PREREQUISITES LEGITIMISING HEARING AND ADJUDICATING CASES FOR THE INVALIDATION[1] OF COMPANY RESOLUTIONS IN ARBITRAL PROCEEDINGS

Summary of the Doctoral Thesis
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1. The subject of the thesis is a comprehensive presentation of the set of issues pertaining to the admissibility of adjudicating disputes on the validity of company resolutions in arbitral proceedings, in particular, the establishment of prerequisites which, when met in such proceedings, legitimize an award on the invalidation of the resolution. The notion of 'prerequisites legitimizing an arbitral award on the invalidation of a resolution' is a synonym of prerequisites which, from the perspective of constitutional rights and civil procedure principles, must be met in arbitral proceedings for the force of law of an award issued in such proceedings to be equated with the force of law of a judgment of a state court as a result of the proceedings on the recognition of an arbitral award.

2. The thesis is divided into five chapters.

3. **Chapter 1** discusses the problem constituting an 'axis' of all further considerations addressed in the work, i.e. whether from the perspective of **the constitutional benchmark of the access to justice,** the standard of legal protection realised before a private court of arbitration is equivalent with a guarantee of proceedings before a state court. The answer to this query is affirmative, despite the fact that the constitutional presumption of competence in favour of common courts of law indicates that the legislator gives priority to the realisation of the constitutional 'access to justice' in the mode of proceedings before a state, and not a private court. Concluding an arbitration court clause (an arbitration covenant) and opting for proceedings before a private court as a mode of protection of subjective rights, constitutes

[1] Notions of a dispute/action 'on invalidating a resolution' are used as a mental shortcut for the notion of disputes in matters on the reversal or ascertainment of invalidity 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-related award' will be synonymous with a final award reversing or ascertaining the invalidity of a resolution.

neither a resignation from the constitutional right to access to justice guaranteed in Article 45 of the Constitution, nor a limitation thereof. This is because concluding an arbitration covenant constitutes **an authorisation**, admissible in the frames of the constitutional freedom of individuals (Article 31 of the Constitution) and civil law autonomy of parties, to settle a dispute which parties grant to a private court.

4. The thesis on **the constitutional equivalence of the state and private mode of the judicial protection of subjective rights**, as two alternative modes for the realisation of the constitutional right of 'access to justice' is, however, based on two assumptions.

   Firstly, **an autonomous decision of an individual** must be a prerequisite for resignation from a state court in favour of a private court as a mode of realisation of the 'access to justice'. The individual's constitutional freedom in terms of choice of the mode of protection of their rights will be realised solely and exclusively when the individual consciously and freely consents to resign from the state mode of judicial protection of rights. **Concluding an arbitration clause (an arbitration covenant)** is an expression of such a will.

   Secondly, the arbitral proceedings must adhere to a specific minimum standard which will guarantee all parties to the basic contentious relationship a realisation of the **right to have their case heard,** constituting a fundamental integral part of the constitutional right to access to justice (the right to 'a fair trial''). Insofar as in proceedings before a state court, realisation of the right to a fair trial **is guaranteed** by detailed **procedural rules stemming from the principle of formalism** of proceedings, **then the principle of optionality of the mode of** arbitral proceedings and the lack of analogical, such as arising from the Code, guarantees of realisation of the right to have one's case heard, may *prima facie* constitute a risk of an actual 'limitation' of their access to justice for parties to arbitral proceedings. Yet, this is not the case – a deficit of statutory rules for arbitral proceedings and parties' freedom in the scope of shaping of the procedure do not release either parties or arbitrators from adhering in arbitral proceedings to the standards of a fair trial (in particular realisation of the right to have one's case heard by the court) analogical to the one realised in proceedings before state courts.

5. Hence, from the constitutional perspective, two fundamental prerequisites arise which must be fulfilled for an award of a private court invalidating a company resolution to obtain constitutional **legitimization** and to be able to be equated in its legal effects with a judgment of a state court (in particular to be capable of causing the *ultra partes/erga omnes* validity effect). The first of them is an existence of **a valid and effective arbitration covenant binding the company and the shareholders**. The second of these prerequisites consists in the

fulfilment in specific arbitral proceedings on the invalidation of a resolution of minimum standards guaranteeing shareholders **a fair arbitral trial.**

6. ***De lege lata* admissibility of adjudicating** by courts of arbitration **in disputes on the validity of capital company resolutions** (i.e. the question of existence of **arbitrability** of this category of disputes) is a source of substantial doubts in the doctrine, whereas it has been negated in the rudimentary case-law of common courts. In this situation, prior to delving into detailed considerations devoted to an arbitration covenant and standards of fair arbitral proceedings (as prerequisites legitimising an arbitral settlement in matters on the validity of a resolution), the foreground must be 'cleared' and these incorrect doubts must be removed. **Chapter Two** is dedicated to deliberations applicable to this scope of investigation.
7. A fundamental conclusion stemming therefrom is a recognition that the arbitrability of disputes on the invalidation of a capital company resolution in Polish law is **unconditional**. The said arbitrability depends neither on the content of a specific arbitration clause nor on the fact whether all the third parties that would be bound by a resolution invalidating the award to be issued in this case were guaranteed the right to participate in the proceedings and the right to a fair trial. This is because the correct evaluation of the existence of arbitrability of resolution-related disputes should be performed **abstractly, *ex ante*** (before a dispute arises), not *ex post* (i.e. after the award is issued). This is because it is an objective characteristic of specific categories of legal relationships, which depends exclusively on their fulfilment of statutory prerequisites indicated in provisions and defining arbitrability.
8. An abstract *ex ante* evaluation of a dispute's arbitrability consists solely in establishing if such a dispute, in accordance with the contents of Article 1157 CCP, is a dispute on **civil rights (and obligations) arising from a specific civil law relationship,** of a **property or non-property nature**, and if such rights (obligations) may **objectively** constitute an object of an **in-court settlement (settleability)**. Obviously, a dispute on the invalidation of a resolution is a dispute on civil rights arising from a specific capital company relationship. Such a dispute also has an attribute of **settleability**. This is because settleability characterises all rights stemming from legal relationships having an **attribute of disposability**, i.e. relationships which parties may create, amend in terms of their content, or abolish by way of an act in law. If shareholders, as parties to a company's memorandum of association and subjects of membership interests (membership rights) in a company, are competent to **autonomously shape** the company relationship, then – in an abstract approach, removed from specific circumstances – the company relationship (as well as membership interests in a company may be subject to an in-court settlement.

9. A dispute on the invalidation of a resolution enjoys the attribute of settleability for this sufficient reason that **the legal effect of the invalidation of a resolution, and this is precisely both the goal of the trial** and the effect of a judgment allowing the action, may be achieved not only by a judgment, but by way of shareholders' act in law – in the case at hand by shareholders' cooperation within the limits of the autonomy they are entitled to and adoption of a resolution to the contrary (of the challenged resolution).

10. A significant element of considerations devoted to admissibility of recourse to arbitral proceedings in matters on validity of company resolutions comes in the form of an explanation of the question regarding an alleged connection between the issue of the arbitrability of a dispute on the validity of a resolution and the question of the specific, since **subjectively extended, validity of an award invalidating a resolution** of a company. This specificity of an award invalidating a resolution (*ultra partes/erga omnes* effectiveness) is emphasised in the scholarly debate as the main obstacle for recognising the arbitrability of this category of disputes. The obstacle is only apparent, since the arbitrability of disputes on the invalidation of a capital company resolution (i.e. admissibility of recourse to arbitral proceedings in such a dispute) has nothing to do with the issue of **the subjective validity of a suitable award.** This conclusion is analogical to a conclusion to be drawn on the grounds of proceedings before a state court – the 'risk' of an extended validity of a judgment issued by a common court in a specific civil case has no influence on finding whether a recourse to civil court proceedings is admissible in a given case.

11. **Chapters Three and Four** present a detailed discussion dedicated to the arbitration covenant as the first prerequisite legitimising an arbitral settlement of a dispute on validity of a capital company resolution. An act in law creating a covenant stipulating arbitration of disputes from a capital company relationship may be an **extra-statutory covenant**, i.e. a shareholders' action executed in an agreement other than the memorandum of association, or a **statutory covenant**, i.e. executing the covenant in the memorandum of association (statutory clause), in keeping with the disposition of **Article 1163 CCP**. A far-reaching distinctness of legal effects of both types of covenants, among others **in the scope of (1) the legal nature of each of these forms of the covenant, (2) the law applicable to the covenant, (3) its objective scope, (4) its subjective scope, and (5) the scope of its autonomous nature** towards the company relationship (as the basic relationship), substantiated a division of these deliberations into two separate editorial units within the thesis, thus allowing to better emphasise the significance and specificity of a statutory covenant, executed on the grounds of the standard from Article 1163 CCP on each of the enumerated planes,.

12. **Chapter Three** covers a discussion limited to the an extra-statutory form of the covenant and its relevant characteristics. A conclusion regarding the **legal nature of an arbitration agreement** finds its footing in the principle of the **unity of civil law** and the principle of autonomy of will, thus providing the basis for the broad understanding of the notion of '**a civil law transaction**' without the need to qualify the transaction as belonging to the procedural or substantive law category. The arbitration agreement is a civil law agreement creating an arbitral civil law relationship (legal bond), the content of which **is not rights and obligations** of the parties, but the **competence (entitlement)** of **the** parties to the basic relationship and **competence** of third parties (arbitrators). The content of this relationship is substantially varied, depending on the addressees of the competence (parties of arbitrators).
13. The reasoning concerning the **law applicable to the extra-statutory arbitration covenant** leads to a fundamental conclusion that **the choice of applicable law** by parties to an extra-statutory arbitration covenant, although in principle admissible (Article 39 PIL) is, nevertheless, subject to **limitations due to the nature of the arbitral relationship** laid down by the constitutional axiology of the right to access to private courts. The effectiveness of the choice of law will be limited if, in consequence, it would lead to questioning the necessity of the existence of the previously granted consent of shareholders and the company for a dispute on the invalidation of a resolution to be settled before a private court.
14. Comments concerning the issue of **minimum, but at the same time required contents** of an extra-statutory arbitration court covenant are based on an analysis of the rather straightforward contents of Article 1161 § 1 CCP. If this provision, **subjectively** defining **relevant elements** (*essentialia negotii*) of the covenant, requires only an indication of the **subject of the litigation or legal relationship** from which the dispute has arisen or may arise, then concluding an extra-statutory (as well as the statutory) arbitration covenant by the shareholders, indicating **a specific** commercial company **relation** from which the dispute has arisen or may arise always fulfils the requirements the CCP demands for an arbitration agreements to be valid. Contrary to the doubts expressed by the doctrine, no provision seems to create a positive obligation to supplement the covenant with additional elements (e.g. rules of **proceedings** before a court of arbitration).
15. Key deliberations in Chapter Three are dedicated to the most controversial in theoretical terms, yet also having the highest practical significance, issue of the **subjective scope** of an extra-statutory arbitration covenant. Despite an unequivocal stance of the doctrine and case-law, there are no convincing arguments, which would substantiate automatically binding a singular acquirer of a membership interest with an extra-statutory arbitration covenant concluded by the

seller and the remaining shareholders (and/or company). The recourse to arbitral court proceedings laid down by virtue of an extra-statutory arbitration covenant is not an element co-creating the content of a membership interest as the right from which a dispute covered by such a covenant has arisen or may arise. An exception from the *nemo alteri stipulari potest* principle and binding the acquirer of a membership interest by a covenant in which they did not participate would require a statutory basis, which does not exist in the event of a singular succession. The situation of a universal successor appears similar, although a substantiation of such a conclusion is based on the interpretation of the rules of natural and corporate universal succession. The hereditary nature of the covenant (**natural succession**) is excluded due to the fact that inheritance consists exclusively of property rights and obligations. Meanwhile, the legal relationship stemming from an arbitration agreement creates no such rights (and obligations). **Corporate succession,– unlike as inheritance** –is not limited to legal property relationships, as **dependent solely from the will of shareholders of the company undergoing a transformation** (i.e. performed without the consent of the other party to this arbitral relationship) implies a conclusion that the recognition of corporate succession in the scope of an extra-statutory arbitration covenant is contradictory to the *nemo alteri stipulari potest* principle.

Chapter Three concludes in considerations dedicated to a possibility where **company bodies**, as 'entities' with an active capacity to challenge company resolutions (meeting of shareholders/general meeting), may bound themselves with an extra-statutory arbitration covenant. Neither company bodies nor physical persons (individual members of company bodies) acting as the guardians of these bodies **possess the legal capacity** (in the case of members of bodies – they do not possess it in this nature – as guardians, regardless of their legal capacity as physical persons) and for this obvious reason they may not be subjects of any civil law agreements, neither **may they be parties to an extra-statutory arbitration covenant**.

16. In first order, **Chapter Four** provides a summary and critical evaluation of the doctrine and case-law views concerning **the significance of the standard from Article 1163 of the CCP**. Contrary to the common opinion, the scope of regulation of Article 1163 of the CCP has nothing to do with the provisions pertaining to the form of an arbitration covenant, including the form of an arbitration clause by reference (Article 1162 § 2 sentence 2 CCP), neither is it an establishment of a norm exceptional towards the general civil law rule according to which parties and only parties are bound by a civil law agreement they concluded (an *inter partes* effect). After all, neither does Article 1163 CCP constitute a legal basis for finding that 'a

company becomes a party to the memorandum of association' (including an arbitration covenant incorporated therein, which the company itself did not accede to). The specificity of legal effects of the statutory arbitration covenant (Article 1163 CCP) is a consequence of a **creating-and-systemic function** of a memorandum of association of a company (articles of association). Regulating relationships between a company (as a corporation) and shareholders (as members of this corporation), as well as principles of the functioning of its bodies, statutory provisions establish **abstract norms of proceeding addressed at a non-individualised circle of people.** These norms are addressed both at current members of a corporate legal person (shareholders) and members of its bodies, as well as persons who will obtain such a status in future.

17. In consequence, a statutory provision (incorporated in articles of association of a commercial company) **alters the statutory organisational template of a company** in the scope of the mode of judicial protection of membership rights in this company. Shareholders' title to carry out such a change stems from the disposition of a standard from Article 1163 CCP. Although contained in a procedural act, due to the subject of its regulation, this provision is of a **corporate** (hence – substantive law) **nature**, since it authorises shareholders to change the statutory template of an internal organisation (structure) of a capital company. Next to distinctness of the legal nature of a statutory covenant in comparison to the extra-statutory one, incorporation thereof within the articles of association in relation to the **scope of subjects** bound thereby entails specific implications. Each shareholder is bound by the company's articles of association only due to the fact that they possess a **status of a member**, i.e. are a subject of a membership right in a corporate legal person, the articles of association of which form its 'systemic constitution'. The univocal legal basis for binding a company (and its bodies) in such a manner is the provision of Article 38 CC in conjunction with Article 2 CCC. By virtue of membership in a company, the binding force of the articles of association extends to all those systemic elements of the company which are a mandatory element of the content thereof. A statutory arbitration covenant determining a jurisdiction forum competent exclusively for disputes arising from a capital company relationship is precisely such a provision.

18. Next to the subjective scope, the subject matter of Chapter Four also extends to other specific consequences which stem from the conclusion of a statutory arbitration covenant by shareholders. Next to excluding a possibility of **limiting such a covenant by means of a condition** (and, in principle, also a time limit), considering an *ex natura* inadmissibility of stipulating a condition in agreements organising the functioning of corporate legal persons, issues concerning **autonomy** (distinctness) **of a covenant incorporated in the articles of**

association of a capital company seem of particular importance. This is because such autonomy turns out to be fundamentally **limited** on both its planes – in the scope of evaluation of the impact of a defective nature (expiry) of the basic relationship on the defective nature (expiry) of the covenant, as well as on the collision of laws plane: in the scope of a possibility of choice of law applicable to the covenant that is separate in relation to the law applicable to the basic relationship. Firstly, in light of the fact that in a dispute from a company relationship, the risk that a charge of invalidity (ineffectiveness or expiry) of a company relationship as a basic relationship will be raised does not exist at all, a teleological reduction of the principle of autonomy of the covenant (Article 1180 CCP) is substantiated as well as substantiated is a recognition that **the rule established by this norm does not apply to a covenant incorporated in the articles of association of a registered capital company**. Secondly, in the collision of laws aspect, a limitation of autonomy of an arbitration agreement in the case of a covenant incorporated in the company's **articles of association** stems from the contents of Article 17 PIL, providing that **a legal person is unconditionally subject to the law of the country** where **its registered office** is located. Thus determined, ***lex societatis*** of a capital company registered in Poland (i.e. Polish law exclusively applicable) covers **all elements** of the organisational **structure** of a company, including determination of a **juridical forum** for settling disputes from the relationship of membership in this company.

19. **Chapter Five** focuses on considerations pertaining to the second of the prerequisites formulated in Chapter One, the fulfilment of which legitimises an award issued by an arbitration court and invalidating a company resolution, i.e. on the minimum standard of a fair arbitration trial in a resolution-related dispute. The analysis aims at reconstructing a possibly detailed catalogue of **principles of arbitral proceedings in the matter on the invalidation of a resolution of a capital company**, that would take the specificity of this multi-entity and (most often) multilateral dispute into consideration. The starting point for this reconstruction is the noticing of two specific circumstances which will constitute fundamental assumptions in the process of a detailed determination of principles of a fair arbitral trial. Firstly, if a law-creating award invalidating a resolution adopted by a meeting of shareholders (general meeting) bears an *ultra partes* effect **by changing the content of rights** and obligations **of all shareholders** as well as the company and its bodies, then such an award, by its nature, constitutes an autonomous substantiation of **these entities' unlimited right to participate** in such proceedings. Secondly, for the purpose of reconstruction of principles of fair arbitral trial on the validity of a capital company's resolution, noticing consequences of the **extraordinary,** absolute in its nature, **passive capacity of a company** in such a trial is of substantial

significance. This capacity does not signify that shareholders may be deprived of **the constitutional right to a fair trial** and the possibility of seeking court protection for their membership right, including the possibility of processual defence of a resolution they adopted and which the minority seek to invalidate (since it has the right to do so). Shareholders' right to a fair trial is realised either by recognition of their joint participation on the side of the claimant or by recognition of a possibility they have to raise a side intervention on the active or passive side of the dispute. Such an intervention is always **autonomous in nature**.

20. From adoption of above-given assumptions it does not follow as if participation of all shareholders in proceedings on invalidating a company resolution was a condition legitimising a verdict issued in such a private arbitral dispute. All shareholders, however, must be **guaranteed a possibility of acquiring knowledge about the initiation** of such proceedings and a **possibility of participation** in such proceedings.

21. Next to determining a minimum standard of rights of parties engaged in arbitral proceedings on invalidating a resolution, special attention is due to an issue characteristic uniquely for arbitral proceedings, i.e. the issue of shaping the rules for the constitution of an arbitration court's ruling bench. These rules must guarantee parties of the dispute a peculiar **"equality of arms" in exercising their appointing competence**, so as to fulfil the constitutional command for a judgment to be issued by **an impartial and independent court.** An analysis of possible risks in the scope of adherence to the 'equality of arms' principle in appointing the ruling bench and, in consequence, a risk that neutrality of a ruling body could be threatened, in this scope requires one to formulate proposals allowing for the elimination of such risks, regardless of the potential casuistry in the scope of these risks. The deliberations performed thus far impel one to conclude that from among many possible models of arranging the manner of appointment of an arbitration court's ruling bench composition for disputes from a capital company relationship (Article 1171 CCP), **delegating the appointing competence onto a neutral third party** must be found the most functional. Such a solution guarantees that – regardless of a changing configuration of shareholders and regardless of the shareholders' legal interest in the settlement of each dispute – the case will be adjudicated upon by an impartial and independent private court, and the standard of the constitutional right of 'access to justice' will thus be fulfilled. The quota model of appointment of the ruling bench composition may theoretically also fulfil the above standard. However, a multi-entity party's quota appointment must be unanimous, whereas a lack of unanimity of even one party (constituting the same multi-entity party to the proceedings) results in the necessity of a subsidiary appointment of the entire ruling bench.

22. Deliberations pertaining to the minimum standards of a fair arbitral trial on the validity of capital company resolutions are concluded by remarks dedicated to the issue of the grounds of adjudication and the question of transparency of proceedings. The conducted analysis allows one to draw a conclusion that, as parties to a company relationship, shareholders **are not entitled** to **release the court of arbitration from the obligation of applying statutory norms** regulating the company's legal relationship in settling disputes arising therefrom. Allowing for the possibility of arbitration court's pronouncing on validity of a resolution of a company's body based on the principle of equity would mean that a resolution of the company's body challenged as defective (contradictory with the law) could be, in spite of the existence of the same cause of defectiveness (hence the same circumstances), assessed by courts differently, depending on the assessment criterion (legality or equity). Consequently, such a situation would violate the principle of the equal treatment of shareholders under the same circumstances. A court of arbitration's authorisation to rule in a dispute from a company relationship in keeping with the equity principles and, *ipso facto,* granting it, as a company's *quasi*-body, a possibility of annihilation of legal decisions of other bodies, would also violate the standards regulating the organisational structure of a capital company and a strict division of competence between individual bodies stemming therefrom.

    In turn, deliberations concerning the admissibility of full confidentiality of arbitral proceedings lead, from the perspective of the constitutional model of 'access to justice', to a conclusion that arbitral proceedings on validity of resolutions are bound by the **principle of full transparency of arbitral proceedings towards shareholders and the principle of confidentiality towards third parties** without the shareholder status. Transparency towards shareholders guarantees that their membership right is protected to the degree they all find necessary (active participation as an intervener, passive participation as 'an observer' of the proceedings) and eliminates the risk that their rights will be adjudicated upon without their knowledge and will. At the stage of initiation and prosecution of arbitral proceedings, a lack of transparency towards third parties does not create a threat for the security of legal transactions and substantiated rights of stakeholders who do not enjoy full external transparency of such proceedings prosecuted before a state court, either.

23. The summary of the thesis has a form of 32 conclusions previously included in the body of the work, in keeping with the structure of issues subject to analysis. The summary also comprises a conclusion that *de lege lata* there are no obstacles for private arbitration courts to adjudicate in matters on invalidation of resolutions of a capital company, insofar as **the arbitration**

covenant binding the company and the shareholders is valid, while the specific arbitral proceedings meet minimum standards guaranteeing shareholders **a fair arbitral trial.**

_____ ,Krakow, 06 June 2016