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Banking Arbitration Proceedings in Poland – a few Remarks on Arbitral Procedure Problems

Arbitration has become an increasingly popular dispute resolution method in Poland, in particular among entrepreneurs and companies conducting specialized business activity. Since 2008 – the beginning of the current financial crisis – arbitration has been used to resolve disputes arising out of contracts between banks and entrepreneurs, in particular those resulting from foreign exchange derivatives contracts. The purpose of this article is to present the characteristics of domestic arbitration proceedings in Poland, with particular emphasis on banking arbitration and adjudication concerning the Court of Conciliation (Arbitration) of the Polish Bank Association in Warsaw[1].

I. Legal basis for arbitration in Poland

1. Historical introduction

In the Polish legal system, arbitration law is governed by the fifth part of the Code of Civil Procedure[2], which came into force in 1965. According to art. 1154 of the Code of Civil Procedure, rules of this chapter apply only to both domestic and international arbitration proceedings, when the place of arbitration is located in the Republic of Poland. If the place of arbitration is located abroad or is not determined, those rules shall apply as expressly provided. The current regulation of arbitration proceeding was enacted in 2005, as the Code of Civil Procedure was amended by the Act of 28 July 2005 Amending the Code of Civil Procedure, which came into force on 17 October 2005[3]. Previous regulations on arbitration in Poland (articles 695 – 715 of the Code of Civil Procedure[4]) were criticized as outdated market expectations and inconsistent with international standards.

The current regulation of 2005 is based on and influenced by the 1985 UNCITRAL Model Law[5] – it is clearly marked in the explanation to the Draft Law on Amending the Code of Civil Procedure[6] that the creators of the new law had the objective to provide a procedure that would facilitate dispute resolution through arbitration in accordance with international standards. However, unlike the Model Law, Polish arbitration law is not limited to international commercial arbitration, but applies to all arbitration proceedings. The most essential differences include additional grounds for setting aside an award and the concept of the place of issuance of the award[7]. There is an important introductory

[1] Sąd Polubowny (Arbitrażowy) przy Związku Banków Polskich w Warszawie.

[2] Ustawa z dnia 17 listopada 1964 roku – Kodeks Postępowania Cywilnego (Journal of Laws, dated December 1, 1964, no. 43, pos. 296, as amended).

[3] Ustawa z dnia 28 lipca 2005 roku o zmianie ustawy – Kodeks Postępowania Cywilnego (Journal of Laws, dated September 16, 2005, no. 178, pos. 1478).

[4] Repealed in 2005.

[5] 1985 Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, The General Assembly Resolution no. 40/72 of 11 December 1985.

[6] Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego i ustawy – Prawo upadłościowe i naprawcze, druk sejmowy nr 3434, p. 1.

[7] *J. Szpara*, *P. Chojecki*, Report on Poland, in: Arbitration in 55 jurisdictions worldwide 2013, Law Business Research, London 2013, p. 349.

remark regarding legal terminology which has to be made here. The Code of Civil Procedure uses two terms: "sąd polubowny" (court of conciliation) and "sąd arbitrażowy" (court of arbitration), which are interchangeable[8]. This is also reflected in the title of the above mentioned part the Code of Civil Procedure: "Sąd polubowny (arbitrażowy)". This terminology is also used in names of arbitration courts seated in Poland.

2. International regulations

As it is not of the essence of this article, the most important international sources of arbitration law being in force on the territory of the Republic of Poland will only be mentioned in order to give a general overview of arbitration practice in Poland. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded in New York on 10 June 1958. Poland ratified the New York Convention on 10 March 1961, which entered into force on 1 January 1962. Poland made a reservation that the Convention will apply only to the recognition and enforcement of awards made in the territory of another contracting state[9]. Furthermore, Poland ratified the 1961 European Convention on International Commercial Arbitration on 15 September 1964, which entered into force on 14 December 1964 as well as the Energy Charter Treaty on 24 November 2000, which entered into force on 23 July 2001. Moreover, Poland is a party of more than sixty bilateral investment treaties.

3. Essential rules of arbitration law in Poland

In order to present arbitration in Poland, it is essential to make a few remarks regarding substantial rules of the arbitration procedure in the Polish legal system. The parties may submit to arbitration any proprietary or non-proprietary dispute that can be subject to court settlement, excluding claims for alimony and child maintenance. Submission of a dispute to be resolved by arbitration requires the agreement in writing of the parties, in which the parties mention the subject-matter of the dispute or a legal relationship from which the dispute may arise or has risen. Any provision of the arbitration agreement infringing the principle of equality of the parties is ineffective. Arbitration agreement regarding employment disputes can be concluded after the dispute arises. Submission of a dispute for resolution to the arbitration court does not exclude the possibility of granting any possible interim measures of protection by the court.

Regarding the composition of the tribunal of arbitration, the parties are free to determine the number of arbitrators and a procedure of appointing as well as challenging the arbitrators. If the parties do not determine the procedure of appointing arbitrators, the provisions of the Code of Civil Procedure will apply. Any natural person of any citizenship may be an arbitrator, except for a judge (this does not apply to retired judges). An appointed arbitrator is obliged to settle the dispute with impartiality and independence.

The arbitral tribunal is entitled to rule on its own jurisdiction, including the validity, existence and effectiveness of the arbitration agreement (*Kompetenz-Kompetenz* doctrine).

The parties of the dispute have to be treated equally in the arbitral proceedings. Each of the parties has the right to be heard and to present the case, including all the necessary

[8] *P. Pietkiewicz*, Legal and Organizational Framework of Arbitration In Poland, in: Arbitration in Poland, Warszawa 2011, p. 26.

[9] *P. Pietkiewicz*, op.cit., p. 23.

evidences. The parties are free to determine all the rules of arbitral procedure. If the parties do not determine the arbitral procedure, the provisions of the Code of Civil Procedure will apply. The arbitral tribunal is not bound by provisions relating to court proceedings and it can hear witnesses, admit documents, make inspections or admit any other necessary evidence. However, it may not use coercive measures. The arbitral tribunal shall decide the dispute in accordance with the law applicable to the contract or, if the parties agreed upon, on the basis of rules of equity or general rules of law. The award of the tribunal shall be made in writing and signed by the arbitrators. An award of the arbitral tribunal is equally binding as the judgment or settlement reached before a court.

An arbitral award made in Poland can be set aside in procedure on application to set aside the award which can be made within three months of delivery of the award. The award may be set aside if any of the conditions prescribed in art. 1206 §§ 1-2 is fulfilled.

II. Court of Conciliation (Arbitration) of the Polish Bank Association in Warsaw

The Court of Conciliation (Arbitration) of the Polish Bank Association was established on 6 March 1992, and thus has been in continuous operation for more than 20 years. The Court has settled over 180 disputes, but during the last four years it settled about 40 disputes with an average value of ca. EUR 2,500,000. The vast majority of the cases is domestic, only a small percentage of disputes is international. The Court may settle disputes about proprietary and non-proprietary rights that can be object to settlement, except for alimony and child maintenance cases – it handles national and international commercial disputes (not only involving the participation of banks) – therefore, the scope of cases which can be settled by the Court is as broad as the scope of arbitrability of the Code of Civil Procedure. Any hearings or procedural steps may be conducted in Polish or in any other language (with a translator approved by the Court) at the request of a party.

The Court of Arbitration of the Polish Bank Association in Warsaw is an authority functioning at the Polish Bank Association[10], a self-governing organization of banks established in 1991 which gathers 107 banks. The seat of the Court is in Warsaw. The Court acts on the basis of Arbitration Rules which were revised and amended in April 2012. The Arbitration Rules are coherent with the Code of Civil Procedure. The rule is that the tribunal settling the case consists of three arbitrators, but can also consist of one, five or seven arbitrators, if provided in the arbitration clause. What is important is that it offers the possibility of conducting two instances of arbitration procedure at the joint request of the parties made during the first instance proceedings or in the arbitration clause.

The Court has a list of arbitrators consisting of more than 30 eminent lawyers, both practitioners and scholars, representing the majority of universities in Poland. According to the Arbitration Rules, arbitrators of The Court of Arbitration at the Polish Bank Association shall be impartial and independent, and shall perform their duties according to their best knowledge and skills, in compliance with the "Code of Ethics for Arbitrators of the Court of Arbitration of the Polish Bank Association in Warsaw," adopted by the Court Presidium on 31 March 2010[11]. Obviously, arbitrators cannot undertake to perform

[10] Związek Banków Polskich.

[11] Zasady Etyki Arbitra Sadu Polubownego (Arbitrażowego) przy Związku Banków Polskich uchwalone przez Prezydium Sadu Polubownego w dniu 31 marca 2010 roku.

their duties if the circumstances of a given case give rise to justified doubts as to their impartiality or independence. The fees for proceedings before the Court of Arbitration at the Polish Bank Association are specified in its Tariff of Fees. A claimant must pay a registration fee (ca. EUR 500) and an arbitration fee proportional to the amount in dispute[12].

III. Procedural rulings of courts arising from foreign exchange derivatives contracts' disputes

1. Political ideas of solving the issue

The first disputes between banks and entrepreneurs regarding contractual relationships based on foreign exchange derivatives contracts arose in 2008 and, from the very beginning, turned out to be highly controversial. At first, Polish politicians wanted to regulate this matter *ex post*. Deputy Prime Minister and Minister of Economy *Waldemar Pawlak* said at the beginning of 2009 that the government has an idea to solve the problem of high debts of Polish entrepreneurs resulting from foreign exchange derivatives contracts by forcing banks to "renegotiate or cancel the contracts" or "allow the parties to terminate the contracts" ("umowy będą mogły być renegocjowane, unieważniane lub strony będą mogły od nich odstąpić")[13]. Those ideas, aiming to promote particular politicians, were met with strong criticism by lawyers. Most of them took a position that such a governmental intervention in any form, especially in presenting a new draft act in the *Sejm* (lower chamber of Polish Parliament), shall be treated as a violation of the *pacta sunt servanda* rule derived from the Constitution and therefore, breach of the Constitution itself[14]. Following significant doubts as to its compatibility with the Constitution, the government eventually abandoned the idea of special regulation of these contracts.

2. Arbitrability in lawsuits for determination of invalidity of agreements

At the end of 2008, the first lawsuits to determine the invalidity of agreements were filed in courts – both in common courts (sąd powszechny) and in the Court of Conciliation (Arbitration) of the Polish Bank Association. One of the first judgments was made by the Regional Court in Toruń[15] on 21 December 2009[16] and by the Supreme Court[17] on 21 May 2010[18]. The issue in dispute in the case was a matter of arbitrability of claims for

[12] P. Bielarczyk: General overview of arbitration practice, in: Arbitration in Poland, Warszawa 2011, p. 44

[13] I.e. *zaw, IAR*: Trzy sposoby Pawlaka na opcje walutowe, 10.02.2009, Gazeta Wyborcza, http://wiadomosci.gazeta.pl/wiadomosci/1,114873,6256671,Trzy_sposoby_Pawlaka_na_opcje_walutowe.html.

[14] *A. Boczkowski*: Eksperci: łapy precz od opcji, 11.02.2009, Puls Biznesu, http://www.pb.pl/1575727,94966,eksperci-lapy-precz-od-opcji.

[15] Sąd Okręgowy w Toruniu.

[16] VI CG 94/09.

[17] Sąd Najwyższy.

[18] II CSK 670/09.

declaration of existence or non-existance of rights or legal relationships. Arbitrability[19] means a characteristic of the dispute (case), due to which it can be subjected to an arbitration court on the basis of the arbitration clause concluded by and between the parties[20]. This matter is regulated in art. 1157 of the Code of Civil Procedure, which stipulates that the parties may submit to arbitration any proprietary or non-proprietary dispute that can be subject to court settlement, excluding claims for alimony and child maintenance cases, unless otherwise stated by any statutory provision (lex specialis). There is an ambiguity in the interpretation – it is unclear whether the condition of a dispute being subject to court settlement is related only to proprietary disputes or to non-proprietary disputes as well[21]. Generally speaking, this requirement of court settlement in a particular dispute has been criticized[22]. It is underlined that this regulation does not allow determining the arbitrability of many types of cases[23].

The plaintiff had filed a lawsuit before the Regional Court in Toruń, seeking the acknowledgment of invalidity of foreign exchange transactions concluded by and between the plaintiff and the defendant (bank). The plaintiff was fully aware of the fact that the parties had entered into an arbitration agreement (the arbitration clause was a part of the framework agreement, within which several foreign exchange transactions were concluded) and therefore presented a number of arguments to disprove the effectiveness of the arbitration clause concluded between the parties. The plaintiff in particular, among other arguments, stated that it is not acceptable to conclude a court settlement between the parties in cases where there is an inability of free disposal of a right by a party[24]. As a result, the plaintiff stated that according to art. 58 of the Civil Code, a legal action which is inconsistent with statutory law or is designed to circumvent statutory law cannot be a subject of court or out-of-court settlement between the parties[25].

The defendant bank filed to dismiss the lawsuit, invoking the arbitration clause concluded between the parties, according to art. 199 § 1 of the Code of Civil Procedure. The defendant raised the argument that the case does not concern any rights, which the plaintiff may not freely dispose of. That is why the case might be ended by a settlement, in order to repeal the existing dispute[26]. The Court dismissed the defendant's charges and held that it had jurisdiction to hear the case. This judgment was justified only by one of the plaintiff's arguments, i.e. the lack of arbitrability of the dispute. The court upheld the predominant opinion of the case law of the Supreme Court of Poland that the condition of a dispute being subject to court settlement is related to both proprietary and non-proprietary disputes[27]. In that manner, the Court started deliberating whether it is possible to file before the court of arbitration a lawsuit for determination of invalidity of a legal action having a proprietary right as a subject, i.e. such type of case might be a sub-

[19] There is no direct translation of this word into Polish. The first one to use the term "zdatność arbitrażowa" as a translation was *A.W. Wiśniewski*: Rozstrzyganie sporów korporacyjnych spółek kapitałowych przez sądy polubowne – struktura problemu (cz. I), Prawo Spółek 2005, nr 4, poz. 10. After four years the term was commonly used in literature and court rulings (i.e. uchwała Sądu Najwyższego z 7 maja 2009 roku, III CZP 13/09, OSNC 2010, nr. 3, poz. 34).

[20] *T. Ereciński, K. Weitz*, Sąd arbitrażowy, Warszawa 2008, p. 27.

[21] I.e. *A.W. Wiśniewski*, in: *A. Szumański (red.)*: Arbitraż handlowy, System Prawa Handlowego, tom 8, Warszawa, C.H. Beck 2010, p. 234.

[22] A.W. Wiśniewski, op.cit., p. 235.

[23] Ibidem, p. 236

[24] See: reasons of the judgment of the Regional Court in Toruń.

[25] Ibidem.

[26] Ibidem.

[27] See: judgment of the Supreme Court, dated 7 May 2009, III CZP 13/09.

ject of a settlement[28]. Moreover, the Court in the reasons of its judgment stated that it is unacceptable to conclude a settlement in a case in which it results from the merits of the case that there is an inability of free disposal of the right by parties. As the plaintiff claims for determination of invalidity of the agreement, it determines the type of settlement which may refer to the merits of the case[29]. Therefore, the court concludes that if the legal action is invalid, it cannot be a subject of a settlement.

It is the court, which decides whether an agreement is invalid. Parties are only capable of determining in the settlement that they will not claim for invalidity of agreement before the court, but they cannot determine the nature of the legal relationship. For these reasons, the Court stated, admissibility of settlement, which is not directly connected with the claim for invalidity of the agreement, is irrelevant for assessing of the arbitrability of such a claim.[30] It is obvious that all of the claims for determination on the basis of art. 189 of the Code of Civil Procedure cannot be judged by the court of arbitration, but only those of the claims which are related to the rights which cannot be freely disposed by the party. Invalidity of a legal action which is inconsistent with statutory law is independent of the will of the parties, and that is why they cannot change it by a settlement[31]. As a conclusion, the Court stated that the dispute regarding determination of invalidity does not have the attribute of arbitrability.

The position of the Regional Court in Toruń can be approved as accurate only in the scope of control of the content of the settlement ex post, when it is uncontested that the legal relationship does not exist and the parties would want to retrospectively validate it[32]. But apart from that, it has to be underlined that, at the beginning of a dispute, neither the parties nor the court know whether the right being a subject of the dispute exists or not. Therefore, it is not possible to eliminate the arbitrability of a dispute when it is impossible to know the ruling of the court at the moment of opening the case[33].

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Analogous facts were the matter of analysis of the Supreme Court in its judgment of 21 May 2010 – the plaintiff claimed for determination of nonexistence of several legal actions. The subject of the dispute – like in the afore-mentioned case before the Regional Court in Toruń – was agreements for the sale of so-called currency *put and call* options. The parties of the dispute had concluded an arbitration agreement for the Court of Conciliation (Arbitration) of the Polish Bank Association. The Court of Appeal in Szczecin[34] dismissed the claim due to the fact that the parties were bound by an arbitration agreement, deciding that the dispute is covered by the arbitration agreement.

The Supreme Court held that the dispute about the proprietary right required settlement fitness, and thus endorses the dominant view of the doctrine and case law presented above. The Supreme Court upheld that the phrase "likely to be the subject of court settlement" refers both to disputes concerning property rights and moral rights disputes. In the literature and case law there is no doubt that the dispute submitted to the arbitration

[28] *A. Szlęzak*, Zdatność arbitrażowa w sporach o ustalenie nieważności umowy – komentarz do orzeczenia Sądu Okręgowego w Toruniu z dnia 21 grudnia 2001 roku oraz Sądu Najwyższego z 21 maja 2010 roku, in: Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie, Warszawa 2011, page 316.

[29] See: reasons of the judgment of the Regional Court in Toruń.

[30] Ibidem.

[31] Ibidem.

[32] *A. Szlężak*, op. cit, page 317.

[33] Ibidem.

[34] Sąd Apelacyjny w Szczecinie.

may apply to both claims for payment, establishing a legal relationship or right, as well as shaping the legal relationship.[35]

Furthermore, the Supreme Court stated that grammatical interpretation of the art. 1157 of the Code of Civil Procedure provides the basis from the standpoint of this provision, that it is important that the type of dispute over the right to property or non-property can be the subject of a settlement court, but there is no matter whether the content of a particular settlement would be acceptable or not. The prerequisite is the suitability of abstract settlement opportunity to dispose of the party's rights (claims of stemming them), rather than the possibility of concluding a court settlement by the parties. In other words, it does not matter whether in the particular circumstances the parties may enter into an agreement of a specific content – such a contract could, in abstract terms apply to the legal relationship and rights under free disposal of parties, but due to its content in several cases may violate applicable laws or rules of social conduct (art. 58 § 1 and 2 of the Civil Code). While assessing the dispute in terms of its arbitrability, it is necessary to break away from the assessment of whether a settlement and its contents violate the law and whether the condition of "mutual concessions" contained in art. 917 of the Civil Code is fulfilled. Opposite reasoning would prevent from *a priori* assessing the suitability of concluding a settlement, and therefore the arbitrability of the dispute and such *a priori* and abstract assessment is required.[36]

The fact that the dispute concerns the existence (non-existence), the validity/non-validity or other defect of legal action[37] has no influence on the assessment of arbitrability. In this sense of the concepts of "arbitrability" and "settlement fitness", while bearing in mind the prerequisites of a settlement according to art. 917 of the Civil Code, it must be held that the admissibility of the settlement in this case should not depend on whether it is possible to determine in the form of a settlement the non-existence or the annulment of the contract, but rather on whether the parties can put an end to a dispute arising between them. If the plaintiff's claim arises from the right of the free disposal of the parties, it is undoubtedly a way to end this dispute depending on the will of the parties[38].

Taking those considerations into account, the Supreme Court focused on systematic and functional interpretation of art. 1157 of the Code of Civil Procedure. Firstly, the Court upheld that a potential dispute about the service arising from the agreement certainly could result in a court settlement. Therefore, there would be no doubt that the dispute has an attribute of arbitrability. The authority (i.e. the court) adjudicating the case would in the first place assess the question of the existence, then the validity of the legal relationship from which a plaintiff wants to provide results. If the arbitral tribunal may then determine the existence or the validity of the agreement in case of a claim for payment, it cannot be assumed that it is not authorized to do so in a case on the determination of the non-existence of the contract or its annulment[39]. Moreover, the Supreme Court stated that the competence of the arbitration court within the scope as outlined above is confirmed by art. 1180 § 1 of the Code of Civil Procedure, which stipulates that the fact that the underlying contract, in which the arbitration agreement was inserted is null and void or expired, shall not entail *ipso iure* the invalidity or expiry of the arbitration agreement. Therefore, the failure to acknowledge arbitrability to establish the non-existence or annulment of the contract would be inconsistent with the legal system's regulation of the institution of arbitration.

[35] See: reasons of the judgment of the Supreme Court.

[36] Ibidem.

[37] Ibidem.

[38] Ibidem.

[39] Ibidem.

The Supreme Court shared the opinion that the arbitration courts should be equipped with broad power. The intention of the legislature in amending the arbitration law was to give the parties broad powers to have the dispute settled by an arbitration court. Exceptions to this rule should be expressed explicitly in the law which has been marked in the text of art. 1157 of the Code of Civil Procedure, or should be justified with extraordinarily important reasons. Concerns in this regard must therefore be interpreted in favor of the existence of arbitrability of the dispute[40]. Argumentation presented by the Supreme Court in the judgment deserves to be approved. The main argument of the Supreme Court is that in any litigation – both when a party seeks satisfaction or only confirmation of existence or non-existence of a contract – a court needs to assess whether a contract is valid or not. Therefore, there are no reasons to maintain that when a party seeks a declaratory judgment on the existence/non-existence of its claim under a contract, such a lawsuit would be non-arbitrable, while a lawsuit for performance under the same contract would pass the settlement-worthiness test and would therefore be arbitrable[41].

The Supreme Court shared the position presented in the judgment described above in further resolutions. At this point, it is worth mentioning one of the resolutions, as it overruled the judgment of the Regional Court in Toruń. In the Resolution, dated 23 September 2010[42], the Supreme Court answered a legal question raised on 29 March 2010 by one of the courts of appeal:

> In the light of the art. 1157 of the Code of Civil Procedure, may the parties submit the dispute to arbitration to determine the invalidity of a legal action?

The answer presented by the Supreme Court fully confirmed the previous decision of this Court – the Court stated that the dispute over the determination of the non-existence of a legal relationship under the contract because of the nullity may be subjected by the parties to the arbitration court. Moreover, the Court upheld that settlement fitness of a dispute must be assessed in the abstract manner, separated from specific circumstances of a case, legal requirements and the considerations whether a possible settlement concluded by the parties would be permitted by law[43].

3. Dispute settlement ability of the Court of Conciliation (Arbitration) of the Polish Bank Association

As it was mentioned before, at the end of 2008, first lawsuits arising from foreign exchange derivatives contracts were filed to the Court of Conciliation (Arbitration) of the Polish Bank Association. From the very beginning, there was a part of entrepreneurs suing or being sued by banks, who claimed that the arbitration clause of the Court of Conciliation (Arbitration) of the Polish Bank Association was not valid. Several arguments were raised in order to justify this assertation. The most common one referred to the fact that it is not possible to guarantee the equality of the parties in the proceeding before the court which was established by and operates at a chamber of commerce[44] of

[40] Ibidem.

[41] *A. Szlężak*, op.cit., page 320.

[42] III CZP 57/10.

[43] See: reasons of the resolution of the Supreme Court on 23 September 2010, III CZP 57/10.

[44] The Polish Bank Association is a chamber of commerce of banks. Membership in the Polish Bank Association is voluntary and open for all banks established under the Polish law as well as for foreign credit institution branches operating in the Republic of Poland.

banks, where the dispute arises between an entrepreneur and a bank being a member of such a chamber of commerce.

One of the first rulings of the Supreme Court ascertaining whether the Court of Conciliation (Arbitration) of the Polish Bank Association is capable to settle a dispute between a bank and an entrepreneur was the judgment of the Supreme Court of 18 June 2010[45]. Firstly, the Court shared the opinion presented in previous rulings regarding the arbitrability of the dispute arisen from a claim for determination of non-existence of a legal relationship under the contract. The Court stated that the ability to submit the dispute to arbitration concerns the abstractly conceived and defined legal relationship, but not the claims arising from such a relationship, which are not subject to the arbitration clause. Moreover, the Court upheld that the prerequisite of arbitrability of the given dispute is an abstract possibility of the parties to freely dispose the rights derived from the legal relationship between the parties, rather than the possibility of concluding a settlement of a specified content[46].

The plaintiff argued that the dispute must not be settled by the Court of Conciliation (Arbitration) of the Polish Bank Association as the arbitration clause concluded between the parties is ineffective as it breaches the principle of equality of parties in the arbitration proceedings, according to art. 1161 § 2 of the Code of Civil Procedure. It was raised that in case of the dispute between an entrepreneur and a bank, being a member of the Polish Bank Association, there is a direct link between a bank and the Court of Conciliation, as i.e. members of the Presidium of the Court, including the President of the Court, are elected and dismissed by the Management Board of the Polish Bank Association, which comprises the President of the bank being the party of the dispute. It was also underlined that there are no safeguards excluding any influence of the Association on the arbitrators, which is important in the situation where the Association already published an official position regarding foreign exchange derivatives contracts.

The Supreme Court did not share these opinions. The Court agreed with the argumentation presented by the Court of Appeal which stated that the arbitration clause does not breach the principle of equality of parties in the arbitration proceedings[47]. Furthermore, the Supreme Court stated that the fact that the Court of Arbitration, chosen by the parties operates at the Polish Bank Association, is insufficient to cause the ineffectiveness of the arbitration clause, because regulations of the Code of Civil Procedure concerning arbitration do not refer to the courts as an institutional whole entity, but to individual members of the tribunal. Simply being a member of the arbitration court operating at an institution does not automatically cause the arbitrators being biased or dependent on the institution or its related entities, in particular when the selection of arbitrators is made by both parties of the dispute. It is necessary to link allegations of lack of impartiality of the arbitrator to a specific person.

There are no grounds to state that the circumstance that a court of arbitration operates at a specific organization, which applies to the vast majority of arbitration courts generally associated with a variety of organizational and professional corporations, business associations etc., by itself (*per se*) cannot determine the dependency of courts of arbitration on organizations with which they are involved, or the lack of impartiality of individual arbitrators. Such accusations can be effectively placed only on the basis of the rules governing the arbitrator or in the application to set aside the arbitration award[48].

[45] V CSK 434/09.

[46] See: reasons of the judgment of the Supreme Court.

[47] Ibidem.

[48] Ibidem.

Independently, the fact of the organizational relationships of the Court of Conciliation chosen by the parties with the Polish Bank Association and the content of the provisions of the Rules of procedure of this court (not deviating from the standard rules of the arbitration award) undoubtedly were (or should be) known to the parties at the moment of conclusion of the arbitration clause[49]. In the opinion of the Author of this article, this decision of the Supreme Court deserves recognition as a reasonable one, which is based on the provision of the Code of Civil Procedure ruling. The Supreme Court took into consideration the fact that the arbitrators elected to settle the dispute are chosen by the parties themselves. The Court of Conciliation as a permanent organizational entity or its authorities have no power to arbitrate the dispute. Their task is to "manage" the proceedings, and therefore it is incorrect to raise the argument of their impartiality.

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Later on, the adjudication of the Supreme Court regarding this issue changed. One of the last rulings of the Supreme Court of 24 November 2010[50] presented an entirely different opinion on this matter. The facts of this case were analogical. The lawsuit for payment was filed by a limited liability company against a bank and it was based, likewise, on foreign exchange derivatives contracts. Although the parties concluded the arbitration clause on the Court of Conciliation (Arbitration) of the Polish Bank Association, the plaintiff filed the lawsuit to the Regional Court and argued that the arbitration clause was ineffective as breaching the principle of equality of the parties. Courts in two instances rejected the claim, stating that the arbitration clause was valid and that it was the Court of Conciliation which has a jurisdiction to hear the case. The Supreme Court did not agree with the positions of the lower courts and stated that the Court of Appeal had taken a premature decision to reject the claim without considering all the facts of the case.

It is worth mentioning at this point that the rules of procedure of the Court of Conciliation (Arbitration) of the Polish Bank Association until 18 April 2012 contained provisions stipulating that the Secretariat of the Court of Conciliation keeps a list of arbitrators, which is, however, not binding to the parties, and the parties may appoint arbitrators from outside, except for the sole arbitrator[51]. However, the presiding arbitrator was elected by the arbitrators elected by the parties, from a list of arbitrators[52]. Therefore, it was not possible to elect the presiding arbitrator from outside the list. This provision is common for other courts of arbitration in Poland[53], and the *ratio legis* of these rules is the fact that, as the presiding arbitrator is the most important person leading the tribunal, it has to be a person with the required knowledge, skills and experience.

The Supreme Court in the analyzed decision made a short analysis of the arguments presented by the parties in this case and stated that the second-instance court in assessing provisions of the Rules of procedure the Court of Conciliation (Arbitration) of the Polish Bank Association regarding the nomination of arbitrators found that "only one" of the arbitrators is chosen from a list of arbitrators created by the Presidium of the Court which is appointed by the Management Board of the Polish Bank Association, which is

[49] Ibidem.

[50] II CSK 291/10.

[51] § 6.2 of the Rules of procedure of the Court of Conciliation (Arbitration) of the Polish Bank Association.

[52] § 15.1 of the Rules of procedure of the Court of Conciliation (Arbitration) of the Polish Bank Association.

[53] See: § 20.2. of the Rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw: "The sole arbitrator and the Chairman of the Arbitral Tribunal can be appointed solely from among the persons included in the List of Arbitrators."

elected only by the members of the Association, including the defendant bank. Such a statement raises fundamental objections from the viewpoint of ensuring the principle of equality of parties, the more that it was a choice of the presiding arbitrator[54].

The principle of equality expressed in art. 1161 § 2 of the Code of Civil Procedure assumes that neither party of the dispute resolved by the arbitral tribunal should use any special powers in proceedings before the court of arbitration. This certainly applies to the method of selecting arbitrators. This is clearly highlighted by art. 1169 § 3 of the Code of Civil Procedure stating that the provisions of the agreement granting one party more power in the appointment of an arbitration tribunal are invalid. It should be appropriately referred to a situation where the rules of procedure of a permanent court of arbitration chosen by the parties contain such a provision regarding the appointment of arbitrators. The Court of Appeal had an obligation to consider whether the provisions of the regulations concerning the selection of the arbitrators in the event of a dispute one party of which is not a bank do not give more power to a bank in this regard and therefore whether it did not violate the principle of equality[55].

In summary, the Supreme Court did not define that the arbitration agreement was invalid, but those considerations have to be made by the Court of Appeal. If it were determined that the regulation concerning the selection of one of the arbitrators was contrary to the principle of equality, it would, as a result, be necessary for the Court of Appeal to consider the implications for the power of the arbitration clause. Consequently the case was returned to the Court of Appeal in Szczecin which in its decision of 22 July 2011[56] rejected the claim and stated that fundamentally the arbitration agreement between the parties of the dispute is valid. However, the Court analyzed the Rules of procedure of the Court of Conciliation (Arbitration) of the Polish Bank Association and stated that those Rules are in breach of the principle of the equality of the parties on the basis of art. 1161 § 2 of the Code of Civil Procedure.

The selection of one of the arbitrators – the presiding arbitrator – violates this principle, because in the proceedings before the court of arbitration none of the parties to the dispute shall be granted special powers, including any special rights regarding the selection of an arbitrator. An analysis of the regulation of the Rules of procedure of the Court of Conciliation concerning the choice of the presiding arbitrator indicates that the parties are not able to freely choose any person to preside the arbitral tribunal at the Court of Conciliation, as the circle of persons is limited to persons from the list of arbitrators. The principle of equality of the parties to the dispute is therefore not preserved in this case due to the fact that the presiding arbitrator is chosen from the list of arbitrators which is created by the Presidium of the Arbitration Court, the members of which are appointed by the Management Board of the Polish Bank Association. The composition of the Management Board of the Polish Bank Association depends solely on banks, including the defendant bank[57].

As a consequence of the given argumentation, the Court of Appeal stated that it must be held that the provisions of the Rules of procedure of the Court of Conciliation give one party more power in the appointment of arbitrators, which violates the principle of equality of parties. Therefore, these provisions are ineffective in this regard and have no legal effect. The sanction for violation of the principle of equality of parties is the ineffectiveness of the particular provisions, and not of the whole arbitration clause. In place of the ineffective provisions the relevant provisions of the Code of Civil Procedure will

[54] See: reasons of the judgment of the Supreme Court.

[55] Ibidem.

[56] I ACz 159/11.

[57] See: reasons of the judgment of the Court of Appeal in Szczecin.

apply, as if the parties have not agreed on how to appoint the arbitrators to settle the dispute.

4. Amendment of the Rules of procedure of the Court of Conciliation (Arbitration) of the Polish Bank Association

As a result of the argumentation of courts in the decisions presented above, the Presidium of the Court of Conciliation (Arbitration) of the Polish Bank Association decided to initiate works on the amendment of the Rules of Procedure. The main objective was to eliminate those provisions of the Rules of Procedure which were determined as invalid. Due to the need to take into account the Supreme Court's jurisprudence, which in its decisions questioned the obligation to choose the presiding arbitrator from the list of arbitrators of the Court as a violation of the principle of equality of the parties in the arbitration proceedings before the Court of Conciliation (Arbitration) of the Polish Bank Association, there was a necessity to change the Rules of Procedure in order to avoid allegations of bias and favoritism of certain parties in the proceedings at the expense of the interests of others.

Bearing in mind that the principle of equality of the parties and the impartiality of the Court of Conciliation is one of the most important rules of arbitration, the Presidium has submitted an application for the adoption of amendments to the Rules in this regard. The amendment of the Rules of procedure was adopted by the General Assembly of the Polish Bank Association on 18 April 2012. Since that date the Court of Conciliation is one of the few in Poland which has a list of arbitrators which is fully optional and auxiliary not only in appointment of arbitrators by the parties, but also in appointment of the presiding arbitrator by arbitrators.

IV. Conclusion

In conclusion, it should be noted that the Supreme Court's jurisprudence on the nature and place in the justice system of the arbitration is ambiguous and not yet precise and stable. In the Author's opinion, it is impossible to agree with the part of the theses presented in the judgments of the Supreme Court which stated that the Court of Conciliation (Arbitration) of the Polish Bank Association does not guarantee equal treatment of the parties in the arbitration proceedings before that court only because of its location at the chamber of commerce of banks: in the first place because of the fact that the dispute shall be settled by arbitrators chosen freely by the parties, and not by any authority or any third party. Only in cases where the party is unable to make such a choice, the substitute arbitrator selection procedure is initiated.

Secondly, the arbitrators appointed by the parties and the presiding arbitrator selected by the arbitrators shall settle the dispute before an arbitration court, and not any other authority. Therefore, the argument concerning the independence and autonomy should not apply to the court as an institution, but to the individual arbitrator assessed *ad casum*, since the independence can be assessed only in a specific case.

Finally, it must be concluded that the rules for selecting a presiding arbitrator from the list of arbitrators of the arbitration court should not be thoughtlessly criticized as a breach of equality of the parties. This rule is intended to ensure that the proceedings will be conducted by a competent and experienced person, thus ensuring the economics of the process and the fast resolution of the dispute. There is no denying that this is entirely in the interest of the parties concerned. Moreover, the selection of the presiding arbitrator

remains the standard in the regulations of permanent arbitration courts in Poland and previously has not been the subject of such a criticism from the Supreme Court.