

## **Adjudication on principles of equity in the proceedings before the arbitral tribunal in the Polish law compared to other legal systems**

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**Summary:** 1. Preliminary remarks. 2. Determination of the concept and the essence of the adjudication on principles of equity. 3. Historical outline of the adjudication on principles of equity. 4. The adjudication on principles of equity prior to the amendment of the Polish Civil Procedure Code. 5. The adjudication on principles of equity in light of the revised Code of Civil Procedure. 6. Conclusion. 7. Bibliography.

**Abstract:** Every lawyer knows Latin maxim “Summum ius summa iniuria”. You can pass an arbitral award that is consistent with the law, but it is unfair. This article aims to attempt to define the institution of adjudicating on the basis of equity in arbitration proceedings. Moreover, it presents the historical outline of this situation in the world, and in Poland, as well as assessment of the current concepts concerning this matter in the Polish Civil Procedure Code.

**Keywords:** material and procedural public policy, arbitration, equity, arbitral tribunal, fairness, arbitral rules, contract law.

### **1. Preliminary remarks**

In the international practice, there are two forms of solving the disputes subjected to the jurisdiction of arbitral tribunals, namely arbitration under international law or national law, or to adjudicate on principles of equity. In the latter case, it is believed that the parties have granted special powers to the arbitrators to ignore law, and to resolve the dispute on the basis of extralegal criteria<sup>2</sup>.

### **2. Determination of the concept and the essence of the adjudication on principles of equity**

The determination of the concept and the essence of the adjudication on principles of equity is a complicated task. It should start from the first demarcation,

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<sup>2</sup> GRABOWSKA, K., (ed.) OLSZEWSKI, J., *Sądy polubowne i mediacja*, Warszawa, 2008, p. 262.

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the distinction of the adjudication on principles of equity from related legal institutions<sup>3</sup>.

The main distinction lies in contrast to adjudicate on principles of equity with general clauses which refer, *inter alia*, to the concept of equity. They are the part of the legal system, there are specific provisions under which facts are subjected to the legal appraisal. The adjudication on principles of equity is not the same as a reference, within the legal system and in accordance with it, to good faith, justice, and finally to principles of equity. The adjudication on principles of equity consists in resolving the dispute in accordance with the directives of equity and justice independently, and sometimes contrary to the regulations in force<sup>4</sup>.

An application of general principles of law and international autonomous merchant law, is also not the same as the adjudication on principles of equity. Merchant law (*lex mercatoria*) is included in the supranational, or the transnational norms, whose scope and content are difficult to determine<sup>5</sup>.

This is due to the richness of the sources of merchant law. *Lex mercatoria* in the narrow sense (strict) includes common law, and is one of the parts of international trade law<sup>6</sup>. In this view from the scope of the *lex mercatoria* are disabled any standards, resulting from a law-making activities of the states, and the international organizations. In the broad sense merchant law (isolated in doctrine) includes, also the acts of international legislation. In addition, out of this division will also remain conventional provisions created by international organizations, the so-called soft law<sup>7</sup>.

The adjudication on principles of equity is right of the arbitrators to dispense with any legal standards, both those resulting from normal commercial practice, and statutory law. The adjudication on principles of equity in a particular case may depend on the outcome of the dispute on the basis of general principles of law, and international trade law, if it leads to the appropriate result<sup>8</sup>.

In turn judgments based on the *legis mercatoria* are generally consistent with principles of equity, and they intend to ensure a balance between the parties of the relationship. They arise, however, from the usages governing trading or uniform norms of law. Solutions based on *legis mercatoria* must not, however, allow the use of equity as the criterion<sup>9</sup>.

A different view on this issue combines principles of equity with the standards of *legis mercatoria*. According to it, the authority of the arbitrator to adjudicate on principles of equity is equivalent to the obligation to take into account general principles of law, and practice of the international trade<sup>10</sup>.

The arbitration based on principles of equity, also requires distinction from the other proceedings aimed at achieving an amicable settlement of the dispute, in particular conciliation and mediation. The jurisdictional nature of arbitration on principles of equity is the criterion for distinguishing it from the above ways of resolving disputes. The arbitral tribunal is obliged to respect fundamental principles of the process. It performs a judicial function, even though the authorization to use as a basis for adjudication extralegal criteria. In turn, mediation procedures are only

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3 MIŚKO, T., "Arbitraż handlowy a orzekanie na zasadach słuszności, Arbitraż i mediacja jako instrumenty wspierania przedsiębiorczości - Materiały z międzynarodowej konferencji naukowej zorganizowanej przez Zakład Prawa Handlowego i Gospodarczego Wydziału Prawa Uniwersytetu Rzeszowskiego w Rzeszowie w dniach 22-23 września 2006 roku", *Ius et Administratio, Zeszyt specjalny 2006*", p. 129.

4 LIZER-KLATKA, A., "Pojęcie orzekania na zasadach słuszności w międzynarodowym arbitrażu handlowym", *Państwo i Prawo*, 2000, No.1, p. 61.

5 *Ibid.*, p. 61-62.

6 BŁASZCZAK, Ł. LUDWIK, M., *Sądownictwo Polubowne (Arbitraż)*, Warszawa, 2007, p. 186.

7 FUCHS, B., *Lex mercatoria w międzynarodowym obrocie handlowym*, Kraków, 2000, p. 56-57.

8 LIZER-KLATKA, A., *op. cit.*, p. 62.

9 MIŚKO, T., *op. cit.*, p. 129.

10 FUCHS, B., *op. cit.*, p. 141-142.

proposing the compromise solution to the parties to the dispute, and are not intended to give the judgment<sup>11</sup>.

In practice of the international trade, there are two determining arbitrations based on the principles of equity - *amiable composition* and *ex aequo et bono* (*arbitrage en équit *)<sup>12</sup>. These institutions are often in the practice of the international trade arbitration identified and denoted as principles of equity. The Polish doctrine on the basis of this view represents, among others KAMIŃSKI, I. C.<sup>13</sup>.

However, you should agree with the view rendering distinction between the two institutions<sup>14</sup>, as there is no cogent counter-arguments for such a standpoint. According to it there are two separate ways of understanding equity as a basis for jurisdiction and as the scope of the arbitrators' authority<sup>15</sup>.

The arbitrators authorized to decide *ex aequo et bono* (according to law and justice), appraise in the light of equity *via* subjective criteria. This appraisal has to fit in the conception of a just settlement of the dispute. They have more freedom in the skipping of law in the name of equity than the *amiable composition*. They are only required to comply with the public policy of the State, or with supranational public order. According to most authors the authority to adjudicate on principles of equity cannot lead to exclusion, or modification of the agreement binding the parties, and that is the distinction from *amiable composition*. The adjudication on principles of equity requires the arbitrators to seek just, and fair settlement of the dispute, whilst in the case of *amiable composition* the arbitrators does not need to use this possibility<sup>16</sup>. *Amiable composition* applies provisions, while retaining the right to depart from them, if their application would lead to an unjust resolution<sup>17</sup>. Institution *l'amiable composition* seems to be adequate to resolve legal disputes arising from long-term contracts, especially those in which the parties are not adversaries process, but they want to save the existing relationships and future bond acts and operations<sup>18</sup>. In judicial practice, both variants of the adjudication on principles of equity are very similar each other<sup>19</sup>.

National legislations dealing with *amiable composition* take three basic forms.

The first group includes countries, similar to French legislation, in which the *amiable composition* is an exception to arbitration based on the law<sup>20</sup>.

The another group assumes that the parties must expressly authorize the arbitrator to rule based on the provisions of the law. This group provides a presumption of *amiable composition*. Decision may be based on the law only at the express request of the parties<sup>21</sup>.

A last, large group of countries (including Germany and the USA), does not distinguish between forms of arbitration, therefore their legislations do not know the law presumption of substantive grounds for jurisdiction<sup>22</sup>.

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11 LIZER-KLATKA, A., *op. cit.*, p. 63.

12 *Ibid.*

13 RYSZKOWSKI, K., "Orzekanie na zasadach susznoci w postępowaniu przed sadem arbitrazowym - summum ius summa iniuria?", *ADR. Arbitraz i Mediacja*, 2011, No.1(13), p. 58.

14 In Polish doctrine this view is represented, *inter alia*, by LIZER-KLATKA, A. and WACH, A.

15 LIZER-KLATKA, A., *op. cit.*, p. 64.

16 *Ibid.*

17 MAZUR, D., "Prawo wlciwe w midzynarodowym arbitrazu handlowym", *Kwartalnik Prawa Prywatnego*, 2003, No.1, p. 146.

18 WACH, A., *Alternatywne formy rozwizywania sporów sportowych*, Warszawa, 2005, p. 208.

19 ERECIŃSKI, T., WEITZ, K., *Sad Arbitrazowy*, Warszawa, 2008, p. 326.

20 KAMIŃSKI, I. C., "Zasady susznoci jako podstawa orzekania w obrocie cywilnym i handlowym", *Pastwo i Prawo*, 1993, No.4, p. 47.

21 RYSZKOWSKI, K., *Orzekanie...*, p. 55.

22 KAMIŃSKI, I. C., *op. cit.*, p. 47.

Another representative of the doctrine considers that the adjudication on principles of equity is mainly the supply of the arbitrators in a certain margin of discretion that goes beyond the legislation. The parties should, therefore precisely define the scope of discretion in the arbitration agreement<sup>23</sup>.

### **3. Historical outline of the adjudication on principles of equity**

Since the beginning, the settlement of civil disputes remains the domain of state courts, but they have never had complete monopoly on the administration of justice in this matter. In many legal cultures were found quite early that the rigor and the formalism of rules of law may result in a particular factual situations for the issue of unfair and unjust judgments and consequently to antagonize the existing legal relationships and facts between the parties<sup>24</sup>.

So the search for alternative legal structures to mitigate the rigor of formal and rigid laws has long lasted. In the ancient Rome it had been up to *praetors* to support, supplement, and improve standards of civil law (*adiuvandi vel supplendi vel corrigendi iuris civilis gratia*). That there had developed two forms referring to principles of equity and justice, alternative for the fast developing arbitration. It had been accepted a distinction between *arbitratum boni viri* and *arbitratum ex compromisso*<sup>25</sup>.

The first of them initially alluded in its construction to conciliation, but later took the form of the classic arbitrage<sup>26</sup>. First the arbitrator was obliged to issue mandatory binding judgment<sup>27</sup>, however, was not limited by law. Referring to the widely understood rules of equity the arbitrator, taking into account changing circumstances, or other valid reasons, had been able to shape the existing legal bond<sup>28</sup>.

In the second form, concerning only contracts *strictae iuris*, the arbitrator derived the power to rule directly from the arbitration agreement. Such a decision did not induce any legal effect unless accepted as collateral, the obligation to pay a penalty by the party in the event of default of the arbitration award<sup>29</sup>.

In turn, in the Far East, where the social order and theoretical thought are dominated by the ideal of harmony, reference was made to conciliation in order to provide an antidote to the defects of judicial adjudication, also by the arbitrator<sup>30</sup>.

In the medieval Europe, Roman Catholic Church in order to transfer the idea of conciliation and love your neighbor on the grounds of law, had revived and expanded the scope of Roman *arbitratum boni viri*. It was then when the function of the arbitrator freely adjudicating on principles of equity began to work<sup>31</sup>. During this period, canonists identified the notion of *arbitrator* with self-created *amicabilis compositor*. It defined the person whose task was to lead to the reconciliation of the parties based on religious grounds, without initiating legal proceedings<sup>32</sup>.

French revolutionary legislator praised his rationalist enlightenment conceptions of law, therefore he had been convinced of the need for the existence of one law. In the Napoleonic Code, only the two canceled contracts referred to arbitration of "good faith" - *l'amicable composition*<sup>33</sup> (French equivalent of the Latin

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23 MAZUR, D., *op. cit.*, p. 146.

24 WACH, A., "L'amicable composition jako samodzielna forma rozwiązywania sporów prawnych", *"Radca Prawny"*, 2004, No.6, p. 120.

25 WACH, A., *L'amicable...*, p. 120.

26 MIŚKO, T., *op. cit.*, p. 130.

27 WACH, A., *L'amicable...*, p. 121.

28 MIŚKO, T., *op. cit.*, p. 130.

29 *Ibid.*

30 WACH, A., *Alternatywne...*, p. 203.

31 WACH, A., *L'amicable...*, p. 121.

32 MIŚKO, T., *op. cit.*, p. 131.

33 *Ibid.*

term *amicabilis compositor* - "friendly conciliator"<sup>34</sup>, while Polish interwar development of this term has been translated as "friendly dealer"<sup>35</sup>). *Amiable composition* was also marginally treated in the Code of Civil Procedure of 1804. Its role was confined to the exception to the arbitration panel pursuant to the provisions of law<sup>36</sup>.

In Italy, analyzed institution was known as *amichevole companimento*, which treated for centuries as a "good child" of arbitration. Although the authors of the Code of Civil Procedure of 1942 had appealed also to Roman *arbitratum boni viri*, however, it was replaced by structure arbitrage-free (*arbitrato libero*). It is true that in this construction the arbitrators were not obliged by law, however, they did not adjudicate, but formulated only an opinion<sup>37</sup>.

In turn, for the lawyers of the common law *amiable composition* is not the kind of arbitration, but an attempt of conciliation, or a variant of transaction (the compromise). English law still does not allow to adjudicate on principles of equity<sup>38</sup>.

Anglo-Saxon opinion underestimates, however, the modern development opportunities and pedigree of this institution. This development is made on the basis of arbitration law, and in France on the grounds of the civil litigation as well<sup>39</sup>.

It should be noted that it is the lack of a clear boundary between *l'amiable composition*, and the ability to adjudicate on principles of equity is a fundamental problem to differentiate and popularize this institution<sup>40</sup>.

Such a distinction does not contain Article VII 2. of the European Convention on International Commercial Arbitration<sup>41</sup>, pursuant to which the arbitrators shall act as *amiables compositeurs*, if the parties so decide, and if they may do so under the law applicable to the arbitration.

Nowadays regulations provide basis for such a distinction. It is essential in this respect of Article 28. (3) the Model UNCITRAL Law on International Commercial Arbitration. It follows that, if the parties expressly authorize the arbitral tribunal may rule on *ex aequo et bono*, or as *amiable l'composition*. The word "or" may be interpreted as an attempt to identify the difference between these two institutions<sup>42</sup>.

Because I support the idea of the delimitation between the adjudication on principles of equity, and *amiable composition*, I will add yet another argument providing of this possibility. It follows from Article 35 2. of the UNCITRAL Arbitration Rules, which also shows that expressly authorized by the parties, the arbitral tribunal may decide a case *ex aequo et bono* "or" as *l'amiable composition*<sup>43</sup>.

Currently adjudicate on principles of equity has been accepted in countries that have adopted the UNCITRAL Model Law and in the European Union, apart the United Kingdom<sup>44</sup>.

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34 WACH, A., *L'amiable...*, p. 121.

35 KURATOWSKI, R., *Sądownictwo polubowne*, Warszawa, 1932, p. 146-147.

36 MIŚKO, T., *op. cit.*, p. 131.

37 WACH, A., *L'amiable...*, p. 121.

38 *Ibid.*

39 *Ibid.*

40 WACH, A., *op. cit.*, p. 121.

41 BŁASZCZAK, Ł., LUDWIK, M., *op. cit.*, p. 185.

42 WACH, A., *op. cit.*, p. 121-122.

43 JAKUBOWSKI, J. and WIŚNIEWSKI, A. W. in a publication "Regulamin arbitrażowy UNCITRAL", "Problemy Prawne Handlu Zagranicznego", 1979, t. 3, s. 35, about the first version of the UNCITRAL Arbitration Rules, beside expression *ex aequo et bono* wrote in the brackets - it means on principles of equity.

44 MAZUR, D., *op. cit.*, p. 146.

#### 4. The adjudication on principles of equity prior to the amendment of the Polish Civil Procedure Code

In the content of the Polish Civil Procedure Code (the Civil Procedure Code) in the version prior to the amendment of 28 July 2005, the legislator did not comment directly on the possibility of the adjudication on principles of equity. Although it was common position for using the *amiable composition* in arbitration proceedings<sup>45</sup>.

It should also be mentioned the notion of minority who refused the arbitral tribunal power to adjudicate on principles of equity due to the lack of clear concepts in the Civil Procedure Code<sup>46</sup>, and the duty to submit by the arbitral tribunal the requirements posed by the other authorities of the state, including the need to implement the postulate of the rule of law<sup>47</sup>.

Under the arbitration tribunal's jurisdiction may be subjected cases of civil nature, and the rule of civil party autonomy resulted in the entitlement to indicate the base of jurisdiction of the arbitral tribunal<sup>48</sup>. A justification for this possibility in the literature can be divided into three groups<sup>49</sup>.

Most authors convey the opportunity to adjudicate on principles of equity with former Article 711. § 3. of the Civil Procedure Code, and Article 712. § 1. point 4) of the Civil Procedure Code. The first of the above-mentioned provisions concerned the refusal by the general court decision on an enforceability of an arbitration award if the content of his failing to fulfill its judgment the rule of law, or principles of community coexistence. And the latter regulated the opportunity to request an annulment of an arbitration award in the event of similar premises<sup>50</sup>.

The first of the proponents of this concept<sup>51</sup> believed that it can be assumed that the arbitrators, in the absence of detailed regulation in the arbitration clause, may also use principles of equity, if the judgment issued by them will not violate applicable in Poland principles of community coexistence, and the rule of law.

According to another representative of Polish doctrine<sup>52</sup> of the wording of the listed Articles, according to Polish law, the arbitrators may decide as *amiables compositeurs* if released judgment will not violate principles of community coexistence, or the rule of law in Poland<sup>53</sup>.

This group may include also the view<sup>54</sup> according to which the lack of a clear order to apply the substantive law of the arbitration clause allowed arbitrators to judge on the basis of general principles of honesty, and fair trading practices<sup>55</sup>.

In turn, in the practice above-mentioned opinion was based on Article 705. of the former Code of Civil Procedure. The Court of Appeal in Szczecin in its judgment of 23 April 2008, I Aca 204/07 concerning, *inter alia*, rights of the defense, stated that this Article relates only to the conduct of proceedings and it is assumed that arbitrators are not bound by the legislation and can be guided by principles of equity resolving the dispute - on condition that the released judgment will not violate the applicable rules of law, or of community coexistence.

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45 In Polish doctrine this view is represented, *inter alia*, by DALKA, S., KAMIŃSKI, I. C. AND LIZER-KLATKA, A.

46 MOREK, R., *Mediacja i arbitraż (art. 1831 - 18315, 1154-1217 KPC). Komentarz*, Warszawa, 2006, p. 231.

47 BALLADA, P., "Zagadnienie obowiązku stosowania prawa materialnego w postępowaniu przed sądem polubownym", *"Ruch Prawniczy, Ekonomiczny i Socjologiczny"*, 2000, No.1, p. 90.

48 SOBKOWSKI, J., "Stosowanie prawa materialnego w sądownictwie polubownym według kodeksu postępowania cywilnego i regulaminów Kolegium Arbitrów przy Polskiej Izbie Handlu Zagranicznego", *"Ruch Prawniczy, Ekonomiczny i Socjologiczny"*, 1980, No.3, p. 69.

49 MIŚKO, T., *op. cit.*, p. 134.

50 *Ibid.*, p. 135.

51 DALKA, S.

52 ERECIŃSKI, T.

53 BALLADA, P., *op. cit.*, p. 95.

54 Represented by POTRZOBOWSKI, K. i ŻYWICKI. W.

55 MOREK, R., *op. cit.*, p. 232.

Thus it will not be in conflict with the public policy clause<sup>56</sup>.

The second group of justifications was based on the former Article 705. of the Civil Procedure Code, which gave the parties the power to determine the course of proceedings. Hence the basis for the choice between the laws and principles of equity was derived<sup>57</sup>. The pertinent objection, however, was raised that this provision referred to the procedure and not the substantive basis for the adjudication<sup>58</sup>.

Article 705. of the former Code of Civil Procedure provided that the parties may determine the same until the initiation of the investigation procedure, which should be used in the course of the examination of the case, however if have not done so, the arbitral tribunal shall apply such procedures as it deems appropriate. The arbitral tribunal is not bound by the rules of civil procedure, but it cannot abandon a comprehensive explanation of the circumstances necessary to resolve the case.

The third group based its claims on the former Article 699. § 1. of the Civil Procedure Code, which permits the possibility of becoming an arbitrator by any person, not necessarily a lawyer. So it was hard to require from such a person knowledge of law and its proper use. Therefore, the legislator acquiesced in this case to base a decision of non-legal rules, including the principle of equity<sup>59</sup>.

This view is supported by the Supreme **Court** of the Republic of **Poland** judgment of 28 April 2000, II CKN 267/00. In this judgment, the Supreme Court expressed the view that the lack of binding arbitral tribunal by rules of substantive law comes before all the fact that entrust settle the case to arbitrators often occurs because of their expertise knowledge, which is more important for the parties than the knowledge of substantive norms of the specific legislation.

Former Article 699. § 1. of the Civil Procedure Code stated that:

§ 1. An arbitrator may be any natural person with full legal capacity, benefiting fully civil rights, and honor civil rights.

§ 2. The arbitrator can not be a judge of the state.

The lesson here is that, if we accept as accurate the argument of the first group, it must be recognized that principles of the rule of law, and principles of community coexistence was the only limitation to the arbitrator adjudicating on principles of equity<sup>60</sup>, and thus the public policy clause.

## **5. The adjudication on principles of equity in light of the revised Code of Civil Procedure**

The amendment to the Civil Procedure Code, enacted by the Sejm of the Republic of Poland of 28 July 2005, added the Part Five entitled "The arbitration court (arbitration)", while removing the Book Three - "The arbitral tribunal" in the Part One of the Civil Procedure Code. It entered into force on 17 October 2005<sup>61</sup>. You should share the view that the present regulation, dispels any doctrinal doubts associated with the possibility of applying principles of equity in the arbitration<sup>62</sup>. As one of the representatives of the doctrine noticed Article 1194. of the Civil Procedure Code removes the loophole by typing in the international mainstream, which includes

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<sup>56</sup> RYSZKOWSKI, K., *Klauzula procesowego porządku publicznego w arbitrażu handlowym w prawie polskim na tle innych systemów prawnych*, Warszawa, 2019, p. 272.

<sup>57</sup> SOBKOWSKI, J., p. 69.

<sup>58</sup> MIŚKO, T., *op. cit.*, p. 135.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, p. 136.

<sup>61</sup> BIELARCZYK, P., "Nowelizacja Kodeksu postępowania cywilnego w zakresie sądownictwa polubownego", *Dodatek specjalny do „Monitora Prawniczego”*, 2005, No.22, p. 1.

<sup>62</sup> MIŚKO, T., *op. cit.*, p. 136.

representative German Code of Civil Procedure, ZPO63. This Article was formed as a result of the impact of the UNCITRAL Model Law<sup>64</sup>, referring to it but only partially<sup>65</sup>. Paragraph. 1. of this Article *expressis verbis* provides that, if the parties expressly authorize the arbitral tribunal it may rule on general principles of law, or equity. This Article however does not enter the distinction between the adjudication *ex aequo et bono*, and as *l'amiable composition*, which is stated in the UNCITRAL Arbitration Rules, and in the UNCITRAL Model Law. The lack of this distinction in Polish legislation speaks for admissibility of the adjudication on principles of equity in both versions<sup>66</sup>, as *amiabes compositeurs*, or *ex aequo et bono*.

In any case, the arbitral tribunal shall, however, take into consideration **the established usages**, which are **applicable to the transaction**, and the provisions of the contract<sup>67</sup>.

According to Article 1194. § 2. of the Code of Civil Procedure the court of arbitration is obliged in any case to take into account the provisions of the contract, and the usages applicable to the transaction. The arbitral tribunal shall only consider (take into account) and not obligatory apply, the relevant commercial usages. In this case, if considerations of equity require it, the arbitral tribunal may omit these usages<sup>68</sup>. The usages referred to are also described as *lex mercatoria*<sup>69</sup> and another author refers in this respect to Article 56., 65. and Article 354. of Polish Code Civil<sup>70</sup>. Also this solution refers to the UNCITRAL Model Law, in which has won the concept of obligation the arbitrators to comply with international trade usages in each case, regardless empowered them to rule on principles of equity<sup>71</sup> (see Article 28. (3) of the Model UNCITRAL Law on International Commercial Arbitration)<sup>72</sup>.

Adjudicating on principles of equity should take into account the particular circumstances of the present case, as well as to treat each case individually<sup>73</sup>. Arbitrators are required to conduct evidence, and to analyze a collected material<sup>74</sup>.

Another author, in turn, assumes that the legislator ordering take into account of the provisions of this agreement do not apply to the plane of facts, but on legal basis of decision<sup>75</sup>.

I agree with the first view. In support of this claim should be put forward the inseparable connection of principles of equity with the totality of circumstances of the case, and the fact that this view sets a base to a resolution of the dispute<sup>76</sup>.

Decisions based on *legis mercatoriae* result from the usages governing trade, or uniform norms. Solutions based on *legis mercatoriae* may not, however, allow the use of equity as a criterion<sup>77</sup>. It must therefore share the view, according to which the obligation to take into account the established commercial practices, when adjudicating on principles of equity may raise doubts<sup>78</sup>.

You should also share the view of the justness of consent in a clear form. Such a consent must be delivered after careful thinking, and with full knowledge of the

63 PAZDAN, J., "Czy można wyłączyć umowę spod prawa?", "Państwo i Prawo", 2005, No.10, p. 17.

64 *Ibid.*, p. 15.

65 ERECIŃSKI, T., WEITZ, K., *op. cit.*, p. 323.

66 *Ibid.*, p. 326.

67 FALKIEWICZ, K., KWAŚNICKI, R. L., "Arbitraż i mediacja w świetle najnowszej nowelizacji kodeksu postępowania cywilnego", "Przegląd Prawa Handlowego", 2005, No.11, p. 35.

68 ERECIŃSKI, T., WEITZ, K., *op. cit.*, p. 327.

69 BŁASZCZAK, Ł. LUDWIK, M., *op. cit.*, p. 186.

70 MOREK, R., *op. cit.*, p. 231.

71 GRABOWSKA, K., *op. cit.*, p. 263.

72 RYSZKOWSKI, K., *Orzekanie...*, p. 60.

73 *Ibid.*, p. 264.

74 MOREK, R., *op. cit.*, p. 232.

75 ULIASZ, M., *Kodeks postępowania cywilnego - Komentarz*, Warszawa, 2008, p. 1585.

76 ZIELIŃSKI, A., (ed.) ZIELIŃSKI, A., *Kodeks Postępowania Cywilnego. Komentarz*, Warszawa, 2008, p. 1673.

77 MIŚKO, T., *op. cit.*, p. 129.

78 ERECIŃSKI, T., WEITZ, K., *op. cit.*, p. 328.



adjudication on principles of equity<sup>79</sup>. Only with such a clear disposal of the parties the arbitral tribunal shall be exempt from the obligation to apply the substantive law<sup>80</sup>.

The parties providing that a judgment may be issued unjust, may authorize the arbitral tribunal to rule in isolation from the norms of substantive law, not only in an arbitration clause, but also in later statements. A part of the doctrine assumes that *per analogiam* to the Section 1051 (3) second sentence of ZPO, the parties can empower the arbitral tribunal to rule according to principles of equity, or general principles of law at any time until the judgment<sup>81</sup>, despite the fact that in Polish law there is no clear legal rule on the matter<sup>82</sup>.

## 6. Conclusion

A main objection in relation to the validity of the adjudication on principles of equity is the inability to resolve the predictability of arbitration court<sup>83</sup>.

Although the judgment of the arbitration tribunal on grounds of equity may be less predictable for the parties than that of the court, it often will be more equitable than the judgment under the same law. Regulations due to their nature are created in order to extend to the greatest number of legal relations, and therefore they are not always ideally suited to the specific facts, and to the law<sup>84</sup>.

The argument above can also be used as a justification for both the existence, and the next function of the another legal institution, namely the public policy clause.

You can pass a sentence that is consistent with the law, but it is unfair. The conclusion drawn from the maxim "*Summum ius summa iniuria*" supports the principle, which states that not everything permitted is fair (*Non omne quod licet honestum est*)<sup>85</sup>. In this case, a similar function is performed by the public policy, but already at an earlier stage of the arbitration, because the parties must take it into account when drafting the arbitration clause, or the arbitration agreement<sup>86</sup>.

The arbitrators, in turn, must take it into account in the course of arbitration proceedings, and thus in a phase in which the rule may be based on principles of equity, and in addition the court under the control exercised.

There is a view according to which the arbitrators may use their special powers only in the event of unusually complex facts<sup>87</sup>. This is, *inter alia*, when obtaining evidence would entail incurring excessive, and unjustified costs<sup>88</sup>.

Article 1194. § 1. of the Code of Civil Procedure as amended does not contain such a reservation, and the consent of the parties must be carefully thought out and clear<sup>89</sup>.

I agree with the opinion that to date has preserved the interwar notion<sup>90</sup>, according to which the arbitrators must be advised to the least deviates from the norms enshrined by law; it is in the interest of the general law, besides that, it flows from the presumption that the written law is the best norm regulating the relations

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79 PAZDAN, J., *op. cit.*, p. 17.

80 ULIASZ, M., *op. cit.*, p. 1585.

81 MOREK, R., *op. cit.*, p. 232.

82 BŁASZCZAK, Ł. LUDWIK, M., *op. cit.*, p. 185.

83 ERECIŃSKI, T., WEITZ, K., *op. cit.*, p. 327.

84 RYSZKOWSKI, K., *Orzekanie...*, p. 61-62.

85 *Ibid.*, p. 62.

86 BÖCKSTIEGEL, K. H., "Public Policy as a Limit to Arbitration and its Enforcement", "*IBA Journal of Dispute Resolution*", 2008,

[http://www.arbitration-icca.org/media/0/12277202358270/bckstiegel\\_public\\_policy...iba\\_unconference\\_2008.pdf](http://www.arbitration-icca.org/media/0/12277202358270/bckstiegel_public_policy...iba_unconference_2008.pdf), 26.10.2014, p. 2.

87 ERECIŃSKI, T., WEITZ, K., *op. cit.*, p. 327.

88 LIZER-KLATKA, A., *op. cit.*, p. 68.

89 PAZDAN, J., *op. cit.*, p. 17.

90 MOREK, R., *cit.*, p. 233.

between people. Without a compelling reason you do not need to depart from the use of generally applicable legal standards in arbitration, even if the parties gave in the direction of far-reaching powers to the arbitrators. Therefore, all arbitration experts advise the use of the substantive law by arbitrators in their decisions<sup>91</sup>.

I treat the opinion of the interwar representative of Polish doctrine as a kind of interpretive to Article 1194. of the Code of Civil Procedure, and as a directive to the arbitration court adjudicating on the basis of equity. In addition the arbitral tribunal should always have regard to the public policy.

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<sup>91</sup> KURATOWSKI, R., *op. cit.*, p. 142.

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