

THE CHALLENGES  
AND THE FUTURE  
OF COMMERCIAL  
AND INVESTMENT  
ARBITRATION

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# THE CHALLENGES AND THE FUTURE OF COMMERCIAL AND INVESTMENT ARBITRATION

Liber Amicorum  
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# THE «ARBITRABILITY II» DECISION OF THE GERMAN SUPREME COURT (BGH) – THE GERMAN BENCHMARK FOR ARBITRATING CORPORATE DISPUTES IN POLAND?

Rafał Kos\*

## 1. INTRODUCTION

A comparison of the German and Polish regulation of company law and procedural law, including arbitration law, has an obvious theoretical foundation. In relation to company law, the Polish regulations most often copy the solutions adopted by the German legislator.<sup>1</sup> Procedural law in both systems is based on the same principles of proceeding and shares a similar understanding of procedural institutions.<sup>2</sup> In turn, the regulation of arbitration law, in both legal orders similarly located in the codes of civil procedure (the so-called 'codical' systems), in its content, includes

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<sup>1</sup> It has been admitted by the authors of the final draft of Code of Commercial Companies ('KSH') who expressed the opinion that majority of KSH rules can be characterised as a faithful imitation of their German models, see K. Oplustil, A. Radwan, *Comparative View on Company Law in Poland; Between Autonomous Development and Legal Transplants*, Working Paper 2/2010, <http://www.allerhand.pl/index.php/pl/dzialalnosc/publikacje/working-papers.html>, p. 7. It applies in particular to the model of challenging the shareholders' resolutions in commercial companies, although the practice and jurisprudence has already proved the general rule stating 'the original is better than the best imitation', see the critical analysis of the existing regulation summarised by the Polish Supreme Court ('Polish SC') in its decision of 13 Sept. 2013 (III CZP 13/13).

<sup>2</sup> For the present deliberations it is worth drawing attention to a similar understanding of such institutions as: the right to a fair trial, the notion of the party to proceedings, formal and material joint-participation, dependent and independent intervention, validity of decision, *res iudicata*, or consolidation of cases for joint examination.

standards enshrined in the UNCITRAL Model Law.<sup>3</sup> Moreover, in 2005 in the course of legislative works on reforming arbitration law, the Polish legislator directly referred to the experience of the German regulation. Far-reaching similarities of substantial characteristics as well as the structure of regulations in both systems lend themselves to the use of a comparative legal analysis method. Confrontation with the output of the German legal science and German case-law constitutes the most valuable source of inspiration for Polish doctrine.

The arbitrability of disputes on invalidation of companies' resolutions<sup>4</sup> constituted the most controversial problem in the scope of the so-called corporate arbitration, both in Polish and German company law and procedural law.

The output of German doctrine and case-law in this scope is enormous. Within the last twenty-five years the view on the arbitrability of resolution disputes has evolved from negating the arbitrability of such disputes by a majority of German doctrine and case-law, to the final recognition that such disputes are arbitrable.<sup>5</sup> The judgment of the German Supreme Court (*Bundesgerichtshof*, 'BGH') of 6 April 2009 (in the literature of the subject commonly referred to as the *Arbitrability II* decision), has put an end to the controversies related to this topic.<sup>6</sup>

In this debate Polish doctrine, despite a substantial concurrence of the legal regulation with the German regulation, is not much more advanced

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<sup>3</sup> The German act amending the law on arbitral proceedings (*'Schiedsverfahren-Neuregelungsgesetz'*) of 22 December 1997 included the UNCITRAL Model Law as adopted on 21 June 1985; Cf. more A. Szumański (ed.), *System Prawa Handlowego vol.8, Arbitraż Handlowy*, Warszawa 2010, pp. 128–129.

<sup>4</sup> The notions of dispute/action 'on invalidation of a resolution' or 'resolution disputes' will be used as a shortcut to define disputes/actions in cases for the annulment or invalidation of a resolution of a meeting of shareholders of a limited liability company (or general meeting of a joint-stock company). The notion of 'a resolution award/verdict' will be synonymous with a final verdict annulling the resolution or ascertaining invalidity thereof.

<sup>5</sup> The time census of approx. 25 years was adopted conventionally – obviously the debate had been ongoing before then. But it was in 1988, hence 20 years prior to the issuance of the *Arbitrability II* decision, when the first in German doctrine voice criticised the commonly established in the German jurisprudence view of non-arbitrability of resolution disputes, see K. Schmidt, *Schiedsfähigkeit von GmbH-Beschlüssen*, ZGR 1988/4 [!, note by RK], p. 525; and *idem*, *Statuarische Schiedsklauseln zwischen prozessualer und verbandsrechtlicher Legitimation*, JZ 1989, pp. 1074–1088.

<sup>6</sup> File ref. No. II ZR 255/08, German original published in BGHZ 180, pp. 221–235.

than German doctrine was twenty-five years ago. Polish doctrine is still dominated by the view ruling out the arbitrability of disputes related to challenging the resolutions of a company.<sup>7</sup> The case-law of state courts and the Supreme Court in this regard is virtually non-existent.<sup>8</sup>

Therefore, it is worth considering to what extent the BGH's case-law output, and in particular the substantiation of the key decision – Arbitrability II, may constitute a source of inspiration in the Polish debate on the arbitrability of disputes on validity of companies' resolutions and in the debate on the minimal standards required of such arbitral proceedings.<sup>9</sup>

## 2. THE ARBITRABILITY II DECISION – ITS HISTORICAL BACKGROUND AND RELEVANCE FOR ARBITRATING CORPORATE DISPUTES IN GERMANY

The gist of the BGH's *Arbitrability II* decision is: '*Disputes on the validity of shareholders' resolutions of limited liability companies are, in principle, arbitrable [...]*'.

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<sup>7</sup> Thus, among others, vol. T. Ereciński, K. Weitz, *Sąd arbitrażowy*, Warszawa 2008, p. 122; M. Spyra, in: S. Włodyka (ed.), *System prawa handlowego, vol. 2B: Prawo spółek handlowych*, Warszawa 2007, p. 510–511; M. Tomaszewski, *O zaskarżaniu uchwał korporacyjnych do sądu polubownego – de lege ferenda*, Przegląd Sądowy 2012/4, pp. 22–39; G. Suliński, *Zdolność ugodowa sporów o zaskarżenie uchwał zgromadzeń spółek kapitałowych*, ADR. Arbitraż i Mediacja 2014, No. 3, pp. 65–66; differently, i.e. in favor of arbitrability of resolution disputes *de lege lata*: R. Uliasz, *Zaskarżanie uchwał zgromadzeń spółek kapitałowych przed sądem arbitrażowym*, Prawo Europejskie w Praktyce 2006/10, pp. 57–58; A.W. Wiśniewski, in: A. Szumański (ed.), *System prawa handlowego, vol. 8: Arbitraż handlowy*, Warszawa 2010, p. 238–239; R. Kos, *Zdatność arbitrażowa sporów o ważność uchwał spółek kapitałowych*, pp. 33–36.

<sup>8</sup> The Judgment of the Court of Appeal in Warsaw of 23 July 2009 (I ACz 1214/09) constitutes the only exception, <http://arbitraz.laszczuk.pl/orzecznictwo/379>; the Court, *ruling out the settleability of resolution disputes referred to legal consequences of a resolution verdict following from Article 254§1 and Article 427§1 KSH*, i.e. *ultra partes effectiveness of such a verdict*. It is precisely the same problem which constituted the *clou* of the debate in German doctrine and in the case-law of the BGH. The Polish SC has not had an opportunity to decide on this issue.

<sup>9</sup> First attempts to reflect on the importance of this decision for Polish arbitration doctrine have already been made, cf. J. Barański, *Problematyka klauzul arbitrażowych w umowach spółek z ograniczoną odpowiedzialnością w prawie polskim i niemieckim*, Biuletyn PrS, 6/2014, pp. 2–8, and A.W. Wiśniewski, in: *System...*, pp. 793–794 and p. 821. More on this topic in section 5 of the present paper.

Prior to the issuance of this decision, the fundamental obstacle to the recognition of arbitrability of resolution disputes was based on the extended effectiveness of judgments invalidating such resolutions to third parties.<sup>10</sup> Under section 248 of the German Stock Corporation Act (*Aktiengesetz*, 'AktG'),<sup>11</sup> a verdict allowing the statement of claims for the invalidation of a resolution *is binding for all shareholders* (and all members of the company's bodies with the capacity to challenge such a resolution), even if they were not parties to such proceedings. Yet, the BGH found that '[...] despite the lack of a clear provision facilitating the direct application of the provisions of sections 248, 249 of the AktG, [i.e. provisions on *ultra partes*<sup>12</sup> effectiveness of resolution verdicts, note by RK], the provisions at issue would apply *per analogiam* by virtue of the arbitration clause [...] provided that in (suitable) arbitral proceedings all shareholders should be guaranteed legal protection equivalent to the protection guaranteed to shareholders by provisions on proceedings before the state courts [...]'].

The view that the *arbitrability* of a specific category of disputes is of a *conditional nature* and dependent on whether the minimum standards of protection of the rights of (all) shareholders in specific arbitral pro-

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<sup>10</sup> The issue of the settleability of resolution disputes, as a prerequisite to arbitrability, occupied a significant place in the German doctrinal and case-law debate until the latest amendment of the German arbitration law (in 1998) abolished the prerequisite of the settleability of a dispute on property rights. In turn, this prerequisite still exists in the Polish regulation on arbitrability in Article 1157 of the Polish Code of Civil Procedure ('KPC'), nevertheless, the case-law of the Polish SC correctly pointed out that even the *de lege lata* settleability of a dispute constitutes no obstacle for arbitrating disputes on the validity (invalidity) of acts in law; see e.g. SC decision of 23 September 2010 (III CZP 57/10), <http://arbitraz.laszczuk.pl/orzecznictwo/340>. Therefore, the issue of settleability as a prerequisite to arbitrability will be omitted in the present deliberations in view of its unambiguous clarification in the case-law of the Polish SC.

<sup>11</sup> It must be remembered that even though the German Act on Limited Liability Companies ('*GmbH-Gesetz*') contains no provisions regulating the challenging of shareholder resolutions, doctrine and case-law commonly recognise that in this scope provisions of the AktG should be applied *per analogiam*, see J. Barański, *Problematyka zaskarżania uchwał spółek z o.o. do sądów arbitrażowych – orzecznictwo niemieckiego Federalnego Sądu Najwyższego jako wzorzec dla polskiego ustawodawcy*, not published, p. 4 and the German literature and case-law quoted therein.

<sup>12</sup> The doctrinal discussion whether an invalidating verdict is effective *erga omnes*, or more correctly – *ultra partes*, has been omitted here, since settling this issue is not necessary for further deliberations.



ceedings are met *is mistaken* (of which more in section 4). However, much confusion results from the discrepancy between the thesis of the BGH's decision and its substantiation. And so, in the substantiation of the thesis on the 'conditional' arbitrability of resolution disputes, the BGH refers to the conditions that must be met by ... *a specific arbitration clause* covering such a dispute in order to be recognised as having legal effects and for the dispute covered under such a clause to be recognised as arbitrable. The issue of the allegedly required *content of the arbitration clause* constitutes the crucial point in the BGH's justification concerning the issue of arbitrability of resolution disputes. The BGH is of the opinion that only such an arbitration clause is effective in a resolution dispute in which all the shareholders had *established the principles of the future arbitral proceedings a priori*. These principles must guarantee each shareholder a possibility to participate in the future proceedings and enable them to exercise influence on the constitution of the arbitral tribunal (unless the arbitral tribunal, in compliance with the contents of the clause, is to be appointed by a neutral institution).

In recapitulation, in the Arbitrability II decision BGH found that disputes on the validity of resolutions of a limited liability company were arbitrable *in principle*, yet the assessment of arbitrability is of a conditional nature and *depends on the contents of a specific arbitration clause*.

In German doctrine this decision was generally received with approval.<sup>13</sup> The decision was assessed as the BGH's departure from its previous contrary stance, adopted in this matter in the decision of 29 March 1996 (the so-called *Arbitrability I* decision),<sup>14</sup> in which the BGH *in principle negated the arbitrability* of such disputes. The thesis of this decision, which did not pertain directly to the issue of arbitrability, is worth quoting: 'Sections 248, 249 AktG [*provisions on the ultra partes effectiveness of resolution verdicts*, note by RK] are not applicable if the award was issued by a private court of arbitration'. The substantiation of the aforementioned thesis also caused a misunderstanding. The BGH admitted that these disputes could be heard in arbitral proceedings if the arbitration clause complied with the specific standards in terms of its content. What standards? Standards which when applied in arbitral proceedings would legitimise

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<sup>13</sup> E.g. J. Bredow, *Arbitrating Shareholder Resolution Disputes in Germany; The New DIS-Supplementary Rules for Corporate Law Disputes ('DIS-RCoLD')*, p. 469 *et seq.*, in: J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka (eds.), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, Warszawa 2010, pp. 469–482, and the commentators referred to there.

<sup>14</sup> Originally published in German in BGHZ 132, pp. 278–290; ZIP 1996, pp. 830–834; BB 1996, pp. 1074–1077, NJW 1996, p. 1753–1756.

vesting the resolution arbitral award with effects *inter omnes* (*ultra partes*), i.e. towards all the shareholders and parties with the capacity to challenge a resolution. The arbitral verdict invalidating the resolution, and this is the only issue on which the BGH is correct, may not pertain to only some shareholders. This results directly both from the contents of §248.1 sentence 1 AktG and from the substance of the company's corporate relationship, shaped by virtue of the resolution being adopted.<sup>15</sup> Nevertheless, in the BGH's opinion, the principal inability to apply the AktG provisions on the extended effectiveness of resolution verdicts issued by private courts of arbitration constituted the fundamental obstacle for recognising *the general arbitrability* of resolution disputes. This obstacle, as the BGH found, may be removed only by way of *a change of the law by the legislator*.

Interestingly, when two years later the German legislator did amend the Code of Civil Procedure (*Zivilprozessordnung*, 'ZPO') with regard to arbitration regulations, it entirely ignored the BGH's suggestion. In the statement of reasons for the amendment, the German legislator explicitly left the problem to be solved by ... the case-law. This was so because the German legislator found the legal *status quo* to be a proper solution, indicating that casuistry of a possible assessment of individual clauses requires courts to be flexible in their application of the provisions. In the Arbitrability II decision the BGH expressly referred to this opinion of the Legislator and took up the 'baton'. BGH, *even though the law had not changed*, altered its opinion and confirmed that the provisions on the *ultra partes* effectiveness of resolution verdicts issued in the arbitral proceedings should apply *per analogiam*.

Thus, in reality, both decisions, although *prima facie* proposing different views of the arbitrability of resolution disputes, in principle are not at all different in terms of the reasoning behind them. In both these decisions, *prerequisites* which according to the BGH underlie the arbitrability of such disputes are tackled in a similar manner. They all aim to ensure that in the arbitral resolution disputes all shareholders enjoy legal protection equivalent to the protection guaranteed by the provisions on proceedings before state courts.

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<sup>15</sup> The nature of the disputed relationship substantiating the binding effects of the verdict for persons other than parties to the litigation follows from the fact that despite their absence in the trial they are parties to the corporate relationship being examined by the court. In some cases, where the relationship being examined is of a multi-party nature (and the company's corporate relationship is always of such a nature), the procedural provisions *do not require all the parties within it to participate in the trial* as mandatory joint-participants.

### 3. STANDARDS ESTABLISHED BY THE ARBITRABILITY II DECISION FOR THE ADMISSIBILITY OF ARBITRATION CLAUSES IN THE ARTICLES OF ASSOCIATION OF A GERMAN LIMITED LIABILITY COMPANY

It is necessary to remember here what specific requirements the BGH set forth for the arbitration clause to be legally effective in disputes over limited liability company's resolutions. To be valid, an arbitration clause covering resolution disputes must comply with the following *requirements*:

- (a) The arbitration clause must be concluded *with the consent of all shareholders*. It may be included in the company's articles of association. If the arbitration clause is concluded outside of the articles of association (which is admissible), apart from the consent of all shareholders, the consent of the company itself is required.
- (b) The arbitration clause must *guarantee all shareholders and members of the company's bodies notification of the ongoing proceedings* on the invalidation of the resolution as well as *make participation* in such proceedings *possible*. Joining proceedings on the side of defendant company is possible as a side intervention ('as a minimum').
- (c) The arbitration clause must guarantee all shareholders *equal treatment as to the appointment of arbitrators*. According to the BGH, this may involve appointing a neutral appointment body in the contents of the clause. Alternatively, each participant of the proceedings must be guaranteed the right to co-participate in the appointment of an arbitrator. In the case of co-participation (on the same side) of a larger number of shareholders, it is admissible for the arbitrator to be appointed with the use of the 'majority of votes' principle.
- (d) Finally, the arbitration clause must *guarantee consolidation within the single proceeding of any and all disputes* dealing with the same subject, i.e. defective nature of the same resolution.

In the case the aforementioned requirements are not met, the arbitration clause is treated as contradictory with the general clause in §138 of the German Civil Code (*Bürgerliches Zivilgesetzbuch*, 'BGB'), and therefore as *invalid*. According to the BGH, the obligation to guarantee all parties the right to appear and be heard before a court follows from the constitutional principle of the state ruled by law. Agreements failing to ensure such protection or limiting such judicial protection should be found to be contrary to good practice (section 138 BGB<sup>16</sup>), and as such invalid.

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<sup>16</sup> It is worth quoting here the full content of §138 BGB, since it will also be subject to interpretation; it is worded as follows – 'An act in law contradicting the good commercial practices is null and void.'

#### 4. CRITICAL EVALUATION OF THE ARBITRABILITY II DECISION

4.1. Contrary to the view adopted by the BGH, *the arbitrability of resolution disputes is of an unconditional nature* – it is not dependent on the conditions indicated in section 3 above.

Firstly, the arbitrability of resolution disputes in German law is a category that shall be *assessed in abstracto*, by way of interpretation of the provision of §1030 ZPO. This provision determines the exclusive criteria of the dispute's arbitrability. Arbitrability in German law is an attribute of *any and all property rights disputes*<sup>17</sup> unless it is explicitly excluded by the provision of the ZPO (e.g. §1030.2 in relation to disputes arising from the lease of residential premises) or provisions of another statute (§1030.3 ZPO). There is no such statutory exclusion in relation to disputes arising out of corporate relationships. It does not exist since disputes related to rights resulting from corporate relationships are not disputes in relation to which the state wishes to preserve its jurisdictional monopoly. For this reason, as the BGH aptly remarked, the settlement of resolution disputes is possible not only by way of litigation and verdict of a state court. It is also possible on the basis of the private law-related autonomy of the shareholders as parties in a company relationship that is realised by way of an agreement of all shareholders or, possibly, by their concurrent action within the company's bodies (e.g. the meeting of shareholders or the general meeting can adopt a new resolution, contrary to the existing provisions).<sup>18</sup> Therefore, if the statutory law contains no such explicit exclusion, then in light of the definition of arbitrability which can be found in §1030.1 ZPO, *any and all corporate disputes*, including disputes on the invalidation of resolutions, enjoy *fully unlimited arbitrability*.

4.2. Secondly, *in principle, the ability of a given category of disputes to be settled in arbitral proceedings is not related to the contents of the arbitration clause in concreto*. Parties concluding *an agreement* which has its own *legal definition* – and the arbitration clause is precisely this kind of agreement – are obligated to shape its content in compliance with the mandatory provisions of the law. These provisions define the *essential elements (essentialia negotii)* of a given type of agreement. Under §1029.1 in conjunction with

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<sup>17</sup> There is no doubt in German doctrine that a resolution dispute is a property rights dispute; cf. K. Schmidt, *Schiedsklauseln und Schiedsverfahren im Gesellschaftsrecht als prozessuale Legitimationsprobleme – ein Beitrag zur Verzahnung des Gesellschafts- und Prozessrecht*, BB 2001, p. 1858.

<sup>18</sup> Thus correctly the BGH, cf. Arbitrability II decision, Statement of Reasons, points 14 and 15; this argument raised beforehand by K. Schmidt was finally adopted by the BGH, cf. K. Schmidt, *ibidem*, pp. 1857, 1859.

§1030.1 ZPO, an effective arbitration clause requires *parties only to indicate the legal relationship* out of which the dispute arises or may arise in the future. Shareholders' inclusion of the arbitration clause *with this minimum content* in specific articles of association fulfils the ZPO requirements for the arbitration clause to be valid. No other provision of Book 10 of the ZPO, regulating the arbitration clause and arbitral proceedings, *stipulates any obligation to supplement the clause with additional components*. In particular, the obligation to *establish the rules of proceedings before the arbitral tribunal* does not follow from any ZPO provision. The fact that the lack of contractual rules of proceedings before an arbitral court is to invalidate the arbitration clause (in part or in full) or make it ineffective, as the BGH had found, does not follow from any provision of statutory law, either.

4.3. The interpretation of §138 BGB performed by the BGH, whereby the general 'good practice' clause were to impose on shareholders an *obligation to establish the rules of proceedings in detail* before the proceedings start, and on top of that, at the risk of declaring the arbitration clause null and void, constitutes merely *judicial law-creation*.<sup>19</sup> Moreover, it remains in direct contradiction with the content of §1042.4 ZPO in conjunction with item 3 of this provision. The ZPO provides for the *competence of parties* to the arbitration clause to regulate the rules of proceedings before courts, but it *does not impose* any obligation to do so.<sup>20</sup> If parties do not take advantage of the competence to regulate the rules of proceedings, *it passes onto the arbitrators*. They may, without prejudice to the mandatory provisions, conduct the proceedings in any manner they find appropriate (§1042.4.1 ZPO). Therefore, *the regulation of competences to determine the rules of proceedings before the arbitral tribunal is complete*. Meanwhile, the interpretation of §138 BGB proposed by the BHG in fact attempts to alter the ZPO contents.

4.4. Obviously, it is a desirable solution for shareholders to regulate, *in their own interest*, the rules of proceedings before the arbitration court, in a way that ensures all shareholders the right to a fair trial. Then, they do not face the risk that the arbitral tribunal will either refuse to apply the proper rules or apply incorrect rules of proceedings, thus violating their right to a fair trial. In such a situation, the award issued by arbitrators *will not be recognised and enforced in the public domain* because it will not pass the *ex post* control exercised by state courts. The courts will set it aside as

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<sup>19</sup> Cf. also the criticism of the interpretation of §138 BGB by the BGH expressed by K. Schmidt in: *Gesellschafterstreitigkeiten vor Schiedsgerichten*, in: *Gesellschaftsrecht in der Diskussion 2009*, pp. 114–115.

<sup>20</sup> Obviously within the limits set by the principle of equality of parties and other mandatory provisions of Book 10 ZPO (§1042.1 and 2 ZPO).

a result of a complaint (§1059.1. (b) and (d) and 2. (b) ZPO)<sup>21</sup> or refuse to recognise its enforceability (§1060.2 ZPO).

4.5. The BGH is correct, however, in claiming that the arbitration clause may not include provisions which would in any degree expressly *limit shareholders' ability to participate in the arbitral proceedings* on the invalidation of a resolution. The BGH rightly indicates that it would be an abuse of the parties' autonomy and freedom of contracts constituting a restriction of the constitutional right to a fair trial for the parties which are to be bound by the verdict. Such contracts do not deserve protection.<sup>22</sup> Such an arbitration clause will be obviously *ineffective*.<sup>23</sup> In turn, a clause containing no such provisions, as long as it contains the objectively relevant elements required by §1029.1 is always fully effective!

4.6. In recapitulation, contrary to the BGH's stance, resolution disputes in German law enjoy *unlimited arbitrability*. *In concreto*, the effectiveness of an arbitration clause in ensuring each shareholder the *right to a fair arbitral trial* in such a dispute has nothing to do with the issue of arbitrability of this category of disputes. The arbitrability feature is decided exclusively by *criteria set forth in abstracto by the legislator (not by the parties to the arbitration agreement!)* in §1030 ZPO. If the dispute (1) is a dispute on a property right and (2) the law does not explicitly reserve exclusive jurisdiction of state courts, then the dispute is arbitrable. Similarly, whether the case may be settled by a state civil court is not decided by the fact whether in the specific proceedings a party was guaranteed a fair trial. It is decided exclusively by the circumstance that the case complies with the definition of 'civil case' as set forth by statutory law, i.e. that it is a civil case (*Zivilsache*) in the meaning of §13 of the German Act on Courts<sup>24</sup> in conjunction with §1 ZPO.

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<sup>21</sup> E.g. due to the failure to notify shareholders about the appointment of arbitrators, or about initiating arbitral proceedings, or in any other manner depriving them of the possibility to defend their rights before an arbitral court i.e. due to the failure to comply with the requirements set forth in the ZPO in terms of the composition of the arbitral tribunal; the setting aside is also possible due to the state court's recognition that the arbitral award issued in proceedings violating a shareholder's/shareholders' right to a fair trial is against public policy.

<sup>22</sup> Thus correctly the BGH, *cf.* the Arbitrability II decision, point 18 in conjunction with point 17.

<sup>23</sup> Thus correctly the BGH, *cf.* the Arbitrability II decision, Statement of Reasons, point 17. However, it is possible that despite such defectiveness (limitation of the shareholders' right to a fair trial) the clause will be ineffective, but not in full scope, as the BGH derived, but *only in this part*, in compliance with the disposition of §139 BGB (*Teilnichtigkeit*).

<sup>24</sup> *Gerichtsverfassungsgesetz*, the Act of 20 September 1950 (BGBl. 1.S. 1077) with amendments.

## 5. CONCLUSIONS – TO WHAT EXTENT MAY THE ARBITRABILITY II DECISION CREATE A BENCHMARK FOR ARBITRATING CORPORATE DISPUTES IN POLAND?

### 5.1. A general conclusion – a fair arbitral process as a requirement legitimising the arbitral award

5.1.1. Despite the above-presented critical analysis the Arbitrability II decision, it is more than useful in the deliberations on the *standards of arbitral proceedings* in resolution disputes in Polish law. It is of great significance, even if not for the debate on the arbitrability of this category of disputes, nor for the debate on the necessary contents of the arbitration clause covering resolution disputes.

Resolution disputes in Polish law enjoy arbitrability for the same reasons for which their *arbitrability* must be *unconditionally* recognised in the German regulation – in both regulations, disputes on the invalidation of resolutions fulfil the prerequisites indicated in the provisions which define arbitrability – i.e. §1030 of the German ZPO and its Polish equivalent, Article 1157 KPC.

Similarly, Arbitrability II is also *lacking the significance for deliberations on the mandatory contents of the arbitration clause* to be effective.<sup>25</sup> This is because it is so decided by the mandatory provisions of the German ZPO (§1029.1) and Polish KPC (Article 1161.1) which, after all, are worded almost identically. In connection with the provisions determining the premises for the dispute's arbitrability, they define the essential elements (*essentialia negotii*) of an arbitration agreement as a civil law agreement. Neither of the systems, Polish or German, lists among these necessary elements the rules of proceedings before the arbitral tribunal, in any case, regardless of the type of dispute.

5.1.2. The significance of the Arbitrability II decision results from the fact that it correctly identifies the fundamental *standard* which legitimises the equal treatment of an arbitral award invalidating a resolution and a similar verdict issued by the state court – in their effects.<sup>26</sup> What is

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<sup>25</sup> Differently A.W. Wiśniewski, *System...*, p. 822, presenting an opinion similar to that expressed by the BGH; *nota bene* this author makes several direct references to the Arbitrability II decision pointing out rightly its importance for Polish doctrine.

<sup>26</sup> K. Schmidt, *Schiedsklauseln...*, p. 1858, who correctly indicated that in reality both decisions issued by the BGH, Arbitrability I and Arbitrability II had nothing to do with the issue of arbitrability of resolution disputes, but instead they indicate conditions legitimising arbitral proceedings and awards issued therein for the purpose of equating them with the verdicts of state courts. Cf. *idem: Gesellschaftsstreitigkeiten...*, pp. 104–105.

this standard? If the resolution award always binds the company and all company shareholders,<sup>27</sup> then *in arbitral proceedings all the shareholders must be guaranteed the right to a fair trial. A fair arbitration is such an arbitration which guarantees all the shareholders a chance to protect their corporate rights, equal to the protection they would enjoy if the resolution dispute was pending before a state court.*<sup>28</sup> Only after this fundamental condition is met can the arbitral award legitimately enter the public domain and be enforced. Only then will it be vested with quality identical to that of a verdict issued by a state court – the quality of *ultra partes extended effectiveness* (the quality of being effective towards all shareholders).

## 5.2. Specific conclusions on the standards of arbitral resolution disputes defined in the Arbitrability II decision

5.2.1. *The consent of all shareholders* for establishing a clause. The existence of an arbitration clause covering a resolution dispute constitutes a *preliminary condition*<sup>29</sup> for initiating and proceeding in arbitral dispute. In the case when such a clause is included in the articles of association, there is no doubt whatsoever in Polish law that it is binding for an *each time shareholder*. Hence, it ‘automatically’ binds each legal successor, both universal and singular, who those who had initially signed the company’s articles of association (and *ipso facto* consented to the arbitration clause included therein). This is stipulated directly by Article 1163 KPC.<sup>30</sup> However, even if no such provision existed, and it is worth remembering that it had not existed prior to the amendment of the Polish arbitration law in 2005, this conclusion could be arrived at for exactly the same reasons as those indicated in German doctrine – the clause included in articles of association

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<sup>27</sup> According to the content – respectively – §248 of the German AktG and its Polish equivalent – Article 254.1 and 427.1 of the Polish KSH.

<sup>28</sup> Interestingly, a reference to the minimal standard of the ‘right to a court’ to be met by arbitral proceedings for the award issued therein to enjoy extended effectiveness is included in the statements of reasons of both verdicts of the BGH on Arbitrability.

<sup>29</sup> Hence, doctrine speaks of a *double basis legitimising* the equating of an arbitral award with the verdict of a state court: the first one – existence of the arbitration clause, the other – guaranteeing a specific standard of the very proceedings.

<sup>30</sup> The provision of Article 1163.1 KPC is worded as follows: ‘An arbitration clause related to disputes from the commercial company relationship that is included in articles of association of a commercial company shall be binding for the company and its shareholders.’



binds its respective members at each given time as an element of organisation of a corporate legal person.<sup>31</sup>

5.2.2. *Guaranteeing all shareholders* and bodies of the company *notification about ongoing proceedings*. While the requirement to notify all shareholders of the pending resolution proceedings is obviously understandable, the *requirement to notify the company's bodies* is highly questionable.<sup>32</sup> The legislators, both Polish and German, set forth a *necessary individual capacity of a company as a defendant* in a dispute on the invalidation of its resolutions. It is only a company that may be sued and an identical principle is in force also in arbitral proceedings. Thus, its bodies are always aware of the initiation of any resolution disputes. Yet, shareholders cannot have such knowledge. Admittedly, in the proceedings before a state court, neither the Polish nor the German laws stipulate mandatory joint-participation of shareholders (for strictly procedural reasons),<sup>33</sup> but proceedings before state courts are open for public inspection. Each of the concerned shareholders may find out whether resolution proceedings were initiated in the *state court of competent venue, which is exclusively the court competent for the company's registered office*. In the case of arbitral proceedings no such possibility exists due to their confidential nature (as regards initiation, course, and sometimes even sentencing and statement of reasons for the verdict). Hence, in the arbitral proceedings for the invalidation of a resolution, the requirement to notify shareholders and only shareholders about starting the proceedings is justified. Shareholders may be notified of the initiation of arbitral proceedings in a number of ways, but they all should take into account both the type of company (limited liability or joint-stock) and the individual specificity of its operation, especially the number of shareholders.<sup>34</sup> Notification performed in the form that is provided for notifying shareholders of the meeting of shareholders (general meeting) must be found sufficient. It guarantees *a real possibility that each shareholder will receive the information*

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<sup>31</sup> Cf. C. Berger, *GmbH-rechtliche Beschlussmängelstreitigkeiten vor der Schiedsgerichten*, ZHR 164, 2000, p. 302; similarly in Polish doctrine M. Romanowski, *Utrata statusu wspólnika a związanie zapisem na sąd arbitrażowy*, PPH 2006, No. 6, p. 56.

<sup>32</sup> However, the BGH's reasoning as to whom the company is to notify about the initiation of proceedings is not unambiguous – cf. Arbitrability II, Statement of Reasons, point 33, which speaks of prior notification of shareholders only.

<sup>33</sup> Such a regulation simply aims to simplify resolution disputes. In the case there is no such regulation, as is the case of corporations, the claimant would have to sue all shareholders, which particularly in relation to resolutions of public companies (with thousands of participating stockholders) would *de facto* not be feasible; cf. more M. Schwab, in: K. Schmidt, M. Lutter, *Aktiengesetz. Kommentar, Band II*, 2008 Köln, p. 2364.

<sup>34</sup> The BGH is of a contrary opinion, see Statement of Reasons, point 29.

on the initiation of the resolution dispute and make a decision whether they want to participate in such arbitral proceedings.<sup>35</sup>

5.2.3. *Enabling shareholders' participation in the proceedings.* Firstly, it is necessary to draw attention to the fact that the requirement of ensuring the participation in arbitral proceedings formulated by the BGH pertains *solely to shareholders*, but not to bodies of the defendant company. Such a conclusion is correct. It follows from the fact that only shareholders hold a legitimate legal interest, *as members of a corporation*, in the resolution dispute *before a state court*. It is only them who are entitled to a *membership interest in the company*, which in the course of the resolution-making process may be violated in a twofold manner: either by the fact that the adopted resolution would be upheld despite its defective nature or if it was withheld by a court verdict despite not being defective. This is why there is a need to guarantee the shareholder judicial protection and a need to guarantee them the ability to participate in the resolution proceedings at each stage and on each side of the dispute,<sup>36</sup> depending on which of them presents statements concurrent with their legal interest. A similar standard – guaranteeing each shareholder a possibility of participating in a resolution dispute, *at each stage of the proceedings*, must be complied with in arbitral proceedings.

5.2.4. *Shareholder's intervention on the side of the defendant company* as a minimal standard. In German doctrine there is no doubt that a shareholder who did not challenge the resolution on their own may join in the resolution proceedings pending before a state court in the capacity of an intervener, whereas such *an intervention* is treated as a *joinder of parties (independent intervention)*.<sup>37</sup> The corporate interest of a shareholder who had voted in favour of the resolution and who wishes to defend its validity may not be covered by inferior protection than the shareholder who voted against and as a claimant is seeking to invalidate it. Their right of 'defending' the adopted resolution in court litigation may not be dependent on the stance and actions taken in the trial by the com-

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<sup>35</sup> See M. Tomaszewski, *O zaskarżaniu...*, p. 36. The author rightly points out that in the case of a public stock company notification could be made in the form provided under statutory law for company announcements.

<sup>36</sup> Similarly, the BGH, *cf.* Arbitrability II, Statement of Reasons, point 33.

<sup>37</sup> *Cf.* K. Schmidt, *Schiedsfähigkeit...*, pp. 533–534, and the literature and case-law cited. The Polish SC presently holds a different, false view as regards the nature of the intervention of a shareholder on the side of the defendant company, recognising it as a defendant, *cf.* decision of the Polish SC of 18 October 2012, V CZ 37/12, SIP Legalis 2014, 667439, and the criticism thereof presented by the author – R. Kos, *Charakter prawny interwencji zgłoszonej przez współnika spółki kapitałowej w sporze o unieważnienie uchwały – glosa do postanowienia Sądu Najwyższego z 18.10.2012 r. (V CZ 37/12)*, Glosa 2/2015.

pany, as a defendant. Hence, the BGH correctly indicated the requirement whereby the rights smaller than those of the independent intervenor should be guaranteed to all shareholders in arbitral proceedings to invalidate a resolution. The shareholder who petitions to join the proceedings on the side of the defendant company must be entitled to take action in arbitral proceedings which *do not have to comply with the actions* of the defendant company. This also entails the need to guarantee such a shareholder the *service of the arbitral award* upon its issuance. The reason is to ensure the *shareholders the right* of lodging their own complaint for setting aside of such an award *within the statutory time limit*.

5.2.5. *Equal treatment at the appointment of arbitrators.* Equal treatment of all shareholders interested in the resolution disputes is a standard which, in contrast to other standards delineated by the BGH, does not have its own benchmark in the proceedings before a state court. Hence, arbitration practice may be the only benchmark in relation to the appointment of arbitrators in disputes where the parties to the dispute are of a multi-entity nature.<sup>38</sup> It must be borne in mind here that in a resolution dispute, shareholders who raise an independent intervention on the side of a defendant company must be guaranteed *the right to co-decide on the appointment of the arbitrator together with the defendant company*. This requirement is obvious in a situation when they are co-participants on the claimant side (co-claimants).

The fundamental problem related to the constitution of an arbitral tribunal is related to the lack of consensus of all parties as to nominating an arbitrator, which is always highly possible in case of multi-shareholder companies. According to the BGH, to solve this problem it is enough for the multi-entity party to adopt the decision by a 'majority of votes' and not unanimously. This standard is not obvious in light of the case-law of inter-

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<sup>38</sup> Cf. in particular the well-known decision in *Dutco v. BKMI ('Dutco')*, French Cour de Cassation (7 January 1992 – XV Yearbook Com. Arb. (1992) 124 *et seq.*), where the standard was established saying that the lack of multi-party consensus as regards the person of an appointed arbitrator *must mean that the entire arbitral tribunal is to be selected by a neutral institution* (e.g. a permanent arbitral court). Offending this standard disqualifies the decision issued as contrary to public policy. As a consequence of that decision, the arbitration rules of numerous institutions, such as the ICC or DIS provide for the appointment of all arbitrators by the institution in case the various parties on the respondent's side cannot agree on a joint arbitrator. See S. Kröll, *Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases*, <http://kluwerarbitrationblog.com/blog/2010/10/15/>. See also in Polish doctrine A.W. Wiśniewski, *System...*, p. 824, finding the application of *Dutco* standards in the resolution disputes unfair for a party who has already exercised its right to nominate the arbitrator.

national arbitration.<sup>39</sup> In turn, the BGH undoubtedly correctly proposes to solve the difficulties related to the appointment process involving a multi-entity party by establishing a neutral appointment body in the clause. The BGH rightly indicated that such an appointment of a single arbitrator, or an entire bench, performed by a neutral body (e.g. a permanent court of arbitration) does not contradict the principle of equality of parties and the right to appoint their 'own' arbitrator. A similar conclusion is also right in light of Polish law.<sup>40</sup>

Obviously, only those shareholders are entitled to participate in the appointment of arbitrators who upon being notified of the initiation of proceedings decided to join the proceedings. Those who decided to join one of the parties to the proceedings after the constitution of the arbitral tribunal do not enjoy this right.

5.2.6. *Consolidation of all disputes in single proceedings.* The German legislature explicitly stipulates the obligation to consolidate before a state court all disputes pertaining to the validity of one and the same resolution,<sup>41</sup> when initiated by different parties as claimants. The axiological legitimacy of such a solution in German law is well justified. Nevertheless, one should state that the Polish legislature contains no rules for the obligatory consolidation of such cases pending before a state court. Neither do the provisions of the Code of Commercial Companies nor the Code of Civil Procedure provide for such an obligation. Therefore, if the Polish legislator chose to set the rules of proceedings for the invalidation of resolutions before state courts in such an unfortunate manner, then it is difficult to expect the parties to the arbitral proceedings or arbitrators themselves to consolidate. Therefore, in Polish law, the obligation to guarantee equivalent legal protection of shareholders in arbitral proceedings with the protection they would enjoy before a state court does not require any consolidation of proceedings.

## 6. SUMMARY

Special standards related to arbitral proceedings on the invalidation of a resolution must be preserved to guarantee shareholders a position not worse than they would enjoy in similar proceedings before a state

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<sup>39</sup> It is not by accident that the DIS model arbitration clause introduces a requirement of unanimity, more rigorous than the one proposed by the BGH, under the pain of appointment of an arbitrator by the DIS Appointment Committee on the motion of one of the participants of the proceedings (§8.3. DIS-ERGeS).

<sup>40</sup> Cf. A.W. Wiśniewski, *System...*, p. 824.

<sup>41</sup> Cf. §246.3 sentence 3 and §249, item 2, sentence 1 AktG.

courts. This has nothing to do with arbitrability or effectiveness (validity) of the arbitration clause the shareholders included in the articles of association. However, it is a condition that makes such an award enforceable in the public domain as equal to the judgement of state courts (effectiveness of the verdict extended to include all shareholders, the company and its bodies authorised to challenge a resolution). The proper moment to check whether these conditions have been met is when a given arbitral award is examined *ex post* in the post-arbitral proceedings – either in recognition, or in the proceedings for setting aside the arbitral award. No changes to Polish law are required in this scope<sup>42</sup> – just as they were unnecessary in German law, where corporate arbitration is practiced effectively. In turn, the standards of proceedings determined *a priori* by shareholders (e.g. in a statutory clause) have a significant practical advantage – they allow arbitrators to apply these standards correctly, thus ensuring that the award issued by them will be upheld during the state courts' control in post-arbitral proceedings.

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<sup>42</sup> Differently M. Tomaszewski, *O zaskarżaniu...*, pp. 34–39.