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# ALTERNATIVE DISPUTE RESOLUTION IN POLAND

# CONTENTS

# FOREWORD

The world of business is a complex reality which needs effective and simple solutions – especially in terms of resolving commercial disputes. Since businesspersons have become used to having all services and goods designed to their personal wants, they have also come to believe the same of legal services. To answer this call, lawyers began to specialize in certain fields, businesses and even in matters regarding certain geographical regions. At the moment, we have real estate lawyers, corporate counsels, banking and finance legal specialists, Emerging Markets legal advisors and so on.

Along these lines, some businesspersons and lawyers have expanded the tools for resolving disputes in other ways apart from the state courts system, which for a long time appeared to remain untouched by this wind of change. The original proposal of the state courts system was the mechanism of "you win – I lose" solution method, with the parties involved having little chance to change anything in its procedure. What the commercial environment needed was a way to resolve disputes in win-win scenarios under the rules suiting its needs. This is how and why the modern Alternative Dispute Resolution was developed.

Poland, as a rising international market, followed this trend. Hence, it is our pleasure to present this short brochure to you, which is aimed at familiarizing foreign parties with means of dispute resolution (other than litigation in a state court) in Poland.

# ADR IN POLAND

## WHAT IS AN "ALTERNATIVE DISPUTE RESOLUTION"?

Alternative Dispute Resolution ("**ADR**" in short) is a term that includes all means of resolving disputes, and the connecting factor of which is that they do not take place in customary proceedings before a state court. In ADR, the outcome of the case and the course of the process of dispute resolution are determined by the parties themselves and the rules of their own choice. In contrast, traditional civil proceedings require that the case is decided by a ruling of a state-appointed judge, who acts on the basis of rules (the law) established by the national state authorities (e.g. in the statutes, regulations, etc.).

Nevertheless, this does not imply the fact that ADR must be conducted out of court every time. In Poland for instance, certain means of ADR (or solutions rooted in ADR) have been adopted to the Polish civil procedure. In any case, the court may refer the parties to mediation or parties may reach a settlement before a court, with a judge being present only as a silent observer of the negotiations or a careful facilitator.

## WHAT ARE THE BENEFITS OF ADR?

We have already mentioned briefly, some of the advantages of ADR and now it is time to discuss them at length.

In ADR, by principle, you (as a party) may choose the procedural rules, which will regulate the process of resolving the dispute. This is of great importance in international disputes, as when contracting with a foreign party you may easily find yourself involved in a case in a foreign court that will rule on the matter in accordance with foreign law. ADR allows you to avoid this situation and choose rules you and your lawyer will feel at home with. Furthermore, ADR is also more flexible than litigating in a state court. There is no deadline or requirement that cannot be modified as long as both parties agree on it.

In ADR, the parties may also choose someone with knowledge of issues related to their businesses as their decision-maker (arbitrator) or a facilitator (mediator or conciliator). For example,

a dispute between construction companies may be resolved by an arbitrator who has decades of experience in the industry and has a deep understanding of the needs of the parties involved in this particular business.

Additionally, most types of ADR allow you to retain amicable relations with your counter-party once the dispute is settled, since the result is based either on mutually accepted solutions (e.g. in mediation) or mutually accepted principles (e.g. in arbitration). Furthermore, the legitimacy of the solution of the dispute is stronger than in the case of a court judgment, which often leaves a sense of bitterness in the parties.

Another very significant fact is that, contrary to the state court proceedings, the course of ADR and its result are usually kept confidential. Neither the parties nor the ADR specialists involved in the dispute (e.g. arbitrators, mediators, and conciliators) may disclose any information to third parties. This, for example, allows parties to protect the public image of their brand or prevent any claims that might follow from other people, if they learned of the resolution of company's dispute with someone else.

Moreover, ADR is time saving, and this becomes very obvious in the case of international disputes. A study prepared by the European Commission entitled "Business-to-Business alternative dispute resolution in the EU" (2012) shows that it takes 15.2 months on average to settle such a dispute in a state court, whereas it lasts 8 months in arbitration and 5.8 months in mediation.

Finally, ADR can also be more financially reasonable than court disputes. Court fees are usually fixed in a statute or regulation, whereas in the case of ADR, the parties are free to seek the most cost sensitive solution.

## IS THERE A CLIMATE FOR ADR IN POLAND?

ADR is becoming increasingly popular in Poland and as a foreign entrepreneur, you may expect that more and more of your Polish contractors will favor this solution. As stated above, the 2012 European Commission's study based on ADR, among others, of 500 interviews with Polish business people, shows that

15% of them have already used arbitration, which ranks Poland in second place, tied with Italy, in all of the European Union. As regards mediation, the statistics revealed by the Polish Ministry of Justice provide that the number of commercial cases directed by Polish courts to mediation increases significantly every year. Additionally, according to the findings, 58% of the business people stated that they would consider submitting their disputes to be resolved in arbitration-style ADR, and 57% would consider having them settled in mediation-style ADR.

Likewise, Polish legislator in a recent amendment of the CCP which came into force on January 1, 2016, advises the potential parties to the state-court dispute to direct to means of alternative dispute resolution. For instance, the claimant in the statement of claim has to include information if the parties attempted to resolve their dispute through mediation or by other out-of-court means of dispute resolution, and if they failed to do so, the claimant is obliged to explain the reason of such action. Besides this, in each case where the settlement is admissible, the court at any stage of the proceedings endeavors to settle the dispute amicably, particularly by persuading the parties to mediation.

The Polish Ministry of Justice set up a special Council on Alternative Dispute Resolution, which comprised leading Polish legal academics and practitioners in the field. The goal of the Council is to promote ADR in Poland, as well as work on the consistent improvement of the institutional and ethical framework for ADR in Poland.

ADR also made its way to the law faculties around the country and as a result, Polish law students have already distinguished themselves as adepts of the art of Alternative Dispute Resolution internationally. Polish law students are taught special courses on arbitration, mediation and legal negotiations in order to adequately equip for providing legal services in the 21st century's business environment, which favors ADR win-win solutions. It is also worth mentioning that the team of students from Jagiellonian University in Krakow, sponsored by our law firm, won the 2013 Commercial Mediation Competition of the International Chamber of Commerce in Paris. In the same way, the team from Jagiellonian University (also supported by our law firm), year after year qualifies for the final rounds of the renowned Vienna Vis Moot Commercial Arbitration Competition and receives individual and team awards.

# ARBITRATION

# WHAT IS ARBITRATION?

Most businesspersons these days must have encountered or heard of arbitration. It is gaining more and more popularity nowadays. It is even becoming "trendy" to resolve disputes in arbitration. Nevertheless, this method of resolving disputes has been in practice in the legal world (in some form) right from the times of the Roman Empire. It is often described as the "private" judiciary as opposed to the "public" state court judiciary. This means that in arbitration, two equal parties, by means of a contract decide to resolve their dispute (already existing or future) by a private court consisting of one or more arbitrators ("private judges").

In connection with this definition, arbitration is conventionally labeled with four features:

**CONSENSUAL NATURE:** Arbitration was once described as "a creature that owes its existence to the will of the parties alone". In other words, arbitration cannot be conducted without the parties' agreement. In addition, by agreeing, the parties can regulate almost every issue in arbitration.

**NON-GOVERNMENTAL DECISION MAKING:** Arbitration is a "private" method of dispute resolution. By agreeing to arbitrate, the parties decide to exclude their dispute from the state court system. State courts, however, have certain duties in arbitration, relating to both the assistance and control of arbitral proceedings (see pp. 29, 32-45 below).

**FINALITY OF THE DECISIONS:** The decisions of arbitrators are final and binding. These are not just recommendations or propositions to settle the case. Arbitral awards can constitute a basis for coercive enforcement. The name arbitration comes from a Latin verb "arbitrari", which means "to give a decision", not to consult or advise as it is done in other ADR methods.

**ADJUDICATORY PROCEDURES:** In arbitration, the decisions are made by a "court" – a panel of arbitrators, who unilaterally decide the case in proceedings where both parties are treated equally.

# WHAT TO EXPECT IN ARBITRATION (ADVANTAGES AND DISADVANTAGES)?

There are many advantages of arbitration. However, there are also some shortcomings. Sometimes, a positive feature of arbitration can also become its weakness. The role of a professional counsel is indispensable in keeping the proceedings well-organized. Please, see the objective analysis of certain aspects of arbitration below:

**FLEXIBILITY:** Arbitration is far more flexible than resolving disputes before a state court. The parties can agree on almost every aspect of the proceedings. For instance, they can resign from a hearing and ask the arbitrators to rule only on the basis of the documents. On the other hand, errors and negligence during the very first part of the proceedings may have severe consequences. A poorly drafted arbitration clause can jeopardize entire proceedings (see pp. 22-23 below).

**INFORMALITY AND CONSENSUAL NATURE:** In arbitration, the parties can agree on numerous aspects of the proceedings, such as the exact date of the hearings, procedural calendar or, for instance, electronic service of documents (this is impossible in some state court jurisdictions).

One must, however, not forget that such informality can also be a threat for the very same reasons as the flexibility, mentioned above.

**COSTS:** The issue of costs is possibly the most complicated in arbitration and yet decisive for many entrepreneurs in selecting an appropriate method of dispute resolution. Without any doubt, arbitration can be less expensive, compared to litigation. In the case of international disputes, and they are the most important, the costs of international litigation can be equally high. For more information on costs of the proceedings, see pp. 23-24 below.

**LENGTH:** If there is some doubt about costs, in most cases the arbitration proceedings are shorter than those before a state court, especially in developing countries. Please note, however,

that a defendant can, in bad faith, attempt to jeopardize and prolong the proceedings and it is important to be prepared for such dilatory tactics.

**EXPERTISE:** In some jurisdictions, a complex multi-million dispute is heard by one judge, quite often young and not always experienced enough. Conversely, in arbitration, the parties can choose well-matched arbitrator for their dispute. For details on the selection of arbitrators, please see pp. 24-27 below.

**CONFIDENTIALITY:** There are some disputes that are better kept outside of public attention. Regarding such issue, arbitration is an ideal forum for them as, in many cases, it is confidential.

**ARBITRATION AGAINST FOREIGN PARTIES AND STATE ENTITIES:** Complex international disputes and cases against state entities need to be heard outside the court room as well. If you have a contract with a foreign party, it is very inconvenient to agree to settle all disputes before a state court situated in that party's country. The solution is to agree on a neutral forum – e.g. arbitration in a third country.

Additionally, foreign investors in certain countries, often seek to avoid litigation with state entities of that country in this country's state court. Furthermore, in the case of disputes concerning investments, expropriation etc., arbitration is a universal method of dispute resolution.

The main legal acts pertaining to investment arbitration are the Washington Convention of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of Other States and also Bilateral (multilateral) Investment Treaties (BITs) concluded by two or more countries. The Washington Convention established the rules on investment arbitration and mostly on the facilitated recognition and implementation of awards rendered in investment arbitration. It is important to underline that Poland is not a party to the Washington Convention. On the other hand, it is possible to enforce an award rendered against Poland in investment arbitration under general rules (see pp. 39-44 below) and Bilateral Investment Treaties concluded by Poland with ca. 60 countries, e.g.: Canada, China, Germany, Great Britain, Israel, Switzerland and the US.

# WHAT ARE DIFFERENT TYPES OF ARBITRATION?

There are many types of arbitration. Each of them is slightly different. A party to a dispute needs to be aware of these particularities.

## Institutional and Ad hoc Arbitration

As stated above, arbitration is based on the agreement of the parties. This agreement is often brief and consists only of the resolution to submit the case to arbitration, without designating any institution to administer the arbitration. Arbitration under such an agreement is referred to as ad hoc arbitration.

Nonetheless, the parties can also submit their future or existing disputes to an arbitration tribunal under the auspices of a certain arbitral institution, such as: the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), the China International Economic and Trade Arbitration Commission (CIETAC) and numerous others. In such a case, the parties adopt the rules of arbitration of such an arbitral institution as part of their agreement.

Poland also offers a good basis for institutional arbitration. There are two main and many more arbitral institutions. The first one is the Court of Arbitration at the Polish Chamber of Commerce. It was established over 60 years ago and has been regarded as a very renowned and valued institution in the region. The second one is the Court of Arbitration Lewiatan. It was founded in 2005 and has since then gained more and more popularity for its energy and innovative approach to arbitration.

Different institutions offer different possibilities to resolve disputes. It is important to choose them wisely.

**More information:**

Court of Arbitration at the Polish Chamber of Commerce
*http://sakig.pl/*

Court of Arbitration Lewiatan
*http://www.sadarbitrazowy.org.pl/en/homepage*

A list of other Polish arbitral institutions:
*http://www.pssp.org.pl/*

### Domestic and International Arbitration

Sincerely speaking, arbitration is not a mechanism pertaining only to international disputes. For the purpose of Polish arbitration law, arbitration conducted in Poland is more or less of a domestic nature. Two parties from one country can also decide to go out of a state court with their dispute. This is often the case with the construction and shareholders disputes. Such proceedings are also referred to as domestic arbitration. If arbitration involves parties from more than one country, it gains international character (particularly if it is conducted abroad).

This distinction is not only a theoretical one. International disputes quite often have different rules prescribed in the arbitral laws of the states. Using Poland as example, the rules of recognition and enforcement are different for domestic and international (conducted abroad) arbitrations (see pp. 37-41 below). The New York Convention and European Convention (see pp. 41-44 below) also do not apply to domestic arbitration.

### Commercial and Investment Arbitration

As stated earlier, arbitration between two equal parties is referred to as commercial arbitration. On the other hand, arbitration between one private entity and a state over a certain investment is referred to as investment arbitration.

# ARBITRATION IN POLAND

## WHAT PROCEDURAL RULES WILL GOVERN THE ARBITRATION?

First, as described above, the arbitration agreement is the basis for arbitration. It is further described in detail below. This is the first part of the rules that constitute a procedural scheme of arbitration.

Second part of the rules is formed by the arbitration law, almost always the one of the state of the seat of arbitration. The rules of an arbitration law, which is usually applicable in arbitration can either, be that of a mandatory or non – mandatory character. If they are mandatory, it is not possible to change them by an arbitration agreement. In the other case they are subject to change

by the parties. The agreement of the parties can change these non-mandatory rules. It can also change the procedural rules (the arbitration rules of a certain institution), if the parties have chosen to do so (and if the rules permit such a modification).

Third, the said procedural rules, usually a set of arbitral rules prepared by an arbitral institution, often constitute the third part of the procedural law applicable to the dispute. Quite often, this is the most important part as it is the broadest, most detailed and contains provisions on the most significant aspects of arbitration – e.g. the selection of arbitrators, the proceedings, etc.

The Polish Arbitral Law Consists of the Following Acts:

**POLISH CODE OF CIVIL PROCEDURE OF NOVEMBER 17, 1964 (CCP):** In 2005, the Polish legislature amended the CCP and adopted the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL). The Model Law helps to harmonize arbitral legislations worldwide. Over 70 states across the world accepted it. This act served as a basis for almost all the provisions of the part of the CCP on arbitration. Besides this, in order to meet a worldwide approach to shorten duration of post-arbitral proceedings, the Polish legislature amended the CCP, and starting from January 1, 2016, the proceedings before the state court on recognition and enforcement of the arbitral awards are significantly simplified (for details please see pp. 36-44 below).

**CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF JUNE 10, 1958 (THE NEW YORK CONVENTION):** This act prescribes the basic and uniform rules for both recognizing arbitration agreements and – as the name of the act suggests – enforcing arbitral awards (see pp. 41-43 below). This act is applicable to the arbitral awards made on the territory of a state other than the state in which the recognition and enforcement of such awards are sought, i.e. to international arbitrations. The significance of the New York Convention is underscored by the fact that ca. 150 countries are parties to it, including: the United States of America, the United Kingdom, Switzerland, France, Germany, China as well as Poland.

**EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION OF APRIL 21, 1961 (THE EUROPEAN CONVENTION):** This act also applies to international arbitrations, however, only to

disputes arising from international trade. The number of issues which are regulated by the European Convention, is much broader, compared to the New York Convention. It also concerns inter alia, the arbitral proceedings and awards. More than 30 countries are parties to the European Convention, including: Russia, France, Germany and Poland.

This brochure focuses mainly on Polish internal arbitral law, i.e. the CCP. Nevertheless, it also touches upon the issues prescribed in the New York and European Conventions, when expressly stated.

## Which Matters Can be Heard in Arbitration?

Under the Polish law, unless otherwise provided for by specific regulations, the parties may submit disputes concerning property rights or non-property rights to arbitration, in both cases on the condition that they can be resolved by a court settlement (except maintenance cases). There is no statutory list of cases in which a party can conclude a settlement (except for social insurance cases in which the settlement is expressly excluded). A settlement is forbidden also in divorce and certain other family cases.

Apart from this, a vast majority of typical disputes is arbitrable in Poland. All the same, the parties have to be careful when submitting the following issues to arbitration, as they may be regarded as non-arbitrable also in some other jurisdictions:

**UNFAIR COMPETITION CLAIMS:** Private competition claims (between two entrepreneurs) are viewed as a tort in Poland and can therefore be settled in arbitration if the arbitration agreement provides for such a possibility.

**EMPLOYMENT:** In Poland, employment disputes are arbitrable only when the arbitration agreement is concluded after the emergence of the dispute (the so called submission clause) and it has to be in writing.

**COMPANY DISPUTES:** In Poland, cases concerning companies and partnerships are arbitrable in principle. Parties can even include an arbitration clause in the company's Articles of Association. In such a situation, this clause binds shareholders and the company itself. This rule is applicable also to cooperatives and societies. On the other hand, there are notable exceptions. In this regard, a lawyer's advice is indispensable to determine whether a certain dispute is arbitrable or not.

**CONSUMER DISPUTES:** Under the Polish civil code, an arbitration clause in a contract against a consumer is treated, in principle, as an unfair contract term. In other words, it disrupts the equilibrium of the contract. As a result, most consumer disputes will be excluded from arbitration in Poland, except for cases where the parties expressly negotiated this term.

## SUBMITTING TO ARBITRATION – AN ARBITRATION AGREEMENT

### Arbitration Clause and Submission Agreement

As described above, an arbitration agreement is the cornerstone of arbitration. Without such an agreement, arbitration, in principle, cannot take place. This agreement also sets forth the scheme of the proceedings. The arbitration agreement can be concluded either before the dispute emerges (usually as an arbitration clause in the contract) or after the dispute arose (submission agreement).

### Form of the Arbitration Agreement

Under the Polish arbitration law, the arbitration agreement needs to be concluded in writing. It can also be concluded by a reference to an extra-contractual document (e.g. trade terms) containing the arbitration agreement. It can also be included into the Articles of Association of a company (a cooperative or a society).

Poland presents a somewhat restrictive approach to the form of the arbitration agreement. Accordingly, it is almost impossible for a party that did not sign the agreement to be a party to arbitration without its consent. The same applies to the tacit conclusion of the arbitration agreement – this is, in principle, excluded in Poland. It limits the possibility to include the presence of third parties in the proceedings of arbitration, which can be both a positive aspect, and a downside of arbitration. Nevertheless, this method is extensively spread in the world, as the same writing requirement is prescribed under the New York Convention.

### Content of the Arbitration Agreement

The description of the subject matter of the dispute or the legal relationship from which the dispute arose or could arise is

required in an arbitration agreement. The provisions which disrupt the principle of equality of the parties are deemed ineffective. This pertains, in principle, to arbitration clauses that permit only one party to initiate arbitration. The contract equilibrium can easily be disturbed also in cases of the selection of arbitrators. It is important that the arbitration agreement is drafted very cautiously in this respect.

## Separability of the Arbitration Agreement

Under the Polish arbitration law, the invalidity or expiry of the basic agreement which includes an arbitration clause does not, in itself, entail the invalidity or the expiry of the clause. This is the so-called "separability" principle, which is one of the most significant features of arbitration clause. It allows the arbitrators to evaluate the validity of the main agreement and continue with the arbitration even if it is invalid. On the other hand, it allows actions to be taken on the basis of the main agreement in cases of the invalidity of the arbitration clause.

**A typical institutional arbitration clause (drafted on the basis of a standard ICC arbitration clause)**

"All disputes arising out of or in connection with the present contract shall be settled in a final manner under the [name of arbitration rules] of the [name of the arbitral institution] by one or more arbitrators appointed in accordance with the said Rules."

It is also possible to include all or some of the following rules:
"The arbitration agreement shall be governed by the law of [name of the state].
The number of arbitrators shall be [number of the arbitrators] / The case shall be decided by a single arbitrator.
The place of arbitration shall be [name of the place of arbitration].
Arbitration shall be conducted in [name of the language]."

## Effects of the Arbitration Agreement

In the situation of submitting the case in which an arbitral agreement was made to a Polish state court, the court cannot refer the parties to arbitration, except if the defendant raises an objection before entering into a dispute on the merits of the case. If the defendant does not raise such an objection, it is deemed to have waived its right. As a result, the case will be heard by the state court.

## Pathological Arbitration Agreements

Arbitration clauses are also known as "champagne" or "midnight" clauses. This is due to the fact that they are usually considered as an insignificant part of the contract and are quite often negotiated after the main part of the deal was agreed on and everyone is already celebrating. In addition, there is generally very little time to spend on negotiating this term. This is a common mistake.

A poorly drafted arbitration clause is referred to as "pathological". This is because it can considerably delay the proceedings as a result of the obligation to interpret it or to clarify the issues connected with its validity. A pathological clause can also endanger the enforceability of the award. Below is a list of ten common mistakes that create a great risk of jeopardizing the arbitral proceedings:

**REFERENCE TO NON-EXISTENT ARBITRAL INSTITUTIONS OR ARBITRAL RULES:** E.g. arbitration, the ICC in Warsaw (not clear whether the seat of arbitration under the ICC rules is in Warsaw or the Parties mistakenly thought that the Paris-based ICC has its seat in Warsaw).

**REFERENCE TO AN ARBITRATOR WHO CANNOT RESOLVE THE DISPUTE:** E.g. the sole arbitrator shall be a British professor of company law who also speaks Polish and Hungarian (a person with such skills and characteristics may be rather difficult to find).

**SETTING PREREQUISITES THAT CANNOT BE MET:** E.g. arbitration preceded by mediation (without specifying when and under what conditions the mediation will end and arbitration will start).

**SUBMITTING THE CASE BOTH TO STATE COURTS AND ARBITRATION:** E.g. specifying clauses, selecting both state courts (in contract terms of a company) and arbitral tribunals (in the text of the main

agreement) to resolve a dispute.

**CHOICE OF NON-MANDATORY ARBITRATION:** E.g. specifying that the dispute "can" be resolved in arbitration (not clear whether such an arbitral agreement is effective).

**TYPOGRAPHICAL ERRORS, MISTAKES IN COPYING AND PASTING.**

**TOO NARROW LANGUAGE TO EFFECTIVELY CONDUCT ARBITRATION:** E.g. arbitration clause: "English law-arbitration, if any, London, according ICC Rules" (although it may be found as a correct clause, its interpretation and supplementation can delay the proceedings).

**NOT ENOUGH ATTENTION IN CHOOSING SOLUTIONS FOR ARBITRATION:** E.g. a purely European dispute resolved in Australia under the law of the State of New York (seems unrealistic in most cases).

**AGREEMENT NOT TAKING THE PROSPECTIVE ENFORCEMENT ISSUES INTO ACCOUNT:** E.g. possibility of choosing the arbitrator for the second party in case this party fails to appoint its arbitrator in a specific period of time (which can endanger the enforcement of the award due to deprivation of the right to due process).

**ARBITRATION AGREEMENT CONCLUDED... WHEN IT SHOULD NOT HAVE BEEN:** In cases of dubious arbitrability or e.g. in multi-party and multi-contract disputes, it is worth carefully evaluating time, costs, effort and procedural risks of conducting arbitration.

## What Are the Costs of Arbitration?

As mentioned above, costs are a problematic issue in arbitration. Parties have to be very careful and verify whether they can accept such costs. This is because of two important rules in international arbitration.

First, a party can neither claim an exemption of costs due to a bad financial situation, nor can it claim a court-appointed counsel, as it can, in proceedings before a state court. This can be problematic in cases when a party to the arbitration agreement is in a bad financial situation.

Second, many arbitral institutions require both parties to pay an advance-payment on the costs of the proceedings (usually split in half). Generally, before a state court, it is the claimant, who

bears all the costs of the proceedings until the defendant loses the case. Usually, when the defendant fails to pay the advance, the claimant can pay its part and claim reimbursement in a separate or final award.

Additionally, the rules on adjudicating costs in arbitration and those in force in proceedings before a state court are similar. The tribunal is, in principle, empowered to adjudicate the costs of legal representation of the winning party to be paid by the losing party (in full or capped by arbitral rules) or decide that the parties will bear the costs of their own legal representation.

## HOW ARE THE ARBITRATORS APPOINTED?

### Procedures for Appointing Arbitrators

The procedure for the appointment of arbitrators is usually the first part of the arbitral proceedings. More often than not, this is concluded before the parties enter into the proper dispute and present their position in final memoranda.

The rules on the number of arbitrators are prescribed usually either by the parties in the agreement, or in the rules of arbitration and in the lack thereof in the arbitration law. Ordinarily, there is a sole arbitrator or three arbitrators, but in most cases, there are no formal obstacles to choose more arbitrators (usually an odd number).

The same applies to the procedure of the selection of arbitrators – the parties can choose their own rules here. In the case of three arbitrators, in all probability, each of the parties will appoint one arbitrator and the parties will either jointly appoint the third one or the two-party-appointed arbitrators will select the third one. Nevertheless, in some institutional rules, it is the institution which, in principle, appoints the president of the panel.

It is acceptable in most cases to approach an arbitrator and arrange an interview before appointing them in a dispute. However, after the appointment, any ex parte communication with the arbitrator is forbidden.

### Challenge of Arbitrators

The arbitrator has to be impartial and independent, complying with high ethical standards. Consequently, when approached,

arbitrators are obliged to inform the party or institution appointing them (and all other entities involved in arbitration) of all of the circumstances that concern their neutrality towards the case and parties. On the other hand, it is not always possible to know which circumstances create a possible conflict of interest and which do not. This is why the International Bar Association prepared Guidelines on Conflicts of Interests in International Arbitration (revised version of 2014). These guidelines contain three lists of circumstances, from those that always create a conflict of interest to those which do not even have to be revealed to the parties as they cannot, in principle, render the arbitrator biased or dependent.

When a particular party doubts the impartiality and independence of an arbitrator, such party can challenge the arbitrator. An arbitrator is successfully challenged when these doubts are "justifiable", in other words, when the risk of a conflict of interest is possible.

The parties can agree on the procedure of a challenge. In principle, this is prescribed in the chosen rules of arbitration. The common rule is that the time-limits for such a challenge are quite short. In addition, all of the participants of the arbitral proceedings, particularly the arbitrator that was challenged by the parties, have a chance to comment.

■ What is important is that if the challenge procedure chosen by the parties fails, a party can turn to a state court, which can remove the arbitrator if such justifiable doubts arise.

Furthermore, after the appointment, it is no longer possible to change the arbitrator. The parties can, nevertheless, file a joint motion to remove an arbitrator. Arbitrators can also resign. If they do so without important reasons, they are responsible for the damage caused.

## 10 tips on How to Choose a Good Arbitrator:

**CONSIDER THE NUMBER OF ARBITRATORS:** In arbitration, greater number of arbitrators entails more expensive proceedings, less flexibility as regards the procedural calendar, etc. Appointing

one arbitrator (one who can devote himself to the dispute) can sometimes be a good solution. Nevertheless, in complex cases, in which there are a lot of legal problems, "the right" decision may be reached more easily in a panel of three specialists.

**CONSIDER CHOOSING A NON-LAWYER:** If your case is that of a totally technical nature, it may be worth appointing as an arbitrator someone who will know what the case is about (i.e. a non-lawyer). It is not a good idea, nonetheless, in the cases involving complex legal issues. What is more, having at least one lawyer in the tribunal (preferably the chair of the panel) is indispensable, to ensure that all the procedural requirements of the case are met.

**CHOOSE SOMEONE WHO IS A SPECIALIST IN THE AREA:** After you know what your dispute is about, you have to be very specific while choosing an arbitrator. The best solution is to choose a highly qualified specialist (for instance, focusing not only in contracts, but on the rules of the formation of contracts).

**CHOOSE SOMEONE WHO WILL HAVE THE TIME TO RESOLVE YOUR DISPUTE:** Most lawyers are extremely busy. Try to choose someone who declares that they are not snowed under with other cases and be able to dedicate themselves to your dispute.

**CHOOSE SOMEONE WHO IS ORGANIZED:** One of the leading Austrian arbitrators asked a very important question: when you ask a construction company when they will finish your house and they reply that they do not know, what do you do with such a company? You simply fire them. You should apply the same rule when appointing an arbitrator – a good candidate should show that he is organized and will be able to conduct the proceedings swiftly. In other words, they should have a plan for the arbitration since the very beginning.

**THE SALARY OF AN ARBITRATOR:** Although many arbitral institutions have introduced a range of arbitrator's remuneration, yet one has to remember that if they want their dispute to be heard by a famous arbitrator, they will be asked to pay a lot. It is for that reason, indispensable to discuss the financial issues before the final decision on the appointment (to avoid disputes over salary in the course of the proceedings).

**CONSIDER CHOOSING A NEW FACE:** Choosing someone from outside of the league of the most renowned arbitrators (apart from

financial and time issues), has also one more advantage. A young lawyer or scholar will most probably treat your case as a very important challenge and devote a lot of attention to it. This is important especially in cases involving complex factual background.

**DO A BACKGROUND CHECK:** If you intend appointing a certain person as an arbitrator, attempt to gather as much information as possible about them – biography, publications etc. It may be that this person presented a view (general or more specific) on the issue being the subject of the dispute. This may serve for determining whether this is an appropriate candidate or not.

**CHECK FOR CONFLICTS:** It is very unfortunate when you appoint an arbitrator and it turns out that they cannot decide on the case due to a conflict of interest. It is very important that both the counsel and the arbitrator do a very thorough conflict check. Any challenge procedure delays the resolution of the dispute, which is unfavorable to the claimant. Appointing a conflicted arbitrator also makes the defendant look as if they were acting in bad faith.

**PLAY FAIR:** Despite the term "party-appointed arbitrator", the arbitrator, once appointed, becomes absolutely detached from the party. Any violation of this rule is severely punishable during the proceedings (the successful challenge of an arbitrator) and afterwards (the challenge of an award rendered by a partial arbitrator or denial of enforcement).

## WHICH SUBSTANTIVE LAW IS APPLICABLE IN THE ARBITRATION?

Under a general rule of Polish arbitration law, the arbitrators apply the law applicable to the dispute. In most cases, it will be the law chosen by the parties or, in the absence of such a choice, the law applicable to the dispute according to rules of private international law.

When the parties clearly agreed to do so, the tribunal could also rule ex aequo et bono, meaning – on the basis of general rules of equity without reference to any particular legal system.

It is then clear that the issue of a substantive law is more flexible in arbitration than in a Polish state court, which can never disregard the law to rule on equity.

# HOW ARE THE PROCEEDINGS ORGANIZED?

## Initiating the proceedings

Arbitration begins with a request for arbitration, and this is contrary to the proceedings before a state court. This brief can conclude all the elements that a regular statement of claim contains, mainly a comprehensive explanation of the facts and law. It suffices, however, that the request for arbitration describes the subject matter of the dispute in detail, points to the arbitration agreement and contains an appointment of the arbitrator (if each of the parties appoints its arbitrator). This is as a result of the fact that this initial step of the arbitral proceedings serves first and foremost to select the arbitrators and create a procedural scheme for arbitration.

The second element of this first phase is generally the answer to the request for arbitration. In this document, the defendant can, e.g. file a counter-claim, select its arbitrator, present the outline of the dispute according to its opinion etc. This is also the moment to question the jurisdiction of the arbitral tribunal, if the defendant does not believe that this case should be heard in arbitration.

At this moment, the arbitral panel is being selected (see pp. 24-27 above). After the selection, the parties and tribunal normally meet or correspond to prepare procedural scheme for the dispute. Occasionally, this scheme takes the form of a calendar in which the parties and the arbitrators agree to file briefs on certain dates, conduct hearings, etc. This is quite often accompanied by the so called “terms of reference”. Sometimes, arbitration rules, (for example ICC Rules) require the drafting of the terms of reference. This document can be referred to as a “contract for arbitration”. It presents the outline of the dispute, details of the parties, their counsels, arbitrators, the claims, issues to be determined, procedural rules of service, etc. This is a very useful tool for well-organized proceedings.

After the tribunal has been constituted, the parties usually submit further briefs, which are usually referred to as memorials or memoranda (as agreed in the procedural calendar). This is also the moment in which all the challenges of the arbitrators are filed and settled (see pp. 24-25 above). Under the Polish arbitration law, if the defendant questions the jurisdiction of the tribunal, ar-

bitrators can issue a separate decision as to this plea for the lack of jurisdiction. Any party not satisfied with a decision confirming jurisdiction can appeal against this decision to a state court.

■ It is worth noting that by and large, it is the tribunal itself that decides on its jurisdiction to hear the case in the first place, no one else. This is one of the most important principles of arbitration, which is referred to as the competence-competence rule. The state court can usually only later assess whether such a decision was proper (however, the decision of the state court is binding for the tribunal).

## Arbitration and State Courts

It is not true that arbitration is totally separate from the influence of the state courts. First and foremost, the state courts control arbitral awards in the post-arbitral proceedings for setting aside the award, as well as decide on its recognition and enforcement (see pp. 32-45 below).

However, the state courts often assist tribunals in many issues. For instance, they can assist in selecting the arbitrators, when the agreement of the parties fails. They can remove arbitrators, when there is a concern as to their impartiality and independence. They can also rule on the parties' appeal against the decision of the tribunal that it has jurisdiction to hear the case. The state courts can also assist in securing claims and in evidentiary proceedings. The last type of assistance is particularly important as arbitral tribunals do not have the power to force a witness to appear at a hearing. They can, however, ask the state court for assistance and rely on the state coercion in this respect.

## Submitting Evidence

Evidentiary proceedings in arbitration are also subject to the agreement of the parties. Consequently, they can look like "ordinary" proceedings before a state court or include features that are somewhat innovative. Here is a list of several examples:

**TIME LIMIT TO SUBMIT EVIDENCE:** Under the Polish civil procedure rules, in principle, all the evidence has to be submitted in the first brief of a party (in principle a statement of claim or the reply to the

statement of claim). In arbitration, it depends on time limit that the parties agree on, to submit new evidence. They can agree on the number of briefs submitted and all other formal issues that can serve for organizing and expediting the proceedings.

This is very important as it can become one of the most important advantages of arbitration in Poland.

**CONSECUTIVE HEARINGS:** In Poland, state court hearings will rarely take place one day after another. The court will rather adjourn the hearing for a period of several weeks or several months. In arbitration, the parties can concentrate all the evidentiary proceedings and propose that they will take place e.g. one week. It saves efforts as parties do not have to re-prepare for another hearing. The tribunal and the parties are also focused on a case and after such a set of hearings, it becomes easier to render a just award. Furthermore, it is effort-saving, particularly in international arbitrations, where costs of travel and accommodation can be significant.

**WITNESS STATEMENTS:** In Poland, as in many civil law jurisdictions, rules of civil procedure require witnesses to be heard before the court. Private pre-trial depositions and written witness statements are of almost no importance to the outcome of the dispute. In arbitration, in principle, witness statements are very popular. In some cases they suffice for the tribunal to gain information about the facts of the case. Sometimes, they determine which witnesses are important and need to be heard before a tribunal. Again, the method of hearing a witness is left to the discretion of the parties to the arbitration.

**CROSS-EXAMINATION:** The witnesses are usually heard before a Polish state court in the following way. First, the court asks all the questions and then leaves the floor for the parties' counsels. In arbitration, following the common law approach, the witnesses are usually cross-examined.

**PARTY-APPOINTED EXPERTS, EXPERTS' HOT TUBBING, ETC.:** Under the current approach in the Polish law, the private opinion of an expert witness does not constitute "proper" evidence, contrary to a court appointed expert's opinion. In other words, contrarily, in arbitration, it is common for both parties to present the opinions of experts they appointed. The tribunal relies on the one that is more convincing. The experts are quite often "hot tubbed", i.e. confronted and examined simultaneously. This would be rather

unlikely in a Polish state court.

**ONLY ELECTRONIC CORRESPONDENCE:** In arbitration the parties are free to agree to electronic service of the documents only, instead of submitting their briefs in hard copies. This obviously saves time and costs. Nevertheless, please note that similar amendment of CCP is to come into force on September 8, 2016. After this date the parties will be allowed to choose if they want to submit their briefs in typical way (in hard copies) or by the use of special court electronic system. The system will also enable to deliver court correspondence to the parties.

## The Arbitral Tribunal Makes Its Decision

The case ends when all the evidence has been gathered by the tribunal and all unresolved procedural and substantive law problems have been discussed with the parties. As earlier mentioned, it is not uncommon for the case to end after one set of hearings (taking place on a few consecutive days). Contrary to the Polish procedural rules in force before a state court, there is no formal requirement for the tribunal to read the verdict. Consequently, the arbitral award could be drafted during a closed hearing and dispatched to the parties.

## When the case ends...

**I WON – WHAT NEXT?:** When you won the case, you may feel satisfied. You might have been able to convince the panel consisting of very renowned arbitrator(s). The arbitral award or settlement concluded before an arbitral tribunal can be recognized or enforced, i.e. serve as a basis of forced execution by means of state coercion (see pp. 36-44 below).

**I LOST – WHAT NEXT?:** Regrettably, in principle, there is no second instance in arbitration and you cannot appeal to the same or other panel of arbitrators (however, the recent amendment in force from March 2015 of the Rules of the Court of Arbitration Lewiatan enables the parties to appeal from an unfavorable judgement providing that they included such opportunity in their arbitration agreement). This does not mean that the case is eventually lost. If you believe that the award is wrong, you can challenge it before the state court of the seat of arbitration (see pp. 32-36 below). If your opponent attempts to recognize or enforce the award against you, you can object (see p. 38 below).

# CHALLENGING AN ARBITRAL AWARD ISSUED IN POLAND

Under the CCP, any arbitral award issued within Poland territory (not abroad) can be challenged in a Polish state-court in a so called "procedure to set aside an arbitral award". On the other hand, this does not mean that a party may appeal to the Polish state court against an unfavorable arbitral award just as to its merits. This is because, in the proceedings to set aside an arbitral award, the Polish state court limits itself to examining whether the statutory prescribed conditions for the setting aside of an arbitral award have been fulfilled. None of those conditions allows the Polish court to examine, whether the arbitral panel (or the sole arbitrator) violated the applicable law. Those conditions are rather concerned with the most basic rules of procedural fairness and the public policy issues. For that reason, the Polish state court does not serve as a higher instance for the arbitral awards issued on the territory of Poland.

## Example

Party A and Party B concluded an arbitration agreement. In this agreement, the parties had agreed to have their dispute decided in Poland by a sole arbitrator, whose decision was to be final and binding upon them. The parties chose the Polish law as the law applicable to the dispute. The sole arbitrator issued an arbitral award in the favor of Party A. Party B believed that the arbitrator erroneously applied certain provisions of the Polish law. Party B then motioned the Polish court to set aside the arbitral award on these grounds. Nevertheless, the Polish court dismissed Party B's motion, as it could not set aside an arbitral award on the basis of the arbitrator's erroneous application of the law governing the dispute (i.e. the Polish law, as chosen by the parties), except in a situation in which this misapplication would lead to the violation of fundamental principles of the public policy of Poland.

The lack of means to challenge arbitral awards as to their merits is not a feature of Polish law, however, it is rather a reflection of a standard that prevails in most modern legal systems (the English law being the notable exception). In fact, by adopting such a solution, Poland followed the model regulation for arbitration draft-

ed by the UNCITRAL. The rationale behind this solution was to safeguard the separateness of the arbitration proceedings from state court proceedings.

A party may petition the Polish court to set aside an arbitral award issued in Poland in the following circumstances that need to be raised by this party in the motion:

- there was no arbitration agreement, the agreement is not valid, ineffective, or it lacks the force of law under the law applicable thereto,
- the party was not given a proper notice of the appointment of an arbitrator, of the arbitral proceedings or was otherwise unable to present its case before the arbitral tribunal,
- the arbitral award deals with a dispute not covered by or beyond the scope of the arbitration agreement, provided that, if the decision on matters submitted to arbitration can be separated from those not covered by the arbitration agreement or going beyond its scope, the award may be set aside only in regard to the matters not covered by this agreement or going beyond its scope; an award that goes beyond the scope of an arbitration agreement cannot be set aside if the party that participated in the proceedings did not raise objections in that regard,
- the composition of the arbitral tribunal or the fundamental rules of arbitral procedure were not in accordance with the agreement of the parties or with a statute,
- the award was obtained by way of a crime or the award was issued on the basis of a forged or falsified document,
- a final court judgment has already been made in the same case between the same parties.

However, there are two more instances in which the Polish court will mandatorily set aside an arbitral award even if the charges regarding those instances are not mentioned by a party in the motion for setting it aside. This includes the following situations:

- under statutory law, the dispute cannot be settled by a court of arbitration,
- the award is contrary to the fundamental principles of the pub-

lic policy of the Republic of Poland (public policy clause).

As was already mentioned, only an award issued on the territory of Poland can be set aside by a Polish court. If an arbitral award was issued in a different country, then the Polish court will have no power to set it aside. On the other hand, when your counterparty tries to have such a "foreign" award recognized or enforced in Poland, you may petition the Polish court to refuse its recognition or enforcement (for details please see pp. 39-44).

Two-tiered arbitral proceedings are a very rare occurrence, though in such a case only the final award can be challenged in a Polish court, which means that a party cannot challenge an award issued by an arbitral panel of the first instance which can be appealed against to the panel of the second instance.

Additionally, a Polish court may set aside an arbitral award only on a motion of one of the parties to the arbitration, also referred to as a recourse against the award. This means that the court cannot act on its own motion (ex officio) in that respect.

In principle, the motion for setting aside can be filed within a period of two months from the date of delivering the award to the party. It has to be lodged with a court of appeal in the circuit of which a state court competent to hear the case – had there not been an arbitration agreement – is situated. In the absence of such basis, the Court of Appeal in Warsaw is the place where the motion needs to be filed. Conversely, if the motion to set aside is based on the precondition that the award was obtained by way of a crime or the award was issued on the basis of a forged or falsified document or on the precondition that a final court judgment had already been made in the same case between the same parties, then the period for filing a motion begins at the moment in which the party learnt of the existence of one of the two abovementioned preconditions. Nevertheless, even in those instances a party may not motion for setting aside of an arbitral award after the lapse of five years as of the date of service of the arbitral award.

## Example

In 2010 Party A and party B participated in arbitration that took place in Poland. On January 30, 2012 Party A learned that the arbitral award was issued by an arbitrator who was bribed by Party B. Although Party A was served with the award back in 2010, yet the period for filing a motion to set aside the arbitral award began on January 30, 2012. This is because, Party A would base its motion to set aside the award on the precondition that the award was obtained by way of a crime.

In general, the fact that an arbitral award is being challenged in the proceedings for setting aside does not mean that it cannot be enforced (once the premises for declaring its enforcement are met – see p. 39). Meanwhile, the court conducting the proceedings on setting the award aside may withhold the enforcement of the arbitral award that is being challenged. The court may request a deposit from the party petitioning for setting aside which will serve to compensate the other party, should it prevail in the case on setting the award aside. The decision of the state court on withholding the enforcement of the arbitral award can be appealed against to a different bench of this court.

What is also important, is that a Polish state court may give the arbitral panel one more chance to reassess its award and remove possible errors, which could lead to setting aside of this award. In this special procedure, the Polish court – only on a motion of one of the parties – stays its proceedings, while the arbitral panel reopens the case and undertakes the actions prescribed by the court in order to remedy the deficiencies of the award. After the arbitral panel concludes the reassessment, it can issue a supplementary award. The parties are free to raise charges against the conduct of the arbitral panel with respect to the reopened case and the reassessed award. These reopening proceedings, nevertheless, are a rare occurrence in modern arbitration.

Finally, there is a question of what happens if the court sets aside an arbitral award. Under the Polish law, the setting aside of an arbitral award does not mean that the arbitration agreement between the parties lost its binding force, unless otherwise agreed. Hence, the parties are free to engage in the arbitration once more.

This, however, obviously does not apply to the case, in which the arbitral award was set aside because there was no arbitration agreement or the arbitration agreement was defective under the law applicable thereto.

As far as the proper requirements of the motion for setting aside an arbitral award are concerned, the motion should comply with the same requirements as an appeal. The provisions on appellate proceedings apply mutatis mutandis to the proceedings initiated by such a motion, except for the discrepancies set forth in the CCP.

At this juncture, it is worth mentioning that an award issued in the proceedings commenced by the motion for setting aside an arbitral award can be appealed to the Supreme Court by a virtue of cassation. Besides this, there is a possibility to request a reopening of the proceedings closed by the final and binding judgment delivered in the proceedings for setting aside an arbitral award, as well as the interested party, may file a plea of illegality of a final and binding judgment rendered by the state court.

## RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD IN POLAND

Once your favorable arbitral award is rendered, it must be put to an effect in Poland, in other words, enforced upon the other party.

An arbitral award as well as a settlement reached before an arbitral panel has the same legal effect as a judgment issued by a Polish state court or a settlement reached in front of such a court upon their recognition or declaration of their enforcement by the Polish state court.

The procedure of recognition regarding those arbitral awards which yield legal effects  cannot be enforced by means of compulsory enforcement, e.g. by a state enforcement officer often referred to as “a bailiff”. On the contrary, the procedure of declaring the enforceability concerns the arbitral awards that are subject to enforcement by means of state coercion. After the procedure is concluded, the arbitral award or the settlements reached by the parties before the arbitral panel are execution titles.

### Example

Party A and Party B participated in arbitration, in which the arbitral panel was to decide whether the sales agreement between Party A and Party B ever existed. The arbitral panel ruled that the sales agreement did exist. Now, if Party A wanted to have this award yield legal effects in Poland, it had to petition the Polish court to recognize this award. This award would not be subject to the declaration of enforcement as there was nothing to enforce in an arbitral award that merely stipulated that the contract between the parties existed, but did not order either party to any performance, e.g. to pay anything.

### Example

Party A and Party B participated in arbitration, in which Party A petitioned the arbitral panel to order Party B to pay the amounts that were due to Party A under a construction agreement. The arbitral panel ruled in favor of Party A and ordered Party B to pay the money it owed to Party A. However, Party B did not comply with the arbitral award. In effect, Party A wanted to enforce the arbitral award upon Party B in Poland, where it had its place of business. To do so, Party A petitioned the Polish court to declare the arbitral award enforceable on the territory of Poland. Having the enforceability declared, Party A might file a motion on starting the enforcement proceedings with the bailiff.

The procedure of the recognition and enforcement of arbitral awards issued on the territory of Poland is to some extent different from the awards made abroad.

## RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD ISSUED IN POLAND

In the case of an arbitral award issued in Poland, the court rules on its recognition during a closed door hearing in a form of a procedural decision. In turn, the court declares the enforceability of an arbitral award that is subject to enforcement by means of state coercion by adding a so-called enforceability clause to it. Once

you have obtained such a declaration, you may initiate the enforcement proceedings. The issue of enforcement proceedings themselves is fully discussed in another brochure published by Kubas Kos Gałkowski entitled “Litigation in Poland” to which we would kindly refer you to.

The party commences the proceedings on recognition or enforcement of an arbitral award by filing with the state court an appropriate motion accompanied by the original award or a copy thereof certified by an arbitration court, or settlement reached before the arbitration court, as well as the original or an officially certified copy of the arbitration clause. If an arbitral award or a settlement reached before an arbitration court, or an arbitration clause, is not made in Polish, the party shall provide their certified translation into Polish. Meanwhile, the other party is entitled to submit its opinion on the motion to the court within two weeks from the date of the delivery of the motion.

The decision on the recognition or declaring the enforceability of an arbitral award is made by a court of appeal in the circuit of which the state court competent to recognize the case – had there not been an arbitration agreement – is situated. In the absence of such basis, Court of Appeal in Warsaw decides on the matter in question. The provisions on appellate proceedings are applied respectively to the described proceedings.

The Polish law prescribes only two conditions under which the Polish court refuses to recognize an arbitral award issued in Poland or refuses to declare its enforceability. This is because the Polish lawmakers intended the motion for setting aside, to be the primary means of challenging an arbitral award issued on the territory of Poland (for details please see pp. 32-36 above).

As a result, the Polish court is obligated to refuse to recognize an arbitral award delivered in Poland or to decline declaring its enforceability, if:

- under the statutory law, the dispute in which the award was issued cannot be settled by a court of arbitration,
- the enforcement and recognition of an arbitral award would be contradictory with the fundamental principles of the public policy of the Republic of Poland (public policy clause).

The same applies to recognition and enforcement of settlements

reached by the parties before the arbitral panel.

If an arbitral award issued in Poland is challenged in a procedure for setting aside, and at the same time one of the parties petitions to have it recognized or enforced, then the court in which the case for recognition or enforcement of an arbitral award is pending, may postpone its decision until the matter of setting aside is settled. This court may also, at the request of the party petitioning for recognition or enforcement of an arbitral award, obligate the other party to provide a proper deposit.

You may have observed that the two preconditions for the refusal to recognize and enforce an arbitral award issued in Poland, which are mentioned above, are the same as the two grounds for setting aside an arbitral award that the Polish courts examine on their own motion (see p. 33 above). Hence, if a motion for setting aside of an arbitral award (filed before the proceedings for the recognition and enforcement were initiated) was finally dismissed the Polish court does not examine them once again in the proceedings for the recognition and enforcement.

## RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD ISSUED ABROAD

The decision on the recognition or enforcement of an arbitral award made abroad is issued by a Polish court only after a full trial, including an oral hearing.

The grounds that the Polish law provides for the refusal of the recognition and enforcement of foreign arbitral awards are almost identical to the preconditions for setting aside an arbitral award discussed previously (please see page: p. 33), namely; the party objecting to the recognition / enforcement needs to raise that:

- there was no arbitration agreement, the agreement is not valid, ineffective, or it lost the force of law under the law applicable thereto,
- the party was not given a proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or it was otherwise unable to present its case before the arbitral tribunal,
- the arbitral award deals with a dispute not covered by or beyond the scope of the arbitration agreement, provided that, if the decision on matters submitted to the arbitration can be

separated from those not covered by the arbitration agreement or go beyond its scope, the court may refuse recognition and enforcement only in respect to those parts of the award which contain decisions on the matters not covered by this agreement or which go beyond its scope,

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or – in the absence of such an agreement – with the law of the country in which the arbitration took place,

- the arbitral award has not yet become binding on the parties or has been set aside or the enforceability thereof has been suspended by the court in which, or under the law of which the award was made.

Moreover, the Polish court refuses the recognition or enforcement of a foreign arbitral award irrespective of the charges raised by the party objecting to the recognition or enforcement, in the following situations:

- under the statutory law, the dispute cannot be settled by a court of arbitration,

- the enforcement and recognition of an arbitral award or a settlement made before an arbitral tribunal would be contradictory with the fundamental principles of the public policy of the Republic of Poland (public policy clause).

Nevertheless, in certain instances, this set of preconditions prescribed in the Polish law will not apply. This is because Poland is a party to international agreements on the recognition and enforcement of foreign arbitral awards which take precedence over the Polish law, should a given arbitral award fall within their scope of application. This will be described in detail below.

In the same way, as in the case of domestic arbitral awards, if there are proceedings on the recognition and enforcement of an arbitral award issued abroad pending in Poland, and at the same time that one party petitions for setting aside of the award in its country of origin, then the Polish state court may postpone its decision until those foreign proceedings are concluded. At the request of the party petitioning for the recognition and enforcement, the Polish state court may also require the other party to provide appropriate deposit.

**Example**

Party A and Party B engaged in arbitration in Paris. Subsequently Party A initiated proceedings in Poland on the recognition and enforcement of the arbitral award issued in this arbitration. However, Party B petitions for setting aside of the arbitral award in France. The Polish court is now empowered to stay its proceedings until the case for setting aside in France is decided.

## New York Convention

Poland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The provisions of the Convention take precedence over Polish statutes, the CCP in particular. Nonetheless, this is the case only when the arbitral award in question was issued in a country which itself is a party to the New York Convention. This is due to the fact that, when Poland signed and ratified the Convention, it also made a reservation under which it agreed to apply the Convention only in relation to arbitral awards issued in another contracting state.

**Example**

Party A participated in arbitration in the United States of America and now intends to enforce in Poland the arbitral award it obtained there. Due to the fact that both Poland and the United States of America are party states to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Polish court will examine whether it should declare the enforceability of the award in accordance with the provisions of the Convention.

Quite similar to the regulations discussed above (please see pp. 39-40), the court can refuse the recognition or enforcement of a foreign arbitral award on the grounds of the New York Convention when a party proves that:

- the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement

is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

- the party against whom the award is invoked was not given a proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, or
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced, or
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place, or
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

In these two cases that are mentioned below, the court refuses the recognition and enforcement of an arbitral award under the New York Convention notwithstanding whether the party indicated those grounds in its objection to the recognition and enforcement. This refers to the following instances:

- the subject matter of the difference is not capable of settlement by arbitration under the law of the country of enforcement or recognition, or
- the recognition or enforcement of the award would be contrary to the public policy of that country.

Similarly as under the CCP, according to the New York Convention; if proceedings for setting aside of an arbitral award in its country of origin were initiated (or in the country under the laws of which the award was made), then the Polish court may stay the proceedings for the recognition and enforcement until the case

for setting aside is resolved. Also, similarly as under the CCP, the Polish court may, at the motion of the party seeking recognition and enforcement, order the other party to provide adequate security before staying the proceedings.

## European Convention

Another important international treaty to which Poland is a party and which regulates the recognition and enforcement of foreign arbitral awards in Poland is the European Convention on International Commercial Arbitration (see above pp. 18-19).

Under the New York Convention, the Polish court may refuse to recognize or declare the enforceability of an arbitral award if it has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The European Convention limits this aspect by prescribing that not in all instances the setting aside of an arbitral award in its country of origin will constitute a basis for the refusal of its recognition and enforcement. The European Convention stipulates that the setting aside of an arbitral award in the country in which it was issued constitutes a basis for a refusal of the recognition and enforcement only, when the award was set aside under one of the following reasons:

- the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
- the party requesting the setting aside of the award was not given a proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, or
- the award deals with a difference, not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside,

- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of the European Convention.

If the arbitral award was set aside on any other grounds apart from those listed above, then it still can be enforced or recognized in another country that is a party to the European Convention. Please note that the above list does not refer, for example, to the violation of the public policy of the country in which the award was issued. Thus, if an award issued in France was set aside because it violated the French public policy, it may still be recognized and enforced in Poland provided it does not violate Polish ordre public.

As in the case of the New York Convention, the regulation of the European Convention takes precedence over the rules of the Polish law. Its sphere of application is limited to arbitral awards issued in arbitration proceedings aimed at the settlement of disputes arising from international trade and based on an arbitration agreement made between parties, who at the time of making this agreement had their habitual places of residence or their seats in different contracting states.

## CHALLENGING THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD

### Domestic Awards

As was explained above in detail (see pp. 37-39), in order to have your arbitral award recognized or enforced in Poland, you must submit yourself to special proceedings before the state court. On the other hand, once you have obtained a court decision recognizing or declaring the enforceability of an arbitral award, such decision can still be appealed against by your counter-party (or you, if you are the party defending against enforcement of the arbitral award).

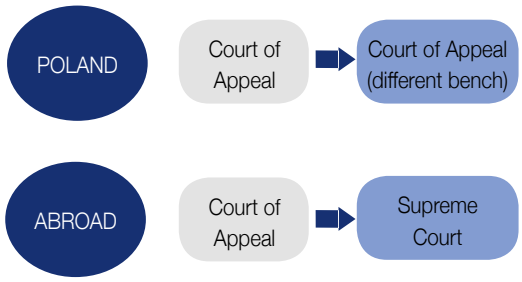
The decision of the state court (court of appeal) on the recognition or enforcement of an arbitral award can be challenged by a complaint filed to the other composition of this court. The period for filing such a complaint is seven days from the date in which you are notified about the decision of the court. The decision of the court issued in the proceedings initiated by a complaint can-

not be appealed against by virtue of a cassation to the Polish Supreme Court, since the arbitral award may be subject to the Supreme Court's control by virtue of a cassation in the proceedings on the setting aside of an arbitral award.

## Foreign Awards

On the other hand, since the Polish courts cannot set aside foreign arbitral awards, in cases concerning recognition and enforcement of such awards, the decision issued in that respect by the court of appeal can be challenged by a cassation filed with the Polish Supreme Court. Please note that decision of the court of appeal is final and binding upon its issuance, though – contrary to the proceedings on the recognition or enforcement of an arbitral award issued in Poland – it can be subject to the control of Supreme Court.

CHALLENGING THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD ISSUED IN



# MEDIATION

# WHAT IS MEDIATION?

Mediation is a method of Alternative Dispute Resolution, the main feature of which is that it involves the participation of a third person, referred to as the “mediator”, in resolving the dispute between the parties. On the other hand, unlike a judge or arbitrator, a mediator is not an adjudicator, who hears the arguments of the parties and then decides which one of them is right and which is wrong. A mediator’s role is to rather help the parties mutually reach an acceptable solution of the dispute and allow them to see the case from the perspective of the other party. In particular, the mediator, by using different methods of an amicable resolution of the dispute and on mutual motion of the parties, can present them with propositions of resolving the dispute which, though, are not binding upon the parties. Except for that specific exception, the mediator cannot express opinion on the case or take a stance on any issue and must remain fully impartial. Besides this, the mediator promptly discloses to the parties any circumstances that may give rise to doubts as to the mediator`s impartiality.

The mediator is obliged to keep any circumstances of which they learn in the course of the mediation confidential, unless the parties relieve them of this duty. The same applies to the parties, who cannot disclose the content of the mediation to third parties. The CCP provides that even any statements made by one of the parties in mediation cannot be effectively invoked in a subsequent litigation.

Mediation has its own particularities, depending on the type of case. For example, the parties will have different expectations in commercial mediation, compared to family law mediation. Through commercial mediation, the parties will try to resolve their dispute in a way that will not impair their future business cooperation. In turn, the parties in family mediation will most appreciate having delicate family matters settled outside the stress of a courtroom.

Mediation is present in several branches of the Polish law. In labor law, mediation is one of the obligatory steps of resolving disputes between employees and employers. Employees may

go on strike only after they have exhausted all options to amicably resolve the dispute, including mediation. In criminal law, the prosecutor or the court, at the request or with the consent of the aggrieved party, may also direct the case to mediation. Nevertheless, in the present brochure, we will focus on the mediation in commercial cases as regulated by the provisions of the CCP.

## HOW CAN I SUBMIT TO MEDIATION?

In general, commercial mediation is completely voluntarily. This means that you can never be forced by any Polish authority to engage in mediation with your counter-party. For the same reason, you may walk away from the mediation table at any point.

There are two ways in which you can submit to mediation. First, you may submit to mediation by concluding the so called "mediation agreement" with the other party. Such an agreement must contain two basic elements: the subject of the mediation and the indication of the mediator or a procedure for the selection of a mediator.

The mediation agreement may be concluded in any form. It does not have to be evidenced in writing. You may even agree to enter into mediation when your counter-party files a motion for conducting mediation to the mediator.

Although a mediation agreement does not preclude parties from pursuing their rights in a state court (because mediation is voluntarily), yet once you find yourself in state court litigation as a defendant, you may – prior to entering into the dispute as to the merits – raise that you have concluded a mediation agreement with your opponent. In such a case, the court will direct the parties to mediation.

Second, in the course of litigation, the court may also decide to direct the parties to mediation by issuing a special decision which can be rendered in camera. The court is empowered to do that on its own motion (ex officio) at any stage of the proceedings. In such a case, the court sets a time limit of mediation not exceeding three months that can be extended on the mutual motion of the parties or due to the other important reasons providing that it

helps to reach an amicable resolution of the dispute. The time devoted to mediation is not included in the time of the proceedings.

In addition, the presiding judge can summon the parties to participate in a so called “informative meeting” concerning an alternative dispute resolution, particularly mediation, which can be conducted by a judge, a court referendary, and a court clerk, an assistant of a judge or a permanent mediator. Additionally, before the first hearing, a presiding judge evaluates directing the parties to mediation. For this purpose, if there is a need to hear the parties, the judge can summon them to attend a closed door hearing. Please note that if the party fails to attend an “informative meeting” or above-mentioned session in camera, the court may ask it to pay the costs borne by the opposing party.

Conversely, even a court decision cannot overrule the basic principle of mediation, i.e. for the fact that it is voluntary. Consequently, mediation cannot commence if a party expresses that it does not agree to enter into mediation in one week from the time of issuance of the court decision (or its service on the party).

## HOW IS A MEDIATOR CHOSEN?

As we already explained, in a mediation agreement, the parties have to indicate a mediator or prescribe a procedure for the selection of one. In effect, parties are free to choose any procedure they see fit. This is, nevertheless, not always the case, when the mediation is commenced as a result of a court decision. Then, if the parties fail to appoint the mediator, it is up to the court to decide on this matter, taking into consideration appropriate knowledge and skills of the candidate in certain types of the cases. The mediator has the right to become acquainted with case file, unless the party within one week from the announcement or delivery of the court`s decision directing the parties to mediation does not give its consent to such an act.

■ According to the CCP, a mediator can only be a natural person, who has a full legal capacity and entertains full public rights. The parties are also not allowed to choose a judge as their mediator, with the exception of retired judges, who can act as mediators.

There are two types of mediators – permanent and ad hoc mediators. Ad hoc mediators are appointed for the purpose of a particular dispute. In turn, permanent mediators have made it their profession to solve others' disputes through mediation. For example, non-governmental organizations and universities may keep lists of such permanent mediators. Those lists are also passed on to the Presidents of the Regional Courts and are made publically available by them. The main feature differentiating an ad hoc mediator from a permanent mediator is that the latter can refuse to conduct mediation only due to important reasons of which they are required to inform the parties. If the permanent mediator was appointed by the court, then those reasons also have to be disclosed to the court.

## COSTS OF MEDIATION

We showed above that mediation is the least expensive form of dispute resolution. Still, it does require certain costs. Under the CCP, the mediator is entitled to remuneration and reimbursement of costs, unless they explicitly agree to conduct the mediation free of any charge.

In the case of mediation entered into by parties under a mediation agreement, they are free to decide what the costs of mediation will be and to what degree each party will bear those costs. Unless otherwise agreed by the parties, the mediator may request an equal share of the costs of mediation from each party.

Different rules on costs apply for mediation commenced as a result of a court decision. In such a case, the costs of mediation are added to the overall costs of the court proceedings and the mediator's fee is regulated by a special regulation issued by the Minister of Justice.

Please, also note that the costs of mediation conducted upon court decision and resulting in a settlement are incurred by the respective parties and are not recoverable, unless the parties decide otherwise.

It is also worth to mention that if a party refuses to mediate in an "obviously groundless" basis, it can be asked to pay all the costs of the proceedings, irrespective of its outcome.

# CONDUCTING MEDIATION

Mediation commences at the time in which the mediator selected by the parties (or one of the parties) is served with the motion for conducting the mediation along with a certificate indicating that its copy was also served to the other party.

The motion for conducting mediation should include the indication of the parties, the exact statement of the petitioning party's claim, the description of the circumstances that substantiate that claim, the petitioning party's signature and the listing of attachments to the motion. If the parties concluded a mediation agreement, then a copy of this agreement must be appended to the motion on conducting mediation.

The CCP prescribes certain situations in which filing a motion for conducting mediation with the mediator does not result in the commencement of mediation. This is the case in the following circumstances:

- the permanent mediator refuses to conduct the mediation within one week from the time they were served with the motion for conducting mediation,
- the parties concluded a mediation agreement in which they selected a person who is not a permanent mediator (i.e. an ad hoc mediator) as a mediator and this ad hoc mediator refuses to conduct the mediation within one week from the time they received the motion for conducting mediation,
- the parties concluded a mediation agreement without selecting a mediator in it and the person chosen to be the mediator refuses to conduct mediation or the other party disagrees to the person chosen as the mediator within one week from the time they received the motion for conducting mediation,
- the parties did not conclude a mediation agreement and the other party does not agree to enter into mediation.

It should be noted that in the first three instances indicated above, the party bringing an action for the claim covered by a motion for conducting mediation within three months from the day:

- in which the mediator or the other party made a statement that prevented mediation from being initiated, or

- following the lapse of a week from the date of the delivery of a motion for conducting mediation if the mediator or the other party did not make an above mentioned statement,

with reference to such a claim the effects prescribed for the commencement of mediation are preserved.

After the mediator is served with the motion for conducting mediation, they are obligated to immediately schedule a time and a place of the mediation hearing. On the other hand, the mediation hearing is not required, if the parties agree to conduct mediation without such a hearing. In those cases the mediation can be conducted, i.e., by telephone conference or the mediator may even meet separately with each respective party. The same applies in the case of mediation commenced as a result of the court's decision.

The course and result of the mediation is recorded in the minutes that are signed by the mediator. If the parties reach a settlement in the meditation, then it is included in the minutes or appended to it. Such a settlement must be signed by the parties. The signing of a settlement is also deemed to mean that the parties agreed to have the mediator petition the state court for approving the settlement, of which the mediator is obligated to inform the parties.

After a settlement is reached during mediation conducted upon mediation agreement, the party can file a court with a motion for approval of the settlement. In such circumstances, the mediator files the minutes from the mediation with the appropriate court. This is the court which directed the parties to mediation in the course of court proceedings or the court that would be competent to hear the case if the parties turned to litigation instead of mediation.

The court approves the settlement reached in mediation at the motion of one of the parties. If the settlement is subject to the enforcement by means of state coercion, then it is approved by being appended with a so-called enforcement clause. Otherwise, the court approves it with a special decision made in camera. The court refuses to approve in part or in whole a settlement reached in mediation if its content is contrary to the law, rules of social coexistence, is aimed at overriding the provisions of law or is either not understandable or contains contradicting language.

# ENFORCING A SETTLEMENT MADE IN MEDIATION

A settlement which was reached in mediation and that was afterward approved by the court has the same binding force as a settlement made before the court. If it can be enforced by means of state coercion, the court approves the settlement by appending it with an enforcement clause. While appended with enforcement clause by a court, it can become an execution title. In such a case, you may file a motion to the state authorities (the bailiff or the competent court – this will depend on the means of enforcement) to enforce the settlement by means of state coercion.

# OTHER MEANS OF ADR IN POLAND

# AN OVERVIEW

Arbitration and mediation are not the only means of Alternative Dispute Resolution available in Poland. In fact, there are other numerous ways by which you may resolve disputes with your counter-parties without engaging in state court litigation. We shall discuss the most popular ones below, which include legal negotiations, conciliation, expert determination and FIDIC disputes.

# LEGAL NEGOTIATIONS IN POLAND

## HOW DO LEGAL NEGOTIATIONS DIFFER FROM ARBITRATION AND MEDIATION?

In contrast to arbitration and mediation, legal negotiations do not entail any third party interference into the parties' dispute. You and your counter-party are left to discuss your differences and try to resolve them on your own. What many people do not realize is that very often, negotiating a business contract consists of resolving micro-disputes on different provisions.

Taking for instance, your party abstains from making lower payments and you push for higher ones. In the end, you find the mutually acceptable solution and conclude the agreement. The legal negotiations are in fact the process in which parties choose the very same way out of the dispute with which they enter into the agreement in question.

## WHAT ARE THE BENEFITS OF NEGOTIATIONS?

The main advantage of legal negotiation is the fact that it can be described as an "everything stays in family" approach. You and your counter-party know your past and future expectations quite well with respect to your commercial cooperation – no third party decision maker (e.g. judge or arbitrator) or facilitator (e.g. mediator) will ever know them as well as you. For that reason, you are the persons in the best positions to address those needs.

Also, in legal negotiations, you choose your own rules of the game, which includes the time, place and costs of the meetings. Similarly, legal negotiations usually remain completely confidential.

### In-court and out-of-court negotiations

Apparently, negotiations usually take place outside a courtroom. However, under the CCP, they can also be conducted in court in special proceedings, usually referred to as "conciliatory proceedings" (please remember that these proceedings are a different type of ADR from the conciliation, which is described below). Those proceedings may be conducted in all cases that can be solved through a settlement in accordance with the Polish law.

Conciliatory proceedings are initiated through a motion filed by a party to the district court in the domicile of the other party. In these proceedings, the judge does not decide the case, but is only a silent observer of the negotiations concluded during the hearing. The parties usually agree on the text of the settlement before the hearing and present the court with a ready agreement. Proper negotiations in their full extent are hardly even conducted during a court hearing. Consequently, in fact, the only role of the judge is to include the settlement reached by the parties in the minutes of the conciliatory hearing or in separate document signed by the parties which is a part of the minutes. Such a settlement, referred to as a court settlement, can afterward be appended with an enforcement clause and serve as a basis for the initiation of enforcement proceedings with the use of state coercion. A court settlement can also be reached during standard civil proceedings.

## ENFORCING A SETTLEMENT MADE IN NEGOTIATIONS

As we described above, a court settlement (appended with an enforcement clause) can directly serve as a basis for initiating enforcement proceedings, without any further requirements. This is however, generally not the case with a settlement reached outside the court room.

The only way to have a settlement reached in negotiations that can be directly enforced is to conclude a notarial deed, in which your counterparty will agree to be subject to the enforcement of its provisions solely on the basis of that notarial deed. Such a deed requires the declaration of enforcement conducted in separate court proceedings.

## CONCILIATION

Conciliation slightly resembles mediation. Just like mediation, conciliation involves the participation of a third person in the dispute resolution. On the other hand, to put it proverbially, the "devil is in the details". Unlike the mediator, the conciliator is expected to have an opinion on the case. In fact, the role of the conciliator is not only to solicit a settlement between the parties, but also to propose solutions to the problem. The conciliator can present his own solution of the dispute and the parties are free to agree to it or to refuse it (this is what makes conciliation different from arbitration). Besides, conciliation is not a form of ADR regulated by law.

## EXPERT DETERMINATION

Expert determination refers to disputes revolving at their core around an issue that needs to be determined by a person with expertise on certain matters (for example "Did the car that I had purchased break down because of an inherent malfunction?"). This type of dispute resolution is typical mostly for construction and lease agreements. The parties appoint an expert to determine this issue, which allows them to assess the chances in the dispute and may possibly lead one of the parties to drop its claims. The parties may also agree with the expert's opinion to have a conclusive effect. Expert determination is not a form of ADR regulated by law.

## FIDIC DISPUTES

These days, construction disputes are frequent and require a complex method of dispute resolution. Such rules were prepared by International Federation of Consulting Engineers (FIDIC, short for *Fédération Internationale Des Ingénieurs-Conseils*) established in 1913.

This Federation prepared various sets of standards for construction contracts, so-called conditions. These, in principle, constitute the general conditions of contract and may be modified by the parties with reference to particular conditions, modeling them

in a way adequate to a certain contract. There are different FIDIC conditions: e.g. for construction only, for plant and design-build and turnkey projects. All of them, though, contain a common method of dispute resolution.

Under the FIDIC conditions, the dispute should first be either referred to the engineer of the contract or the so-called dispute adjudication board (DAB). It consists of either one or three members, usually appointed by the parties or – should they fail to appoint a DAB – by a designated appointing authority. The DAB is typically appointed after the dispute emerges, but it is not unusual for the parties to expect technical disputes, and they select a permanent DAB. The DAB members are most likely engineers prepared to settle the technical aspect of the dispute. The DAB can visit the construction site and consult any documentation in order to settle the case. The DAB concludes its proceedings by rendering a decision.

When the decision is made, a party can manifest its discontent therewith. This means that the decision will not become final and binding and the parties can start the process of arbitration. A party that obtains a favorable decision can also pursue arbitration when the other party fails to comply with the decision, which became final and binding due to the lack of challenge thereof. Arbitration under the FIDIC should, in principle, be preceded by pre-arbitral negotiations.

The arbitration under the FIDIC is, in principle, the ICC arbitration with a panel of three arbitrators. On the other hand, this provision is quite often altered by the particular conditions of contract.

# PROSPECTIVE CHANGES – ACT ON ADR FOR CONSUMER DISPUTES

One of the aims of the European Union is to defend consumers against unfair market practices. Effective resolution of consumer disputes that is informal, quick and cost-effective undoubtedly serves at achieving this aim. State court litigation, on the other hand, does not always fit within this definition. Consequently, the European Parliament and Council adopted Directive 2013/11/UE of May 21, 2016 on alternative dispute resolution for consumer disputes. Poland is obligated to implement this act into its legal system, as with every other EU directive. Consequently, the government filed a draft bill of an Act on Alternative Dispute Resolution for Consumer Disputes ("ADR Act") on June 14, 2016.

At the time of preparing of the present study the legislative process was not yet concluded and the final version of provisions has not yet been agreed upon. However, we are of an opinion that the main features of the new ADR Act should nonetheless be presented to foreign entities doing business in Poland:

**SCOPE OF THE ADR ACT:** The Act will apply to disputes between consumers residing in the European Union and business entities having their seat in Poland. It will apply to consumer disputes, i.e. proceedings which allow to bring parties together with the aim of resolving a dispute, to propose a solution or to resolve a dispute by imposing a solution. The act does not apply e.g. to B2B disputes or disputes pertaining to health and education services.

**REINFORCEMENT OF THE OUT-OF-COURT DISPUTE RESOLUTION:** The ADR Act prescribes rules for establishing entities, which are responsible for resolving consumer disputes. Their aim is to make out-of-court ADR disputes effective and quick (they should end, in principle, in a maximum 90 days).

**PRO-CONSUMER APPROACH TO CONSUMER DISPUTES:** The ADR Act contains certain provisions of a pro-consumer nature, e.g. both the ADR entities and business entities have certain information duties in favor of consumers. The proceedings should, in principle, be free or cheap and available to everyone.

**OBLIGATORY ADR IN CERTAIN FIELDS OF BUSINESS:** The ADR Act sets forth new rules on obligatory ADR in certain fields, e.g. energy, rail or telecommunication.

**CHANGES IN ARBITRATION LAW:** The ADR Act also amends the Code of Civil Procedure's part on arbitration. It introduces a rule that an arbitration agreement concluded with a consumer can be concluded only after the dispute emerges and only in writing (just as in a labor dispute). The agreement also has to contain a declaration that the parties are aware of the consequences of arbitration, in particular the binding effect of an arbitral award.

Furthermore, an arbitral award cannot deprive consumers of the rights granted on the basis of a binding provision of the applicable law. If it does, such an award can be set aside or refused enforcement and recognition by the state court *ex officio.*

# OUR SERVICES

## Dispute Resolution & Arbitration

We represent clients in proceedings before the Supreme Court, the Constitutional Court, courts of first and second instance as well as administrative courts. We also act as proxies for our clients before arbitration courts and cooperate with foreign law firms on trans-border arbitration cases, which allows us to exchange experiences and join forces with our foreign counterparts in the client's best interest. We prepare each lawsuit with utmost care and it is of fundamental importance to us to develop a long-term lawsuit strategy in consultation with the client that will yield the best results. Nonetheless, a lawsuit spanning many years is not always the best solution and for this reason, we negotiate and prepare conciliation scenarios for the termination of disputes in cases when circumstances allow and clients expect it. We find the fight for conciliation on favourable terms just as exciting as a court battle for victory, with the former often entailing significantly lower costs for the client.

## Real Estate

By carrying out thorough analyses, we present investors with adequate and optimal solutions for them that helps reduce the risk associated with the purchase and sale of real estate properties to a minimum. We successfully represent our clients in proceedings aimed at the recovery of real estate and other assets unlawfully seized by the State Treasury under the previous regime. We also provide comprehensive support to entrepreneurs in their investment processes, especially related to construction investments. Our employees are experienced and continually further their knowledge, which enables us to tackle almost any legal issue concerning real estate. Their involvement and passion assure our clients that no case is viewed by us as a lost cause.

## Banking & Finance

We support our clients in complicated projects that require expert knowledge. We prepare comprehensive legal documentation for bank products that are aimed at consumers as well as business owners. Our agreement templates and legal solutions find their applications in products worth hundreds of millions of zloty.

We possess extensive experience in dealing with legal issues related to internal bank operations, and particularly bank outsourcing. Our involvement and professionalism in conducting court proceedings is recognized by our clients, as especially reflected in our long-term cooperation with one of the leading banks in Poland.

## Corporate / M&A

We support our business partners in complicated projects that require expert knowledge. We provide advice at all project stages, starting from the conception of the project's legal structure and strategy through to its final implementation. We guarantee comprehensive legal services based on an individual and interdisciplinary approach to tasks carried out within the framework of our business relations with clients. The high level skills and dedication of our lawyers combined with our experience enable us to provide top quality legal services while adhering to the rule of: high quality at a reasonable price.

## Restructuring / Insolvency

We support business owners in negotiations, the preparation of documentation on restructuring agreements, bankruptcy proceedings with their participation (as the debtor or creditor) as well as at stages prior to the declaration of bankruptcy – ensuring that our clients take the right steps.

We possess a wealth of experience in the preparation and execution of restructuring processes, which we have gained by effectively advising entrepreneurs in difficult financial situations – usually brought about not through their own fault. This enables us to help our clients fulfil their plans while providing the management with maximum security. Our Partners Rafał Kos, attorney-at-law, and Dominik Gałkowski, attorney-at-law, par-

ticipated in the works of the Minister of Justice's team for the amendment of the Bankruptcy and Rehabilitation Law which prepared recommendations in terms of specific changes in the Bankruptcy and Rehabilitation Law in Poland: legislative, IT, and institutional solutions.

## Class Action

Kubas Kos Gałkowski was materially involved in the process of implementing the possibility of pursuing claims in group proceedings into the Polish legal system, modelled after the American class action since the very beginning of the legislative process of the Act of December 17, 2009 on Pursuing Claims in Group Proceedings. Professor Andrzej Kubas and Rafał Kos, attorney-at-law, prepared a legal opinion on the drafted bill at the commission of the Bureau of Research Chancellery of the Sejm. Furthermore, Rafał Kos, attorney-at-law, participated in the sessions of the Sejm Justice and Human Rights Committee in the capacity of an expert. Moreover, Kubas Kos Gałkowski is also present in all major domestic initiatives aimed at class action assessment and an owner of ClassAction.pl portal.

## International Desk

International cooperation is a vital part of our operations. Thanks to our ties with international industry and commerce chambers as well as cooperation with law firms around the world we are able to provide our clients with fast and effective legal solutions, also in large, complex cases. Such cooperation also enables us to offer comprehensive legal services in the area of international transactions, while taking the specificity of foreign jurisdiction into consideration. We specialise not only in providing legal services to foreign businesses but also in providing consultancy services to companies starting or intending to start operations in Poland. We know the specifics and mode of work of our clients very well.

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