity, are not sufficient. In the Arbitral Tribunal's opinion, both parties to the proceeding referred to the arbitration clause contained in § [..] of the Agreement of 2010, and thus to an arbitration clause which had previously expired. By making the statements referred to above, the parties could not validate a clause which had expired by operation of common provisions of law. The parties could have entered into a new arbitration agreement. However, the Claimant refused to sign the statement on submission of the dispute specified in the Statement of Claim for resolution by the Court of Arbitration, the draft of which was submitted to the parties by the Arbitral Tribunal in the course of the hearing held on [...], 2013.

The lack of jurisdiction over the dispute in question does not result from the failure to comply with the required form of the arbitration agreement, but from the absence of a mutual intention of the parties to submit the dispute to arbitration. One should refer at this point to the provision of Article 7 of the 1985 UNCITRAL Model Law on International Commercial Arbitration which, although not directly applicable in the case at hand, may provide some point of reference with respect to the rules of interpretation, as the wording of the provision of § 2.1 of the Rules of the Court of Arbitration at the Polish Confederation

Lewiatan, as in force since February 15, 2005, has a similar wording. Within the meaning of Article 7 of the UNCITRAL Model Law, the issue of an arbitration agreement validity may be examined only if the mutual intention of the parties to submit a dispute to arbitration is not challenged (cf. Explanatory Note No. 19 on the UNCITRAL Model Law, prepared by the UNCITRAL Secretariat, available on UNCITRAL's official website at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf, and Binder P., *International Commercial Arbitration In UNCITRAL Model Law Jurisdictions*, Sweet & Maxwell, 2000, p. 59.). In the case at hand, there is no mutual intention of the parties to submit the dispute to the Court of Arbitration for resolution. Although such consent of the Supplier and the Respondent had existed and been expressed in § [..] of agreement No. [...], dated [...], 2010, there is no such consent in place between the Claimant and the Respondent due to the fact that the above clause expired.

Addressing the issue of the Claimant's attorney's authorization to execute a valid arbitration agreement on the Claimant's behalf, the Arbitral Tribunal endorses the view expressed on this point in the jurisprudence, according to which a power of attorney *ad litem* does not authorize its holder to execute an arbitration agreement (cf. T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*, LexisNexis, 4th ed., 2012, p. 732; A. Szymański (ed.), *System Prawa Handlowego. Tom 8. Arbitraż handlowy*, C.H. Beck, Warsaw 2010, p. 317). In consequence, the Arbitral Tribunal is of the opinion that the filing of the Statement of Claim

by the Claimant's attorney could not be deemed to constitute an expression of the Claimant's intention to execute a separate arbitration agreement with the Respondent.

Furthermore, it should be pointed out that pursuant to Article 1206 § 1.1 of the Act of November 17, 1964 – Code of Civil Procedure (Dz. U. [Journal of Laws] of 1964 No. 43, Item 296, as amended, hereinafter referred to as "CCP"), expiration of the arbitration agreement under the law applicable to it serves as a ground for setting aside the arbitral award. An analysis of the above provision in the context of the provisions of Article 1206 § 1.3 CCP and Article 1193 CCP leads to the conclusion that a common court may set aside an arbitral award rendered on the basis of an arbitration clause which expired also in the event that a party failed to make a plea to the jurisdiction by the prescribed time limit in the course of the arbitration proceeding. The failure to make the plea by the prescribed time limit in the course of the arbitration proceeding results in the loss of the right to file a petition to set aside an arbitral award on two grounds, i.e. (i) due to the fact that the award deals with matters beyond the scope of the arbitration agreement (Article 1206 § 1.3 CCP); and (ii) due to non-compliance with the provisions of Part Five CCP from which the parties may derogate, or any of the rules of procedure before the arbitral tribunal, as agreed upon by the parties (Article 1193 CCP) (see also the discussion of admissibility of invoking the absence or invalidity of the arbitration agreement in the event of a prior failure to make or delay in making the relevant plea in the course of the arbitration proceeding: Łaszczyk M., Szpara J. [in:] A. Szumański (ed.), *System*

Prawa Handlowego, Tom 8, *Arbitraż Handlowy*, C.H. Beck, Warsaw 2010, pp. 592-593).

Having determined the lack of jurisdiction of the Court of Arbitration at the Polish Confederation Lewiatan to resolve the dispute specified in the Statement of Claim, the Court of Arbitration decided to reject the Statement of Claim pursuant to § 20.1 of the Rules of the Court, as in force since February 15, 2005.

The Arbitral Tribunal acknowledges that the institution, conduct and interruption (due to the Claimant's refusal to sign the statement on submission of the dispute specified in the Statement of Claim to the Court of Arbitration for resolution) of the proceeding in this case resulted directly from the initiative and acts of the Claimant. Therefore, the Arbitral Tribunal is of the opinion that the Claimant's acts necessitated the undertaking of defense by the Respondent, including the retaining of a professional attorney *ad litem* to defend the Respondent's legitimate interests. In view of the fact that the Respondent requested reimbursement of the cost of representation in the arbitration proceeding at the prescribed rates, and taking into consideration the amount of work performed by the Respondent's attorneys, as well as the fact that the proceeding to take evidence was completed at the Claimant's request, the Court of Arbitration has deemed it legitimate to adjudicate from the Claimant in favor of the Respondent the costs of representation in the arbitration proceeding in the amount of [...], pursuant to § 56 in connection with § 59 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan, as in force since February 15, 2005. [...]

Commentary

■ Dr. Marcin Dziurda

Linklaters C. Wiśniewski i Wspólnicy sp. k.

INTRODUCTION

The award to which this gloss refers deserves attention for at least two reasons. Firstly, it was rendered based on a very interesting set of facts. Secondly, it incorporates a number of important legal positions adopted by the arbitral tribunal. Not only are these interesting from the theoretical point of view, but they are also of relevance for the practice of arbitration.

In this gloss, I will focus on three issues. The first one is the consequences of filing a statement of claim with a court of arbitration pursuant to an arbitration agreement which expired *ex lege*. My second focus will be on the necessary requirements to be complied with in order to submit a dispute to arbitration when a respondent does not make a plea to the jurisdiction. Lastly, the third discussed issue will be the admissibility of a ruling on the costs of arbitration in a case in which there was no valid arbitration agreement.

THE CONSEQUENCES OF THE EXPIRATION OF AN ARBITRATION AGREEMENT

It is a well-known fact that an arbitration agreement concluded by a party expires as a result of declaration of that party's

bankruptcy¹, and that the arbitration proceedings already under way are subject to discontinuation. In case of a declaration of bankruptcy involving liquidation of the bankrupt's assets, this takes place by operation of the provision of Article 147, and in the case of declaration of bankruptcy with a settlement option – pursuant to Article 142 of the Act of February 28, 2003 – Bankruptcy and Rehabilitation Law². Thus, what we have here is a situation which is in a sense the opposite of the situation provided for in Article 1180 § 1 in fine of the Code of Civil Procedure, pursuant to which invalidity or expiration of the underlying contract in which the arbitration agreement was inserted does not by itself render the arbitration agreement invalid or make it expire.

This means, in the first place, that if an action is brought in a common court following the declaration of bankruptcy, the defendant may not make an effective plea of arbitration agreement, hence this may not serve as

1. There are views expressed in the literature according to which the arbitration agreement becomes invalid for the time of the bankruptcy procedure only; see Hrycaj A., Wpływ postępowania upadłościowego na wszczynanie i dalsze prowadzenie postępowań cywilnych, *Czasopismo Kwartalne Całego Prawa Handlowego, Upadłościowego oraz Rynku Kapitałowego* 2008, No. 2, p. 212; Kruczałak-Jankowska J., Wpływ ogłoszenia upadłości na zapis na sąd polubowny, *Gdańskie Studia Prawnicze* 2001, T. XXVI, p. 132.

2. Dz.U. [Journal of Laws] of 2012, Item 1112, as amended.

a ground for rejecting the action.³ What is more, if, after declaration of a party's bankruptcy, an arbitration proceeding were conducted on the basis of a previously executed arbitration agreement and ended in an award rendered by the arbitral tribunal, such an award could be set aside pursuant to Article 1206 § 1.1 of the Code of Civil Procedure.⁴ In accordance with the above mentioned provision, a party may request that an arbitral award be set aside, *inter alia*, if the arbitration agreement expired.⁵

The sequence of events in the case under discussion was the following: in 2011, liquidation bankruptcy was declared with respect to one of the parties to an agreement of 2010, containing an arbitration clause. In 2012, the official receiver assigned the receivables under the above agreement to a third party. In 2013, the party who acquired the receivables filed a claim for the payment of the same with the Court of Arbitration at the Polish Confederation Lewiatan, referring to the arbitration clause incorporated into the agreement of 2010.

Thus, before the arbitration proceeding was instituted, the arbitration clause had expired pursuant to Article 147 of the Bankruptcy and Rehabilitation Law. This effect could not have been changed by the assignment of receivables made after the original creditor had been declared bankrupt. In such circumstances, the arbitral tribunal of the Court of Arbitration was right to assume that the statements made by the

parties' attorneys in the course of the proceeding (in the course of a teleconference), to the effect that they did not object to the jurisdiction of the Court of Arbitration, including to the "validity" of the arbitration clause, were insufficient.

One should fully endorse the view expressed in the award to the effect that "the parties could not validate a clause [i.e. the arbitration clause] which had expired by operation of common provisions of law." That is because no statements by the parties may exclude the effect of expiration of an arbitration agreement as a result of declaration of bankruptcy, which follows from Articles 142 and 147 of the Bankruptcy and Rehabilitation Law.

ISSUES RELATING TO THE CONCLUSION OF A NEW ARBITRATION AGREEMENT

The tribunal also considered the possibility of concluding an arbitration agreement on the basis of § 2.1 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan⁶. Pursuant to this provision, the Court of Arbitration has jurisdiction to resolve disputes not only under a valid arbitration agreement (arbitration clause) between the parties, but also if "the respondent has not raised the plea of the Court's lack of jurisdiction in due time."

On the side note, one should point out that, given the facts of the case, the arbitral tribunal did not consider what procedure was available to the official receiver following the expiration of the arbitration clause pursuant to

3. Decision of the Supreme Court, dated March 25, 2009, V CSK 390/08, LEX No. 508817.

4. Decision of the Supreme Court, dated September 23, 2009, I CSK 121/09, LEX No. 527140.

5. Jakubecki A. [in:] Jakubecki A., Zedler F., Prawo upadłościowe i naprawcze. Komentarz, 3rd ed., LEX 2011, proposition 2 under Article 142.

6. Rules of the Lewiatan Court of Arbitration from 15 February 2005.

Article 147 of the Bankruptcy and Rehabilitation Law to execute a new arbitration agreement applicable to disputes involving claims for receivables against the bankruptcy estate.

It is pointed out by the scholars that “the accomplishment of the goals of a bankruptcy procedure requires that the dispute to which the bankrupt is a party be resolved in strict adherence to the letter of the substantive law, taking into account all requirements resulting from the rules of civil procedure (...). On the contrary, arbitration proceedings are characterized by a considerable flexibility which is not desirable when one of the parties is declared bankrupt. Dispute resolution on the basis of the rules of equity may also be admissible (see Article 1194 § 1 of the Code of Civil Procedure). Due to the reasons specified above, the provision commented upon stipulates expiration of the arbitration agreement.”⁷

As a matter of fact, pursuant to Article 206.1.6 of the Bankruptcy and Rehabilitation Law, an official receiver may submit a dispute to arbitration after declaration of bankruptcy. However, this requires consent of the board of creditors.

In the case at hand, however, the claimant was not the official receiver but an entity which had acquired the disputed receivables from the official receiver. Thus the claimant (and the respondent alike) was not bankrupt. Therefore, the arbitral tribunal could focus on other issues relating to the alleged conclusion of an arbitration agreement in the course of the arbitration proceeding.

The arbitral tribunal took notice of the fact that the claimant's attorney, who had filed the statement of claim with the Court of Arbitration despite the absence of a valid arbitration agreement, held only a power of attorney *ad litem*. Whereas (although this does not follow from the literal wording of Article 1167 § 1 of the Code of Civil Procedure), it is consistently assumed that the power of attorney *ad litem* does not itself authorize its holder to conclude an arbitration agreement. This option is also excluded by advocates of the view that the arbitration agreement is a procedural act. What is conclusive here is an argument that the conclusion of an arbitration agreement is beyond the scope of the statutory powers of an attorney *ad litem* (Article 91 of the Code of Civil Procedure).

Thus, an attorney *ad litem* may conclude an arbitration agreement only if this is expressly stated by his/her mandator in the power of attorney granted to him/her.⁸ Therefore, given the facts of the case in which the award in question was rendered, no acts undertaken by the claimant's attorney *ad litem* could have led to a conclusion of an arbitration agreement.

The arbitral tribunal was thus right to decide that the Court of Arbitration at the Polish Confederation Lewiatan had no jurisdiction over the dispute. This finding provided a ground for rejecting the statement of claim pursuant to § 20.3 of the Rules.

7. Ibidem, proposition 1 under Article 142.

8. Ereciński T., Weitz K., *Sąd arbitrażowy*, Warsaw 2008, pp. 115-116.

ISSUES RELATING TO THE COSTS OF ARBITRATION

The arbitral tribunal held that “the institution, conduct and interruption (due to the Claimant’s refusal to sign the statement on submission of the dispute specified in the Statement of Claim to the Court of Arbitration for resolution) of the proceeding in this case resulted directly from the initiative and acts of the Claimant.” Thus, in the arbitral tribunal’s opinion, “the Claimant’s acts necessitated the undertaking of defense by the Respondent, including the retaining of a professional attorney ad litem to defend the Respondent’s legitimate interests.” In consequence, the arbitral tribunal adjudicated the costs of representation in the arbitration proceedings from the claimant to the respondent.

This reasoning should be deemed correct. If the claimant argues that an arbitration agreement is valid, the respondent has every reason to undertake acts in defense of its interests in the arbitration proceeding.

One should note the decision of the Supreme Court, dated August 8, 2003⁹, issued in a case which was a mirror image of the one in which the award in question was rendered by the Court of Arbitration.

In the case in which the above mentioned Supreme Court’s decision was issued, an action was rejected by a common court due to the fact that the defendant made an effective plea of arbitration agreement. According to the statement of reasons, “the Court of

Appeal concluded that, as a result of its action having been rejected, the plaintiff lost the case altogether, which made it legitimate to adjudicate the court fees [i.e. the costs of representation in the court proceeding] from it” in favor of the defendant. While repealing the decision (which was subsequently appealed against on other grounds), the Supreme Court held that “the Court of appeal is right to conclude that the decision rejecting the action results in acknowledging that the plaintiff lost its case altogether.”

Thus, the Supreme Court accepted, as a rule, the adjudication of court fees from the plaintiff in favor of the defendant in the event that the action is rejected by a state court on the ground of an effective plea of an arbitration agreement. This serves as a very strong argument supporting the conclusion that the arbitral tribunal was right when deciding that an arbitral award rejecting the statement of claim on the ground of an absence of a valid arbitration agreement should also contain a decision as to the costs of arbitration (and, in practical terms, as to the costs of representation in the arbitration proceeding).

⁹“z” V CSK 486/02, LEX No. 172836.

Application of the provisions of the code of civil procedure in arbitration proceedings

■ Date of award: 2012
 Place of award: Warsaw
 Arbitral tribunal composed of: Three arbitrators

EXCERPT FROM THE STATEMENT OF REASONS:

Under its statement of claim dated XX.YY.2011, received by the Court of Arbitration at the Polish Confederation of Private Entrepreneurs Lewiatan on XX+3.YY.2011, the claimant requested that the amount of PLN [...] be adjudicated from the respondent, along with statutory interest accrued on the following amounts and for the following periods: [...]

The contracts executed by the parties (the “Commercial Terms and Conditions”) were actually framework agreements on sale of goods to the respondent by the claimant, made specific under respondent’s successive orders. [...]

[According to the claimant], the respondent’s conduct consisting in charging the fees the reimbursement of which is sought by the claimant constitutes an act of unfair competition, as referred to in Article 15.1.4 of the Act of April 16, 1993 on Combating Unfair Competition (the “Unfair Competition Act”), in the form of hindering an entrepreneur’s access to a market through charging

fees for accepting goods for marketing other than the trade margin.

[According to the respondent], the respondent’s conduct is not illegal or contrary to the principles of commercial integrity, and neither does it infringe upon another entrepreneur’s (i.e. the claimant’s) or customer’s interest, or threatens the same. This is so due to the fact that an act of unfair competition is not constituted by entrepreneur’s conduct which is justified in economic terms from the point of view of both business partners, consistent with the practice recognized in a given area of trade and beneficial to consumers who are informed that goods distributed or manufactured by a specific entrepreneur are offered on the market. Any and all fees charged pursuant to the Commercial Terms and Conditions had their equivalents in (and were justified in economic terms by) the performances made by the respondent for the claimant’s benefit. The price charged for the products purchased by the respondent from the claimant was set while taking account of the needs of the consumer as the product end-user. [...]

While providing reasons for the defense it raised to the effect that the claims have been barred by statute of limitations, the respondent argued that – from the perspective of the effects produced by Article 123 § 1 of the Civil Code – the conclusive factor was the date on which a letter instituting the proceeding had been received by the court of arbitration, and not the date on which the same had been mailed. The framework for this proceeding is set by the Rules of the LEWIATAN Court of Arbitration and those provisions of the Code of Civil Procedure which pertain to arbitration proceedings and are of mandatory nature, as confirmed by Article 1184 of the Code of Civil Procedure and §12.2 of the Rules of the LEWIATAN Court of Arbitration.

Responding to the statute of limitations defense, the claimant argued that the respondent incorrectly interpreted the provision of § 12 of the Rules of the LEWIATAN Court of Arbitration. The claimant pointed out that the parties had not made arrangements different from those resulting from the provisions of law, hence the provisions of both the law of civil procedure and the substantive law should apply in the case at hand, and that the arbitration proceeding was one of the procedures provided for in the Code of Civil Procedure and, as such, it was subject to the rules thereof.

Pursuant to § 35 of the Rules of the LEWIATAN Court of Arbitration, an arbitration proceeding is instituted through the submission of a statement of claim. The Court of Arbitration does not specifically define submission of a statement of claim to take place upon the receipt of the same by the Court, hence,

per analogiam, one should assume that the provision of Article 165 § 2 of the Code of Civil Procedure applies.

The adoption of a view to the contrary would make the party to the proceeding who specified the court of arbitration as competent to resolve disputes suffer an adverse consequence in the form of being prevented from benefiting from the provisions of the substantive law on interruption of the period of limitations as a result of application of the provision of Article 165 §2 of the Code of Civil Procedure.

The Court has resolved as follows. [...]

The respondent correctly pointed out that some of the claimant's claims had been barred by statute of limitations. Pursuant to Article 20 of the Unfair Competition Act, claims in connection with acts of unfair competition are barred by statute of limitations upon the expiration of three years, and the limitations period starts to run separately for each breach. The provision of Article 20 of the Unfair Competition Act is of mandatory nature.

The date of the act of unfair competition should be deemed the day on which there occurred the facts necessary to classify it as such, for instance one of the circumstances categorized in Chapter II of the Unfair Competition Act (see the judgment of the Supreme Court, dated 12.2.1991, docket No. III CRN 500/90, OSN 1992, Nos. 7-8, item 137).

The limitations period for each claim started to run on the date on which the

respondent charged to the claimant each of the fees specified in the Commercial Terms and Conditions.

The provision of Article 20 of the Unfair Competition Act does not set forth the events that interrupt the limitations period or the effects produced by the claim limitations period having been interrupted. Therefore, the relevant provisions of the Civil Code, and in particular Articles 123 and 124 of the Civil Code, should apply.

Pursuant to Article 123 § 1.1 of the Civil Code, the limitations period is interrupted by any act before a court or other authority appointed to examine cases or enforce claims of a specific type, or before a court of arbitration, undertaken directly in order to pursue or assert or satisfy or secure a claim.

The limitations period is interrupted exclusively by those acts which are undertaken directly in order to pursue or assert or satisfy or secure a claim. In view of the foregoing, the acts interrupting the limitations period include the filing of a statement of claim with a court of arbitration. In the case under consideration, the claim for payment was received by the Court of Arbitration at the Polish Confederation of Private Entrepreneurs “Lewiatan” on July 4, 2011.

The claimant incorrectly assumed the applicability in an arbitration proceeding of the provision of Article 165 §2 of the Code of Civil Procedure, pursuant to which deposition of a pleading with a Polish public operator post office branch is equivalent to filing the same with the court.

The parties may agree upon the rules and the method of proceeding before a court of arbitration. In the case at hand, the parties selected the court of arbitration through specifying jurisdiction of the Court of Arbitration at the Polish Confederation of Private Entrepreneurs “Lewiatan” in the Commercial Terms and Conditions they executed. By specifying the permanent court of arbitration as the court competent to adjudicate a specific dispute, the parties accepted the Rules of this court (the “Rules”).

Pursuant to § 12.2 of the Rules, the Court of Arbitration is not bound by the provisions governing civil procedure, except for the mandatory provisions pertaining to courts of arbitration. This provision is a confirmation of the rule contained in Article 1184 § 2 of the Code of Civil Procedure, in accordance with which in the absence of any arrangements by the parties to the contrary, the arbitral tribunal may, subject to provisions of the law, conduct the proceeding in such a manner as it considers appropriate.

The view according to which a court of arbitration is not, while examining a case, bound by the general provisions of civil procedure in the event that the parties or the court of arbitration did not otherwise specify the arbitration procedure to be followed, is well established in the case law and holds true for Article 1184 §2 of the Code of Civil Procedure (judgments of the Supreme Court dated 6.5.1936, docket No. 1914/35, Zb.Urz. [Official Compilation of Judgments] of 1937, item 56; dated 27.5.1947, docket No. C III 81/47, OSN [Journal of Supreme Court’s Judgments] of 1948, No. 1, item 17; and dated 14.11.1960,

docket No. 2 CR 1044/59, OSN [Journal of Supreme Court's Judgments] of 1962, No. 1, item 24; as well as the judgment of the Supreme Court of 13.12.1967, docket No. I CR 445/67, OSNCP [Journal of Judgments of the Supreme Court, the Civil/Labor Law Chamber] of 1968, Nos. 8-9, item 149). In its judgment of June 16, 2004, the Supreme Court held straight out that "the purpose of incorporating an arbitration clause into a contract is for the parties to submit, should a dispute arise, to the jurisdiction of the court of arbitration [specified therein]. Neither is it required that such court's decisions be consistent with the substantive law and the procedural law applied by common courts." (Judgment of the Supreme Court, Civil Chamber, docket No. III CK 97/2004, published in lex 585818).

The provision contained in the second sentence of Article 1184 § 2 of the Code of Civil Procedure, to the effect that the court of arbitration is not bound by the provisions on court procedure, does not refer to the mandatory provisions of the Code of Civil Procedure which govern proceedings before a court of arbitration (cf. the judgment of the Supreme Court of 3.6.1987, docket No. I CR 120/87, OSNCP [Journal of Judgments of the Supreme Court, the Civil/Labor Law Chamber] of 1988, No. 12, item 174).

As the Court of Appeal in Gdańsk rightly contended, a material difference, as compared with proceedings before common courts, consists in the fact that the court of arbitration is bound neither by the provisions on civil procedure (Article 1184 § 2 of the Code of Civil Procedure) nor by the provisions of

substantive civil law, which is clearly revealed by an analysis of the provisions of Article 1214 § 2 and Article 1206 § 2.2 of the Code of Civil Procedure, stipulating compliance with the public policy clause as the only criterion according to which award legality is judged (cf. judgment of the court of appeal in Gdańsk, dated 1995.07.14, T U I A Cr 424/95, OSA [Journal of Judgments of Courts of Appeal] 1995/9/62).

In turn, the Regional Court in Wrocław held straight out in the statement of reasons to its decision of November 16, 2010 (docket No. X Ga 254/2010) that the provisions of Part V of the Code of Civil Procedure, which are of mandatory nature for arbitration proceedings, do not contain any regulation concerning service of documents on the court of arbitration. Therefore, Article 165 § 2 of the Code of Civil Procedure does not apply here (cf. Decision of the Regional Court in Wrocław, docket No. X Ga 254/2010, published in LexPolonica No. 2810160; and in *Zamówienia Publiczne w Orzecznictwie*, Journal No. 8, item 141; *Zamówienia Publiczne w Orzecznictwie*, Journal No. 8, item 145; *Zamówienia Publiczne w Orzecznictwie*, Journal No. 8, item 169).

Pursuant to § 20.1 of the Rules, documents intended for the Court of Arbitration are delivered directly to the Court's Secretariat or served by registered mail.

And pursuant to § 19.3(b) of the Rules, documents intended for the parties are deemed to have been served if sent by registered mail.

Since the Rules clearly differentiate between documents intended for the parties and documents intended for the Court of

Arbitration, but it is only documents intended for the parties that are deemed served if sent by registered mail, then it is clear that documents addressed to the Court of Arbitration are served on the day of their receipt by the Court of Arbitration.

In the absence of any other regulations pertaining to service of documents intended for the Court of Arbitration, one should invoke the general substantive law principle contained in Article 61 of the Civil Code, saying that a declaration of intent is considered made upon the addressee thereof having been offered an opportunity to become acquainted therewith. In the case at hand, the statement of claim was sent to the address of the Court of Arbitration on XX.YY.2011, but received by the Court of Arbitration on XX+3.YY.2011. Therefore, the proceeding was instituted on XX+3.YY.2011, which resulted in the interruption of the limitations periods for the claims which were to mature on that date or thereafter.

In view of the fact that the act consisting in the filing of the statement of claim was performed before the Court of Arbitration on XX+3.YY2011, the following claims raised by the claimant have been barred by statute of limitations as a result of the defense raised by the respondent: [...].

Substantive law statements made by an attorney; application of the provisions of the code civil procedure in arbitration proceedings

■ Date of award: 2012
Place of award: Warsaw
Arbitral tribunal composed of: Three arbitrators

EXCERPT FROM THE STATEMENT OF REASONS:

The arbitration clause was incorporated into Article [...] of the General Provisions of the Agreement [...], dated [...], 2009, and reads as follows:

“14.5.3. Failing an amicable settlement, any and all disputes resulting from this Agreement or arising in connection herewith shall be, to the extent permitted under law, resolved in a final manner by the Court of Arbitration at the Polish Confederation of Private Entrepreneurs Lewiatan, in accordance with the Rules of that Court, by three arbitrators appointed in compliance with those Rules. The proceeding shall be held in Polish.”

The Agreement is governed by Polish law (Article 14.5.1. of the Agreement).

The dispute arose in connection with the Agreement executed between the Claimant as the Landlord and the Respondent as

a Tenant, concerning lease of Premises No. [...] to the Tenant, on the terms and conditions set forth in detail in the Agreement. [...]

The Claimant is of the opinion that the Agreement was effectively terminated without notice due to reasons attributable to the Tenant, under the Claimant's statement of [...], 2010, which authorized the Claimant to accrue liquidated damages.

In their statement of defense dated [...], 2011, the Respondents requested that the claim be dismissed in its entirety. The Respondents admitted that they had executed the Lease Agreement referred to above with the Claimant, but denied that the Claimant had effectively terminated the same. The Respondents argued that the Claimant's statement of [...], 2010 on the Agreement termination had never been served upon them, and claimed that such statement had not been signed by the persons authorized to do so. In consequence, the performed unilateral legal transaction (i.e. the making of the statement on the Agreement

termination) without a valid power of attorney authorizing the holder thereof to do so, is invalid (Article 104 of the Civil Code). [...]

The Claimant enclosed with its statement of claim a statement of [...], 2010 on "termination of the Lease Agreement [executed with the Respondents] with immediate effect," signed by Mr. XX and Mr. YY, acting in the capacity of the Claimant's attorneys. As rightly pointed out by the Respondents, neither the above statement nor the documents submitted in the course of the proceeding provide for Messrs. XX's and YY's authorization to make on behalf of the Claimant substantive law statements on termination of the Agreement without notice. Neither are the above persons authorized to act on behalf of the Claimant pursuant to the excerpt from the Polish Court Register of Business Entities, as enclosed by the Claimant. [...]

As a matter of fact, neither the intention, if any, nor the grounds for the Agreement termination are alone sufficient to decide that the Claimant did unilaterally terminate the Agreement without notice due to Respondents' fault. To make a statement on agreement termination is a right vested in the Claimant, and this right is of a nature creating legal rights, hence an effective termination of the Agreement required a unilateral statement made by the Claimant or the persons it authorized to do so. A statement to that effect should have been made in a manner permitting the Respondents to become familiar with the content of the same.

Based on the evidence gathered in the case, the Arbitral Tribunal has not been able to establish that the Claimant did make such

statement. The Arbitral Tribunal has also decided that the Claimant failed to prove that the statement on the Agreement termination without notice was made by persons authorized to do so, and that the authorization, if any, of the persons specified in the letter of [...], 2010 did not follow from the entries made in respect of the Claimant in the Polish Court Register of Business Entities.

The service of the above statement on the Respondents on [...], 2010 has also been deemed unproven by the Arbitral Tribunal. The Claimant failed to present evidence to that effect and the Respondents denied that such service had taken place. The Claimant only presented evidence of sending the letter by courier and an order route-tracking chart, which does not constitute evidence of service of the letter.

Furthermore, the statement of claim filed by the attorney ad litem may not be deemed to constitute a Claimant's statement on the Agreement termination. The Arbitral Tribunal concurs with the view expressed also by the Supreme Court in its judgment of October 20, 2004, docket No. I CK 204/04 (OSNC 2005/10/176), that the statutory scope of authorization provided for in Article 91 of the Code of Civil Procedure does not include the attorney's ad litem right to make a substantive law statement. The above view was expressed by the Supreme Court with respect to a statement on set-off, but the proposition thereof holds true also for other unilateral substantive law statements made by an attorney ad litem. It is beyond doubt that the power of attorney granted to legal advisor [...] did not authorize him to make such statement. [...]

Commentary

■ Stanisław Drozd

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INTRODUCTION

In 2012, the Court of Arbitration at the Polish Confederation Lewiatan rendered two awards concerning the legitimacy of application by the court of arbitration of the provisions of the Code of Civil Procedure governing the procedure before the state court.

Practical implications of the issue under discussion

The issue in question appears to be of a slightly academic nature. Obviously the purpose parties have in mind when agreeing to have disputes between them resolved in arbitration is not to bind themselves by the formalism of the court procedure. This procedure serves purposes different from those of the arbitration proceeding, hence it is governed by different rules. Therefore, the provisions governing the procedure before the state court should not, as such, apply to arbitration.

However, this problem is slightly more complex and carries certain implications of practical nature. The rules adopted by courts of arbitration do not provide for a number of relevant issues. Naturally, this is deliberate and intended to make the arbitration procedure flexible and to enable the parties and the arbitrators to tailor it to the needs of a given case. As a result,

however, when deciding procedural issues that arise in arbitration proceedings, parties and arbitrators sometimes refer, in the absence of other sources, to the provisions of the Code of Civil Procedure governing the court procedure. Also, it sometimes happens that the parties' attorneys agree between themselves or simply expect the arbitrators to apply the provisions of the Code of Civil Procedure governing the court procedure whenever they come across any issues not provided for in the rules of arbitration. The awards mentioned above inspire a discussion of this practice.

The awards commented on

The first of the discussed awards referred to claims arising in connection with a tortious act of unfair competition. The arbitrators dismissed the claims raised by the claimant who argued that it had been injured by the respondent's unfair conduct, and deemed the statement of claim to have been barred by statute of limitations. The Arbitral Tribunal concluded that the claimant filed its statement of claim after the claims had been barred by statute of limitations. Although the claimant sent the statement of claim by registered mail prior to the expiration of the time-limit, the same was received by the court already after the time-limit expiration, and, in the arbitrators' opinion, Article 165 §2 of the Code of Civil Procedure, referring to the consequences of

deposition of a pleading with a post office in the course of a court procedure, might not be applied in arbitration. Thus, in the award in question, the arbitrators refused to apply the provisions of the Code of Civil Procedure.

In the other case, the arbitrators took a different stance and referred to the provisions of the Code of Civil Procedure, but the result was very similar, i.e. the dispute was not decided on its merits either. The dispute between the parties involved liquidated damages in connection with termination of a lease agreement prior to the expiration of its term due to reasons attributable to the respondent. The arbitrators dismissed the statement of claim since, for a number of reasons, they decided that the claimant had not effectively terminated the disputed agreement. The claimant argued, *inter alia*, that the statement of claim in which it requested payment by the respondent of liquidated damages in connection with termination of the agreement prior to the expiration of its term due to the respondent's fault, should itself be deemed to constitute a notice of termination. The arbitrators did not concur with this argument, as they decided that the attorney who had signed the statement of claim had not been authorized to perform the substantive law act of terminating the lease agreement. The arbitrators pointed out that such authorization does not follow from the provision of Article 91 of the Code of Civil Procedure, which stipulates the scope of a power of attorney *ad litem*.

COMMENTARY

The essential holding of the first of the awards referred to above deserves to be approved of. Indeed, the provisions of the Code of Civil

Procedure governing the court procedure should not apply to arbitration proceedings. The other award deserves to be criticized. Here, the arbitrators applied the restrictive interpretation of Article 91 of the Code of Civil Procedure, which would not be justified even if applied by a state court.

However, as a matter of fact, both the awards should be criticized for the formalism of the line of reasoning followed therein. Regardless of whether or not the arbitrators were right when rendering such awards in the specific circumstances of the discussed cases, the formalistic approach taken in the statements of reasons to those awards appears to be in conflict with the essence and purpose of arbitration.

Arbitration and the application of the provisions of the Code of Civil Procedure governing the procedure before state courts

As noted above, in the first of the discussed awards, the arbitrators correctly pointed out that the issue of the court of arbitration being bound by the provisions of the Code of Civil Procedure had already been addressed by the Supreme Court. The case law established by the Supreme Court in this respect is consistent and clearly confirms that arbitrators are not bound by any provisions of the Code of Civil Procedure except for the mandatory rules of procedure pertaining to proceedings before the court of arbitration. The arbitration proceeding is to follow certain fundamental standards of procedural justice. Otherwise, arbitrators enjoy broad discretion to set the rules of procedure before the court of arbitration.

The fact that arbitrators are not bound by the provisions of the Code of Civil Procedure governing the procedure before state courts does not mean, however, that they may not draw on certain solutions stipulated in such provisions when resolving procedural issues arising in the course of the arbitration proceeding.

The difference between the court procedure and the arbitration proceeding is of fundamental nature. The court procedure is a process of dispute resolution and administration of justice by courts entrusted under the Constitution with the authority of the state. Whereas commercial arbitration is a consensual method of amicable dispute resolution within the community of entrepreneurs, to which the state authority only lends its support in order to guarantee efficiency of this method and effective protection against misuse of authority.

However, certain fundamental principles apply equally to both types of procedure. Both the court procedure and the arbitration proceeding need to be conducted in an efficient manner, while concurrently ensuring equal and impartial treatment to all parties, and offering each party an opportunity to argue its case and defend its point of view. This is why some solutions of practical nature adopted in the court procedure and being the realization of the above principles may seem useful to arbitrators for the purposes of the arbitration proceeding. However, in such a case, arbitrators may not directly apply the provisions of the Code of Civil Procedure which contain such solutions, but only be inspired by the regulations of the Code of Civil Procedure when

setting the rules to govern an arbitration proceeding, and thus when making more specific the principles of equal treatment of the parties to an arbitration proceeding as well as the obligation to ensure efficiency of the proceeding before a court of arbitration and to guarantee that each party is offered an opportunity to argue its case.

Reference to the Code of Civil Procedure made in order to implement into the arbitration procedure certain solutions available in the procedure before state courts may be epitomized by the institution of evidence preclusion. The concerns expressed sometimes about arbitrators introducing preclusion into the arbitration procedure (resulting from the absence of an explicit statutory authorization that would vest such right in arbitrators) are not legitimate. Since preclusion may be used in the court procedure which is required, as is the arbitration proceeding, to ensure equal treatment of the parties and to offer each of them an opportunity to argue its case and defend its point of view, then it is also possible to apply preclusion in arbitration with no breach of those rules.

Some other solutions adopted in the Code of Civil Procedure with respect to the court procedure will not be fit at all for implementation into arbitration. Still other ones will formally be possible to adopt, but, if used in the arbitration proceeding, they would only make it noxiously formal, clerical or unnecessarily and illegitimately restricted.

There is no rationale behind e.g. referring to the provisions of the Code of Civil Procedure in order to reject solutions generally recognized in

international arbitration, such as written witness testimony or private expert opinions. It is inconsistent with the nature and function of arbitration to deprive the arbitration proceeding of the elements of constructive cooperation between the arbitrators and the parties, such as joint formulation of the essence of a dispute and the issues requiring resolution, or joint work on the scope of the task to be commissioned to an expert. Invoking to that end the principle of the adversarial system resulting from the Code of Civil Procedure is incorrect.

And to conduct an arbitration proceeding in the manner specific to court proceedings is in a complete contradiction with the arbitrator's duties, and not so much on account of the provisions of the Code of Civil Procedure as by reason of the deficiencies of the system of administration of justice, resulting in court proceedings being conducted in a haphazard, fragmented and unpredictable manner.

It is also against the nature of arbitration to implement elements of the formalism typical of the court procedure into arbitration proceedings. Although it is legitimate for a procedure of administration of justice by a state court judge, which is compulsory and financed from public funds, to be of substantially formal nature, such formalism is by no means justified in a consensual procedure based on an agreement between the parties and conducted by a tribunal composed of arbitrators appointed by the parties, whom the parties trust and to whom they entrust their dispute on account of such arbitrators' assumed expertise in efficient resolution of problems, such as commercial disputes arising in the course of business activity.

Special duties of arbitrators to set and interpret the rules governing an arbitration proceeding

In other words, arbitrators are free to draw on the procedural solutions offered by the Code of Civil Procedure and set at their discretion the rules governing an arbitration proceeding. Nevertheless, they have to bear in mind the special nature of arbitration and what Prof. Jerzy Rajski calls the "ethos of arbitration."¹ What is essential is not what detailed solutions the arbitrators adopt when setting the rules governing the arbitration proceeding, but how they will approach their mission and the application of such rules.

Arbitration has a special role to play in business transactions. It is a mercantile court and thus an institution of practical nature, established by entrepreneurs to protect the values and rights of fundamental importance to trade. This imposes on arbitrators special duties with respect to interpretation of the law, including with respect to the setting and construing of the rules governing arbitration proceedings.

Arbitrators may not use as an excuse the grammatical interpretation of the provisions of law and resort to purely formal maneuvers when applying the same. They are expected to employ the purposive interpretation and competently apply general clauses, such as the principles of equity in the first place. Both procedural and substantive decisions taken by arbitrators should especially protect good faith and confidence of the parties, as well as

1. Rajski Jerzy, "Etos arbitrażu," *Przegląd Prawa Handlowego* 2013, journal 5, p. 4.

promote conduct consistent with the principles of contractual loyalty and commercial integrity. Arbitrators should not allow situations in which the reliance on formal grounds would lead to decisions which are in conflict with the sense of justice and common sense. The effectiveness of arbitral awards should be primarily derived from the confidence parties place in and the respect they have for the institution of arbitration and the role of the arbitrator. Therefore, the court of arbitration has to take care at all times that every decision it takes is supported by the principles of equity and results in a resolution of the issue in dispute based on such principles and in a manner perceived by the parties as an actual solution.

This does not mean that arbitrators should not discipline the parties and have them comply with the obligation to act with due care when seeking to enforce their respective rights. Quite the opposite, the reliability and efficiency of proceedings the purpose of which is to resolve disputes are virtues of great significance for trade. To protect these virtues arbitrators must sometimes make the parties suffer an adverse consequences of their failure to undertake certain procedural acts or to comply with certain procedural requirements. However, they invariably have to inquire and establish whether, in a given case, the taking of such adverse measures against a party is justified with the need to protect the material virtues and whether this will not have illegitimate effects. The method of application of the procedural law or the substantive law by arbitrators must raise no suspicions whatsoever that they apply the provisions of law in an insufficiently authorized manner, only to “fix up” the case easily (instead of resolving it) without

going into its merits, as is unfortunately all too often the case with common courts.

For this reason, arbitrators should always inquire whether the procedural acts undertaken by parties (such as peremptory pleas) are, given the circumstances of the case, consistent with the principles of public policy and customs and raised in good faith, as well as whether they are based on a legitimate interpretation of the provisions of law or of the contract, which is consistent with such principles. They should also construe statements made by parties with the use of the purposive method of interpretation and not deprive the same of their validity due to formal reasons, if this is not justified by the legitimate interests of the other party.

Comments on the statements of reasons to the discussed awards

In light of the foregoing discussion, the following comments should be made on the awards in question.

As regards the first of the awards referred to above, one should conclude that the arbitrators were right to decide that Article 165 §2 of the Code of Civil Procedure does not apply in arbitration. However, one is wondering whether the statement of reasons should not have referred more extensively to the purposes of the institution of statute of limitations and whether it should not have discussed the issue of whether the claimant having sent its statement of claim by registered mail to the address of the court of arbitration constituted performance of its obligation to act with due care when seeking to enforce its

rights. Perhaps it should also have been examined whether the claimant having used this method of service posed a threat to the other party's legitimate interests protected under statute of limitations (reliability of the law, defense against the need to meet claims resulting from circumstances in the past which are difficult to verify), and whether the respondent having raised the statute of limitations defense was not, given the facts of the case, in conflict with the principles of public policy and customs. The Arbitral Tribunal having contenting itself in the award with a grammatical analysis of the rules of arbitration leaves one unsatisfied. The more so that such literal analysis does not produce unequivocal conclusions.

As far as the other discussed award is concerned, it appears to be unsound. The formalistic approach adopted in the award with respect to the scope of the power of attorney ad litem granted to the legal advisor who filed the statement of claim does not seem justified. Even in the case of the formalized court procedure emphasis is put on the need to interpret powers of attorney ad litem with the use of the purposive method, and to extend the scope of the same to cover the acts necessary to achieve the procedural goal for the purpose of which they were granted. Such an approach is all the more justified in the arbitration proceeding.

SUMMARY

There is nothing wrong with arbitrators being inspired by the provisions of the Code of Civil Procedure when seeking to resolve procedural issues arising in the course of arbitration,

provided that this leads to the adoption of solutions which are practical and justified by the function of arbitration, and does not serve as a pretext for rejecting solutions which are legitimate and useful, though unknown to the Polish Code of Civil Procedure. Arbitrators' search for inspiration in the provisions of the Code of Civil Procedure governing the court procedure may not lead to copying court practices, especially the negative ones which result from state courts being overloaded with cases.

In particular, there is no room in arbitration for formalistic solutions which can appear to serve as a pretext for getting rid of the case and avoiding the need to decide it on the merits. Every arbitral ruling, either deciding a dispute on the merits or of procedural nature, has to be supported with purposive arguments based on the principles of equity and consolidating entrepreneurs' confidence in the institution of arbitration.

Extension of the arbitration clause

- Date of award: 2011
- Place of award: Warsaw
- Arbitral tribunal composed of: Three arbitrators

EXCERPT FROM THE STATEMENT OF REASONS:

In its statement of claim dated [...], 2011 (the "Statement of Claim"), the Claimant requested adjudication in its favor from the Respondent of the amount of PLN [...] along with statutory default interest accrued thereon as of [...], 2010 until the payment date. [...]

In its statement of defense dated [...], 2011, the Respondent requested that the Statement of Claim be dismissed in its entirety and that reimbursement of the cost of arbitration, including the cost of representation in the arbitration proceeding, be awarded from the Claimant at the prescribed rates. In the Statement of Defense, the Respondent raised the defense of set-off of the receivable claimed under the Statement of Claim against the receivable acquired by the Respondent on [...], 2011. The receivable acquired by the Respondent originates from agreements executed by the Claimant with XX. [...]

Jurisdiction of the Court of Arbitration. The arbitration clause, incorporated into Section [...] of the AGREEMENT executed by the Parties on [...], 2006, reads as follows: Any disputes arising from or related to the Agreement or its performance, shall be finally

settled by the Arbitration Court at the Polish Confederation of Private Employers LEWIATAN in Warsaw, in accordance with the Arbitration Rules of this Court. Pursuant to the provision quoted above, any disputes resulting from the AGREEMENT or arising in connection therewith will be resolved in a final manner by the Court of Arbitration at the Polish Confederation of Private Entrepreneurs Lewiatan in accordance with the Rules of that Court. It is beyond doubt that the quoted arbitration clause, drawn up by the Parties in writing, names a specific permanent court of arbitration and refers to disputes involving property rights which have capacity for settlement. It thus satisfies the conditions set forth in Article 1157, Article 1161 §§ 1 and 3 and Article 1162 § 1 of the Code of Civil Procedure. The claims under the AGREEMENT were subsequently the object of a Settlement (as defined below) which provided, in Article [...] thereof, for termination of the AGREEMENT. Acting pursuant to Article 1180 of the Code of Civil Procedure, the Arbitral Tribunal has assumed that the claims decided in the Settlement and pursued under the Statement of Claim originate in the AGREEMENT, hence the arbitration clause contained therein remains in force despite the AGREEMENT termination and, in consequence, the court of arbitration has jurisdiction over the claims in question. As regards

its competence to rule on the defense of set-off raised by the Respondent, the Arbitral Tribunal concurs with the view expressed in the jurisprudence that a defense of set-off of a receivable resulting from a legal relation not covered by the clause providing grounds for jurisdiction of the court of arbitration before which the proceeding is conducted, is to be assessed by that court of arbitration, even if the receivable to be set off is disputed, especially if, following the respondent having raised the defense of set-off, the claimant did not raise a plea to the effect that the respondent's claim concerning the set-off exceeded the scope of the arbitration agreement (Tomaszewski M. [in:] A. Szumański (ed.), *System prawa handlowego. Arbitraż handlowy*, T. 8, CH Beck, Warsaw 2010, p. 328). In this proceeding, neither the Claimant nor the Respondent has challenged jurisdiction of this Court in its pleading or during the hearing, in response to the Arbitral Tribunal's inquiry.

[...]

Commentary

■ Dr. Marek Jeżewski

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INTRODUCTION

This commentary refers to an award rendered by the Lewiatan Court of Arbitration in 2011, to the extent the same is concerned with the Arbitral Tribunal's ruling that claims originating in the agreement which contains the arbitration clause may be adjudicated by a court of arbitration even if previously settled under a settlement which resulted in the agreement termination. The Arbitral Tribunal adopted Article 1180 of the Act of November 17, 1964 – Code of Civil Procedure, as the grounds for its decision.

The arbitrators also addressed the Respondent's defense of set-off of the receivable claimed under the statement of claim against the receivable acquired by the Respondent and resulting from agreements originally executed by the Claimant. The Arbitral Tribunal held that: "a defense of set-off of a receivable resulting from a legal relation not covered by the clause providing grounds for jurisdiction of the court of arbitration before which the proceeding is conducted, is to be assessed by that court of arbitration, even if the receivable to be set off is disputed, especially if, following the respondent having raised the defense of set-off, the claimant did not raise a plea to the effect that the respondent's claim concerning the set-off exceeded the scope of the arbitration agreement."¹

1. Quoted from the statement of reasons to the award (bibliographical references omitted).

When deciding both the above issues, the Arbitral Tribunal acted pursuant to the arbitration clause which reads as follows: "Any disputes arising from or related to the Agreement or its performance, shall be finally settled by the Arbitration Court at the Polish Confederation of Private Employers LEWIATAN in Warsaw, in accordance with the Arbitration Rules of this Court."

TERMINATION OF THE CONTRACT UNDER A SETTLEMENT AND THE ARBITRATION CLAUSE

The first of the issues referred to above seemingly does not raise any major concerns. In accordance with the provision contained in the second sentence of Article 1180 of the Code of Civil Procedure, "The invalidity or expiration of the underlying contract in which the arbitration agreement was inserted shall not entail ipso jure the invalidity or expiration of the arbitration agreement." In this respect, the above provision of the Code of Civil Procedure draws on the clearly formulated provision of the 2006 UNCITRAL Model Law, pursuant to which: „[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be

treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."²

This amounts to the principle of separability of the arbitration clause from the contract of which it forms part. The principle of arbitration clause separability is an important aspect of the arbitral tribunal's autonomy, as it allows the arbitrators to recognize their competence to decide also on the validity or even the existence of the underlying contract³. Separability so understood means that the arbitration clause serves as a ground for a legal relation between the parties to a contract other than that established under the contract, and that its fate is independent of that contract. This does not change the fact that when the contract is defective in terms of the declaration of intent made, such defects quite frequently affect the arbitration clause as well. On the other hand, in line with the separability principle and the kompetenz kompetenz principle relating thereto, the entity competent to rule on such defects and the effects they produce should be, as a rule, the court of arbitration as the only entity authorized to resolve disputes as to the existence or validity of the contract in which the arbitration clause is inserted.

The concept of arbitration clause separability was emphasized especially in the

French arbitration case law⁴, and subsequently it was endorsed practically in all jurisdictions. Despite the fact that the separability doctrine is generally recognized, one cannot disregard the counterargument in the form of the principle of *accessorium sequitur principale*, which puts emphasis on the ancillary role of the arbitration clause in relation to the contract of which it forms part, as a result of which the arbitration clause is expected to share the fate of such contract. This approach is obviously self-contradictory in nature, as there arises the question as to who would be authorized to declare the contract invalid if, pursuant to Article 1165 § 1 of the Code of Civil Procedure, the common court with which a claim is filed with respect to such contract is under obligation to reject – in response to a relevant plea by the other party – the claim or the request to institute voluntary jurisdiction proceedings even before it may consider the case on its merits.

As mentioned above, the major correlate of the doctrine (principle) of arbitration agreement separability is the recognition of the court's of arbitration competence to rule on its jurisdiction (*kompetenz kompetenz*)⁵. It is only an arbitral tribunal appointed under a declaration of the parties' intent that is assumed to be competent to decide on the validity of an arbitration agreement and thus on its own jurisdiction. Therefore, the decision taken by the Arbitral Tribunal in the case under discussion to the effect that it had jurisdiction should be

2. Article 16 of the 1985 UNCITRAL Model Law (with amendments as adopted in 2006).

3. Sammaritano M. R., *International Arbitration. Law and Practice*, 3rd Ed., Juris 2014, p. 270; Steingruber A. M., *Consent in International Arbitration*, Oxford University Press 2012, p. 92; Tomaszewski M., [in:] A. Szumański (ed.), *'System Prawa Handlowego. Tom 8. Arbitraż Handlowy'*, CH Beck 2010, p. 288.

4. See, for instance, the case law referred to in Steingruber A. M., *op. cit.*, p. 91.

5. Zacharasiewicz M., *Autonomiczny charakter klauzuli arbitrażowej w międzynarodowym arbitrażu handlowym*, *'Problemy Prawa Prywatnego Międzynarodowego'* 2007, vol. 1, p. 89.

tentatively regarded as legitimate. In other words, the Arbitrators were competent to investigate their jurisdiction, and the grounds for them to do so were provided by the clause contained in the original contract executed between the parties to the dispute. However, it should be contended that the remaining portion of the statement of reasons to the award is nowhere near sufficient.

Given that the principles of separability and kompetenz kompetenz are respected, primacy should undoubtedly be awarded to the intention expressed by the parties to a contract who may, under a mutual declaration of intent, procure termination not only of the contract but also of the arbitration clause. As a matter of fact, the numerous analyses of the separability principle all emphasize that the criterion determining the fate of the arbitration clause inserted into a contract is invariably the intention of the parties. Therefore, if, as noted in the statement of reasons, the parties entered into a settlement the purpose of which was to set forth their mutual rights and obligations under the contract containing the arbitration clause, and, in addition, declared the contract invalid, there arises the legitimate question whether the contract was not thus replaced by an entirely new legal relation in which the parties did not stipulate a relevant arbitration agreement. As a result of such an assumption, one would have to decide that the arbitration clause has become pointless, i.e. that there was no dispute arising out of or in connection with the contract that might be adjudicated by the Arbitral Tribunal. It is the fact of the settlement execution that makes the situation in question qualitatively different from the one dealt with in the jurisprudence and case law

when discussing the separability principle. To recognize their jurisdiction, the Arbitrators would actually have had to decide that the settlement entered into between the parties formed part of a single legal transaction or was related thereto, and that, when declaring expiration of the contract in the settlement, the parties did not intend the “separable” arbitration clause to expire. Therefore, the conclusion of the Arbitral Tribunal that „Acting pursuant to Article 1180 of the Code of Civil Procedure, the Arbitral Tribunal has assumed that the claims decided in the Settlement and pursued under the Statement of Claim originate in the AGREEMENT,” is unsatisfactory. As a matter of fact, it is unclear how a provision concerned with respect for the parties’ intention that an arbitration clause (arbitration agreement) should continue in force determines the object of a claim and its relation to the contract. While the first issue does not raise concerns, the other one requires (and required) an in-depth analysis.

There are three solutions available in the above respect, but when employing either of them the Arbitral Tribunal should have considered how the claims resulting from the settlement related to the contract. First, when examining the declarations of intent made by the parties, the Arbitral Tribunal could have concluded that the execution of the settlement had established an entirely new legal relation which had no connection with the contract. In consequence, the Arbitrators should have decided that they had no jurisdiction over the claims resulting from the settlement. Second, the Arbitrators might equally legitimately decide (which they appear to have done) that it was not possible to rule on the claims under the

settlement without reference to the provisions of the contract. In such a case, since the declaration of the contract invalidity had not affected the validity of the arbitration clause, it had not rendered the arbitration clause invalid with respect to the claims under the Settlement either, which claims should thus have been considered to result from the contract. Third, when assessing the facts, the Arbitral Tribunal might have concluded that to examine the parties' claims under the settlement was actually tantamount to examining the same against the previously executed contract, which would have resulted in deciding that such claims related to the contract and, in consequence, might be ruled upon by the arbitral tribunal on the basis of the arbitration clause which, pursuant to Article 1180 of the Code of Civil Procedure, continued in force. However, in either case, jurisdiction might not have been assumed based on the clause separability only, which fact does not raise concerns, but based on the determined nature of the claims to be ruled upon.

DEFENSE OF SET-OFF OF A RECEIVABLE NOT COVERED BY THE ARBITRATION AGREEMENT

The other issue addressed in the statement of reasons appears to be relatively easier to judge. In line with the statement of reasons: "the Arbitral Tribunal concurs with the view expressed in the jurisprudence that a defense of set-off of a receivable resulting from a legal relation not covered by the clause providing grounds for jurisdiction of the court of arbitration before which the proceeding is conducted, is to be assessed by that court of

arbitration, even if the receivable to be set off is disputed, especially if, following the respondent having raised the defense of set-off, the claimant did not raise a plea to the effect that the respondent's claim concerning the set-off exceeded the scope of the arbitration agreement."⁶ In the case under discussion, the defense of set-off was raised in respect of receivables acquired by the respondent and resulting from the claimant's liabilities under other previously executed contracts. The *prima facie* impression is that the purpose of the purchase of receivables by the respondent was to enable it to raise the defense of set-off in the arbitration proceeding and, perhaps, to procure discontinuation of the proceeding by the Arbitral Tribunal on the ground of lack of jurisdiction.

From the Arbitral Tribunal's point of view, conclusive was the fact that neither party challenged the Court's jurisdiction (including in response to the Arbitrators' inquiry) in the course of the proceeding. For this reason, while approving of the stance taken by the Arbitral Tribunal, one should point out two issues.

It is beyond doubt that, in the case in question, the parties agreed that the court of arbitration should rule on the defense of set-off despite the fact that the same referred to a receivable which apparently bore no relation to the principal claim. This is proven in the first place by the fact that the claimant did not object to the defense of set-off being decided upon on the ground that it exceeded the scope of the arbitration clause. In consequence, although the defense of set-off referred to a receivable over

6. Quoted from the statement of reasons to the award (bibliographical references omitted).

which the Court had no jurisdiction pursuant to the arbitration clause, the absence of any objection to the defense of set-off (which was not raised in response to the Arbitral Tribunal's inquiry either) produced the effect consisting in extension of the scope of the parties' consent to arbitration⁷. It should be noted in this connection that should the claimant have raised an objection to the effect that the respondent's claim exceeded the scope of the arbitration clause, the Arbitral Tribunal should have granted the same; nevertheless, the set-off related issues would undoubtedly have to be reconsidered at the stage of the arbitral award enforcement⁸. On the other hand, it would have been somewhat controversial if the Arbitrators had ruled only on selected facts relevant to a dispute covered by the arbitration clause, as this could have led to an undesirable fragmentation of the facts of the case and potential difficulties to establish the same in a final manner.

SUMMARY

The award commented upon undoubtedly clarifies the facts forming the basis for the Arbitral Tribunal's decision in an insufficient manner. For this reason, many of the comments made above have conditional nature as well as constitute a statement of issues calling for changes in the prerequisites. Undoubtedly, especially the issues relating to the principle of arbitration clause separability and the defense of set-off, as discussed in this commentary, require to be handled by Arbitrators with considerable care, and no conclusions in this respect must be drawn without due deliberation.

7. Tomaszewski M., *op. cit.*, p. 328 (cited also by the Arbitral Tribunal).

8. Sammaritano M.R., *op. cit.*, p. 1359.

The governing law

– general principles of law

■ Date of award: 2014
 Place of award: Warsaw
 Arbitral tribunal composed of: Three arbitrators

EXCERPT FROM THE STATEMENT OF REASONS:

Jurisdiction of the Court of Arbitration at the Polish Confederation of Private Entrepreneurs Lewiatan in Warsaw results from the arbitration clause contained in § XX of the Cooperation Agreement executed in [...] on [...], 2009, between the Claimant and the Respondent. Neither party to the dispute has challenged jurisdiction of the above Court. [...]

The Claimant [...] argued that it did not follow from § XX.2 of the agreement executed by the parties that they were not bound by the provisions of the Act on Combating Unfair Competition, due to the fact that the legal relation between the parties in which the claim originated was tort, and liability in tort is independent of liability in contract. The Claimant points out that there was no mutual intention of the parties, and in particular of the Respondent, to make an exclusion in the above respect. Furthermore, in the Claimant's opinion, there are no grounds permitting the parties to contractually exclude the applicability of the provisions of the Act on Combating Unfair Competition in the relations holding between them. The Claimant argues that "a contractual

clause in which the parties preclude the operation of the provision of Article 15.1.4 of the Act on Combating Unfair Competition in the relations between them should be deemed to be an attempt at circumventing the law." The Claimant further argues that to consider permissible conduct which is illegal or in conflict with the principles of commercial integrity, such as a tortious act of unfair competition, would be to violate the fundamental rules of the public policy of the Republic of Poland.

[...] The Respondent sustained its position on resolution of the dispute in accordance with general principles of law. In the same pleading, the Respondent pointed out that Article 15.1.4 of the Act on Combating Unfair Competition was out of touch with the needs of the present-day trade, in particular claiming that "in no case would identical expenditures incurred for a promotional campaign carried out by the supplier individually have translated into benefits comparable to those derived by the supplier as a result of the large-scale marketing campaigns organized by commercial networks."

The Court has resolved as follows:

[...] Neither the Claimant, when filing its statement of claim, nor the Respondent in its statement of defense and the successive pleadings challenged the arbitration clause inserted into § XX of the Agreement. The arbitration clause incorporated into the agreement executed by the parties authorizes the court to resolve disputes arising out of or in connection with the performance of the above agreement (§ 2.1 of the Rules of the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan, hereinafter referred to as the “Rules”). In this respect, the Court concurs with the view expressed by the Supreme Court in its decision of October 17, 2012, docket No. I CSK 119/12, as referred to by the parties, according to which it follows from an arbitration clause which identifies the legal relation in a sufficient manner and specifies that it applies to claims relating to cooperation on the basis of a specific agreement, that the arbitration agreement extends to cover also claims arising as a result of an act of unfair competition.

As part of the competence granted to the Court to rule on this dispute, the parties specified in the arbitration clause that the legal ground for adjudication should be general principles of law, and in particular the principle of *pacta sunt servanda*, to the exclusion of the substantive law governing the civil law relation holding between the parties. Contrary to what the Respondent claims, such formulation of the court’s competence in the arbitration clause may not be regarded as illegal or aimed to circumvent the law. Article 1194 of the Code of Civil Procedure (Dz.U. [Journal of

Laws] No. 43, Item 296; hereinafter referred to as CCP) permits the arbitral tribunal to adjudicate on the basis of general principles of law, if expressly authorized to do so, and an authorization to that effect is granted in the agreement referred to above. This interpretation follows directly from the wording of the provision and it has not been challenged in the literature, where principles are assumed to be the fundamental legal norms of a specific field of law (e.g. the principle of equality of the parties or of freedom of contract in civil law) or the principles generally recognized in civilized legal systems.

When deciding a dispute on the basis of principles of law, the court assumes the definition of the same adopted in civil jurisprudence, in line with which principles of law are “norms created based on a reconstruction of the fundamental assumptions, values and ideas resulting exclusively from a specific system, branch or field of law” (Safjan M., *Pojęcie i funkcja zasad prawa prywatnego* [in:] *W kierunku europeizacji prawa prywatnego*. Księga Pamiątkowa Dedykowana Profesorowi Jerzemu Rajskiemu, Warsaw 2007, p. 5.). In the present case, civil law principles shall apply, which – as Z. Radwański correctly assumes (*Prawo cywilne – część ogólna*, Warsaw 2007, p. 16) – form a “category of norms of law indicating the values to be regulated by civil law norms, and specify the method of application of the law, while concurrently setting the limits within which subjective rights may be exercised.”

In consequence, the Arbitral Tribunal was faced with the need to extract principles that might apply in the case at hand from the

applicable provisions of law. The protection of competition, to which the parties to the proceeding refer when arguing in favor of a specific interpretation of Article 15.1.4 of the Act on Combating Unfair Competition, may be provided under both public law and private law. Under private law, it takes the form of protection of fair competition, and tortious acts of unfair competition are considered to be civil law torts. This is the view taken, *inter alia*, by J. Szwaja (*Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz.*, Warsaw 2013), who concludes that "Given the legislation in force, it seems legitimate to assume that the Act on Combating Unfair Competition belongs, except for its penal provisions, under private law, due to the fact that in the legal relations holding between an entrepreneur and its competitors or customers, the parties enjoy equal status. Likewise, in the course of proceedings related to unfair competition neither party has a superior status."

The Arbitral Tribunal is of the opinion that the principle of fair competition protection takes different forms, depending on the legislative authority's intention. Not every norm of the Act on Combating Unfair Competition, if violated, makes a specific act be in breach of the principle of fair competition protection. The principle of freedom of contract and the admissibility of authorizing the court of arbitration to adjudicate exclusively on the basis of principles of equity or general principles of law (§ 38.3 of the Rules) argue for the possibility of excluding the applicability of specific norms of civil law. The clause adopted by the parties makes it possible to disregard not only norms of the nature of *jus dispositivum* but also those of the nature of *jus cogens*, provided that the

arbitral award is not in conflict with Article 1206 §§ 1 and 2 CCP, and in particular is not in conflict with the fundamental rules of the public policy clause.

Owing to the fact that the parties excluded Polish law applicable to the relation holding between them as a ground for adjudication by the court of arbitration, the tribunal is faced with the need to determine how the provision of Article 15.1.4 of the Act on Combating Unfair Competition, to which the parties refer, relates to the general principle of fair competition. While resolving this issue, the Arbitral Tribunal may not omit to consider the legitimate concerns raised by the manner in which common courts construe and apply the above provision. In the interpretation of the provisions amending the Act of April 16, 1993 on Combating Unfair Competition (dated February 4, 2003, *Dz. Urz. UOKiK* [Official Journal of the Office of Competition and Consumer Protection] 2003/1/240), the President of the Office of Competition and Consumer Protection contended that "Fees charged e.g. in connection with promoting goods should not be regarded as fees in connection with accepting goods for marketing. The charging of such fees, if any, does not constitute an act of unfair competition." A concise recapitulation of the case law established in this respect is made by G. Kaniecki ("Opłaty półkowe" z punktu widzenia ekonomicznej analizy prawa, *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 2013, No. 2(2)), who concludes that: "Putting it somewhat simply, one can assume that a significant portion of the case law considers a majority of the so-called slotting fees charged in practice to be equivalent to a tortious act of unfair competition, with the

statutory defenses differently formulated (...).” A typical judgment of a common court is epitomized by the judgment rendered by the Court of Appeal in Warsaw, dated October 28, 2011, docket No. VI ACa 392/11, in which the court held that it was not permissible to charge entrepreneurs for any services relating to the standard offering of goods to end-customers, but deemed such fees permissible in the case of equivalence of performances. Among the critical views on Article 15.1.4 of the Act on Combating Unfair Competition expressed by jurisprudence authors, the opinion offered by M. Modzelewska de Raad and Pola Karolczyk in their article entitled “Opłaty półkowe” – między reżimem prywatno- i publicznoprawnym – polemika systemowa (Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2013, No. 2(2)), deserves attention. The authors point out that “The application of Article 15.1.4 of the Act on Combating Unfair Competition, as currently worded, substantially hinders the development of sale-related services, by reducing the network sales model to a simple sales contract which does not meet the needs of present-day trade.” As rightly argued by the authors, the findings of an economic analysis of the role of slotting fees, as carried out by the European Commission in a number of EU member states, do not confirm that a total prohibition to charge them is justified. The differences found in this respect in the legislations of EU member states are acknowledged in the position of the European Commission (the Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, Brussels, January 31, 2013). It concludes that “Another type of UTP [unfair trading practices] that merits attention is the abusive use of the so-called ‘reverse

margin’ practices.” This model, forming part of the business model employed nowadays by numerous retailers, consists in combining the purchase of goods with specific extra services rendered by a retailer against payment for the benefit of its suppliers (e.g. promotional and transportation fees, shelf-space related services, etc.). The majority of practices of this type are legal” (p. 23). Owing to the reasons specified above, the Arbitral Tribunal deemed permissible the exclusion under the arbitration clause of the applicability of Article 15.1.4 of the Act on Combating Unfair Competition to an assessment of the legal relation in place between the Claimant and the Respondent.

Given the foregoing, the Arbitral Tribunal found it necessary to determine whether or not the fee charged by the Respondent to the Claimant in consideration of its marketing activities was consistent with the principles of civil law. Pursuant to the arbitration clause, the principle of *pacta sunt servanda* should apply in particular. In the contract law, this principle is of fundamental importance, as it provides protection of an entity’s confidence in the declarations made to it or other legally significant conduct undertaken in respect of it, without which the trade would be disrupted. The above principle significance in private law was acknowledged in the UNIDROIT Principles of international commercial contracts 2004. It is in light of this principle that an assessment should be made of the fact that, while entering into the agreement, the parties agreed upon and were subsequently mutually performing the contractual provisions on fees charged in consideration of marketing services, and that similar provisions were incorporated into agreements as early as September 2002.

In this proceeding, the Claimant intends to entirely evade an obligation under the agreement which has already been performed. Therefore, the Claimant's conduct should be considered *prima facie* as being in breach of the principle of *pacta sunt servanda*.

The Arbitral Tribunal concurs with the view expressed by M. Safjan in *Pojęcie i funkcja zasad prawa prywatnego* ([in:] *W kierunku europeizacji prawa prywatnego. Księga Pamiątkowa Dedykowana Profesorowi Jerzemu Rajskiemu*, Warsaw 2007, p. 13), according to which "The isolation and recognition of the directive principles of a system, which are of normative nature (and whose applicability is thus based on a reconstructed norm of law), do not necessarily lead to the conclusion that the same are peremptory in nature and take precedence over the other norms of the system." A conflict of the values expressed through norms is a property specific to norms which cannot be disregarded when adjudicating on the basis of principles. In the Arbitral Tribunal's opinion, in the case at hand, there is a conflict between the principle of *pacta sunt servanda*, which makes it legitimate for the Respondent to expect that should its business partner wish to evade a performance already made and consistent with the contract, it shall be protected under law, and the claimant's expectation that it shall be protected under law as the weaker party to the contract.

Based on the presented facts of the case, the Arbitral Tribunal decided that the Claimant was the weaker party to the contract. This follows primarily from the fact that the equivalence of performances made by the parties

was substantially upset. The consideration in the form of the discount allowed by the Claimant was not reflected in the performance provided by the other party, i.e. in the marketing activities. The promotional materials, i.e. promotional flyers and campaigns concerning newly-opened stores, served first of all to promote the business name of the Respondent, and the suppliers' business names and trademarks were not displayed therein. The Respondent did not prove that such materials and the information they contained served primarily the Claimant's interests. Only to a small extent did the Claimant benefit from the Respondent's activities to attract a greater number of customers. However, the Respondent failed to prove that there had existed any material connection between the increase in sales in the months in which advertising activities were performed and the advertising activities as such. To quote the sales figures and to refer to the fact that advertising activities were or were not carried out do not prove on their own a causal relation between an increase in sales and advertising activities. The volume of the Claimant's goods sold was increasing e.g. around Christmastime and Eastertime. In this respect, the burden of proving the claim raised rests with the Respondent.

The principle of protecting the weaker contractual party is realized both under Polish law and in leading legal systems. The French jurisprudence points out that the issue of imbalance can arise not only with consumer contracts. The case law established by French courts is familiar with the concept of economic compulsion and assumes contract invalidity due to lack of *causa*, whenever the performance of one of the parties is of negligible

value or absent altogether (Wyszogrodzka S., Ziętek M., *Ochrona słabszego przedsiębiorcy w orzecznictwie sądów francuskich* [in:] *Przegląd Prawa Handlowego*, May 2009). In Poland, the legitimacy of protecting the weaker contractual party is argued by E. Łętowska (*Prawo zobowiązań – część ogólna. System Prawa Prywatnego*, vol. 5, Warsaw 2013, pp. 496-498), who points out that imbalance can take the form, inter alia, of an actual lack of equal status of the parties, and thus consist in the fact that “one party has an economic advantage over the other party, which makes the execution of a specific contract less important to such party than to its business partner, as a result of which such party can exert pressure on its business partner to execute a contract containing specific provisions (or at least benefits from the fact that it is very desirable for its business partner to execute the contract).” The Arbitral Tribunal is of the opinion that the situation described above is what we deal with in the case at hand. Despite the lack of equivalence of performances, the Claimant agreed to bear the cost of the fee in consideration of marketing activities, being driven by the very opportunity to enter into a contract with the Respondent who, being a franchisor of a chain of stores, could influence the range of goods offered therein.

In this proceeding, the Arbitral Tribunal faced the need to resolve a conflict between two civil law principles, in accordance with which protection under law might be legitimately expected by both parties to the proceeding. The Court has decided that the principle of *pacta sunt servanda* is to be limited due to the necessity to protect the weaker contracting party whose obligations were

incommensurate with the benefits derived, and whose other means of accessing the market of large-format retail stores were restricted, though available. The incommensurateness of the obligations with the derived benefits is not, however, equivalent to the absence of any benefits whatsoever. Owing to the need to decide the conflict between two civil law principles, the Arbitral Tribunal has assumed that, given the facts of the case at hand, priority should be given to protection of the weaker party, although the principle of *pacta sunt servanda* may not be totally disregarded. Given the difficulties to be faced when attempting to make an accurate calculation of the benefits obtained by the Claimant, the Arbitral Tribunal has decided to apply per analogiam Article 322 CCP, which authorizes a departure from the rule that it is not only the existence of a claim but also the value of the same that should be proven in a lawsuit. [...]

The governing law

– general principles of law

■ Date of award: 2014
 Place of award: Warsaw
 Arbitral tribunal composed of: Three arbitrators

GLOSS

Introductory comments

The selected award deserves to be commented on for two reasons. Firstly, it is an example of adjudication on the basis of general principles of law to the exclusion of the applicable law governing a specific legal relation. Over the last few years, principles of law, and in particular constitutional principles, have inspired extensive research by jurisprudence authors. Their role at courts of arbitration is unique in that they may serve there as an independent ground for adjudication. That is why this method of adjudication deserves some thought. Secondly, the analysis of the arguments presented by the court in the award commented on, which is – getting ahead of further assessment presented herein, more of a failure than a success both in terms of the argument structure and the relevance of individual arguments – can contribute to setting the standards of adjudication to be followed by courts of arbitration. In the case of common courts and administrative courts, such standards have been debated in the jurisprudence in the form of glosses and otherwise for several dozen years now. A corresponding jurisprudence output is not yet available to courts of arbitration.

The facts and the object of dispute

In a framework agreement the parties established the rules of cooperation consisting, *inter alia*, in the claimant supplying to the respondent goods intended for sale, to be subsequently marketed by the respondent. The reason for and the object of the dispute was a practice consisting in the respondent charging to the claimant fees for marketing services, i.e. fees other than the trade margin. Such fees were not explicitly provided for in the agreement, although they had been charged in the course of the parties' cooperation since 2002.

In the case of the agreement currently in force, the claimant challenged legitimacy of the marketing fees referred to above, arguing that the same constituted an act of unfair competition within the meaning of Article 15.1.4 of the Act of April 16, 1993 on Combating Unfair Competition (consolidated text: Dz. U. [Journal of Laws] of 2003 No. 153, Item 1503, as amended; hereinafter referred to as the "Unfair Competition Act"). According to the claimant, "it does not follow from the agreement executed by the parties that they are not bound by the provisions of the Unfair Competition Act," hence Article 15.1.4 of the Unfair Competition Act should apply. The claimant

further argued that “to consider permissible conduct which is illegal or in conflict with the principles of commercial integrity, such as a tortious act of unfair competition, would be to violate the fundamental rules of the public policy of the Republic of Poland.”

In turn, the respondent argued that Article 15.1.4 of the Unfair Competition Act did not apply to the legal relation holding between the parties. This follows from the arbitration clause incorporated into § XX.2 of the agreement and providing that a dispute should be resolved “exclusively on the basis of general principles of law, and in particular the principle of *pacta sunt servanda*, to the exclusion of the substantive law governing the civil law relation holding between the parties.” The respondent considers Article 15.1.4 of the Unfair Competition Act to form part of “the substantive law governing the civil law relation holding between the parties,” the applicability of which is excluded.

Other arguments raised by the parties in their respective pleadings can be disregarded at this point.

Thus, the essence of the dispute comes down to two fundamental questions of law, namely:

1) the question of correctness of the arbitration clause contained in § XX.2 of the agreement in light of Article 1194 § 1 of the Code of Civil Procedure. The Arbitral Tribunal had to establish whether what it dealt with was a provision of the nature of *jus cogens* (even if in part, with respect to the exclusion of the applicable law governing the relation in question) or the provision in question should be deemed to be of

the nature of *jus dispositivum* in its entirety. In the dispute resolved under the award commented on, the object of dispute was the issue of admissibility and effectiveness of the contractual exclusion of applicability of “the substantive law governing the civil law relation holding between the parties,” including the issue of whether or not an exclusion made by virtue of the mutual intention of the parties extended to cover also the rules governing the liability in connection with private law torts;

- 2) the question of the consequences of the “general principles of law, and in particular the principle of *pacta sunt servanda*,” having been specified by the parties as the ground for adjudication. This means that the following issues needed to be decided:
- a) whether the principle of *pacta sunt servanda* is of peremptory (conclusive) nature, i.e. whether this principle should be applied on an “all-or-nothing” basis and thus prevent the court from applying other “general principles of law,” and, if so, then what other principles and to what extent;
 - b) whether “general principles of law” assume, permit or preclude reference to principles of equity, the application of which also requires, pursuant to Article 1194 § 1 of the Code of Civil Procedure, to be explicitly authorized, although the conjunction “or,” as used in the provision quoted, makes the same an alternative to “general principles of law.” Let us remember that the provision of § XX.2 of the agreement (i.e. the arbitration clause) remains silent on principles of equity; and

c) whether general principles of law can alone serve as a ground for, or at least as arguments in support of, application of the requirements set forth in the Unfair Competition Act, despite the fact that the linguistic interpretation of the agreement suggests their exclusion, while the systemic interpretation (and in particular the argument under Article 1206 of the Code of Civil Procedure) might justify their application. It should be borne in mind that the provisions of the Unfair Competition Act were not mentioned in the agreement in relation to the fees owed by the parties in connection with a regular performance of the agreement, but were directly referred to in § TT.2 in relation to a disclosure by either party of “news and information” constituting a trade secret.

Exclusion of the applicability of the law governing a given legal relation

The first issue requiring a decision of the Arbitral Tribunal was “dealt with” in a relatively brief manner: it was assumed that both the wording of Article 1194 § 1 of the Code of Civil Procedure and its interpretation assumed in practice permitted the exclusion of the “law governing a given legal relation” and the recognition of “general principles of law” alone as a basis for the court’s of arbitration ruling, if any. This view is not justified by the Arbitral Tribunal in too detailed a manner. The Arbitral Tribunal refers to the clear wording of the provision and to an unquestioned standpoint expressed in the “literature” (i.e. the jurisprudence). The view offered by the Arbitral Tribunal deserves to be approved of, even though the Arbitral Tribunal does not cite the extensive

and substantially consistent case law established by common courts or the infrequent views challenging the admissibility of the governing law being excluded altogether¹. As a matter of fact, one should approve of the practice according to which the task of courts, including courts of arbitration, is to resolve the disputes submitted to them, and not to reconcile the divergent views one can come across in the jurisprudence. Therefore, they may ignore minor differences of opinion among jurisprudence scholars.

However, the Arbitral Tribunal’s position on the issue of the exclusion of the “law governing a given legal relation” and the recognition of “general principles of law” as themselves forming a sufficient basis for resolution turns out not to be fully consistent. When refusing to apply the governing law, the Arbitral Tribunal held that it “was faced with the need to extract principles that might apply in the case at hand from the applicable provisions of law. The protection of competition, to which the parties to the proceeding refer when arguing in favor of a specific interpretation of Article 15.1.4 of the Act on Combating Unfair Competition, may be provided under both public law and private law, and tortious acts of unfair competition should be considered civil law torts.”

Thus, the Arbitral Tribunal assumed that the exclusion of the governing law applicability affected the provisions of specific legislative acts, including the Civil Code and the Unfair

1. The “unquestioned standpoint expressed in the jurisprudence” is, however, challenged, inter alia, by K. Knoppek in his article entitled *Problem związania sądu polubownego przepisami prawa materialnego*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny,” Year LXXVI, Journal 1 of 2014, pp. 69 ff.

Competition Act, but not specific norms (and especially not ones of general nature). The statement of reasons does not provide an answer to the question: “what general [applicable] principles of law should apply to the dispute submitted to the Court of Arbitration?” (without making an a priori assumption of relevance of the norms pertaining to unfair competition torts), but specifies the general principles of law from which detailed standards (directives) indicating how competition could be protected in the case under consideration can be derived. The Arbitral Tribunal assumed that since the parties focused their dispute on the application of fair competition standards, the relevance of such standards became legitimate *per se*². In this way, a potential conclusion of the reasoning (i.e. the necessity to consistently comply with the requirements of the Unfair Competition Act) was turned into an assumption for the reasoning conducted by the Arbitral Tribunal. Such a position is, in the author’s opinion, supported neither by Article 1194 § 1 of the Code of Civil Procedure nor the provisions of the agreement executed by the parties to the proceeding in question. However, the Arbitral Tribunal is of the opinion that it is supported by the principle of fair competition, as discussed below.

The nature of general principles of law and the methods of their application

While deciding the dispute, the Arbitral Tribunal focused on the points involved in the other key

2. However, the Arbitral Tribunal does not conclude that this was the parties’ intention at the stage of the agreement execution, which might justify consideration of the fair competition standards when construing the agreement (an argument under Article 65 of the Civil Code), but that this is the key issue disputed by the parties.

issue under dispute, i.e. the conclusions of general principles of law, and especially of the principle of *pacta sunt servanda*, which required to be taken account of “in particular.” The method employed to resolve the dispute and the arguments formulated by the Arbitral Tribunal are the consequence of adopting:

- a) a specific interpretation of the concept of “general principles of law”;
- b) specific methods of reconstructing their content and determining their application; and
- c) a specific method of handling conflicts of various principles.

However, the position taken by the Arbitral Tribunal in the statement of reasons to the award in question on all the three aspects of “adjudication on the basis of principles of law” raises certain concerns.

While explicating the essence of the general principles of law referred to in Article 1194 § 1 of the Code of Civil Procedure, the Arbitral Tribunal assumed after Marek Safjan that principles are “norms created based on a reconstruction of the fundamental assumptions, values and ideas resulting exclusively from a specific system, branch or field of law”³. This means that principles are normative in nature, hence they can and should be an important standard to be followed in the course of application of law, but also that their meaning is neither obvious nor the effect of some illumination or

3. Safjan M., *Pojęcie i funkcja zasad prawa prywatnego* [in:] *W kierunku europeizacji prawa prywatnego. Księga Pamiątkowa Dedykowana Profesorowi Jerzemu Rajskiemu*, Warsaw 2007, p. 5. An elaborated and slightly modified version of this article was also published under the title of *Rozdział VI. Zasady prawa prywatnego*, w: *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, M. Safjan (ed.), Warsaw 2007, pp. 261-308 (hereinafter cited as Safjan M., *System*).

(should we invoke a recognized interpretation concept) “direct understanding.”

M. Safjan’s understanding of principles of law, which the author fully endorses, does not appear to be the best point of departure for adjudication on the basis of general principles of law, as stipulated in Article 1194 § 1 of the Code of Civil Procedure. M. Safjan’s broad way of looking on this issue results from analyzing the legal norms applicable in Polish civil law in terms of their logical structure, their position within the system of law and the grounds for their applicability. This is a reference to the debate initiated by Ronald Dworkin in 1975 and ongoing in philosophy of law worldwide, seeking to answer the question whether law consists exclusively of the so-called norms-rules, which prescribe the conduct of the addressees of a law in line with the formula: “a rule is either complied with or violated,” or there are also other standards to be identified within law, such as principles, which can be complied with to a greater or lesser extent, policies, programmatic norms, etc.⁴ The debates on norms-rules and norms-principles have also a systemic aspect, as, according to some authors, moral standards can have the nature of principles of law as well if courts somehow refer to them when applying law.

The above understanding of principles of law clearly differs from the one adopted for the purposes of Article 1194 § 1 of the Code of Civil Procedure. When talking about the

principles of private law, M. Safjan in the first place provides an answer to the question of what is the nature of the standards which this branch of law considers to be principles. Whereas the primary question that needs to be answered with respect to Article 1194 § 1 of the Code of Civil Procedure is: what substantive standards are classified as “general principles of law,” regardless of whether or not they are found in individual applicable law systems, and which of them deserve to be applied in proceedings before courts of arbitration in addition to and, more frequently, in place of the applicable law and principles of equity. In other words, when determining the list of general principles of law in the context under discussion, we inquire in the first place about a certain practical institutional consensus, i.e. what standards the practice recognizes as permitting the exclusion of the applicable law of specific countries. That is why authors commenting on Article 1194 § 1 of the Code of Civil Procedure point out that “general principles of law are understood as supranational fundamental legal norms, generally recognized and shared by the so-called civilized legal systems, referring for instance to contract validity (*pacta sunt servanda*, *rebus sic stantibus*) or to respecting the principles of good faith or protection of acquired rights. Parties [and not arbitrators! – TS’s note] can specify such principles in more detail by referring e.g. to the UNIDROIT principles or the principles of European contract law”⁵. This is the interpretation of the concept of general

4. See Safjan M., *Pojęcie i funkcje ...*, pp. 3, 10, 13, 16, 17, 18; Safjan M., *System ...*, pp. 261, 263 ff.; in the Polish literature, see, inter alia, Gizbert-Studnicki T., *Zasady i reguły prawne*, “Państwo i Prawo” 1988, no. 3; and Dworkin R., *Taking rights seriously* [Polish edition: *Biorąc prawa poważnie*, Warsaw 1998].

5. Ereciński T., *Komentarz do art. 1194*, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 5, T. Ereciński (ed.), 3rd ed., Warsaw 2009, p. 704; likewise, Prus P., *Uwagi do art. 1194 § 1*, [in:] Manowska M., Adamczuk A., Prus P., Radwan M., Sierko M., Stefańska E., *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2013 (Section 4).

principles of law which the Arbitral Tribunal presents at the beginning of its analyses (page 2, paragraph 2 of the statement of reasons); however, it does not refer to it further on in the document.

It should be added that the general principles of law within the meaning of Article 1194 § 1 of the Code of Civil Procedure are also the principles of law as defined by Ronald Dworkin, Marek Safjan or Tomasz Gizbert-Studnicki. But the reverse does not hold true! Not every standard, and in particular not every morally justified standard which we are guided by in society and need to reconcile with other standards, may be deemed to be a principle of law, a “supranational fundamental legal norm, generally recognized.” This is so also due to the fact that the general principles of law within the meaning of Article 1194 § 1 of the Code of Civil Procedure are usually considered separate from principles of equity, which are reconstructed not so much at the level of universal supranational case law practice as in the context of the local legal culture and specific facts.

Adjudication on the basis of general principles of law

The interpretation of the concept of general principles of law adopted by the Arbitral Tribunal, which is incorrect in my opinion, led to dubious conclusions. In the first place, the Arbitral Tribunal decided that it was its task, and concurrently its competence, to reconstruct the principles of law most relevant to the resolution of the disputed submitted to it. Such a reconstruction should be based on “the assumptions, values and ideas resulting

from a specific system, branch or field of law” (following M. Safjan). In consequence, the Arbitral Tribunal decided that it was necessary to adopt a “general principle of fair competition,” and thus to make an assessment of the marketing fees charged by the respondent to the claimant. In this way, another dubious line of reasoning was employed: instead of seeking an answer to the question whether general principles of law require an inquiry into the legitimacy of the marketing fees and justify the claim that the same violate the principles of fair competition, the Arbitral Tribunal assumed beforehand that it should look for an equivalent of Article 15.1.4 of the Unfair Competition Act in the collection of general principles of law⁶. One can say that the Arbitral Tribunal “took a shortcut” and, for a second time, took a hypothesis to be a (justified) proposition. Except that, as a result, it failed to provide reasons for the fundamental element of its own ruling.

If we apply a “friendly interpretation” of the award commented on, we can consider an argument justifying the position of the Arbitral Tribunal. Perhaps the Arbitration Tribunal has reached its conclusion that if the principles of fair competition are ignored, the verdict will be exposed to the accusation that the principles of public policy of the country referred to in Article 1206 of the [Polish] Civil Procedure Code, as

⁶ Meanwhile, an analysis of the case law established by common courts, including the Supreme Court, clearly reveals a multitude of possible interpretations of Article 15.1.4 of the Unfair Competition Act, and leads to the conclusion that not all fees other than the trade margin are automatically deemed to constitute an act of unfair competition (I omit to quote the case law). Disputes involving a decision as to whether or not specific fees constitute an act of unfair competition, including views such as the one of M. Modzelewska de Raad, P. Karolczyk, are also quoted in the statement of reasons commented on (p. 5).

well as in Article V.2.b of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), have been breached. The argument referring to public order clause was explicitly used in the filing by the claimant. The Arbitration Tribunal takes also the public policy clause into consideration while discussing the effectiveness of the exclusion of the applicable law governing a specific legal relationship (see page 3 above). It may be understood as a suggestion – made in accordance with the claims expressed in the filing – that the exclusion of the rules and principles of the fair competition is inadmissible. The following argumentation of the Arbitration Tribunal goes, however, in a different direction. First of all, the statement of reasons does not mention that the agreement executed by the parties remains silent about marketing fees. Thus, instead of calling the practice of charging marketing fees into question altogether due to the absence of any contractual grounds therefor and, possibly, making an attempt to identify any basis therefor in the actual conduct of the parties (which, however, would have had to be well justified), the Arbitral Tribunal assumed that such fees were due, although not necessarily in the amount charged by the respondent.

The Arbitral Tribunal's understanding of general principles of law was also the decisive factor determining further unconvincing findings. The Arbitral Tribunal decided that, in the case at hand, "there is a conflict between the principle of *pacta sunt servanda*, which makes it legitimate for the respondent to expect that should its business partner wish to evade a performance already made and consistent with the contract, it shall be protected under law, and the claimant's expectation that it shall be

protected under law as the weaker party to the contract" (p. 5 of the statement of reasons). The Arbitral Tribunal thus decided that in order to render an award, it needed a solution reducing or removing a conflict between two principles of law, i.e. the principle of *pacta sunt servanda*, as explicitly referred to by the parties in the arbitration clause, and the principle of protecting the weaker party to the contract. As part of its findings of fact, the Arbitral Tribunal also established that the claimant was the weaker party to the contract. This was indicated, *inter alia*, by a substantially upset equivalence of the performances made by the parties. These were the grounds on which the Arbitral Tribunal rendered its award.

The position taken by the Arbitral Tribunal seems to raise concerns due to four reasons.

First, while assuming the findings of fact (which I do not question) as a basis for reconstruction of a relevant principle of law, it deemed the principle of protecting the weaker party to a contract to be binding. This is questionable due to the fact that, as I pointed out, whether or not a given standard is classified as a "general principle of law" within the meaning of Article 1194 § 1 of the Code of Civil Procedure, is determined by a practice the scope of which is broader than local, and not by a discretionary decision of arbitrators made based on an analysis of specific facts.

Second, an analysis of the literature and case law on private law principles applicable to relations between entrepreneurs reveals that the same leave out the principle of protecting the weaker party to a contract. What is emphasized is the principle of equality of the parties and the

principle of party autonomy, including its version in the form of the principle of freedom of contract, and its consequence, i.e. the principle of *pacta sunt servanda*.⁷ The principle of protecting the weaker party is certainly applicable in other fields of trade, including in consumer relations, but it does not sound convincing as a standard applicable to relations holding between entrepreneurs⁸. The French law argument raised in the statement of reasons to the award in question refers to the principle proposed within that system of law rather than to “generally recognized” standards. Such a legitimization is too weak. It is also pointed out in the jurisprudence that protection of the weaker party to a contract is achieved through a legislative technique other than principles of law. To this end, so-called semi-imperative norms (unilateral peremptory norms) tend to be employed, as it is such norms that permit gradation of the protection granted over conflicting interests⁹.

Third, the principle of protecting the weaker party to a contract would be rather some form of the “equitable contract principle”¹⁰. In the framework cooperation agreement the performance of

which was assessed under the award, the parties had not, however, specified in the arbitration clause principles of equity as an admissible basis for an arbitral award. And since they did not do so, those standards should not be employed with full conviction. Such a restriction is required both under the interpretation of Article 1194 § 1 of the Code of Civil Procedure (“if expressly so authorized by the parties, on the basis of [...] principles of equity”), as endorsed by a vast majority of authors, and under the unequivocal provision of § XX.2 of the agreement which stipulates that a dispute should be resolved “exclusively on the basis of general principles of law, and in particular the principle of *pacta sunt servanda*” (emphasis added by TS).

Fourth, being a type of norms of law, principles of law, including general principles of law within the meaning of Article 1194 § 1 of the Code of Civil Procedure, are realized to a greater or lesser extent, and in the event of their conflict – are weighted (balanced), which is reminiscent of proportional reasoning (Article 31.3 of the Constitution of the Republic of Poland of April 2, 1997). However, the weighing of principles does not necessarily mean that in the case of a conflict of principles applicable in a given set of facts, each such principle should be applied “equally” or “to some extent,” as done by the Arbitral Tribunal in the award commented on. Just the opposite, the extent to which each of the conflicting principles will be realized depends on the “weight” assigned to it and on the proportions that best fit a given case.¹¹ And this must be

7. See, for example, Safjan M., *System*, pp. 273 ff.

8. I leave aside the fact that the principle of protecting the weaker party to a legal relation is frequently adopted under public law, including in the fields in which public authorities interfere in many various ways in private law relations.

9. See Machnikowski P., § 29. Zakres swobody kształtowania treści umowy, [in:] *Prawo zobowiązań – część ogólna. System Prawa Prywatnego*, tom 5, Warsaw 2013, p. 484. The substantive principle of protecting the weaker party should not be confused either with the rule of interpretation which says that any ambiguity involved in a legal transaction should be construed in favor of the weaker party (*contra proponentem*). Cf. Safjan M., *System*, p. 282.

10. See *Prawo zobowiązań – część ogólna*, *ibid.*, pp. 496–498, as cited in the statement of reasons. Incidentally, the author of the quoted fragment is P. Machnikowski, and not E. Łętowska, who is the editor of the entire volume.

11. Dworkin R., *Imperium prawa*, Warsaw 2006, pp. 61, 250. For the balancing of a conflict of principles, see also Safjan M., *System*, pp. 302 ff.; and Kordela M., *Zasady prawa. Studium teoretycznoprawne*, Poznań 2012, pp. 250 ff.

clearly and convincingly justified! The Arbitral Tribunal was aware that the application of principles of law was not made “in absolute terms,” but needed to take into consideration the fact that also other principles were in place. However, it failed to consistently follow this rule. It did not take account of the fact that upon the execution of the framework cooperation agreement, the intention of the parties had been to “adhere” to the agreement to the greatest extent possible, and not to look for equitable arguments in the law governing the legal relation or in the standards of *ex aequo et bono* adjudication¹². Therefore, there were no grounds for charging marketing fees, even if in a lower amount, since in the agreement they had executed, the parties had not provided for such mutual obligations.

Conclusions

The formula of “adjudication on the basis of principles of law” proposed by the Arbitral Tribunal in the award commented on, is not convincing in terms of its pertinence and can hardly be considered to provide a model to be followed in cases in which parties precluded under an arbitration clause dispute adjudication on the basis of the applicable law governing a given legal relation. The category of general principles of law should be understood as meant for Article 1149 of the Code of Civil Procedure, and not as used in general discussions on Polish law regulations. The method of what Ronald Dworkin calls principle

“weighing” should also be taken seriously, as the traditional conflict of laws rules (*Lex superior derogat legi inferiori* or *Lex specialis derogat legi generali*) do not apply in this respect. Neither do courts of arbitration have discretionary power or can use their discretion when deciding to apply principles. In such cases, the goal should not be to render awards being the product of seeking “the lesser evil”, and in particular of consent to a “rotten compromise,” etc. Finally, the difference between adjudication on the basis of general principles of law and the reasoning referring to principles of equity should not be blurred. General principles of law, the application of which by a court of arbitration may be authorized by the parties, are not a mere “extension” of moral principles, such as justice in exchange (*iustitia commutativa*). They serve as an objective legal instrument, selected while having in mind this particular method of dispute resolution, i.e. arbitration.

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12. For the permeation of non-legal standards (inter alia, arguments based on equity) or the reasoning specific to mediation into arbitration proceedings, see Jemielniak J., *Legal interpretation in international commercial arbitration*, Ashgate, 2014, pp. 175 ff. However, in the case under discussion, one can hardly find a reason for employing such solutions.



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