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EDITORIAL

The end of the last year – likewise the entire 2010 – abounded in important arbitration events. In a subjective ranking of the latter, a particular place should be allocated to the establishment of a new organization, *Young Arbitration Practitioners in Poland*. Taking into account the multitude of foreign associations similar in nature, such as e.g. ASA below 40, DIS 40, ICC Young Arbitrators Forum, LCIA Young International Arbitration Group (YIAG) and Young Austrian Arbitration Practitioners, one can only wonder why it has taken so long for such an organization to be set up in Poland. YAPP's principal aim is to provide young Polish lawyers with diverse opportunities to acquire knowledge and exchange experiences related to arbitration as well as to promote arbitration in Poland, and the country in the arbitration world. International activities are supposed to play a vital role in YAPP. It is already indicated by the foreign sounding name, which this new (or better – "young") organization has adopted. The first international event which YAPP is co-organizing is the February conference and 3rd Warsaw Arbitration Pre-Moot for law students, which is mentioned below.

A particularly significant event in the last weeks of the past year was the Austrian/Polish Twin Arbitration Conference, which took place on 3 December 2010 in Vienna. This issue of the Arbitration e-Review includes a conference note prepared by Dr. Marcin Kałduński. The conference attracted a number of prominent academics and practitioners from both countries. The need for further development of the cooperation and exchange of views between the arbitration communities from those two countries seems to be self-evident. In each of them, possible amendments to the arbitration laws enacted almost simultaneously, in 2005 and 2006, are currently being discussed. Thus from the Polish perspective it is certainly worth tracking what is happening in Austrian arbitration. In line with this we are publishing a discussion on an important recent decision of the Austrian Supreme Court concerning the legal character of the arbitral hearing in the context of the grounds for setting aside an arbitral award.

However, the leading theme of this issue is the question of substantive grounds for an arbitral tribunal making an award, in particular its obligation to apply the provisions of law. The speech held on 10 December 2010 by Prof. Dr. hab. Jerzy Rajski at the annual arbitrators' meeting of the Lewiatan Court of Arbitration was devoted to this important question. The article by Dr. Łukasz Błaszczak on making awards on the basis of *lex mercatoria*, general principles of law and ex *aequo et bono* explores some other important issues related to this topic.

The beginning of the new year, as usual, encourages retrospection as well as looking into the future. In her article, Ms. Łucja Nowak, LL.M., the Secretary of Arbitration Commission at the Polish Committee of the ICC, presents selected statistical data on the ICC's activity, and asks some important questions relating to its future. Will the ICC International Arbitration Court move from Paris? What will change in the new ICC arbitration rules?

Finally, a few words on upcoming arbitration events that have been mentioned in the introductory paragraph. In February and March, the Court of Arbitration at the PKPP Lewiatan and the *Chartered Institute of Arbitrators European Branch* are organizing training courses on international commercial arbitration for attorneys, including *in-house lawyers*. An application form is available on the Court's website. In addition, from 9 to 11 February 2011 the conference "Confidentiality vs. Transparency in International Arbitration" as well as the 3rd Warsaw Arbitration Pre-Moot, both co-organized by YAPP, will take place. An active and promising start to the New Year then! We wish all readers of Arbitration e-Review, on behalf of its co-authors, all the best for the rest of 2011!

Dr. Rafał Morek

The limits of the arbitral tribunal's freedom in respect of applying provisions of law in commercial cases

Prof. Dr. hab. Jerzy Rajski

Address at the annual conference of arbitrators of the Court of Arbitration at the Polish Confederation of Private Employers "Lewiatan" on 10 December 2010.

Ladies and Gentlemen, it is a great personal honour and a professional pleasure to address such a distinguished audience. I thank you deeply for the invitation.

I would like to share with you a few reflections concerning the extremely important and complex issue of the limits of the autonomy of an arbitration court in interpreting and applying the provisions of law. I will focus mainly on jurisdiction over commercial disputes. Given the highly complicated nature of the issues, I will try to share my reflections with you in as few words as possible, but necessarily with some oversimplification.

We may start from a more general statement that will help guide the argument further, and it is this: The constitutional principle of economic freedom, tied to the proclaimed principle of the system of the Republic of Poland i.e. a social market economy, establishes the basis for economic relations on the principle of freedom of the will. This justifies giving the parties the opportunity to waive the right to apply to the state court for examination and resolution of disputes to certain extent. The state permits the parties to make their own choice to submit their commercial disputes to arbitration courts for examination and settlement. Thus, by providing legal protection equivalent to that available from the state courts, arbitration courts fulfill the tasks belonging to the state. Arbitrators often forget this, or perhaps do not even realize that while serving as arbitrators, they are performing tasks involving the dispensation of justice that are vested in the state. The state sanctions their activity by providing that so long as certain requirements are met, arbitration awards are given legal force equal to state court judgments.

Under Art. 1194 §1 of the Polish Civil Procedure Code, an arbitration court, like a state court, resolves a dispute according to the provisions of law applicable to the given legal relationship. The parties may, however, release the arbitration court from the duty of ruling on the basis of provisions of law by expressly authorizing it to rule in accordance with rules of law or principles of equity. Then the arbitrators are not bound by the provisions of law applicable to the given relationship. Nonetheless, in any event the arbitration court should give consideration to the provisions of the agreement and the established practices applicable to the given legal relationship.

* The address is based on the article of Prof. Dr. hab. Jerzy Rajski published in Przegląd Prawa Handlowego (Commercial Law Review) No. 1/2011.

When ruling on the basis of provisions of law, arbitrators, unlike a state court, have a certain degree of autonomy in interpreting and applying the law. The scope of this autonomy is laid down by the Civil Procedure Code and by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, i.e. provisions of procedural law in connection with provisions of substantive law.

The provisions of civil procedure law permit a dispute to be resolved by an arbitration court in a manner that is inconsistent with the provisions of law applicable to a given legal relationship, so long as there is no violation of the fundamental principles of the legal order of the Republic of Poland. The award is final, in the sense that it is unappealable (assuming of course the parties did not provide for its review within the arbitration proceeding). No appeal or other form of complaint will lie from an arbitration award. Upon recognition or enforcement of the award by the state court, the award receives *res judicata* effect and becomes subject to compulsory enforcement. The limits of the arbitrators' autonomy with respect to application of law are thus determined by the fundamental principles of the legal order of the Republic of Poland. An award contrary to these principles may be set aside by the proper state court, and the court will refuse recognition or enforcement of a foreign award if recognition or enforcement would be inconsistent with these principles.

Thus the key concept we will discuss today is that of the notion of the **legal order** of the Republic of Poland, or of any other state. I should mention that in the legal literature, both in Poland and internationally, it is difficult to find synthesizing studies attempting to answer the question of what, essentially, is the nature of the legal order of each state. In the legal writings mainly cases are presented—various decisions by the courts of country X or Y finding that there was or was not a violation of the legal order in a particular instance. It is difficult to find in the legal writings is an answer to the question of how to interpret the concept of the "legal order" and how this differs from the concept of the system of law in force in each country. Thus I would like to share with you an attempt at responding to that question.

The legal order of the Republic of Poland includes not only the provisions of the system of law and its various branches, but also the axiological foundations that lie beyond the scope of legislative acts. In other words, the legal order is not just the legal system, but also the rules derived from another order, another normative sphere, which constitutes the axiological foundation of the legal system of any state.

The concept of **"fundamental principles of the legal order"** referred to in the regulations I have just mentioned is already highly complex. Here I will not attempt to give you a very precise answer, but a few words indicating how this concept may be understood. The fundamental principles are primarily made up of the fundamental axiological assumptions and principles of the legal system as a whole as well as the principles and axiological foundations of specific branches of the system, or, within private law, even institutions. Some of these fundamental principles follow directly from specific legal norms, for example from the provisions of the Constitution, ratified treaties, European Union law, or statutes. Other principles, however, are derived from a generalizing reconstruction, in the legal doctrine or case law, of the axiological assumptions of the system or the branch or field of law and its institutions, reflecting the process of their historical development. These principles thus vary in their significance and legal character. The principles with a character extending beyond spe-

cific branches of law are those that derive from provisions of the Constitution, certain treaties, or legal acts of the European Union. These are the principles of the system. Others are by their nature specific to certain branches, and concern various branches of law, and here we are interested in the fundamental principles of private law and its main fields and institutions.

Constitutional provisions are of great importance in determining the fundamental principles of the whole legal order of the Republic of Poland, as they express the axiological priorities of the legislator. The principle of a democratic State governed by the rule of law and implementing the principles of social justice (Constitution Art. 2) is of fundamental importance for the legal order, stating the basic axiological assumptions both of the system as a whole and of its specific branches. Justice represents the highest value protected by law. Other constitutional principles that state fundamental principles of the legal order of the Republic of Poland include the principle of legalism (Constitution Art. 7), the inviolability of the dignity of every person (Art. 30), the freedom of every person (Art. 31) and equal treatment (Art. 32). Some constitutional principles address specific types of legal relationships, governed by specific branches of law, including private law. These include, for example, the principle of economic freedom and a social market economy (Art. 20 and 22), protection of ownership and equal protection of property rights (Art. 21) and protection of the environment (Art. 54).

Constitutional principles are not only legislative directives binding on arbitration courts, but should also be taken into consideration—and this is perhaps most important for us—when conducting an interpretation, particularly a functional interpretation, of any provisions of law that are the basis for the arbitration courts to decide a case. They establish the axiological foundations of the legal system, and thus of the legal order of the Republic of Poland, introducing the duty to respect the axiological foundations in such fields as private law, using all available legal means. This is the duty of every judge and every arbitrator.

For civil law, references to the so-called principles of community life and rules of equity assuring achievement of a just resolution must reflect the axiological foundations of the legal system arising under the Constitution. In light of their overriding position and value, constitutional principles also indicate the hierarchy of principles of private law as well as those concerning its specific fields and institutions. Among the **fundamental principles of private law** we may distinguish those that relate to private law as a whole as well as those that concern only certain branches or institutions of private law.

One of the fundamental principles of civil law is the principle of **autonomy of the will**, expressing the right of parties to civil-law relationships to freely shape such relationships on the basis of their juridical acts, specifically by contract, within the limits laid down by law. I would only like to stress, as is rarely done in the legal writings, that the principle of autonomy of the will is not absolute. Autonomy of the will is, after all, only one value among the axiological foundations of civil law. The principle of freedom of contract constitutes a fundamental principle of the law of obligations within the field of contract law. The limits of this freedom are laid down by statute, principles of community life, and the nature of the legal relationship. The concept of "statute" for purposes of this regulation is broadly understood to include all sources of binding law in Poland, and thus also the Constitution, ratified treaties, EU legal acts, executive regulations and local laws.

The fundamental principles of the legal order of the Republic of Poland also include certain mandatory rules, which are necessarily applicable: for example, those that determine the limits of freedom of contract, as well as those that are intended, broadly speaking, to protect the public interest, e.g. against threats to free competition, the interests of third persons who are non-parties to a transaction, and in certain instances the interests of one of the parties as well, particularly in situations involving decidedly unequal positions of the parties. The fundamental principles of the legal order of the Republic of Poland do not permit contracts to be entered into that are contrary to principles of community life, meaning moral principles commonly accepted in the society. A juridical act contrary to principles of community life is invalid (Civil Code Art. 58). The principles of community life also limit the scope of shaping the legal relationship by the parties when entering into a contract. On this basis, contracts are deemed impermissible if they are contrary to principles of professional honesty and decency, or shape the mutual relations between the parties inconsistently with basic requirements of fairness. Of fundamental importance in this respect is the meaning of "contractual justice," requiring a balanced distribution of rights and duties of contracting parties, and of the benefits, burdens and risks associated with the establishment of the contractual relationship and the process of performance of the contract. When there is a conflict between these two legally protected values—freedom of contract and "contractual justice"—the law clearly comes down on the side of fairness.

Certainty, confidence and security of turnover is a fundamental principle of civil law. This principle is expressed in a number institutions of civil law, for example in the binding nature of contractual obligations undertaken by contracting parties, from which is derived from the principle of enforceability of contracts (*pacta sunt servanda*). The principle of *pacta sunt servanda* plays a fundamental role in the certainty and security of turnover under conditions of normal development of trade, when it is not upset by deep economic, social or political turmoil. As is well known, this ideal world is rarely realized in the contemporary economic climate, and thus the principle of *pacta sunt servanda* must be supplemented by another: *rebus sic stantibus* principle, which aims at reinforcing obligations under circumstances of various sudden and sometimes deep economic and political changes.

The principle of confidence and certainty of turnover is also furthered by the fact that each of the parties has certain duties arising out of the requirements of contractual loyalty. First and foremost, a party is required to act in accordance with **principles of good faith and fair dealing**. Each party should give fair consideration to the interests of the other party. Under the provisions of our law, the parties to a contract should cooperate in performance of their obligations on the basis of mutual trust. This axiological foundation of the system is often forgotten. It should also be stressed, because it is extremely important for commercial dealings, that third parties are required to respect the legal and factual status established by a contract.

Certainty, confidence and security of trade are also served by an arsenal of instruments available to a creditor in order to satisfy the creditor's interests that are deserving of protection in the case of non-performance or improper performance of obligations by the debtor. Achievement of this goal is furthered through appropriate framing of the grounds and rules for contractual liability, in particular liability in damages, under the rule of full damages, so that

consideration intended to redress the injury is commensurate to the injury, known as the "**restitution principle**." According to the social and economic purpose of the institution of liability in damages, it performs a compensatory function, making up for the loss suffered by the injured party and bringing about the situation that would have occurred were it not for the event giving rise to the injurious consequences. The principle of full compensation of damages is expressed in Civil Code Art. 361 §2, under which redress of the damage covers losses suffered by the injured party as well as benefits that the party could have obtained had he not suffered the damage. This provision also provides a basis for determining the legally relevant loss, including detriment suffered by the injured party. It follows from the restitution principle that such damages are also an important issue for arbitration, where some errors are committed in this respect. It follows from the restitution principle that the amount of compensation may not exceed the amount of the legally relevant damages. Gross violation of this principle by an arbitration court should be regarded as contrary to the fundamental principles of the legal order of the Republic of Poland. The prohibition against enrichment of the injured party complies, after all, with the principle of confidence and security of turnover as well as the idea of justice that is at the foundation of the civil law system.

Coming to the most important point, the fundamental principles of the legal order of Poland include **respect for the principles of equity in private law**, and thus **observance of the defined axiological order**. The requirement to respect the principles of equity in private law is based on the conception of "compensatory justice", seeking to protect the subjective rights and legal interests of participants in transactions by restoring the balance that has been upset in the relations between the parties. Achievement of "compensatory justice" via mechanisms of private law requires that a certain degree of flexibility be afforded in the solutions provided by rules of law, enabling them to be adapted to specific situations—the circumstances of the specific case. This purpose is served by rules of equity introduced into the legal system, which enable better identification of the interests of the parties and better recognition of their positions, and thus proper consideration of the assignment of rights and obligations under the facts of the case. Normative regulations referring to principles of community life, good practice and fair dealing, which are set forth in numerous provisions of civil law, are of fundamental importance in this respect. By way of example I may mention the construction of the abuse of a subjective right, definition of the terms of a juridical act via principles of social coexistence, the fundamental importance of this principle when interpreting statements of will and contracts, as well as establishment of the limits of autonomy of the will of the parties under private law—contracts in particular.

Mechanisms of equity permeate the institutions of private law and offer solutions that serve the purposes of carrying out the model of justice that should be implemented through the whole system of private law and by the arbitration court standing guard over it. Among other things, they support the requirement to conduct a functional interpretation of provisions of law, seeking to achieve the purpose assumed by the legislator.

There is time for a few final reflections. The importance of the issue of the limits of the autonomy of the arbitration court with respect to application of provisions of law is increasing along with the dynamic development of arbitration. Resolution of disputes by arbitration

courts is no longer an exception from the rule of resolution of disputes by the state courts. Unlike in the past, arbitration courts no longer only resolve quickly and cheaply cases of minor economic importance. They resolve hugely important cases, where monetary claims are pursued for hundreds of millions of dollars, and sometimes even billions of dollars. I myself have served as an arbitrator in three cases where the claims asserted were well over a billion dollars. Thus the dynamic growth of arbitration in commercial cases is, and must be, accompanied by a high level of professionalism of arbitration and the related trend toward "juridicalization" of its operations and functioning more juridical. This unfortunately sometimes generates certain negative phenomena, for example a growing procedural formalism, which means that sometimes arbitration proceedings go on for years, and the awards issued in arbitration cases, or rather the reasons of these awards, number in the hundreds of pages. I myself had to sign a series of awards like that, where the total reasons exceeded 1,000 pages. I doubt that any court that had to review that case would want to study such extremely lengthy reasons, not to mention the case file, composed of tons volumes. In other words, arbitration courts sometimes do resolve cases of great significance for the economy and with serious social consequences—hence the great importance of judicial review of arbitration awards from the perspective of their compliance with the fundamental principles of the legal order of the Republic of Poland. Such review can no longer be understood as something extraordinary or very exceptional.

When an arbitration court rules on the basis of provisions of law, it should resolve the dispute, pursuant to the express wording of Civil Procedure Code Art. 1194 §1, according to the law applicable to the given relationship. In other words, the law imposes an obligation on an arbitration court deciding under provisions of law to apply those provisions. It is thus a legal obligation, but of a specific nature, because the law does not draw any disadvantageous legal consequences from violation of the obligation so long as the fundamental principles of the legal order of the Republic of Poland are not violated. The law thus allows an arbitration court to resolve a dispute contrary to the provisions of applicable law. It forbids only a resolution of the dispute that is contrary to the fundamental principles of the legal order of the Republic of Poland. Recognition of a certain autonomy of the arbitration court with respect to application of provisions of law is accompanied, however—as I would like to stress, because it is the thesis of my lecture—by imposition of an obligation to take into consideration the fundamental values that are among the axiological assumptions of the legal system, and of private law and its institutions, when resolving disputes. These values, which derive from rules outside the legislative acts, form an inherent part of the fundamental principles of the legal order of the Republic of Poland. The limits of the autonomy of the arbitration court in applying provisions of law are thus inextricably linked with the idea of justice that constitutes the axiological foundations of the legal order of the Republic of Poland.

Thank you very much.

Lex mercatoria, rules of law and rules of equity as grounds of adjudication by an arbitration court

Dr. Łukasz Błaszczak

This study relates to a particularly important issue involving arbitral awards, i.e. the grounds of adjudication by an arbitration court. The discussion of the grounds for adjudication by an arbitration court in this case has been confined to that which is presented in the title of this article. The justification for this was that in practice it is precisely these grounds which give rise to the greatest doubts and with regard to which there is most discussion, not only in Polish legal doctrine but also in the doctrine of international commercial arbitration.

I. Analyzing the grounds of adjudication by an arbitration court – be it in a national or international context – serious doubts appear already at the beginning with regard to ex-legal (i.e. differing from the governing law) grounds of adjudication and the factual scope of their application in arbitration practice. This is because this issue may appear in different ways, depending on whether it is seen from the point of view of the regulation of Art. 1194 of the Code of Civil Procedure, or whether account is taken of international arbitration practice. Additional problems are created by the fact that individual notions are defined in different ways in arbitration doctrine, without maintaining a uniform point of view. This applies in particular to *lex mercatoria*, which is used in international arbitration practice, but where determining its factual scope and relation to the rules of equity or of law is problematic. A key issue is whether *lex mercatoria* covers the above grounds or whether one should examine it in a separate manner. This is all the more visible when we look at the provision of Art. 1194 of the Code of Civil Procedure, from which it in no way follows that *lex mercatoria* could serve as grounds of adjudication at all. There is no doubt however that an arbitration court is obligated to take into consideration established customs being applicable to a given legal relationship (Art. 1194 § 2 of the Code of Civil Procedure).

The need to base arbitral awards on grounds other than substantive law in international arbitration follows from the fact that the traditional manner of subjecting international civil-law relationships to national law is an unsatisfactory solution and one which is contrary to the postulate of substantive justice. While it is true that national treatment of international factual states guarantees legal certainty, this however takes place at the expense of justice, and furthermore cannot be sufficiently flexible[1]. In addition, it should be noted that national legal orders do not offer any adequate solutions for the regulation of international civil-law relationships. In choosing *lex mercatoria,* parties aim to subject the legal relationship binding them to a system of rules which

[1] See B. von Hoffman, *O stosowaniu "legis mercatoriae" w międzynarodowym arbitrażu handlowym* [On application of "legis mercatoriae" in international trade arbitration], PPHZ 1988, vol. 12, p. 14; also D. Mazur, *Prawo właściwe w międzynarodowym arbitrażu handlowym* [Governing law in international commercial arbitration], Kwartalnik Prawa Prywatnego 2003, paper 1, p. 141.

are adapted to the needs of international trade and to avoid inconveniences of national law[2]. One of the basic ideas of *lex mercatoria* is that of "*conflict avoidance*", and thus an overcoming of classical solutions following from private international law by way of the creation of substantive law norms for world trade. Thanks to this there would be a possibility of avoiding disputes as to the applicability of norms between State legal orders which arise when attempts are made to nationalize factual states which go beyond the State borders[3].

When discussing the remaining (apart from substantive law) grounds of adjudication by an arbitration court, one should commence one's considerations with a presentation of the essence of *lex mercatoria*. An exact determination of whether a resolution of disputes according to *lex mercatoria* covers ruling on rules of equity and on general rules of law is very important from the point of view of the issue raised. From the Polish point of view it is like this, all the more that the national legislator makes no mention of the possibility of ruling on the basis of *lex mercatoria*. If one were to accept the literal wording of the provision of Art. 1194 § 1 of the Code of Civil Procedure, one should rule out such possibility. However, this issue does not appear in an obvious manner when we take into consideration international arbitration practice and the solutions adopted in foreign legal systems. In addition, doubts are increased by the fact that in general it is accepted that the legal rules constitute one of the sources of *legis mercatoriae*. Thus, to accept that Art. 1194 § 1 of the Code of Civil Procedure refers not directly but indirectly to adjudication on the basis of *lex mercatoria* could give rise to significant consequences on various levels.

II. The notion of *lex mercatoria* is typically used as an abbreviated meaning for unusually problematic and disputed components of a non-State order which is taken into account as the grounds of adjudications, in particular of international arbitration courts [4]. *Lex mercatoria* – which should be decisively emphasized – is not only a theoretic model existing in the sphere of arbitration law academic speculation and solutions[5]. *Lex mercatoria* has been applied in a range of international arbitration proceedings as an essentially authoritative law[6].

It is emphasized in the doctrine that *lex mercatoria* constitutes a source of autonomous commercial law, alongside acts of international legislation. It is impossible to include these latter in the discussed theory as that would mean that all acts of law-creating State activity or of international organizations would be treated as an autonomous, trans-state legal order. Thus, one should decisively take the view that *lex mercatoria* covers only interna-

[2] See B. von Hoffman, *O stosowaniu "legis mercatoriae"...*, p. 14; B. Handorn, *Das Sonderkollisionsrecht der deustchen internationalen Schiedsgerichtsbarkeit*, Tübingen 2005, pp. 84 and 85; D. Mazur, *Prawo właściwe ...*, p. 141.

[3] See A. Kappus, "*Conflict avoidance" durch „lex mercatoria" Und UN-Kaufrecht 1980*, RIW 1990, paper 10, pp. 788 and 790; C.M. Schmitthoff, *Das neue Recht des Wlethandels*, RabelsZ 1964, vol. 28, p. 47 et seq.; U. Stein, *Lex mercatoria: Realität Und Theorie*, Frankfurt a.M. 1995, p. 23; F. Dasser, *Internationale Schiedsgerichte und lex mercatoria: Rechtsvergleichender Beitrag zur Diskussion über ein nichtstaatliches Handelsrecht*, Zürich 1989, p. 6 et seq.

[4] See U. Stein, *Lex mercatoria, op. cit.*, p. 1 et seq.; B. Handorn, *Das Sonderkollisionsrecht ...*, p. 84.

[5] See the study by Ph. Fouchard, *L'arbitrage commercial international*, Paris 1965; J. Gentinetta, *Die lex fori internationaler Handelsschiedsgerichte*, Bern 1973.

[6] F. Dasser, *Internationale Schiedgerichte und lex mercatoria: Rechtsvergleichender Beitrag zur Diskussion über ein nichtstaatliches Handelsrecht*, Zürich 1989, p. 180 et seq.

tional trade customs[7]. This is not, however, a uniform position. There appear concepts which assume a broader understanding of *lex mercatoria*. Thus, apart from trade customs, the following are also included in it: rules of law, uniform law of international trade, arbitration decisions, and furthermore international contracts and agreements[8]. The foregoing shows that the understanding of *lex mercatoria* is not uniform, at least as far as the sources of this concept are concerned. In this study I have assumed a narrower understanding of the concept of *lex mercatoria*, assuming that it is confined to international customs only.

Taking the foregoing into account, I have adopted the assumption that if we are dealing with arbitration which is defined by the term 'international', then in principle the source of *lex mercatoria* may only be an international trade custom. In the Polish regulation the legislator did not opt for such wording of the text of the provision. The legislator adopted in Art. 1194 § 2 of the Code of Civil Procedure the phrase "(...) *established customs being applicable to a given legal relationship*". Notwithstanding such wording, the foregoing solution should be interpreted as referring to international customs, and not national customs, as the essence of *lex mercatoria* amounts to the former customs, and not the latter customs. Indeed, from this point of view, taking national customs into account would be entirely useless. One could include among the customs which may taken into consideration in the light of Art. 1194 § 2 of the Code of Civil Procedure specimen contracts used in trade, on condition however that they have been in circulation for a certain period of time[9].

Amongst the international customs collected into one entirety which may be classified as part of the theory of *lex mercatoria* a particular role is played by the UNIDROIT Rules and Rules of European contract law developed by the Lando Commission[10]. By way of the former, a shape was put on a collection of rules being deprived of State or international sanction. They constitute a private codification of the general rules of international trade contracts signed by UNIDROIT[11]. In turn, as regards the Rules of European contract law, it should be noted that they do not cover the entire law of contracts but merely a section of it. However, this does not change the meaning of these rules from the point of view of *lex mercatoria*. With regard to international customs one cannot omit to mention the INCOTERMS which relate to the so-called supply base, that is contractual arrangements concerning the rules for dividing between the buyer and the seller the

[7] Such position is represented by B. Fuchs, *Lex mercatoria w międzynarodowym obrocie handlowym* [Lex mercatoria in international trade], Cracow 2000, p. 56; J. Jakubowski, [in:] J. Jakubowski, M. Tomaszewski, A. Tynel, A.W. Wiśniewski, *Zarys międzynarodowego prawa handlowego* [An outline of international commercial law], Warszawa 1983, p. 10; L. Łabędzkie, *Międzynarodowy arbitraż handlowy w sporach między stronami z państw członkowskich RWPG* [International commercial arbitration in disputes between parties from Member States of the Council for Mutual Economic Assistance], Warsaw 1984, p. 155; T. Ereciński, K. Weitz, *Sąd arbitrażowy* [Arbitration court], Warsaw 2008, p. 326.

[8] Such position is taken by B. von Hoffamann, *O stosowaniu "legis mercatoriae" ...* , p. 14; D. Mazur, *Prawo właściwe ...,* p. 141; B. Handorn, *Das Sonderkollisionsrecht ...*, p. 84.

[9] See M. Pazdan, *Zagadnienia kolizyjne zwyczajów handlowych* [Conflict of law issues of commercial customs], PPHZ 1979, vol. 3, p. 98; B. Fuchs, *Lex mercatoria ...*, p. 104..

[10] See B. Fuchs, *Lex mercatoria ...*, pp. 65 and 66; see also J. Rajski, *Potrzeba kodyfikacji międzynarodowego prawa handlowego w skali światowej* [Need for worldwide codification of international trade law], PiP 1985, paper 9, p. 46 et seq.

[11] See J. Rajski, *Zasady międzynarodowych kontraktów handlowych UNIDROIT* [Rules of UNIDROIT international commercial contracts], KPP 1996, paper 2, p. 239.

obligations and risk related to the transport of goods and insurance of same. The foregoing rules, in their general aspect, are thus linked to an agreement on the international sale of goods[12]. Thus, the parties have at their disposal a closed collection of provisions developed on an international level to which they can turn as part of arrangements as to the choice of grounds of adjudication by an arbitration court. Both the UNIDROIT Rules and the Rules of European contract law are considered to be the most recent expression of *lex mercatoria*. Both collections of provisions state expressly that they may be applied also in cases where the parties subjected the agreement to "the general rules of law" or indeed to "*lex mercatoria*"[13], just as in the case of general terms and conditions of an agreement. The choice of these rules as statutes would thus be ineffective[14].

In practice the usefulness of *lex mercatoria* is considered as positive, despite numerous opinions in the doctrine to the contrary. National regulations of arbitration law for the most part relate in the said aspect only to issues of substantive law being applicable in proceedings before an arbitration court, possibly also to rules of law or rules of equity. Few court rulings – and foreign ones at that – directly concerned the issue of whether *lex mercatoria* may, from the point of view of a State judge, constitute the grounds of a decision. To date, the judicial decisions of Polish courts have not dealt with the issue of *lex mercatoria*, which undoubtedly resulted and results to some extent from the adopted regulation concerning the grounds of an award of an arbitration court as, from the point of view of national and international arbitration, this problem was not examined or analyzed at all. On the other hand, particular importance has been attached to *lex mercatoria* in French judicial decisions[15].

In this respect it should also be emphasized that the starting point for an assessment of whether *lex mercatoria* may dominate arbitration proceedings and as a result constitute the grounds of arbitral awards should be the point of view of the State judge[16]. From his point of view the possibility of subjecting oneself to *lex mercatoria* constitutes a problem not so much of a legal-philosophical nature as a problem as part of the interpretation of *lex fori* norms containing the concepts of "law" and "legal provisions". In the case of a subsumtion of *lex mercatoria* to a factual state related to the concept of "law" or "legal provisions" a State judge will not avoid theoretical-legal considerations and he will have to once again verify the conclusions arising out of these considerations as regards fulfillment by *lex mercatoria* of the function of "law" or "legal provisions" assumed in a concrete norm[17]. At present one can notice a tendency where the legislator and State courts are increasingly willing to grant the *lex mercatoria* norms the quality of "legal provisions". In any event the acknowledgement of

[12] For more, see B. Fuchs, *Lex mercatoria ...,* pp. 96 and 97; K. Gienas, K. Siewicz, *Lex mercatoria cyberprzestrzeni. Licencje wolnego oprogramowania oraz zabezpieczenia techniczne* [Lex mercatoria cyberspace. Licenses of free software and technical security], [in:] *Kolizyjne aspekty zobowiązań elektronicznych. Materiały z konferencji* [Conflict of law aspects of electronic obligations. Material from a conference], edited by J. Gołaczyński, Warsaw 2007, p. 349 et seq.

[13] See E. Gaillard, *Transnational Law: A legal system or a Method of Decision Making*?, Arb. Int. 2001, vol.17, pp. 59 and 62.

[14] See B. Handorn, *Das Sonderkollisionsrecht ...,* p. 88.

[15] For more, see study by Ł. Błaszczak, *Wyrok sądu polubownego w postępowaniu cywilnym* [Award of an arbitration court in civil proceedings], Warsaw 2010, p. 246 et seq.

[16] In a certain sense however the following author takes a critical view: F. Dasser, *Internationale Schiedsgerichte und Lex mercatoria ...,* p. 389.

[17] See T. Rensmann, *Anationale Schiedssprüche: Eine Untersuchung zu den Wirkungen anationaler Schiedssprüche im nationalen Recht*, Berlin 1997, p. 114.

the usefulness of *lex mercatoria* is confined in the functional aspect to substantive law which can be applied in arbitration proceedings.

In the light of the currently applicable regulation, the legislator expressly indicated that when handing down an award an arbitration court is obligated to take into consideration the provisions of the agreement and the established customs being applicable to a given legal relationship (Art. 1194 § 2 of the Code of Civil Procedure). However, this solution does not provide a full answer with regard to the scope of taking international customs into consideration, which may also lead to doubts when an arbitration court adjudicates not on the basis of the law but on the basis of rules of equity or indeed on the basis of rules of law. International customs may come into conflict with the assumptions of the non-substantive grounds of adjudication. It follows from the wording of the above-mentioned article that *lex mercatoria* cannot be treated as direct and independent grounds of adjudication by an arbitration court. On the other hand, one may attribute to it an auxiliary and supplementary function in the sense that if the need arises, when taking into consideration the circumstances of a given case, the court is obligated to take into consideration *lex mercatoria*. Each time the arbitration court will first of all have to establish whether in a specific case a need has arisen to refer to *lex mercatoria* or not. There is no doubt that the foregoing statutory obligation does not have the features of an obligation in each case, but only when it is justified. In addition, as a condition one may point to the need for the existence of a dispute arising out of international transactions. It would be difficult to assume the admissibility of applying transnational customs to national disputes. It would not then be in any way justified. Taking into consideration the possibility of applying *lex mercatoria* one could also say that the role of its provisions have a subsidiary character.

Despite the fact that *lex mercatoria* will not constitute independent legal grounds of an arbitration decision, one cannot however say that it has no legal quality. This follows from the fact that it will be part of the legal grounds of the award by way of the invoking of a specific legal regulation which refers to *lex mercatoria*. No rights or obligations of a legal nature follow from its essence. Nonetheless, it is accepted that *lex mercatoria* should be linked to an application of substantive law, and not with the rules of equity. Thus, the provision of Art. 1194 of the Code of Civil Procedure should be understood to mean that if an arbitration court applies the provisions of a concrete legal order, its mandatory norms have priority over the provisions of the agreement of the parties and trade customs[18].

III. Adjudicating on the basis of rules of law and the application of *lex mercatoria* should be examined separately as they are two separate categories. The differences consist in the fact that the norms *lex mercatoria* are concrete legal norms from which a detailed decision follows, whereas the general rules of law must - by their very nature – be made concrete in a specific factual state[19]. Adjudicating on the

[18] See T. Ereciński, K. Weitz, *Sąd arbitrażowy, op. cit.*, p. 328.

[19] See A. Szumański, *Renegocjacja umów w międzynarodowym obrocie gospodarczym. Studium prawnoporównawcze* [Renegotiation of contracts in international trade. A legal comparison study], Cracow 1994, p. 76; see also K. Piasecki, *Kodeks postępowania cywilnego. Komentarz* [The Code of Civil Procedure. A commentary], vol. III, Warsaw 2007, p. 303. A different view is adopted in this respect by D. Mazur, *Prawo właściwe ...*, pp. 141 and 142 and B. von Hoffman, *O stosowaniu „legis mercatoriae" w międzynarodowym arbitrażu han-*

basis of rules of law cannot be equated with adjudicating on the basis of rules of equity. This follows from the fact that legal rules are formulated *a priori* and constitute certain objective and abstract rules adopted in most legal systems and which most often developed over the course of a century. In turn, rules of equity are difficult to formulate in an abstract manner and are rather created on the basis of a concrete factual state[20]. An indication by parties of general rules of law as the grounds of adjudication contains – just like rules of equity – a release from the obligation to apply non-mandatory provisions[21]. However, from the point of view of the freedom of arbitrators in taking a decision, an indication of general rules of law restricts them as compared to the situation which arises when applying the rules of equity. As emphasized by *B. von Hoffmann*, an arbitration court which 'develops the law' on the basis of general legal rules still differs from a court adjudicating as an *amiable composition*, it does not confine itself here in a concrete case to handing down a decision in an individual way, but rather considers the general legal problem, establishing the rules which it would formulate as legislator[22]. The Polish regulation in the provision of Art. 1194 § 1 of the Code of Civil Procedure emphasizes the difference between application of rules of law and rules of equity, and a similar conclusion should be adopted as regards a comparison of *lex mercatoria* and rules of law. A decision handed down by an arbitration court on the basis of rules of law will not at the same time indicate that this court is applying *lex mercatoria*. However, what is problematic is the factual indication of the differences between the two categories, which results first of all from the fact that in certain cases the doctrine equates these grounds, and secondly that determination of the borderline may prove very difficult.

The following rules are classified amongst transnational rules of law: the rule of freedom of contracts concluded in international trade, the rule of applicability of an agreement in the case of essentially unchanged circumstances (*rebus sic stantibus*), the rule of keeping agreements (*pacta sunt servanda*), the rule obligating to act in good faith (*bona fides*), the rule providing for a ban on abuse of an entity-related right, the rule of obligatory cooperation of a debtor and creditor when performing an agreement, the rule of liability for breach of an obligation and commission of damage, the rule providing for a ban on opposing the effects of one's own conduct or earlier declarations of will (*venire contra factum proprium nemini licet*), the rule pursuant to which impossibility rules out an obligation (*impossibilium nulla obliagatio*), the rule of protection of acquired rights, the rule of protection of trust[23].

dlowym, PPHZ 1988, vol. 12, p. 14, accepting that rules of law constitute the source of *lex mercatoria*.

[20] See D. Mazur, *Prawo właściwe ...,* p. 143.

[21] See J. Gentinetta, *Die lex fori ...,* p. 204.

[22] B. von Hoffman, *O stosowaniu „legis mercatoriae" ...,* p. 25.

[23] See J. Poczobut, *Ewolucja pojęcia międzynarodowego prawa handlowego* [Evolution of the notion of international commercial law], PPPM 2007, vol. 1, pp. 50 and 51; J. Jakubowski, *Prawo jednolite w międzynarodowym obrocie gospodarczym* [Uniform law in international trade], Warsaw 1972, p. 152; same [in:] J. Jakubowski, M. Tomaszewski, A. Tynel, A. W. Wiśniewski, *Zarys międzynarodowego prawa handlowego*, Warsaw 1983, p. 24; D. Mazur, *Prawo właściwe ...,* p. 142; B. von Hoffman, *O stosowaniu „legis mercatoriae" ...*, p. 16; J. Rajski, *Zasady międzynarodowych ...,* p. 239 et seq.; see also the study by M. Pilich, *Dobra wiara w Konwencji o umowach międzynarodowej sprzedaży towarów* [Good faith in the Convention on agreements on international sale of goods], Warsaw 2006, p. 25 et seq. ; M. Konopacka, *Dobra wiara w prawie umów* [Good faith in contract law], [in:] *Polskie prawo prywatne w dobie przemian. Księga jubileuszowa dedykowana Profesorowi Jerzemu Młynarczykowi* [Polish private law in the era of change. A jubilee book dedicated to Professor Jerzy Młynarczyk], Gdańsk 2005, p. 54 et seq.

Application of rules of law, on the basis of which an arbitration court could base its decision, is dependent however on an authorization made by the parties. Arbitrators cannot at their own discretion apply such grounds if the parties did not make pertinent arrangements in this respect. The provision of Art. 1194 § 1 of the Code of Civil Procedure leaves no doubt in this regard. It follows from that provision in an obvious manner that the parties must expressly authorize the arbitration court to adjudicate on the basis of general rules of law. In other legal systems it is regulated similarly. An express authorization means that the parties cannot express their will in an implied manner, nor can the arbitration court derive a tacit authorization from a given circumstance. The legislator does not specify here the form of such express authorization; nonetheless it should be accepted that it should be in written form. One wonders whether on this same level one could consider both an invoking of legal rules and a choice of a specific legal system. It does not seem justified, however, to equate the two in this regard as it is not until a specific law is invoked (or indeed a legal system chosen) that it will be possible to state whether adjudication on the basis of rules of law is possible at all. Since adjudication on the basis of rules of law is linked to an express authorization, this issue must be reflected in a concrete provision of law which refers to such possibility. Similarly, one cannot argue from the circumstance that the parties submitted the dispute to an international arbitration court that their will was to give an authorization to hand down an adjudication on the basis of general legal rules[24]. It is obvious that the arbitration court to which the parties entrusted the task of adjudicating according to a specific legal system cannot apply general legal rules instead of that system[25]. Application of general rules – as compared to application of the law of a specific State – is more complicated and leads to results which are difficult to predict as it is linked to particular burdens of proof[26].

When discussing rules of law, a quite important and unexplained theoretical problem arises. Namely, one should wonder whether general rules of law can be treated in categories of legal norms or whether one should rather support the view that they are merely directives of conduct. It seems that one may accept here a two-type solution. In the first case, some of the rules are reflected in international codifications and then we can assume that they are legal norms, universally adopted, common to so-called civilized legal orders. An example are norms relating to the binding force of international agreements[27]. Secondly, one should bear in mind here the fact that certain legal rules are a result of arbitration practice and, thanks to arbitration decisions, function internationally. In turn, with that assumption one can accept that rules worked out in

[24] See B. von Hoffman, *O stosowaniu „legis mercatoriae"...*, p. 23; A. Bucher, *Transnationales Recht im IPR*, [in:] *Aktuelle Fragen zum Europarecht aus der Sicht in-und auslädischer Gelehrter*, Wien 1986, p. 53.

[25] See B. von Hoffman, *O stosowaniu „legis mercatoriae"* ..., p. 24.

[26] Ibidem, p. 16.

[27] The following endorse this understanding: T. Ereciński, K. Weitz, *Sąd arbitrażowy, op. cit.,* p. 325. In the doctrine it is pointed out moreover that the rules of law acknowledged by civilized nations are in no manner situated lower in the hierarchy of sources of law than international agreements or custom. Thus, they do not have a merely auxiliary character as compared to other sources but are fully equal as to legal force, see W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [International public law. System issues], Warsaw 2004, p. 98 et seq.; T. Jasudowicz, *O zasadach ogólnych prawa uznanych przez narody cywilizowane – garść refleksji* [On general rules of law accepted by civilized nations – some reflections], [in:] *Pokój i sprawiedliwość przez prawo międzynarodowe* [Peace and justice by international law], Toruń 1997, p. 141.

arbitration decisions may constitute directives of a specific conduct. The view that rules are not legal norms is supported by the argument that legal rules are not norms which can be applied directly as they can be in conflict with each other. The rule of freedom of contracts may, for example, collide with the rule of protection of trade[28]. For this reason also the first concept may prove to be isolated. On the other hand, acknowledging rules to be norms will make it possible to retain so-called certainty of law, which category is one of the goals of the law itself. In the case of a question as to which should be applied - substantive law or rules of law - in the second understanding the conclusion will be as follows: substantive law if the emphasis is placed on certainty of law, whereas rules of law when we are thinking in terms of justice.

Resolution by arbitration courts of disputes arising out of international trade relations on the basis of rules of law is an unusually helpful solution which makes it possible to gain insight into the structure of the problem from an entirely different point of view than would be the case where it was a question of application of provisions of law only. Application of transnational rules from the point of view of the Polish legal regulation (Art. 1194 § 1 of the Code of Civil Procedure) may give rise to doubts with regard to the question of whether rules will be applicable only if a dispute arises out of international transactions (and thus in the case of international arbitration), or whether there is also a possibility of taking into account the rules as grounds of adjudication also in national arbitration. When answering this question it should be emphasized that in essence the concept of "general rules of law" within the meaning of the provision of Art. 1194 § 1 of the Code of Civil Procedure covers all rules of law, both deriving from national law and international law, as well as adopted rules of legal understanding. Despite the fact that these rules also have a transnational aspect, there is no doubt however that some of them are regulated directly in national statutes (e.g. rule of freedom of contracts – Art. 353^1 of the Civil Code). It should thus be accepted that in national arbitration there is a possibility for an arbitration court to adjudicate on the basis of general rules of law, unless they are not known to a given system. This follows from the fact that, first of all, questioning such possibility would to a large extent constitute a limitation of grounds of adjudication by an arbitration court and, secondly, the above-mentioned article does not provide any limitations in this respect, nor any subordination of specific grounds to a given category of arbitration, which should support the position taken by me.

IV. The greatest doubts when applying ex-legal grounds of adjudication are caused not so much by the issue of authorization of an arbitration court to hand down a decision on the basis of rules of equity as by the construction itself of these grounds. "Equity" is an ambiguous term even when its meaning is examined in the context of a concrete legal language. It is also an ambiguous term with a significant emotional tinge[29]. The classical understanding of equity consists in a definition as a proper concrete decision which in a right manner corrects a decision which is to be

[28] See K. Lorenz, *Methodenlehre der Rechtswissenschaft*, Berlin 1983, p. 420 et seq. quoted with B. von Hoffman, *O stosowaniu "legis mercatoriae" ...,* p. 16.

[29] See J. Wróblewski, *Wartości a decyzja sądowa* [Values and court decision], Wrocław-Warszawa-Kraków-Gdańsk 1973, p. 204; see also H. Piętka, *Słuszność w teorii i praktyce* [Equity in theory and practice], Warsaw 1929, p. 55 et seq.

handed down on the basis of norms which regulate cases of a given type[30]. In this case it is a so-called self-contained understanding of equity. Another understanding of equity is a relation understanding which differs from the first one in that it is understood as a feature of a decision or feature of a norm which assumes compliance with another norm.

From the point of view of an arbitration court the term "equity" is taken into consideration when the "rule of equity" is invoked. Essentially one could say somewhat differently, namely that we are dealing with consideration being taken of "rules following from equity". Both wordings will mean the same, though in the provision of Art. 1194 § 1 of the Code of Civil Procedure the legislator decided however on the phrase "rules of equity"[31]. The theoretical meaning of rules of equity assumes the existence of some system of rules of equity with regard to which this evaluation is made. One cannot accept that adjudicating on the basis of rules of equity does not mean anything and does not have features of a given content (even one that is difficult to grasp). It could be content which is to a large extent abstract. The indicated provision of the Code of Civil Procedure is an example of an invoking of equity by way of a legal text. It is not a matter here, as an assumption, of equity of the goal but of referring to equity as a factor which determines the grounds of an arbitration decision. When referring to rules of equity as grounds of adjudication, one should also bear in mind the need to distinguish this level from the level of general clauses which in turn refer to the concept of equity. This is because the essence of general clauses is that of opening a legal system to ex-legal criteria, i.e. not incorporated for some reasons into a legal system, not defined precisely as regards content[32]. Similarly one cannot equate adjudication on the basis of rules of equity with mediation or conciliation. The assumption of an award on the indicated grounds does not lie in aiming at concluding a settlement. An arbitral award, even if it was handed down on the basis of the rules of equity, is binding on the parties after it was been confirmed by a State court.

[30] In its assumptions the classical understanding of equity relates to justice, see Aristotle, *Etyka nikomachejska* [Nicomachean Ethics], Warsaw 1956, p. 198 et seq.

[31] In the light of the previous legal state (i.e. the provisions of Art. 695 et seq. of the Code of Civil Procedure) the doctrine admitted the possibility of an award on the basis of rules of equity, despite the fact that the provisions of the Code of Civil Procedure did not refer to this issue directly. The possibility of adjudicating on the basis of equity was argued from an analysis of the provisions on setting aside an award of an arbitration court and on a rejection of the provisions on enforcement of that award. The provision of Art. 711 § 3 stated that a refusal to perform an award may be justified by a breach of law and order or the principles of social coexistence. An identical provision concerned the grounds for setting aside an award, as indicated by the content of the abrogated Art. 712 § 1 Point 4 of the Code of Civil Procedure. It followed from this that an arbitration court was bound only by these rules and could, whilst complying with them, adjudicate both according to the law and the rules of equity. See, inter alia, L. Łabędzki, *Międzynarodowy arbitraż handlowy ...,* p. 158; S. Dalka, *Sądownictwo polubowne w PRL* [Arbitration court decisions in Polish People's Republic], Warsaw 1987, p. 86; J. Sobkowski, *Stosowanie prawa materialnego w sądownictwie polubownym według kodeksu postępowania cywilnego i regulaminów Kolegium Arbitrów przy Polskiej Izbie Handlu Zagranicznego* [Application of substantive law in arbitration court decisions according to the Code of Civil Procedure and rules of the College of Arbitrators at the Polish Chamber of Foreign Trade], RPEIS 1980, paper 3, p. 70; I.C. Kamiński, *Zasady słuszności jako podstawa orzekania w obrocie cywilnym i handlowym* [Rules of equity as grounds for adjudication in civil and commercial matters] PiP 1993, paper 4, p. 48; T. Ereciński, [in:] T. Ereciński, J. Gudowski, *Komentarz do kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze* [Commentary on the Code of Civil Procedure. Part One. Examination proceedings], vol. 2, Warsaw 2004, p. 397.

[32] See L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa* [Issues concerning application of law. Doctrine and theses of judicial decisions], Cracow 2002, p. 44; same, *Stosowanie generalnych klauzul odsyłających* [Application of general reference clauses], Cracow 2001, p. 21 et seq.

Adjudicating according to rules of equity is accepted not only in the Polish system of litigation law but also in other regulations. It suffices here to point to § 1051 Sec. 3 of the German ZPO, in the light of which parties may release arbitration judges from being bound by any law and authorize them to hand down decisions according to rules of equity. Similarly, Art. 822 of the Italian Code of Civil Procedure provides for the admissibility of adjudicating on the basis of equity. A condition, however, is that a pertinent authorization be granted by the parties. Also Art. 34 Sec. 1 of the Spanish Act on Arbitration emphasizes the possibility of adjudication by arbitrators on the basis of rules of equity. Swiss law also goes in this direction, as indicated by Art. 31 Sec. 3 of the Swiss intercantonal Arbitration Convention (Concordat) which admits adjudication according to the rule of equity. The possibility of adjudicating on the above-mentioned grounds is also provided for by Art. 187 of the Swiss Federal Act of 18.12.1987 on international private law (IPL). Adjudication on the basis of rules of equity is thus a commonly accepted method of applying ex-legal criteria when an arbitration court adjudicates disputes. When pointing to individual legal orders, attention should be paid to a quite important issue, namely that an arbitration court may adjudicate *ex aequo et bono* or as *amiable composition*. This distinction was reflected in Art. 28 Sec. 2 of the UNCITRAL Model Law, and in certain States these institutions are not equated with one another. In France, the *amiable composition* construction appears as an exception to arbitration based on provisions of law and is admitted only upon the consent of the parties. In turn, in Switzerland adjudication according to rules of equity differs from the French construction[33]. The ratio legis of *l'amiable composition* goes no further than the possibility of granting arbitrators an authorization to modify or moderate the consequences of application in the light of law of contractual provisions if this is required by the interests of the parties or rules of justice. *L'amiable composition* enables the parties to waive benefits resulting from application of the law. On the other hand, it is emphasized that *l'amiable compositeur* is empowered to adjudicate on the basis of rules of law if it considers their application in a concrete case to be in accordance with equity, rules of justice, well understood joint interest of the parties or other values of importance to them[34]. Thus, one may assume that adjudication according to rules of equity differs from adjudication as *l'amiable composition* in that arbitrators are ordered to make an equity evaluation according to subjective criteria, i.e. that which fits within their concept of a just resolution of the dispute[35]. Also it differs in that arbitration *ex aequo et bono* – as compared to *l'amiable composition* – means a greater freedom in ignoring pertinent legal provisions in the name of the demands of equity[36]. As emphasized by A. Wach, *l'amiable compositeur* – being not authorized to hand down awards only from the point of view of equity – may however employ this criterion and often does so in practice. When carrying out its mission, it may in particular moderate the effects of applicable law, including that following from the agreement, aiming at finding a solution which is just and in compliance with equity rules, which solution will remove the need to carry out in a manda-

[33] See A. Wach, *L'amiable composition* as an independent form of resolving disputes, R.Pr. 2004, No. 6, p. 124.

[34] See A. Wach, *L'amiable composition* ..., p. 125.

[35] See A. Lizer-Klatka, *Pojęcie orzekania na zasadach słuszności w międzynarodowym arbitrażu handlowym* [Notion of adjudication according to rules of equity in international commercial arbitration], PiP 2000, paper 1, p. 64; T. Ereciński, K. Weitz, *Sąd arbitrażowy, op. cit.*, p. 326.

[36] See A. Lizer-Klatka, *Pojęcie orzekania ...,* p. 64.

tory manner specific obligations and rights following from a given contract[37]. Emphasizing further the existing difference between the mentioned institutions, it should be additionally noted that in the case of an authorization *ex aequo et bono* arbitrators are obligated to seek an equitable and just resolution of a dispute, whereas *amiables compositeurs* is only a possibility which arbitrators may – but do not have to – make use of[38]. If one were to refer to the provisions of Polish legal regulation, we would come to the conclusion that the two institutions are not distinguished. In the opinion of some representatives of the doctrine, this may constitute an argument in favor of the view that it is admissible to apply both versions of adjudication according to rules of equity adopted in the provision of Art. 1194 § 1 of the Code of Civil Procedure[39]. In my opinion, this type of view is too far-reaching, firstly because *l'amiable composition* interprets equity somewhat differently, and secondly because the scope of authorization of the arbitrators is separate. In the case of invoking rules of equity as grounds of adjudication in the light of Art. 1194 § 1 of the Code of Civil Procedure, arbitrators should be released from any legal rule. Their far-reaching sense of equity in this case is heavily abstract. On the other hand, adjudicating on the basis of *l'amiable composition* means that arbitrators are not necessarily released from adjudicating on the basis of the law. The sense of equity in this institution has a somewhat different aspect than in the case of adjudication on the basis of rules of equity only. In a certain sense this difference is thrown into relief also by the statement of P. Lalive, who accepts that arbitration according to the rule of equity is unconnected with that which is the law, remaining in each case something different than *l'amiable composition* of French law, which generally allows an arbitrator adjudicating on the basis of the law to moderate the effects of application of this latter[40]. Thus, a broader interpretation should not be applied with regard to the provision of Art. 1194 § 1 of the Code of Civil Procedure, all the more that it introduces a certain confusion in the understanding of certain institutions. The essence of adjudicating according to rules of equity will thus be that of granting arbitrators a certain degree of freedom of discretion, going beyond legal provisions[41]. Adjudicating according to rules of equity is characterized by a disconnection from applicable law. It cannot however as a result exceed the boundaries of public order. The powers of arbitrators cannot be greater than that of the parties to the arbitration agreement, and since the parties themselves cannot exclude the provisions of *iuris cogentis*, all the more the arbitrators cannot derogate those provisions, which relates to public order and rules of morality[42]. If however such situation were to arise, then the possibility would come into play of setting aside the arbitral award or indeed refusing to acknowledge it or refuse to declare its enforceability precisely in view of such contradiction with the public order. Adjudicating on the basis of rules of equity cannot therefore justify a breach of the right to defense, as well as the right to challenge an award of an arbitration court. The scope and importance of both the right to defense and the right to challenge an award are ambiguous in various legal systems. Thus, each case should be evaluated *a casu ad casum*.

[37] A. Wach, *L'amiable composition* ..., p. 125.

[38] See A. Lizer-Klatka, *Pojęcie orzekania ...,* p. 64.

[39] See T. Ereciński, K. Weitz, *Sąd arbitrażowy, op. cit.,* p. 326.

[40] P. Lalive, [in:] P. Lalive, J.F. Poudret, C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, p. 400

[41] See D. Mazur, *Prawo właściwe ...,* p. 146.

[42] See O. Chukwumerije, *Choice of Law in International Commercial Arbitration*, Westport (Connecticut), London 1994, p. 119 et seq.

In the case of international arbitration, however, a problem appears with this issue as it is difficult to establish which of the public orders could come into play, and thus: place of adjudication, place of performance of the award, or the public order related to the legal system which covers the law on which the award was based, or indeed the autonomous legal order. It does not seem justified in the case of *ex aequo et bono* to take into consideration all the legal orders, but only the system whose law constitutes the grounds for such award[43]. An award in the indicated form requires not only an authorization made by the parties, but also admission of this form of adjudication by the pertinent national law. On the other hand, account should be taken – from the point of view of a future acknowledgement or declaration of enforceability – of the order of the place of performance of the award as it may be that a given law admits the possibility of adjudicating on the basis of rules of equity, while the law of the place of performance does not provide for such solution.

When discussing the indicated grounds, it is also worth noting that despite existing and express diversities, the provision of Art. 1194 § 2 of the Code of Civil Procedure obligates the arbitration court to take established customs under consideration. Hence a situation could arise where on the one hand the arbitration court adjudicates on the basis of rules of equity, and on the other takes into consideration transnational customs. If this leads to a conflict in the sense that a custom makes impossible application of an equity criterion, then such possibility should be decisively ruled out. This follows from the fact that the rules of equity have priority over customs which in essence cannot constitute independent grounds of an arbitration decision. In addition, a custom is generated by specific factual states which with the passage of time became or were transformed into an autonomous and trans-state order. In turn, application of rules of equity means the need to take into consideration the particular circumstances of each case in an individual manner[44], and not in a general manner, as could be the case in the application of a custom. The authorization to abandon the obligation to closely keep to the letter of the law and take into consideration only the well understood joint interest of the parties in the case of rules of equity is the most important. On the other hand, in the case where the norm of custom law leads in effect to a just solution, then there are no obstacles to its being taken into consideration by the arbitrators, even when they are adjudicating on the basis of rules of equity. A similar solution is provided for by the Model Law in Art. 28 Sec. 4, with the reservation that it additionally follows from that article that trade customs being applicable to transactions should be taken into consideration not only in the case of arbitration *ex aequo et bono*, but also *l'amiable composition*.

When adjudicating on the basis of rules of equity the issue may also appear of taking into consideration the provisions of the agreement. As emphasized by A. Lizer-Klatka, a question arises in relation to this as to whether arbitrators should always observe the norms following from the agreements concluded by parties, or whether they are empowered to make changes in them and fill in gaps in contracts, and perhaps even infringe new solutions for the future[45]. However, in this respect there is no uniform position as, on the one hand, more

[43] See I.C. Kamiński, *Uprawnienia sędziów i arbitrów orzekających na podstawie reguł słuszności* [Authorizations of judges and arbitrators adjudicating on the basis of rules of equity], PPHZ 2000, vol. 19/20, p. 75.

[44] See A. Lizer-Klatka, *Pojęcie orzekania ...,* p. 68; T. Ereciński, K. Weitz, *Sąd arbitrażowy, op. cit.,* p. 327.

[45] A. Lizer-Klatka, *Pojęcie orzekania ...,* p. 67.

common is the concept of refusing arbitrators the right to ignore contractual provisions, and this is particularly visible amongst representatives of Swiss doctrine, while on the other hand there are supporters of the view which allows such modification[46]. The problem of the moderating powers of an arbitrator with regard to a contract is particularly important when, first of all, we are dealing with international arbitration, and secondly when the arbitrator has been granted the powers of *amiable compositeur*. Supporters point to the supplementary character of contractual rules. However, this circumstance is irrelevant when one cites the basic argumentation in the form of private will and public order. There are no doubts that where provisions of a non-mandatory nature come into play, the arbitrator – by way of a delegation of powers attributable to the parties with regard to these rights – may instead of specifying the consequences of their application, base himself on other grounds pertinent for the resolution of the dispute. Pursuing this train of thought, one may thus assume that the powers of an arbitrator to moderate a contract means that this arbitrator has the same powers with regard to that contract as with regard to a right of a non-mandatory nature. The powers of *amiables compositeurs* are a copy of the powers of the parties who resign from their rights in favor of the arbitrators. In turn, opponents emphasize that this cannot be reconciled with the basic rule in international private law of respect for contract and its inviolability. This view was also confirmed in arbitration decisions. An example here is award No. 3267 of 1979 of the ICC, pursuant to which "despite the fact that some representatives of the doctrine hold the opinion that arbitrators equipped with the powers of *amiables composition* may break the disposition of the joint will of the parties, it is a generally accepted principle that the first duty of an arbitrator (also one adjudicating as an *amiable compositeur*) is to apply the agreement of the parties, outside of the order, when it is proven that cited provisions are clearly contrary to the actual will of the parties or breach a principle of the pertinent public order. In the opinion of the arbitration court, this rule is the basic condition for safety of international trade". Similarly, in another award of the ICC, No. 3938 of 1982, it was accepted that "according to the dominant doctrine and practice of international commercial arbitration, the arbitrator - as *amiable compositeur* – remains bound by the contract (...). Considerations which could lead *l'amiable compositeur* to correct the effects resulting from application of provisions of a non-mandatory nature in concrete circumstances are not justified with regard to a contract, being a special regulation as following from the will of the parties themselves". Additional arguments against the possibility of modifying the provisions of an agreement can be found in Art. 28 Sec. 4 of the Model Law. The discussed issue - having not only a theoretical aspect but also a practical one - was reflected above all in the judicial decisions of French State courts, which of course should not be surprising given the origin of the construction itself of *l'amiable composition*. An unusually rigorous approach was shown with regard to the issue of modification of contractual provisions, all the more that in international arbitration the unquestioned rule of *pacta sunt servanda* came into play, which rule was taken into consideration as a component of the public order of a transnational nature. An interference in the provisions jointly accepted by the parties cannot be made without a breach of the public order in its transnational form. On the other hand, the possibility of modifying the consequences of contractual

[46] See A. Lizer-Klatka, *Pojęcie orzekania ...,* pp. 67 and 68.

clauses in the light of the requirements of equity, without resorting to an actual renegotiation of the contract, remains in compliance with the rules which govern *l'amiables composition* arbitration.

To sum up, it should be pointed out that non-legal grounds of adjudicating today are becoming an important element of the process of adjudication by an arbitration court. From this point of view it is also easy to see the difference between the grounds followed by a State court and those which set the direction for adjudication for an arbitration court, to the advantage, of course, of the latter. The popularity of non-legal grounds of adjudication in arbitration is increasing, which fact is indicated not only by arbitration practice, but also by the approach to this issue in academic studies. One should not be in any way surprised by this since it is precisely grounds such as *lex mercatoria*, legal rules or rules of equity which make it possible to depart from the stiff formulae as provided for (and offered by) traditional substantive law. On the other hand, application of the indicated grounds may cause – in complicated factual states – significant problems (and doubts) not only in the context of adjudication itself by an arbitration court but also from the point of view of possible supervision of an arbitral award carried out by a State court.

Conditions for bringing new claims to arbitration under FIDIC contracts

Piotr Bytnerowicz

In the previous article the issue of a cut-off time for introducing a counterclaim (or, generally, a new claim) under the ICC Rules of Arbitration was discussed. This article touches upon some more specific aspects of a closely connected topic – conditions for introducing new claims (including counterclaims) to pending arbitration proceedings in disputes resulting from FIDIC-type contracts providing for multi-tier arbitration clauses.

The main questions that arise in this context are:

- whether every new claim or counterclaim has to be brought through all the tiers for it to be admissible in arbitration (or, more specifically, does every claim have to be first subject to the decision of an Adjudication Board before it can be pursued in arbitration);
- what are the consequences if the claim is not brought through all the tiers.

I. Tiers of arbitration clauses in FIDIC contracts

Multi-tier arbitration clauses providing for a requirement to refer a dispute to the Dispute Adjudication Board ("**DAB**") are included in the FIDIC 1999 Red Book, 1999 Yellow Book and the 1999 Silver Book. As the effects of DAB's decisions are governed homogeneously in each of the Books, for the sake of convenience I will be further referring to the Clauses of the FIDIC 1999 Red Book[1] (hereinafter the "**Conditions**").

Pursuant to Sub-Clause 20.4, *"*[i]*f a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer"*.

Claims falling within the scope of Sub-Clause 20.1 should be first notified to the Engineer under the pain of the consequences provided for under the second and ninth paragraph of Sub-Clause 20.1 (claims being excluded or subject to reduction, respectively).

Generally, the DAB shall give its reasoned decision within 84 days of receiving a reference. The decision *"*[...] *shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award* [...]*"* (Sub-Clause 20.4, fourth paragraph).

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[1] Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, First Edition 1999.

If either of the parties is dissatisfied with the DAB's decision, it shall give notice of its dissatisfaction to the other party within 28 days. The notice of dissatisfaction must state that it is given under Sub-Clause 20.4 and should set out the matter in dispute and the reasons for dissatisfaction with the DAB's decision.

Save as the Conditions expressly otherwise provide (see Sub-Clause 20.7 and 20.8) *"*[...] *neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given* [...]*"*. Pursuant to Sub-Clause 20.5, arbitration may be commenced on or after the fifty-sixth day after the notice of dissatisfaction was given (during this period the parties have the opportunity to attempt to settle their dispute amicably; however this is not obligatory).

Only after the expiry of the fifty-six day period can a request for arbitration pursuant to Article 4 of the ICC Rules of Arbitration be submitted.

Therefore, depending on the situation, before arbitration can be commenced, the party wishing to initiate arbitration should go through the following three to five tiers:

- notifying the claim to the Engineer under Sub-Clause 20.1 (if applicable);
- referring the dispute in writing to the DAB for its decision;
- giving notice of its dissatisfaction with the DAB's decision;
- attempting to settle the dispute amicably before the commencement of arbitration (not obligatory);
- lapse of the fifty-six day period after giving notice of dissatisfaction with the DAB's decision.

II. Introducing new claims in the course of pending arbitration proceedings

The wording of the Sub-Clauses referred to above leaves no doubt that it is mandatory to follow the multi-tier procedure provided for in Clause 20. Therefore, as indicated by N. G. Bunni with respect to Clause 67 of the 1987 Fourth Edition of the Red Book, Clause 20 *"*[...] *incorporates a number of steps, each of which must be taken before proceeding to the next step, with arbitration as the ultimate step"*[2]. In other words, going through the applicable tiers is a condition precedent to arbitration of a dispute[3].

There is no single provision in the Conditions that might suggest that the situation is any different when arbitration proceedings are already pending between the parties and one of the parties wishes to introduce a new claim to the pending arbitration. The Conditions explicitly provide only for one exception when arbitration can be commenced without obtaining a decision from the DAB – that is where there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise (Sub-Clause 20.8)[4]. The Condi-

[2] N. G. Bunni, The FIDIC Forms of Contract, Blackwell Publishing, Ltd. 2005, p. 400.

[3] *Ibidem,* pp. 404, 407

[4] Some authors argue that also Sub-Clause 20.7 provides for a situation where arbitration can be commenced without obtaining the DAB's decision (see eg. A. Olszewski, Kontraktowe procedury rozwiązywania sporów w umowach o roboty budowlane opartych na wzorach umownych FIDIC – w świetle prawa polskiego). This view does not seem fully appropriate as in the situation described in Sub-Clause 20.7 the DAB's deci-

tions deliver no grounds to add any further exceptions under which a claim could be brought to arbitration without being subject to the DAB's decision in the first place.

Nevertheless, some tend to believe that when arbitration proceedings are already pending, there is no sense to refer new claims to the DAB for its decision when an arbitral tribunal is already in place and could immediately handle such a claim. There are a number of reasons why such standpoint should not be approved.

The first reason is the principle *pacta sunt servanda.* As indicated by Lord Mustill in the *Channel Tunnel* case:

> *"Those who make agreements for the resolution of disputes must show good cause for departing from them* [...] *Having promised to take their complaints to the experts and if necessary to the arbitrators, this is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purposes is to my way of thinking quite beside the point"*[5].

Secondly, referring the dispute to the DAB is an effective and efficient way of resolving disputes. The DAB's final and binding decisions can be enforced[6] and often enable future arbitration to be avoided. Therefore, any arguments by a party that it would be a waste of time to refer the dispute to the DAB should be treated with reserve. Normally, the parties should have no reason to assume *prima facie* that their claims will be dismissed by the DAB (which could have been and often was a justified assumption under the 1987 Fourth Edition of the Red Book where referring the matter to the Engineer, instead of the DAB, was required). The provisions of Sub-Clause 20.2 safeguard the impartiality and independence of the DAB and require its members to be 'suitably qualified'. Therefore, refereeing the matter to the DAB can in fact lead to obtaining a satisfactory resolution without the need to engage into more lengthy and costly arbitration.

Moreover, the arbitration clause included in Sub-Clause 20.6 provides that, *"*[...] *unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration".* What follows from the wording of this provision is that the arbitration clause covers only disputes in respect of which a decision of the DAB was issued but has not become final and binding (with the exception provided for in Sub-Clause 20.8). Hence, claims that were not subject to the DAB's decision are outside the scope of the arbitration agreement and cannot be submitted to arbitration, even in a situation where arbitration proceedings are already pending between the parties with respect to other claims under the same contract.

It should also be borne in mind that the arbitration clauses included in FIDIC contracts cover disputes (not claims). Hence, the existence of a dispute is a precondition for a matter to be arbitrated. As noted by Lord Denning in the *Monmouthshire County Council v. Costel-*

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sion itself (or rather the fact that this decision is not being complied with) is the subject of the arbitration proceedings. The purpose of Sub-Clause 20.7 is therefore to ensure enforceability of the DAB's decision.

[5] Lord Mustill in the *Channel Tunnel* case, cited after: Alexander Jolles, Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement, Thomson Sweet & Maxwell, reprinted from (2006) 72 Arbitration 329 – 338, Sweet & Maxwell Ltd, p. 333.

[6] P. Pietkiewicz, Egzekwowalność decyzji Komisji rozjemczych w umowach FIDIC, ADR Nr 1(9)/2010, pp. 88-90.

lo & Kemple Ltd case[7], the mere submission of a claim does not necessarily cause a dispute to arise (although it may). In a latter judgment in the case of *Fastrack Contractors Ltd v. Morrison Construction Ltd*[8] it was held that a claim should be rejected before a dispute can be said to exist (however the rejection of a claim can take different forms).

A similar approach was adopted in a ruling of an ICC arbitration tribunal in case no. 6535 (relating to Clause 67 of the 1987 Fourth Edition of the Red Book, however still applicable as a matter of principle), where it was held that:

> *"*[...] *before a claim or contention can constitute a dispute to be referred under Clause 67, it must first have been submitted and rejected under the contract. It follows that if the matters submitted to the Engineer are claims which have not previously been rejected, they cannot be regarded as submitted under Clause 67 whatever language is used in the submissions".*[9]

For the reasons stated above, there should be no doubt that a party that wishes to introduce a new claim in the course of a pending arbitration, must follow the standard route provided for in Clause 20 (in particular, refer the matter to the DAB for its decision and submit a notice of dissatisfaction with the decision, provided of course that the decision is not satisfactory).

Moreover, for a new claim (or counterclaim) to be introduced into pending arbitration, conditions provided for in the ICC Rules of Arbitration must be complied with. By virtue of Article 19 of the Rules, after the Terms of Reference have been signed (which will usually be the case), new claims or counterclaims can be made only if they are within the limits of the Terms of Reference or if the Tribunal has authorised a party to make a claim that falls outside these limits[10]. Therefore, while the Terms of Reference are being drafted, the parties should pay attention to their wording and make sure that it will cover any new claims or counterclaims they might want to introduce at a later stage.

III. Consequences of not obtaining the DAB's decision

If the steps provided for in the multi-tier arbitration clause included in Sub-Clause 20 are not abided by, the claim cannot be effectively pursued in arbitration. This view is supported by the decisions of ICC arbitral tribunals, dating back to 1987 Conditions. For example *"*[...] *in ICC Case Nos. 6276 and 6277, the arbitral tribunal found that claimant had not satisfied the prerequisite for arbitration set forth in Clause 67 and, consequently, the Request for Arbitration was 'premature'. In ICC Case Nos. 6238 and 6535, the tribunal held that the contractor had not complied with Clause 67 and that the tribunal had no jurisdiction over the claims"*[11].

[7] *Monmouthshire County Council v. Costello & Kemple Ltd* [1965] 5 BLR 83.

[8] *Fastrack Contractors Ltd v. Morrison Construction Ltd* [2000] BLR 168.

[9] ICC case no. 6535 [1992] cited in: Christopher R. Seppala, International Construction Contract Disputes: Commentary on ICC Awards Dealing with the FIDIC International Conditions of Contract, The ICC International Court of Arbitration Bulletin Vol. 9/No. 2, November 1998, pp. 34 – 35.

[10] See the remarks made in my previous article [Arbitration e-Review no. 2(2)/2010].

[11] Peter M. Wolrich, Multi-tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules, 2002 Curtis,

Under Polish law, A. Olszewski[12] also adopts the view that if the steps of the multi-tier arbitration clause are not abided by, the claim should be regarded as premature. A. Olszewski suggests that in consequence, such claim should be (i) considered by the arbitral tribunal and (ii) dismissed.

While there should be no controversy that such claims are premature, there are justified doubts as to whether the arbitral tribunal would be empowered to dismiss them. As indicated above, generally, the arbitration clause (Sub-Clause 20.6) only covers disputes in respect of which a decision of the DAB was issued but has not become final and binding. Therefore, apparently claims that are not subject to a non-final and non-binding decision from the DAB are outside the scope of the arbitration clause. As a result, it would be difficult to justify the tribunal's jurisdiction over such claims.

Mallet-Prevost, Colt & Mosle LLP, Published on October 2, 2002 and Presented at The International Bar Association 2002 Conference in Durban, South Africa, October 20 – 25, 2002, p. 3.

[12] A. Olszewski, Kontraktowe procedury rozwiązywania sporów w umowach o roboty budowlane opartych na wzorach umownych FIDIC – w świetle prawa polskiego, Biuletyn Konsultant Nr 18, 10/2010, p. 5.

What's new at the ICC Court of Arbitration?

Łucja Nowak, LL.M.

The start of the year is a perfect time to look back and make predictions. This is no different in the international commercial arbitration world. The International Court of Arbitration of the International Chamber of Commerce (ICC) is not only one of the most prestigious arbitration institutions in the world, but also the most commonly selected arbitration institution worldwide. What did 2010 hold for the ICC International Court of Arbitration? What are the prospects for the Court and its users in 2011? This article endeavours to answers these questions.

I. Polish users of ICC arbitration – the statistics

The ICC International Court of Arbitration in Paris (ICC Court) is an institution which is well-known to many Polish lawyers and arbitration users. In recent years parties to commercial transactions and their legal advisors have become acquainted with it. They often use ICC arbitration clauses and submit commercial disputes to ICC arbitration. The ICC Court's statistics for 2010 are unfortunately not available yet. However, an analysis of previous years' statistics paints a very rosy picture of the Polish use of ICC arbitration. Disputes in which Polish entities (mainly companies) have been involved have been decided in arbitration under the auspices of the ICC Court for many years now. The number of these entities is constantly increasing. In comparison with other countries in the region, Polish entrepreneurs are some of the most frequent users of ICC arbitration. Recently, within the Central and Eastern European countries, only Turkish entrepreneurs used the services of the ICC Court more frequently than their Polish counterparts. Twenty two Polish entities were parties to ICC arbitration in 2009 (there were 33 in 2008, 29 in 2007 and 28 in 2006).[1] Some of these cases are disputes between two Polish entities, which in ICC language are referred to as *single-nationality cases*. The number of such cases has been increasing in the last few years.

The number of Polish arbitrators deciding ICC arbitration disputes has also been growing over time. Eighteen Polish arbitrators were members of ICC arbitral tribunals in 2009 (there were 18 in 2008, 19 in 2007 and 12 in 2006). The language selected by the parties to be used in the course of the arbitration is often Polish, and Poland (most often Warsaw) is also often chosen by the parties as the place of arbitration. It shows that the parties have confidence in the Polish legal system, including in the available assistance of the Polish courts as

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[1] In comparison, 62 Turkish entrepreneurs were parties to ICC arbitrations in 2009 (36 in 2008, 31 in 2007 and 47 in 2006). All data in this article are taken from the official ICC statistics published annually by the ICC Court in its *Arbitration Bulletin*.

well as efficiency of recognition and enforcement of arbitral awards. In comparison, the Russian Federation, Ukraine and even Hungary are not nearly as frequently chosen as seats of arbitration in ICC arbitrations.

We do not know at this stage what the above numbers will look like in the detailed ICC statistics for 2010. Taking into consideration, however, that the number of requests filed with the ICC Court has been systematically increasing over many years[2], the above trends have probably continued. The Chairman of the ICC Court recently stated that the Court has estimated that 700-750 requests for arbitration will be filed by the end of 2010.[3]

II. New year – new Rules of Arbitration?

The ICC was founded in 1919 and is one of the oldest international organisations in the world. The ICC Court, which was set up in 1923, is probably the oldest arbitral institution in the world. The longevity of the ICC and its International Court of Arbitration is a result of, among other things, high standards of operation, the strongest efforts to maintain these standards at the highest level while at the same time being responsive to changes in international commercial practice. The need to keep its arbitration services at the highest level became all the more visible when the amount of requests registered yearly at the ICC Court increased from 33 in 1955 to 427 in 1996.[4] Political, economic and social changes initiated at the beginning of the 1990s have also caused an increasingly open global economy and a marked expansion in international commercial relations worldwide. They have also prompted an increase in international commercial disputes, which were often submitted to arbitration under the auspices of ICC arbitration. Since the beginning of the 1990s the increase in the number of requests for arbitration submitted to the ICC Court has been relatively steady and, in accordance with the above-cited statistical data, the number of new requests in 2009 (817) constitutes almost a doubling of requests in comparison with 1996.

Since its inception, the ICC Court has been monitoring the arbitration practice, collecting opinions of arbitration users and making periodic updates of its Rules of Arbitration. New versions of the ICC Rules of Arbitration entered into force in 1955, 1975 and 1998.[5] Naturally, the Rules have not been written from scratch each time. They were improved and perfected in response to the needs of the Court's users. As a result, a tradition emerged according to which the Rules of Arbitration are reviewed thoroughly approximately every decade. These reviews take into consideration the experience gained under the current version of the Rules.[6] In line with this tradition, in October 2008 the Commission on Arbitration of the ICC Court set up a Task Force on the revision of the ICC Arbitration Rules. Two representatives of ICC Poland – Mr. Andrzej

[2] Year 2009 saw a particularly sharp year-on-year increase of requests filed. 817 new requests were registered in that year, in comparison with 663 new requests in 2008.

[3] *Global Arbitration News*, 22 November 2010

[4] Yves Derains, *The Revision of the ICC Rules of Arbitration: Method and Objectives*, ICC International Court of Arbitration Bulletin, Vol. 8 No. 2, December 1997, p. 10

[5] *ibid.*

[6] A similar tradition of reviews carried out every decade is observed in relation to other flagship ICC products, such as the *Uniform Customs and Practice for Documentary Credits* and Incoterms.

Kąkolecki and Mr. Piotr Nowaczyk – participated in the works of the Task Force. The mandate of the Task Force included analysis of changes in the Rules proposed by the users of ICC arbitration, ICC National Committees and other persons and entities. In cases where the Task Force decided that changes to the Rules were necessary, it was requested to prepare a project of such amendments. The Task Force prepared a draft of changes to the ICC Rules of Arbitration and its mandate was completed at the end of 2010. The ICC Court will probably announce the amendments to the Rules within the next few months. As with the previous amendments to the ICC Rules of Arbitration, one should not expect entirely new Rules. However, every change, even ones that seem only cosmetic, will undoubtedly be subjected to detailed scrutiny. The year 2011 will therefore be marked by lively discussions about the "2011 ICC Rules of Arbitration."

In conjunction with the activities of the team tasked with the revision of the Rules of Arbitration, 2010 saw the works of another Task Force of the ICC Commission on Arbitration. This task force, set up in March 2009, is concerned with arbitration involving States or State entities.[7] One of the tasks of this team in 2010 was to review the Rules of Arbitration from the vantage point of the investor-State arbitrations based on bilateral investment treaties ('investment treaty arbitrations') and to establish whether the Rules require any changes to meet the specific requirements of investment disputes. The ICC Court of Arbitration is often one of the arbitral institutions listed in an investment treaty that a foreign investor can choose to submit its investment dispute with the host States to. The task of the team was to discuss whether possible changes in the ICC Rules of Arbitration could influence investors' decisions to choose the ICC Court as a forum for dispute settlement of an investment treaty dispute. The team has sent its recommendations to the Task Force working on the review of the Rules of Arbitration. When the new Rules are published later this year, we will find out whether they include changes addressed to users of investment treaty arbitration.

III. Moving from France?

The end of November 2010 brought information that the ICC Court might be considering moving its seat from Paris to Geneva or Vienna.[8] The Chairman of the ICC Court, Mr John Beechey, was calming emotions by explaining that the Court is not planning to leave Paris and is only considering moving to a more modern headquarters. However, it does not seem that the issue of the possibility of the ICC Court moving out of France is 'dead and buried' and that such plans will never resurface, even if not necessarily in 2011. The ICC statistics show that recently, Paris, perhaps for the first time ever, has lost its top position as a place of ICC arbitrations. In 2009 the total number of ICC arbitrations where the venue of arbitration was in Switzerland (Geneva or Zurich) exceeded those, where the place of arbitration was Paris.

Of relevance in this context may also be that some tensions between the regulation and practice of international commercial arbitration and the European Union law slightly shook the reputation of the EU as an arbitration-friendly place. The ECJ judgement in the

[7] The author of this article is a member of this Task Force.

[8] *Global Arbitration Review*, 22 November 2010

West Tankers case[9] has influenced the use of anti-suit injunctions by English courts. This kind of injunction makes it possible to prevent a party to an arbitration agreement from commencing or continuing court proceedings in defiance of the arbitration agreement. After *West Tankers* this kind of injunction is, generally speaking, practically impossible when both parties are located in the EU. The ECJ judgement has provoked a fierce and still continuing discussion. Another judgement, this time from an English court, in the *Jivraj v. Haswani*[10] case, has raised controversies concerning a possible conflict between the EU law and the principles of international arbitration limiting the choice of arbitrators in certain cases because of the arbitrator's nationality.[11] In the arbitration clause in question, the parties agreed that disputes between them should be decided by an arbitrator of a certain religious group. The English court found such a provision in violation of the EU non-discrimination laws. The case is currently pending before the English Supreme Court.[12] Such controversies may not be helpful in promoting the EU as a place of international commercial arbitration. The seat of an arbitral institution does not have to be, and often is not, related to the place of arbitration. However, for ICC arbitration the place of arbitration is most often Paris, i.e. the seat of the institution. The fact that the ICC Court has its seat in the EU, is therefore not without significance.

The world of international arbitration is becoming increasingly globalised, with competition from other arbitral institutions growing. The ICC statistics show that the place of arbitration in ICC arbitrations is increasingly located not only in Paris, Zurich, Geneva, New York or Vienna, but also in counties like Mexico, Brazil, Dubai or Singapore. With the world economy shifting East, new arbitration centres are emerging that are slowly and systematically building their reputations. According to the 2010 International Arbitration Survey, the ICC Court is still the most preferred and widely used arbitration institution in the world.[13] Considering the institutional wisdom connected with its longevity, the ICC Court is fully aware of the changing reality. The issues outlined above will undoubtedly influence the discussions about plans and decisions of the ICC Court of Arbitration in 2011.

[9] C-185/07, *Allianz SpA i Generali Assicurazioni Generali SpA przeciwko West Tankers Inc.,* ECJ judgement of 10 February 2009

[10] *Nurdin Jivraj v Sadruddin Hashwani [2009] EWHC 1364 (Comm)* and *Nurdin Jivraj v Sadruddin Hashwani [2010] EWCA Civ 712*.

[11] E.g. pursuant to Article 9(5) of the ICC Rules of Arbitration the sole arbitrator or the chairman of the arbitral tribunal shall be of a nationality other than those of the parties.

[12] The hearing before the Supreme Court will most probably be scheduled for the end of 2011.

[13] *2010 International Arbitration Survey: Choices in International Arbitration*, White & Case and Queen Mary School of International Arbitration, available at: http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf

Hong Kong International Arbitration Centre – 25th anniversary of its founding

Stanisław Sołtysik

This year the Hong Kong International Arbitration Centre ("**HKIAC**" or the "**Centre**"), peer to the 1985 UNCITRAL Model Law on International Commercial Arbitration, celebrates its 25th anniversary. Thus, an opportunity presents itself to introduce this institution, seemingly exotic to the average European-based practitioner of arbitration.

Southeast Asia has for some time now been an area of increased interest for the arbitration community. Recent actions taken by the permanent courts of arbitration that are opening their subsidiaries in this part of the world tempted by the economic growth of the region may serve as an excellent example of this trend. However, the Secretariat of the ICC International Court of Arbitration Asia Office and London Court of International Arbitration in India have to face a serious competitor whose reputation for resolving disputes by arbitration has long been established in this part of the world.

This direct competition comes from the Centre, which was established in 1985 as a *non-profit* organization and is now one of the biggest arbitral institutions in Southeast Asia. Having administered 649 cases in 2009, HKIAC comes in second in the region, just after the China International Economic and Trade Commission, which during that time managed 1482 proceedings[1].

A good part of the cases (according to the HKIAC 2009 Annual Report, 332 out of the above mentioned 649) pending under the auspices of the Center are, of course, arbitration proceedings. The fact that as many as 212 of them were international in nature places HKIAC among the leading international permanent courts of arbitration when it comes to the number of cases managed (at the same time ICC administered 817 and LCIA 232 international arbitrations[2]). The Centre does not limit itself to administering commercial arbitrations. Other cases managed under the aegis of the HKIAC include mediations, both family and commercial ones. The Centre is also a dispute resolution provider with regard to domain names including .hk and .cn extensions.

Despite its established reputation, HKIAC for a considerable time did not have its own arbitration rules. The Centre was therefore only an apparatus managing *ad hoc* proceedings conducted in accordance with the 1976 UNCITRAL Arbitration Rules. This situation changed in 2008 when the Hong Kong International Arbitration Centre Administered Arbitration Rules (further: the "**Rules**") were enacted.

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1 http://www.hkiac.org/show_content.php?article_id=9

2 http://www.hkiac.org/show_content.php?article_id=9

Inspired by the Swiss Rules of International Arbitration, The Rules adapt the 1976 UNCITRAL Arbitration Rules to the needs of proceedings administered by an arbitral institution. Distinctive features of the Rules include:

- mandatory confirmation of the designated arbitrators by the HKIAC Council; the HKIAC Council is not obliged to give reasons when it decides not to confirm the appointments (Art. 10.1 of the Rules);

- freedom of the parties to choose the method of remunerating the arbitrators: either pursuant to the HKIAC Schedule of Fees and Costs of Arbitration, or in accordance with their own fee arrangements (Art. 36.2 of the Rules);

- where the parties are of different nationalities: an explicit requirement that the sole arbitrator and the chairman of a three-member arbitral tribunal do not have the same nationality as any party unless specifically agreed otherwise by all parties in writing (Art. 11.2 of the Rules).

Despite the enactment of the Rules, the majority of arbitration proceedings is still conducted under the UNCITRAL Rules Of Arbitration (either the 1976 or, recently, the 2010 edition) or under another procedure agreed on by the parties. In fact, in 2009 the Rules were applicable only in 29 out of 332 arbitration proceedings administered by the Centre[3]. However, this relatively small number of cases probably results from the fact that the Rules were only introduced in 2008. Thus, one may assume that the above-mentioned proportion will change steadily.

HKIAC's activities also include cooperation with other arbitral institutions, both national and international. Most recently, at a conference celebrating the 25th anniversary of the Centre, HKIAC signed an agreement with the Permanent Court of Arbitration in The Hague (further: PCA). The agreement enables both institutions to hold hearings and meetings at each other's premises and marks the beginning of cooperation between them in organizing conferences, seminars and in exchanging information and expertise on areas of mutual interest.

Interestingly enough, the Centre's tasks are not limited to the administration of legal disputes. According to Art. 13.2 of the Arbitration Ordinance enacted by the Hong Kong's Legislative Council (further: the "**Ordinance**"), HKIAC serves as an appointing authority in cases where the arbitrators were not chosen in accordance with the procedure agreed on by the parties or, in the absence thereof, with the procedure envisaged by the provisions of the Ordinance. This solution is quite extraordinary when compared with the practice of most countries in which this function is usually delegated to the common courts. The very fact that the Centre was indicated as an official appointing authority, therefore hints at the importance of its role in the Hong Kong Special Autonomous Region.

The dynamic economic growth of the South-east Asian countries practically warrants that the arbitral institutions located in this region will be increasingly important. Therefore, as one of them, HKIAC certainly does deserve some interest. However, having just finished reading this short article, you probably realize this simple fact better than I do.

[3] http://www.hkiac.org/newspdf/2009_Annual_Report.pdf

Report from the international conference entitled "International Commercial Arbitration. Austrian/Polish Twin Conference."

Dr. Marcin Kałduński

On 3 December 2010 an international arbitration conference was held in Vienna with particular focus on practice and experience of Austrian and Polish lawyers.

The conference was organized by the Arbitration Court at PKPP Lewiatan and the Austrian Arbitration Association. The Chairperson of the Conference was Dr. Beata Gessel-Kalinowska vel Kalisz, who represented the Polish side, and counselor Jenny Power, who organized the conference on behalf of Austrian lawyers. Both ladies greeted the guests, presented the plan of the conference, and provided details as to the program and topics of the individual panels to those present. The participants were also greeted by the presidents of the institutions organizing the conference: Dr Wolfgang Hahnkamper and Prof. Dr hab. Andrzej Szumański.

The meeting was attended by numerous specialists and experts on the practical and theoretical aspects of international arbitration, which has recently come to enjoy increased popularity in business and legal circles as an alternative method of resolving commercial disputes. The speakers and participants in the discussion included such lawyers as Prof. Dr Christoph Schreuer, Prof. Dr. hab. Stanisław Sołtysiński, counselor Anton Baier, Dr. Wolfgang Hahnkamper, counselor Monika Hartung, counselor Florian Haugeneder, Dr. Manfred Heider, counselor Waldemar Koper, Dr. Florian Kremslehner, counselor Bartosz Krużewski, Dr. Agnieszka Lizer-Klatka, Dr. Rafał Morek, counselor Philipp Peters, counselor Mirèze Philippe, counselor Paweł Pietkiewicz, Dr. Nikolaus Pitkowitz, counselor Anna Maria Pukszto, Prof. Dr. hab. Jerzy Rajski, Dr. Krzysztof Stefanowicz, Prof. Dr. hab. Andrzej Szumański, counselor Tomasz Wardyński, Dr. Gerhard Wegen, Prof. Dr. Irene Welser, counselor Kamil Zawicki and counselor Gerold Zeiler.

The theme of the conference was arbitration in Austria and Poland, as well as various issues related to the manner of resolving disputes in the world of international commercial relations. The conference participants reflected on and discussed such problems as the role of arbitrators, of arbitration institutions, and of State courts in setting certain standards and models of conduct. Another topic considered was the position of the arbitrator and his function in the whole process of resolving a dispute. Also interesting were comments devoted to the issue of burden of proof in the arbitration process.

A further problem which gave rise to much discussion was that of the relation between common courts and arbitration courts in an ideal world, as well as the rift between this ideal world and reality. One of the questions

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discussed as part of this panel was that of the practical aspects of assistance of common courts in evidence proceedings underway as part of arbitral proceedings. A major discussion revolved around the issue of interim measures, and particularly interesting for the conference participants was the topic of public order clauses, which was analyzed mainly in the context of the Austrian and Polish constitutions. In this area counselor Florian Haugeneder and counselor Kamil Zawicki had interesting remarks to make.

A separate discussion was devoted to the position and role of women in international commercial arbitration. On the basis of statistics, counselor Monika Hartung pointed to the very small number of women arbitrators, while counselor Mirèze Philippe noted that arbitration should be open not only to women but also to young lawyers who in the future will determine its impact and importance in commercial relations. In the course of the discussion the Conference participants stated that the number of women is indeed small and, as a result, an appropriate emphasis should be placed on a greater involvement of women in the world of international arbitration.

The highlights of the Conference were talks given by Prof. Dr hab. Stanisław Sołtysiński and Prof. Dr. Christoph Schreuer. The inaugural speech by Prof. Dr. hab. Stanisław Sołtysiński was devoted to Poland's place in international arbitration in the contemporary world. It contained many interesting observations concerning individual aspects of international arbitration, broadly understood. The Professor noted that key features of arbitral proceedings are: the principle of equality of the parties, as well as freedom of choice of the arbitration venue and of the arbitrators.

In turn, when addressing the issue of investment arbitration, the speaker stated (citing, amongst others, the *Salini* case) that an investor is in a privileged position and under bilateral investment agreements is treated better than national investors, which in this context means unfair treatment. The Professor's speech included many interesting themes devoted to decisions of the Supreme Court, the Washington Convention, as well as bankruptcy law. Thanks to this, it provoked much interest on the part of all the conference participants.

A similar situation occurred with the closing speech of Prof. Dr. Christoph Schreuer concerning the evolution of investment arbitration. The Professor referred – directly or indirectly – to a number of aspects of international investment law, thanks to which his comments took the form of an overview and induced the participants to look at investment law and its development from a broader perspective, taking into consideration the development of international law, and in particular arbitration judicial decisions. In this context the Professor referred to the content of certain fundamental institutions of international investment law, such as investor and investment. The main part of his speech was devoted to the evolution (development) of investment law, of which a particular expression is the number of investment agreements concluded to date, as well as arbitration judicial decisions of recent years. The speaker also made some very interesting remarks on the issue of citizenship in the context of the definition of an investment, as well as the standards of treatment in investment law. These elements of the speech were particularly interesting, thanks to which the Conference participants had a rare opportunity to

hear a speech of this class and to look at the problem of investment arbitration from an entirely different angle, and thus to comment in their own circle in the context of the observations made by the speaker. Both talks met with much interest and were highly appreciated by the participants.

To conclude, it should be said that the Conference showed that the practice of commercial arbitration in Poland and in Austria is marked by complex and debatable issues. The speeches and discussion led to an identification of certain fundamental problems of arbitration in the Austrian and Polish context, a certain comparison being made, and conclusions being drawn for the future. Certain postulates also appeared in the course of the conference, the realization of which would favor the effectiveness and popularization of arbitration in the future. For this reason it seems that such conferences should be held more often. The conference organizers promised that Austrian-Polish cooperation will not end with this event, and that the next conference of this type will be held next year in Poland.

Austrian Supreme Court: Refusal to Conduct a Hearing Despite a Party's Motion is Reason to Set Aside an Arbitral Award

Harald Sippel

In a recent decision the Austrian Supreme Court held that a tribunal's refusal to conduct an oral hearing despite a party's motion is reason to set aside an arbitral award.

Article 598 ACCP (Austrian Code of Civil Procedure) provides that "*unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings, or whether the proceedings shall be conducted in writing. Where the parties have not excluded an oral hearing, the arbitral tribunal shall, upon the motion of a party, hold an oral hearing at an appropriate stage of the proceedings.*"

Until recently, it had been generally posited by most scholars that not holding an oral hearing despite a party's motion constitutes a procedural error only, which could only constitute a reason to set aside an award if the parties were not given the possibility of submitting written statements. The only consequence for disregarding a party's motion for an oral hearing would be the arbitrators' liability for damages under Article 594 Sec. 4[1] of the ACCP.[2]

However, in a recent decision by the Austrian Supreme Court, *7 Ob 111/10i*, the enlarged panel[3] held that the Supreme Court does not agree with this opinion, emphasizing that Article 598 ACCP (in accordance with Article 24 Sec 1 Model Law as well as Article 1047 German Code of Civil Procedure) contains principles on oral hearings which concretize the parties' right to be heard as per Article 594 (2) ACCP.[4] If the parties' right to be heard were satisfied by the mere possibility of submitting a written statement, the Court's decision read, there would be no change from the old (Austrian) arbitration law.[5] The explicit command of the second sentence of Article 598 to "hold an oral hearing" would thus not bear any consequence.

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[1] Article 594 Sec. 4 reads as follows: *An arbitrator who does not or does not timely fulfill his obligation resulting from the acceptance of his appointment, shall be liable to the parties for all damages caused by his culpable refusal or delay.*

[2] Hausmaninger in Fasching/Konecny, *Kommentar zu den Zivilprozessgesetzen*, 2nd ed., 2007, § 598 Sec. 34

[3] This is referred to as the *verstärkter Senat* in Austria: a simple panel must be supplemented by adding a further six members of the Supreme Court if, following submission of the report, it holds by ruling that a decision on an issue of fundamental importance will depart from the Supreme Court's consistent jurisprudence or from the last decision rendered on the issue by an enlarged panel, or that the jurisprudence of the Supreme Court has not given a uniform answer on a legal issue of fundamental importance.

[4] Article 594 Sec. 2 reads as follows: *The parties shall be treated fairly. Each party shall be given a full opportunity of presenting his case.*

[5] The New Austrian Arbitration Act came into force on July 1, 2006

However, it is a settled principle of statutory interpretation in Austria that one cannot assume that the legislator had "aimless or function-less provisions in mind." The same applies to laws which are barely executable in practice.[6] It would thus be wrong to simply presume the Austrian legislature stipulated the obligation to hold an oral hearing in the new Austrian Arbitration Act without any reason.

Contrary to the general opinion of Austrian scholars and the old[7] Austrian Arbitration Act, the Austrian Supreme Court thus ruled that disregarding the motion to hold an oral hearing is a reason to set aside the award according to Article 611 Sec. 2 (2) ACCP.[8]

Keeping in mind that the Austrian Arbitration Act is an adoption of the UNCITRAL Model Law, the Supreme Court's decision is natural as Article 24 Sec. 1[9] of the UNCITRAL Model Law is very clear on this topic. Indeed, although scholarly opinion was in line with the old law, some authors had, in fact, suggested that a motion by a party to hold oral hearings could not be disregarded by the arbitral tribunal.[10]

[6] RIS-Justiz RS0111143

[7] „Old" here refers to the legislation in place before it was amended by the New Austrian Arbitration Act.

[8] Article 611 Sec. 2 (2) ACCP reads as follows:

An arbitral award shall be set aside if:

1. *...*
2. *A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present his case;*

[9] Article 24 Section 1 of the UNCITRAL Model Law reads as follows: *Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.*

[10] See von Saucken, *Die Reform des österreichischen Schiedsverfahrensrechts auf der Basis des UNCITRAL-Modellgesetzes über die internationale Handelsschiedsgerichtsbarkeit*, 2004, 223

UPCOMING EVENTS AND RECENT PUBLICATIONS

27 January 2011, Basel

ASA Conference – Post Award Issues, conference organized by the Swiss Arbitration Association (ASA).

9 February 2011, Warsaw

Confidentiality vs. Transparency in International Arbitration, conference co-organized by the Centre for Amicable Dispute Resolution at the Faculty of Law, University of Warsaw (CRSiK) and Young Arbitration Practitioners in Poland (YAPP).

10–11 February 2011, Warsaw

III. Warsaw Pre-Moot, moot competition co-organized by the Centre for Amicable Dispute Resolution at the Faculty of Law, University of Warsaw (CRSiK) and Young Arbitration Practitioners in Poland (YAPP).

10 February 2011, Paris

ICC's 2nd Annual International Mediation Conference: Win-Win Strategies – Tools for corporate disputes management., conference organized by the ICC.

3–4 March 2011, Seoul

14th Annual IBA International Arbitration Day conference organized by the International Bar Association (IBA), supported by the IBA Asia Pacific Regional Forum and the Korean Bar Association.

4–5 March 2011, Vienna

Vienna Arbitration Days 2011, conference organized by the Arb–Aut, YAAP, ICC Austria and the Austrian Yearbook on International Arbitration.

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