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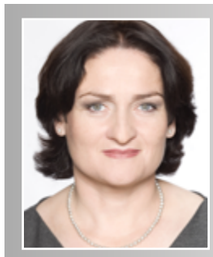

dr Beata Gessel-
-Kalinowska
vel Kalisz

President
of the Lewiatan
Court of Arbitration

Dear Readers,

Today we draw your attention to another double issue of our magazine. Diverse topics posted articles very curious.

From the perspective of the Court of Arbitration an interesting read is Dr. Marcin Asłanowicz' article about the exclusion of an arbitrator procedure. That is why I allowed myself to a brief comment to this material. Issues related to the procedure are also discussed in the analysis of Alicja Szczęśniak on remission proceedings in matters of the action for annulment of the arbitration award.

Recently in the literature much space is devoted to the issues of multi-party arbitration. A special case in this regard are group actions. Article relating to this issue has been prepared by Dr. Łukasz Gorywoda.

Three articles relate to the use of arbitration agreements in specific industries. One of them by Katarzyna Szostak examines the issues of the arbitration agreement under the Convention on the Contract for the International Carriage of Goods (CMR), while the other two M. Bednarza and J. Szczekaly-Liharewskiej relate to the use of arbitration respectively plaster capital and banking services.

In this issue we continue the issues of confidentiality in arbitration. Commentary of A. Różalska-Kucal raises issues of confidentiality in the context of investment arbitration in light of the recent judgment of the Regional Administrative Court of 2012.

At the end of the primarily invite young readers to read Dr. Maciej Zachariasiewicz relationship with the ICC YEF conference, held in New York in June last year, under the significant title: „ ... chat young and young at the international arbitration...„.

I wish you a successful reading,

Dr. Beata Gessel-Kalinowska vel Kalisz
President of the Lewiatan Court of Arbitration

Procedure for disqualification of an arbitrator – comments based on the practice of the Court of Arbitration at the Polish Confederation Lewiatan

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I owe special thanks to Dr. Beata Gessel-Kalinowska vel Kalisz, President of the Court of Arbitration at the Polish Confederation Lewiatan, for making available dockets of proceedings for arbitrator disqualification, which allowed me to do academic research underlying this article.

In accordance with para. 10.1 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan, the grounds for challenging an arbitrator include circumstances that raise justifiable concerns as to the arbitrator's impartiality or independence, or the lack of the qualifications required of an arbitrator under the agreement between the parties. Thus the above provisions do not depart from those of Article 1174.2 of the Code of Civil Procedure, nor from the rules adopted by other Polish permanent courts of arbitration[1]. Neither do the group of entities authorized to challenge an arbitrator (either party to the proceeding – cf. para. 10.1 of the Rules), the deadline for filing a notice of challenge (14 days following the day on which the grounds for disqualification became known to a party – cf. para. 10.2 of the Rules), the restriction of the possibility for the party who appointed the arbitrator to challenge him/her only due to the reasons that became known to such party following the appointment of such arbitrator (para. 10.2 of the Rules), the right of the opposing party and of the arbitrator to respond to the filed notice of challenge (para. 10.3 of the Rules), the procedure under which the notice of challenge is decided by a separate body (i.e. by the Nominating Committee – cf. para. 10.4 of the Rules), and the fact that a filed notice of challenge does not affect the course of the arbitration proceeding (para. 10.6 of the Rules) make the procedure for arbitrator disqualification before the Court of Arbitration at the Polish Confederation Lewiatan substantially different from the corresponding procedures at the Court of Arbitration at the Polish Chamber of Commerce or the Court of Arbitration at the Polish Bank Association. However, while the number of notices of challenge filed with the courts of arbitration referred to above remains relatively high (and keeps increasing), only one such notice has been filed in recent years with the Court of Arbitration at the Polish Confederation Lewiatan[2].

The reasons why notices of challenge are not filed in proceedings before the Court of Arbitration at the Polish Confederation Lewiatan

An analysis of the reasons why parties do not, as a rule, challenge an arbitrator in the course of the proceedings before the Court of Arbitration at the Polish Confederation Lewiatan is a task which is exceptionally difficult, if at all feasible. It is not only that (as pointed out above) there are no substantial differences between the procedure for arbitrator disqualification at the Court of Arbitration at the Polish Confederation Lewiatan as compared with the solutions adopted by other Polish permanent courts of arbitration, but also the values of claim and the types of disputes heard by these courts might be considered similar. An examination and comparison of the number of instituted proceedings do not provide an answer to that question either, as it may be assumed that at the Court of Arbitration at the Polish Chamber of Commerce there is one notice of challenge to ca. 40 cases on average[3], at the Court of Arbitration at the Polish Bank Association – one such notice to ca. 20 cases on average[4], and at the Court of Arbitration at the Polish Confederation Lewiatan – one to ca. 160 cases on average[5].

As a consequence of the fact that parties do not file notices of challenge with the Court of Arbitration at the Polish Confederation Lewiatan, they are devoid of the right to (subsequently) file a request to that effect with a common court. Pursuant to Article 1176.2 of the Code of Civil Procedure, a party may request a common court to disqualify an arbitrator only after it sought to no avail to challenge the arbitrator under a procedure before the court of arbitration[6].

1. Cf. Asłanowicz M., Postępowanie o wyłączenie arbitra – analiza spraw toczonych przed Sądem Arbitrażowym przy Krajowej Izbie Gospodarczej w Warszawie, PUG No. 11/2013; and Asłanowicz M., Postępowanie o wyłączenie arbitra – analiza spraw toczonych przed Sądem Polubownym (Arbitrażowym) przy Związku Banków Polskich, PUG No. 12/2013.

2. As at October 2013.

3. In the years 2006-2013, 65 notices of challenge were filed in the overall number of approximately 2,500 new cases; for a more detailed discussion see Asłanowicz M., Postępowanie o wyłączenie arbitra – analiza spraw toczonych przed Sądem Arbitrażowym przy Krajowej Izbie Gospodarczej w Warszawie, PUG No. 11/2013.

4. In the years 1992-2013, 5 notices of challenge were filed in the overall number of approximately 100 new cases; for a more detailed discussion see Asłanowicz M., Postępowanie o wyłączenie arbitra – analiza spraw toczonych przed Sądem Polubownym (Arbitrażowym) przy Związku Banków Polskich, PUG No. 12/2013.

5. In the years 2006-2013, only 1 notice of challenge was filed in the overall number of approximately 160 cases (in 2006, one arbitration proceeding was instituted at the Court of Arbitration at the Polish Confederation Lewiatan; in 2007 – 5 proceedings; in 2008 – 7 proceedings; in 2009 – 9 proceedings; in 2010 – 25 proceedings; in 2011 – 33 proceedings; in 2012 – 29 proceedings; and in 2013 (as at November) – 48 proceedings).

6. In accordance with the provision of the last sentence of Article 1176.2, any agreement by the parties to the contrary is ineffective. It is unanimously argued in the jurisprudence that an application for arbitrator disqualification may be filed with a common court (only) where – as part of the procedure agreed upon between the parties (i.e. prescribed under the applicable rules of the court of arbitration) - no decision disqualifying the arbitrator is taken or the decision taken refuses to disqualify him/her; see Uliasz M., Kodeks postępowania cywilnego. Komentarz, Warsaw 2008, p. 1561, nb 2.

A party's failure to challenge an arbitrator in the course of the arbitration proceeding results also in a (further) restriction of the scope of grounds for a petition to set aside an arbitral award based on Article 1206.1.4 of the Code of Civil Procedure[7].

In view of the foregoing, it is difficult to identify the reasons why parties to arbitration proceedings before the Court of Arbitration at the Polish Confederation Lewiatan consider it necessary to challenge an arbitrator substantially less frequently than parties to arbitration proceedings conducted before other courts of arbitration. However, given the increasing number of filed notices of challenge, noticeable in recent years both in Poland and abroad[8], it cannot be ruled out that such a phenomenon will also take place in the court of arbitration referred to above.

Challenge of the presiding arbitrator in the case marked with docket number SA/086/XI/2011

In the case brought by X. sp. z o.o. against Y. spółka jawna, the respondent's attorney challenged the presiding arbitrator, claiming that she had acted in breach of the standards of impartiality and independence, had no qualifications to handle the case, and had failed to follow the principles of ethics applicable to arbitrators of the Court of Arbitration at the Polish Confederation Lewiatan. The objections raised resulted, in the first place, from the fact that hearings had been scheduled to be held during a period when the respondent's attorney was on sick leave and could not, as he argued, not only duly prepare himself for the hearings but even "assume a sitting position for a time longer than an hour or so." In the opinion of the respondent's attorney, the challenge of the presiding arbitrator was also justified by the fact that she had scheduled hearings to be held during the vacation time when "the availability of witnesses is much limited or, in some cases, none at all." In consequence, as the respondent's attorney argued, "due to this generally known fact, allowed for by all courts of arbitration (and frequently by common courts as well), no Presiding Arbitrator, and in particular one holding such function at a court of arbitration aspiring to resolve material disputes between entrepreneurs, schedules hearings to be held on dates which are ex definitio unavailable to the parties, thus making the right of recourse to a court and the right to a fair trial be a pure fiction."

The challenge of the presiding arbitrator was dismissed by the Nominating Committee, as a result of which the dispute was resolved by a tribunal composed of the originally appointed arbitrators. Nevertheless, the reasons for the filed notice of challenge provoke reflection both on the way in which parties to proceedings perceive impartiality and independence of arbitrators, and on the impact of a notice of challenge on the course of an arbitration proceeding.

7. See also Wójcik M., Komentarz do art. 1206 Kodeksu postępowania cywilnego, Lex (el.) 2013, Jakubecki A. (ed.), nb 6.

8. For a more detailed discussion see Hacking D., Challenges: Theirs Is To Reason Why, Global Arbitration Review, Volume 1, Issue 6, p. 26 et seq.

The independence and impartiality of arbitrators as perceived by parties to proceedings

The necessity for a dispute referred to arbitration to be resolved by a tribunal composed of independent and impartial arbitrators does not raise any concerns and constitutes a condition of a fair trial[9]. However, in practice, assessments of compliance by arbitrators with the principle of independence and impartiality frequently diverge, which is a consequence, in the first place, of the above principles being differently understood[10].

Both the UNCITRAL Model Law[11] and the rules of permanent courts of arbitration[12] contain provisions forming grounds for disqualification of an arbitrator and imposing on arbitrators the obligation to remain independent and impartial throughout the arbitration proceeding. However, these provisions are of a general nature only and hardly provide any basis for a formulation of detailed requirements to be satisfied by every arbitrator. The codes of ethics for arbitrators – both the principles of ethics in arbitration adopted by the Polish Arbitration Association to serve as guidelines for arbitrators and the codes of ethics adopted by individual permanent courts of arbitration[13] – also tend to introduce general principles and rules of conduct to be followed by arbitrators rather than specify a list of circumstances which might, depending on the facts of a case, form grounds for an objective assessment of (the extent of) compliance by arbitrators with the independence and impartiality requirement.

Bearing in mind the foregoing, the standards set forth in the IBA Guidelines on Conflicts of Interest in International Arbitration should be assumed to serve as the basic measure of arbitrators' independence and impartiality. As A. Szumański rightly points out[14], they prescribe the types of arbitrator's conduct which, if followed, guarantees that the arbitrator is and will continue to be impartial and independent in a given case. Thanks to the very detailed regulations contained in the General Standards and the specific Application Lists, the risk of discrepancies in interpretation is relatively low, though still exists both as a result of divergent subjective

9. See also Tomaszewski M., Skuteczność ochrony prawnej przed sądami polubownymi. Doświadczenia polskie, Przegląd Sądowy No. 1/2006, p. 40.

10. Such divergences occur even where the arbitrators' obligation to comply with the "general principles of ethics" relating to their function is adopted as a reference point in international arbitration; see also Manzaners – Bastida B., The Independence and Impartiality of Arbitrators in International Commercial Arbitration, Revista e-Mercatoria, vol. 6, No. 1/2007, pp. 12-13.

11. The UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (United Nations documents A/40/17, annex I and A/61/17, annex I).

12. For instance, para. 8.1 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan stipulates only that an arbitrator is and remains, throughout the entire arbitration, impartial and independent, and shall observe the principles of ethics approved by the Arbitration Committee. Para. 8.2 of the Rules says in addition that a person in relation to whom there exist concerns as to his/her independence or impartiality, or a person who lacks the qualifications specified by the parties in the arbitration agreement, may not accept his/her appointment as an arbitrator.

13. Cf. the Code of Ethics of the Court of Arbitration at the Polish Confederation Lewiatan or the Code of Ethics of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw.

14. Cf. Szumański A. [in:] System prawa handlowego, Arbitraż handlowy, t. 8, Szumański A. (ed.), Warsaw 2010, pp. 370-371, nb 2. The author extends the presented conclusion to cover – in my opinion illegitimately - also the codes and principles of arbitrator's ethics (as referred to above), although those regulations do not describe in detail the types of expected conduct, but contain only a list of general expectations to be met by arbitrators.

assessments made by the parties to an arbitration proceeding and as a result of the fact that the list of situations described in the IBA Guidelines is not of an exhaustive nature.

It does not seem possible to resolve completely the two issues referred to above. Firstly, divergent opinions on arbitrators' conduct and divergent assessments of whether or not arbitrators comply with the impartiality and independence requirement will certainly always be formulated, if only in order to accomplish the procedural objectives of a party. Secondly, development of an exhaustive list of all types of potential arbitrator's conduct and all relations that might hold between arbitrators and parties to a proceeding and their attorneys would be impossible. Therefore, the decision as to whether or not an arbitrator satisfies the independence and impartiality requirement, i.e. the decision that may be verified by a common court pursuant to Article 1176.2 of the Code of Civil Procedure, will depend upon an objective assessment being made by the competent bodies of a court of arbitration (the Nominating Committee in the case of the Court of Arbitration at the Polish Confederation Lewiatan).

Incidentally, it is worth noting that a party's subjective assessment as to whether or not an arbitrator complies with the impartiality requirement will normally be made on an ex post basis, i.e. after the arbitration proceeding is completed and the case decided[15]. It is only then that impartiality of the arbitrators towards the parties in the course of the proceeding may be validated through an impartial evaluation of the evidence gathered in the case and issuance of a correct award.

The impact of a notice of challenge on the course of an arbitration proceeding

Pursuant to para. 10.6 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan, the filing of a notice of challenge does not affect the course of arbitration, including the issuance of an award, unless the Arbitral Tribunal decides otherwise[16]. However, in such a case, the Arbitral Tribunal normally refrains from undertaking further procedural acts, which is confirmed both by the case under analysis above and by other procedures for arbitrator disqualification conducted before other courts of arbitration[17]. Such a course of action taken by the Arbitral Tribunal can hardly be considered to be fully justifiable (especially where the challenging party does not concurrently file a request for suspension of the proceeding), due to the fact that even if the arbitrator is subsequently disqualified, the acts undertaken by the Arbitral Tribunal when the disqualified arbitrator was still its member remain valid and effective, and the Rules of the Court of Arbitration at the Polish Confederation Lewiatan do not require the same to be repeated in whole or in part[18].

The Arbitral Tribunal's decision to refrain from undertaking acts until the notice of challenge of an arbitrator is decided results in a corresponding extension of the duration of the arbitration proceeding, which can encourage the party benefiting from a delayed case resolution to file such notices. Despite a short deadline for the Nominating Committee to decide a notice of challenge (pursuant to para. 10.4 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan, a decision in this respect should be made within 30 days following the filing of the notice), the cancellation or adjournment of a previously scheduled hearing will, as a rule, delay the resumed proceedings to take evidence or the issuance of an award by several months.

What usually serves as a justification of the formal or actual suspension of the proceeding in a case is the Arbitral Tribunal's concern that the challenging party will effectively apply to a common court for disqualification of the arbitrator pursuant to Articles 1176.2 and 1176.4 of the Code of Civil Procedure, or will effectively file a petition to set the rendered arbitral award aside pursuant to Article 1206.1.4 of the Code of Civil Procedure[19]. However, given the provision of Article 1176.6 of the Code of Civil Procedure, in accordance with which – as a rule – the filing of an application for arbitrator disqualification with a common court does not affect the course of the arbitration proceeding, it should be assumed that the priority should be rather for the Arbitral Tribunal (and for the court of arbitration before which the case is conducted as well) to complete the arbitration proceeding in a time-efficient manner.

The risks involved in an arbitration proceeding taking longer than expected to be completed

It is generally assumed that a prompt resolution of a dispute is crucial to persons seeking legal protection[20]. It is the promptness of proceedings that is deemed to constitute a fundamental virtue of arbitration and its advantage over proceedings at a common court[21]. Therefore, an evaluation of the course of proceedings will be substantially dependent upon the Arbitral Tribunal's determination to resolve the dispute and to render an award as promptly as possible.

15 Cf. Wiśniewski A. W., Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów, Warsaw 2011, p. 561.

16. A corresponding solution is provided for in para. 25.7 of the Rules of the Court of Arbitration at the Polish Chamber of Commerce. The rules adopted by the majority of courts of arbitration do not provide for the issue in question explicitly – cf. the Rules of the Court of Arbitration at the Polish Bank Association or the rules of arbitration in place at the International Chamber of Commerce in Paris (ICC), the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), or the UNCITRAL Arbitration Rules. Where a party (parties) challenges one or more arbitrators in proceedings governed by the rules adopted by each of the above courts, the decision on the further course of the proceedings is up to the Arbitral Tribunal. As a side note, one should point out an interesting regulation contained in Article 20.4 of the VIAC Rules, which leaves it to the Arbitral Tribunal to decide whether or not the proceeding is to be continued after an arbitrator has been challenged, concurrently prohibiting the Arbitral Tribunal from rendering an award while the filed notice of challenge is pending.

17. For a more detailed discussion see Asłanowicz M., Postępowanie o wyłączenie arbitra – analiza spraw toczonych przed Sądem Arbitrażowym przy Krajowej Izbie Gospodarczej w Warszawie, PUG No. 11/2013.

18. This solution corresponds to the ones adopted in the rules of numerous other courts of arbitration (e.g. ICC, SCC, LCIA, VIAC).

19. It is admissible to refer to Article 1206.1.4 of the Code of Civil Procedure (i.e. to the requirements as to the composition of the arbitral tribunal not having been satisfied) as the ground for a petition to set aside an arbitral award exclusively where a prior challenge has been made; cf. Piasecki K., KPC. Komentarz, t. III, Warsaw 2007, p. 321, nb 20, along with the ruling of the Supreme Court, dated February 8, 1937 (III C 1254/35), published in OSN 1957, Item 59, as referred to therein.

20. Cf. Ereciński T., Weitz K., Sąd arbitrażowy, Warsaw 2008, p. 48.

21. As rightly pointed out by J. Adamkowski (Citius, Altius, Fortius! Szybkość jako element marketingu arbitrażu [in:] Arbitraż i mediacja. Księga jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi, Warsaw 2012, p. 19).

The most prominent issue among the factors pointed out in the jurisprudence as adversely affecting the development of arbitration is the increasingly complex nature of proceedings, their lengthy duration and expensiveness[22]. Expensiveness can be considered to be mainly a consequence of lengthy duration, since the longer a dispute takes to be resolved, the greater is the financial burden to be borne by the parties, both in terms of direct expenses incurred to conduct the proceeding and in terms of indirect expenses incurred in connection with the sustained legal uncertainty. This issue is all the more important as pursuing claims in a court of arbitration is considerably more expensive than doing so in a common court. The higher amount of arbitration fees as compared with court fees[23] is not normally compensated by the fact that arbitration is usually a single-instance procedure[24] and by the resultant absence of the costs related to an appeal procedure[25].

In addition to the undesirable sustained legal uncertainty and increased costs of proceedings, evidence-related difficulties resulting from prolonged arbitration procedures should be also noted. Such difficulties relate both to the fact that the usefulness and reliability of personal sources of evidence decrease over time, and the fact that the volume of evidence is unnecessarily getting larger as parties and their attorneys keep filing further pleadings (despite the actual or formal suspension of the arbitration proceedings)[26].

In view of the foregoing, it is normally not only the Arbitral Tribunal that is interested in having the proceeding completed as promptly as possible[27], but also at least one of the parties to the proceeding (usually the claimant). The most prominent procedural instrument that might be used by a party not interested in having the proceeding completed (i.e. usually the respondent) is the challenging of an arbitrator[28]. Where the court of arbitration and the Arbitral Tribunal fail to respond unequivocally and promptly, such challenge may arrest for a long time both the Arbitral Tribunal's work and the arbitration procedure. This risk is especially high where notices of challenge are made repeatedly, arbitrators are challenged one by one or the challenging party endeavors to have an arbitrator disqualified by a common court pursuant to Article 1176.2 of the Code of Civil Procedure.

Neither the provisions of the Code of Civil Procedure nor the rules applicable at permanent courts of arbitration restrict the right of a party to challenge an arbitrator. In consequence, a party can attempt to sabotage the arbitration proceeding by filing repeatedly (similar) notices of challenge. However, given the fact that no provision equivalent to that of Article 50.3 of the Code of Civil Procedure applies to arbitration proceedings[29] and the resultant fact that such proceedings may be continued despite a notice of challenge having been filed, it is the court of arbitration and the Arbitral Tribunal that will decide on the actual impact that notices of challenge will have on the course of arbitration proceedings[30].

It should be also noted that both the common provisions of law and the rules of permanent courts of arbitration contain clauses the purpose of which is to counteract arbitration proceedings being arrested as a result of repeated removals of or resignations by arbitrators appointed by a party[31]. In accordance with Article 1178.2 of the Code of Civil Procedure, if a resignation or removal by the parties or the court of an arbitrator appointed by a party takes place twice, the other party may request the common court to appoint a new (substitute) arbitrator for the opposing party. Para. 13.2 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan is even more stringent on this point, as it provides that, in such a case, the Nominating Committee

22. Cf. Rajski J., Polubowne aspekty arbitrażu w sprawach gospodarczych, Kwartalnik ADR No. 2/2013, p. 7.

23. Pursuant to Article 13 of the Act of July 28, 2005 on Court Fees in Civil Law Cases (Dz. U. [Journal of Laws] of 2010 No. 90, Item 594), the highest proportionate fee in property rights cases amounts to PLN 100,000. While introducing progressive rates of arbitration fees, the rules applicable at the majority of permanent courts of arbitration do not specify their upper limits (concurrently introducing in addition registration and administrative fees), as a result of which the arbitration fee due is higher than the proportionate fee would be (if the dispute were decided by a common court) already for the value of claim exceeding PLN 1,587,000 (in the case of a dispute heard by the Court of Arbitration at the Polish Confederation Lewiatan – cf. para. 3.1 of the Tariff of Fees applicable at the Lewiatan Court of Arbitration), PLN 1,420,000 (in the case of a dispute heard by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw – cf. para. 8 of the Tariff of Fees of the Court of Arbitration at the Polish Chamber of Commerce), PLN 1,708,000 (in the case of a dispute heard by the Court of Arbitration at the Polish Bank Association – cf. para. 9 of the Tariff of Fees of the Court of Arbitration at the Polish Bank Association). As regards foreign courts of arbitration, the disproportions referred to above are considerably greater, especially in the case of proceedings where the value of claim is high.

24. Despite the parties' right to appoint an arbitral tribunal of second instance (a clause to that effect would have to specify in addition the rules governing appeal against the award rendered by the arbitral tribunal of first instance, as well as the rules to be followed by the arbitral tribunal of second instance when considering such appeal – cf. Uliasz M., Kodeks postępowania cywilnego. Komentarz, Warsaw 2008, p. 1595, nb 6), arbitration clauses of such type are rarely found in practice. Neither is a procedure for appealing against an arbitral award provided for in the majority of the rules adopted by permanent courts of arbitration, including the Rules of the Court of Arbitration at the Polish Confederation Lewiatan.

25. The expensiveness of arbitration proceedings is also a consequence of the costs borne in connection with post-arbitration procedures, including the court fees due on a petition to set aside an arbitral award and the court fees due in the course of proceedings at the successive instances.

26. Such conduct is identified and considered unfavorable in the jurisprudence; for a more detailed discussion see Adamkowski J., op. cit., pp. 29-30. The author points out, inter alia, the tendency to "reproduce" multipage pleadings, concurrently noting that "the absence of any concern about evidence preclusion, (…) pointless motions for hearing several witnesses as to the same fact already proven with documents" result in substantial delays in rendering an award.

27. However, it also happens in practice that as a result of a boycott of the arbitration proceeding by one of the arbitrators, the procedure is substantially delayed; for a more detailed discussion see Asłanowicz M., UNCITRAL – Regulamin i Ustawa Modelowa, Studia Prawnicze No. 1/2012, pp. 27 et seq.

28. Tomaszewski M. [in:] Skuteczność ochrony prawnej przed sądami polubownymi. Doświadczenia polskie, Przegląd Sądowy No. 1/2006, p. 51; it is the frequent challenging by parties of co-arbitrators or the presiding arbitrator that the author considers to be a major reason for delays in arbitration procedures (in addition to the lengthy process of the Arbitral Tribunal constitution, arbitrators' overload with work and arbitrators' failure to act).

29. It is correctly argued that the provision of Article 50.3 actually encourages a party "to file applications for judge disqualification, even if the reasons therefor are illegitimate and the same doomed to failure"; cf. Bilewska K., Wyłączenie sędziego czyli procesowa taktyka, Rzeczpospolita, PCD, 2012.1.17.

30. The broad scope of powers vested in a court of arbitration in the above respect is confirmed in Article 1176.6 of the Code of Civil Procedure, pursuant to which an application for arbitrator disqualification filed with a common court does not affect the arbitration proceeding either, unless the arbitral tribunal decides otherwise. A. Jakubecki ([in:] Komentarz do art. 1176 Kodeksu postępowania cywilnego, Lex, nb 7) points out that the filing of an application for arbitrator disqualification with a common court does not deprive the arbitrator of the right to take part in the acts undertaken in the course of the arbitration proceeding, hence the arbitrator is not under obligation to refrain from participating in hearing the case.

31. Cf. Ereciński T., Kodeks postępowania cywilnego. Komentarz, t. V, Warsaw 2012, p. 752, nb 2.

appoints a substitute arbitrator ex officio, within 10 days following the date on which the arbitrator resigns or is removed for the second time[32].

It remains open to debate whether the provisions of Article 1178.2 of the Code of Civil Procedure and para. 13.2 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan apply as well where an arbitrator's mandate expires for the second time as a result of his/her disqualification. Some authors seem to be of such opinion[33], although the view according to which the mechanism of substitute arbitrator appointment may be used exclusively where an arbitrator twice resigns (on his/her own initiative) or is removed (e.g. at a mutual request of the parties)[34] seems to be more justifiable. This view is supported both by the literal interpretation of the provisions referred to above and the fact that the legislator and the authors of the Rules, respectively, concurrently use the concept of "expiration of [an arbitrator's] appointment" (cf. e.g. Article 1178.1 of the Code of Civil Procedure) or "expiration of [an arbitrator's] mandate" (cf. paras. 13.1 and 13.3 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan) to refer to a broader spectrum of potential circumstances, including also arbitrator's death and disqualification. Bearing the foregoing in mind, it is appropriate to extend application of the provisions of Article 1178.2 of the Code of Civil Procedure and para. 13.2 of the Rules of the Court of Arbitration at the Polish Confederation Lewiatan to cover also situations in which an arbitrator is disqualified, as this would improve the arbitration procedure whenever one of the parties endeavors to delay the proceedings through challenging arbitrators frequently.

Closing comments

As procedures for arbitrator disqualification are rare in cases heard by the Court of Arbitration at the Polish Confederation Lewiatan, it is difficult to make a comprehensive analysis of the Court's practice and experience in this respect. However, given both the international and Polish trends, the number of such procedures can be expected to keep increasing in the near future.

The Rules of the Court of Arbitration at the Polish Confederation Lewiatan provide for nearly all legal constructs necessary to prevent notices of challenge from adversely affecting the course of arbitration proceedings. Whether application of such constructs is effective in practice, will depend upon the conduct of the court itself (acting through the Nominating Committee) and of the individual arbitral tribunals.

32. Some other permanent courts of arbitration have adopted similar rules – cf. e.g. para. 26.7 of the Rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw.

33. Cf. Zieliński A., Kodeks postępowania cywilnego. Komentarz. Warsaw 2011, pp. 1661-1662, nb 1.

34. Cf. Ereciński T., Kodeks postępowania cywilnego. Komentarz, t. V, Warsaw 2012, p. 752, nb 1.

A few comments from the President of the Lewiatan Court of Arbitration on the article by M. Asłanowicz Procedure for disqualification of an arbitrator – comments based on the practice of the Court of Arbitration at the Polish Confederation Lewiatan

The comments made by M. Asłanowicz on the procedure for arbitrator disqualification based on the practice of the Lewiatan Court of Arbitration are an interesting read from our Court's perspective. In his article, the author emphasizes the fact that few notices of arbitrator challenge are filed with our institution. Indeed, as at the date of the author's research, only one such notice was filed in 160 registered cases. What is more, as of today, this figure has remained unchanged for 185 registered cases. The author observed that the above figure was remarkably lower than that found with other Polish arbitration institutions, although both the type of disputes heard by such other courts of arbitration and the procedure for notice filing were similar. He also pointed out that it was thus difficult to identify the reasons why parties to arbitration proceedings considered it necessary to challenge an arbitrator substantially less frequently. However, given the tendencies observable both in Poland and abroad, an increase in the number of such notices of challenge should be expected.

As a side note, M. Asłanowicz's discussion brings to my mind the following comment. The challenging of an arbitrator is a manifestation of the lack of a party's satisfaction with his/her qualifications, independence or impartiality. Such satisfaction or dissatisfaction is to a large extent a consequence of the scope of the parties' autonomy in an arbitration proceeding. The more freedom parties have, the greater their satisfaction is. In the case discussed in the article, the mistrust of the Presiding Arbitrator of the arbitral tribunal resulted from the fact that hearings had been scheduled to be held on dates which the attorney of a party deemed inappropriate. Leaving aside the facts of this particular case, it should be noted that pursuant to § 26.2 of the Rules of the Lewiatan Court of Arbitration[1], as currently in force, the timetable of an arbitration proceeding needs to be consulted with the parties. Such a procedural standard reduces the risk of the timetable being considered by the parties to result from arbitrators' partiality.

A broad autonomy of the parties to decide upon the arbitral tribunal composition serves as a potent stimulus for reinforcing the sense of satisfaction referred to above. This autonomy consists in the parties' freedom to appoint arbitrators also from among persons not entered in the lists of arbitrators maintained by arbitration institutions. What is also of importance from the discussed point of view is the rule saying that a party has the right to consult the arbitrator it appointed about the appointment of a presiding arbitrator, which rule is slowly gaining ground also in Polish arbitration and has been formulated expressis verbis in the guidelines on party representation in

1. Rules of the Court of Arbitration at PKPP Lewiatan, in force since March 1, 2012; available at http://www.sadarbitrazowy.org.pl/upload/Regulamin1marca20121.pdf. The arbitration proceeding presided over by the challenged arbitrator was governed by the rules previously in force, which contained no provision equivalent to § 26.2 of the Rules currently in force.

arbitration proceedings, announced of late by the International Bar Association (IBA)[2].

Another IBA's document that cannot possibly be overestimated sets forth in detail the rules applicable in the case of a conflict of interest among arbitrators[3]. A reference to the above document is contained in the provision of § 8.1 of the Rules of the Lewiatan Court of Arbitration, which assumes the Guidelines to be the minimum standard to be complied with by arbitrators. Incorporation of the above document into the Rules makes the approach to the issue of conflicts of interest predictable both to parties and arbitrators. When addressed by arbitrators in too liberal a manner, this issue automatically translates into parties' frustration and an increase in the number of arbitrator challenges. On the other hand, when standards in the field of conflicts of interest among arbitrators are set, this reduces the number of the so-called frivolous challenges, the exclusive purpose of which is to delay arbitration proceedings.

Finally, it is also worth commenting upon § 6.5 of the Rules of the Lewiatan Court of Arbitration, which introduces a completely new institution of substitute arbitrator appointment, available in the event of a failure to appoint the presiding arbitrator or the sole arbitrator. The Nominating Committee suggests then five candidates, and the parties (or the arbitrators, as applicable) have the right to strike off two candidate names without the need to provide any reason for their decision. This procedure offers to parties an opportunity to have a greater influence on the final decisions taken on a matter which is crucial to any arbitration proceeding.

Summing up, it seems that the number of notices of arbitrator challenge is not only a function of the type of disputes heard or the nature of the complaint procedure as such. Viewed in a broader context, it is – on the one hand – a consequence of the extent of the autonomy granted to parties. The greater the freedom of parties is, the lower the number of arbitrator challenges should be. Secondly, it is a consequence of the specific standards adopted in the field of arbitrators' ethics and applicable when making a decision on nomination in a given case. It should be added in this connection that these are certainly not the only factors affecting a party's decision to challenge an arbitrator.

2. Cf. Section 8(b) of the IBA Guidelines on Party Representation in International Arbitration (2013); available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#partyrep.

3. IBA Guidelines on Conflicts of Interest in International Arbitration (2004); available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#partyrep.

On the application of arbitration clauses under securities law – selected aspects

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This article aims to examine the potential for arbitration clause application in the public securities market, given the restrictions and duties in place in that market, and the structure of the Polish securities market, as well as the U.S. market experience the selected aspects of which are presented.

This article does not focus on an evaluation of the advantages and disadvantages of arbitration e.g. in terms of cost-effectiveness, but attempts only to present issues relating to the potential application of arbitration to the processes taking place in the public market.

This article does not take into account either issues relating to a potential bias of arbitration in terms of investor protection in favor of professional market participants, such as brokerage houses, and against small investors.

Introduction – arbitration and diverse concepts of the financial market and securities law

The financial market classifications used worldwide differ immensely and are made based on a variety of different criteria. The most popular division of this market is that into the capital market, banking market and derivatives market. Obviously, this market evolves as new financial instruments come into the picture, and increasingly more sophisticated instruments – not readily assignable to the capital or banking market - become available, but the evolution does not appear to have reached the stage at which such market division may be considered to have lost its relevance.

The capital market predominates in the Anglo-Saxon model of economy (in place, inter alia, in the U.S. and Great Britain), whereas the banking system has been the prevailing one for centuries in Europe.[1]

Hence, corporate financing in Europe is based in the first place on bank loans, whereas in the U.S. and Great Britain, inter alia, on raising funds through issuing shares and introducing them to public trading, or through issuing debt securities, i.e. bonds.

The fact that it is the banking market or the capital market system that is employed in

1. http://www.investopedia.com/terms/a/anglo-saxon-capitalism.asp

a given economy relates directly to the legal system in place and has a substantial impact on such legal system, mostly in respect of securities regulations, but also, inter alia, in the field of arbitration.

The civil law system, predominant in continental Europe which relies on the banking market system, seems to be less flexible and more conservative about dispute resolution based on arbitration clauses than the common law system of Anglo-Saxon origin. Although this does not mean that arbitration is not used at all, its place in the civil law system seems less important as a result of such differences. Jurisdictions and legal systems in which financing depends on banks tend to be less conducive to development of arbitration and more oriented towards the classic method of dispute resolution by common courts.

In the field of securities law, it is also the specific nature of arbitration, in addition to the division into the two systems of law, that affects its application. The securities market is a public market, governed by separate regulations, duties and rules that actually have no point of reference in any other market. Market participants derive numerous benefits from being present in a public market and listed on a stock exchange, but concurrently have equally numerous duties which are frequently extremely expensive.

The specific nature of the public market and securities law

Securities law, which governs the public securities market and organized trading, actually has no counterpart among the other branches of law. It is characterized by a special rigorism imposed by the legislator. Unlike in the private securities market, parties' freedom to act in the public market is considerably restricted under the provisions of law. Individual participants of the public market have specific duties and restrictions imposed on them. Among such restrictions there are, inter alia, (i) the necessity to comply with the reporting duties imposed on issuers, including the obligation to announce current and periodic reports; (ii) the obligation of individual shareholders to notify issuers of any effected transactions involving shares; (iii) the prohibition for specific entities to effect transactions in close trading periods; (iv) the stringent conditions to be satisfied by companies in connection with an initial public offering, including e.g. the obligation to prepare a prospectus or the limited possibility of holding a marketing campaign to promote the share issue. The access to professions needed by the public market, such as securities broker and especially investment adviser, is also restricted.

Therefore, one can hardly talk about any freedom to make transactions in the public market. When effecting a specific transaction, a market participant each time checks whether it is consistent with securities law, and it is frequently the case that, despite its indisputable economic "added value," a transaction may not be completed due to a prohibition resulting from the provisions of law.

In consequence, securities law is restrictive and aims to protect the investor (and especially the retail one). In addition, regardless of the criterion we adopt, securities law reflects a strong position of the regulator in the legislation, and whether in the U.S. or British jurisdiction, the regulator has an exceptionally broad scope of powers in administrative law relations which frequently corresponds to that vested in a public prosecutor. Thus, whether it is SEC, FSA or the Polish Financial Supervision Authority, all these bodies exercise supervision over all the relevant procedures and processes provided for in the respective statutes under which a given capital market is regulated. The scope of such supervisory powers includes, inter alia, supervision over (i) tender offers; (ii) market manipulation; (iii) acquisition of substantial blocks of shares; or (iv) imposition of administrative sanctions. As a result of all the above supervisory powers, the extent to which market participants – whether investment companies, banks or small investors - can regulate the relations between them is remarkably limited, and in the majority of cases, it is the regulator's scope of powers that prevents a separate regulation of the legal relations between parties, as this would interfere in its administrative governance.

Furthermore, efforts are being made to strengthen the position of regulators, both in American law (as a result of the financial crisis[2] or the Bernard Madoff case[3]) and European law (inter alia, as a consequence of the regulations in force so far, but also e.g. as a result of the LIBOR manipulation scandal[4]), and to broaden the scope of their powers to exercise supervision over public market participants.[5]

It is thus difficult to use arbitration clauses in the field of regulators' powers; however, even in the public market, not all legal relations need to be supervised by the regulator.

The evolving extent of arbitration clause application in the United States as an example of an effective use of arbitration clauses to resolve disputes

Despite the specific nature of the public market in the U.S. in terms of securities law, as outlined above, arbitration clauses have found their place there, to a significant extent as a result of the legal culture which is totally different in the English speaking world, but also thanks to the properties of the framework for the financial system in the United States.

The understanding of arbitration clause enforceability has evolved over time. First, when deciding the well-known case Wilko v. Swan (1953)[6], where claims were raised based on the Securities Act of 1933, the Supreme Court held that an arbitration agreement relating to an agreement between a securities brokerage firm and its customer,

2. The mortgage market crisis considered to have been triggered by the collapse of the American investment bank Lehmann Brothers on September 15, 2008. http://www.telegraph.co.uk/finance/financialcrisis/6173145/The-collapse-of-Lehman-Brothers.html

3. An American financier, former chairman of the Nasdaq stock market, convicted of multi-billion fraud and sentenced to many years in prison. http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all&_r=0

4. The scandal relating to an attempted interest rate manipulation by major European banks.

5. Such efforts are manifested e.g. in the draft Regulation adopted by the European Parliament and the Council, under which a new regime for the handling of confidential information is to be introduced, or in the adoption of Directive 2013/50 amending Directive 2004/109 of 2004, i.e. the so-called Transparency Directive.

6 http://supreme.justia.com/cases/federal/us/346/427/

which had been made prior to the date on which the dispute arose, was void, and extended its ruling to cover claims under the Securities and Exchange Act of 1934, justifying its decision with an argument that aimed to protect investors[7].

However, the approach under which arbitration clauses were not deemed enforceable as between public market participants changed in the eighties of the 20th century. In its judgments rendered in the cases Shearson/American Express, Inc. v. McMahon (McMahon) and Rodriguez De Quijas v. Shearson/American Express, Inc. (Rodriguez), the Supreme Court decided that an arbitration clause referring to future disputes between brokerage firms and their customers was admissible. At present, the majority of disputes related to trading in financial instruments are decided by arbitral tribunals, which constitutes a change in the Supreme Court's views, as compared with the one expressed in the fifties of the 20th century[8].

Nowadays, nearly all disputes between brokerage houses and their customers are handled by arbitral tribunals[9]. Incorporation of arbitration clauses into investor contracts have even been considered mandatory.

However, it should be noted that the above view appears to be slightly changing, as can be seen from a report of the Department of the Treasury, released by the Obama administration, which challenges the "mandatory" arbitration clauses in investor contracts and calls for restoration of the situation from before the judgment of 1987, i.e. the judgment rendered in the Mc Mahon case. According to the report, the Obama administration's intention was to offer to the public market participants an alternative to the mandatory arbitration clause, consisting in the possibility of bringing an action to a common court[10]. However, there is no telling whether the above point of view will be endorsed. According to the available information, no legislation aiming to change the present state of affairs has been passed.

Arbitration plays a significant role in the legislation pertaining to the securities market – it has undoubtedly been successful and become popular, but it seems (at least based on the observations made) that this does not hold true of the aspects supervised by SEC, which proves that the application of arbitration in the field of securities law should not be related to the scope of the supervisory powers vested in SEC.

7. Sójka Tomasz, Ph.D. Rozstrzyganie przez sąd arbitrażowy sporów z zakresu zorganizowanego obrotu papierami wartościowymi. Kwartalnik ADR, nr 2(6)/2009, s. 57, http://arbitraz.laszczuk.pl/_adr/84/Rozstrzyganie_przez_sad_arbitrazowy_sporow_z_zakresu_zorganizowanego_obrotu_papierami_wartosciowymi.pdf.

8. Sójka Tomasz, Ph.D. Rozstrzyganie przez sąd arbitrażowy sporów z zakresu zorganizowanego obrotu papierami wartościowymi. Kwartalnik ADR, nr 2(6)/2009, s. 57, http://arbitraz.laszczuk.pl/_adr/84/Rozstrzyganie_przez_sad_arbitrazowy_sporow_z_zakresu_zorganizowanego_obrotu_papierami_wartosciowymi.pdf.

9. Sójka Tomasz, Ph.D. Rozstrzyganie przez sąd arbitrażowy sporów z zakresu zorganizowanego obrotu papierami wartościowymi, Kwartalnik ADR, nr 2(6)/2009, s. 58, http://arbitraz.laszczuk.pl/_adr/84/Rozstrzyganie_przez_sad_arbitrazowy_sporow_z_zakresu_zorganizowanego_obrotu_papierami_wartosciowymi.pdf.

10. See e.g. http://www.forbes.com/2009/06/29/lipner-mandatory-arbitration-intelligent-investing-consumer-choice.html

The current and potential use of arbitration clauses under the Polish securities law

In its present shape, the Polish securities market has been in existence only for slightly more than 20 years; however, it should be emphasized that during that period, the Warsaw Stock Exchange earned a strong position among the stock exchanges in Central and Eastern Europe, although, despite its impressive development (mostly as regards the companies listed), its market capitalization can still hardly be compared with that of the largest European stock exchanges or the American NYSE.

However, the Polish legal system forms part of the civil law system of continental Europe, and the financial system in place in Poland is based mostly on the banking system. Such a state of affairs affects also the use of arbitration clauses in the Polish legal system.

The manner in which relations between entities, in terms of their mutual rights and obligations, are regulated does not appear to raise any controversies. When assessing the potential effectiveness of arbitration clause application, it should be noted that, as regards the relations holding between an investor and a brokerage house, incorporation of an arbitration clause into the contract they execute is effective, even if as a result of the principle of freedom of contract and shaping legal relations between parties, as stipulated under Polish law (Article 3531 of the Civil Code[11]).

11. Act of April 23, 1964 – Civil Code (Dz. U. [Journal of Laws] of 1964 No. 16, Item 93 as amended)

The situation is similar where it is the brokerage house and the market participant to whom the former renders its services that provide for resolution of disputes relating to the validity of the contract between them by reference to an arbitration clause, i.e. for instance, in the case of (i) a placement agreement; (ii) a consulting contract in connection with IPO.

However, it should be admitted that the use of arbitration clauses is not widespread under the Polish securities law although obligatory to some extent[12]. Both Warsaw Stock Exchange and the Polish Financial Supervision Authority have their own courts of arbitration to resolve disputes of this type, such disputes are not very common.

Furthermore, to make the presented analysis complete, it should be pointed out that prospective investors are not consumers within the meaning of the provisions of Polish law, and it is in relations with consumers that arbitration clauses are very restricted[13]. Consumers as natural persons executing the legal acts not directly connected with its business or professional activity are entities which are highly

12. Examples of obligatory arbitration clauses include the arbitration clause to be incorporated into an agreement executed between an issuer and the Central Securities Depository of Poland (Krajowy Depozyt Papierów Wartościowych S.A.), where the issuer intends to have its shares registered with the Central Securities Depository of Poland. One of the enclosures to an application for registration of shares is then a statement by the issuer to the effect that an arbitration clause specifying the Court of Arbitration at the Central Securities Depository of Poland is in place.

13. Budniak Aleksandra, "Forma zapisu na sąd polubowny w świetle polskiego i niemieckiego postępowania cywilnego – zagadnienia prawno porównawcze, XI. Zapis na sąd polubowny z udziałem konsumenta". Kwartalnik ADR, Nr 4 (8)/2009, s. 47 – 48, http://arbitraz.laszczuk.pl/_adr/103/Forma_zapisu_na_sad_polubowny_w_swietle_polskiego_i_niemieckiego_postepowania_cywilnego_-_zagadnienia_prawnoporownawcze.pdf.

protected in the business trading due to the provision of the article 3851 of the Civil Code[14]. Hence, while preparing the arbitration clauses in the agreements, in a situation in which the second party of such agreement shall be the consumer, certain analysis has to be concluded in order to assess whether such a clause will be a clause binding and not abusive on the basis of the article 3851 of the Civil Code[15]. The negative outcome of such analysis brings on that an arbitration clause shall not be binding for a consumer.

In my opinion, a difficulty arises where the purpose of an arbitration clause is to provide for resolution of disputes the object of which falls within the scope of powers vested in the Polish regulator, i.e. the Polish Financial Supervision Authority. It is difficult to imagine that an arbitration clause could serve as grounds for resolution of a price issue found e.g. in a tender offer to subscribe for sale of shares, announced on the public market[16]. The issue of whether or not the offered price is in compliance with the provisions of the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading, and Public Companies (the "Act on Public Offering")[17] is to be decided exclusively by the Polish Financial Supervision Authority and is not within the jurisdiction of any other authority. Moreover, it seems that even if such a clause were in place, it would be unenforceable, as no court of arbitration may interfere in any way in the scope of powers vested in the Polish Financial Supervision Authority.

A similar situation is to be found in the case of resolution of disputes involving third party (civil) liability in connection with the accuracy and reliability of information disclosed in a document based on which securities of a given company will be introduced into public trading. The source of the obligation to act in compliance with the law is, in this case, the Act on Public Offering, and the relevant provision has the nature of substantive law. Therefore, it appears that it would not be possible to have such third party (civil) liability regulated through arbitration clauses[18].

Thus, it can be concluded that, as regards securities law, so long as a given institution does not have a substantive law source in a statute and does not fall within the scope of powers vested in the Polish Financial Supervision Authority, the use of arbitration clauses is possible and even obligatory at times.

However, controversies arise in connection with a different aspect of general application of arbitration clauses in the public market. In the Polish legal system, the arbitration clause implies certain difficulties, e.g. in respect of its compliance with the requirements specified in the Code of Civil Procedure[19]. As a consequence of the fact that an arbitral court judgment does not originate with a common court, such court needs to conduct special proceedings as a result of which the arbitral court judgment will be made equal to a common court's judgment and simultaneously the enforcement clause will be appended to such an arbitration court judgment. Under such proceedings, a common court may also refuse to enforce an arbitral court judgment if it finds that the dispute is not arbitrable or that enforcement of the judgment would be in conflict with the fundamental principles of the Polish legal order (the public policy clause)[20]. Such an enforceability procedure in relation to the common court judgment is not required, the judgment of common court is strictly binding for the common court. In the abovementioned additional procedure, the common court assesses only whether such a judgment meets the formal criteria, common court is not authorized to assess the merits of the judgment. But the fact is that the situations in which the common court in the enforcement proceedings refuses to append the enforcement clause to the arbitration court judgment happen very rarely, hence such a risk shall not be treated as a substantial risk.

It shall be pointed out that such a situation shall be also observed in the most of the European jurisdictions, including these jurisdictions in which arbitration is much more widespread. It cannot taken into account though that such an authorization of a court reduces the efficiency of arbitration proceedings in comparison to the common courts.

Summary and conclusions

Under the Polish securities law, arbitration clauses are to a large extent admissible.

An analysis of the above statements and observations suggests that, perhaps, amendments to the Polish securities law should be proposed, not so much to restrict the scope of powers vested in the supervision authority as to let public market participants decide whether they wish to have disputes between them (inter partes) resolved through arbitration or submitted to the Polish Financial Supervision Authority for its exclusive decision. It seems that this would be the efficient solution, given the fact that arbitration itself is definitely an efficient procedure that has an accelerating impact on resolving every dispute.

However, it should be pointed out that as regards e.g. disputes resulting from the tender offer procedure, the solution in force at present seems to be the optimal one. Taking into account the issue of arbitration cost-effectiveness, the powers vested in the Polish Financial Supervision Authority in respect of disputes appear to be appropriate, also in the context of investor protection.

To sum up, it can be concluded that arbitration should be used to resolve disputes

14. Act of April 23, 1964 – Civil Code (Dz. U. [Journal of Laws] of 1964 No. 16, Item 93 as amended).

15.Act of April 23, 1964 – Civil Code (Dz. U. [Journal of Laws] of 1964 No. 16, Item 93 as amended).

16. The tender offer procedure is provided for in Articles 72-91 of the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading, and Public Companies.

17. Dz. U. [Journal of Laws] of 2009 No. 185.

18. See Dr. Tomasz Sójka, „Rozstrzyganie przez sąd arbitrażowy sporów z zakresu zorganizowanego obrotu papierami wartościowymi". Dr Tomasz Sójka, Kwartalnik ADR, nr 2(6)/2009, s. 62 – 63, http://arbitraz.laszczuk.pl/_adr/84/Rozstrzyganie_przez_sad_arbitrazowy_sporow_z_zakresu_zorganizowanego_obrotu_papierami_wartosciowymi.pdf.

19. Aleksandra Budniak, „Forma zapisu na sąd polubowny w świetle polskiego i niemieckiego postępowania cywilnego – zagadnienia prawno porównawcze Aleksandra Budniak V. Klauzula arbitrażowa przez odesłanie prawno porównawcze", Kwartalnik ADR, Nr 4 (8)/2009, s. 25 – 26, http://arbitraz.laszczuk.pl/_adr/103/Forma_zapisu_na_sad_polubowny_w_swietle_polskiego_i_niemieckiego_postepowania_cywilnego_-_zagadnienia_prawnoporownawcze.pdf.

20. Art. 1214 of Polish Code of Civil Procedure (Journal of Laws no. 43 pos. 296 as amended).

arising in the public market but, in order to make trading secure, this should be done while allowing for the specific and restrictive nature of the public market[21].

21 *I would like to thank Paweł Krzeski, a fourth-year student of law at the University of Warsaw, for his help in connection with this article preparation.*

Class Arbitration

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Introduction

Class arbitration is a dispute resolution method originating in the U.S., which adapts the procedural solutions of class action to the needs of arbitration proceedings. As arbitration provides an alternative to litigation,[1] the U.S. case law and legal literature faced a demanding task of handling the difficulties resulting from the fact that class arbitration clearly blurs the borderline between the model arbitration proceeding and the traditionally perceived class action suit.[2] There is no denying that the issue of seeking class claim satisfaction through arbitration raises numerous controversies in the U.S.[3]

Typically, arbitration is considered a procedure used to efficiently resolve individual disputes,[4] whereas class action – being an archetypal group action – traditionally brings to mind lengthy proceedings which combine in a complex manner hundreds or thousands of individual claims to be considered jointly.[5] From this perspective, class arbitration seems to be a perversion of the traditional concept of arbitration. Class arbitration sounds like an oxymoron. However, despite these apparently contradicting features, the class arbitration procedure is widely used in the U.S. In the period from 2003 to October 2013, the American Arbitration Association (AAA) administered 352 class arbitration cases.[6]

Class arbitration has its roots in the American practice of dispute resolution in the sense that it draws upon the procedural solutions developed within the framework of American common law and typical of that law. However, the interest in class arbitration transcends the U.S. borders.

Mechanisms for asserting claims on a class basis are also being developed in European jurisdictions, both at the level of the European Union (EU) and its Member States. In 2009, the Deutsche Institution für Schiedsgerichtsbarkeit

1. George A. Bermann, The "Gateway" Problem in International Arbitration, 37 Yale Journal of International Law 1, 1 (2012).

2. On difficulties with classification of class arbitration see S.I. Strong, Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles, 17 Harvard Negotiation Law Review 201 (2012).

3. See Gary Born & Claudio Salas, The United States Supreme Court and Class Arbitration: A Tragedy of Errors, 2012 Journal of Dispute Resolution 21 (2012); William W. Park, The Politics of Class Action: Jurisdiction, Fairness and Vindication of Rights. A Comment on Stolt-Nielsen SA v AnimalFeeds Intl Corp and AT&T Mobility LLC v Concepcion, [in:] The Practice of Arbitration: Essays in Honour of Hans van Houte 169 (Patrick Wautelet, Thalia Kruger & Govert Coppens eds., 2012).

4. Gary Born, International Commercial Arbitration 252 (2009); Nigel Blackaby, Constantine Partasides, Alan Redfern & J. Martin Hunter, Redfern and Hunter on International Arbitration 1 (2009).

5. Manual for Complex Litigation, Fourth §10.1 (Federal Judicial Center, 2004); American Law Institute, Principles of the Law of Aggregate Litigation §1 (2010).

6. American Arbitration Association, Class Arbitration Case Docket, available at <http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket?_afrLoop=415794185525297&_afrWindowMode=0&_afrWindowId=ky19xujik_166#%40%3F_afrWindowId%3Dky19xujik_166%26_afrLoop%3D415794185525297%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dky19xujik_211>.

(DIS), a German arbitration institution, published rules governing resolution of corporate law disputes, which provide for a class procedure in disputes requiring a single decision binding upon the company and all its shareholders.[7] The DIS Rules were developed soon after the German Federal Court of Justice (Bundesgerichsthof) had acknowledged arbitrability of shareholders disputes in April 2009.[8] It is worth noting at this point that not all institutions are in favor of dispute resolution on a class basis. The International Chamber of Commerce (ICC) published in 2005 its policy statement in which it disapproved of class action, concluding that its adverse impact on enterprises and consumers outweighed its benefits to the society.[9]

At the EU level work on legal mechanisms for handling class claim procedures has recently gained momentum.[10] In June 2013, the European Commission (Commission) issued yet another communication[11] and recommendation[12] on collective redress, as well as a proposal for a directive on private enforcement of the competition rules.[13] In its public consultation document of 2011, i.e., in the document in which the Commission announced transition from the sectoral to the horizontal approach towards collective redress, emphasis was placed on the "consensual" mechanisms of class procedures, including arbitration and mediation. According to the Commission such mechanisms supplement the judicial system and frequently allow the parties to have the dispute between them resolved in a more time- and cost-efficient manner.[14]

7. DIS-Supplementary Rules for Corporate Law Disputes 09 (SRCoLD); German title: DIS-Ergänzende Regeln für gesellschaftsrechtliche Streitigkeiten 09 (ERGeS)). The Rules are available at <http://www.dis-arb.de/en/16/rules/dis-supplementary-rules-for-corporate-law-disputes-09-srcold-id15>. For a more detailed discussion of the DIS Rules and their comparison with the AAA Rules for Class Arbitration see S.I. Strong, Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?, 29 ASA Bulletin 145 (2011).

8. S v. M., II ZR 255/08, April 6, 2009.

9. Class Action Litigation, Document no. 460/585 of December 1, 2005, available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2005/Class-action-litigation/>.

10. Lukasz Gorywoda, The Emerging EU Legal Regime for Collective Redress: Institutional Dimension and Its Main Features, [in:] Cross-Border Class Actions: The European Way (Arnaud Nuyts & Nikitas E. Hatzimihail eds., 2013). For a discussion of the EU policy on collective redress, including the concept of a collective interest, see also Marek Safjan, Lukasz Gorywoda & Agnieszka Janczuk, Taking the Collective Interests of Consumers Seriously: A View from Poland, [in:] New Frontiers of Consumer Protection (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009).

11. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final (Strasbourg, June 11, 2013).

12. Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, C(2013) 3539/3 (Strasbourg, June 11, 2013).

13. Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, COM(2013) 404 final (Strasbourg June 11, 2013).

14. Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173 final, (Brussels, February 4, 2011), para. 19, at 8. An inquiry into whether or not class arbitration actually has consensual nature, both from the claimant's and the respondent's perspective, exceeds the scope of this article. In a recently adopted Directive 2013/11/EU on alternative dispute resolution for consumer disputes the EU legislature underlined that "[t]his Directive should be without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. Comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures." Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165), item 27 of the Preamble.

Completing this review, one should also note that the class procedure has also affected investment arbitration. In 2011, an ICSID tribunal decided in Abaclat v. Argentine Republic that a state's consent to the jurisdiction of the International Centre for Settlement of Investment Disputes included also its consent to claims being considered on a class basis.[15]

Understanding how issues arising in the course of class arbitrations are dealt with in the American case law will be helpful to users of the arbitral process from outside the U.S. Therefore, it is worth presenting development and the present status of this dispute resolution mechanism, and pointing out the questions that arise in practice.

An "outburst" of class arbitration in the U.S.

Class arbitration as a new mechanism employed in the U.S. practice of dispute resolution

Class arbitration is a mechanism employed most frequently to resolve domestic disputes within the U.S. Although it has been used since the 1980s, for many years – until the Bazzle case of 2003 discussed below – class arbitration was considered a "mythological two-headed monster," which was a court proceeding on the one hand and an arbitration proceeding on the other, and only few people had a chance to come across it.[16] This is in contrast to the class action which has an established position with the American civil law procedure. The class action requirements are governed by Rule 23 of the Federal Rules of Civil Procedure which was introduced in 1938 and revised to receive its present wording in 1966.[17] Rule 23 regulates the class action at the federal level and also serves as a model for approximately two-thirds of class action regulations at the state level.[18]

What contributed to class arbitration development was the business practice of incorporating an arbitration clause into standard-form contracts in order to avoid the risk of class action. Businesses using such contracts hoped that, as a result of the requirement to resolve disputes through individual arbitration – which involved costs often exceeding the value of awarded damages – the arbitration clause incorporated into the standard-form contract would discourage potential claimants from asserting their claims.[19] However, courts and arbitration tribunals gradually began to regard this practice as an abuse, and, in consequence, they began referring parties to class arbitration more and more frequently.[20] This is how the class procedure entered the field of arbitration.

15. Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5 (August 4, 2011), decision on jurisdiction. The dispute involved 60 thousand Italian bondholders of Argentine bonds. For more information on this case see S.I. Strong, Mass Procedures as a Form of "Regulatory Arbitration" – Abaclat v. Argentine Republic and the International Investment Regime, 38 Journal of Corporation Law 259 (2013). See also papers discussing the Abaclat case, published in 27 ICSID Review – Foreign Investment Law Journal (2012).

16. Kelly Thompson Cochran & Eric Mogilnicki, Current Issues in Consumer Arbitration, 60 Business Lawyer 785, 791 (2005).

17. Rule 23 was also amended in 1998 and 2003 but this exceeds the scope of this article.

18. McCarthy Tétrault (ed.), Defending Class Actions in Canada 5 (2007).

19 S.I. Strong, From Class to Collective: The De-Americanization of Class Arbitration, 26 Arbitration International 493, 497 (2010).

20 S.I. Strong, op. cit., footnote 19.

Nowadays, disputes resolved in class arbitration result mostly from labor law issues, as well as financial, insurance, telecommunications and health-care services. However, application of this dispute resolution mechanism is not limited to the above fields and, potentially, class arbitration may be employed to resolve any dispute. As is the case with class action, claims decided in class arbitration arise on various grounds. It should be pointed out, however, that class arbitration is not really used to pursue tort claims because, for obvious reasons, a contractual relation rarely holds between the parties to disputes of such type. As there is no arbitration agreement in place between the parties when damage occurs,[21] tort claims are not, as a rule, considered in class arbitration. Because of a large number of claimant members, an ex post arbitration agreement, i.e., one concluded after the occurrence of the event giving rise to tort liability, is hardly possible, as transaction costs of contracting with all injured parties is too high.

It should be also mentioned that in the U.S. disputes resolved in class arbitration do not involve consumer issues only. Two cases of crucial importance to class arbitration development, i.e., Stolt-Nielsen[22] and AmEx III,[23] resulted from business-to-business dealings.

21. S.I. Strong, Resolving Mass Legal Disputes through Class Arbitration: The United States and Canada Compared, 37 North Carolina Journal of International Law and Commercial Regulation 921, 935 (2012).

22. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758 (2010), see below.

23. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013), see below.

The ruling in the Bazzle case: the green light to class arbitration

As mentioned above, class arbitration has been employed in the U.S. practice of dispute resolution since the 1980s,[24] but it was not until the Supreme Court of the United States made its ruling of 2003 that it started being used more widely. The direct stimulus to class arbitration development was the case Green Tree Financial Corp. v. Bazzle.[25] It was in this case that the Supreme Court of the United States opened the door to this form of arbitration, deciding that the class procedure was available to parties even if not directly provided for in the arbitration clause. In other words, the fact that an arbitration clause is silent about class arbitration does not in itself mean that this type of dispute resolution procedure was excluded by the parties. The case law before Bazzle was saying the opposite thing, i.e., as a rule, class arbitration was out of the question unless parties incorporated a relevant provision to that effect into the arbitration clause. However, as a result of Bazzle, a clause which is silent about permissibility of the class procedure is to be interpreted by an arbitration tribunal which, in consequence, decides whether or not a dispute may be resolved with the use of this procedure.

Encouraged by the ruling in Bazzle, the major U.S. arbitration institutions came up with rules governing class arbitration. AAA published its rules in 2003,[26] and JAMS – an institution with its seat in California, providing alternative dispute resolution services – offered its rules to parties interested in having their disputes resolved in class arbitration in 2005.[27]

24. California is a forerunner as far as application of this dispute resolution mechanism is concerned, see Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982).

25. Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).

A silent clause does not preclude class arbitration

The disputed issue in Bazzle was whether the parties had agreed to exclude class arbitration from their relationship. The dispute arose as follows. Green Tree, a financial institution, entered into loan agreements with borrowers, using to that end standard-form contracts under which it granted home improvement loans to borrowers represented in the dispute by the Bazzle spouses and mobile home loans to borrowers represented in the dispute by Daniel Lackey. The contracts contained an arbitration clause providing that any disputes "arising from or relating to this contract or the relationships which result from this contract […] shall be resolved by binding arbitration by one arbitrator selected by [Green Tree] with consent of you."[28]

The dispute thus involved two groups of consumers who initially brought actions in a state court claiming that they had not received from Green Tree the legally required form that would have told them that they had had a right to name their own lawyers and insurance agents. The consumers brought two separate legal actions in state courts of South Carolina, arguing that Green Tree failed to comply with the information requirement under South Caroline banking law, and seeking damages in connection therewith. Green Tree sought to stay the court proceedings and compel arbitration, as required under the contracts.

Before granting the Green Tree's motion to compel arbitration, the South Carolina state court had certified class action in respect of one of the cases. In its motion to compel arbitration, Green Tree also requested that the class procedure be prohibited, arguing that by being silent on the issue of class arbitration permissibility, the arbitration clauses actually precluded a dispute from being resolved on a class basis.

Despite Green Tree's objections, in the course of the arbitration proceeding the arbitrator considered the first dispute on a class basis, as certified by the state court, and, in addition, also certified a class in respect of the other case. Having heard the cases, the arbitrator awarded the total amount of 19 million USD in damages to both claimant classes. As a result of Green Tree's appeal, the cases reached the South Carolina Supreme Court[29] which consolidated the proceedings and upheld the arbitral awards, having not identified any reasons why arbitration could not be held on a class basis either in the standard-form contracts or in the U.S. Federal Arbitration Act (FAA).[30]

26. AAA Supplementary Rules for Class Arbitrations, available at <http://www.adr.org/aaa/ShowPDF;jsessionid=Q38zRMZQvJFBzn295h3vWxwZDyxRNyqnmT2dlynW2SmlyPCLGRpLI644581746?url=/cs/groups/ commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf>.

27. JAMS Class Action Procedures, available at <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf> (2009 version).

28. Green Tree Financial Corp. v. Bazzle, op. cit., footnote 25.

29. As mentioned above, the proceedings were conducted in this jurisdiction.

30. Federal Arbitration Act, 9 U.S.C. § 1 et seq. (1925).

The proper forum, according to Bazzle, to decide on permissibility of class arbitration

Green Tree filed another appeal with the Supreme Court of the United States which granted certiorari and vacated the judgment of the South Carolina Supreme Court. The threshold question in the proceeding at the federal level was whether the contract between the financial institution and the consumers prohibited class arbitrations. Green Tree argued that the disputed contracts prohibited class arbitration because, according to their wording, they referred to arbitration "all disputes arising between [Green Tree] and individual [borrowers]" who had signed the arbitration clause. As pointed out above, Green Tree claimed that by being silent on the issue of class arbitration permissibility, the arbitration clauses actually precluded the possibility for a dispute to be resolved on a class basis. The South Carolina state court in which the consumers had initially brought an action did not accept these arguments. Deciding that the contracts in question were silent on the issue of permissibility of class arbitration, it concluded that they indirectly permitted this dispute resolution procedure.

The Supreme Court of the United States did not address the issue of whether or not the arbitration clause had been construed correctly, but held that the South Carolina state court had made a mistake when undertaking to interpret the contracts challenged by the Bazzles and Lackey. Given the practice then established in the U.S. to refer issues of arbitration clause construction to arbitrators, the Supreme Court of the United States decided that a dispute as to the objective scope of the arbitration clause used by Green Tree, i.e., as to what kind of arbitration proceeding the parties agreed to, should be resolved by the arbitrator. As this case involved an actual dispute concerning the meaning of a contract and the intentions of the parties relating to permissibility of class arbitration, the Supreme Court of the United States assumed that the controversies around the scope of the arbitration clause in terms of its object should be resolved by the arbitrator, and not by a court. It seems that the reasons behind the U.S. Supreme Court's decision were as follows. The Court was not certain whether in the Bazzle and Lackey cases the arbitrator had made an independent assessment of the provisions of the arbitration clause or had been guided by the prior decision of the court which had construed the contract as permitting the class procedure before referring the dispute to arbitration.[31] Therefore, the Supreme Court of the United States concluded that the case should be remanded to the arbitrator for a de novo interpretation of the disputed arbitration clause.

Inconsistent interpretations of silence in arbitration clauses

Silence of an arbitration clause on the issue of class proceedings can be interpreted in two ways. First, such silence can be construed to mean that the class procedure is not precluded for a given arbitration proceeding. In other words, such silence is tantamount to consent to class arbitration. Supporters of the other model of interpretation argue that the fact that the remaining provisions of the agreement indicate individual relationship between the respondent and the claimant reflects the parties' intention to limit also the arbitration clause to govern resolution of bilateral disputes only. This is based on the assumption that if the agreement containing an arbitration clause governs the relationships between the respondent and the individual claimants, it determines as well the procedure to be followed when resolving a dispute between them. The case law of both U.S. courts and arbitration tribunals differs over the issue which model of interpretation is the correct one.[32]

In consequence, until the 2010 ruling made in the Stolt-Nielsen[33] case – where the Supreme Court of the United States held that arbitration clause silent on the issue of class proceedings had to be construed as not authorizing class arbitrations – courts and arbitration tribunals in the U.S. used to interpret arbitration clauses silent about class arbitration in an inconsistent manner.

To avoid the difficulties referred to above, a practice was developed of incorporating a class treatment waiver into the arbitration clause. This is an additional provision which prohibits class procedures directly and expressly. The class treatment waiver was conceived to include both the class action waiver and the class arbitration waiver.

Judicial response to class treatment waivers

Courts faced a difficult task of dealing with class treatment waivers incorporated into arbitration clauses. Given the fundamental importance in the U.S. legal system of the right to assert claims collectively, it is not easy to answer the question how class treatment waivers should be handled. The purpose of class actions is not only to seek damages but also to serve as an instrument which – as a result of the system of judicial precedent existing under common law – is used to change the law.[34]

As discussed above, class arbitration is a relatively new method of dispute resolution. The stance taken on class arbitration by courts is still evolving. On the one hand, courts which affirm the validity of class treatment waivers are of the opinion that the consensual nature of arbitration translates into the right of parties to an arbitration agreement to restrict the scope of arbitration proceedings by prohibiting class arbitration.[35] On the other hand, adjudicating panels challenging the validity of class

31. Philip Allen Lacovara, Class Action Arbitrations – the Challenge for the Business Community, 24 Arbitration International 541, 542 (2008).

32. For a more detailed discussion see Jan Krzysztof Dunin-Wasowicz, Collective Redress in International Arbitration: An American Idea, a European Concept? 22 American Review of International Arbitration. 285 (2011).

33. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., op. cit., footnote 22. As in Bazzle, the threshold question here was also whether an arbitration clause which is silent on the issue of class arbitration permitted this type of dispute resolution procedure. As noted above, in Bazzle, the Supreme Court of the United States concluded that the decision as to whether or not class arbitration was permitted under an arbitration clause which was silent on this issue lay with the arbitration tribunal. However, in the Stolt-Nielsen case, the Supreme Court of the United States changed its mind, deciding that (1) a court could determine, in the course of a proceeding for setting aside an arbitral award, whether the arbitration clause provided for class arbitration; and that (2) an arbitration clause which was silent on the issue of class arbitration should be construed as precluding this type of dispute resolution procedure.

34. This mechanism is called regulation through litigation, see, e.g., W. Kip Viscusi (ed.), Regulation through Litigation (2002).

35. Philip Allen Lacovara, op. cit., footnote 31, 550.

treatment waivers perceive such provisions as unconscionable. According to this view, the unconscionability involves the unilateral imposition of the requirement to submit to arbitration individual disputes, even minor ones, which actually renders assertion of a large number of claims impossible because the cost of an arbitration proceeding is many times higher than the value of the claim.[36]

The majority of consumer contracts concluded in the U.S. on the basis of standard-form contracts, relating e.g. to financial, telecommunications or cable TV services, contain clauses precluding assertion of claims on a class basis. If the amount charged to an individual subscriber in violation of the contract is low, e.g. 10 USD, the subscriber can hardly be expected to assert a claim on a bilateral basis. However, should individual subscribers form a group, the amount of their claims might turn out to total even 39,000 USD. Such a value of claim, being in excess of the cost of the proceeding, would obviously make institution of a proceeding reasonable.[37]

The decision as to whether the inability of a plaintiff to assert a claim on a class basis should serve as grounds for concluding that she will not be able to assert such claim at all – due to the cost of a bilateral procedure – depends on the evidence presented by the plaintiff. Therefore, the crucial factor is whether the plaintiff sufficiently proved that the costs she would have to incur if she asserted her claim on a bilateral basis would be of "prohibitive" nature, i.e. that the costs would be disproportionately high as compared with the value of the damage suffered or the claim asserted.[38]

It is worth mentioning here the arguments raised in Shroyer v. New Cingular Wireless Services, Inc.[39] by Justice Reinhardt, who pointed out the "pro-arbitration" ratio legis underlying FAA. According to an established view, the purpose of FAA is to promote the practice of having disputes resolved in arbitration.[40] In Justice Reinhardt's opinion, a holding that class arbitration is in conflict with FAA would in consequence frustrate the fundamental purpose of FAA, i.e. promotion of arbitration, because as a result of such interpretation fewer consumers would decide to use this method of dispute resolution.[41] On the other hand, some state courts argue that, given the clearly "pro-arbitration" policy pursued at the federal level and the concurrent lack of a corresponding policy to promote class procedures, contractual class treatment waivers are neither unconscionable nor in conflict with the law.[42]

Another reason why courts hold class treatment waivers as invalid is of a normative nature and results from the public policy pursued by a given state. A number of states regulate specific issues, such as employment, through statutes and do not leave them to be resolved through common law only. It is then decided that a party may not contractually waive e.g. her right to remuneration for overtime work, as this is a statutory right. In such a case, an arbitration clause incorporated into an employment contract and compelling the employee to assert her claims in bilateral arbitration only will most likely be held invalid because it prevents the employee from asserting effectively her statutory right. In Gentry v. Superior Court of Los Angeles County[43], the Supreme Court of California decided that a contractual provision modifying the procedure for assertion of claims resulting from statutory rights might be invalidated as contrary to the public policy pursued by the state. The Court noted that employees might abandon asserting their claims for fear of an adverse response from employers or simply because they were not aware of their rights. The class proceeding mechanism is a stimulus to plaintiffs who would otherwise be likely to abandon asserting their claims on a bilateral basis.[44]

The consequence of waiver invalidation is up to the court

The consequence of invalidation by a court of a class arbitration waiver contained in an arbitration clause is an issue of major practical significance. According to some U.S. courts, such a provision is closely related to the provision compelling arbitration, hence the entire arbitration clause should be affected by invalidity. In consequence, the plaintiff will be able to assert her claims in court, also on a class basis. Other courts are of the opinion that invalidity of a class arbitration waiver does not result in invalidity of the entire arbitration clause, but precludes only the possibility of asserting claims in class arbitration, as a result of which the respondent is compelled to individual arbitration. Owing to the absence of any established case law in this respect, the wording of the arbitration clause disputed in a given case is of considerable importance.[45]

The controversies surrounding class arbitration in the U.S.

Further development of class arbitration in the U.S. was upset by the ruling of the Supreme Court of the United States made in the well-known case of AmEx III[46]. In the AmEx III case (called this way due to its procedural history), the arbitration clause incorporated into contracts between a credit card issuer (i.e. American Express) and merchants contained a provision under which the merchants waived their right to assert claims in class arbitration. The merchants brought a class action in a district court in New York, claiming infringement by American Express of the antitrust laws. In response, American Express requested institution of bilateral arbitration proceedings. The district court granted the request of American Express. However, the U.S. Court of Appeals for the Second Circuit reversed the decision

36. Ibidem.

37. This is what the value of individual claims and the total value of such claims were in Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. 2007). The court held invalid the clause incorporated into the TV service contract and providing for arbitration while concurrently prohibiting class arbitration; see zob. Philip Allen Lacovara, op. cit., footnote 31, 551.

38. See, e.g., the Maryland case Doyle v. Finance America, LLC., 918 A.2d 1266 (Md. Ct. Spec. App. 2007).

39. Shroyer v. New Cingular Wireless Servicess, Inc., 498 F.3d 976 (9th Cir. No. 06-55694, August 17, 2007).

40. See, e.g., George A. Bermann, Transnational Litigation in a Nutshell 369 (2003).

41. See Philip Allen Lacovara, op. cit., footnote 31, 553.

42. E.g. the Appellate Division of the Supreme Court of the State of New York in Ranieri v. Bell Atlantic Mobile, 759 N.Y.S.2d 448 (App. Div. 1st Dep't 2003).

43. Gentry v. Superior Court of Los Angeles County, 42 Cal. 4th 443 (S141502, August 30, 2007).

44. See more Philip Allen Lacovara, op. cit., footnote 31, 552.

45. See Hans Smit, Class Actions and their Waiver in Arbitration, 15 American Review of International Arbitration 199 (2004).

46. Am. Express Co. v. Italian Colors Rest., op. cit., footnote 23.

referring the parties to bilateral arbitration, holding that the cost of a bilateral arbitration proceeding would exceed the value of damages, if awarded.

The case reached the Supreme Court of the United States which vacated the judgment rendered by the U.S. Court of Appeals as inconsistent with FAA and concluded that the class arbitration waiver was valid and fully enforceable. The merchants argued that the rule of effective vindication of statutory rights, being an exception to FAA, applied in this case. According to the effective vindication doctrine, the disputed arbitration clause would be invalid because it prohibited the merchants from asserting their statutory rights under the Sherman Act.[47] In order to prove violation of the antitrust laws by American Express, the plaintiffs would have to present complex economic testimony, the cost of which would exceed the value of damages awarded to each of them individually. In consequence, assertion of claims in connection with violation of the antitrust laws would be actually possible only if the plaintiffs joined forces – in this case, in the form of class arbitration.

The Supreme Court of the United States rejected the above argument. The decision was adopted by a vote of 5 to 3.[48] The author of the majority opinion, Justice Antonin Scalia, concluded that the rule of effective vindication of statutory rights might apply exclusively to arbitration filing and administration fees if their amount make access to the forum impracticable. According to Scalia, this was not the case here. In his opinion, the fact that the expense involved in proving the violation of law is not economically feasible does not constitute the elimination of the right to pursue a claim for damages.

In practice, Justice Scalia upheld the validity of an earlier ruling of 2011 in AT&T v. Concepcion,[49] in which the Supreme Court of the United States deemed valid class treatment waivers under which consumers waived their right to pursue on a class basis claims in connection with violation of contracts on telecommunications services.

AmEx III attracted considerable attention because it involved an element not present in earlier cases. The disputed issue was not only contractual rights but also statutory rights, which makes a difference in the U.S. legal system, mainly from the perspective of the strength and the method of protecting a given right. The ruling of the Supreme Court of the United States means that it is irrelevant for the purposes of deciding as to the validity of a class treatment waiver (i.e. a class action or class arbitration waiver) whether such waiver refers to rights conferred under statute or otherwise (under common law). In brief, a class treatment waiver incorporated into an arbitration clause is effective even if it actually prevents the other party from pursuing statutory remedies. Such party is indeed prevented from asserting a claim because the cost of a proceeding is substantially higher than the value of the asserted claim. This is in conflict with the very essence of Rule 23 of the Federal Rules of Civil Procedure which regulates class actions in the U.S.

Not all Justices of the Supreme Court of the United States share the idea of arbitration put forward by Justice Scalia, according to which class arbitration cannot be reconciled with the "individualistic" nature of arbitration. Justice Elena Kagan, who was in the minority, prepared a very clear dissenting opinion. According to Kagan, "the nutshell version" of AmEx III can be summed up as follows. The owner of a small restaurant (Italian Colors) wished to challenge the contract with American Express after he had discovered that American Express had used its monopoly position to actually force merchants like Italian Colors to accept a form contract violating the antitrust laws (by imposing a tying arrangement). However, the owner of Italian Colors could not do that because the arbitration clause contained in the form contract which he had signed deprived him of the right to assert antitrust claims on a class basis. The arbitration clause contained both a class arbitration and a class action waiver. Justice Kagan concluded that if we considered such a clause to be valid, no case against American Express could be brought even if it had actually had broken the law. In other words, the monopolist will continue to be able to take advantage of its monopoly position through imposing on its business partners form contracts depriving them of the right to assert claims.

Conclusion

Class arbitration sounds like an oxymoron. Traditionally, arbitration is considered a procedure used to effectively resolve individual disputes, whereas class action brings to mind lengthy proceedings which combine in a complex manner hundreds or thousands of individual claims to be considered jointly. However, despite these apparently contradicting features, class arbitration has become a dispute resolution mechanism widely used in the U.S. practice.

AmEx III raises concerns as to the future of class arbitration in the U.S. However, this type of arbitration becomes more and more popular also in other jurisdictions and at the international level. As pointed out above, the European Commission appreciates the significance of "consensual" mechanisms of collective dispute resolution, including arbitration and mediation. The Commission is of the opinion that such mechanisms supplement the judicial system and frequently allow the parties to have the dispute between them resolved in a more time- and cost-efficient manner.[50]

The U.S. practice established so far indicates that the combination of class action and arbitration gives rise to numerous questions requiring further analysis. These are frequently issues of a technical nature which, however, might be potentially crucial to the resolution of a given dispute. One such issue pointed out in this article relates to the question who, i.e. the arbitrator or the judge, should be authorized to decide whether an arbitration clause permits class arbitration. Another issue is the question whether an arbitration clause silent about class arbitration should be deemed to permit or preclude class arbitration. As noted above, U.S. courts are divided on this point.

One of the essential questions – originating in AmEx III – is whether the consensual nature of arbitration should translate into the contractual right to waive class arbitration in

47. 15 U.S.C. §§ 1 et seq. (1890).

48. This proportion of votes (the Supreme Court is a nine-member court) results from the fact that justice Sonia Sotomayor recused herself.

49. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

50. See above text accompanying footnotes 10-14.

connection with claims resulting from statutory rights. This is a question whether a situation in which a class treatment waiver actually renders it impossible to assert material subjective rights (due to a disproportionally high cost of a bilateral proceeding) should not be construed as a limitation of the right of access to court, which is a fundamental right.

Arbitrability of consumer financial disputes between banks and their private clients in selected jurisdictions

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Introduction

Disputes between banks and individual clients seem to require special attention in the years to come and it is crucial to set forth some of the issues and recent developments where arbitration may be possible or not. In this regard the concept of arbitrability is decisive and sets limitations on matters that might be settled by arbitration. Public policy restrictions are defined by every State or any other legal order in accordance with their own economic and social policy. Thus, the concept of arbitrability is relative and not absolute since it varies from one jurisdiction to another. Hence, this analyse will focus on mandatory rules and restrictions applied by three distinctive systems: the European Union, Switzerland and the United States as to draw a line between those consumer disputes in financial matters that may be resolved by arbitration and those that belong exclusively to the domain of the courts.

In the aftermath of the worldwide financial crisis the market has found itself in a more contentious environ than before. For that reason financial and banking institutions tend to appreciate today the benefits of arbitration more often. Still on top of their considerations, while drafting an arbitration clause, is the importance of public policy matters in a particular jurisdiction. This is the fundamental issue.

Courts in each country usually balance the importance of reserving matters of public interest such as human rights or criminal law issues, to the courts against public interest in the encouragement of arbitration in commercial matters. It means that the notion of arbitrability in one jurisdiction does not imply that the dispute is not arbitrable anywhere at all, but simply that it is not arbitrable in that particular jurisdiction.

Arbitrability sometimes refers to as subjective arbitrability (arbitrability ratione personae), which encompasses capacity of a person or entity to enter into an arbitration agreement. It should be distinguished from objective arbitrability (arbitrability ratione materiae) that

relates to the matter in dispute, which may or may not be submitted to arbitration accordingly to the applicable law[1]. Therefore, arbitrability draws a borderline between those disputes that may be resolved by arbitration and those that belong exclusively to the domain of the courts[2]. With regard to consumer types of disputes, such as those discussed in financial matters, they are, as a matter of principle, arbitrable[3]. Nevertheless, they are subject to mandatory requirements and restrictions provided by the European Union (EU) or national regulations.

European Union's approach to consumer disputes in financial matters

In the European Union several provisions restrict or prohibit the arbitrability of certain disputes where a legal relationship involves a party deemed to be economically weak.

There is no doubt that post dispute agreements are valid and can be submitted to arbitration[4]. The problem exists with respect to pre-dispute arbitration agreements. If the consumer wishes to enter into such an agreement, the only choice he or she has is to accept arbitration. Therefore the question that ultimately arises is whether such an imposed choice is valid?

Henceforth, arbitration involving a consumer, meets with significant restrictions embodied in European Union rules prohibiting, to some point, the enforcement of consumer agreements with a pre-dispute arbitration clause.

In the European Union, Council Directive 93/13 on Unfair Terms in Consumer Contracts[5], provides that unfair clauses in consumer contracts do not bind the consumer. The Directive does not prohibit arbitration or affects arbitrability itself, but only prohibits some arbitration clauses in certain circumstances and relates only to pre-dispute clauses[6]. As it is stated in Article 3(1) of the Directive:

"A contractual term which has been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the customer".

Therefore, a notion of "good faith" prevents significant imbalances in the rights and obligations of consumers, however this does not mean that all standard terms are automatically classified as unfair. Some guidance derives from an indicative and non-exhaustive list of terms contained in Article 1(q) of the Annex to the Directive that provides:

"Excluding or hindering the consumer's rights to take legal actions or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions…"

Although the above-mentioned proviso presumes to prohibit the use of pre-dispute arbitration clauses, it is apparent that it relates to the term (i) of the Annex, which deals with those clauses that "irrevocably bind the consumer to terms they had no real opportunity to familiarise themselves with", i.e. hidden terms. Hence, it would be essential to establish that the consent was not defective and the consumer had sufficient opportunity to conclude the agreement with the full consequences of the arbitration clause. Then the consumer ought to be bound by it[7].

Additionally, Article 4(1) of the Directive adds that:

„The unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent".

Although it can be assumed from Article 1(q) of the Annex that a pre-dispute arbitration clause is unfair in particular circumstances and thus, not binding under Article 6(1)[8] of the Directive, a party pursuing to rely on the clause can argue that in the circumstances attending the conclusion of the contract, the clause is fair.

In Oceano v. Rocio Murciano Quintero, the European Court of Justice (the ECJ) applied these provisions to a choice of court clause and stated that:

"Where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier … and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirements of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer"[9].

Although the Oceano case was related to a choice of court clause, there is no reason not to apply it to arbitration clauses, including those related to consumers in financial matters.

1. Alain Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, London, Fourth Edition 2004, p. 137.

2. Bernard Hanotiau, Arbitrability of Financial Disputes in Gabrielle Kaufmann-Kohler and Viviane Fossard (eds), Arbitration in Banking and Financial Matters, ASA Special Series No.2 2003, p. 34.

3. Gabrielle Kaufmann-Kohler, Online Dispute Resolution and its Significance for International Commercial Arbitration, 2005, 693 Global Reflections on International Law, Commerce and Dispute Resolution Liber Amicorum in honour of Robert Briner ICC Publishing 437, p. 444.

4. Gabrielle Kaufmann-Kohler and Thomas Schultz, Online Dispute Resolution, Challenges for Contemporary Justice, Kluwer Law International, The Hague 2004, p. 173.

5. European Council Directive 93/13/EEC of April 15, 1993 on Unfair Terms in Consumer Contracts.

6. Jean Francois Poudret, Sebastien Besson, Stephen Birti and Annette Ponti, Comparative Law of International Arbitration, Sweet & Maxwell, Second Edition, 2007, p. 314.

7. Susan Schiavetta, Does the Internet Occasion New Directions in Consumer Arbitration in the EU?, 2004, 3 Journal of Information Law and Technology, para 2.1.

8. Article 6(1) provides as follows: „Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms".

9. European Court of Justice, Oceano Grupo Editorial SA and Salvat Editores SA v. Rocio Maurciano Quintero, 27 June 2000, Cases C-240/98 to C-244/98, [2000] ECR I 4941.

In Freiburger Kommunalbauten[10], the ECJ was of the view that a disputed clause gave rise to a disadvantage that was detrimental to the consumer but the question whether it causes imbalance under the requirements of Article 3(1) of the Directive was the matter to be decided by the national court. In Claro[11], the ECJ generally followed the line of the Oceano and Freiburger Kommunalbauten cases and emphasized that "the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge" and "such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract"[12].

These decisions show that, even though the system of consumer protection is introduced by the Directive, it is under the discretion of a national court to determine whether a term is unfair[13]. Given the mandatory nature of the Directive, the ECJ cannot, generally evaluate the unfairness of every concrete contract term, since this is the task for a national court.

So far, there is relatively little case law that dealt with the interpretation of the Directive, which may suggest that it did not bring a significant change to contract law of the Member States. Nevertheless, the Directive has been implemented by EU Members but in varying ways. By comparison, in Poland, Article 3853 paragraph 1(23) of Polish Civil Code[14] considers arbitration clauses as abusive and therefore not binding on consumers. The proviso does not allow overriding polish court jurisdiction through arbitration conducted in Poland or abroad.

France adopted an approach where pre-dispute consumer arbitration clauses are invalid in domestic arbitration[15]. As stated by the French Court of Cassation in Meglio v. V2000 and Renault v. V2000[16], pre-dispute consumer arbitration agreements are valid in international contracts, because French consumer protection law concerning jurisdiction does not apply to international situations. The outcome of these cases was questioned in a way that consumers deserve the same protection in international and domestic situations[17].

In the United Kingdom, Section 91(1) of the Arbitration Act[18] extends the application of the Directive by pronouncing unfair any contract term submitted to arbitration (existing and future disputes) insofar "as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purpose of this section". The order[19] mentioned in the proviso fixes the limit at the level of 5 000 £. Hence, in UK arbitration, an agreement concluded with a consumer is considered as unfair and therefore unenforceable if the claim does not exceed the stipulated limit.

The Swedish Arbitration Act[20] goes even further and in Section 6, it bans all pre-disputes arbitration agreements in contracts concerning goods or services supplied in principle for private use.

In Germany, Article 1031(5) of the ZPO[21], requires a special form in consumer contracts. Such an agreement should be a separate document, distinct from the main contract and signed by the consumer personally unless the whole contract is notarised. This is for the purpose of drawing the consumer's attention to consent to arbitration and therefore waiving his/her right to a State court.

The EU Directive 93/13 on Unfair Terms in Consumer Contracts creates partially the European pubic policy that tightens the contractual law of its Member States on one hand but on the other it strengthens fundamental rights of consumers in economic relations.

Given the above mentioned arguments one may not exclude the possibility that courts of the EU Member States under the provisions of the Directive may annul an arbitration award provided that the arbitration agreement is an unfair contract term and therefore void. However, when parties not knowingly and voluntary agreed to arbitration, pre-disputes arbitration clauses should not be deemed as automatically unenforceable[22].

Switzerland's approach to consumer disputes in financial matters

In Switzerland, as far as the consumer is domiciled or a habitual resident, he or she may not waive in advance the forum of his domicile or habitual residence[23]. Although this proviso prohibits jurisdiction clauses, it does not exclude arbitration agreements per se[24]. With relation to domestic matters, "arbitration may relate to any rights of which the parties may freely dispose unless the suit falls within the exclusive jurisdiction of a State authority by virtue of a mandatory provision of the law"[25]. Therefore it might not employ restrictions related to territorial

10. European Court of Justice, Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger and Ulrike Hofstetter, 1 April 2004, Case C-237/02, [2004] ECR I 3403.

11. European Court of Justice, Elisa Maria Mostaza Claro v. Centro Movil Milenium, 26 October 2006, Case C-168/05, [2006] ECR I 10421.

12. Ibidem, para 25.

13. Ibidem, para 27.

14. Polish Civil Code, 23 April 1964.

15. Article 2061 of The French Civil Code allows only for pre-disputes arbitration agreements in context of professional activity, which automatically excludes consumers.

16. Cass. civ. 1re, 21 May 1997, Meglio v. V2000, Rev. cri. dr. internat. privé 1998.87; Cass. civ. 1re, 21 May 1997, Renault v. V2000, Rev. arb. 1997, 1997.537.

17. Gabrielle Kaufmann-Kohler and Thomas Schultz, Online Dispute Resolution, Challenges for Contemporary Justice, Kluwer Law International, The Hague 2004, p. 177.

18. The English Arbitration Act 1996.

19. Order 1999 (SI 1999/2167).

20. The Swedish Arbitration Act (SFS 1999:116), see Section 6 provision: „Where a dispute between a business enterprise and a consumer concerns goods, services, or any other products supplied principally for private use, an arbitration agreement may not be invoked where such was entered into prior to the dispute. However, such agreements shall apply with respect to rental or lease relationships where, through the agreement, a regional rent tribunal or a regional tenancies tribunal is appointed as an arbitral tribunal and the provisions of Chapter 8, section 28 or Chapter 12, section 66 of the Real Estate Code do not prescribe otherwise".

21. The German Code on Civil Procedure (Zivilprozessordnung) 1997.

22. Julia Hörnle, Cross-border Internet Dispute Resolution, Cambridge University Press, London, 2009, p. 183.

23. Article 114(2) of Swiss Federal Statue on Private International Law (PILA) of December 18, 1987.

24. Laurent Lévy, Arbitration of Asset Management Disputes in Gabrielle Kaufmann-Kohler and Viviane Fossard (eds), Arbitration in Banking and Financial Matters, ASA Special Series No.2 2003, p. 103.

25. Article 5 of Swiss Intercantonal Arbitration Convention of March 27, 1969.

jurisdiction but only those that relate to subject-matter jurisdiction[26].

International arbitration matters are settled in Chapter Twelve of PILA and it only applies to "all arbitrations if the seat of the arbitral tribunal is in Switzerland and if at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland"[27]. According to Article 177(1) PILA all disputes involving property may be subject to arbitration. Still the arbitrability of international consumer disputes was questioned given the restriction of Article 114(2) PILA (outside the scope of Chapter 12)[28]. Notwithstanding this argument, Chapter Twelve should be perceived as a self-contained piece of legislation that stands alone quite in accordance with international requirements and the expectation that a modern lex arbitri should be devoid of "local colour"[29]. Chapter Twelve, in particular, grants the so-called "procedural law autonomy", the authority for ordering interim measures, a so-called "conflict of laws autonomy" as well as a "substantive law autonomy"[30].

Moreover, Article 177 (1) of the PILA, which, in the sense of a material rule of conflict of laws, provides on objective arbitrability that "any dispute involving financial interests can be the subject-matter of an arbitration". The effect of this provision is that the parties and the arbitrators are not referred to the lex causae, or to any other national law, in order to determine whether a claim is arbitrable. Consequently, all claims involving financial interests are pursuant to Article 177(1) of the PILA objectively arbitrable (ratione materiae) for any arbitral tribunal having its seat in Switzerland. The term arbitrability is used in a wider sense, as to include the subjective validity (ratione personae) of the arbitration agreement[31]. Therefore, given the above-mentioned arguments we should not exclude international consumer disputes from arbitration seated in Switzerland.[32]

As to the very broad notion of arbitrability under Article 177(1), it certainly includes all rights related to property, personal rights as well as tangible and intangible rights. Hence only non-economic rights would not fall into the scope of the proviso. Additionally, the Swiss Supreme Court in one of its latest decisions (Football Association of Serbia v. M.[33]) clearly stated that all claims of financial nature are arbitrable and additionally emphasized that the issue of arbitrability is as a matter of principle, exclusively governed by Article 177(1) of PILA.

26. Laurent Lévy, Arbitration of Asset Management Disputes in Gabrielle Kaufmann-Kohler and Viviane Fossard (eds), Arbitration in Banking and Financial Matters, ASA Special Series No.2 2003, p. 103.

27. Article 176(1) of Swiss Federal Statue on Private International Law (PILA) of December 18, 1987.

28. „The consumer may not waive in advance the venue at his domicile or place of habitual residence".

29. Marc Blessing, Introduction to Arbitration – Swiss and International Perspectives, 1999, 10 Swiss Commercial Law Series, p. 181.

30. Ibidem.

31. Robert Briner, International Arbitration in Switzerland. An introduction to and a commentary on articles 176- 194 of the Swiss Private International Law Statute, The Hague, 2000, no. 2 on art. 177 PILA.

32. Jean Francois Poudret, Sebastien Besson, Stephen Birti and Annette Ponti, Comparative Law of International Arbitration, Sweet & Maxwell, Second Edition, 2007, p. 314.

33. Football Association of Serbia v. M., Swiss Federal Court Judgment 4A_654/2011 of May 23, 2012.

After the above-mentioned arguments there is no disagreement that all financial types of disputes between banks and their private clients, that involve pecuniary claims, fall into objective arbitrability of Article 177(1) of PILA.

The United States' approach to consumer disputes in financial matters

In the United States the term "arbitrability" goes beyond the answer to the question whether a dispute is capable of being settled by arbitration under the applicable law. In US terminology, arbitrability is often given a broader meaning, which covers the existence and validity of the parties consent to arbitration[34]. The essence of which, is whether the arbitration agreement itself in a contract has been sufficiently attacked as invalid by a respondent such that it would be improper for an arbitral tribunal constituted under that "agreement" to make the initial determination of its validity[35].

As to consumer disputes, the United States are in general in favour to settle them through arbitration. Main arguments that speak for this approach (i.e. consumer financial disputes in securities) are: a distrust of the civil justice system, particularly juries and punitive damages, as well as the fact that consumer disputes decided by arbitrators are expected to be more "reasonable" than juries on liability and damages, and additionally banks will not usually want arbitration of jurisdictional questions[36]. Once a dispute goes before an unqualified jury a financial institution runs the risk, that a member of such jury will be more likely sympathetic to the client, if he/she used to have some issues with this particular financial institution. Furthermore, the juries tend to award punitive damages for amounts over and above the plaintiff's' actual loss. Whereas in arbitration the award rendered is presumed to be more reasonable and in addition, the law of some states, e.g. New York, prohibits arbitrators from giving a claimant anything more than compensation for actual loss[37].

In the United States most important arbitral matters are governed mainly, but not exclusively, by federal rather than state law. Besides the New York Convention, the primary US act that deals with arbitration is the Federal Arbitration Act (FAA) enacted in 1925. The FAA does not completely displace state law in the way as Chapter Twelve of PILA pre-empts the Intercantonal Arbitration Convention. The FAA implements policy favourable to arbitration, however, providing that arbitration clauses are enforceable except on such grounds as exist at law or equity for the revocation of any contract[38]. In one of the landmark decision related to admissibility, Kloss v. Jones[39]

34. Gabrielle Kaufmann-Kohler and Thomas Schultz, Online Dispute Resolution, Challenges for Contemporary Justice, Kluwer Law International, The Hague 2004, p. 171.

35. Laurence Shore, Defining Arbitrability, The United States v. The rest of the world, June 15, 2009, New York Law Journal, Litigation Section, 1.

36. William Park, Arbitrability and American Securities Law: A Tale of Two Cases in Gabrielle Kaufmann-Kohler and Viviane Fossard (eds), Arbitration in Banking and Financial Matters, ASA Special Series No.2 2003, p. 82 and 86.

37. William Park, Arbitration in Banking and Finance, 1998 Yearbook of International Financial and Economic Law 142, p. 158.

38. William Park, Arbitrability and American Securities Law: A Tale of Two Cases in Gabrielle Kaufmann-Kohler and Viviane Fossard (eds), Arbitration in Banking and Financial Matters, ASA Special Series No.2 2003, p. 84.

39. Kloss v. Edward D. Jones & Co., 310 Mont. 123 (2002).

case, the US courts refused to enforce arbitration agreements due to the fact that it might run in contradiction to federal arbitration policy. Nevertheless, it did not exclude arbitration in general. In Kloss v. Jones the Court stated that the arbitration clause encompasses a waiver of rights to access to courts and a trial by a jury guaranteed by the Montana Constitution whereas these rights in the Court's opinion are "sacred" and "inviolable"[40]. The Court did not aim to abolish arbitration itself but its purpose was to apply this rule in general to all contracts in order to protect citizens against waiver of constitutional rights[41].

Despite this particular judgment, arbitration, especially international arbitration, certainly continues to prosper well in the United States. It has become well established in the jurisprudence of the United States as an acceptable and often preferable mechanism for dispute resolution[42]. With regard to consumer disputes, the advocates of arbitration share the view that arbitration is faster and less expensive than litigation, and thus the use of arbitration in simple collection actions should be beneficial to the consumer[43].

As for the binding[44] arbitration agreements, these are treated as a contractual provision under FAA (contracts of adhesion) and thus, they are usually challenged under the same grounds as any other contractual arrangements, e.g. unconscionability, frustration of purpose, fraud or duress. One of the rising arguments for the invalidation of a arbitration clause in consumer disputes is the excessive cost shifted onto individuals. It is true that arbitration agreements require from consumers to advance or pay for a significant part of arbitration costs. In the Wells v. Chevy Chase Bank[45] case fees were far higher than the value of the plaintiff's claims. Some arbitration agreements include a clause requiring the losing party in arbitration to pay the other side's attorney and arbitration fees. In consequence, it may reveal a very burdensome debt on a consumer in return for a relatively minor claim. Therefore some states, e.g. Maryland[46] enacted special legislative policies prohibiting such provisions in order to protect consumers' rights. As the US Supreme Court admitted in the Christiansburg Garment Co. v. EEOC case that 'loser pays all' rule would treat unsuccessful consumer plaintiffs as if they themselves were guilty of violating the Consumer Protection Act[47].

In the Green Tree Financial Corp. v. Randolph[48] case, the United State Supreme Court faced the question of whether prohibitive costs could invalidate an arbitration agreement. The Court acknowledged that large arbitration costs might deter someone from asserting their statutory rights, and thus invalidate pre-dispute arbitration clauses, but the Court noted a lack of evidence to support the notion of incurring such costs if the case proceeded to arbitration.

In the Circuit City Stores Inc. v. Adams[49] case, the Court of Appeals for the Ninth Circuit, held that requiring an consumer to pay even part of the arbitrator's fees makes an agreement unenforceable as a matter of law.

Such an approach provides a special protection to consumers who could potentially be discouraged from filing their claims if the arbitration agreement is enforced against them[50].

Notwithstanding the above-mentioned restrictions, pre-dispute arbitration agreements with consumers are valid under US law and provide for swift and accessible arbitration proceedings.

The banks' global character of operations that involve clients from worldwide markets result in arbitration being used especially in disputes with corporate clients. Arbitration in private clients' matters is still used exceptionally in the financial context. Therefore, it is obvious that arbitration should not be considered as a solution for all kinds of banking and financial disputes, and if it is to be preferred for a particular matter it will depend on several factors, which need to be carefully assessed[51]. The restrictions and public policy matters in the jurisdiction where the seat of arbitration is fixed, are of primary importance.

40. Ibidem, para 55.

41. William Park, Arbitrability and American Securities Law: A Tale of Two Cases in Gabrielle Kaufmann-Kohler and Viviane Fossard (eds), Arbitration in Banking and Financial Matters, ASA Special Series No.2 2003, p. 85.

42. Catherine M. Amirfar and David W. Rivkin Current Challenges to Consumer Arbitration in the United States: Much Ado About Nothing For International Arbitration? The Arbitration Review of the Americas 2012 <http://globalarbitrationreview.com/reviews/39/sections/137/chapters/1422/> accessed 6 July 2013.

43. Dwight Golan, Developments in Consumer Financial Services Litigation, 1988, 43 Business Law 1081, p. 1091.

44. See for instance Gabrielle Kaufmann-Kohler and Thomas Schultz, Online Dispute Resolution, Challenges for Contemporary Justice (Kluwer Law International, The Hague 2004) 169 ("binding arbitration apply to the outcome of the process which bounds like a judgment, as opposed to a contract. In non-binding arbitration, the arbitration clause provides one or both parties with an option to submit a dispute to arbitration. Often the option is in favour of the customer only, the other party being bound to arbitrate if the customer so wishes").

45. Wells v. Chevy Chase Bank, Md. Court of Appeals, No. C-99-000202 (Appellant's Reply Brief).

46. Maryland's Consumer Protection Act 2010, Title 13 of Maryland's Code of Commercial Law.

47. Christiansburg Garment Co. v. EEOC, 434 U.S. (1978) 412, 413.

48. Green Tree Fin. Corp-Ala. v. Randolph, 531 U.S. 79, 90 (2000).

49. Circuit City Stores, Inc. v. Adams, 9th Cir. 279 F.3d at 889, 892 (2002).

50. Richard A. Bales and Mark B. Gerano, Determining The Proper Standard For Invalidating Arbitration Agreements Based On High Prohibitive Costs, 2012, 14 The Tennessee Journal of Business Law 57, p. 77.

51. Stefano E. Cirielli, Arbitration, Financial Markets and Banking Disputes, 2003, 14 The American Review of International Arbitration 243, p. 283.

The arbitration clause in light of the Convention on the Contract for the International Carriage of Goods by Road (CMR) – selected issues

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Introduction

The practice of business transactions shows that disputes resulting from contracts governed by the provisions of the Convention on the Contract for the International Carriage of Goods by Road[1] are infrequently referred to arbitration, despite the fact that such an option was expressly provided for in those contracts. Although it is difficult to identify all the reasons underlying such a state of affairs, one such reason may be the fact that contracts of this type are commonly executed orally or an implied manner, through acceptance of goods for carriage, neither of which is sufficient for execution of a valid arbitration agreement.

1. The unabridged title of this piece of legislation reads as follows: Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Protocol of Signature to the Convention, done at Geneva on 19 May 1956 (Dz. U. [Journal of Laws] of 1962 No. 49, Item 238, as amended), amended by Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR), done at Geneva on 5 July 1978 (Dz. U. [Journal of Laws] of 2011 No. 72, Item 382), hereinafter referred to as the "CMR Convention."

Another reason that is pointed out is the need for an arbitral tribunal to apply the CMR Convention and the mandatory nature of the legal norms it contains, which render it impossible for the parties to a contract to avoid application of the Convention regime[2].

The scope of application of the CMR Convention and the nature of its resultant norms

Article 1.1 of the CMR Convention establishes the criterion of "international nature" of the contract for the carriage of goods, according to which the provisions of the CMR Convention apply to any contract for the carriage of goods by road in vehicles for reward, regardless of the place of residence and the nationality of the parties, where the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting state. Hence, wherever, in accordance with the article referred to above, the provisions of the Convention are applicable, courts in the states which are parties to the Convention are under obligation to apply the same[3].

Pursuant to the provision of Article 41 of the CMR Convention, any stipulation which would directly or indirectly derogate from the provisions of the Convention is null and void. Wherever the provisions of a statute or of an executed contract of carriage are in conflict with the provisions of the CMR Convention, such provisions are replaced by the provisions of the CMR Convention. The foregoing determines the mandatory nature of the provisions of the Convention, save for a few exceptions permitting their modification (Articles 37 and 38 of the CMR Convention). Although while deciding a case within its jurisdiction, the court in a state which is not a party to the Convention is not bound by the provision of Article 1.1 of the Convention, it may apply its provisions on the grounds that they form part of the legal order specified by the conflict of laws rules applicable in that state[4]. To prevent a situation in which courts not bound by the CMR Convention disregard its provisions, one should – as required under Article 6.1(k) of the Convention – incorporate into the consignment note a statement to the effect that the carriage is subject to its provisions, notwithstanding any clause to the contrary (the so-called paramount clause). Such a clause ensures application of the CMR Convention in accordance with the lex contractus principle.[5]

Jurisdiction of state courts under the CMR Convention and choice of the place of arbitration resulting from the arbitration clause

Where the arbitration clause is absent from a contract of carriage, the provisions of the CMR Convention on jurisdiction apply, including Article 31.1, pursuant to which in the case of any dispute arising out of carriage governed by the Convention, the plaintiff may bring an action in the courts or tribunals of the contracting states designated by agreement between the parties and, in addition, in the courts or tribunals of the country within whose territory the defendant is ordinarily resident, or the place where the goods were taken over for carriage or the place designated for delivery is situated, and is precluded from bringing an action in any other court or tribunal. The views expressed in the jurisprudence differ as to whether the jurisdiction clause executed by the parties to a contract of carriage precludes the possibility of bringing an action in a court other than specified in such clause or only extends the scope of jurisdictions for

2. Wesołowski K., Umowa międzynarodowego przewozu drogowego towarów na podstawie CMR, Warsaw 2013, p. 705.

3. Being an international treaty ratified by the Republic of Poland, the CMR Convention is a source of generally applicable law in Poland, is directly applicable and takes priority over the statute if the statute is in an unresolvable conflict with the Convention (Article 87, Article 91.1, Article 91.2 of the Constitution of the Republic of Poland); see Habryn E., Windykacja należności z umowy międzynarodowego przewozu towarów, LEX No. 140865. In addition, the provision of Article 71 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001) gives priority to the provisions of the Convention in particular matters.

4. Wesołowski K., Umowa …, p. 100.

5. Ibidem.

the creditor to choose from[6]. Bearing in mind the principle of the parties' freedom to contract, one should decide that the execution of a jurisdiction clause by the parties precludes them from referring a case to a court other than specified in that clause. For the avoidance of doubt, the fact that the only competent court is the one specified by the parties should be reflected in the provisions of the jurisdiction clause. The court specified in the clause agreed upon by the parties invariably has to have its seat in a state which is a party to the Convention, which follows from the literal wording of Article 31.1 of the CMR Convention. Given the foregoing, it should be concluded that the scope of jurisdiction of common courts provided for in Article 31 of the CMR Convention is relatively broad and, in addition, makes it possible to refer a case to a court with which neither party needs to have any links, e.g. by reason of its registered office[7]. This provides an argument in favor of incorporating the arbitration clause into contracts of carriage, as such clause offers the parties unrestricted freedom to choose the place of arbitration. Furthermore, it should be noted that, unlike in the case of the jurisdiction clause, the state chosen as the place of arbitration does not need to be a party to the Convention[8]. It should be emphasized at this point that the parties' decision as to the place of arbitration actually precludes the possibility of referring a case elsewhere, which makes the issue of the place where disputes resulting from a contract of carriage are to be arbitrated fully predictable to the parties.

Provisions of the CMR Convention on the arbitration clause

General comments

The arbitration clause is provided for in Chapter V of the CMR Convention, entitled Claims and Actions. In accordance with Article 33 of the Convention, the contract of carriage may contain a clause conferring competence on an arbitration tribunal if such clause provides that the tribunal will apply the Convention. As noted above, this provision stipulates mandatory norms of law (jus cogens), which means that if the parties to a contract of carriage decide to submit a dispute to the jurisdiction of an arbitration tribunal, such clause needs to satisfy the conditions listed in this provision. A clause inconsistent with the provisions of the Convention is – pursuant to Article 41 of the CMR Convention – null and void, and is to be replaced with the provisions on jurisdiction contained in Article 31 of the CMR Convention.

The rules set forth in the CMR Convention and referring to arbitration proceedings stipulate only the minimum requirements in terms of the provisions of the arbitration clause that make it effective. In order to have arbitration in disputes arising out of contracts for the international carriage of goods comprehensively regulated, one should refer to the provisions of international law and the internal law indicated by the conflict of laws rules. The New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention on International Commercial Arbitration, done at Geneva on April 21, 1961, are of special significance among the international treaties on arbitration. As regards Poland, the major source of regulations pertaining to proceedings before a court of arbitration is Part V of the Code of Civil Procedure, entitled Court of Arbitration. Pursuant to Article 1154 of the Code of Civil Procedure, the provisions of that chapter apply if the place of arbitration is in the territory of the Republic of Poland and, in the instances indicated in that part, also where the place of arbitration is outside the borders of the Republic of Poland or is not specified. The regulation contained in the Code of Civil Procedure refers also to international arbitration. Furthermore, arbitration proceedings between the parties may be also governed by the rules of arbitration adopted by permanent courts of arbitration and arbitration institutions in which the parties brought their dispute. However, such rules may only refer to norms of law of the nature of jus dispositivum[9].

Polish authors point out concerns raised by the concept of arbitration tribunal, as introduced in Article 33 of the CMR Convention, to which parties may submit a dispute between them. In their opinion, the above term suggests that the tribunal considering a case has the nature of an institution (unlike ad hoc arbitration)[10]. Concerns of such type are likely to result from the fact that the term arbitration tribunal is to be found neither in the provisions of the Code of Civil Procedure nor in the New York Convention or the European Convention which uses the terms permanent arbitral institution and ad hoc arbitration to differentiate between those two institutions.

At this point one should refer to the provisions of the UNCITRAL[11] Model Law on International Commercial Arbitration of June 21, 1985, with amendments adopted on July 7, 2006, which, according to UNCITRAL's data, served as a model for the arbitration laws enacted by more than 65 countries, including Poland[12]. Article 2 of the Model Law disambiguates the term arbitration by specifying that it covers any type of arbitration procedure, whether or not administered by a permanent arbitral institution, whereas the term arbitral tribunal means either a sole arbitrator or a panel of arbitrators. To illustrate the foregoing with an example, one can also refer to the Arbitration Act adopted by the British Parliament in 1996,[13] setting forth the rules governing arbitration held within the jurisdiction of the United

6. The view according to which the jurisdiction clause serves only as a basis for jurisdiction which is supplementary to the one referred to in the Convention is endorsed, inter alia, by R. Loewe in Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), Geneva 1975, p. 64; and by M. A. in International Carriage of Goods by Road: CMR, Witherby 1985, p. 162. The literal wording of Article 31 of the English version of the CMR Convention provides an argument in favor of such interpretation of the above provision. Furthermore, the issue of choice of jurisdiction was settled in that spirit in Article 21 of the United Nations Convention on the Carriage of Goods by Sea of 1978 (the Hamburg Rules), which, having listed the available jurisdictions for the creditor to choose from, also permits a party to bring an action in a court specified by the parties in the contract of carriage by sea. On the other hand, K. Wesołowski points out (Umowa ..., p. 669) that, if understood in this manner, Article 31 of the Convention would actually make jurisdiction clauses executed by parties be of marginal nature and, in addition, would be conducive to the so-called forum shopping. Moreover, the author is of the opinion that the systemic interpretation of the CMR Convention also weighs against the view presented by M.A. Clarke.

7. Adamus R., Klauzula arbitrażowa w oparciu o art. 33 Konwencji CMR, Biuletyn Arbitrażowy No. 9/2009, p. 43.

8. When selecting the place of arbitration, parties are not forced to choose only from among the states listed in Article 31 of the Convention; see Wesołowski K., Umowa ..., p. 705. An opposite view was expressed by the Austrian Oberster Gerichtshof in its judgment of May 5, 2010, ETL 2010, pp. 637-646.

9. Kąkolecki A., Nowaczyk P., [in:] Arbitraż handlowy, System Prawa Handlowego, Tom 8, Szumański A. (ed.), p. 53.

10. See, inter alia, Adamus R., Klauzula..., p. 44; Wesołowski K., Umowa..., p. 705.

11. United Nations Commission on International Trade Law.

12. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

13. http://www.legislation.gov.uk/ukpga/1996/23/contents

Kingdom. The Arbitration Act uses the term arbitral tribunal, and in the chapter so entitled it regulates exclusively the issue of composition of the panel of arbitrators, and not the issue of institutional nature of the procedure. This suggests that the term arbitral tribunal or arbitration tribunal corresponds to the Polish term court of arbitration, which denotes either a permanent or an ad hoc court of arbitration. Therefore, it should be concluded that the notion of arbitration tribunal, as used in the CMR Convention, does not determine the nature of the arbitration procedure to be held thereunder.

Formal requirements as to the arbitration agreement in light of the CMR Convention

The CMR Convention does not stipulate any formal requirements to be met by the arbitration agreement, although it is pointed out in the jurisprudence that the very term clause suggests its written form[14]. However, this does not mean that the arbitration agreement may take any form, but only that, in this case, the relevant provisions of international conventions and the domestic regulations indicated in conflict of laws rules of the state in which the court/tribunal has its seat, apply[15].

The issue of the form of the arbitration agreement is regulated in Article II (1) of the New York Convention, pursuant to which an agreement under which the parties undertake to submit to arbitration all or some of the disputes which have arisen or may arise between them in respect of a specific legal relation, whether contractual or not, concerning a matter capable of being settled through arbitration, should be made in writing. Concurrently, in accordance with Article II (2) of the New York Convention, the term agreement in writing covers an arbitral clause incorporated into a contract or an agreement on submission to arbitration, either signed by the parties or contained in an exchange of letters or telegrams[16]. It should be noted in this connection that the formal requirements set forth in the Convention apply in any situation involving an award entered in international arbitration, regardless of the limitation resulting from Article I (1) of the New York Convention, i.e. not only where a state court recognizes or enforces a foreign award but whenever we deal with an award rendered in international arbitration[17].

It is pointed out that where the statutory laws of a state which is a party to the New York Convention provide for a form less stringent than that set forth in the Convention, the internal laws, as referred to in Article V (1) (a) of the New York Convention, may be invoked, although this view is by no means prevailing[18]. A failure to meet the requirements on the form, as set forth in Article II (2) of the New York Convention, may render it impossible to refer the parties to arbitration on the basis of Article II (3) of the above Convention, or to recognize or enforce an arbitral award, which follows from the provisions of Article IV (1) (b) and Article V (1) (a) of the Convention.

The obligation to comply with the written form requirement in order for an arbitration agreement to be valid exists, inter alia, under the laws of Germany, France, Belgium, Switzerland, the U.S. and China. Only a few countries permit a departure from the written form requirement for the arbitration agreement, including the Netherlands, Denmark and Sweden[19]. Within the Polish legal framework, i.e. pursuant to Article 1162 of the Code of Civil Procedure, the arbitration agreement is also required to be drawn up in writing. Concurrently, in accordance with Article 1162 §2 of the Code of Civil Procedure, the written form requirement is also met when the relevant provisions are contained in letters exchanged between the parties or statements made through direct communications facilities which provide a record of their content, as well as in the case of the so-called arbitration clause by reference. In its decision of January 18, 2007, the Supreme Court pointed out that the provisions of the New York Convention were frequently disregarded by Polish courts, despite the fact that the different regulations governing the procedure for recognition of a foreign arbitral award, as contained in the New York Convention, took priority over the provisions of the Code of Civil Procedure, and, among other things, the requirements as to the form of the arbitration agreement should be viewed in light of the New York Convention and not Article 1162 of the Code of Civil Procedure[20].

It should be noted that a tendency to liberalize the written form requirement imposed on the arbitration agreement is observable in international commercial arbitration, which is reflected, inter alia, in the amendments to the UNCITRAL Model Law, made in 2006. At present, there are two options to choose from when regulating the form of the arbitration agreement in national legislation. The first one permits execution of the agreement in any method, including orally and in an implied manner, provided that the content of the arbitration clause is recorded in any method. It is not necessary for the recorded text of the arbitration clause to be the outcome of an exchange of correspondence between the parties[21]. The choice of the other

14. Messent A., Glass D., CMR, Contracts for the International Carriage of Goods by Road, LLP 2000, p. 257.

15. Adamus R., Klauzula …, p. 45; Wesołowski K., Umowa …, p. 706.

16. During its 39th session held on July 7, 2006, the United Nations Commission on International Trade Law (UNCITRAL) adopted a resolution regarding the interpretation of Article II (2) of the New York Convention, in which it recommended that, when applying the provision in question, one should assume that the circumstances listed therein (referring to execution of an agreement in writing) are not exhaustive.

17. Balcarczyk J., Zagadnienie formy umowy o arbitraż w świetle art. II (2) Konwencji Nowojorskiej o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych oraz w świetle regulacji wewnętrznych, ADR. Arbitraż i Mediacja No. 4/2008, pp. 5 et seq.

18. As pointed out by J. Balcarczyk (Zagadnienie…, pp. 5 et seq.), this is a manifestation of the view according to which "(…) Article II (2) of the New York Convention – previously considered to lay down formal requirements less stringent than those imposed under the internal laws of the contracting states – used to apply where an internal law imposed more stringent requirements as to the form. This led to the conclusion that, as regards the form, the Convention took priority over the more stringent requirements resulting from the law applicable to the agreement, as determined on the basis of Article V (1) (a) of the New York Convention. This is how the assumption of an arbitration-friendly regulation was being put into effect."

19. Budniak A., Treść zapisu na sąd polubowny w świetle przepisów polskiego i niemieckiego postępowania cywilnego – wybrane zagadnienia, ADR. Arbitraż i Mediacja No. 4/2009, p. 15.

20. Decision of the Supreme Court, dated January 18, 2007 (I CSK 330/06, OSNC 2007, No. 12, Item 185); decision of the Supreme Court, dated January 23, 2013 (I CSK 186/12, Legalis No. 697873).

21. Wiśniewski A.W., Międzynarodowy arbitraż handlowy w Polsce, Warsaw 2011, pp. 450 et seq.

option is tantamount to abandoning any formal requirements as to the form of the arbitration agreement. Liberalization of the requirements as to the form of the arbitration agreement can contribute to making arbitration more popular as the manner of dispute resolution selected in remote agreements, being the type commonly chosen in the case of contracts for the international carriage of goods by road.

Pursuant to Article 33 of the CMR Convention, the arbitration agreement should be incorporated into the contract of carriage. Owing to the fact that the CMR Convention does not provide for any special form of the contract of carriage, it is legitimate to conclude that such a contract may be executed in any form[22]. In practice, the contractual provisions are frequently agreed upon orally and subsequently confirmed in writing by electronic mail of fax. Not infrequently a carriage order is issued, laying down conditions of the carriage performance. Thus the contractual terms and conditions may be spread out over a number of documents and arrangements made orally[23]. All this makes it difficult to comply with the requirements as to the form of the arbitration agreement.

Taking into account the practice of business transactions, the jurisprudence goes for permitting incorporation of the arbitration clause also into documents other than the contract of carriage[24]. The provisions of the CMR Convention do not prevent the arbitration clause contained in a separate contract from being valid and effective. However, in order for the arbitration agreement to have the intended effect, both parties need to comply with the requirements as to its form by making declarations of will pursuant to the provisions of the internal law and of the international treaties. And thus, where the arbitration clause is incorporated into the carriage order, oral or implied acceptance of such order is not sufficient (Article 69 of the Civil Code), and neither is the so-called tacit offer acceptance (Article 682 of the Civil Code), which forms are sufficient for the contract itself to take effect. Under such circumstances, it is necessary to have the order acceptance confirmed, for instance by sending a statement on acceptance of the order on the terms and conditions set by the counter party through direct communications facilities, or by returning the order signed by the carrier and containing an arbitration clause. It should be assumed that the provision of Article 33 of the CMR Convention does not prevent a dispute from being submitted to arbitration also when the parties did not incorporate the arbitration clause into the contract of carriage itself but did so in a collateral agreement executed already in the course of the contract performance or even after the contract had been performed and a dispute had arisen[25]. Such interpretation is supported with the broad definition of the arbitration agreement, which extends to cover also the agreement on submission to arbitration.

Owing to the fact that the consignment note serves as a proof of execution of the contract of carriage (Article 4 and Article 9.1 of the CMR Convention), the arbitration clause can be also incorporated into its provisions. Absence of the arbitration clause from a consignment note does not, however, render the clause invalid, as it may be incorporated into another document as well. This is so due to the fact that the consignment note is neither a condition for execution of a contract of carriage (Article 4 of the CMR Convention) nor for application of the provisions of the Convention. Should the arbitration clause be incorporated exclusively into the consignment note signed by the parties, one should determine what nature the carrier's signature set on that document has and whether the carrier's intention was to accept the arbitration clause contained in the consignment note or only to confirm the fact of receiving goods for carriage. For the avoidance of doubt, consent to the incorporation of the arbitration clause into the contract of carriage should be confirmed by a signature set below the clause[26].

In practice, discrepancies between the contract of carriage and the consignment note are found all too often. This refers, in the first place, to the situation where the parties to a contract of carriage are not specified in the corresponding consignment note. Usually, the entity delivering goods for carriage (called a shipper) is specified as the sender, and the entity to which the contractual carrier subcontracted the carriage performance (the actual carrier) is specified as the carrier. Concurrently, an entity which is not a party to a contract of carriage may not be considered to be the sender of a consignment only on account of the fact that it was specified as such in the consignment note[27]. Hence, if the entities incorrectly specified in the consignment note are not parties to the contract of carriage, they will not be bound by the arbitration clause incorporated into the note.

Another issue is that annotations in consignment notes are usually made by employees of the sender or carrier, and not themselves by the parties to a contract, authorized to execute the arbitration agreement. As far as statements of knowledge are concerned, no power of attorney or authorization of other type is necessary, as pursuant to Article 3 of the CMR Convention, such statements are effective towards the carrier regardless of whether or not the persons who made the same held a relevant document. And as regards declarations of will, which undoubtedly include declarations on submission of a case to arbitration, evaluation of the effectiveness of making such a declaration by

22. Wesołowski K., Umowa …, p. 165.

23. Messent A., Glass D., CMR: Contracts…, p. 257.

24. Adamus R., Klauzula …, p. 46; Wesołowski K., Umowa … p. 707; Walczak K., Międzynarodowy przewóz drogowy towarów, Warsaw 2006, p. 58; Loewe R., Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), Geneva 1975, p. 70.

25. Loewe R., Commentary …, p. 70; Clarke M. A., International …, p. 162.

26. See R. Adamus (Klauzula …, p. 43) who refers to the decision of the Supreme Court, dated October 6, 1969 (I CZ 66/69, LEX No. 6577), in which the Supreme Court concluded that the signing of a bill of lading by its holder did not in itself, when not accompanied by a concurrent declaration of will on submission of a dispute to a court of arbitration, provide grounds for assuming that the signing party's intention was to accept the arbitration clause stipulated in the bill of lading. In addition, the ruling of the Supreme Court, dated April 22, 1966 (I CR 433/65, OSPiKA 1967, No. 1, Item 7.), is worthy of attention, in which it was pointed out that the bill of lading formed basis of the legal relation holding between the carrier and the consignee only where there was no charter contract in place between the consignee and the carrier. Thus the consignee, being concurrently the holder of the bill of lading, is not, as a rule, a party to the contract of carriage and is not bound by the arbitration agreement contained therein, even if the arbitration agreement is repeated in the bill of lading.

27. Judgment of the Supreme Court, dated September 3, 2003 (II CKN 415/01, OSNC 2004/10/163).

persons acting on the carrier's behalf requires reference to the governing law indicated by the conflict of laws rules.

Obligatory elements of the arbitration clause

Pursuant to Article 33 of the CMR Convention, the arbitration clause has to provide that the arbitration tribunal will apply the Convention. As pointed out by R. Adamus, this provision should be deemed to be lex specialis in respect of Article 1161 § 1 of the Code of Civil Procedure which provides for obligatory elements of the arbitration clause, but also in respect of Article 1194 § 1 of the Code of Civil Procedure pursuant to which the court of arbitration resolves a dispute in accordance with the law applicable to a given transaction and, if expressly so authorized by the parties, on the basis of general rules of law or rules of equity[28]. Given the provision of Article 41 of the CMR Convention, it should be unambiguously concluded that an arbitration clause which does not satisfy the requirement of Article 33 of the Convention is invalid[29]. However, the issue debated in the jurisprudence was whether the arbitration clause needed to expressly provide for application of the Convention by a tribunal. In this context, one should refer to the judgment dated December 1, 1981, entered in the UK in case A. B. Bofors-UVA vs. A.B. Skandia Transport by the High Court Queen's Bench Division. The disputed arbitration clause referred the parties to arbitration in Stockholm, concurrently specifying Swedish law as the applicable law. The dilemma faced by the British court in this case came down to the question whether, given the provision of Article 33 of the CMR Convention, it was necessary for the arbitration clause to stipulate expressis verbis that the tribunal would apply the Convention, or it was sufficient that the arbitration clause specified Swedish law as the applicable law, hence regardless of the provisions of the arbitration clause, arbitrators would decide the case based on the CMR Convention as forming part of Swedish law. In the end, the British court decided that both the teleological and grammatical interpretations of the provision of Article 33 of the CMR Convention led to the conclusion that it was necessary for the arbitration clause to be formulated so as to stipulate that the tribunal would apply the Convention and that the stipulation to that effect needed to be "express." The British court pointed out that the need for a literal interpretation of Article 33 of the CMR Conventions was a consequence, inter alia, of the necessity to protect application of the obligatory substantive law regime of the Convention in order to prevent arbitration clauses from being used to circumvent regulations restricting the freedom of choice of jurisdiction. Furthermore, the purpose of such regulation is not only to make application of the CMR Convention obligatory but also to provide grounds for review of an award rendered by an arbitration tribunal based on this requirement. A clause which expressly provides for exclusion of the CMR Convention application will thus be invalid, and so will a clause which does not stipulate that the arbitration tribunal will apply such regulations. It should be concluded that such interpretation is in line with the literal wording of the CMR Convention and, in addition, ensures application of its provisions. The view expressed by the British court in the judgment referred to above is the one that prevails at present in the jurisprudence[30].

It is pointed out in foreign literature that if the parties executed an agreement on submission to arbitration which lacked a provision to the effect that the tribunal would apply the CMR Convention, such agreement was valid and effective[31]. In support of their position, the authors refer to the principle according to which where a dispute has already arisen between the parties, the parties have the right to make arrangements in this respect at their discretion. However, should the arbitration tribunal considering the case keep persistently avoiding applying the Convention, the award rendered by such tribunal might be set aside as part of judicial review, in accordance with the provisions of the applicable internal law. One cannot possibly endorse the above view, as Article 33 of the CMR Convention does not provide grounds for differentiating between an arbitration clause executed prior to and following the occurrence of a dispute, and stipulates the obligatory provisions of such a clause in either case. The fact that in the course of a judicial review of an arbitral award conducted by a state court there are actually no grounds for verification whether the tribunal applied the Convention and that the disregarding thereof does not in itself provide grounds for challenging the award rendered, also speaks against the view described above.

Entities bound by the arbitration clause

As a rule, an arbitration agreement is binding upon the parties who executed it either personally or through their respective representatives. However, there are exceptions to that rule, and these include general or special legal succession and constructions – discussed at length in the jurisprudence – used to extend the arbitration clause to non-signatories, such as the implied power of attorney, abuse of a right or misuse of the legal form of a company[32]. The issue of whether or not third parties who have not made a statement on arbitration agreement execution are bound with its provisions arises also in the context of contracts for the international carriage of goods by road.

The standard pattern of contract of carriage performance assumes the participation of at least a sender, a carrier and a consignee. However, it is only the sender and the carrier that are parties to the contract of carriage, and the view prevailing in the jurisprudence requires that the contract they executed be deemed a contract for the benefit of a third party (pactum in favorem tertii), with certain modifications as compared with the provision of Article 393 of the Civil Code.[33] Despite the fact that the consignee is not a party to the contract of carriage, he may, through exercising the rights

28. Adamus R., Klauzula …, p. 48.

29. Loewe R., Commentary …, p. 70.

30. Messent A., Glass D., CMR: Contracts…, p. 257; Clarke M. A., International …, p. 166; Löwe R., International …, p. 164; Wesołowski K., Umowa …, p. 708 and the sources quoted therein.

31. Messent A., Glass D., CMR: Contracts…, p. 257; Loewe R., Commentary …, p. 70; Löwe R., International …, p. 164.

32. Ereciński T., Weitz K., Sąd arbitrażowy, Warsaw 2008, pp. 146-151; Wętrys E., Skuteczność zapisu na sąd polubowny spółki zależnej wobec spółki dominującej, ADR. Arbitraż i Mediacja No. 3/2010, pp. 150-154; Zrałek J., Kurowski W., Wpływ przelewu wierzytelności na klauzulę arbitrażową, ADR. Arbitraż i Mediacja No. 3/2008; Szumański A., Wpływ uczestnictwa spółki kapitałowej w grupie spółek na związanie zapisem na sąd polubowny dokonanym przez inną spółkę z grupy, PPH No. 5/2008, pp. 44–58.

33. Wesołowski K., Umowa…, p. 264.

provided for in the CMR Convention (e.g. the right to dispose of the goods, the right to request the consignment note to be released along with the goods), join, as it were, in the structure of the legal relation holding between the sender and the carrier, where such act of joining is not tantamount to acceding to the contract[34]. And thus, pursuant to Article 13.1 of the CMR Convention, after arrival of the goods at the place designated for delivery, the consignee is entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods, and if a loss of the goods has been established or if the goods have not arrived after the expiry of the period provided for in Article 19 of the CMR Convention, the consignee may enforce in his own name against the carrier any rights arising from the contract of carriage. Upon the handing over of the second copy of the consignment note it is the consignee, and not the sender, that is entitled to pursue against the carrier claims for damages in connection with damage to the goods[35]. However, in this case, the consignee does not assume the sender's rights and obligations under the contract of carriage and his right to pursue claims does not result from legal succession but falls within the scope of his own powers conferred under the Convention. On the other hand, as a result of exercise of the rights provided for in Article 13.1 of the CMR Convention, the consignee concurrently becomes the party under obligation to pay the charges shown to be due on the consignment note (the first sentence of Article 13.2 of the CMR Convention), and the carrier has claims against him.

34. Wesołowski K., Umowa …, p. 265.

35. Wesołowski K., Umowa …, pp. 618, 619.

In such a case, owing to the absence of legal succession, the arbitration clause incorporated into a contract of carriage, even if contained in a consignment note (constituting a proof of establishment of a legal relation between the carrier and the sender), will not be binding on the consignee. To make the arbitration clause binding in respect of the consignee, it would be necessary for the latter to make a statement in the required form to the effect that he agrees to arbitration provided for in that clause. This solution is justified insofar as it refers to entities which did not participate in drafting the contractual provisions, as they were not parties to the contract, hence the arbitration clause would be forced upon them[36]. The above argument does not, however, hold true where a consignee who is a party neither to the contract of carriage nor the arbitration agreement would like to refer to the latter when a dispute with his participation arises. As pointed out by M. Zacharasiewicz and J. Zrałek, foreign literature allows of the possibility for a third party to "benefit" from the positive effect of the arbitration clause incorporated into a contract executed for the benefit of such party; however, a case may not be brought in a court of arbitration against the third party himself if he has not agreed to be bound by the clause[37]. The foregoing follows from the rule according to which no obligations may be imposed under an agreement of third parties on a party for whose benefit a contract is executed, but rights for the benefit of such party may be established. However, this concept raises certain concerns in the context of considering the arbitration clause in terms of the law to which such party might refer and, in addition, in terms of admissibility of the binding nature of the arbitration clause where the required form has not been complied with[38].

36. A similar situation is to be found in the contract for the carriage of goods by sea. Given the absence of any clear regulation and the fact that the holder of the bill of lading is not a legal successor of the freight broker, it should be concluded that the arbitration clause incorporated into the contract of carriage to which the bill of lading refers will be binding on the holder of the bill of lading in his relations with the carrier only when the holder of the bill of lading makes towards the carrier a written statement to the effect that he agrees to the arbitration provided for in that clause. It is only when such conditions are satisfied that the form of the arbitration agreement required under Article 1162 of the Code of Civil Procedure may be deemed complied with (see Tomaszewski M., [in:] Arbitraż …, pp. 308 et seq.).

Consideration should be also given to the arbitration clause in the context of carriage being performed by several road carriers. In this case, a distinction should be drawn between subcontracted carriage and successive carriage. In the first case, the contract is executed by the sender with the first carrier who may subcontract the carriage performance to another carrier. The carrier who executed the contract with the sender is responsible for the subcontractor's acts or omissions as for its own acts or omissions (Article 3 of the CMR Convention). From the sender's point of view, its counterparty to the contract of carriage is exclusively the carrier with whom he executed the contract, and it is only such carrier that is responsible towards the sender. In this case, the arbitration clause incorporated into the contract between the sender and the first carrier is not binding upon the subcontractor carrier, as this entity is not a party to such contract. The arbitration clause may be incorporated into a contract executed by the first carrier with its subcontractor, and the first carrier acts towards its subcontractor as a sender. However, it should be noted that a carrier may subcontract the carriage performance only with respect to the stretch of the entire route that runs within the territory of his country, and then the contract executed with the subcontractor is governed by the provisions of internal law, including those on arbitration agreement.

37. Zachariasiewicz M., Zrałek J., Czy umowa arbitrażowa rozciąga się na podmioty powiązane ze spółką będącą stroną tej umowy?, ADR. Arbitraż i Mediacja No. 2/2009, pp. 167-168; Zrałek J., Kurowski W., Wpływ …, pp. 137 et seq.; Wętrys E., Skuteczność…, p. 153.

38. Zachariasiewicz M., Zrałek J., Czy …, pp. 169 -170.

Issues relating to successive carriage are provided for in Articles 34 – 40 of the CMR Convention. Pursuant to Article 34 of the CMR Convention, if carriage is performed by several successive road carriers based on a single contract, each such carrier is responsible for the performance of the whole operation, where the second and each succeeding carrier become parties to the contract of carriage under the terms of the consignment note, by reason of acceptance of the goods and the consignment note. As pointed out by the Supreme Court, successive carriers accede to the contract executed between the sender and the carrier and, forming a single party to the contract, agree to be bound by its terms and conditions[39]. The Convention does not require successive carriers to make any declaration of will towards the sender, and their accession to the contract takes place per facta concludentia, and the sender may even not be aware of such fact.

39. Judgment of the Supreme Court, dated April 8, 2009 (V CSK 392/08, LEX No. 627253).

As regards the issue of successive carriers being bound by the arbitration agreement, K. Wesołowski is of the opinion that the arbitration clause takes effect towards successive carriers, provided that it was incorporated into the consignment note[40]. To justify the above view, one can refer to the fact that a successive carrier accedes to the contract of carriage to the extent provided for in the consignment note, hence it is bound by those terms and conditions of the contract of carriage between the sender and the original carrier with which it could thus become familiar. Furthermore, the jurisprudence allows of the possibility for a third party acceding to a given legal relation to be bound with an arbitration clause referring to disputes resulting from such legal relation. In such a case, there is no need for an express written statement by the party acceding to the contract to the effect that such party accepts the clause incorporated into the contract governing the legal relation. However, in order for a party acceding to a contract to be bound by the arbitration clause, the act of accession should be made in a form sufficient for drawing up the arbitration clause[41]. The above view can be supported with the case law concerning the issue of an assignee being bound by the arbitration clause as a legal successor. According to J. Zrałek and W. Kurowski, the claim that an assignee is bound by the arbitration clause can be justified by recognizing the arbitration clause as one of the elements giving shape to a legal relation, and a similar situation is to be found in the case of the choice of governing law for a contract and the legal relation resulting from the same[42].

In practice, successive carriers sometimes sign the consignment note, but this is not a necessary condition for them to accede to the contract of carriage. If the arbitration clause was incorporated into the consignment note and a successive carrier signed such note, it could be assumed that an arbitration agreement was executed in compliance with the formal requirements in this respect. The issue becomes much less obvious if a successive carrier did not sign the consignment note and acceded to the contract of carriage only by making a declaration of will in an implied manner, through taking over the goods along with the consignment note. It should be borne in mind that execution of the arbitration agreement in an implied manner or orally is, as a rule, excluded[43]. The parties are required to expressly declare their intention to submit a dispute to arbitration, and consent to being bound by an agreement expressed through the taking over of goods for carriage does not satisfy the above requirement.

Summary

The CMR Convention imposes on the parties to a contract of carriage special requirements concerning the necessary provisions of the arbitration agreement which make application of its regulations mandatory. As regards the formal requirements, reference should be made to the provisions of international treaties on arbitration and the internal law indicated by the applicable conflict of laws rules. Where the requirements as to its form and content are met, the arbitration clause is binding on the sender of goods and the carrier. In order for other participants of the carriage process, such as the consignee or a successive carrier, to be bound by the arbitration clause, it is recommended that such entities make a relevant statement expressing their consent to being bound by the arbitration clause. In either case, the parties can supplement the arbitration clause with additional provisions on the procedure before the court of arbitration or specify a permanent court of arbitration as the court competent to resolve a dispute.

Owing to their international nature and the fact that experts in the field of international carriage of goods by road can be appointed to sit on the panel of arbitrators, disputes arising in connection with performance of contracts to which the CMR Convention applies should be, as a rule, referred to arbitration. The unrestricted freedom of the parties to choose the place of arbitration, which is not guaranteed under the jurisdiction clauses executed based on the CMR Convention, also speaks in favor of the foregoing. However, it should be borne in mind that in the case of disputes in which the value of claims is relatively low (and claims for payment for the carriage service usually belong to that group of claims), arbitration may prove to be more expensive than proceedings before common courts.

40. Wesołowski K., Umowa…, p. 706.

41. Tomaszewski M., [in:] Arbitraż …, p. 323. An example of this institution application is Article 1163 of the Code of Civil Procedure, pursuant to which an arbitration agreement contained in the articles of association (statutes) of a commercial company, referring to disputes resulting from the corporate relation between the company and its shareholders, binds the company and its shareholders.

42. Zrałek J., Kurowski W., Wpływ przelewu wierzytelności na klauzulę arbitrażową. ADR. Arbitraż i Mediacja No. 3/2008, pp. 135 et seq.

43. Tomaszewski M., [in:] Arbitraż …, p. 306.

Some comments on the remission proceedings in cases for setting an arbitral award aside

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The Code of Civil Procedure provides for an option to request for a final and unappealable arbitral award to be set asideby a state court exclusively on the specific grounds listed in its Article 1206. Nonetheless, even if the state court identifies grounds for setting an arbitral award aside, this does not necessarily have to mean that the award will be aside and, in consequence, disqualified it from legal relations. At a party's request, the proceedings instituted under a petition to set an arbitral award aside may be stayed and the arbitral tribunal may be given an opportunity to resume its proceedings in order to remove the grounds for setting its award aside.

The institution referred to in Article 1209 of the Code of Civil Procedure introduces the so-called "corrective procedure" or "remission procedure" into the Polish system of judicial review of arbitral awards. This is a new institution (introduced under the 2005 amendment to the Code of Civil Procedure) and it did not have any equivalent in the legal framework previously in force.

The purpose of the remission procedure is to prevent setting an arbitral award aside and the necessity to re-conduct the arbitration proceedings.[1] The institution in question was to make dispute resolution by arbitration more efficient (both in terms of procedure duration and cost) through offering the arbitral tribunal an opportunity to correct its award without the need to set the same aside and reconsider the whole dispute.[2]

The regulation is based on Article 34.4 of the UNCITRAL Model Law.[3] In accordance with the above model provision, the state court with which a petition to set aside an arbitral award was filed, may, where so requested by the parties and deemed appropriate by the court, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitration proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

The Polish legislator made some modifications as compared with the Model Law. Under the Model Law, the decision granting or refusing to grant a party's request for remitting the case to the arbitral tribunal depends on whether or not the state court deems such a course of action appropriate. Although the Polish counterpart of that provision does not contain a similar phrase ("where appropriate"), its effect is comparable, as the court "may stay the proceedings" and not "shall stay the proceedings," i.e. the decision in this respect is left to the discretion of the court.

In addition, the Polish legislator vested in the state court the power to specify the scope of changes to be made in the award – the state court is to instruct the arbitral tribunal to take specific actions the purpose of which is to have the deficiencies remedied (Article 1209 § 2 of the Code of Civil Procedure). The Model Law says, however, that the arbitral tribunal may take any actions which in its opinion will eliminate the grounds for setting an award aside. As a result of the above modification, the Polish regulation raises some concerns as to the degree of detail with which the state court should instruct the arbitral tribunal to take the actions intended to remedy the defective award and as to the legitimacy of the state court's interference in the arbitral tribunal's autonomy.

What raises the most serious concern is that the arbitral tribunal is to undertake the actions "instructed" by the state court (Article 1209 § 2 of the Code of Civil Procedure). W. Głodowski is right to point out that the legislator failed to specify in detail the scope of actions that the state court may instruct the arbitral tribunal to take, and an assumption that such instructions may include directing that the arbitral tribunal to change its award as to its merits would violate the principle of the arbitral tribunal's autonomy.[4]

On the other hand, R. Morek's view, according to which it is admissible to instruct the arbitral tribunal in the course of the remission proceedings to take only such actions that will not interfere in the part of the award referring to the merits of the dispute, seems to be very restrictive. In his opinion, one should assume that this provision refers to certain activities of technical nature that the arbitral tribunal may perform, such as remedying formal defects of the award or correcting obvious typographical errors.[5] However, there are no grounds for adoption of the above view, as it is not supported by the interpretation of the discussed provision. The possibility for a party to have typographical inaccuracies and errors corrected at its request, as well as to obtain an interpretation of the award, was provided for

1. Ereciński T., Weitz K., Sąd arbitrażowy, Warsaw, 2008, p. 409; Łaszczuk M., Szpara J. [in:] System Prawa Handlowego. Arbitraż handlowy, t. 8, Szumański A. (ed.), Warsaw 2010, p. 634; Piasecki K., Kodeks postępowania cywilnego. Komentarz. T. 4, Piasecki K. (ed.), Warsaw 2013, commentary on Article 1209.

2. Cf. the statement of reasons to the draft Amendment of 2005, parliamentary print No. 3434.

3. UNCITRAL Model Law on International Commercial Arbitration 1985, www.uncitral.org.

4. Głodowski W., Postępowanie na skutek wniesienia skargi o uchylenie wyroku sądu polubownego, [in:] Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego Szczecin – Niechorze 28-30.9.2007, Dolecki H., Flaga-Gieruszewska K. (eds.), Warsaw 2009, p. 177.

5. Morek R., Mediacja i arbitraż (art. 1831 - 18315, art. 1154-1217 k.p.c.), Warsaw 2006, p. 274; Morek R. [in:] Kodeks postępowania cywilnego. Komentarz, Marszałkowska-Krześ E. (ed.), Warsaw 2012, commentary on Article 1209.

separately in Article 1200 of the Code of Civil Procedure. Furthermore, it seems that should this view be endorsed, the usefulness of a remedy such as remission of the case to the arbitral tribunal in order for it to remove the deficiencies justifying setting the award aside would be doubtful. Situations where the technical deficiencies referred to by R. Morek might serve as grounds for setting an arbitral award aside should be only rarely found, hence the need to correct them would arise equally infrequently.

Indeed, an institution permitting the state court to instruct the arbitral tribunal to undertake specific actions in a prescribed manner, the performance of which will render the arbitral award acceptable to the state court, might be perceived as detrimental to the finality of the arbitral award.[6] Similarly, allowing the state courts to instruct the arbitral tribunal to change the merits of an award might jeopardize the arbitral tribunal's autonomy.[7] A. Zieliński argues that "the discussed part of the provision is in conflict with the idea of arbitration, which is totally independent of state courts and, consequently, state courts may not impose on arbitral tribunals the obligation ("shall undertake the actions") to perform any acts."[8] The act of the state court consists not so much of ordering that the arbitral tribunal resume its proceedings and remedy specific deficiencies of an award,[9] but rather of pointing out the defects identified in the award and giving the arbitral tribunal an opportunity to remove them. It is however clear that annulment of an arbitral award is much more detrimental to the final nature of the arbitral award and the autonomy of the arbitral tribunal. The purpose of the remission proceedings is to promote the final nature of the arbitral award and to respect the award rendered by the arbitral tribunal, provided that the deficiencies justifying its annulment are removed. It should be assumed, however, that the arbitral tribunal is not under obligation to undertake the actions instructed by the state court, and the state court has no sanctions against the arbitral tribunal if it fails to do so. Therefore, the arbitral tribunal is free to refuse to perform the actions it was instructed to undertake, in whole or in part. This allows the arbitral tribunal to preserve its autonomy.

However, given the rule of arbitrators' due care, as reflected in numerous sets arbitration rules and codes of arbitrators' ethics,[10] arbitrators should act with due care so as to ensure that the award they render is effective and enforceable under the applicable provisions of arbitration law. For this reason arbitrators may be obliged to take any steps intended to ensure correctness of the award they render, including to remove any deficiencies which might result in the award being set aside, provided, however, that they agree with the determinations made by the state court. Where their position differs from that of the state court, they may supplement it or make it more precise with the use of the remedy in question, which also constitutes performance of their duty to make any and all endeavors to ensure that the award they render is final and enforceable. Otherwise, where the arbitrators refuse to correct the award or refuse to provide reasons why they refuse to do so, they may bear third party liability towards the parties.[11]

Thus, the interpretation of this rather unfortunate wording ("the arbitral tribunal shall undertake the actions instructed by the state court") suggested by A. Zielony and according to which the state court no so much instructs the arbitral tribunal to undertake specific actions as it specifies the scope of actions to be undertaken as part of the dispute reconsideration, seems to be justified.[12] Such a scope of actions could correspond to the award deficiencies, which – in the state court's opinion - serve as grounds for setting the award aside, but the court should not determine what specific actions the arbitral tribunal should undertake in order to remove the deficiencies.[13]

In view of T. Ereciński and K. Weitz, the scope of the defects specified by the court should correspond to the permitted scope of award judicial review, i.e. it should not go beyond the grounds for a petition to set an award aside, as indicated by a party, and the grounds that the state court may consider ex offcio[14], due to the fact that the purpose of the remedy in question is to remove the grounds for arbitral award annulment and not to correct all the deficiencies it might possibly have.

Furthermore, it seems that despite the wording of Article 1209 § 2 of the Code of Civil Procedure, i.e. "the arbitral tribunal shall undertake the actions as instructed by the state court," the scope of actions specified by the state court should not mean that the arbitral tribunal may undertake only the actions so specified. A teleological interpretation of the above provision seems to support the claim that the arbitral tribunal should undertake any and all actions to render an award which will be correct in terms of the grounds for a petition to set it aside.

The state court may stay the proceedings exclusively at the request of one of the parties and does not have the power to do so ex officio. It seems that should the state court be allowed to act ex officio in this respect, this very convenient remedy might be used more frequently and a larger number of arbitral awards could be upheld.

The institution of remission proceedings results in restoration, as it were, of the arbitral tribunal's appointment to decide the case. This (in addition to the arbitral tribunal's power to rectify or supplement an arbitral award and the activities involved in storing of the files)[15] is one of the exceptions to the rule provided for

6. Kurnicki T., Znowelizowane postępowanie przed sądem polubownym, MoP No. 22, p. 1128.

7. Głodowski W., op.cit., p. 177; Morek R., Komentarz…, op.cit.; Zieliński A. [in:] Kodeks postępowania cywilnego. Komentarz; Zieliński A., Flaga-Gieruszyńska K. (eds.), Warsaw 2012, commentary on Article 1209.

8. Zieliński A., op.cit.

9. See Głodowski W., op.cit., p. 177.

10. For instance, § 10 of the Rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw of January 1, 2007; Article 41 of the ICC Arbitration Rules of 2012; Article 32.2 of the Rules of the London Court of International Arbitrationof 1998; cf. Boog C., Wittmer S., The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award, "Kluwer Arbitration Blog", 28/01/2013.

11. Głodowski W., op.cit., p. 178.

12. Zielony A., Postępowanie rektyfikacyjne i remisyjne, "Przegląd Sądowy" No. 3/2007, p. 51.

13. Cf. Ereciński T., Weitz K., op.cit., p. 410.

14. Ereciński T., Weitz K., op.cit., p. 410.

15. Articles 1200-1203 and 1204 § 1 of the Code of Civil Procedure.

in Article 1199 of the Code of Civil Procedure, which says that the duties of arbitrators expire upon issuance of an award or a decision on discontinuing the proceedings, or another decision terminating the proceedings in a case.

The Code of Civil Procedure is not specific about at which stage of the proceedings, or in what form the state court may use the remedy provided for in Article 1209 of the Code of Civil Procedure. However, pragmatically speaking, the state court can decide whether or not to stay the proceedings and remit the case to the arbitral tribunal for reconsideration only at the final stage of the proceedings to set an award aside, at the moment when, were it not for the party's request, the state court would decide to set the arbitral award aside. This is so due to the fact that it is only after the state court examines the petition on its merits (at the earliest after the opposing party files its pleading in response to the petition or after the deadline for doing so expires, and after a hearing is held) that it can be certain whether or not the petition to set the arbitral award aside is justified and, consequently, whether or not it is legitimate to give the arbitral tribunal an opportunity to correct the award.[16]

Availability of the option of remitting a case to the arbitral tribunal for it to remove the deficiencies should also depend upon the prospect for such deficiencies being in fact removed by the arbitral tribunal[17]. Some legislative frameworks, including the U.S. Uniform Arbitration Act[18], expressly provide that the remission procedure is not used where the defectiveness of an award consists of the absence, invalidity or ineffectiveness of the arbitration clause, as the arbitral tribunal is not capable of remedying such a defect. However, where the arbitral tribunal is found to have acted in bias or to have been involved in corruptive practices, the remission procedure should be conducted by another tribunal. It seems that, despite the absence of any express regulation to that effect, under the Polish Act, the state court should, when acting under such circumstances (i.e. where the arbitration clause is defective and not capable of being remedied or where objections as to the composition of the arbitral tribunal are raised), dismiss a party's request for remitting the case to the arbitral tribunal.

Pursuant to the English and Welsh Arbitration Act of 1996[19], in the case of identification of any of the grounds listed as the grounds for petition to set an arbitral award aside and referred to as "serious irregularities" (including, inter alia, a defective scope of the arbitration clause, formal defects of the award rendered, failure to comply with the agreed procedure), the case is, as rule, remitted to the arbitral tribunal for reconsideration, in whole or in part. The state court may set the award aside only if it is satisfied that the remission procedure is inappropriate in a given case.[20] In accordance with Section 71.3 of the Arbitration Act of 1996, the arbitral tribunal to which a case was remitted in the course of such procedure, makes a fresh award in respect of the matters remitted within three months of the remission date, unless the state court prescribed a longer period therefor.

It is frequently pointed out that, as a problematic consequence of the regulation in question, the state court's decision on whether or not to allow the petition to set an arbitral award aside is disclosed. Also, it seems that where the arbitral tribunal does not undertake the actions it is instructed to take or does not otherwise address the state court's concerns, the state court should be bound with the determinations it previously made and obliged to set the award aside.

A state court's decision remanding an award to the arbitral tribunal for removal of deficiencies is not, in light of the provision of Article 1159 § 2 of the Code of Civil Procedure, subject to recourse. It is only a decision on stay of the proceedings that may be subject to an appeal (pursuant to Article 394 § 1.6 of the Code of Civil Procedure), although it seems that when considering such an appeal, the court will have to examine the legitimacy of staying the proceedings, hence also the legitimacy of remission of the award to the arbitral tribunal in order for it to remove the deficiencies.[21]

As a result of the remission procedure, the arbitral tribunal issues a supplementary award, also called a remission award. Given the mutatis mutandis application of Article 1202 of the Code of Civil Procedure (resulting from the provision of the second sentence of Article 1209 § 2 of the Code of Civil Procedure), the arbitral tribunal should issue a supplementary award within no more than two months following the day on which it received the state court's order to that effect[22].

In accordance with Article 1209 § 2 of the Code of Civil Procedure, petition to set an award aside is not permitted in respect of awards rendered as a result of such a remission procedure. The disclosure of the state court's position on the petition's legitimacy does not itself have an adverse impact on the proceedings, due to the fact that, as a rule, a case should be remitted to the arbitral tribunal for reconsideration only at the moment when, were it not for the decision to remit, the award would be set aside. This is how this issue has been expressly settled, for instance, in the Swedish Arbitration Act of 1999[23]. Pursuant to Article 35 of that Act, an award may be remitted to the arbitral tribunal only where the state court is satisfied that the petition to set the same aside is legitimate or where the parties have mutually so requested.

Objections, if any, as to the actions undertaken by the arbitral tribunal as part of the remission procedure are considered by the state court after the previously stayed court

16. Morek R., Komentarz… op.cit.; Ereciński T. [in:] Ciszewski J., Grzegorczyk P., Weitz K., Ereciński T., Kodeks postępowania cywilnego. Komentarz. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy), Warsaw 2012, commentary on Article 1209; Głodowski W., op.cit., p. 176.

17. Pruś P. [in:] Kodeks postępowania cywilnego. Komentarz, Pruś P., Stefańska E., Sieńko M., Tomaszewski K., Radwan M., Manowska M. (eds.), Warsaw 2011, commentary on Article 1209; Głodowski W., op.cit., p. 177.

18. The U.S. Uniform Arbitration Act of December 13, 2000 (originally enacted in 1955 and substantially revised in 2000); http://lp.findlaw.com; Section 23(c).

19. The English and Welsh Arbitration Act of June 17, 1996, providing for the operation of arbitration tribunals in England, Wales and Northern Ireland; http://www.legislation.gov.uk

20. Section 68.3 of the Arbitration Act of 1996.

21. Cf. Głodowski W., op.cit., p. 177.

22. For a different view see Głodowski W., op.cit., p. 179.

23. The Swedish Arbitration Act of March 4, 1999 (Lag om skiljeförfarande (SFS 1999:116)), as amended, providing for the operation of arbitration tribunals in Sweden; www.sccinstitute.se.

proceedings to set an arbitral award aside are resumed. It should be assumed that such objections to a remission award need to refer to the grounds for the petition to set aside an arbitral award or, possibly, also to the actions undertaken by the arbitral tribunal, or to the award itself.[24] In the resumed proceedings the parties may not refer to new petition-justifying grounds if such grounds do not involve the issues that arose as a result of the remission procedure.

A slightly different framework for the remission procedure was adopted by the German legislator. Pursuant to § 1059.4 of the German Code of Civil Procedure[25], the state court may remit a case upon annulment of the arbitral award. It is assumed, however, that a case may be remitted only where the defects of the arbitral award are capable of being remedied by the arbitral tribunal.

The institution of remission of an award to the arbitral tribunal in order for it to remove the deficiencies originates from common law countries and is typical of this system of law. Nevertheless, several countries, including Cyprus, Russia, Turkey, Ukraine, Peru and Poland,[26] which drew upon the UNCITRAL Model Law when drafting their arbitration laws, introduced such a regulation.

Despite numerous controversies and views critical of this new institution in the Polish law, the concept itself seems to be appropriate and convenient.[27] Certain interpretative concerns result from the wording adopted by the Polish legislator, i.e. the phrase saying that "the arbitral tribunal shall undertake the actions as instructed by the state court." Nonetheless, it seems that an appropriate interpretation of this provision by state courts, taking into account its purpose, could contribute to efficiency of the proceedings to set an award aside. On the one hand, it makes it possible to avoid annulment of the award, which can be particularly useful where the defect is an obvious mistake or a minor omission of the arbitral tribunal that the arbitral tribunal might want to correct. On the other hand, where the arbitral tribunal does not consider the objections raised by the state court justified, this remedy allows it to present its position (e.g. through supplementing the statement of reasons to the award in respect of the issues that raise concerns), which may constitute a valuable contribution to the discussion on the annulment case. However, it seems that the objections referred to above are raised out of false concern for the autonomy of arbitration and the finality of arbitral awards, since annulment of an award (unavoidable if remission is not instituted despite existence of the grounds), obviously harms the above principles much more.

24. Pruś P., op.cit.

25. The German Code of Civil Procedure of December 5, 2005, as amended (Zivilprozessordnung).

26. Sanders P., Unity and Diversity in the adoption of Model Law, Kluwer Law International, 11/1/1995, p. 19.

27. See Morek R., Komentarz… op.cit.; Pruś P., op.cit.

Gloss on the judgment in case marked with docket No. II SAB/Wa 252/12, rendered by the Voivodeship Administrative Court in Warsaw on October 25, 2012

THE RELEVANT EXCERPT FROM THE STATEMENT OF REASONS TO THE JUDGMENT HAS NOT PREVIOUSLY BEEN EXTRACTED

Agnieszka Różalska-Kucal

Lewiatan Court of Arbitration, Ph.D. Candidate at University of Cardinal Stefan Wyszyński

However, Article 32.5 of the UNCITRAL Arbitration Rules, as referred to by the authority, provides only that an award may be made public exclusively with the consent of both parties. The Court is of the opinion that the above provision may not be deemed either to set forth a different procedure and rules for disclosure of public information within the meaning of Article 1.2 of the Public Information Act.

If so, the Public Information Act, which sets forth in the first place the rules and procedure for disclosure of information of the nature of public information, applies in the case at hand.[1]

1. The relevant excerpt from the statement of reasons to the judgment identified and extracted by the Author.

The facts and legal situation

In his application of May 2012, K. I. requested the State Treasury Solicitors' Office ("STSO") to provide him, pursuant to the Public Information Act, with a copy of the award rendered by an UNCITRAL arbitral tribunal in the case L., B., A. vs. Poland. In its reply of May 2012, the State Treasury Solicitors' Office referred to the judgment of the Voivodeship Administrative Court in Warsaw, dated December 29, 2011 (II SAB/Wa 357/11), and informed the applicant that it was not under obligation to disclose public information.

K. I. disagreed, arguing, inter alia, that the judgment referred to by STSO was not final and unappealable and STSO was declared to be an entity under obligation to disclose public information in other rulings of administrative courts. Furthermore, STSO maintains the

Public Information Bulletin in which it publishes, inter alia, the rulings of common courts and the Supreme Court served upon STSO. In his complaint on the failure of the President of STSO to act, filed with the Voivodeship Administrative Court in Warsaw, K. I. argued that the authority had acted in breach of Articles 61.1 and 61.2 of the Constitution of the Republic of Poland, as well as Article 1.1.1 in connection with Article 10.1, Article 4.1 and Article 13.1 of the Public Information Act (the "Act"). In connection with the foregoing, he requested that the authority be obliged to disclose public information in line with the application of May 2012. In the justification for his request he argued, in particular, that pursuant to Article 4 of the Act, every entity performing tasks of public nature or managing public property was under obligation to disclose public information. In the complainant's opinion, STSO undoubtedly performs, within the scope covered by the application, the tasks of public nature specified in the Act of July 8, 2005 on the State Treasury Solicitors' Office. This is so due to the fact that pursuant to Article 1.2 of the above act, the State Treasury Solicitors' Office is a state organizational unit.

In his reply to the complaint, the President of STSO requested that the same be dismissed. In his opinion, it clearly follows from an analysis of the provisions specifying the scope of duties assigned to the State Treasury Solicitors' Office (i.e. the tasks within the scope of representation at court) that the State Treasury Solicitors' Office is not an entity under obligation to disclose public information. In its pleading of September 2012, the authority argued, referring to the judgment of the Supreme Administrative Court of July 23, 2012 (I OSK 896/12), that the exclusion under Article 1.2 of the Act applied accordingly in respect of the decisions made by the Arbitral Tribunal in the case referred to by the complainant. The authority also pointed out that the Bilateral Investment Treaty between the Government of the People's Republic of Poland and the Government of the French Republic, signed in Paris on February 14, 1989, sets forth the rules governing arbitration proceedings instituted against a contracting State by an investor. Pursuant to Article 8.2, a dispute should be resolved pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law, adopted by the General Assembly of the United Nations under Resolution No. 31/98, dated December 15, 1976. In accordance with Article 32.5 of the above Rules, an award may be made public only with the consent of the parties. In the authority's opinion, application of the procedure for disclosure of information provided for in the Public Information Act to arbitral awards rendered in proceedings governed – under an international treaty - by the UNCITRAL Arbitration Rules, would be in breach of Article 1.2 of the above Act and of the regulations of international law.

The complainant argued that in view of the fact that the authority had not presented any evidence or information to the effect that the reason why the parties to the proceeding had met before the arbitral tribunal had been the circumstances specified in Article 5.2 of the Treaty and that there had been no consent of the parties to publishing the award or that the authority had requested the parties to give such consent following the filing of the application, the authority illegitimately referred to Article 8.2 of the Treaty in connection with Article 32.5 of the UNCITRAL Arbitration Rules.

The ruling

The Voivodeship Administrative Court in Warsaw, composed of: Presiding Judge - Justice Andrzej Góraj, Judge of the Voivodeship Administrative Court; Judges of the Voivodeship Administrative Court - Justice Stanisław Marek Pietras, Justice Andrzej Kołodziej (Reporting Judge); and Court Clerk - Łukasz Mazur, Assistant Judge, having examined, during a hearing held on October 25, 2012, the complaint filed by K. I. and concerning the failure of the President of the State Treasury Solicitors' Office to consider the application for disclosure of public information, dated May [...], 2012, hereby:

1) resolves to impose on the President of the State Treasury Solicitors' Office the obligation to consider the complainant's application of May [...], 2012 within 14 days following the date on which a copy of the final an appealable judgment along with the files of the case are served; and

2) holds that the failure to act was not in gross violation of the provisions of law, [...].

The statement of reasons

[...] An administrative authority is considered to have failed to act whenever it did not institute a procedure in a case by the deadline prescribed under law, or instituted such procedure but did not complete it with an issued decision, ruling or another resolution, or did not undertake the required act, despite its statutory obligation to do so. [...] Public information may be disclosed according to the procedure provided for in the act referred to above, where the statutory objective and subjective requirements are satisfied, i.e. where the requested information is public information and the entity with which the application was filed is an administrator of such information and an entity obliged to disclose the same.

Pursuant to Article 1.1 of the Act, any item of information on public affairs is public information within the meaning of the Act, and a list of items serving as an example of public information is contained in Article 6.1 of the Act.

In the case at hand, the complainant's request for a copy of the award rendered by the Arbitral Tribunal in the case L., B. and A. vs. the Republic of Poland undoubtedly refers to public information, as the above award is a document of such nature due to the fact that it may establish financial obligations of the State Treasury towards the above entities, which fact was not challenged at any stage.

Contrary to what it claims, the State Treasury Solicitors' Office is an entity under obligation to disclose public information. In its judgment of July 23, 2012, docket number I OSK 896/12, the Supreme Administrative Court held, and this view is shared and endorsed by the Court in its entirety, that "As regards classification of the State Treasury Solicitors' Office as an entity obliged to disclose public information, it should be concluded that the same is a state organizational unit operating pursuant to the Act of July 8, 2005 on the State Treasury Solicitors' Office (Dz. U. [Journal of Laws] No. 169, Item 1417), which follows directly from Article 1.2 of the above Act and from § 1 of the Statutes of the State

Treasury Solicitors' Office. The scope of duties assigned to the State Treasury Solicitors' Office includes representation of the State Treasury and the Republic of Poland before courts and tribunals, issuance of legal opinions and opinions on draft normative acts pertaining to rights or interests of the State Treasury (Article 4 of the Act on the State Treasury Solicitors' Office). [...] In accordance with Article 4 ust. of the Public Information Act, the group of entities obliged to disclose public information includes, inter alia, entities representing other persons or organizational units that perform public tasks or manage public property. [...] Given the fact that the list of entities contained in Article 4.1 of the Public Information Act serves as an example only, which is indicated by the phrase "[entities] under obligation (...) shall be in particular (...)," the State Treasury Solicitors' Office should be classified as an entity obliged to disclose public information. [...] It should be also noted that a broad interpretation of the term "entities under obligation to disclose public information" is reflected in the interpretation of Article 4.5 of the Public Information Act, pursuant to which the category of "persons or organizational units [other than public ones] that perform public tasks or manage public property" includes also private entities (entrepreneurs, societal organizations, higher education institutions, etc.) which draw on public funds to perform the tasks entrusted to them.

Neither are there any grounds for the authority's claim that in the case at hand the exclusion provided for in Article 1.2 of the Act applies, in accordance with which the provisions of the Act are not in conflict with the provisions of other acts that set forth a different procedure and rules for disclosure of information which is public information.

Leaving aside the place in the hierarchy of legislation occupied by the documents referred to by the authority, i.e. the Bilateral Investment Treaty between the Government of the People's Republic of Poland and the Government of the French Republic, signed in Paris on February 14, 1989, and Resolution No. 31/98 adopted by the General Assembly on December 15, 1976 – the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), it should be pointed out that Article 8.2 of the above Treaty provides only that should a dispute not be resolved amicably (...), it shall be referred to arbitration at the request of either party. Such dispute is to be resolved in a final manner, in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, adopted by the General Assembly of the United Nations under Resolution No. 31/98, dated December 15, 1976.

Therefore, it must not be concluded that the above provision stipulates a different procedure and rules for disclosure of information which is public information within the meaning of Article 1.2 of the Act.

However, Article 32.5 of the UNCITRAL Arbitration Rules, as referred to by the authority, provides only that an award may be made public exclusively with the consent of both parties. The Court is of the opinion that the above provision may not be deemed either to set forth a different procedure and rules for disclosure of public information within the meaning of Article 1.2 of the Public Information Act.

If so, the Public Information Act, which sets forth in the first place the rules and procedure for disclosure of information of the nature of public information, applies in the case at hand.

In view of the foregoing, acting pursuant to Article 149 § 1 of the Act of August 30, 2002 – Law on Proceedings Before Administrative Courts (Dz. U. [Journal of Laws] of 2012, Item 270), the Voivodeship Administrative Court in Warsaw has resolved as first written in the conclusion of this judgment. [...]

Commentary

Introductory comments

The judgment in question was rendered at the time of a debate on transparency and confidentiality in international arbitrations with the participation of States that has started a long time ago. Arbitration, being a private method of dispute resolution originating in the mercantile court, is characterized, inter alia, by confidentiality, which makes it possible not only to protect a business secret but also to prevent a conflict from escalating and to focus on the merits of a dispute, which is conducive to entering into settlements[2]. Thus confidentiality frequently translates into the fact that arbitration becomes an actual court of conciliation, which is of great importance to the conduct of business.

Confidentiality began to raise concerns in arbitrations in which, in addition to private entities, also a State was a party to the proceeding, that is mostly in investment arbitrations. The underlying major reason was substantial amounts of public funds awarded as damages and incurred as costs of proceedings, as well as the nature of investment arbitration which goes beyond the framework of private arbitration and towards public law arbitration[3]. However, due to the advantages offered by confidentiality, States rarely decided to make proceedings public, and if they did so, such disclosure most frequently took the form of publication of awards rendered in proceedings already closed. The two sets of rules most frequently governing investment arbitrations, i.e. the Washington Convention of June 10, 1985 on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") and the Arbitration Rules of the United Nations Commission on International Trade Law, adopted by the General Assembly of the United Nations under Resolution No. 31/98, dated December 15, 1976 (the "UNCITRAL Rules"), provide that an arbitral award may be made public exclusively with the consent of both parties to the proceeding. However, as a result of a demand for transparency of such proceedings being raised more and more often and supported with national laws on disclosure of public information, access to information concerning arbitration proceedings has improved not only in respect of publication of rendered awards.

Thus the judgment for which this gloss is provided attempts to answer the question of

2. For a more detailed discussion of confidentiality in arbitration see: Gessel-Kalinowska B. vel Kalisz, Perception of the practices followed in the field of the confidentiality obligation in arbitration. An analysis of the results of a survey carried out by the Lewiatan Court of Arbitration among Polish arbitration practitioners [in:] Arbitration e-Review Nos. 3-4(10-11)/2012, p. 5.

3. Wiśniewski A. W., Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów, Warsaw 2011, pp. 122 et seq.; Dolzer R., Schreuer Ch., Principles of International Investment Law, Oxford 2008, pp. 221 et seq.

whether or not and to what extent Poland is under obligation to publish arbitral awards rendered in investment disputes. However, given the legal framework in force, the judgment is subjected to criticism.

The arbitration clause

Investment arbitration is a unique dispute resolution method, as compared not only with arbitration in its traditional form, i.e. commercial arbitration, but also interstate arbitration. The arbitration clause incorporated into an international treaty the parties to which are States, subsequently becomes a clause which can benefit an investor from one contracting State wishing to bring an action against the other contracting State, i.e. the recipient State. Thus, this is a peculiar "open-end clause," being a proposal that investors can accept[4].

In the discussed case, the international treaty from which the arbitration proceeding resulted was the Bilateral Investment Treaty between the Government of the People's Republic of Poland and the Government of the French Republic, signed in Paris on February 14, 1989[5], and its Article 8.2, pursuant to which:

"1. Any investment-related dispute between a Contracting State and an investor of the other Contracting State shall be, as far as possible, resolved amicably between the two interested parties or, should this prove impossible, with the use of internal means of recourse.

2. Notwithstanding the foregoing, disputes relating to the forms of expropriation referred to in Article 5.2, and in particular to damages, quantification of the same, conditions of payment of the same, as well as default interest accrued thereon in the event of a delay in payment thereof, shall be resolved as follows:

– Should a dispute not be settled amicably within six months following the date on which it was reported by a party, it shall be submitted to arbitration at either party's request. Such dispute shall be resolved in a final manner pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law, adopted by the General Assembly of the United Nations under Resolution No. 31/98, dated December 15, 1976 (...)."

Such an express and firm reference to arbitration governed by the UNCITRAL Arbitration Rules, as made in the arbitration clause incorporated into the treaty, constitutes the above mentioned proposal addressed to investors, and - in addition and more importantly for the purposes of the case at hand – an obligation assumed by each contracting State both towards the other contracting State and towards prospective investors, to the effect that arbitration proceedings will be governed by the above Rules. This refers to all provisions of the Rules, including Article 32.5 which permits publication of an award exclusively with the consent of the parties.

Thus, despite the fact that the UNCITRAL Rules do not in themselves constitute common provisions of law but only a developed model of arbitration that can be used by parties to a dispute by analogy to a private law document executed between them, they acquire – upon their incorporation into an investment treaty, and for the purposes of such treaty and proceedings resulting therefrom - a different legal status. The status of an international obligation.

The arbitration clause incorporated into an investment treaty is not the arbitration clause within the meaning of private law[6], the fundamental purpose of which is, also under Polish law, to define the legal relation involved in a dispute[7]. Clauses incorporated into investment treaties do not satisfy this requirement on account of their abstract quality – they refer to any potential disputes resulting from any conceivable investments made by any investors coming from a contracting State. Nonetheless, they are valid arbitration clauses. The Model Bilateral Investment Treaty developed by the U.S. handles the arbitration clause in the same way, providing that the proposal by a State satisfies the requirements set for an arbitration agreement within the meaning, inter alia, of the New York Convention[8] which is applicable to commercial arbitration. However, ipso facto, it does not constitute such an agreement.

Upon the occurrence, in the course and upon the closing of a dispute, investment arbitration adopts and makes use of certain solutions typical of commercial arbitration (such as the UNCITRAL Arbitration Rules, enforcement of an award under the New York Convention), but by doing so, it does not transform into commercial arbitration sensu stricto[9]. It continues to be legitimized by the provisions of an international treaty, such as BIT. Therefore, the legal regime for investment arbitration is provided, both in respect of substantive and procedural issues, exclusively by BIT and international law[10]. For example, an arbitration clause incorporated into an investment treaty may be declared invalid only if this follows from the Vienna Convention on the Law of Treaties[11], and not from other regulations that might apply in commercial arbitration, e.g. the Code of Civil Procedure or the Civil Code in the case of arbitration proceedings held in Poland[12].

However, where a dispute between a State and an investor is to be resolved solely based on a private law contract and the arbitration clause incorporated therein, the arbitration proceeding will be indeed of an exclusively private law nature, intrinsic to commercial arbitration. Consequently, also the rules of arbitration will

4. See, inter alia, Dugan Ch., Wallace D., Jr., Rubins N., Sabahi B., Investor-State Arbitration, Oxford 2008, p. 236; Schreuer Ch., Muchlinski P., Ortino F., The Oxford Handbook of International Investment Law, Oxford 2008, p. 837; Dolzer R., Schreuer Ch., Principles of International Investment Law, Oxford 2008, p. 238.

5. Dz. U. [Journal of Laws] of 1990 No. 38, Item 220.

6. Wiśniewski A. W., Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów, Warsaw 2011, p. 127

7. Article II.1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958, Dz. U. [Journal of Laws] of 1962 No. 9; Article 1161§1 of the Code of Civil Procedure, Dz. U. [Journal of Laws] of 1964 No. 43, Item 296, as amended; Article 7 (Option I, Option II) of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Resolution of the General Assembly of the United Nations No. 61/33 (2006).

8. US Model BIT 2004, available at: http://www.state.gov/documents/organization/117601.pdf

9. Wiśniewski A. W., Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów, Warsaw 2011, p. 135.

10. Wiśniewski A. W., Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów, Warsaw 2011, p. 130.

11. Part V of the Vienna Convention on the Law of Treaties, dated May 23, 1969 (Dz. U. [Journal of Laws] of 1990 No. 74, Item 439).

12 Schreuer Ch., Muchlinski P., Ortino F., The Oxford Handbook of International Investment Law, Oxford 2008, p. 837.

have the exclusive status of a private law agreement executed between the parties. However, this is not the case here.

At the level of international law, should a contracting State fail to perform its obligation under a treaty or perform the same improperly, this would be a violation of international law[13]. As regards a provision such as the arbitration clause, violation would occur both in the case of a refusal to comply with the above Rules governing arbitration proceedings and in the case of a breach of their provisions.

Provisions of the UNCITRAL Arbitration Rules

As pointed out by the Court, Article 32.5 of the UNCITRAL Rules provides that an award may be made public exclusively with the consent of both parties. In consequence, the international treaty, i.e. BIT, itself provides that an award may be made public exclusively with the consent of both parties. Therefore, if even one of the parties, i.e. the State or the investor, does not agree to award publication, the award may not be published and there are no exceptions to that rule.

This is also confirmed by the new wording of the UNCITRAL Rules of 2010[14], where Article 34.5 reads as follows:

"An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority."

Thus, the revised UNCITRAL Rules would permit publication of an award wherever such publication is required under statute. The Rules of 1976, which govern the proceedings in the case at hand, do not provide for such a possibility. A contrario, the prohibition of award publication resulting exclusively from the legal obligation imposed on one of the parties under the UNCITRAL Rules of 1976 unambiguously leads to the conclusion that it is only an express consent of both parties to the proceeding that may bring about publication of a given award. In the case at hand there was no such consent.

Obligations under the Public Information Act

However, the Public Information Act[15] of September 6, 2001, requiring that an award be disclosed regardless of the parties' will wherever the proceedings involved public affairs, constitutes an obligation imposed on a party to the proceeding, in this case, on the State Treasury represented by the State Treasury Solicitors' Office. In accordance with Article 1.1 of the Act:

"Any information on public affairs shall be public information within the meaning of the Act and shall be subject to disclosure and further use on the terms and conditions and according to the procedure provided for herein."

13. Dugan Ch., Wallace D., Jr., Rubins N., Sabahi B., Investor-State Arbitration, Oxford 2008, p. 238.

14. Resolution No. 65/22 of the General Assembly of the United Nations.

15. Dz. U. [Journal of Laws] No. 112, Item 1198.

Thus, the conclusion of the judgment, saying that there exist both subjective and objective grounds for disclosure of public information, may not be questioned.

However, the Court failed to take into account the fundamental issue of precedence as between the statute and the international treaty.

The hierarchy of norms

The BIT was signed in Paris on February 14, 1989 and subsequently ratified by the State Council of the People's Republic of Poland, as required under Article 25.1 of the Constitution of the People's Republic of Poland, dated July 22, 1952 (Dz. U. [Journal of Laws] No. 33, Item 232, as amended), and published in the Journal of Laws (Dz. U. [Journal of Laws] of 1990 No. 38, Item 220).

Pursuant to Article 241.1 of the transitional provisions of the Constitution of the Republic of Poland, dated April 2, 1997[16], as currently in force:

"International agreements, previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), shall be considered as agreements ratified with prior consent granted by statute, and shall be subject to the provisions of Article 91 of the Constitution if their connection with the categories of matters mentioned in Article 89, para. 1 of the Constitution derives from the terms of an international agreement."

In other words, in order for an international treaty executed prior to 1997 to take precedence over a statute in a situation where the regulations of the above documents are in conflict, the three conditions set forth in the provision of the Constitution have to be satisfied jointly. The investment treaty was duly ratified and published in the Journal of Laws. Furthermore, it refers to the categories of matters listed in Article 89.1 of the Constitution, pursuant to which:

"Ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute - if such agreement concerns:

1) peace, alliances, political or military treaties;
2) freedoms, rights or obligations of citizens, as specified in the Constitution;
3) the Republic of Poland's membership in an international organization;
4) considerable financial responsibilities imposed on the State;
5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute."

In addition to the condition set forth in Item 4, which may be satisfied and be of relevance, in particular, to payment of damages in connection with expropriation, provisions of investment treaties also refer to the freedoms and civil rights or duties set forth in the Constitution, for instance:

– Article 21, providing, inter alia, that expropriation is permissible only when done

16 Dz. U. [Journal of Laws] of 1997 No. 78, Item 483, as amended.

for public purposes and against just compensation;

– Article 64, being concerned with protection of ownership;

– Article 41, relating personal inviolability to the provisions of BITs on full protection and security.

Furthermore, the treaty also provides for a number of matters governed by statutes (Item 5), such as unrestricted transfer of funds (Article 6 of the BIT) regulated under statute, i.e. the Foreign Exchange Act[17]; dispute resolution (Article 8 of the BIT), which is provided for in the Code of Civil Procedure[18]; or the already mentioned issue of expropriation (Article 5.2 of the BIT), which is provided for in the Act on Real Estate Trading and Management[19]. Therefore, also this condition is satisfied.

In other words, the status of the treaty in question is at present the same as that of international agreements ratified with a prior consent granted under statute.

In consequence, as provided for in Article 91.2 of the Constitution, "An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes."

In the case at hand, the international treaty stipulates a procedure different from that specified in the Public Information Act. By referring to Article 32.5 of the UNCITRAL Rules, the BIT provides that an award may be published exclusively with the consent of both parties. Since there is no such consent, the award may not be published. Pursuant to the Public Information Act, an award is to be made public regardless of the parties' will, due to the fact that a legal obligation to that effect is in place. The above obligation is in conflict with the obligation imposed on the State under the international treaty, also towards the other party to the proceeding who, pursuant to the UNCITRAL Rules, may have the award maintained confidential, whereas pursuant to the Public Information Act, the award may be made public also against its will.

Consequently, the obligations under the Act cannot be reconciled with those resulting from the international treaty, hence the provisions of the international treaty take precedence over those of the Act.

Therefore, the conclusive legal ground for the case resolution should be Article 32.5 of the UNCITRAL Rules, as incorporated into Article 8.2 of the investment treaty, pursuant to which confidentiality of an arbitral award may be lifted exclusively with the consent of the parties to an arbitration proceeding, and not the Public Information Act which requires that such an award be made public unconditionally.

If the dispute had been based exclusively on a civil law investment contract executed between the State Treasury and an investor, and governed by Polish law, the situation would have been different. The provisions of the UNCITRAL Rules referred to in the arbitration clause would have had the status of contractual provisions which, if in conflict with the Act, would have been declared invalid in the relevant respect under Article 58§1 of the Civil Code[20]. And the award might be published pursuant to the provisions of the Public Information Act.

Final comments

Transparency of arbitration proceedings with the participation of a State is indeed increasingly promoted, especially in the case of investment disputes. Parties to disputes also realize that the worldwide trend is to make proceedings public, not only through publication of arbitral awards regardless of the parties' will (as required under the revised UNCITRAL Rules), but also e.g. by allowing an amicus curiae to participate in proceedings. This offers an opportunity to monitor not only the practice established in individual States as well as actions conducive to or discouraging investments, but also the process of international investment law being developed by the case law and interpretations that form its part.

However, the above arguments are irrelevant to the legal situation found in the case of the judgment for which this gloss is provided, on account of the legal grounds therefor. Moreover, the vast majority of the investment treaties executed by Poland provide for dispute resolution based on the UNCITRAL Rules of 1976[21], due to the fact that Poland is not a party to the ICSID Convention and following the effective date of the UNCITRAL Rules of 2010, it has not entered into any investment treaty. Consequently, unless the State and the investor agree to publication of an award, it is not possible from the legal point of view to have such award published. Hopefully, being influenced by the worldwide trend, parties will be increasingly inclined to agree to such a course of action, especially if to be undertaken exclusively in respect of proceedings already completed.

17 Dz. U. [Journal of Laws] of 2012, Item 826, as amended.

18 Dz. U. [Journal of Laws] of 1964 No. 43, Item 296, as amended.

19 Dz. U. [Journal of Laws] of 1997 No. 115, Item 741, as amended.

20. Dz. U. [Journal of Laws] of 1964 No. 16, Item 93, as amended.

21. An exhaustive list of the investment treaties executed by Poland is available at the website of the Ministry of Economy: http://www.mg.gov.pl /Wspolpraca+miedzynarodowa / Umowy+miedzynarodowe/Umowy+w+sprawie+popierania+i +wzajemnej+ochrony+inwestycji

The 4th Global ICC YAF Conference – a chat among and about the young in international arbitration

dr Maciej Zachariasiewicz

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At the end of June 2013, New York University School of Law in New York hosted the fourth conference organized by a group of young arbitration practitioners of the Young Arbitrators Forum at the International Chamber of Commerce. Conventionally, "young" arbitration practitioners are assumed to be those under 40, or sometimes 45, years of age. The Conference was thus dominated by participants between 30 and 40 years of age, although younger persons were also strongly represented. It was emphasized in unofficial discussions among representatives of different generations that while lawyers graduating from schools of law in the 1970s or 1980s had frequently found their way to arbitration by chance and as a result of the scope of duties assigned to them at the law firm, nowadays young lawyers were purposefully seeking opportunities to practice commercial arbitration. Many of them were bitten by the bug already in Vienna, during the Willem C. Vis International Commercial Arbitration Moot Court Competition. In the course of the sessions a number of interesting issues, grouped by subject into several sections, were addressed. Here I would like to mention only a few of them.

The Conference began with a presentation by Salim Moollan of Essex Court Chambers in London. Salim, who comes from Mauritius but was educated and works in Europe, addressed the issue of legitimacy of international arbitration which attracted more and more attention of late. He pointed out that the majority of disputes originating in African countries were nowadays resolved in Europe or North America, usually by lawyers practicing the laws of those regions. In consequence, the process of resolving international commercial and investment disputes in arbitration is frequently perceived as alien in developing countries and treated with reluctance. This, in turn, has an adverse impact on the economic cooperation among countries and societies. In this context, Salim mentioned the efforts undertaken in Mauritius to establish an international arbitration center addressing its services in the first place to parties from African and Asian countries, and pointed out the advantages offered by this small island, i.e. neutrality, bilingualism (English and French) and human resources of good quality. However, he failed to mention the most important one, i.e. the wonderful climate of the heavenly island in the Indian Ocean!

Among the several conference panels there was also room for a discussion on the applicable law in arbitration. As noted by Prof. Franco Ferrari, this issue is unjustly disregarded by the practitioners of international commercial arbitration who think that the choice of law clause incorporated into a contract (which is indeed found all too frequently in large-scale international transactions) serves as a solution to all problems. He pointed out only some of the difficulties that an arbitration tribunal might face: the issue of depeçage, validity of choice of law, permissibility of the choice of sets of non-legal norms (such as the UNIDROIT Principles of International Commercial Contracts), or the issue of interference from mandatory laws (compelling their application) or from the laws of the state of the seat of arbitration, or from the regulations of another system of law. Owing to the fact that Rules of Arbitration usually contain conflict-of-law provisions of a very general nature only, it is frequently necessary to refer to some other set of conflict-of-law rules based on which the above difficulties could be resolved. An interesting (although not clearly conclusive) discussion resulted from the question whether courts of arbitration in EU Member States should apply in this respect the provisions of the Rome I Regulation on the law applicable to contractual obligations. Diverse views are expressed in the jurisprudence on this issue. However, the view that seems to prevail is the one according to which a court of arbitration may, but is not under obligation to, refer to the conflict-of-law rules set forth in the Rome I Regulation to determine the law applicable to the contractual merits of a case. It is pointed out that courts of arbitration are free to choose from among a number of methods used to determine the applicable law[1].

From the practical point of view, the workshop on quantification of damages in commercial arbitration was of great interest, conducted by economists of a specialist firm offering, on an expert basis, services in the field of assessing the value of damage in international disputes. They shared their knowledge, difficult for lawyers to assimilate, with the workshop participants, and kept emphasizing the importance of cooperation between economists and parties' attorneys in the course of preparing positions justifying the raised claims for damages. Using as an example a hypothetical dispute between an investor and a holiday resort operator on the one hand, and the owner of the plots of land on which that resort was located on the other, they demonstrated the method for quantification of damages known as Discounted Cash Flow (DCF), and presented the difficulties involved in assessing the damage value with the use of this method. In the hypothetical scenario, the owner of the plots of land breaks the agreement and there arises the need to quantify damages based on the assumption that the lease agreement was executed for a term of 30 years and for such period was to earn income to the investor. As

1. See e.g. Yüksel B., The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union, Journal of Private International Law, vol. 7, 2011, No. 1, p. 157.

a result of the agreement having been broken by the owner of the plots of land, the hypothetical income that the investor could have earned constituted its damage. Owing to the fact that what we have here is future income that could only potentially be earned by the investor, there arises the question how such income should be calculated. The starting point is the business plan adopted by the investor's board. However, it needs to be evaluated by an expert in terms of its soundness and feasibility. Numerous variables (both accounted for in the business plan and resulting from the new circumstances) come into play and need to be taken into consideration by the expert when making a DCF valuation, for example, the potential increase (or decrease) in the number of customers; the competitors existing now and, potentially, in the future; the competitive advantages, if any (e.g. the fact that the resort was designed by famous architects, was much appreciated in travel guides); the impact of the financial crises on customers' financial situation; the political situation in the country where the resort is situated; the changes in the cost of running the resort (costs of employment, taxes). When quantifying damages, the expert has to determine the discount rate as well, since the damages are to be payable as at the date of the dispute resolution, that is earlier than the future income would have been derived from the investment.

The ICC YAF Conference was not only organized by the young for the young, but was also an event during which animated discussions about the young were held, and to be more specific, about the difficulties in pursuing a career in international commercial arbitration, and in particular about the path leading to the first appointment as an arbitrator. Lucy Reed, one of the leaders of the arbitration group at the international law firm Freshfields Bruckhaus Deringer, made a very appealing speech, addressing the issue from the perspective of an experienced professional. She admitted that the predominance of lawyers of older generations in terms of the number of appointments as arbitrator did sometimes pose a problem, especially where individual arbitrators were overloaded with such responsibilities. Although, as she assured the audience, she herself aims to promote younger professionals, it is extremely often the case that attorneys are reluctant to assume the risk of appointing a less experienced person. Should the dispute be lost, such an appointment needs to be justified to the client, which is sometimes very difficult. However, she mentioned the policy of the ICC Court of Arbitration (confirmed by ICC representatives) which strives to appoint younger arbitrators in minor cases (whenever the parties did not do so). Lucy Reed also kept emphasizing how important it was for a prospective candidate for an arbitrator to be at least a little bit predictable to the parties. Before appointing an arbitrator parties invariably wish to have some information on him/her, and the source of such knowledge is his/her reputation earned in the international arbitration community (half-world), publications or public speeches. Although Lucy Reed urged the young to be patient, she finished her speech on an optimistic note by pointing out that "time is on your side."

How to host an efficient telephone conference?

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Telephone conferences with co-co-unsels are common in international arbitration. However, they have one thing in common with discovery – when unmanaged; they can easily get out of control. The aim of this article is to show that a telephone conference can be short and to the point.

Introduction

In the last time one can hear a lot about the declining efficiency and speed of arbitration. Unfortunately, some telephone conferences are one of many examples for this negative trend. Nevertheless, it can be changed.

The requirements of an effective telephone conference

Telephone conference vs. e-mail correspondence

Before a telephone conference is scheduled, one has to ask himself whether such a conference is truly necessary. With all the technology available today, in the majority of cases an e-mail would be enough. One shall also remember that telephone conferences interrupt the work process and other persons' schedules. The other pro-e-mail argument is that the receiver can read the message, think about it and review his position. In brief, he can take a look at the subject matter from various angles avoiding a premature answer.

Tip 1: Before you schedule a telephone conference, consider an e-mail correspondence in the first place.

The importance of an agenda

A clear agenda is the foundation of an efficient telephone conference. However, in order to also keep it short, the agenda shall not only include just the points to be discussed, but also the pro and contra arguments and suggested solutions. Such a „road map", circulated prior to a telephone conference, gives other participants a chance to consider the suggestions and come up with their own ideas. The other advantage of an agenda is that it keeps the speakers on track - especially when a great deal of subject matters is discussed.

Tip 2: Never schedule a telephone conference without an agenda.

Telecommunication infrastructure

Nowadays, one can witness the rapid development of telecommunication technology. The right equipment and location are crucial for holding a telephone conference. Further, any

disturbing factors shall be prevented. Unfortunately, sometimes all kinds of noise can be heard except of a caller's voice. In the end, a bad telecommunication infrastructure costs time, because participants have to repeat themselves.

Tip 3: Make sure that your telecommunication infrastructure is suitable for holding telephone conferences. Further, avoid mobile phones when participating in a telephone conference.

Get in, get it done right and get out

When you are the host of a telephone conference, you have to manage it. The key is to obey the following rules. Make sure that speakers always introduce themselves. This is crucial in cases with a high number of participants. The other issue is to prevent the participants from speaking at the same time. Such a conduct is truly counterproductive, because one listens just to himself and not to the others. Further, small talk has to be avoided in the course of a telephone conference. True, sometimes it is a good opener - but it has to be kept at a minimal level. At the end of a telephone conference, its host shall send an e-mail with a to-do list and the summary of matters discussed. Such an e-mail is important for the following reasons: 1) every participant has a clear view of the conclusions drawn in the course of a telephone conference, 2) any misunderstandings regarding the agreed matters can be quickly detected and 3) it prevents the so called double drafting of summaries by associates.

Tip 4: If you are the host of a telephone conference, manage it actively. Prevent the other participants from discussing irrelevant issues. Finally, circulate an e-mail with a brief summary of a telephone conference regarding the subject matters discussed and conclusions drawn. The e-mail shall also include a to-do list.

Conclusions

As already mentioned, there is a lot of talk regarding the lack of speed and efficiency in international arbitration. So what would be the cure? We, as arbitration practitioners, should start fixing the little things in the first place (e.g. a better case management). Well managed and brief telephone conferences would be certainly one of the steps in the right direction.

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