

# Arbitration as an instrument of support for business transactions

**Lukasz BŁASZCZAK**

**University of Wrocław, Poland**

## **Abstract:**

**Aim:** The article is concerned with issues relating to arbitration in terms of the development of economy and entrepreneurship. Attention should be drawn, in particular, to speed as one of its key assets. In terms of the cost of proceedings, arbitration is less expensive than a court process. Another advantage stems from the possibility to design an arbitral procedure. The process of designing the arbitral procedure may proceed according to the arrangement made by the parties themselves. They can decide on the choice of law, arbitrators, their competences and method of conducting a proceeding. Arbitration resolves disputes which arise between entities participating in business transactions. Based on the analysis conducted in the paper, the author takes the view that arbitration is of crucial importance to economic development. A quick dispute resolution has the effect that entrepreneurs show interest in this form of resolving their conflicts.

**Design / Research methods:** The interpretation of the impact of arbitration on business transactions was conducted employing historical and dogmatic method. The phenomenon of arbitration has been explained as an alternative form which exists next to mediation proceedings.

**Conclusions / findings:** The studies allow the author to advance a thesis that, apart from the usual economic mechanisms, the mechanisms contributing to the resolution of disputes arising between entrepreneurs ensure the proper functioning of the economy as well. One of such mechanisms is precisely the arbitral tribunal. Unlike common courts, it is a more effective instrument in the hands of entrepreneurs.

**Originality / value of the article:** There is a two way link between law and economics. The article shows that legal institutions like arbitration in fact serve economic aims. On the other hand, the legal aspects of arbitration can also be evaluated through the prism of economic analysis.

*Keywords: arbitration, award, disputes, economy, entrepreneurs, confidentiality, mediation, arbitrator, rules of arbitration*

JEL: K40, K41

## 1. Introduction

The beginning of arbitration as a method of dispute resolution dates back to different civilizations in ancient times. The history of arbitration is older than that of state judiciary. The form of arbitration in those days naturally looked slightly different than the arbitration we see today, also considering the contemporary regulations of law. However, that does not change the assumption underlying the emergence of this institution, which is to achieve as expeditious and perfect resolution as possible of the dispute arising between the parties. There should be no doubt that from its very beginning arbitration predominantly served to eliminate disputes of various types arising among people, preferring to refer to a third party's decision as a method of settling a conflict. Those disputes were commercial, religious and even familial in origin. Arbitration used neither force nor violence, and instead employed the institution of arbitrator, that is a third party enjoying great respect and esteem. An arbitrator was to be entrusted with the dispute with the objective to eliminate and resolve it for good (Szurski 1994: 3; Żołnieruczuk 1973: 113; Dalka 1987: 9; Wilanowski 1929: 141; Dąbkowski 1911: 445; Koredczuk 2006: 295-296). It is therefore quite reasonable to argue that arbitration is a social phenomenon which is not only older than state judiciary (Szurski 1994: 3; Habscheid 1959: 113), but also than any other form which served to mitigate conflicts between feuding parties. Some go even so far as to discern certain references to arbitration in the Bible, in the letter of St. Paul to the Corinthians (Myrcha 1948: 9).

Thus, it can be argued that from its very beginning the history of arbitration entailed the role of settling disputes arising among people initially by conciliation. Not until later was the arbitrator, in addition to dispute resolution, vested with powers of issuing decisions which would frequently form the basis of enforcement proceedings (Bossowski 1932: 2-6; Kuratowski 1932: 2-3). The power of issuing binding awards proved to be crucial not only from the point of view of the consequences arising from the dispute resolution, but also from the point of view of the authority of this institution. The historical circumstances have made it possible for the arbitration institution to survive until present times, making it into a serious

rival to contemporary administration of justice. There is no doubt that nowadays arbitration as a method of dispute resolution provides an alternative to inefficient state judiciary.

In our times, we can come across arbitration in a wide range of situations. As a mechanism for resolving disputes, it is known both to public law (including international public law) and private law. In fact, both of these forms should be considered separate, for arbitration operating under public law has little in common with the one operating in the area of private law. This comes from the fact that the formula and role of one somewhat differs from the other.

Given the set of issues adopted in the paper, arbitration known in private law will be of basic relevance, meaning the form which comes down to resolving disputes in a manner that is of private and not of public law nature. Arbitration occupies a special place in international business transactions, where it has for many years now been considered the best method of dispute resolution between contractors from different countries. Entrepreneurs on the international front see the advantages of arbitration, and certainly there are many more of those in arbitration than in the state judiciary. For international business, the sources allowing arbitration to operate are in the first place in the form of international conventions. Here we distinguish the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention of 1961 on International Commercial Arbitration. They have played a major role in the development of international arbitration and have certainly contributed to the economic development in their own particular way.

Arbitration has also been well established in domestic business transactions (Błaszczak, Ludwik 2007: 3). Today arbitration happens to surface in places which have so far been unavailable to it, and there have been increasingly more references in various legal regulations requiring that the provisions on arbitration be applied accordingly. All this has the effect that, on the one hand, we can distinguish arbitration types – accounting for certain arbitration differences – and on the other hand, it appears necessary to try and sort out the concepts in order that the forms which do not represent arbitration are not named as such (Błaszczak, Ludwik 2007: 3-10). The aim of this paper is therefore to clarify the essential element of arbitration

and to show the role of arbitration as an instrument supporting business transactions in Poland. It is undisputed that, apart from the standard economic mechanisms, an expeditious dispute resolution followed by prompt enforcement of obligations is crucial to economic development. Arbitration is here to serve just this purpose.

## **2. Classification of arbitration as alternative dispute resolution**

Today's role of arbitration looks slightly different than in the old days. The difference is mainly linked to the fact that currently arbitration is, next to common judiciary (state judiciary), one of the methods of dispute resolution. The parties can therefore decide between choosing the path following arbitration or state judiciary. In making their choice, they are likely to be motivated by different factors, from the speed of the proceeding, qualifications and expertise of arbitrators to the efficiency and modalities of the proceeding. In the case of the latter, it is about the possibility of tailoring the conduct of the proceedings to the expectations of the parties themselves. In addition to accounting for specific requirements, the arbitral award may have procedural consequences in that its legal effect is equal to a court judgment. This feature is paramount in choosing this and not the other dispute resolution procedure.

From the point of view of the topic in question it is worth pointing out that today, due to the development of international business relations and thus the necessity to resolve disputes in the context of international trade, arbitration started to play special, and I would venture to say, even remarkable and dominant role (Błaszczak, Ludwik 2007: 3-20). This comes from the fact that specific business centers are naturally interested in providing their partners who are members of chambers or other associations with the guarantee of as quick and efficient dispute resolution as possible.

One could argue that in terms of business support, this role may first entail a speedy resolution of disputes arising from business cooperation at the international level, and secondly, at the national level, the issue could be raised that at a time when too great a burden is placed on state courts, arbitration is likely to represent an

effective alternative to common courts, and further to that, it is very conducive to business transactions. It is undisputable that every exchange of goods in business transactions is bound to generate conflicts on various grounds. Were these conflicts to be resolved before the courts (traditional way), then the effect could be an excessively lengthy hearing. Yet, in the case of arbitration this kind of lengthiness of proceedings can in principle be avoided. In this respect, therefore, the role of arbitration is not insignificant.

The arbitral tribunals which are organized within the framework or under the aegis of chambers of trade and industry or commodity exchanges have grown in importance (for example, International Chamber of Commerce in Paris – ICC, Internationale Schiedsgericht der Wirtschaftskammer Österreich, London Court of International Arbitration, Schiedsgericht der Zürcher Handelskammer, The Arbitration Institute of the Stockholm Chamber of Commerce, Regional Center for Arbitration in Kuala Lumpur, American Arbitration Association – AAA). Some even say that international commercial arbitration has become a judicial system that is “competitive” to the state judiciary (Rajski 2001: 2-3), with arbitrators being referred to as “natural judges” in matters of international business transactions (Lionnet 2001: 42). The centers for international commerce mentioned above are of immense relevance to international business. They are important centers with lists comprising highly qualified arbitrators with huge experience. Furthermore, the arbitration centers have a long tradition of resolving international disputes.

It should come as no surprise then that the entrepreneurs very frequently decide to refer their disputes to arbitral tribunals relying on their speedy resolution. In the domestic system a tendency is being observed of establishing permanent courts of arbitration at the Chambers of Commerce. This appears to be particularly important at the time of certain ineffectiveness of the state judicial system. The court of arbitration emerges here as an effective response to the paralysis of the Polish judiciary. There exists quite significant number of arbitral tribunals in Poland; however, not all of them could be characterized as professional unlike such courts as, for example, Court of Arbitration at the Polish Chamber of Commerce or Court of Arbitration at Polish Confederation of Private Employers Lewiatan. One could assert that at the present moment those are the two most important and highly

organized arbitration institutions in Poland. They have been operating for a long time, being the most recognizable in the Polish arbitration system. In choosing arbitration on the domestic arena one should pay attention especially to the experience and, if need be, the number of cases submitted to the particular institution. This should allow us to assess not only the professionalism of an arbitration center but also the expertise of arbitrators. Not for nothing do they say that whether or not the resolution is correct depends on the wisdom of arbitrators.

Arbitration is classified as alternative forms of dispute resolution. This, however, is not a one voice statement, for this issue depends on the designations contained in the very concept. There is no doubt as to the fact that from a systemic perspective arbitration will be viewed as an alternative to the state judicial system.

The term alternative forms of dispute resolution has multiple meanings, since an internal alternative and external alternative are being indicated. The first one is connected with the resolution of disputes before the court and, beside the judicial process, it comprises non-contentious proceedings and separate proceedings. Arbitration and mediation, on the other hand, tend to be defined as an external alternative. In literature the question of multiple meanings of the term was first brought to attention by Morawski. In his view, the term “alternative forms of dispute resolution” can be understood as having three meanings (Morawski 1993: 21; Morawski 2003: 228): a) first, alternative forms of dispute resolution can be seen as forms of judicial proceedings which are alternative to the traditional judicial proceeding. Within this meaning, an alternative to the civil proceeding could be a non-contentious proceeding, with any separate proceeding being that too. However, one should approach this concept with caution, for we need to remember that within the framework of civil proceedings a wide range of civil cases is indeed heard; still, this is the legislator who defines the limits of every civil proceeding, and it is not possible (beside arbitration) to have the matter referred to a different procedure or to another proceeding. I am referring here to a situation where parties are in conflict and refer their dispute to a court. In this case they cannot choose independently the contentious or non-contentious procedure, for the Code of Civil Procedure (hereinafter referred to as CCP) specifies in Article 13 that the court holds a hearing in litigation, unless otherwise provided by statute. If there are specific statutory

grounds for this, then no obstacle exists for the court to hear the case within the framework of a specific procedure, since it is obligated to do so. Thus, a fundamental question arises whether we can talk about an alternative if something is imposed or prohibited, with the parties having hardly any influence in this respect; b) secondly, the term “alternative forms of dispute resolution” can also imply those forms of court procedures which are not of adjudication nature. Conciliation and mediation proceedings ought to be pointed out here. It needs to be noted that at every stage of the proceedings a common court judge should seek to settle a dispute amicably. What follows from art. 10 of the CCP is that in matters where a settlement agreement is permissible the court should seek such settlement. The parties may also resolve a dispute before a mediator. In both cases the alternatives under the civil judicial proceedings are generally referred to as internal alternatives (Morawski 2003: 229); c) third, “alternative forms of dispute resolution” are to be understood as any out-of-court forms. These forms operate outside the state judicial system. They involve either jurisprudence activities (e.g. arbitration) or they are based on mediation or conciliatory techniques. These forms, in turn, are usually referred to as external alternatives (Morawski 2003: 229; Wach 2005: 124). The perspective thus presented is predominantly theoretical, based on the tenets adopted above. However, while using a practical approach to arbitration it does not clarify much.

Analyzing both the external and internal alternatives, it is rather difficult to accept such a differentiated approach. While for the common courts of law indicating the internal alternative does not seem justifiable because the judicial proceeding is first and foremost a basic procedure in the civil cases adjudication, all those methods which do not entail civil case adjudication by judicial bodies administering justice will provide an alternative to the judicial proceedings. Another situation which would support the notion that the division lacks justification is the fact that the structure and course of the judicial proceeding is not in the hands of the parties, since we deal here with clear criteria defined by the legislator itself. The judicial proceeding is inherently marked by formalism, which cannot be said about out-of-court methods of dispute resolution, where we encounter a much greater flexibility, having the opportunity to design the rules of the proceeding. With respect to arbitration, the parties may design the arbitral proceeding in a manner which they

choose; however, it remains crucial that the procedure does not infringe the principle of equality. From this perspective, it seems unreasonable to point to any alternative solutions or methods of civil cases settlement within the state judicial system. We should bear in mind that even if we differentiate between the contentious and non-contentious procedure, there is no way for the latter to become an alternative to the first one, for they are not subject to the will of the parties who would be able to decide either of which to choose; and secondly, the category of matters that may be the subject of the non-contentious procedure is laid down by law. So whatever the parties may desire or whatever their findings, all that will be rendered meaningless.

An arbitral proceeding as an out-of-court proceeding is also classified as alternative dispute resolution –ADR (Morawski 2003: 229; Morawski 1993: 21, Korybbski 1993: 83; Korybski 1991: 139; Błaszczak 2006: 331-336; Zienkiewicz 2004: 257; Jakubiak-Mirończuk 2008: 19-25; Rajski 2001: 38-39; Piasecki 1995: 258; Białecki 2010: 370-371; Ślęzak: 2003: 90; Kalisz-Prokopik 2003: 183-190; Skibińska 2009: 41; Mól 2001: 35; Gajda 2008: 23; Morek 2004: 1-5).

This, however, is not a uniform view as this concept has its advocates and critics. The issue here is that arbitration is of adjudication nature, while the ADR methods are based on conciliatory elements. Some authors (Rajski 2001: 38; Szurski 1994: 87) believe, therefore, that arbitration should be excluded from the scope of alternative dispute resolution. This observation refers in the first place to the EU Green Paper which distinguishes only so called contractual ADR, that is methods of dispute resolution conducted out-of-court by a neutral third party, excluding arbitration (Wach 2005: 137; Morek 2004: 133); secondly, the observation results from the fact that the court of arbitration does not seek to settle a dispute amicably, but to resolve it by issuing an award. That does not alter the fact that in view of the currently applicable provisions, arbitration represents an alternative to the state judiciary. The very fact of the adjudication nature cannot undermine the fundamental assumption that the proceeding before an arbitral tribunal is still an out-of-court procedure of dispute resolution, which is also conceived as such from the point of view of the concept of ADR (Wach 2009: 65-67). In view of the topic discussed in the paper, I should, without investigating this issue any further, limit myself to and accept that in employing this approach a proceeding before an arbitral

tribunal has also the form of ADR (Błaszczak 2006: 345; Błaszczak, Ludwik 2007: 24-30; Ereciński, Weitz 2009: 25; Wach 2005: 137, Pazdan 2004: 15).

### **3. Characteristic features and the essence of arbitration**

The fundamental feature of arbitration is its being of voluntary nature. In this aspect, its voluntariness runs counter to compulsion. Voluntariness involves the notion that nobody can be forced to have a dispute heard in arbitral proceedings. Otherwise one could assume that in imposing on anybody the requirement to have a dispute heard before an arbitral tribunal would indeed be inadmissible and impermissible abusive clause.

The autonomy of the will of the parties lies at the core of arbitration. Not only is it expressed in the freedom of decision whether or not bring the dispute before the arbitral tribunal for judgment, but also in the freedom in terms of making a decision as to the way the panel is constituted and the composition of arbitrators, as well as in the freedom of designing the proceeding, which also includes the choice of applicable law for the dispute resolution. In arbitration, the autonomy of the will ensures that the parties may at their own discretion bring the case before the arbitral tribunal.

The principle applied in arbitration is that the number of arbitral judges and its composition is specified by the parties. They can also define the procedure of appointing arbitrators in that they may establish it by themselves, or use the rules of *ad hoc* arbitration. Only in the situation where the parties have made no arrangements, the procedural laws established by the state find their application. They often provide for an “emergency” procedure regarding the appointment of arbitrators, including the aid of domestic courts within this scope with the purpose to maintain the original intention of the parties, which is to bring the dispute before the arbitral tribunal, when the parties, being already in conflict, appear incapable of reaching the agreement as to the composition of the arbitral tribunal (Błaszczak, Ludwik 2007: 20-30).

There is a number of reasons why the parties elect arbitration as a method of resolving a dispute. The decision to bring the dispute before the arbitral tribunal should always be considered depending on the real circumstances surrounding a specific case, for what seems attractive to a foreign entrepreneur need not be so for a domestic consumer or entrepreneur. What follows is that the lists of arbitration advantages and drawbacks cited in literature are not always identical (Błaszczak, Ludwik 2007: 14-20; Rajski 2001: 1; Szurski 1999: 4; Dalka 2003: 92-94; Schlosser 1989: 6; Podkowiński 2004: 113). Still, the aspect most frequently highlighted is that arbitration ensures, to a greater degree than state courts could ever do, that the dispute resolution is in accordance with the peculiarities of the case in question. Furthermore, an emphasis is put on the fact that arbitration proceedings are as a rule speedier, less expensive and less formalized than a court litigation (Podkowiński 2004: 113), with the arbitral tribunal providing an opportunity to resolve a dispute according to the rules established by the parties, which is particularly important between entities who, because of their different nationalities, may find it more difficult to pursue their claims and accuse the state courts of bias in that they favor their own citizens and evince a tendency to discriminate against foreign entities (Błaszczak, Ludwik 2007: 15). Moreover, the following advantages can also be included: confidentiality and expertise of arbitrators, and in the case of international arbitration, easier enforcement of foreign awards issued by the arbitral tribunals. The disadvantages of the arbitral proceedings are, on the other hand, perceived in the limitation of competences of the arbitral tribunals, in the lack of uniformity regarding awards and the problems related to the participation in the proceedings of entities not covered by the arbitration agreement.

The key feature of arbitration is its flexibility. The flexibility of the arbitration procedure is the possibility of designing it in a way the parties see fit, unless the dispute is being resolved by a permanent arbitration court. If this is the case, the court follows its own arbitral rules. From this point of view, it is of significance that although arbitration is deformalized in its nature, specific standards must be observed; first, the standards which aim at safeguarding the principle of the parties' equality, and second, the opportunity to present arguments and evidence in support of the facts alleged. Hence, it is not possible to conduct an arbitral proceeding with a

focus solely on one party to the detriment of the other. This kind of proceeding would have to be considered flawed, failing to provide the basis for arbitral settlement. The deformed nature of arbitration is linked to its speed. It is inherent for arbitration to be quicker than any court proceedings. However, the problem comes down to the post-arbitral proceedings, that is procedures for recognition or a declaration of enforceability of the arbitral award, or the actions seeking its annulment. Since these proceedings are brought before common courts, they may limit the speed of arbitration considerably.

Moreover, the expertise of arbitrators forms a crucial foundation among the characteristic features of arbitration. The dispute resolution depends mainly on the arbitrators' knowledge, expertise and qualifications.

With regard to confidentiality, it is accepted not only in international but also in domestic business transactions. The confidentiality of arbitration is quite often indicated in the doctrine, generally deriving it from the very essence and nature of arbitration (Błaszczak, Ludwik 2007: 34). At the same time, what is highlighted is lack of normative basis, both in domestic and international law, specifying the content and scope of confidentiality of arbitration (Przedzińska 2003). In the majority of cases arbitration proceedings are kept confidential, which is the result of a confidentiality clause signed by the parties, along with the arbitration agreement under which participants to the proceeding are prohibited from disclosing any information to third parties in connection with the conduct and outcome of the arbitration, allowing the use of any information thus disclosed solely for the purpose of the proceeding (Paulsson, Rawding 1995: 303; Coe 1997: 179; Rajski 2001: 3). Virtually all rules obligate the arbitrators to maintain secrecy of any information they have been made aware of while conducting the arbitral proceeding.

As noted above, arbitration entails dispute resolution. Before providing the opportunity for disputes to be resolved by arbitration, an arbitration agreement has to be concluded. It is an indispensable element without which the arbitral tribunal could not function. This is an agreement under which the parties submit disputes to arbitration which arose between them in connection with a specific agreement. Pursuant to Article 1161 § 1 CCP, submission of a dispute to arbitration requires an agreement between the parties defining the subject of the dispute or the legal

relationship under which the dispute has arisen or may arise (an arbitration agreement) Provisions of an arbitration agreement which are in breach of the principle of equality of the, parties, in particular provisions entitling only one party to bring a case before the arbitral tribunal indicated in the arbitration agreement or before a court, shall be ineffective (CCP: Article 1161 § 2). 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 arbitration agreement (CCP: Article 1161 § 3).

It should be underlined that the arbitration agreement itself demonstrates that arbitration operates within the framework of the autonomy of the parties (Pazdan 2003: 174). The arbitration agreement is an act in law by virtue of which the parties submit their dispute to an arbitral tribunal of their choice, thus excluding proceedings before a state court, and recognizing in advance the arbitral award that is to be rendered in their case (Pazdan 2003: 174). In legal writings the nature of arbitration agreement has been extensively explored (Siedlecki 1979: 169; Mokry 1993: 70; Mokry 1973: 34-35; Skąpski 1981: 24; Kulski 2006: 69-72; Kulski 2002: 53-55). Hence, three theories on this topic have emerged. The first one reduces the arbitration agreement to an act in law in the broader sense, whose basic consequence is the exclusion of the common court jurisdiction. The second theory assumes that the arbitration agreement is an act in law of substantive nature, which would allow the use of defects in consent. The third theory suggests that the arbitration agreement is a *sui generis* act. None of the theories could be named a leading theory and none could be considered more relevant than the other.

The arbitration agreement forms the basis of the jurisdiction of the arbitral tribunal, arbitrators' rights and the effectiveness of an arbitral award (Mazur 2003: 120). Furthermore, it should be noted that in order to initiate an arbitral procedure, the arbitration agreement has to be drawn up correctly, where the content of the agreement can considerably influence the course of the procedure, and the action for setting aside the arbitral award frequently finds its grounds in the allegations as to the validity or correctness of the arbitral agreement (Błaszczak, Ludwik 2007: 76; Jankowski 2005; Morek 2006: 127). All this has the effect that the relevance of the

arbitration agreement extends beyond its being the core of the competences of the arbitral tribunal and one ought to agree with the assertion that it represents the central institution of arbitration (Morek 2006: 127). Moreover, it is worth noting that the arbitral tribunal will have no competences to act and state courts will not be excluded from consideration of the dispute, unless the parties have concluded the arbitration agreement effectively (Błaszczak, Ludwik 2007: 76-78). In the nomenclature of the Polish Code of Civil Procedure, the arbitration agreement is traditionally referred to as an arbitration clause. This wording was employed for the CCP of 1932 (Article 486 § 1), CCP of 1964 (Article 698 § 1), and the legislator preserved it in the recent amendment of the provisions of the Code of Civil Procedure pertaining, *inter alia*, to arbitration. Pursuant to Article 1161 CCP, submission of a dispute to arbitration requires an agreement between the parties, defining the subject of the dispute and the legal relationship under which the dispute has arisen or may arise (an arbitration agreement) (Błaszczak, Ludwik 2007: 77). The quoted provision provides that the decision on submitting a dispute to arbitration the parties can make when the dispute has already arisen and when the parties merely foresee that it may arise under the specific legal relationship between them. Therefore, in the theory of civil litigation the following forms of arbitration agreement can be distinguished: a compromise, that is an agreement to submit a dispute to arbitration which may arise in the future under a specific legal relationship, and an arbitration agreement, in the strict sense of the term, in which the parties submit a dispute to arbitration which has already arisen and has been specifically defined (Błaszczak, Ludwik 2007: 77; Potzobowski, Żywicki 1961: 14; Tomaszewski 1994: 15; Mazur 2003: 120; Naworski 2005: 239; Morek 2006: 127). The arbitration agreement can be a stand-alone agreement as well a clause in the principal agreement (e.g. sale agreement, contract for works, agency contract, etc.), where it is traditionally referred to as arbitration clause (Tomaszewski 1994: 15; Morek 2006: 127). Since this distinction is not reflected in the Polish Code of Civil Procedure, its provisions, in particular those governing the form and content of the arbitration agreement are applicable both to the arbitration agreement and arbitration clause.

Pursuant to Article 1162 § 1 CCP, an arbitration agreement has to be drawn up in writing. The requirement with regard to the form of the arbitration agreement is also met when it is contained in correspondence exchanged between the parties or statements made using telecommunication allowing for the content to be recorded. Reference in a contract to a document containing a provision on submission of a dispute to arbitration meets the requirement as to the form of the arbitration agreement if the contract is made in writing, and the reference is such that makes the clause an integral part of the contract (CCP: Article 1162). Likewise noteworthy is the provision under Article 1163 § 1 CCP, according to which an arbitration agreement included in the articles of association (statute) of a commercial company concerning disputes arising out of the corporate relationship is binding upon the company and its shareholders.

Another important issue related to the functioning of arbitration is arbitrability of a dispute. The arbitrability of a dispute is to be understood as the admissibility of submission of a given dispute to arbitration on account of its subject. Arbitrability (*Schiedsfähigkeit, arbitrabilité*) represents a necessary condition for an arbitration agreement to be valid, while affecting the competence of the arbitral tribunal. Lack of arbitrability implies that the resolution of a particular dispute is reserved to state courts (Błaszczak, Ludwik 2007: 96-97). Moreover, in American legal literature and science the concept of arbitrability allows one to answer the question whether the dispute to be resolved by an arbitral tribunal is covered by the arbitration agreement (Błaszczak, Ludwik 2007: 97). In the European legal literature a narrower interpretation of the concept of arbitrability prevails. It appears that it has been adopted by the Polish legal literature, which sees the concept of arbitrability as the material scope of admissibility of arbitration (Morek 2006: 114). It is worth recalling here that setting limitations to the competences of arbitral tribunals through specifying what disputes may be submitted to arbitration represents one of the forms of the state control over arbitral tribunals, and it is first and foremost linked to the concept of public policy adopted by a particular country in the public interest. Therefore, the New York Convention and Geneva Convention left the regulation of this issue to national legislators. Furthermore, adjusting national arbitration laws to UNCITRAL model law does not involve having to adopt a list of those disputes

which may be resolved by arbitral tribunals. On the contrary, pursuant to the provisions of Article 1 (5) of the UNNCITRAL model law, the provisions of this law shall not affect any other law of the state adopting the model law by virtue of which certain disputes may not be submitted to arbitration. In view of the above, the approach to arbitrality of various legal systems is differentiated. (Wiśniewski 2005: 16; Błaszczak, Ludwik 2007: 97). Still, a clear tendency has emerged towards expanding the scope of disputes which the arbitral tribunals may resolve. In the light of the provisions of the Polish Code of Civil Procedure, arbitrable disputes are those regarding property rights and non-property rights which may be subject to a judicial settlement, excluding cases for support (CCP: Article 1157). In addition, disputes involving labor law which were previously excluded from arbitration are now considered to be arbitrable (CCP: Article 1164). Here the issue comes down merely to the fact that the arbitration agreement may only be drawn up after the dispute has arisen and not before. Hence it is not admissible to design the arbitration agreement already in the work contract.

#### **4. Arbitration proceeding and arbitral award**

As indicated before, the arbitral proceedings can be largely deformed, which implies that the parties may design the rules and how the proceeding will be conducted before the arbitral tribunal. This is crucial, for the parties may agree that the proceeding will be conducted before the arbitral tribunal including or without hearing only through the exchange of written statements. Moreover, there is the possibility to modify the taking of evidence itself. The rules of arbitral tribunals may determine the procedure and the rules regarding this proceeding. The autonomy of the parties with respect to the procedure design is limited when the parties decide to resolve their dispute by a permanent court of arbitration. In making such decision, they also accept the rules of a particular permanent court of arbitration. These rules, as previously discussed, may not breach the mandatory provisions of the Polish Code of Civil Procedure (Błaszczak, Ludwik 2007: 138). Pursuant to Article 1187 § 1 CCP, the parties may agree on the language or languages in which the proceeding

is to be conducted. Failing such agreement, the arbitral tribunal shall determine the language or languages of the proceeding. Unless provided otherwise, the parties' agreement or the decision made by the arbitral tribunal apply to all written declarations of the parties, hearings, awards and notices issued by the arbitral tribunal. In the proceedings before the arbitral tribunal, neither the principle of equality nor the dispositive principle nor adversarial principle are restricted. The rules of the arbitration proceeding must be stringently complied with, otherwise the arbitral award may be set aside. With regard to the arbitral tribunal which is not part of the judicial system, the rules of the Polish Code of Civil Procedure Article 1205 § 2 provide for the possibility of establishing the second instance court, however, the rule is not a two-instance but a single-instance system of the arbitral tribunal. On the one hand, this feature can be perceived as an advantage, for it makes consideration of the case speedier, yet on the other hand, everybody makes mistakes and so we may face the risk of committing an error in the application of law which, on top of that, cannot be remedied (Tomaszewski 2006: 45).

When completing the proceeding, arbitral tribunals can issue two types of awards. The form of the award depends on whether or not a dispute has been examined on the merits of the case. Although the provisions of the Polish Code of Civil Procedure do not contain a regulation similar to Article 32 of the UNCITRAL model law, according to which an arbitral proceeding is terminated by a final award or an order in matters provided for in the law, there is no doubt that the form of dispute resolution before the arbitral tribunal which is based on the merits of the case is an arbitral award (Fenichel 1935: 223; Błaszczak, Ludwik 2007: 180-185). Awards closing the proceeding officially, e.g. by terminating the proceeding, are orders of the arbitral tribunal. When it comes to the award issued by an arbitral tribunal it is an award on the merits of the case. Not unlike the judgments delivered by common courts, the awards issued by the arbitral tribunals can be grouped based on a range of criteria (Błaszczak, Ludwik 2007: 180). Looking at the operative part of the award in relation to the claim contained in the petitum of the application, it is possible to distinguish awards which either take into account or refuse the claim. Considering the scope of the settlement in relation to the claim and the wording of the provisions under Article 1195 CCP, as well as the present position of science

(Dalka 1996: 59-61) and the content of a number of the arbitral rules, we can acknowledge that also the arbitral tribunal may issue an award that is final, partial or provisional. Depending on the type of claim, the arbitral award may have the effect of ordering, declaring and affecting. As a rule, awards made by arbitral tribunals are adversarial in nature, that is they are issued in a proceeding characterized by the defendant's active defense (Morek 2006: 233; Błaszczak, Ludwik 2007: 181). However, it is quite possible that the arbitral decision will be a consent award. Moreover, it can also happen that the arbitral tribunal gives the settlement concluded by the parties the form of an award (CCP: Article 1196 § 2). However, considering the wording of Article 1190 CCP, it is deemed that the arbitral tribunal may not issue default awards (Błaszczak, Ludwik 2007: 182).

Awards made by the arbitral tribunals are subject to control of the common court. This control may take the form of an action for setting aside the arbitral award, seeking obliteration of the arbitral award or aiming at the procedure for recognition or declaration of enforceability of the award issued by the arbitral tribunal. As far as the first measure of control is concerned, we can observe, without going into too much detail, that a party, pursuant to Article 1206 § 1 CCP, may request that the arbitral award be set aside, if: 1) there was no arbitration agreement or the agreement was invalid, ineffective or no longer in force under the provisions of applicable law; 2) the party did not have proper notice of the appointment of an arbitrator, or the proceeding before the arbitral tribunal or was otherwise deprived of the opportunity to be able to defend their right before the arbitral tribunal; 3) the arbitral award is concerned with the dispute not covered by the arbitration agreement or exceeds the scope of the arbitration agreement; however, if the decision on matters covered by the arbitration agreement is separable from matters not covered by the arbitration agreement or those exceeding its scope, then the award may be set aside only with regard to the matters not covered by the arbitration agreement or those exceeding its scope; exceeding the scope of the arbitration agreement may not constitute grounds for vacating an award if a party who participated in the proceeding failed to raise a plea as to the hearing the claims exceeding the scope of the arbitration agreement; 4) the requirements with regard to the composition of the arbitral tribunal or fundamental rules of procedure before such tribunal, arising

under statute or specified by the parties, were not observed; 5) the award was obtained by means of an offence or the award was issued on the basis of a forged or altered document; 6) a legally final court judgment was issued in the same matters between the same parties.

An arbitral award shall also be set aside if the court finds that: 1) in accordance with statute the dispute may not be resolved by an arbitral tribunal; 2) the arbitral award is contrary to fundamental principles of the legal order of the Republic of Poland (public order clause) (CCP: Article 1206 § 2)

Moreover, regarding the recognition or declaration of enforceability, it is worth referring to the rule in Article 1212 CCP pursuant to which an arbitral award or a settlement entered before an arbitral tribunal shall have legal effect equal to a court judgment or a settlement entered into before a court upon recognition or enforcement thereof by the court. An arbitral award or settlement entered into before an arbitral tribunal, irrespective of the country of issuance, shall be subject to recognition or enforcement in accordance with rules set forth in this title (CCP: Article 1212 § 2)

## **5. Conclusion**

Considering the discussion above, it should be observed that arbitration plays a huge role among entrepreneurs, providing them with an effective method of dispute resolution. For obvious reasons, it was not possible to refer to all the issues relating to arbitration as it would exceed the framework of the paper. Still, a number of aspects were highlighted which may prove to be significant and rather crucial from the point of view of an average entrepreneur.

While arbitration is a more or less universal method in dispute resolution at international level, in national terms, and particularly across Poland, it is becoming more and more embedded in the minds of not only lawyers but also business entities, enjoying ever greater popularity. Although it is not yet so widespread as in the other countries, hopefully the nearest future will alter the attitude towards it. For

it seems that the future should belong to arbitration, it being, after all, the basic method of commercial dispute resolution.

## Bibliography

Białecki M. (2010), Mediacja w sprawach rodzinnych na przykładzie rozwiązań europejskich – analiza prawnoporównawcza, in: Współczesne przemiany postępowania cywilnego, eds. Cioch P., Gapska E., Nowińska J., Pogonowski P., Wolters Kluwer, Warszawa.

Błaszczak Ł. (2006), Alternatywne formy rozwiązywania sporów – analiza zjawiska na tle prawa polskiego, [w:] Czterdziestolecie Kodeksu postępowania cywilnego. Zjazd Katedr Postępowania Cywilnego w Zakopanem (7-9.10.2005 r.), ed. Oklejak A., Zakamycze, Kraków.

Błaszczak Ł., Ludwik M. (2007), Sądownictwo polubowne (arbitraż), C.H. Beck, Warszawa.

Bossowski F. (1932), Wpływ sądownictwa polubownego biskupów na prawo rzymskie, „Rocznik Prawniczy Wileński”, t. IV, dobitka, pp. 2-3.

CCP (1964), Ustawa z dn. 17 listopada 1964 r. Kodeks postępowania cywilnego (Code of Civil Procedure), Journal of Laws 1964, no. 43, item 296, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640430296> [12.12.2016].

Coe J. (1997), International commercial arbitration. American principles and practice in a global context, Irvington-on-Hudson, New York.

Dalka S. (2003), Rola i podstawy działania sądownictwa polubownego w polskim postępowaniu cywilnym, „Problemy Prawne Egzekucji”, no. 9-10, pp. 19-26.

Dalka S. (1987), Sądownictwo polubowne, Wydawnictwo Prawnicze, Warszawa.

Dalka S. (1996), Wykonalność wyroków sądów polubownych i ugód zawartych przed tymi sądami, „Problemy Prawne Egzekucji”, no 15, pp. 92-94.

Dąbkowski P. (1911), Prawo prywatne polskie, vol. II, Lwów.

Ereciński T., Weitz K. (2008), Sąd arbitrażowy, LexisNexis, Warszawa.

Fenichel Z. (1935), Charakter orzeczeń sądu polubownego, „Polski Proces Cywilny” no.7-8.

Gajda K. (2008), Alternatywne metody rozwiązywania sporów w sprawach konsumenckich (cz. I), ADR. Arbitraż i Mediacja, C.H. Beck, Warszawa.

Habscheid W. (1959), Schiedsgerichtsbarkeit und Staatsaufsicht, „KTS“, vol. 8.

Jakubiak-Mirończuk A. (2008), Alternatywne a sądowe rozstrzygnięcie sporów sądowych, Wolter Kluwer, Warszawa.

Jankowski M. (2005), Zapis na krajowy sąd polubowny *de lege lata* i w świetle projektowanych zmian, in: Prace laureatów konkursu im. Prof. Jerzego Jakubowskiego, ed. Skoczylas J., 2nd edition, Twigger, Warszawa.

Kalisz-Prokopik A. (2003), Alternatywne rozwiązywanie sporów – recepcja rozwiązań czy globalizacja koncepcji?, in: Filozofia prawna wobec globalizmu, ed. Stelmach J., Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, pp. 183-190.

Kolańczyk K. (1973), Prawo rzymskie, LexisNexis, Warszawa.

Koredczuk J. (2006), Sędziowie polubowni według kodeksu postępowania cywilnego z 1930 roku, „Acta Universitatis Wratislaviensis” no 2887, Prawo CCXCVIII, pp. 295-296.

Korybski A. (1993), Alternatywne rozwiązywanie sporów w USA, Wydawnictwo UMCS, Lublin.

Kulski R. (2002), Charakter prawny umów procesowych, Państwo i Prawo, LexisNexis, Warszawa.

Kulski T.R. (2006), Umowy dowodowe w postępowaniu cywilnym (rozważania na tle prawnoporównawczym), in: Czterdziestolecie Kodeksu postępowania cywilnego. Zjazd Katedr Postępowania Cywilnego w Zakopanem (7-9.10.2005), ed. Oklejak A., Zakamycze, Kraków, pp. 69-72.

Kuratowski R. (1932), Sądownictwo polubowne, Warszawa.

Lionnet K. (2001), Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit, Boorberg, Stuttgart-München-Hannover-Weimar-Dresden.

Mazur D. (2003), Prawo właściwe w międzynarodowym arbitrażu handlowym, „Kwartalnik Prawa Prywatnego” no. 1.

Mokry J. (1993), Czynności procesowe podmiotów dochodzących ochrony prawa w postępowaniu cywilnym, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław.

Mokry J. (1973), Odwołalność czynności procesowych w sądowym postępowaniu cywilnym, Wydawnictwo Prawnicze, Warszawa.

Morawski L. (2003), Główne problemy współczesnej filozofii prawa. Prawo w toku przemian, LexisNexis, Warszawa.

Morawski L. (1993), Proces sądowy a instytucje alternatywne (na przykładzie sporów cywilnych), „Państwo i Prawo” no. 1, pp. 21-22.

Morawski L. (1991), Ruch tzw. alternatywnego rozwiązywania sporów i jego znaczenie dla amerykańskiej jurysprudencji, „AUMCS” vol. XXXVIII, Sectio G, pp. 34-35.

Morek R. (2004), ADR w sprawach gospodarczych, C.H. Beck, Warszawa.

Morek R. (2006), Mediacja i arbitraż (art. 183<sup>1</sup> – 183<sup>15</sup>, 1154 – 1217 KPC). Komentarz, C.H. Beck, Warszawa.

## ARBITRATION AS AN INSTRUMENT OF SUPPORT FOR BUSINESS TRANSACTIONS

Mól A. (2001), Pojęcie i znaczenie alternatywnych metod rozstrzygania sporów (ADR), „Przegląd Prawa Handlowego”, vol. 12, pp. 29-37.

Myrcha M.A. (1948), Sądy polubowne w prawie kanonicznym. Studium prawno – porównawcze, Lublin.

Naworski J.P. (2005), Wybrane zagadnienia zapisu na sąd polubowny. Monitor Prawniczy, C.H. Beck, Warszawa.

Pasek A. (2005) Arbitraż międzynarodowy w Polskiej Rzeczypospolitej Ludowej, in: Postępowanie polubowne w dziejach. Materiały IX Konferencji Historyków Państwa i Prawa, Przemysł 7-10 lipca 2005, ed. Jurek P., Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław.

Paulsson J., Rawding N. (1995), The trouble with confidentiality, “Arbitration International”, vol. 11 no. 3, pp. 303-320.

Pazdan M. (2003) Prawo właściwe do oceny zapisu na sąd polubowny, „Rejent”, no. 10, p. 64.

Pazdan M. (2004), O mediacji i projekcie jej unormowania w Polsce, „Rejent”, no. 2, p. 15.

Piasecki K. (1995), Organizacja wymiaru sprawiedliwości, C.H. Beck, Warszawa.

Podkowiński T. (2004), Raport o polskich stałych sądach polubownych, „Radca Prawny”, no. 3, p. 113.

Potrzebowski K., Żywicki W. (1961), Sądownictwo polubowne. Komentarz dla potrzeb praktyki, Warszawa.

Przędzińska G. (2003), Poufność może być wadą, „Rzeczpospolita”, 17 stycznia.

Rajski J. (2001), Nowe wyzwania wobec sądów arbitrażowych, „Przegląd Prawa Handlowego”, no. 2, pp. 1-3.

Rajski J. (2001), Regulamin ADR Międzynarodowej Izby Handlowej, „Przegląd Prawa Handlowego”, vol. 11, pp. 38-42.

Rajski J. (2001), Zagadnienia poufności w arbitrażu handlowym, „Przegląd Prawa Handlowego”, no. 6, pp. 1-4.

Schlosser P. (1989), Das Recht der internationalen privaten Schiedsgerichtsbarkeit, Mohr Siebeck, Tübingen.

Skąpski A. (1981), Ograniczenia dowodzenia w procesie cywilnym, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków.

Siedlecki W. (1979), O tzw. umowach procesowych, in: Studia z prawa zobowiązań, ed. Radwański Z., Wydawnictwo Prawnicze, Warszawa-Poznań.

Skibińska M. (2009), Koszty mediacji w sprawach cywilnych, ADR. Arbitraż i Mediacja, C.H. Beck, Warszawa.

Szurski T. (2003), Międzynarodowy arbitraż handlowy (sądownictwo polubowne w międzynarodowych stosunkach handlowych), „Radca Prawny”, no. 2, pp. 67-70.

Szurski T. (1999), Podstawowe aspekty arbitrażowego rozstrzygnięcia sporów, „Przegląd Ustawodawstwa Gospodarczego”, no. 3, p. 4.

Szurski T. (1994), Uwagi wprowadzające do problematyki krajowego i międzynarodowego arbitrażu handlowego (gospodarczego), „Przegląd Ustawodawstwa Gospodarczego”, no. 1, p. 87.

Ślązak M. (2003), Alternatywne sposoby rozwiązywania sporów w sprawach cywilnych i handlowych w pracach CCBE, „Radca Prawny”, no. 2, p. 90.

Tomaszewski M. (2006), Skuteczność ochrony prawnej przed sądami polubownymi. Doświadczenia polskie, „Przegląd Sądowy”, no. 1, p. 45.

Tomaszewski M. (1994), Umowa o arbitraż. Podstawowe problemy prawne, „Przegląd Ustawodawstwa Gospodarczego”, no. 1, p. 15.

Wach A. (2005), Alternatywne formy rozwiązywania sporów sportowych, Liber, Warszawa.

Wach A. (2009), Znaczenie ADR dla realizacji roszczeń w postępowaniu cywilnym, in: Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego (Szczecin – Niechorze 28-30.9.2007), ed. Dolecki H., C.H. Beck, Warszawa, pp. 65-67.

Wilanowski B. (1929), Rozwój historyczny procesu kanonicznego, t. I: Proces kościelny w starożytności chrześcijańskiej, Wilno.

Wiśniewski A.W. (2005), Rozstrzygnięcie sporów korporacyjnych spółek kapitałowych przez sądy polubowne – struktura problemu (cz. I), „Prawo Spółek”, no.4, p. 23.

Zienkiewicz A. (2004), Mediacja instytucjonalna w postępowaniu procesowym w sprawach gospodarczych w Polsce – między inspiracją europejską a wewnętrzną koniecznością, in: Teoretycznoprawne problemy integracji europejskiej, ed. Leszczyński L., Wydawnictwo Uniwersytetu Marii Curie Skłodowskiej, Lublin.

Żołnierczuk M. (1978), Rzymskie sądownictwo polubowne (okres przedklasycy i klasycy), Lublin.

**Sądownictwo arbitrażowe jako instrument wsparcia obrotu gospodarczego**

**Streszczenie**

**Cel:** Artykuł dotyczy zagadnień związanych z arbitrażem i jego wpływem na rozwój gospodarki i przedsiębiorczości. Arbitraż może wpłynąć na przyspieszenie rozstrzygnięcia sporów i tym samym i tym samym doprowadzić do uaktywnienia współpracy pomiędzy przedsiębiorcami. Jeśli chodzi o koszt postępowania, arbitraż jest tańszy niż proces sądowy. Kolejną zaletą jest możliwość opracowania procedury arbitrażowej. Proces arbitrażowy może rozpocząć się zgodnie z ustaleniami poczynionymi przez strony. Strony mogą decydować o wyborze prawa, arbitrów, ich kompetencjach i sposobie prowadzenia postępowania. Na podstawie analizy przeprowadzonej w pracy autor zauważa, że arbitraż ma kluczowe znaczenie dla rozwoju gospodarczego. Szybkie rozwiązywanie sporów powoduje, że przedsiębiorcy wykazują zainteresowanie tą formą rozwiązywania konfliktów.

**Układ / metody badawcze:** Interpretację wpływu arbitrażu na transakcje handlowe przeprowadzono metodą historyczną i dogmatyczną. Zjawisko arbitrażu zostało wyjaśnione jako alternatywna forma, która istnieje obok postępowań mediacyjnych.

**Wnioski / wyniki:** Niniejsze badania pozwalają autorowi na postawienie tezy, że poza zwykłymi mechanizmami ekonomicznymi, mechanizmy przyczyniające się do rozwiązania sporów między przedsiębiorcami zapewniają również prawidłowe funkcjonowanie gospodarki. Jednym z takich mechanizmów jest właśnie sąd arbitrażowy. W przeciwieństwie do sądownictwa powszechnego, arbitraż jest skuteczniejszym instrumentem w rękach przedsiębiorców.

**Oryginalność / wartość artykułu:** Istnieje dwustronny związek między prawem a ekonomią. Artykuł pokazuje, że instytucje prawne takie jak arbitraż faktycznie służą celom gospodarczym. Z drugiej strony, prawne aspekty arbitrażu można również oceniać za pomocą pryzmatu analizy ekonomicznej.

*Słowa kluczowe:* Arbitraż, nagroda, spory, gospodarka, przedsiębiorcy, poufność, mediacja, arbiter, zasady arbitrażu

JEL: K40, K41