

## **Disputes related to the company's relationship in arbitration proceedings in the light of the amendments to the Polish Code of Civil Procedure from 2019**

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**Abstract:** On September 8<sup>th</sup> 2019, the amendment to the arbitration proceedings regarding four provisions entered into force, so the 2019 reform of the Polish Code of Civil Procedure did not bypass the arbitration. These changes were introduced by the Act of July 31<sup>st</sup> 2019 on the amendment of certain acts to reduce regulatory burdens. This amendment has removed the criterion of the amicable settlement to all disputes about property rights and, also exaggerated the arbitrability to shareholder disputes. This amendment also has removed another practical problem, i.e. bounding by an arbitration clause of the company's bodies and their members, which before the amendment to the article 1163 of the Polish Code of Civil Procedure did not result directly from the provision. This amendment, apart from many positive aspects, has not solved all practical aspects of company law disputes.

**Keywords:** jurisdiction of the arbitration court, amicable settlement, arbitrability, company law, contract law, arbitration law

On September 8<sup>th</sup> 2019, the amendment to the arbitration proceedings regarding four provisions entered into force in the Polish Code of Civil Procedure from the 17<sup>th</sup> November 1964 (*Kodeks Postępowania Cywilnego, KPC*), so the 2019 reform of the Polish Code of Civil Procedure did not bypass arbitration, even though first signs had made such impression. These changes in the arbitration proceedings were introduced by the Act of 31<sup>st</sup> July 2019 amending certain acts to reduce regulatory burdens (The Journal of Laws of 2019, item 1495). The amendment covered the following article of the Polish Code of Civil Procedure: the article 1157, the article 1161 §3, the article 1163, and in the article 1169 §2<sup>1</sup> has been added. Due to the subject of this article, the amendments to the article 1157 of the Polish Code of Civil Procedure and the article 1163 of the Polish Code of Civil Procedure<sup>2</sup> are important for the arbitration in company matters.

The rapid development and the progressive complication of legal relations as well as the constantly increasing impact of cases before the courts made it necessary to reform the model of the civil process. It became necessary to speed up the court

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<sup>2</sup>RYSZKOWSKI, K., "Spory ze stosunku spółki w postępowaniu przed sądem polubownym w świetle nowelizacji KPC", "ADR. Arbitraż i Mediacja" 2020, No.2(50), p. 85.

proceedings and introduce solutions enabling the shortening of the waiting time for a decision, as well as making it easier for the parties to pursue their claims<sup>3</sup>.

Before abovementioned amendments in 2019 there had been the big novelization of the Polish Code of Civil Procedure by the Act of 4<sup>th</sup> of July 2019 amending the Act - Code of Civil Procedure and some other acts, which has had many implications to the practice and doctrine, as well.

Changes of the system should serve in order to "repair" the Polish judiciary, increase its efficiency and remove the most serious shortcomings, bringing the courts closer to the citizen<sup>4</sup>.

The nature and scope of the changes introduced by it in individual procedural institutions varies greatly. One of the main assumptions of the authors of the draft amendment was to streamline and accelerate the procedure. The way in which this goal was achieved by the legislator raises significant doubts from the point of view of the implementation of the right to a fair trial, one element of which is the right to an appropriately shaped (fair) court proceeding<sup>5</sup>.

The doctrine stressed the importance of the novelization implemented by the Act of 4<sup>th</sup> of July 2019 in many aspects of the Polish civil procedure.

"By the Act of 4<sup>th</sup> of July 2019 amending the Act - Code of Civil Procedure and some other acts, the legislator has made one of the biggest changes to the basic procedural act in the last thirty years. In principle, these changes affected every part of the Code relating to the first instance procedure"<sup>6</sup>.

"The amendment to the Code of Civil Procedure not only changed the model of the trial in Poland but also imposed new obligations on professional representatives towards the court and clients"<sup>7</sup>.

"The first change introduced by this amendment will be the so-called preparatory proceedings – obligatory and less formal meetings taking place outside the courtroom to resolve the dispute at an early stage. Their aim is to get the parties to reconciliation and settlement, and the court chairman has the task of pointing out to the parties the ways and effects of the out-of-court resolution of the dispute. These meetings should be considered an attempt to introduce the idea of arbitration to the Polish civil procedure"<sup>8</sup>.

The new article about serving of the statements through this novelty was added.

"Article 139<sup>1</sup>.

§ 1. If the respondent did not accept an action or another pleading resulting in the need to defend their rights despite another notice being served as provided for in the second sentence of Article 139 § 1, no other pleading has been served on them previously in the case as provided for in preceding Articles and Article 139 § 2 to 31 or other special provision providing for the effect of service does not apply, the presiding judge shall notify the plaintiff thereof by sending them an excerpt of the pleading for the respondent and imposing on them an obligation to serve that pleading to the respondent through an enforcement officer.

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<sup>3</sup> FIK, P., "Rozdział XVI. Postępowanie uproszczone po nowelizacji z 4.7.2019 r.", FLAGA-GIERUSZYŃSKA, K., FLEJSZAR, F., MALCZYK, M., (ed.), *Nowelizacja Kodeksu postępowania cywilnego z 4.7.2019 r. w praktyce*, Warszawa 2020, p. 273.

<sup>4</sup> GUTOWSKI, M., KARDAS, P., "O nowym modelu polskiej procedury cywilnej – uwagi wprowadzające do „Palestry” 11–12/2019 poświęconej nowelizacji Kodeksu postępowania cywilnego”, *"Palestra"* No.11–12/2019, p. 34.

<sup>5</sup> FLEJSZAR, F., Rozdział XV. "Postępowanie nakazowe i postępowanie upominawcze po nowelizacji z 4.7.2019 r. – wybrane zagadnienia", FLAGA-GIERUSZYŃSKA, K., FLEJSZAR, F., MALCZYK, M., (ed.), *Nowelizacja Kodeksu postępowania cywilnego z 4.7.2019 r. w praktyce*, Warszawa 2020, p. 255.

<sup>6</sup> RYLSKI P., "O nowelizacji Kodeksu postępowania cywilnego ustawą z 4.07.2019 r. w ogólności", *"Palestra"* No.11–12/2019, p. 34.

<sup>7</sup> TOMASZEK, A., "Nowe powinności adwokackie po nowelizacji procedury cywilnej", *"Palestra"* No.11–12/2019, p. 49.

<sup>8</sup> "Planned amendments in the Polish Code of Civil Procedure – crucial changes for entrepreneurs", <https://www.kg-legal.eu/info/cross-border-cases/planned-amendments-in-the-polish-code-of-civil-procedure-crucial-changes-for-entrepreneurs/>, 17.07.2020.

§ 2. Within two months from the day of being served the obligation referred to in § 1, the plaintiff files a confirmation that the pleading has been served on the respondent through an enforcement officer to the case files or returns the pleading and indicates the current address of the respondent or proof that the respondent is residing at the address indicated in the action. After the ineffective expiry of the time limit, the provisions of Article 177 § 1 (6) shall apply”.

The significant change should be considered to add the new article 139<sup>1</sup> of the Polish Code of Civil Procedure, which provides for a specific method of serving the statement of claim or another pleading on the defendant causing the need to defend his rights, in a situation where he does not stay against proper, substitute, or bogus service was effected. The introduction itself special regulation to protect the rights of the defendant in the event of service of the letter the initiator of the proceedings had long been awaited due to unreliability the per aviso delivery mechanism<sup>9</sup>.

One of the news is the return of the separate procedural proceedings in commercial cases. The previous version had been in force from 1<sup>st</sup> October 1989 to 3<sup>rd</sup> May 2012.

“According to the assumptions of the legislator, due to the importance of civil law relations in business transactions, such proceedings should be conducted faster than other court cases. For this reason, and also – in principle – because of the participation of professional entities, it contains stricter requirements and procedural rigours than the general rules of civil proceedings”<sup>10</sup>.

“Although the entire commercial proceedings will be very formalized, the entrepreneur will be able to communicate with the court using the e-mail address. The new procedure sets forth in commercial cases the introduction of an obligation to indicate the e-mail address of the party in the statement of claim or in the first procedural letter filed after the receipt of the copy of the claim. In the case of its absence, there has to be submitted a statement that the party has no such address. Failure to comply with this obligation will constitute a formal error of a court pleading and will make it impossible to give it a proper course”<sup>11</sup>.

There is more than one amendment connected with evidences in this novelization. Even though some of the changes are significant, the legislator provided for a relatively short *vacatio legis*<sup>12</sup>.

“The amendment to the Polish civil procedure also provides for the witness to give evidence in writing. This is a very beneficial change in the era of open borders and the mobility of both people and enterprises, which will also have a positive impact on reducing the number of hearings and reducing the time of proceedings”<sup>13</sup>.

Speaking about evidences, another novelty in the Polish Code of Civil Procedure is the institution of the agreements excluding evidence.

“Until now, the agreements excluding evidence raised serious doubts because they had no regulations in the Code of Civil Procedure. After the amendment to the Code of Civil Procedure, the legislator decided to introduce the regulation of evidence contracts. Evidence agreements have been regulated in art. 458<sup>9</sup> Code of Civil Procedure...”<sup>14</sup>.

The additional protection of the consumers in this Act is also guaranteed.

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<sup>9</sup> RYLSKI P., *op. cit.*, p. 22.

<sup>10</sup> CHRAPONSKI, D., “Odrębne postępowanie w sprawach gospodarczych – zarys regulacji”, *“Palestra”* No.11–12/2019, p. 127.

<sup>11</sup> “Planned amendments in the Polish Code of Civil Procedure – crucial changes for entrepreneurs”, <https://www.kg-legal.eu/info/cross-border-cases/planned-amendments-in-the-polish-code-of-civil-procedure-crucial-changes-for-entrepreneurs/>, 17.07.2020.

<sup>12</sup> MENDREK, A., “Rozdział V. Reforma prawa dowodowego w świetle nowelizacji z 4.7.2019 r.”, FLAGA-GIERUSZYŃSKA, K., FLEJSZAR, F., MALCZYK, M., (ed.), *Nowelizacja Kodeksu postępowania cywilnego z 4.7.2019 r. w praktyce*, Warszawa 2020, p. 85.

<sup>13</sup> “Planned amendments in the Polish Code of Civil Procedure – crucial changes for entrepreneurs”, <https://www.kg-legal.eu/info/cross-border-cases/planned-amendments-in-the-polish-code-of-civil-procedure-crucial-changes-for-entrepreneurs/>, 17.07.2020.

<sup>14</sup> BŁASZCZAK, Ł., “Umowa dowodowa jako przykład nowej instytucji w Kodeksie postępowania cywilnego (art. 458<sup>9</sup> k.p.c.)”, *“Palestra”* No.11–12/2019, p. 160.

"The Act also introduces facilitations for consumers (by preventing the use of an alternate jurisdiction in cases against consumers), since consumers will be allowed to dispute with entrepreneurs in the court appropriate to their place of residence, and not – as currently – at the entrepreneur's registered office"<sup>15</sup>.

There is a major change of process costs in the Polish Code of Civil Procedure, as well.

One of the authors "... emphasizes the fiscalism of new solutions and the threat to the right to court, including the right to a fair trial. This applies especially to the fee for justification introduced by the amendment and fees in the writ proceedings"<sup>16</sup>.

With the process costs is connected another issue.

"One of the most serious problems of Polish courts was procedural obstruction, which is why the new draft of the Civil Procedure Code introduces sanctions for the abuse of procedural law. If the judge raises suspicions that the respective complaints of the parties lead only to delaying the proceedings, the judge will be able to decide to double the costs of the proceedings imposed on the violating party, or even to leave the applications submitted for obstruction without consideration"<sup>17</sup>.

Returning to amendments important for the commercial arbitration it should be indicated the changes made by the Polish legislator to article 1157 of the Polish Code of Civil Procedure and the article 1163 of the Polish Code of Civil Procedure.

The version after the amendment: "Article 1157.

Unless otherwise provided for by specific regulations, the parties may bring the following disputes before an arbitration court:

1) disputes involving property rights, except maintenance cases;

2) disputes involving non-property rights, if they can be resolved by a court settlement".

The version before the amendment: "Article 1157.

Unless otherwise provided by a specific regulation, the parties may submit to arbitration disputes regarding property rights and non-property rights which may be subject to a judicial settlement, excluding cases for support [*alimenty*]."

The version after the amendment: "Article 1163.

§ 1. An arbitration clause in the articles (memorandum) of association of a commercial company concerning disputes arising from company relationships is binding on the company, its shareholders, governing bodies and their members.

§ 2. In cases concerning the revocation or recognition of invalidity of a resolution of the shareholders' meeting of a limited liability company or a general meeting of a joint-stock company, an arbitration clause is effective if it provides for the obligation to announce the commencement of proceedings as required for company announcements within one month from the date of their commencement at the latest; the announcement may also be published by the plaintiff. In such cases, each partner or shareholder may join the proceedings on one of the sides within one month from the date of their announcement. The composition of the arbitration court appointed in the earliest commenced case examines all other cases for the revocation or recognition of invalidity of the same resolution of the shareholders' meeting of a limited liability company or a general meeting of a joint-stock company.

§ 3. The provisions of § 1 and 2 shall be applied accordingly to arbitration clauses included in the memorandum of association of a cooperative or an association."

The version before the amendment:

"Article 1163.

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<sup>15</sup> "Planned amendments in the Polish Code of Civil Procedure – crucial changes for entrepreneurs", <https://www.kg-legal.eu/info/cross-border-cases/planned-amendments-in-the-polish-code-of-civil-procedure-crucial-changes-for-entrepreneurs/>, 17.07.2020.

<sup>16</sup> MENDREK, A., "Nowe unormowania kosztów sądowych w sprawach cywilnych wynikające z nowelizacji z 4.07.2019 r.", *"Palestra"* No.11–12/2019, p. 231.

<sup>17</sup> "Planned amendments in the Polish Code of Civil Procedure – crucial changes for entrepreneurs", <https://www.kg-legal.eu/info/cross-border-cases/planned-amendments-in-the-polish-code-of-civil-procedure-crucial-changes-for-entrepreneurs/>, 17.07.2020.

§1. An arbitration agreement included in the articles of association or statute of a commercial company concerning disputes arising out of the corporate relationship shall be binding upon the company and its shareholders. §2. §1 shall apply as relevant to arbitration agreements included in the statute of a cooperative or an association".

Other changes in the regulation of Polish commercial arbitration are as follows:

The version after the amendment: "Article 1161.

§ 3. An arbitration clause may identify a permanent arbitration court as competent to resolve a dispute. Unless the parties have agreed otherwise, they are bound by the regulations of a permanent arbitration court applicable on the date of bringing an action".

The version before the amendment: "Article 1161

§ 3. An arbitration agreement may indicate a permanent arbitral tribunal for resolution of the dispute. Unless otherwise agreed by the parties, the parties are bound by the rules of such arbitral tribunal in force as of the date of the conclusion of the arbitration agreement".

The version after the amendment: "Article 1169.

§ 1. The parties may determine in an agreement the number of judges of an arbitration court (arbitrators).

§ 2. Where the number of judges is not determined, an arbitration court of three arbitrators is appointed.

§ 2<sup>1</sup>. If an action is brought by or against two or more persons, they unanimously appoint an arbitrator, unless the arbitration clause stipulates otherwise.

§ 3. Contractual provisions which give one party more rights to appoint an arbitration court are void."

The version before the amendment: "Article 1169.

§ 1. The parties may determine in an agreement the number of judges of an arbitration court (arbitrators).

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§ 3. Contractual provisions which give one party more rights to appoint an arbitration court are void."

After the change of the political system in Poland, there was also a change from a planned economy to a free-market economy, it is in the form of companies that most economic activities take place. So the arbitrability of the disputes related to the company's relationship in arbitration proceedings are important not only because of their scientific but also practical importance. The possibility of solving these matters through arbitration is connected with all benefits of arbitration such as:

- Cost savings - When assessing, you should always refer to the specific regulations and the degree of complexity of the case. Arbitration will be cheaper in cases of significant value in dispute and of considerable complexity. In cases of low value, arbitration will most likely turn out to be more expensive than the one conducted before common courts. Unless the one-instance procedure has a positive effect on saving money. Savings are also achieved through the qualifications of the adjudicating team allowing them to recognize the essence of the problem without appointing experts. Saving money is especially evident in international affairs,

- Saving of time - The arbitral tribunal will conduct the proceedings much earlier, and will also make efforts to ensure that the award is issued at the first hearing,

- One-instance proceedings - It saves time and money when compared with the cost of multi-instance proceedings. Proceedings before the state court are two-instance, which is associated with a lengthy process, which adversely affects the quick pursuit of claims, so necessary in running a business,

- Confidentiality of proceedings, the principle of secrecy - The confidentiality of arbitration is one of its greatest advantages. Although the files of court cases in state courts are also available only to the parties and their attorneys, the hearing itself in the state court is in principle public, and even in rare cases of secret hearing, the very fact of its proceedings in court is always announced in the courtroom. Meanwhile, entrepreneurs are most often not interested in publishing the fact that they conduct court proceedings.

Often, information that is a business secret must be included in the process. Arbitration ensures complete confidentiality of the proceedings and no one is informed about the arbitration process except the parties themselves<sup>18</sup>. This aspect is important in business relations, especially in disputes related to company's relationship in arbitration proceedings,

- Freedom to choose the court, language, and place of proceedings,
- Freedom of choice of arbitrators,
- Possibility of the mediation and the settlement - The parties can mediate in each case and they can reach a settlement at any time, which reduces the costs of the proceedings by half<sup>19</sup>.

- Ability to adjudicate on the basis of principles of equity - "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. (...)

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>20</sup>.

The possibility of adjudicating on the principles of equity is provided for in the Polish Code of Civil Procedure. According the article 1194 of the Polish Code of Civil Procedure:

"§ 1. An arbitration court shall resolve a dispute according to the law applicable to a given relationship or, where expressly authorised by the parties, on the basis of general principles of law or equity.

§ 2. However in each case the arbitration court shall take into consideration the provisions of an agreement and established customs applicable to a given legal relationship.

§ 3. In the case of disputes arising from an agreement a party to which is a consumer, the settlement of a dispute in accordance with the general rules of law or rules of equity shall not lead to depriving the consumer of the protection afforded to them by the mandatory provisions of the law applicable to the given relationship".

- Professionalism of the arbitrators - The parties may appoint specialists in the field to which the dispute relates to the adjudication panel of the arbitration court. There is no requirement for arbitrators to be lawyers. Some rules of the permanent courts of arbitration are limited to the requirement that the super arbitrator be a lawyer. Our court has determined that the arbitrator will always be a lawyer with extensive experience and additional competences in various areas, including knowledge of foreign languages in international matters.

With all due respect to the competence of state court judges, judges are only lawyers. Hence the great - often unjustified - tendency for judges of state courts to use expert opinions. As a result, a trial before a state court often turns into a kind of war of opinions, and the appointment of new experts is an extension of the trial.

The parties may appoint specialists in the field to which the dispute relates to the adjudication panel of the arbitration court. This means that persons competent in a given field are also judges-arbiters, which affects the quality of judgments and the speed of proceedings. It is commonly believed that arbitral tribunals in their adjudication panels are more substantively competent than state courts<sup>21</sup>,

<sup>18</sup> "Zalety arbitrażu", <https://msa.pl/pl/sad-arbitrazowy/zalety-arbitrazu.html>, 21.07.2020,

<sup>19</sup> "Zalety arbitrażu", <https://msa.pl/pl/sad-arbitrazowy/zalety-arbitrazu.html>, 21.07.2020,

<sup>20</sup> RYSZKOWSKI, K., "Adjudication on principles of equity in the proceedings before the arbitral tribunal in the Polish law compared to other legal systems", "Cadernos de Dereito Actual", No 12 (2019), p. 09

More about the equity in the commercial arbitration see RYSZKOWSKI, K., "Orzekanie na zasadach słusznosci w postepowaniu przed sadem arbitrazowym - *summum ius summa iniuria?*", "ADR. Arbitraż i Mediacja", 2011, No.1(13), p. 53-62.

<sup>21</sup> "Zalety arbitrażu", <https://msa.pl/pl/sad-arbitrazowy/zalety-arbitrazu.html>, 21.07.2020,

- Principle of concentration of evidence – Serving the implementation of the postulate of the speed of civil proceedings, the principle of concentration of procedural material concerns the time at which the factual and evidence material should be collected<sup>22</sup>,

- Jurisdiction of the arbitral tribunal - The arbitration court is competent if an appropriate clause is made in the contract prior to cooperation or in the agreement. It is possible that after the dispute has arisen, the parties decide to resolve the matter by an arbitration court and draw up a separate agreement,

- Enforceability of an Arbitral Award - An award of an arbitration court operating in Poland is an enforceable title which, after issuing an enforcement clause by a state court, is suitable for enforcement, similarly to a state court judgment.

The same is true of a foreign arbitration award, which thanks to an international convention (mainly the New York Convention of 1958) is currently enforceable in over 140 countries around the world.

At the will of the parties, the arbitration court replaces the state court. It is a body that is empowered by law to issue legally binding judgments.

The resolution of a dispute before a state court of one country is usually not approved by the other party, as there is no universal international convention on the enforcement of judgments of foreign common courts, there are mainly bilateral agreements. In practice, this causes a rather onerous path to obtain recognition and enforcement of such a judgment.

A ruling of a foreign arbitration court, which thanks to an international convention (mainly the New York Convention of 1958) is currently enforceable in over 140 countries around the world. Proceedings for the recognition and enforcement of such a judgment comes down to examination by a state court, and at the request of the party against whom the judgment is directed, whether such a judgment meets the premise listed in Art. V of the Convention. These are only formal reasons, the court has no right to examine the merits of the claim. In addition, this convention guarantees equal recognition and enforcement of foreign arbitration awards with domestic awards in terms of court fees and charges<sup>23</sup>.

Both of the above provisions (the article 1157 of the Polish Code of Civil Procedure and the article 1163 of the Polish Code of Civil Procedure) before the amendment raised some doubts, both in practice and in case law<sup>24</sup>.

Regarding the article 1157 of the Polish Code of Civil Procedure, it should be noted that the legislator's intervention is not perfect, because the division into property and non-property rights raises doubts in the doctrine. Their source is difficulties in determining whether the subjective right of a given type serves exclusively the exercise of property or non-property rights. The problem with defining and delimiting these rights in market economy conditions, in which it is often difficult to indicate the precise limit, when and to what extent a given subjective law serves to protect or implement the property interest of an authorized entity, is deepening<sup>25</sup>.

Non-property rights also sometimes include personal corporate rights arising from membership of an organization. According to another view, there are no grounds for treating an organizational right with no asset value as non-property rights, as they are accessory rights for the protection of property rights. Any dispute over the content of this protection is a dispute over property rights<sup>26</sup>.

Doubts about personal corporate rights may justify the author's opinion, an isolated view, isolating the third category of subjective rights - the category of "mixed" rights. These rights include both non-property and property rights. As an example, the right to participate or shares in commercial companies, which in addition to property

<sup>22</sup> STRUMIŁŁO, T., "Zasady postępowania arbitrażowego", "ADR. Arbitraż i Mediacja", 2009, No.3(7), p. 74.

<sup>23</sup> "Zalety arbitrażu", <https://msa.pl/pl/sad-arbitrazowy/zalety-arbitrazu.html>, 21.07.2020,

<sup>24</sup> RYSZKOWSKI, K., Spory..., p. 86.

<sup>25</sup> ROMANOWSKI, M., "Podział praw podmiotowych na majątkowe i niemajątkowe", "Państwo i Prawo" 2006, No. 3, p. 24.

<sup>26</sup> BŁASZCZAK, Ł. LUDWIK, M., *Sądownictwo Polubowne (Arbitraż)*, Warszawa, 2007, p. 103.

rights (the right to participate in the company's profits) also includes non-property elements<sup>27</sup>. Similarly, according to a similar view, the phenomenon of overlapping and penetration of property and non-property (e.g. in copyright law and the case of a right to maintenance) leads to the separation of the structure of mixed subjective law<sup>28</sup>. Also in the jurisprudence, one can notice a distinction of mixed rights, such as the Supreme Court with the right to the grave in the resolution of December 2, 1994, III CZP 155/94<sup>29</sup>.

This indicates the lack of completeness of the criterion of arbitration as regards the division of property and non-property rights, and on the other hand may indicate the intention of the legislator to leave maintenance disputes, i.e. mixed disputes, outside arbitration. However, the systematic structure of the provision rather indicates that the legislature includes maintenance disputes as property disputes<sup>30</sup>.

A. Tujakowska and M. Olechowski have indicated that the amendment to the article 1157 of the Polish Code of Civil Procedure consists in recognizing that all property disputes, except for cases for support, have arbitrability. The current wording of this provision has raised many doubts, due to how arbitrability is linked to amicable settlement. In particular, it was not entirely clear whether the condition of amicable settlement related only to non-property rights disputes or also to property rights disputes. The amendment should finally end this state of uncertainty in favor of unlimited (with the exception of cases for support) arbitrability of property rights disputes. This change is also in line with solutions that operate in countries with a pro-arbitration attitude, such as France or Switzerland<sup>31</sup>. I support this position, and as regards the nature of maintenance cases, this is not the merits of the article. This change is also in line with the solution adopted by the German legislator from January 1, 1998<sup>32</sup>.

Against the background of the old wording of the article 1157 of the Polish Code of Civil Procedure, the editors of this provision raised considerable doubts, which served as an argument for supporters of opposing views. I supported the prevailing position in the doctrine, i.e. the application of the amicable settlement criterion to both property rights disputes and non-property rights disputes. This view was supported by the assumption of the rationality of the legislator, who should establish a uniform, uniform criterion for both categories of disputes<sup>33</sup>.

The doctrine stressed the defectiveness of the wording of this provision and the inadequacy of the application of the amicable settlement criterion to the arbitration fit criterion, in particular to disputes over property rights. Among others A Szumański has said:<sup>34</sup> However, Polish law adopts in the article 1157 of the Polish Code of Civil Procedure, a restrictive criterion of arbitrability in the form of amicable settlement capacity for a dispute, which *de facto* means a translation of the unknown by the unknown. The bigger problem for practice, however, is the faulty nature of the wording of the above provision, because its editorial raises significant doubts in the doctrine, namely whether the criterion of the amicable settlement of the dispute relates only to

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<sup>27</sup> KRAWCZYK, I., "Podatek od czynności cywilnoprawnych a VAT", *"Przegląd Podatkowy"* 2004, No. 12, p. 21.

<sup>28</sup> GOETTEL, M., BIERANOWSKI, A., BOGDALSKI, P., *Prawo cywilne. Zarys wykładu*, GOETTEL, M., (ed.) Warszawa 2009, p. 42.

<sup>29</sup> "Orzecznictwo Sądu Najwyższego. Izba Cywilna" 1995 No.3, pos. 52.

<sup>30</sup> RYSZKOWSKI, K., *Spory...*, p. 87.

<sup>31</sup> TUJAKOWSKA, A., OLECHOWSKI, M., "Zmiany w kpc: nowe przepisy w sprawie arbitrażu", <https://www.rp.pl/W-sadzie-i-urzedzie/309099972-Zmiany-w-kpc-nowe-przepisy-w-sprawie-arbitrazu.html>, 18.12.2019

<sup>32</sup> ERECIŃSKI, T., "Zdatność arbitrażowa (art. 1157 KPC)", (ed.) NOWACZYK, P., PIECKOWSKI, S., POCZOBUT, J., SZUMAŃSKI, A., TYNEL, A. (ed.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurkiewiczowi*, Warszawa 2008, p. 5.

<sup>33</sup> RYSZKOWSKI, K., "Głosa do uchwały Sądu Najwyższego z 7.5.2009 r. - Problem zdatności arbitrażowej sporów ze stosunku spółki", *"ADR. Arbitraż i Mediacja"*, 2011, No.3(15), p. 113-114.

<sup>34</sup> RYSZKOWSKI, K., *Spory...*, p. 87.

disputes on non-property rights, or also includes disputes on property rights<sup>35</sup>. Moreover, A. Szumański pointed to the postulate of adopting the German solution, which departed from the criterion of amicable settlement in respect of all disputes regarding property rights<sup>36</sup>, which took place in Poland on September 8, 2019<sup>37</sup>.

It is worth emphasizing that these doubts persisted despite the Supreme Court resolution of 7 May 2009, III CZP 13/09<sup>38</sup>, in which the Supreme Court ruled that the provision of the article 1163 § 1 of the Polish Code of Civil Procedure does not contain a special norm in relation to the article 1157 of the Polish Code of Civil Procedure to the extent that disputes submitted for arbitration may be the subject of a court settlement.

Personally, based on the former legal status, I was in the position, also under the influence of resolution SN III CZP 13/09, on the application of the criterion of amicable settlement capacity also for disputes over property rights<sup>39</sup>.

Regarding the article 1163 of the Polish Code of Civil Procedure, its previous content also raised doubts, in particular, what was its attitude to the article 1157 of the Polish Code of Civil Procedure<sup>40</sup>.

On the basis of the former legal status, the doctrine presented divided views on the admissibility of arbitrability in disputes in the field of company law<sup>41</sup>.

According to the view of K. Weitz, if it is assumed that the final determinant of the arbitrability of all disputes (both property and non-property rights) is the admissibility of concluding a settlement if the case is considered by a common court, it cannot be concluded that all disputes regarding corporate rights in commercial companies (even after prior acceptance that such disputes regarding corporate rights) are subject to the arbitral tribunal's decision<sup>42</sup>.

Nothing changes in this matter, because the article 1163 § 1 of the Polish Code of Civil Procedure does not apply to the subject matter of cases that may be subject to arbitration. However, it regulates compliance with the requirements in force regarding the form of an arbitration clause and the subjective boundaries of its validity when it concerns disputes related to the company's relationship. Both provisions have a completely different subject of regulation, so the article 1163 § 1 of the Polish Code of Civil Procedure is not a *lex specialis* in relation to the article the 1157 of the Polish Code of Civil Procedure<sup>43</sup>. The article 1163 § 1 of the Polish Code of Civil Procedure solves partly problems regarding the company's ability to commit itself independently and as to binding shareholders or partners with an arbitration clause contained in the company's statutes or articles of association<sup>44</sup>.

The next author in support of the lack of overlap of the scope of standards arising from the article 1157 of the Polish Code of Civil Procedure and the article 1163 § 1 of the Polish Code of Civil Procedure used a systemic interpretation. Well, the article 1163 § 1 of the Polish Code of Civil Procedure is in Title II, Part Five of the Polish Code of Civil Procedure – "Arbitration agreement", so it applies, like the articles preceding it and the following articles. The article 1164 of the Polish Code of Civil Procedure prerequisites that an arbitration clause must meet to bind specific entities. It does not specify, however, which of the cases can be referred to the arbitral tribunal as in the article 1157 of the

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<sup>35</sup> SZUMAŃSKI, A., "Czy jest w Polsce kryzys arbitrażu handlowego?", "Monitor Prawniczy" 2019, No.2, p. 92.

<sup>36</sup> SZUMAŃSKI, A., "Sąd polubowny a ugoda sądowa", "Glosa" 2010, No 1, p. 20-21.

<sup>37</sup> RYSZKOWSKI, K., Spory..., p. 88.

<sup>38</sup> „Biuletyn Sądu Najwyższego” 2009/5, pos. 6; LEX No.493962.

<sup>39</sup> RYSZKOWSKI, K., "Klauzula porządku publicznego w postępowaniu przed sądem polubownym a zdatność arbitrażowa", "ADR. Arbitraż i Mediacja", 2013, No.1(21),p. 83.

<sup>40</sup> RYSZKOWSKI, K., Spory..., p. 88.

<sup>41</sup> RYSZKOWSKI, K., Glosa..., p. 116.

<sup>42</sup> WEITZ, K., *Kodeks postępowania cywilnego. Komentarz. Część czwarta. Przepisy z zakresu międzynarodowego postępowania cywilnego. Część piąta. Sąd polubowny (arbitrażowy). Tom 5*, Warszawa, 2009, ERECIŃSKI, T. (ed.), p. 605.

<sup>43</sup> *Ibid.*, p. 606.

<sup>44</sup> BUDNIAK, A., "Forma zapisu na sąd polubowny w świetle polskiego i niemieckiego postępowania cywilnego - zagadnienia prawnoporównawcze", "ADR. Arbitraż i Mediacja" 2009, No.4(8), p. 29.

Polish Code of Civil Procedure. According to this view, the latter article, in its current wording, does not provide for any exceptions to the criterion of the amicable settlement. Reservation that "Unless otherwise provided by a specific regulation..." does not apply to words after a dash "... which may be subject to a judicial settlement...", but to "... the parties may submit to arbitration disputes regarding property rights and non-property rights"<sup>45</sup>.

According to the article 1164 of the Polish Code of Civil Procedure: "Labour law disputes. An arbitration agreement pertaining to labour law disputes may be made only after the dispute has arisen and shall be in writing. Article 1162 § 2 does not apply".

R. Uliasz refused the article 1163 § 1 of the Polish Code of Civil Procedure, the nature of *lex specialis*, because the mutual subordination of a special provision to a general provision and on this basis exclusion of the application of the general provision is possible only when the hypotheses of both provisions overlap to some extent. In this case, this situation does not occur, because the hypotheses of both provisions apply to completely different situations<sup>46</sup>.

The indirect view referred to the division of disputes from the company's relationship into disputes in a narrower and wider scope. According to this view, the article 1163 § 1 of the Polish Code of Civil Procedure granted arbitrability to disputes in a narrower scope, while to disputes in a broader scope the article 1157 of the Polish Code of Civil Procedure regarding arbitrability and the article 1162 of the Polish Code of Civil Procedure regarding the form of an arbitration clause<sup>47</sup>.

According to the article 1162 of the Polish Code of Civil Procedure: "§ 1. An arbitration clause should be made in writing.

§ 2. Requirements concerning the form of an arbitration clause are also met if the clause is included in letters exchanged between the parties or statements made by means of remote communication which enable their content to be recorded. Reference in an agreement to a document containing a decision to bring a dispute before an arbitration clause complies with the requirements concerning the form of an arbitration clause if such agreement is made in writing and the reference incorporates that clause into the agreement".

Completely opposite to the first position, the point of view in this matter assumes that the article 1163 § 1 of the Polish Code of Civil Procedure is a special provision in relation to the article 1157 of the Polish Code of Civil Procedure. Statement of cases from the company's relationship with the subject scope of the arbitration agreement under the article 1157 of the Polish Code of Civil Procedure leads to the conclusion that a large part of these cases is excluded from the jurisdiction of the arbitration court. According to G. Suliński, this provision allows, however, the possibility of departing from the general principle of amicable settlement as a criterion for arbitrability, because the legislator allows different regulation of this issue in specific provisions<sup>48</sup>.

According to the article 1163 § 1 of the Polish Code of Civil Procedure, the arbitration court's provision in the articles of association (agreement) regarding disputes arising from the company's relationship binds the company and its partners, so the act does not impose that disputes from the company's relationship that the arbitral tribunal settles based on the arbitration clause concluded in the statutes (contracts) of the companies, they had the amicable settlement<sup>49</sup>.

Finally, the representative of the literature assumed that the article 1163 § 1 of the Polish Code of Civil Procedure is a special provision for the article 1157 of the Polish Code

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<sup>45</sup> KOCUR, M., "Kłopotliwe zaskarżanie uchwał", *"Rzeczpospolita"* from 04.06.2005.

<sup>46</sup> ULIASZ, R., "Zdolność arbitrażowa sporów wynikłych z zaskarżenia uchwał zgromadzeń spółek kapitałowych - 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. 204-205.

<sup>47</sup> BUDNIAK, A., *Forma...*, p. 31.

<sup>48</sup> SULIŃSKI, G., "Dopuszczalność poddania sporu ze stosunku spółki pod rozstrzygnięcie sądu polubownego", *"Przegląd Prawa Handlowego"* 2005, No 12, p. 31.

<sup>49</sup> *Ibid.*

of Civil Procedure because it refers to a narrower circle of disputes. He emphasized, however, that outside the scope of cases under the article 1163 § 1 of the Polish Code of Civil Procedure, disputes remain regarding the company's relationship, which the parties entrust to the arbitral tribunal by concluding an arbitration agreement outside the company's statute (contract). In such cases, the dispute will have to meet the condition of the amicable settlement, as the article 1157 of the Polish Code of Civil Procedure<sup>50</sup>.

A. Szumański, who shares the view according to which the article 1163 § 1 of the Polish Code of Civil Procedure is a *lex specialis* to the article 1157 of the Polish Code of Civil Procedure, negatively referred to the view on the different scopes of regulation of both the above provisions. At the outset, the article 1157 of the Polish Code of Civil Procedure allowed the possibility of regulating arbitration, other than in the general provision. The referral refers to a "special provision" and not a "special act" if the situation were the opposite view of the special nature of the article 1163 § 1 of the Polish Code of Civil Procedure would be unauthorized<sup>51</sup>.

System interpretation argument prohibiting the application of *the lex specialis derogat legi generali* principles to the application of the article 1163 § 1 of the Polish Code of Civil Procedure to the article 1157 of the Polish Code of Civil Procedure, would be included only if the article 1157 of the Polish Code of Civil Procedure does not provide for any exceptions to the principle of the amicable settlement<sup>52</sup>.

According to this position, the article 1163 § 1 of the Polish Code of Civil Procedure covers not only the form and the subjective scope of the arbitration clause in the event of a dispute arising from the company's relationship, but also, in the light of the above argumentation, the total scope of the arbitration court's jurisdiction in disputes arising from the company's relationship, including the subject matter<sup>53</sup>.

The author's view was also supported by an argument resulting from a functional interpretation - i.e. the assumption of quick resolution of commercial disputes<sup>54</sup>.

The doctrine was dominated by the view that the article 1163 § 1 of the Polish Code of Civil Procedure is a special provision because it refers to a narrower scope of disputes than in the article 1157 of the Polish Code of Civil Procedure<sup>55</sup>. Another supporter of the special nature of the article 1163 § 1 Polish Code of Civil Procedure pointed out, however, that the relation of *lex specialis* to *lex generalis* is not that the former is more detailed than the latter in terms of disposition. Both standards contained in the provisions have different instructions, and what is essentially different is the scope or degree of case-law of the hypotheses of norms reconstructed based on these provisions<sup>56</sup>.

A. Szumański, a supporter of this view, referring to the argument of opponents regarding the placement of the article 1163 of the Polish Code of Civil Procedure in the Title "Arbitration agreement", pointed to the location of § 1030 *Zivilprozessordnung* (ZPO, German code of civil procedure from 30<sup>th</sup> January 1877) between the regulation

<sup>50</sup> *Ibid.*

<sup>51</sup> SZUMAŃSKI, A., "Zakres podmiotowy zapisu na sąd polubowny w sporze ze stosunku spółki kapitałowej ze szczególnym uwzględnieniem sporu powstałego na tle rozporządzenia prawami udziałowymi", NOWACZYK P., PIECKOWSKI S., POCZOBUT J., SZUMAŃSKI A., TYNEL A. (ed.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*, Warszawa 2008, p. 231-232.

<sup>52</sup> *Ibid.*, p. 232.

<sup>53</sup> *Ibid.*

<sup>54</sup> SZUMAŃSKI, A., "Zapis na sąd polubowny w sprawie zaskarżenia uchwały zgromadzenia spółki kapitałowej", CZAPLIŃSKI, W., (ed.) *Prawo w XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk*, Warszawa 2006, p. 886.

<sup>55</sup> See also BIELARCZYK, P., "Nowelizacja Kodeksu postępowania cywilnego w zakresie sądownictwa polubownego", *Dodatek specjalny do „Monitora Prawniczego”* 2005, No.22 and FALKIEWICZ, K., KWAŚNICKI, R. L., "Arbitraż i mediacja w świetle najnowszej nowelizacji kodeksu postępowania cywilnego", "Przegląd Prawa Handlowego", 2005, No.11, p. 34.

<sup>56</sup> DMOCHOWSKA, M., "Rozpatrywanie sporów korporacyjnych w spółkach kapitałowych przez sądy polubowne", *Prace laureatów konkursu im. prof. Jerzego Jakubowskiego. Edycja Trzecia*, Warszawa 2007, p. 377.

governing the concept of arbitration agreement and the provision regarding the form of the arbitration agreement<sup>57</sup>.

Also, the linguistic interpretation of the wording ("... concerning disputes arising out of the corporate relationship ...") demonstrated that this provision should also apply to arbitration, otherwise it would be an instructional standard. The possibility of concluding an arbitration clause in the company's agreement (statute) can also be derived from the article 353<sup>1</sup> of the Polish Civil Code of 23<sup>rd</sup> April 1964 (*Kodeks Cywilny*, CC) in connection with the article 2 of the Polish Commercial Companies Code of 15<sup>th</sup> September 2001 (*Kodeks Spółek Handlowych*, CCC)<sup>58</sup>.

In the case-law of the courts, both opposing positions were reflected<sup>59</sup>. This issue based on the jurisprudence was resolved by the Supreme Court in the above-mentioned resolution of May 7, 2009, III CZP 13/09<sup>60</sup>.

The arbitrability of disputes for annulment of resolutions of shareholders of capital companies also raised controversies. The indicated change of the article 1157 of the Polish Code of Civil Procedure with the amendment to the article 1163 of the Polish Code of Civil Procedure, which directly regulates the issues of resolution disputes should put an end to these controversies. First of all, the amendment specifies the circle of entities that will be bound by the arbitration agreement contained in the contract (statute) of a commercial company, indicating next to the company and its partners also the organs of the company and their members. This eliminates, among others risk of appealing against the same resolution of the meeting of shareholders in arbitration proceedings (by a shareholder) and in court proceedings (by a member of the body). The amendment also synchronizes the provisions of the Polish Code of Civil Procedure in the area of corporate disputes with the relevant provisions of the of the Polish Commercial Companies Code (the article 250 item 1 of the Polish Commercial Companies Code, the article 422 § 2 item 1 of the Polish Commercial Companies Code and the provisions of the article 295 § 1 of the Polish Commercial Companies Code and the article 486 § 1 of the Polish Commercial Companies Code)<sup>61</sup>.

Currently the article 1163 § 2 of the Polish Code of Civil Procedure *expressis verbis* provides for arbitral resolution of resolution disputes, at the same time indicating what the articles of association (statute) must contain to be effective and to cover resolution disputes<sup>62</sup>.

This amendment also removed another practical problem, i.e. binding the arbitration agreement of the company's bodies and their members, which before the amendment to the article 1163 of the Polish Code of Civil Procedure did not result directly from the provision<sup>63</sup>.

It has already been approved in practice<sup>64</sup>. The amendment gives a strong impetus to strengthen Polish arbitration, as it removes doubts that could have appeared on the side of entrepreneurs when registering for arbitration. Importantly, the introduced

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<sup>57</sup> SZUMAŃSKI, A., "Zdatność arbitrażowa ze szczególnym uwzględnieniem sporów korporacyjnych – Konferencja w Sądzie Arbitrażowym przy KIG 15 grudnia 2009 roku", *"Biuletyn Arbitrażowy"* 2010, No.2(14), p. 25.

<sup>58</sup> SZUMAŃSKI, A., *Sąd...*, p. 16.

<sup>59</sup> MOREK, R., "Przegląd orzecznictwa Sądu Najwyższego i sądów apelacyjnych, Case Law Section", *"Biuletyn Arbitrażowy"* 2009, No.11, p. 117.

<sup>60</sup> See also Judgment of the District Court in Warsaw - XXVI Economic Department of January 25, 2018, XXVI GC 172/17, Judgment of the Court of Appeal in Gdańsk - I Civil Division of May 24, 2016, I ACa 1142/15, Judgment of the Regional Court in Warsaw - 20th Commercial Department of July 8, 2014, XX GC 579/13, Decision of the Court of Appeal in Warsaw - First Civil Division of June 23, 2014, I ACz 921/14 and Judgment of the Supreme Court - Civil Chamber of April 19, 2012, IV CSK 443/11.

<sup>61</sup> TUJAKOWSKA, A., OLECHOWSKI, M., *op. cit.*

<sup>62</sup> RYSZKOWSKI, K., *Spory...*, p. 91.

<sup>63</sup> RYSZKOWSKI, K., *Spory...*, p. 91.

<sup>64</sup> RYSZKOWSKI, K., *Spory...*, p. 91.

changes do not limit the instruments for controlling arbitration awards in the hands of common courts, which may still eliminate defective rulings in their opinion<sup>65</sup>.

This amendment, apart from many positive aspects, which were described above, does not solve, however, all practical aspects of disputes in the field of company law<sup>66</sup>. Some doubts about this regulation arose in the doctrine. Below I will try to respond to these doubts.

Nevertheless, the path chosen by the legislator may also raise a number of doubts. First of all, whether the proposed solution will work in resolving disputes in the case of joint-stock companies, where the number of stakeholders (whether plaintiffs or defendants) can be significant. In addition, the adopted consolidation rule may mean that in practice only some of the participants in the dispute will have an influence on the selection of arbitrators. In this respect, the solution adopted, for example, by the Italian legislator, seems to be more balanced, which requires that in the case of corporate disputes, the nomination of the entire composition of the arbitral tribunal should be entrusted to a body external to the company. It remains an open question whether in practice the changes made will not create new opportunities for instrumental blocking or delaying proceedings (so-called guerrilla tactics). Finally, in the absence of an explicit transitional provision, it is also not entirely clear what will be the fate of the existing clauses contained in the company's contracts or statutes, and which do not provide for the requirements of the announcement and arbitration proceedings pending on their basis<sup>67</sup>.

It can be considered that some of the above fears are exaggerated, because by applying the principles of law application: the Act is not retroactive (*lex retro non agit*) and if any legal effects arose during the repeal of the repealed Act, they should be assessed according to its provisions - it should be considered existing clauses contained in the company's agreements or statutes remain legally effective<sup>68</sup>. Moreover this view is supported by the Latin maxim "*Pacta sunt servanda*".

Putting aside those fears, above-mentioned changes of the Polish Code of Civil Procedure in the field of the arbitration will guarantee the competitiveness of Polish arbitration courts with arbitration courts from other states, especially European. But the practice has to accommodate to the changed provisions.

However, a full assessment of these changes will be possible after the amended provisions have been in effect for a longer time. Forecasts are optimistic, but at the moment the final result of the changes cannot be determined yet.

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<sup>65</sup> FURTEK, M., "Furtek: Zmiany w procedurze cywilnej impulsem do umocnienia polskiego arbitrażu", <https://www.prawo.pl/prawnicy-sady/arbitraz-zmiany-w-procedurze-cywilnej-zwieksza-popularnosc-sadow,467718.html>, 24.12.2019,

<sup>66</sup> RYSZKOWSKI, K., *Spory...*, p. 92.

<sup>67</sup> TUJAKOWSKA, A., OLECHOWSKI, M., *op. cit.*

<sup>68</sup> RYSZKOWSKI, K., *Spory...*, p. 92.

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