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Rights and Duties of Parties in Arbitration

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All contributions in this book are subject to academic review.

List of Abbreviations

AA 1996	United Kingdom the English Arbitration Act 1996
AAA Code of Ethics	AAA The Code of Ethics for Arbitrators in Commercial Disputes
AAA	American Arbitration Association
AAR	ARIAS (UK) Arbitration Rules, per the wording in force as of 1 January 2014 (Third Edition)
ADR	Alternative Dispute Resolution
AFTAR	ARIAS (UK) Fast Track Arbitration Rules (2013)
AIIB	Asian Infrastructure Investment Bank
Albanian CCP	Albanian Code of Civil Procedure
AMA Protocol	Arb-Med-Arb Protocol
ARIAS U.S.	AIDA Reinsurance and Insurance Arbitration Society United States
ARIAS UK	AIDA Reinsurance and Insurance Arbitration Society United Kingdom
ARRUS	ARIAS Rules for the Resolution of U. S. Insurance and Reinsurance Disputes
ARRUS	ARIAS Rules for the Resolution of U. S. Insurance and Reinsurance Disputes
CEFAREA	French Reinsurance and Insurance Arbitration Center
CEFAREA Rules	CEFAREA's 2013 Arbitration Rules
CEFAREA-ARIAS France	The new rules of the French Reinsurance and Insurance Arbitration Centre

CIETAC	China International Economic and Trade Arbitration Commission
CLE BC	Continuing Legal Education Society of British Columbia
Directive	EU's Mediation Directive
EU	European Union
HKIAC	Hong Kong International Arbitration Centre
IBA Rules	International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration
IBA	International Bar Association
ICC Rules	Rules of Arbitration of the ICC International Court of Arbitration
ICC	International Chamber of Commerce (often used in terms International Court of Arbitration attached to the International Chamber of Commerce)
ICDR	International Centre for Dispute Resolution
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965
ICSID	International Center for Settlement of Investment Disputes
JCAA	Japan Commercial Arbitration Association
KCAB	Korea Commercial Arbitration Board
LCIA Rules	LCIA Arbitration Rules – The London Court of International Arbitration (see also 'LCIA')
LCIA	London Court of International Arbitration (see also 'LCIA Rules')
MEDART	Albanian Centre on Commercial Mediation and Arbitration
Model Law	UNCITRAL Model Law on International Arbitration[1]
SCC Rules	SCC Institute Arbitration Rules. Arbitration Rules of the Arbitration

[1] The template was approved on 21 June 1985 as UN Document A/40/17, Annex I, within the framework of the unification program of the UN Commission on International Trade Law (UNCITRAL).

	Institute of the Stockholm Chamber of Commerce (see also *SCC*)
SCC	Stockholm Chamber of Commerce. In this book in the sense of the Arbitration Institute of the Stockholm Chamber of Commerce (see also 'SCC Rules')
SIAC	Singapore International Arbitration Centre
SIMC	Singapore International Mediation Centre
UNCITRAL Rules	UNCITRAL Arbitration Rules within the meaning of the UN General Assembly resolution 31/98 of 15 December 1976,[2] as amended in 2010 by the UN General Assembly resolution 65/22[3]
UNCITRAL	United Nations Commission on International Trade Law[4]
VIAC	Vienna International Arbitration Centre

[2] Available online in English at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (accessed on 5 May 2014). Also available in other UN languages.

[3] Full text of the UNCITRAL Rules 2010 is available online in English at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (accessed on 5 May 2014).

[4] See www.uncitral.org.

Articles

Andrzej Kubas | Maciej Durbas

Conditional Effectiveness of the Arbitration Agreement

Key words
arbitration agreement | autonomy | civil law | contract | FIDIC | forum | jurisdiction | mediation | Polish arbitration law | separability | state courts |

Abstract *| This paper concerns two frequent situations in international commercial arbitration, i.e. concluding a conditional arbitration agreement and implementing an arbitration agreement in the conditional main contract. The first part concerns the possibility of making the arbitration agreement conditional (from the procedural and substantive point of view) and also includes practical examples of such conditional arbitration clauses. The second part concerns the effect that a conditional main agreement has on the arbitration clause contained therein. The third part discusses the effects of conditional arbitration agreements, also from the procedural and substantive perspective. The authors reach a conclusion that it is in principle possible to conclude a conditional arbitration agreement and – in certain cases – the conditional nature of the main contract can influence the nature of the arbitration clause.*

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I. Introduction

6.01. In the practice of international commercial arbitration, an arbitration agreement is frequently stipulated to under a condition. Similarly, many commercial agreements are commonly of a conditional nature, e.g. agreements for sale of shares/stocks in companies. Therefore, it is necessary to analyse what effects conclusion of a conditional arbitration agreement entails and what results the conditional nature of the main agreement has for the arbitration clause itself.

6.02. The first part of this article will investigate the issue of a conditional arbitration clause – its admissibility and examples of practical application. The second part will be dedicated to the influence that conditionality of the main agreement has on the arbitration clause. The third part will discuss the effects of the conditionality of the clause.

II. Admissibility of Concluding a Conditional Arbitration Agreement

II.1. General Remarks – the Legal Nature of the Arbitration Agreement

6.03. The problem of the admissibility of concluding a conditional arbitration agreement may not be investigated in isolation from the legal nature of the arbitration clause. The doctrine presents four views in this scope[1] and the clause is treated as an agreement of substantive law, procedural, mixed, or *sui generis* nature. The frames of the present study do not permit the authors to discuss each of the aforementioned stances as well as their advantages and disadvantages in detail. However, such analyses were already performed in Polish[2], German[3], and even Turkish[4] doctrines. In our opinion, the view proposing a mixed, substantive and procedural nature of the arbitration clause is correct. The parties conclude such a clause first and foremost to cause procedural effects[5], especially to establish a

[1] Cf. e.g. Tadeusz Ereciński, Karol Weitz, Sąd arbitrażowy (Court of arbitration), Warsaw: Lexis Nexis 79-87 (2008); Piotr Wiliński, *Skuteczność umowy o arbitraż* (*Binding effect of arbitration agreement*), (4) ADR Arbitraż i Mediacja 79 et seq. (2010) in both cases with further references.

[2] Cf. also Maciej Tomaszewski, *Umowa o arbitraż* (*Arbitration agreement*), in 8 System prawa handlowego, Arbitraż handlowy (8 System of Commercial Law. Commercial Arbitration), Warsaw: C.H. Beck 285-288 (A. Szumański ed., 2010).

[3] Cf. Rolf Trittmann; Inka Hanefeld, *in* Arbitration in Germany: The Model Law in Practice, Alphen aan den Rijn: Kluwer Law International 81 (K.-H. Böckstiegel, S. Kröll, P. Nacimiento eds., 2015).

[4] S. Özmumcu, *The Principle of Separability and Competence – Competence in Turkish Civil Procedure Code No. 6100*, XLV(62) Annales 265-266 (2013).

[5] Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 85 quoting German-language authors.

court's jurisdiction[6]. An arbitration clause bears two types of effects, namely: a positive effect (a possibility for the case to be heard by a court of arbitration) and negative (a prohibition of hearing the case before a state court)[7]. However, the latter one is not absolute, but conditioned by the defendant's making an adequate request. This is because simply drafting the clause (an arbitration agreement) does not entail creation, change, or termination of any substantive law relationship[8], although its content may exceed the very procedural effects and also cause substantive law effects[9]. The clause imposes certain obligations onto each of the parties and awards them appropriate rights in the event a dispute should arise. Therefore, it is the state of being bound that is reminiscent of effects of a conditional agreement (*pendente conditione*).

6.04. Doubts concerning the purely procedural nature of the arbitration clause originate from the fact that an arbitration agreement is not concluded in the course of ongoing proceedings and, in consequence, it does not in any way influence the course of this or any other ongoing proceedings. This is in contrast to such unmistakeably procedural activities as, for example, filing or withdrawing a suit. The procedural effects of the arbitration clause are potential, they may, but do not have to materialise; yet, the parties are bound by an agreement concerning the forum where future or already existing disputes should be heard. Qualifying the arbitration agreement as a substantive law, mixed, or *sui generis*[10] act is of significance for our deliberations insofar as the literature of the subject raises doubts whether and to what degree and on what grounds it is possible to apply to the clause, as a procedural act, provisions of substantive law on legal acts (legal transactions), including also rules on condition. This is because the admissibility of stipulating a condition in relation to purely procedural acts is controversial[11]. It is, nevertheless,

[6] Alexander Bělohlávek, *Arbitration Agreement, MDR Clauses and Relation thereof to Nature of Jurisdictional Decisions on the Break of Legal Cultures*, *in* Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie (Festschrift: 60 years Arbitration Court at Polish Chamber of Commerce in Warsaw), Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej 412 (J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka eds., 2010). The author is of an opinion that arbitration agreements are contracts of mixed type – sui *generis*.

[7] For more on this issue cf. 1 Gary Born, International Commercial Arbitration, Alphen aan den Rijn: Kluwer Law International 1253 et seq. (2014).

[8] Maciej Tomaszewski, *supra* note 2, at 287.

[9] Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 85.

[10] On the legal character of arbitration agreement cf. again Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 79 et seq. and extensive references to international authorities contained therein.

[11] Zbigniew Radwański, in 2 System Prawa Prywatnego, Prawo Cywilne – Część Ogólna (*2 system of Private Law, Civil Law – General Part*), Warsaw: C.H. Beck 271 (Z. Radwański ed., 2008).

[A] condition may be implemented into such procedural acts that trigger some substantive effects; consequently a conditional court settlement in some cases is acceptable – cf. Resolution of the Full Bench of the Chamber of Labour and Social Security of 20 December 1969, file ref. no III PZP 43/69, SIP Legalis.

correctly claimed that both acts of substantive law and procedural acts, despite bearing effects in two different areas, belong to a common, broader category of 'acts of civil law'. This substantiates the application of provisions on acts of substantive law to procedural acts in such a scope in which the latter are not specifically regulated, and in every case, with taking into consideration specificity of each of them[12].

6.05. An arbitration clause is not separated from substantive law. Its interpretation, conclusion, dissolution, and defects of declarations of will[13] related therewith are usually regulated in substantive law and these provisions will adequately apply to an arbitration clause. However, it is not clear whether it pertains to all provisions of substantive law. The case-law speaks in favour of applying provisions on legal acts to the arbitration clause[14]. Yet, it did not settle this issue as regards the condition and time limit (the discussion on the latter issue remains generally outside of this paper's scope), similarly as the UNCITRAL Model Law. This constitutes a starting point for our further deliberations.

II.2. Conditional Arbitration Clause

6.06. In principle, each legal act and hence also an arbitration agreement may be concluded under a condition; exceptions from this principle may stem from a statute or properties of the legal transaction. In our opinion, legal orders of main European countries lack provisions which would enact a prohibition on rendering legal effectiveness of an arbitration clause dependent on a condition. Therefore, it is possible to assume that there exists a presumption of admissibility of concluding conditional acts; including agreements[15].

6.07. Regardless of the legal character attributed to the arbitration clause, Polish[16], German[17], and Austrian[18] doctrine allows for the possibility of concluding an arbitration clause under

[12] On the civil law character of arbitration agreement cf. e.g. Rafał Kos, *O związaniu cesjonariusza zapisem na sąd polubowny* (*On the assignee being bound by the arbitration agreement*), (4) Glosa 41 (2013).

[13] Cf. Aleksandra Pokropek, *Problematyka prawna zapisu na sąd polubowny w tzw. sprawach opcyjnych* (*Legal aspects of arbitration agreement in so-called option cases*), (1) ADR Arbitraż i Mediacja 110 et seq. (2012).

[14] Resolution of the Supreme Court of 8 March 2002, file ref. no III CZP 8/02, SIP Legalis.

[15] Zbigniew Radwański, *supra* note 11, at 268-272; Bartłomiej Swaczyna, Warunkowe czynności prawne (Conditional legal acts), Warsaw: Lexis Nexis 94-95 (2002).

[16] Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 104-105; Maciej Tomaszewski, *supra* note 2, at 299 with further references.

[17] Cf. with regard to multi-tiered dispute resolution clauses: Rolf Trittmann and Inka Hanefeld, *supra* note 3, at 88-89.

[18] Alice Fremuth-Wolf, *in* Arbitration Law of Austria: Practice and Procedure, New York: Juris Publishing 52 (S. Riegler, A. Petsche, A. Fremuth-Wolf, M. Platte, C. Liebscher 2007). Case law cited by the author (OGH 24 November 1964, 8 Ob 331/64 and OGH 29 April 1953, 1 Ob 315/53), however, is reluctant to accept conditions and limitations in jurisdictional agreements.

a condition. Yet it is emphasised that 'Stipulating a condition or time limit in an arbitration agreement is sometimes viewed negatively in literature, since it may generate uncertainty as regards the existence of the agreement, and hence, the way in which a party is able to pursue its claims'[19]. R. Kulski correctly noted that including a condition directly in an arbitration clause is allowed by Polish procedural law in Article 1165 § 2 of the CCP and Article 1206 § 1.1 of the CCP[20]. The first of these provisions is an equivalent of Article 8.1 of the UNCITRAL Model Law, which indicates that state courts do not dismiss the suit in the event the arbitration agreement giving basis to the request of a party when the clause is invalid, incapable of being performed or inoperative. The scope of Article 1165 § 2 of the CCP is broader and it applies when the clause is invalid, *ineffective***,** inoperable, or *lost its legal effect*, as well as when the arbitral tribunal declared itself incompetent[21].

6.08. The lack of a clear clause, or where it is not possible to derive from the contents of provisions, prohibition of conditionality of an arbitration clause does not definitively settle the issue of its admissibility. It is worth considering here whether inadmissibility of a condition does not follow from the 'nature of the legal act', i.e. the nature of the clause itself. Literature correctly emphasises that granting a universal answer when and in relation to what acts their 'nature' excludes the possibility of a condition is very difficult. Hence, in settling this issue, it is necessary to precisely indicate which value would be violated if a given legal act would be made conditional[22]. The 'nature' (sometimes defined as the 'property' of the act) constitutes an obstacle for a conditional clause in the case where uncertainty as to arising or durability of legal effects of an act would be irreconcilable with the character of effects caused by a given act (e.g. acts shaping a civil status or family relations of natural persons, such as recognition of a child, conclusion of a marriage), threaten – considering both

[19] Cf. Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 105 and references made therein, also negative opinion, as to conditional arbitration agreements, of German-language authorities.

[20] Robert Kulski, Umowy procesowe w postępowaniu cywilnym, Krakow: Wolters Kluwer 85, 95 – 96, 184 – 186 (2006). The law does not specify directly the possibility to conclude a conditional arbitration agreement. Such a conclusion can be drawn after examining the effects, which can be triggered by different reasons why the agreement is defective. However, some reasons that point to the possibility to implement a condition into an arbitration agreement coincide with other defects of arbitration agreement (e.g. lack of legal capacity, improper representation, bankruptcy etc.).

[21] Not only the wording 'loss of legal effect' proves the possibility to conclude a conditional arbitration agreement (loss of legal effect is triggered by the condition subsequent), but also 'ineffectiveness' of the clause can be triggered by not meeting the condition precedent. These remarks also apply to Art. 1206 § 1 pt. 1 CCP, which – as a prerequisite to set aside the award – mentions invalidity, ineffectiveness or loss of legal effect. Again its scope is wider than its prototype – Article 34 (2) (a) (i) of the UNCITRAL Model Law, which mentions only the invalidity of the arbitration agreement.

[22] Zbigniew Radwański, *supra* note 11, at 269 et seq.; Bartłomiej Swaczyna, *supra* note 15, at 95-101.

private and public interest – certainty regarding the legal status (e.g. transfer of real estate ownership, appointment of a legal successor) or security of transactions (agreements creating legal personality, such as, for example, articles of association of a company). An arbitration clause, in principle, neither violates any of such values nor threatens them. It causes legal effects compliant with an unambiguous will of the parties participating in it and subjectively limited exclusively to them. This is not affected by the fact that each and every shareholder is bound by an arbitration clause included in the Articles of Association or by binding effect of arbitration agreement on legal successors under a general title[23]. It does not cause a 'removal' of cases covered by the clause from under the jurisdiction of state courts if persons other than the parties to the clause were to participate in the capacity of parties in the proceedings. It does not bear any effects in relation to the substantive law and procedural legal situation of third parties. It in no way threatens public interest as the scope of arbitrable cases is limited to those within the limits of the parties' discretion, under the supervision of state courts'. Therefore, in our opinion it is correct to state that the property of the act such as the arbitration clause does not prohibit its conditionality[24].

6.09. It is also necessary to draw attention to the fact that, in a sense, each arbitration clause hides within itself a negative condition subsequent; this condition is triggered when the defendant sued before a state court does not request at an appropriate time for the case to be heard by an arbitral tribunal.

6.10. Stating that an arbitration clause may be concluded under a condition or with stipulation of a time limit does not yet settle the question whether all provisions on condition or time limit apply thereto. The subject here is in particular those provisions

[23] Cf. Rafał Kos, *O związaniu…*, *supra* note 12 at 46 and 37 and with regard to relations to the binding effect of the awards in corporate disputes on certain persons: Rafał Kos, *Zdatność arbitrażowa sporów o ważność uchwał spółek kapitałowych* (*Arbitrability of disputes on the validity of corporate resolutions*), (3) Przegląd Prawa Handlowego 28 et seq. (2014).

[24] Cf. also Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 104-105.

which guarantee a practical application of the condition and remedy unlawful actions of the parties.

6.11. National legal orders, e.g. German[25], French[26], Polish[27], and Swiss[28] provide for – although expressed in different ways, but ultimately interpreted in a similar way – a principle according to which if a party prevents satisfaction or non-satisfaction of the condition, it is possible to adopt a fiction of – respectively – satisfaction or non-satisfaction of a condition[29]. Depriving conditional provisions of the stipulated 'protection' principles might undermine the practical usability of many instruments. This is because it is possible to imagine a situation where a party is deliberately paralysing initiation or conclusion of pre-arbitral mediation proceedings in order to prevent initiation of arbitration. In such a situation, it would be legitimate to enable the other party to initiate adjudicative proceedings as a result of assuming a fiction that the mediation proceedings concluded without yielding any result, if this fact constitutes a condition of the clause's effectiveness and the arbitration agreement is valid.

6.12. Similarly, there are no obstacles to apply to a conditional arbitration clause provisions on impossible conditions or conditions violating a statute. In such a case, for example French[30] and Polish[31] law, in principle, stipulates invalidity of a legal act in the case of a condition precedent and when it is a condition subsequent – a fiction of non-stipulation of a condition. The parties may, however, introduce safety valves in the event of

[25] Under section 162 of the BGB: (1) If the satisfaction of a condition is prevented in bad faith by the party to whose disadvantage it would be, the condition is deemed to have been satisfied.
(2) If the satisfaction of a condition is brought about in bad faith by the party to whose advantage it would be, the condition is deemed not to have been satisfied. Available at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0475.

[26] Under art. 1178 of the civil code: A condition is considered fulfilled when the debtor who is bound by such condition prevents it from being fulfilled. Available at: http://legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

[27] Under Art. 93 of the civil code: § 1 If a party, who benefits from non-satisfaction of a condition, interferes against the rules of social coexistence, with satisfaction of a condition, the effects will be such as if the condition had been fulfilled. § 2 If a party, who benefits from satisfaction of a condition, leads, against the rules of social coexistence, to satisfaction of a condition, the effects will be such as if the condition had not been fulfilled (Private translation).

[28] Under Art. 156 of the civil code, A condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting in bad faith. Available at: https://www.admin.ch/opc/en/classified-compilation/19110009/201507010000/220.pdf.

[29] Cf. on condition, in comparative perspective, Julita Zawadzka, Warunek w prawie cywilnym (*Condition in civil law*), Warsaw: Lexis Nexis, pt. II.3 (2012).

[30] Under Art. 1172 of the Civil code: Any condition providing for an impossible thing, or contrary to public morals, or prohibited by law, is null and renders the agreement itself that depends upon it null. Under Art. 1173 of the Civil code: A condition not to do an impossible thing does not render null the obligation contracted upon that condition. Available at: http://legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

[31] Under Art. 94 of the Civil code: An impossible condition or a condition which is contrary to the law or to the principles of community life makes a legal act invalid if it is a condition precedent; it is deemed not having been made if it is a condition subsequent (Private translation).

impossibility of satisfaction of a condition for effectiveness of an arbitration clause. By means of an example, consider a case heard by the Polish Supreme Court, where in the agreement the parties included FIDIC clauses which, in principle, required submitting disputes to be first settled by dispute adjudication boards, and only then by arbitration. When parties achieved no agreement concerning the composition of the board and did not motion for its appointment by an appointing body, it was possible – according to the mechanism provided for in the parties agreement – to nonetheless hear the case in arbitration[32].

II.3. Individual Cases of a Conditional Arbitration Clause

6.13. If an arbitration clause may be conditional, it needs to be analysed how parties make use of this possibility.

II.3.1. Clauses Rendered Dependent on Exhausting Certain Obligations – Multistep Dispute Resolution Clauses

6.14. Multistep (escalating) dispute resolution clauses consist in placing parties under an obligation to undertake – prior to an adjudicative settlement of a dispute (most often in arbitration) – to solve the dispute by conciliatory means, e.g. in mediation[33]. There is a whole range of problems related to clauses of this type: uncertainty if conditions for conducting arbitration have been satisfied and a doubt whether pre-arbitration stages of dispute settlement are obligatory or not[34]. Application of the above-indicated safety valves in the form of provisions on impossibility of satisfying the condition and interfering in satisfying the condition against good faith principles could serve as a remedy in this scope.

6.15. Multistep arbitration clauses seldom become the basis of rulings of state courts. One of such somewhat peculiar cases was examined by the Court of Appeals in Krakow[35]. In this case the claimant filed a statement of claim with a court of arbitration simultaneously maintaining that the said court was incompetent to hear the case. The court of arbitration dismissed

[32] Judgment of the Supreme Court of 19 March 2015, file ref. no IV CSK 443/14, SIP Legalis.

[33] Rafał Morek, *Wielostopniowe klauzule rozwiązywania sporów w praktyce kontraktowej i orzecznictwie wybranych systemów prawa kontynentalnego* (*Multitiered dispute resolution clauses in contract practice and case law of selected civil law systems*), *in* Księga pamiątkowa..., *supra* note 6 at 51-52.

[34] *Ibid*., at 57-58.

[35] Judgment of Court of Appeals of Krakow of 25 June 2014, file ref. no I ACa 497/14, available at: http://orzeczenia.ms.gov.pl/. This judgment was appealed before the Supreme Court, but it refused to accept the case (file ref. no III CSK 10/15).

this argument and upon examination of the case issued a judgement which the claimant challenged with a motion to set aside. One of the arguments raised was the defective nature of the clause, resulting from omitting the mediation requirement. The Regional Court assumed, and the Court of Appeals did not object to this position, that, firstly, it was the claimant who did not conduct such mediation proceedings and, secondly, as it seems, in this case particular case mediation was not a precondition to arbitration. Nevertheless, the court dismissed arguments concerning defectiveness of the arbitration clause due to the preclusion caused by non-questioning of the arbitration court's decision on competence.

6.16. Another example of a multistep dispute resolution clause examined by state court was a clause stipulating mandatory pre-arbitration negotiations. The Court of Appeals of Katowice, pointing to preclusion of arguments concerning jurisdiction of the court of arbitration, noted that the arbitration clause was conditional and its effectiveness was rendered dependent on 'previous clarification of contentious issues and discrepancies on the way of negotiations'[36]. However on the other hand, 'parties did not indicate any specific procedure or effects of not abiding thereby in this scope'. Hence if one of the parties was delayed in payment, and the other party did not grant consent for the payment date extension, then the 'negotiating mode of dispute settlement was exhausted'. This stance can hardly be recognised as an expression of a general rule. This is because in each case it is necessary to consider the true intention of the parties, i.e. what role – according to the parties – the obligation to engage in negotiations prior to initiating a court dispute was to play and what consequences the parties wanted to attribute to a violation of this obligation. It may particularly be a 'stronger' sanction, i.e. non-engaging in negotiations creates an obstacle for initiation of arbitration. Thus, the obligation to conduct negotiations may in concreto be a prerequisite of effectiveness of the arbitration clause; it is not such a prerequisite in relation to proceedings before a state court since the 'forbidding' the recourse to state courts is an exclusive competence of the legislator.

II.3.2. Clauses Provided with a Condition Subsequent

6.17. An arbitration clause may also be stipulated under a condition subsequent. As a rule such a clause is connected with the *ad*

[36] Decision of Court of Appeals of Katowice of 12 December 2012, file ref. no V ACz 914/12, available at: http://orzeczenia.ms.gov.pl/. This judgment was not appealed before the Supreme Court.

quem time limit, i.e. the clause loses its binding force if a given future and uncertain circumstance, constituting a condition subsequent, materialises or does not materialise (in the case of the so-called negative condition) before the lapse of the time limit indicated by the parties; upon its ineffective lapse, the provision becomes unconditional.

6.18. A condition of this type entails a risk of specific problems if it materialises in the course of the earlier initiated arbitration proceedings. Therefore, attention is drawn to the fact that the assessment of satisfaction of the condition should take place at the moment of initiating the proceedings before a court of arbitration or state court, whereas later changes in this scope are inadmissible[37]. It is also postulated for the condition subsequent to be worded in a manner allowing it to materialise only prior to initiation of arbitration proceedings[38].

6.19. What happens, however, when the condition of an arbitration agreement is triggered already after that date? The doctrine expresses a view that in cases where the arbitration agreement was contested due to the defect of the declaration of will after initiating the proceedings, the party may invoke this issue only within such a time limit within which they may question the competence of the arbitral tribunal[39]. Consequently, in countries that based their arbitral law on UNCITRAL Model Law, the issue must be raised in principle in the answer to the statement of claim (Article 16.2 of the Model Law). The Law, however, provides for a possibility of admitting a later plea if the delay is justified. In our opinion, *Mutatis mutandis* this principle should be applied to loss or emergence of effectiveness of the arbitration clause in the course of proceedings[40]. In Article 1180 § 2 of the CCP, Polish law provides for a possibility of raising a plea of non-competence after the lapse of the time limit if the grounds of the argument emerged only after the lapse of such a limit. It is so in the described circumstances.

6.20. The Model Law and Model Law jurisdictions, however, did not directly stipulate a situation where the reason for rejecting the suit by state court emerges in the course of the proceedings (e.g. the arbitration clause becomes effective). One of the proposed

[37] Alice Fremuth-Wolf, *supra* note 18, at 52 with further references.

[38] Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 105 with further references

[39] Maksymilian Pazdan, *Bezskuteczność lub nieważność zapisu na sąd polubowny w prawie polskim* (*Ineffectiveness or invalidity of arbitration agreement under Polish law*), *in* Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga Jubileuszowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu (*International and domestic arbitration on the verge of XXI century. Festschrift for dr hab. Tadeusz Szurski*), Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej 121 (A. Tynel, A. Szumański, S. Pieckowski, P. Nowaczyk, J. Poczobut eds. 2008).

[40] Cf. on this issue also Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 228 et seq.

solutions is to treat this situation as providing the grounds for the staying of proceedings before state court at a joint motion of the parties[41]. It seems, nevertheless, that a party should be able to invoke the arbitration clause if effectiveness thereof materialised in the course of the proceedings, provided it is done immediately. This issue seems to be of lesser significance in jurisdictions where state courts may raise the issue of the clause *ex officio*, as is the case in Austria[42].

6.21. Moreover, a change in the scope of effectiveness of the arbitration clause may be significant for jurisdictional decisions. The frames of this study do not permit the authors to delve into more detailed discussion of this issue. Yet it is worth postulating for the binding effect of such rulings also to be affected by an exception in the event of 'a change in circumstances'[43], e.g. a conditional arbitration clause becoming effective.

II.3.3. Clauses Rendered Dependent on the Amount in Dispute

6.22. It is also common that the parties decide to separate competences of the court of arbitration and the state court. For example, small claims, with low amount in dispute are to be heard before state courts, whereas complicated cases arising from the same legal relationship – before an arbitral tribunal. In such a case, however, one should not speak of a condition, but of designating by the parties an objective scope of the arbitration clause, and hence the scope of cases to be heard in arbitration.

II.3.4. Clauses Rendered Dependent on the Type of the Claim Raised

6.23. At times, the parties may also decide to establish the competence of the court of arbitration only for individual claims, e.g. claims for payment, or only for claims arising from the agreement, but not those remaining in connection with the agreement. Similarly as in the case of division of claims according to the amount in dispute, by doing so the parties determine the objective scope of the arbitration clause, but they do not establish a condition.

41 Ibid. at 253 and authorities cited therein.

42 Alice Fremuth-Wolf, *supra* note 18, at 195-196.

43 Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 250-251.

II.3.5. Clauses Rendered Dependent on a Potestative Condition

6.24. Clauses awarding one of the parties more rights (e.g. a possibility of initiating the case, at the claimant's discretion, before a court of arbitration or state court) as a rule are found ineffective, at least in Poland (Article 1161 § 2 of the CCP). This is because they violate the principle of equal treatment of parties which is fundamental in arbitration proceedings[44].

II.3.6. Other Cases

6.25. Among other cases of conditionality of the arbitration clause, it is possible to examine arbitration clauses included in the Convention on the Contract for the International Carriage of Goods by Road (CMR). Under Article 33 of the Convention on the Contract for the International Carriage of Goods by Road[45], the contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply the Convention. It seems that the requirement of invoking the application of the Convention is not a condition of effectiveness of the arbitration clause, but of its validity. This is suggested by the wording of Article 41.1 of the Convention, under which any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void[46].

III. Admissibility and Effects of an Arbitration Clause in an Agreement Concluded Under a Condition or with a Stipulation of a Time Limit

6.26. It is commonly accepted, at least on the grounds of legal systems deriving from Roman law, that save for exceptions provided for in a statute or resulting from the characteristics of a legal act, emergence or cessation of effects of such an act may be rendered dependent on a future and uncertain event (condition), or on the lapse of a specific period of time or materialisation of a certain

[44] Cf. on this issue e.g. Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 107-108.

[45] Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956).

[46] Similarly, Karolina Szostak, *The arbitration clause in light of the Convention on the Contract for the International Carriage of Goods by Road (CMR) – selected issues,* (3-4) Arbitration e-review 48-49 (2013). One of Polish trial courts hearing an appeal determined that in case where the agreement does not refer to the Convention, it is 'at least without legal effect if not void' (cf. Judgment of Regional Court of Szczecin of 28 June 2013, file ref. no VII Ga 37/13, available at: http://orzeczenia.ms.gov.pl/).

future event, materialisation of which, unlike in the case of the condition, is inevitable (time limit).

6.27. It is possible to find, without a need to provide a closer substantiation, that most agreements in the frames of which or in relation to which parties draft arbitration clauses (cases arising from the agreement or related to the agreement in a manner which parties may define more closely) belong to such a category of acts which may, in full or in part, be shaped by parties as conditional or related to a time limit. A question arises in such a case if effects of the stipulation of a condition or time limit extend also to the arbitration clause (arbitration agreement), the subject of which is to resolve potential disputes arising from the conditional or time limit-bound 'main agreement' ('substantive agreement'). Case-law and literature on arbitration confirm the independence (autonomy) of the arbitration clause in relation to the main agreement regardless of the fact whether this clause is incorporated into the main agreement as an integral part thereof or it constitutes an act distinctly separate from the main agreement[47]. It would seem, therefore, that separability of the clause creates an obstacle for extending the effects of the stipulation of a condition or time limit also onto the arbitration clause, and in any case for assuming an automatic nature of such effects. Moreover, assuming that in certain cases the stipulation of a condition or time limit in the substantive agreement defining the substantive law rights and obligations of the parties, may also refer to that of its element which constitutes an arbitration clause. Due to the lack of provisions excluding admissibility of stipulating a condition or time limit in an arbitration agreement, but also due to the fact that 'the nature' thereof as a legal act does not prevent it, in principle this act may be conditional (time limit-bound).

6.28. The autonomy of an arbitration clause boils down to determining that the clause is a separate agreement regardless of the fact whether it was incorporated into the main agreement as one of its provisions or it was concluded separately. Consequently validity of the clause is not dependent on the validity of the main agreement, but in terms of assessment of prerequisites of its validity, it is subject to an independent determination as a separate legal act[48]. This leads to a conclusion that competence

[47] Gary Born, *supra* note 7, at 350 et seq.; Cf. also Wojciech Popiołek, *W sprawie niektórych konsekwencji zasady autonomii umowy o arbitraż* (*On certain aspects of separability of arbitration agreement*), *in* Arbitraż i mediacja. Księga jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi (*Arbitration and Mediation. Festschrift for doctor Andrzej Tynel*), Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej 444-447 (M. Łaszczuk, M. Furtek, S. Pieckowski, J. Poczobut, A. Szumański, M. Tomaszewski eds., 2012) with further references to International case law and doctrine.

[48] Gary Born, *supra* note 7, at 350 et seq.; Wojciech Popiołek, *supra* note 47, at 444-445.

of arbitral tribunals, lacking a different contractual provision also extends to – disputes on validity (invalidity) of the main agreement and the clause itself. It seems, however, that the statements above, commonly accepted in the doctrine and practice of arbitration, especially international commercial arbitration, constituting a manifestation of a tendency to extend the competence of arbitral tribunals (it remains controversial whether this tendency deserves approval in all situations), are not always equally obvious and acceptable for the parties. It is, after all exclusively their will that is a source of competence of arbitration as a system of administration of justice in civil cases as an alternative to the state judiciary. In particular, in these cases where the arbitration clause constitutes an integral part of the main agreement, the parties may find it difficult to understand why it is treated as a separate agreement possessing a separate legal nature. At the same time it is treated as autonomous in the sense that it may function independently regardless of the fact whether the substantive agreement binds the parties or, due to its defective nature from the beginning (contradiction with the law or principles of good faith, non-observance of the form required under pain of invalidity) or emergence of later events cancelling or limiting its effectiveness (avoiding effects of a legal act performed due to mistake or under coercion, withdrawing from the agreement, a subsequent impossibility to deliver a performance, etc.), it ceases to be a source of a contractual legal relationship.

6.29. These doubts are founded. Even when the autonomy of the clause in relation to the main agreement was directly articulated in the statute (cf. Article 1180 § 1 of the Polish CCP), then such a regulation does not eliminate a possibility of emergence of another state of affairs. This is because the mentioned provision provides that 'invalidity or expiration of the main agreement in which the arbitration clause was included, *in itself* (authors' emphasis) does not signify invalidity or expiration of the clause'. G. Born emphasises correctly that it is better to use the term of *separability* of the arbitration agreement than *independence*, since a certain degree of dependence always exists, and in any case it may come into existence by the parties' will[49]. This seems to suggest that in the case of emergence of yet other circumstances than invalidity or expiration of the main agreement, the clause may share its fate; such a circumstance may above all else come as the parties' will. This is because if the will of the parties is the only source of the competence of the tribunal to rule in

[49] Gary Born, *supra* note 7, at 351-352.

a given case or in a given category of cases, then it is within the parties exclusive competence not only to select a private court in place of a state court, and therefore make a decision creating the jurisdiction of the tribunal and determining its limits, but also – in our opinion – to determine the manner and degree of connection between the arbitration clause and the main agreement, irrespective whether the former is a part of the latter, or a separate agreement. Therefore, the parties may decide that this connection will be manifest in the fact that the condition (time-limit) stipulated for the materialisation or cessation of effects of the substantive agreement applies also to the arbitration clause and the materialising or non-materialising of the condition shall bear the same effects for the clause that it bears for the main agreement.

6.30. We see no obstacles for the parties to an arbitration agreement to modify its doctrinal or jurisprudential (not imposed by statutes) construction by combining the validity or effectiveness of the arbitration agreement with the validity and effectiveness of the main agreement. The autonomy of the arbitration agreement, as a concept, developed in the doctrine and case law, does not extend its effects further than statutory norms of a dispositive nature. Therefore, if the parties may shape a contractual legal relationship (in any case – an obligational relationship) in a manner other than provided for by dispositive statutory provisions, then they may also take advantage – in the frames of the autonomy of will they are entitled to – of the same competence in relation to the construction of autonomy of the clause as an agreement 'separated' (independent of the main agreement) in connection to which it was concluded.

6.31. Such a departure from the commonly adopted rule must be expressed in the parties' declarations of will. The construction proposed here found its normative expression in Section 7 of the British Arbitration Act of 1996, which enacting the doctrine of autonomy of the clause in a similar, although, substantially more detailed manner than Article 1180 § 1 of the Polish CCP, included a proviso 'unless otherwise agreed by the parties'[50]. It does not mean, nevertheless, that it must be an express declaration, it suffices if such a will of the parties could be recreated (decoded) by application of standard directives for interpretation of agreements. If the dispute concerns validity of the substantive agreement as well as the fact whether the condition materialised or not, then – according to current authorities – the arbitral

[50] Cf. also David Sutton, Judith Gill, Matthew Gearing, Russel on Arbitration, London: Sweet & Maxwell 20-21, 32 et seq. (2007).

tribunal is competent to hear the case, thus deciding not only on validity (effectiveness) of the substantive agreement, but also on its own competence[51]. If the tribunal decides that the main agreement is invalid or ineffective, or that the condition subsequent did not materialise or a condition subsequent stipulated for the main agreement materialised, then it faces two alternative manners of adjudication in the case. First, it may rule on the merits of the case, finding the main agreement (and thus also the clause) to be invalid or ineffective. Second, in the alternative, it may reject the statement of claim and declare itself incompetent, at the same time discussing the issue of validity (invalidity) of the agreement or materialisation of the condition as a reason for the decision in substantiation of the award, but not its operative part. It seems to us that this second version is more correct. This is because if, in a specific case, there is an obstacle to the tribunal's jurisdiction, namely that 1) it was the parties' will to render the binding force of the clause dependent on the validity (effectiveness) of the main agreement and 2) the main agreement is invalid from the start or became invalid *ex post*, or the condition precedent did not materialise or the condition subsequent stipulated in the substantive agreement materialised, then deciding on the merits of the case would be done by an entity without competence stemming from the parties' will, expressed jointly in the clause and in the main agreement.

6.32. The inseparable connection between an arbitration clause and substantive agreement at times happens to be a consequence of the function of the arbitration clause that is specific for a given type of agreements. Thus, an arbitration clause included in articles of association especially of a capital company, is binding for all shareholders, both for those who had this status at the moment of conclusion of the agreement and expressly consented to the clause, as well as future shareholders acceding the company in which articles of association such a clause was included. This is because in such an event the arbitration clause covering cases arising from the company relationship becomes an integral element of a corporate legal relationship and fully shares its fate. At the same time this corporate (legal and organisational) element of the company relationship, i.e.

[51] Cf. as to the *competence-competence* doctrine e.g. Gary Born, *supra* note 7, at 1046 et seq.

the arbitration clause included in the contents of the articles of association, is *eo ipso* accepted by each shareholders[52].

6.33. We are under an impression that the inseparable connection between the substantive agreement and the clause dictated *in concreto* by the will of the parties may function also independently of the view on admissibility of the conditional arbitration clause. The clause itself, (an arbitration agreement), may be unconditional, but the interpretation of the main agreement and the clause itself may lead to a conclusion that the parties made the status of being bound by the main a prerequisite of the effectiveness of an arbitration clause. This would mean that the parties would be unconditionally bound by the clause since the moment it was drawn up, whereas a later 'breakdown' of a contractual legal relationship arising from the agreement would subsequently trigger a loss of effect of the clause.

6.34. The connection of the conditional substantive agreement with an arbitration clause resulting from the parties' will necessitates further consideration of another significant issue pertaining to any conditional act. Namely, what happens when the very condition stipulated in the main agreement is impossible, contradicts a statute or principles of good faith. As we have already mentioned while considering this issue in relation to a conditional clause, a part of European legislations assumes that if a condition precedent is affected by such a defect, then the entire legal act is invalid *ex tunc*, and if it is subsequent, then it is considered to have been non-stipulated (e.g. Article 94 of the Polish CC). In such a case, it is necessary to assume that the arbitration clause will be affected by identical effects. The same pertains to a situation where a party depending on non-materialisation of the condition prevents the condition from materialising in bad faith. The consequence is that such effects occur as if the condition became materialised. In turn when a party depending on materialisation of the condition causes it to materialise in the same unacceptable manner, the consequence is that such effects occur as if the condition did not become materialised.

6.35. Difficulties arise when stipulation of the condition does not pertain to an entire act in law, but only to some of its provisions, in particular to certain effects related to its performance53. The effect in the form of invalidity of the entire agreement concluded with a stipulation of a condition precedent contradicting

[52] Rafał Kos, *O związaniu..., supra* note 12 at 46.

[53] Cf. with regard to an arbitration agreement that is conditional only in part: Tadeusz Ereciński, Karol Weitz, *supra* note 1, at 105.

statutory law or good faith is an exception from the rule that limits effects of a partial unlawfulness of the legal act to only this part of the act which is affected by such a defect. Frequently, effects of defectiveness of a legal act are limited by the so-called severability clauses, the sense of which consists in upholding a partly defective agreement and replacing invalid or ineffective elements of its content with other regulations. Yet such clauses may not mitigate a sanction of a given defectiveness if it is stipulated by a mandatory statutory provision. This means that the contractual limitation of effects of stipulation of a unlawful or 'bad-faith' condition will not protect the validity of the clause if it was – by the will of the parties – inseparably connected with the validity of the main agreement. In such a case, subjecting the agreement along with the arbitration clause to the following interpretative procedure will be a 'rescue instrument' for an arbitration clause. One must consider whether the will of the parties establishing an inseparable connection between the clause and the substantive agreement was also to uphold the intended primary connection resulting in a 'twin' sanction of invalidity (e.g. when the entire agreement is invalid only due to the contradictoriness of the condition with the law or good practice). A negative answer to the question thus posed will allow the clause to retain its binding force, due to its autonomous character.

IV. Effects of a Conditional Nature of an Arbitration Clause

IV.1. Substantive Law Effects

6.36. As already indicated, an arbitration clause also bears substantive law effects as a legal act[54]. These effects, however, may be caused only when the clause itself is effective (materialisation of a condition precedent or non-materialisation of a condition subsequent).

6.37. The doctrine devoted some considerations to the question whether the very drawing up of a clause interrupts the period of prescription and facilitates further pursuit of claims[55].

[54] Alexander Bělohlávek, *supra* note 6, at 418.

[55] Cf. In this regard e.g. Łukasz Błaszczak, Małgorzata Ludwik, Sądownictwo polubowne (arbitraż) (*Arbitration*), Warsaw: Lexis Nexis 121-122 (2007); Szczęsny Kazimierczak, *O możliwości przerwania przed sądem powszechnym biegu przedawnienia roszczeń podporządkowanych kognicji sądu arbitrażowego* (*On the possibility to interupt before a state court the limitation period of claims*), (4) Biuletyn Arbitrażowy 82-101 (2011); Joanna Kuźmicka-Sulikowska, *Zapis na sąd polubowny i postępowanie przed tym sądem a przerwanie biegu przedawnienia* (*Arbitration agreement and proceedings and interuption of limitation period*), (4) ADR Arbitraż i Mediacja 17 et seq. (2010); The author noted that concluding an arbitration agreement does not take place before a court or tribunal, as required by Article 123 of the CC.

Obviously, this issue depends on applicable substantive law. For example, under article 123 §1.1 of the Polish Civil Code, the period of prescription is interrupted by an act embarked upon *directly* with the view of pursuing, establishing, satisfying, or securing a claim. Therefore, it is correctly indicated that the very fact of drawing up of a clause is not such a 'direct' act[56].

6.38. The problem of interruption of the period of prescription by initiating an action before an incompetent forum (judicial or arbitral) is slightly more controversial. The Polish Supreme Court indicated that the period of prescription is interrupted when a case covered by an *effective* arbitration clause is initiated before a court of arbitration[57]. However some authors correctly claim that the period of prescription can also be interrupted if the case is initiated before an incompetent forum (regardless whether arbitral or judicial)[58]. On the other hand, it is highly risky to leave this issue only to changeable views of the case-law and doctrine. For this reason it is worth following the example set by Austria, where a special rule was introduced in this scope[59].

6.39. Equally controversial is the question regarding substantive law effects of clauses in the context of supporting arbitration proceedings and not interfering in their conduct and potential claims for violation of these obligations[60]. It is aptly indicated that on the grounds of the majority of continental jurisdictions, an arbitration clause does not create such obligations or the right to seek compensation for their violation[61].

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[56] Karol Potrzobowski, Władysław Żywicki, Sądownictwo polubowne. Komentarz dla potrzeb praktyki (Arbitral Judiciary. Practical Commentary), Warsaw: Wydawnictwo Prawnicze 15-16 (1961).

[57] The judgement of the Supreme Court of 18 February 2005, file ref. no. V CK 467/04, SIP Legalis.

[58] Maciej Zachariasiewicz, Jacek Zrałek, *Nieskuteczność przerwania biegu terminu przedawnienia w przypadku wniesienia pozwu przed niewłaściwe forum arbitrażowe lub państwowe* (*Ineffectiveness of interrupting limitation period by filing a statement of claim before an improper arbitration or state court forum*), (4) Przegląd Sądowy (*Court review*) 87 et seq. (2015) and further extensive references made therein.

The state court is *prima facie* always competent to hear the case and becomes incompetent only when a party points its attention to the arbitration agreement. A statement of claim is not rejected ex officio but at the request of a party; consequently the effects of filing a statement of claim should not be nullified in such a case. Cf. Joanna Kuźmicka-Sulikowska, *supra* note 55, at 33; Szczęsny Kazimierczak, *supra* note 55, at 95 et seq.

[59] Cf. Article 584 (4) of the ZPO: If an action is rejected by a court due to the jurisdiction of an arbitral tribunal, or by an arbitral tribunal due to the jurisdiction of a court or of another arbitral tribunal, or when an arbitral award is set aside in setting aside proceedings due to lack of jurisdiction of the arbitral tribunal, the proceedings are deemed to have been properly continued if the action is immediately brought before the court or arbitral tribunal. Available at: http://www.viac.eu/en/materials/83-recht/gesetze/200-zpo-as-amended-2013.

[60] Łukasz Błaszczak, Małgorzata Ludwik, *supra* note 55, at 122.

[61] Alexander Bělohlávek, *supra* note 6, at 418-419. However, recent developments in Swiss case law point to a conclusion that awarding damages for the breach of arbitration agreement is not contrary to Swiss public policy. Cf. Tanya Landon, Sabrine Schnyder, *Remedies for Breach of the Arbitration Agreement – Dealing with Parties That Try to Circumvent Arbitration*, *in* International comparative legal guide

IV.2. Procedural Effects

6.40. The procedural effects of an arbitration clause are closely connected with its substantive law effects. An ineffective arbitration clause should not be taken into consideration. It does not bear the above-described positive and negative effects, and thus it does not establish competence of the court of arbitration and does not deprive state courts of the possibility of examining the case. Therefore, non-satisfaction of a condition precedent or satisfaction of a subsequent one causes ineffectiveness of the clause; neither a state court nor a court of arbitration should take such a clause into consideration at the moment of deciding on competence. The form of a procedural decision in the case of ineffectiveness depends on jurisdiction and applicable procedural law. The UNCITRAL Model Law in Article 8.1 only mentions remitting a case covered by an arbitration clause to the court of arbitration, while not refusing such a remission. On the grounds of the Polish Code of Civil Procedure, in the case of a state court examining an ineffective arbitration agreement it will be a refusal to reject the suit (Article 394 § 1.1 of the CCP)[62], and in the case of a court of arbitration, according to the practice – a decision rejecting the suit[63]. Such 'declining jurisdiction' decisions were rendered by the ICC court of arbitration[64]. From an interesting analysis carried out by R. Morek it follows that the German Supreme Court found an action initiated with omitting the mediation to be inadmissible (*uzulässig*), however not in the case where the blame for not conducting the mediation rested with the defendant who acted in bad faith[65]. Similarly, a solution stipulating inadmissibility of a recourse to court without conducting mediation found its reflection in French case-law[66]. In turn, from the case-law analysis conducted by A. Bělohlávek, it also follows that in principle, multistep arbitration clauses

to International Arbitration 2015, London: Global Legal Group 9-10 (S. Finizio, C. Caher eds., 2015).

62 Cf. e.g. judgment of Polish Supreme Court of 8 April 2009, file ref. no V CSK 405/08, SIP Legalis.

63 Polish procedural law does not contain any specific form and content of such a decision. It merely contains guidelines as to the opposite decision (Article 1180 § 3 CCP mentions a decision of an arbitral denying a plea of no-jurisdiction). However, it seems that arbitration practice leans towards the decision on the rejection of a statement of claim by the arbitral tribunal, e.g. as in the case heard by Court of Appeals of Warsaw in a judgment of 14 November 2014, file ref. no I ACa 677/14, available at: http://orzeczenia.ms.gov.pl/. This judgment was not appealed before the Supreme Court.

64 Ewelina Kajkowska, *Incorporating ADR into arbitration framework: issues arising from integrated dispute resolution clauses*, *in* Aurea Praxis. Aurea Theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego (Frestschrift for Professor Tadeusz Ereciński), Warsaw, Lexis Nexis 1714-1717 (Jacek Gudowski, Karol Weitz eds., 2011).

65 Judgments of Bundesgerichthol of 23 November 1984, file ref. no VIII ZR 197/82 and of 18 November 1998, file ref. no VIII ZR 344/97 cited by Rafał Morek, *supra* note 33, at 58-60.

66 Judgment of Cour de Cassation of 14 February 2003, case *Poiré* v. *Tripier* cited by Rafał Morek, *supra* note 33, at 61-62.

contain a *condition precedent* of admissibility for the case to be heard in arbitration[67].

6.41. However, an assumption that a state court and a court of arbitration mutually 'remit' the case to each other is not correct. The only 'remission' which may take place has the form of staying the proceedings before an arbitral tribunal with the view of satisfying the *condition precedent to arbitration*, which a conclusion of pre-arbitration negotiations may be[68], although on the grounds of Polish law such a solution will not be appropriate in the majority of cases.

V. Conclusion

6.42. It is clearly visible that the set of issues revolving around a conditional arbitration clause and a clause in a conditional main agreement is extremely interesting, albeit complex. According to our observations, an arbitration clause may be concluded under a condition, therefore, the competence of the court of arbitration will also be conditional. On the other hand, conditionality of the substantive agreement may influence the effectiveness of the clause. However, in each case the outcome depends on the will of the parties, which after all constitutes a foundation of arbitration.

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Summaries

DEU [***Bedingte Wirksamkeit der Schiedsgerichtsbarkeitvereinbarung***]

Das vorliegende Dokument bezieht sich auf zwei in der internationalen Wirtschaftsschiedsgerichtsbarkeit häufig anzutreffende Situationen, d.h. den Abschluss einer bedingten Schiedsvereinbarung sowie die Durchführung der Schiedsvereinbarung in einer bedingten Hauptvereinbarung. Der erste Teil betrifft die Möglichkeit des Abschlusses einer Schiedsvereinbarung (aus verfahrenstechnischer und materieller Sicht) und zeigt praktische Beispiele von bedingten Schiedsklauseln. Der zweite Teil betrifft die Einwirkung der bedingten Hauptvereinbarung auf die darin enthaltene

[67] Alexander Bělohlávek, *supra* note 6, at 421-426.

[68] The alternative, in this regard, would be to order the party that fail to meet the condition precedent to pay the costs of the proceedings. Cf. Rafał Morek, *supra* note 33, at 57–58.

Schiedsklausel. Der dritte Teil beschreibt die Folgen der bedingten Schiedsvereinbarung, auch aus verfahrenstechnischer und materieller Sicht. Die Autoren ziehen die Schlussfolgerung, dass es möglich ist, eine bedingte Schiedsvereinbarung abzuschließen und dass sich der bedingte Charakter der Hauptvereinbarung – in einigen Fällen – auf den Charakter der Schiedsklausel auswirken kann.

CZE [***Podmíněná účinnost rozhodčí smlouvy***]
Tento článek se týká dvou častých situací v mezinárodním rozhodčím řízení v obchodních věcech, a to otázek týkajících se podmíněné rozhodčí smlouvy a začlenění rozhodčí smlouvy do podmíněné smlouvy hlavní. První část se týká možnosti podmínit rozhodčí smlouvu určitými skutečnostmi (z pohledu procesního a věcného), včetně pojednání o praktických případech takové podmíněné rozhodčí doložky. Druhá část se týká účinků, které má podmíněná hlavní smlouva na rozhodčí doložku v ní obsaženou. V třetí části pojednáváme o účincích podmíněných rozhodčích smluv rovněž z pohledu procesního a věcného. Autoři docházejí k závěru, že je v zásadě možné uzavřít podmíněnou rozhodčí smlouvu a že podmíněná smlouva hlavní může – v některých případech – ovlivnit charakter rozhodčí doložky.

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POL [***Warunkowa skuteczność zapisu na sąd polubowny***]
Niniejszy artykuł porusza problematykę dwóch, często spotykanych sytuacji w międzynarodowym arbitrażu handlowym: warunkowych zapisów na sąd polubowny (dopuszczalności sporządzenia zapisu pod warunkiem oraz praktycznych przypadków zastosowania takich klauzul) oraz wpływu warunkowości głównej na zapis na sąd polubowny. Artykuł analizuje także skutki zawarcia zapisu pod warunkiem.

FRA [***L'efficacité conditionnelle de convention d'arbitrage***]
Le présent article traite de problématique de deux situations rencontrées dans l'arbitrage commercial international: les conventions conditionnelles d' arbitrage (les conditions de légalité de la caluse d'arbitrage et son application en pratique de l'arbitrage) et son impact de la conditionnalité principale sur

la clause elle-même. L'article étudie aussi des consequénces de la conclusion telle convention conditionelle d'arbitrage.

RUS [***Обусловленное действие арбитражной оговорки***]
Настоящая статья поднимает проблематику двух часто возникающих ситуаций в международном коммерческом арбитраже: обусловленных арбитражных оговорок (допустимость составления оговорки при условии, а также практические случаи применения таких положений), а также влияния основной обусловленности на арбитражную оговорку. В статье также анализируются последствия применения оговорки при условии.

ESP [***Eficacia condicional de cláusulas arbitrales***]
El presente artículo plantea el problema de dos situaciones que ocurren con frecuencia en el arbitraje comercial internacional: la de las cláusulas arbitrales condicionales (la admisibilidad de las cláusulas de arbitraje bajo ciertas condiciones y los casos prácticos de aplicación de dichas cláusulas), y la de la influencia de la condicionalidad principal sobre una cláusula arbitral. En el artículo se analizan también las consecuencias de la inclusión de una cláusula arbitral condicional.

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Bibliography

1 Gary Born, International Commercial Arbitration, Alphen aan den Rijn: Kluwer Law International (2014)

Aleksandra Pokropek, *Problematyka prawna zapisu na sąd polubowny w tzw. sprawach opcyjnych* (*Legal aspects of arbitration agreement in so-called option cases*), (1) ADR Arbitraż i Mediacja 110 (2012)

Alexander J. Bělohlávek, *Arbitration Agreement, MDR Clauses and Relation thereof to Nature of Jurisdictional Decisions on the Break of Legal Cultures*, *in* Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie (*Festschrift: 60 years Arbitration Court at Polish Chamber of Commerce in Warsaw*), Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej (J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka eds., 2010)

Alice Fremuth-Wolf, *in* Arbitration Law of Austria: Practice and Procedure, New York: Juris Publishing (S. Riegler, A. Petsche, A. Fremuth-Wolf, M. Platte, C. Liebscher eds., 2007)

Bartłomiej Swaczyna, Warunkowe czynności prawne (*Conditional legal acts*), Warsaw: Lexis Nexis (2002)

David Sutton, Judith Gill, Matthew Gearing, Russel on Arbitration, London: Sweet & Maxwell (2007)

Ewelina Kajkowska, *Incorporating ADR into arbitration framework: issues arising from integrated dispute resolution clauses*, *in* Aurea Praxis. Aurea Theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego (*Frestschrift for Professor Tadeusz Ereciński*), Warsaw, Lexis Nexis (Jacek Gudowski, Karol Weitz eds., 2011)

Joanna Kuźmicka-Sulikowska, *Zapis na sąd polubowny i postępowanie przed tym sądem a przerwanie biegu przedawnienia* (*Arbitration agreement and proceedings and interuption of limitation period*), (4) ADR Arbitraż i Mediacja (2010)

Julita Zawadzka, Warunek w prawie cywilnym (*Condition in civil law*), Warsaw: Lexis Nexis (2012)

Karol Potrzobowski, Władysław Żywicki, Sądownictwo polubowne. Komentarz dla potrzeb praktyki (*Arbitral Judiciary. Practical Commentary*), Warsaw: Wydawnictwo Prawnicze (1961)

Karolina Szostak, *The arbitration clause in light of the Convention on the Contract for the International Carriage of Goods by Road (CMR) – selected issues,* (3-4) Arbitration e-review (2013)

Łukasz Błaszczak, Małgorzata Ludwik, Sądownictwo polubowne (*Arbitraż*) (*Arbitration*), Warsaw: Lexis Nexis (2007)

Maciej Tomaszewski, *Umowa o arbitraż* (*Arbitration agreement*), in 8 System prawa handlowego, Arbitraż handlowy (*8 System of Commercial Law. Commercial Arbitration*), Warsaw: C.H. Beck (A. Szumański ed., 2010)

Maciej Zachariasiewicz, Jacek Zrałek, *Nieskuteczność przerwania biegu terminu przedawnienia w przypadku wniesienia pozwu przed niewłaściwe forum arbitrażowe lub państwowe* (*Ineffectiveness of interrupting limitation period by filing a statement of claim before an improper arbitration or state court forum*), (4) Przegląd Sądowy (*Court review*) (2015)

Maksymilian Pazdan, *Bezskuteczność lub nieważność zapisu na sąd polubowny w prawie polskim* (*Ineffectiveness or invalidity of arbitration agreement under Polish law*), *in* Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga Jubileuszowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu (*International and domestic arbitration on the verge of XXI century. Festschrift for dr hab. Tadeusz Szurski*), Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej (A. Tynel, A. Szumański, S. Pieckowski, P. Nowaczyk, J. Poczobut eds. 2008)

Piotr Wiliński, *Skuteczność umowy o arbitraż* (*Binding effect of arbitration agreement*), (4) ADR Arbitraż i Mediacja (2010)

Rafał Kos, *O związaniu cesjonariusza zapisem na sąd polubowny* (*On the assignee being bound by the arbitration agreement*), (4) Glosa (2013)

Rafał Kos, *Zdatność arbitrażowa sporów o ważność uchwał spółek kapitałowych* (*Arbitrability of disputes on the validity of corporate resolutions*), (3) Przegląd Prawa Handlowego (2014)

Robert Kulski, Umowy procesowe w postępowaniu cywilnym, Krakow: Wolters Kluwer (2006)

Rolf Trittmann; Inka Hanefeld, *in* Arbitration in Germany: The Model Law in Practice, Alphen aan den Rijn: Kluwer Law International (K.-H. Böckstiegel, S. Kröll, P. Nacimiento eds., 2015)

S. Özmumcu, *The Principle of Separability and Competence – Competence in Turkish Civil Procedure Code No. 6100*, XLV(62) Annales (2013)

Szczęsny Kazimierczak, *O możliwości przerwania przed sądem powszechnym biegu przedawnienia roszczeń podporządkowanych kognicji sądu arbitrażowego* (*On the possibility to interupt before a state court the limitation period of claims*), (4) Biuletyn Arbitrażowy (2011)

Tadeusz Ereciński, Karol Weitz, Sąd arbitrażowy [Court of arbitration], Warsaw: Lexis Nexis (2008)

Tanya Landon, Sabrine Schnyder, *Remedies for Breach of the Arbitration Agreement – Dealing with Parties That Try to Circumvent Arbitration*, *in* International comparative legal guide to International Arbitration 2015, London: Global Legal Group (S. Finizio, C. Caher eds., 2015)

Wojciech Popiołek, *W sprawie niektórych konsekwencji zasady autonomii umowy o arbitraż* [*On certain aspects of separability of arbitration agreement*], *in* Arbitraż i mediacja. Księga jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi [*Arbitration and Mediation. Festschrift for doctor Andrzej Tynel*], Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej (M. Łaszczuk, M. Furtek, S. Pieckowski, J. Poczobut, A. Szumański, M. Tomaszewski eds., 2012)

Zbigniew Radwański, in 2 System Prawa Prywatnego, Prawo Cywilne – Część Ogólna [2 system of Private Law, Civil Law – General Part], Warsaw: C.H. Beck (Z. Radwański ed., 2008)