„Problemy Prawa Prywatnego Międzynarodowego". T. 22
ISSN 2353-9852

Grzegorz Żmij[a)]

The arbitrability of disputes concerning personal rights

Abstract: The notion of arbitrability, which has not been defined in international treaties and has been given various meanings in international literature covers the question whether the subject-matter of the dispute submitted to arbitration is one that can be resolved by arbitration. In Polish literature, arbitrability is defined in a similar manner, as a feature of the dispute (case) that makes it capable of being resolved by the arbitration tribunal, i.e. it falls under the jurisdiction of the arbitration tribunal as a consequence of concluding an arbitration agreement.

Despite certain doubts concerning specific issues, the division of subjective rights into economic and non-economic rights is widely adopted in the Polish doctrine and it covers two categories of rights: personality rights, i.e. rights protecting personal interests, as far as immaterial rights protecting the right holder's personal interests, and non-economic family rights.

The relative nature of arbitration always causes trouble when the case may concern rights of a third party. Traditionally, most disputes resolved through arbitration are cases of a contractual nature. As a result of the 'commercialisation of personal goods', it is nowadays also possible that the contractual dispute may concern the infringement of these goods. An example of this can be found from the provision of Article 4.7.2 sec. 2 of the UNIDROIT Principles of International Commercial Contracts, which gives the aggrieved party in a case of non-performance of the contract, the right to damages covering non-pecuniary harm, which includes, for instance, physical suffering or emotional distress.

In spite of the fact that the tendency to cover immaterial harm within the frame of contractual liability has spread since the first edition of the UNIDROIT Principles

[a)] Dr hab., Associate Professor, Director of the Research Centre for European Private Law, Faculty of Law and Administration, University of Silesia in Katowice.

(1994), including in European private law, most cases concerning an infringement of a personal right are still tortious by nature.

The solution taken by Polish lawmaker in Article 1157 KPC concerning arbitrability of disputes is rather unnecessarily complicated. The ostensibly unambiguous wording of that article does not suffice the requirement of legal certainty.

Keywords: arbitration, personal rights, non-pecuniary loss, arbitrability, UNIDROIT Principles

For the purposes of this analysis, the notion of arbitrability, which has not been defined in international treaties[1] and has been given various meanings in international literature[2], will be further used in a sense of "objective arbitrability" or "*arbitrabilty ratione materiae*". It thus covers the question whether the subject-matter of the dispute submitted to arbitration is one that can be resolved by arbitration[3]. In Polish literature, arbitrability is defined in a similar manner, as a feature of the dispute (case) that makes it capable of being resolved by the arbitration tribunal, i.e. it falls under the jurisdiction of the arbitration tribunal as a consequence of concluding an arbitration agreement[4]. The notion of arbitrability defined in that way is the objective scope of jurisdiction of the arbitration tribunal[5]. Another important observation may also be that the lawmaker uses arbitrability as a tool to control the scope of admissibility of arbitration as a dispute resolution mechanism[6].

---

[1] R. Sikorski: *General Issues*. In: Ł. Błaszczak, R. Sikorski, M. Zachariasiewicz, K. Zawiślak, G. Żmij: *Polish Arbitration Law*. Transl. B. Filipowicz, J. Rewiński, B. Gessel Kalinowska vel Kalisz (ed.). Warszawa 2014, p. 39.

[2] Conf. e.g. E. Gaillard, in: *Fouchard, Gaillard, Goldman on International Arbitration*. Eds. E. Gaillard, J. Savage. The Hague—Boston—London 1999, pp. 312, 313; L. Yves Fortier: *Arbitrability of Disputes*. In: *Liber Amicorum in honour of Robert Briner*. Eds. G. Aksen et al. Paris 2005, p. 269, 268; J.-F. Poudret, S. Besson: *Comparative Law of International Arbitration*. 2nd ed. London 2007, pp. 288, 289; M. Pazdan: *The Interplay between the Law Applicable to the Arbitration Agreement and the Laws Concerning Other Issues*. In: *The Challenges and the Future of Commercial and Investment Arbitration. Liber Amicorum Jerzy Rajski*. Ed. B. Gessel Kalinowska vel Kalisz. Warszawa 2015, p. 210; J.J. Barceló III: *Arbitrability Decisions Before, During, and After Arbitration*. In: *Defining Issues in International Arbitration. Celebrating 100 Years of the Chartered Institute of Arbitrators*. Ed. J.C. Betancourt. Oxford 2016, p. 67, 68.

[3] E. Gaillard, in: *Fouchard, Gaillard, Goldman*..., p. 313.

[4] K. Weitz, in: J. Ciszewski, T. Ereciński, P. Grzegorczyk, K. Weitz: *Kodeks postępowania cywilnego. Komentarz*. T. 6: *Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*. Ed. T. Ereciński. 5th ed. Warszawa 2016, p. 832.

[5] Ibidem.

[6] M. Pazdan: *The Interplay*..., p. 210.

Looking from a comparative perspective, the majority of laws provide that claims capable of being settled by the parties are arbitrable[7]. In France, for example, Article 2059 of the French Civil Code stipulates that "all persons may make arbitrations agreements relating rights of which they have free disposal"[8]. In Netherlands, the only restriction is that arbitration cannot be used to ascertain legal consequences that may not be freely determined by the parties (Article 1020(3) of the Dutch Code of Civil Procedure)[9]. The exclusive jurisdiction of state courts, in contrast, comprises *inter alia* subjects in which dispute resolution results in a ruling that has legal effect in relation to everyone ('*erga omnes*'), and not just to the parties to the dispute[10].

As an exemption, Swiss law, in Article 177 sec. 1 Swiss Private International Law Act (IPRG) provides that any dispute concerning economic rights (rights involving an economic interest) may be the subject of arbitration[11]. German law, however, combines an exclusive material criterion along with one based on the freedom of the parties to transfer or waive their rights by a way of settlement[12]. Specifically, pursuant to § 1030 sec. 1 German Code of Civil Procedure (ZPO), any claim concerning economic rights may be the subject of an arbitration agreement; an arbitration agreement concerning claims involving a non-economic interest is admissible only if the subject-matter of the dispute can be the subject of a settlement.

Despite certain doubts concerning specific issues[13], the division of subjective rights into economic and non-economic rights is widely adopted in the Polish doctrine[14]. For the purposes of this analysis, the notion of per-

---

[7] J.-F. Poudret, S. Besson: *Comparative Law…*, p. 289.

[8] P. Chrocziel, B. Kosolowsky, R. Whitener, W. Prinz zu Waldeck und Pyrmont: *International Arbitration of Intelectual Property Rights, A Practitioner's Guide*. München 2017, s. 19.

[9] B. van der Bend, M. de Boer, L. Giacometti-Vermeer, M. van de Hel-Koedoot, M. Leijten, E. Meerdink, R. Schnellaars, M. Ynzonides: *A Guide to the NAI Arbitration Rules Including a Commentary to the Dutch Arbitration Law*. Eds. B. van der Bend, M. de Boer, M. Leijten, M. Ynzonides, p. 18.

[10] Ibidem.

[11] Conf. P.M. Baron, S. Liniger: *A Second Look at Arbitrability*. Arbitration International ("Kluwer Law International" 2003, Vol. 19, Issue 1) pp. 27 ff.

[12] Conf. J.-F. Poudret, S. Besson: *Comparative Law…*, p. 290.

[13] M. Romanowski: *Podział praw podmiotowych na majątkowe i niemajątkowe*. "Państwo i Prawo" 2006, No. 3, pp. 24 ff.

[14] Conf. S. Grzybowski, in: „System Prawa Cywilnego". Vol. 1: *Część ogólna*. Ed. S. Grzybowski. Wrocław—Warszawa—Kraków—Gdańsk—Łódź 1985, pp. 230—231; Z. Radwański: *Prawo cywilne — część ogólna*. 7th ed. Warszawa 2004, pp. 96, 97; A. Wolter, K. Ignatowicz, K. Stefaniuk: *Prawo cywilne. Zarys części* ogólnej. 2nd ed. Warszawa 2000, pp. 138, 139; M. Romanowski: *Podział…*, p. 24; M. Pyziak-

sonal (non-economic or moral[15]) rights is of course important. The notion covers two categories of rights: personality rights, i.e. rights protecting personal interests, as far as immaterial rights protecting the right holder's personal interests, and non-economic family rights[16]. Personal rights of natural persons are protected by Articles 23 and 24 of the Polish Civil Code. The Code offers a non-exhaustive catalogue of personal interests such as: health, freedom, dignity, freedom of conscience, name and nickname, a person's pictures, secrecy of correspondence, inviolability of the home, as well as artistic, inventive and scientific activity[17].

The concept of personality rights is widely adopted in the main Continental legal systems, such as French, German or Swiss law, where the protection of personality rights is organised in a rather similar way, while English law adopts a different approach[18]. With the plurality of personal interests, the majority of Polish legal science links the plurality of personal of personal subjective rights[19]. One of the common features of personal rights is the absolute (*erga omnes*) character of those rights[20].

The current Polish regulations concerning arbitration were introduced by the Act Amending the Code of Civil Procedure of 28 July 2005[21], which thoroughly modified the existing regulations on arbitration. The official statement of reasons for the draft of that legal act states that it was prepared partially on the basis of the Model Law created in 1985 by the United Nations Commission on International Trade Law (UNCITRAL), recommended to all Contracting States by the UN General Assembly as a model to be followed when enacting domestic regulations on the issues in question[22]. As a result, the current Polish regulations on arbitration fail to take into account the 2006 Model Law amendment.

According to the rules of law applicable prior to the 2005 reform, the parties, acting within the limits of their capacity to enter into legal obli-

---

Szafnicka, in: „System Prawa Prywatnego". Vol. 1: *Prawo cywilne — część ogólna*. Ed. M. Safjan. 2nd ed. Warszawa 2012, p. 821.

[15] Conf. P. Chrocziel, B. Kosolowsky, R. Whitener, W. Prinz zu Waldeck und Pyrmont: *International Arbitration*..., p. 18.

[16] A. Wolter, J. Ignatowicz, K. Stefaniuk: *Prawo*..., p. 139.

[17] M. Kępiński, in: *Handbook of Polish Law*. Eds. W. Dajczak, A.J. Szwarc, P. Wiliński. Warszawa—Bielsko-Biała 2010, p. 409.

[18] See more W. van Gerven, J. Lever, P. Larouche, Ch. Von Bar, G. Viney: *Torts. Scope of protection*. Oxford 1998, pp. 203—206. Conf. to the Swiss law

[19] M. Kępiński, in: *Handbook of Polish Law*..., p. 409.

[20] A. Wolter, K. Ignatowicz, K. Stefaniuk: *Prawo*..., s. 137, 184.

[21] "Journal of Laws" No. 178, item 1478.

[22] The Sejm of the Republic of Poland, IV term, Document No. 3434, p. 1, http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/3434/$file/3434.pdf (accessed on 4 August 2017).

gations, were only able to refer disputes to arbitration where the disputes in question concerned economic rights[23].

However, under the present Article 1157 Code of Civil Procedure (KPC), subject to the exceptions provided for by law, the parties may refer disputes concerning economic and non-economic rights to an arbitration tribunal, as long as such rights may be subject of a court settlement, with the exception of cases involving the payment of alimony[24].

The different views in the literature concern the question as to whether the requirement that the rights may be subjected to court settlement affects both categories of rights: economic and non-economic[25]. Some authors argue that the criterion applies only to non-economic rights, which historically explained the introduction of the division of economic and non-economic rights to Article 1157 KPC during the legislative work[26].

Looking again at the contents of Article 1157 KPC, it seems that the division into economic and non-economic rights does not play any crucial role in assessing whether a case is capable of being decided through arbitration[27]. In spite of the fact that the wording of the provision is not

[23] R. Sikorski: *General Issues…*, p. 40.

[24] The solution taken by the Polish lawmaker has been criticised in the doctrine conf. A.W. Wiśniewski: *Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów*. Warszawa 2011, pp. 194, 195; also in connection with the history of that regulation I. Bałos: *Zdatność arbitrażowa sporów dotyczących patentu*. Warszawa 2017, pp. 188—191.

[25] K. Weitz, in: J. Ciszewski, T. Ereciński, P. Grzegorczyk, K. Weitz: *Kodeks…*, p. 836.

[26] A. Zieliński: *Kodeks postępowania cywilnego*. T. 2: *Komentarz do art. 507—1217*. Warszawa 2006, s. 1359; R. Morek: *Mediacja i arbitraż (art. 183[1]—183[15] k.p.c. — art. 1154—1217 k.p.c.). Komentarz*. Warszawa 2006, s. 115, nb. 4; K.A. Piwowarczyk: *Umowa o arbitraż w świetle ustawy z 28 lipca 2005 r. o zmianie ustawy Kodeks postępowania cywilnego*. "Prawo Spółek" 2006, No. 6, p. 51.

[27] So i.a. Ł. Błaszczak, M. Ludwik: *Sądownictwo polubowne (Arbitraż)*. Warszawa 2007, s. 100; K. Falkiewicz, R. Kwaśnicki: *Arbitraż i mediacja w świetle najnowszej nowelizacji Kodeksu postępowania cywilnego*. "Przegląd Prawa Handlowego" 2005, nr 11, pp. 33, 34; T. Ereciński: *Zdatność arbitrażowa (art. 1157 k.p.c.)*. In: *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*. Eds. P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel. Warszawa 2008, pp. 9, 10; A.W. Wiśniewski, in: "System Prawa Handlowego". T. 8: *Arbitraż handlowy*. Red. A. Szumański. Warszawa 2010, p. 234; A. Wolak-Danecka: *Rozstrzyganie sporów przez sąd polubowny — próba ujęcia zdatności arbitrażowej*. "Rejent" 2013, No. 4, p. 129; I. Bałos: *Zdatność…*, p. 191; K. Weitz, in: J. Ciszewski, T. Ereciński, P. Grzegorczyk, K. Weitz: *Kodeks…*, pp. 836, 837; conf. also resolution of SN of 7 May 2009, III CZP 13/09, OSNC 2010, No. 1, item 9 and a resolution of SN of 23 September 2010, III CZP 57/10, OSNC 2011, No 2, item 14.

completely clear, which leads to controversies in the doctrine[28], in the end it is the criterion of whether the dispute can be settled (settleability, Polish: zdatność ugodowa) that decides on its arbitrability[29].

Disputes concerning rights arising out of legal relationships that, under the provisions of substantive law, are not capable of being legally transferred or waived by the parties, cannot be settled, but the lack of settleability may be a consequence of the legal nature of a given right, rather than an express exclusion provided for under the provisions of applicable laws[30]. A dispute is not capable of being resolved by arbitration when, in light of the provisions of substantive law, a given part of a legal relationship, or the resulting rights or obligations, are not capable of being transferred or waived by the parties[31]. The typical examples of such disputes given by the doctrine cover such cases as those pertaining to divorce, separation, annulment of marriage, parental authority, affiliation of a child and adoption[32].

Now, returning again to personality rights in the sense defined above, further reconsideration should be given to the interplay between the absolute legal character of such rights and arbitration, which is an institution based on an arbitration agreement. The relative nature of arbitration always causes trouble when the case may concern rights of a third party.

Traditionally, most disputes resolved through arbitration are cases of a contractual nature. As a result of the 'commercialisation of personal goods', it is nowadays also possible that the contractual dispute may concern the infringement of these goods[33]. An example of this can be found from the provision of Article 4.7.2 sec. 2 of the UNIDROIT Principles of International Commercial Contracts, which gives the aggrieved party in a case of non-performance of the contract, the right to damages covering non-pecuniary harm, which includes, for instance, physical suffering or emotional distress.

---

[28] Conf. A.W. Wiśniewski, in: "System Prawa Handlowego". T. 8: *Arbitraż handlowy*..., p. 234; R. Sikorski: *General Issues*..., p. 42; K. Weitz, in: J. Ciszewski, T. Ereciński, P. Grzegorczyk, K. Weitz: *Kodeks*..., p. 836.

[29] K. Weitz, in: J. Ciszewski, T. Ereciński, P. Grzegorczyk, K. Weitz: *Kodeks*..., p. 837.

[30] Conf T. Ereciński, K. Weitz: *Sąd arbitrażowy*. Warszawa 2008, p. 120; R. Sikorski: *General Issues*..., p. 43; K. Weitz, in: J. Ciszewski, T. Ereciński, P. Grzegorczyk, K. Weitz: *Kodeks*..., p. 835.

[31] K. Weitz, in: J. Ciszewski, T. Ereciński, P. Grzegorczyk, K. Weitz: *Kodeks*..., p. 835.

[32] Conf. e.g. R. Sikorski: *General Issues*..., p. 43.

[33] As an aside, it should be noted the first appearances of granting 'moral damages' within the scope of investment arbitration, conf. C. Mc Lachlan, L. Shore, M. Weininger: *International Investment Arbitration, Substantive Principles*. 2nd ed. Oxford 2017, pp. 447—450 and the cases presented there.

In spite of the fact that the tendency to cover immaterial harm within the frame of contractual liability has spread since the first edition of the UNIDROIT Principles (1994), including in European private law[34], most cases concerning an infringement of a personal right are still tortious by nature.

The question as to whether the tort may be the subject of a dispute that can be resolved in arbitration concerns both its arbitrability, as well as the objective scope of the obligations arising from the arbitration agreement.

The question posed above — despite the complicated issues concerning the links between the tort committed and the contract — encompasses the problem of the arbitrability of tortious disputes. There is nothing in either domestic[35] or international[36] case law[37] to suggest that, in principle, disputes arising from non-contractual obligations — including both obligations from torts and unjust enrichment, as well as the management of the affairs of another without mandate (*negotiorum gestio*), could not be included within the ambit of arbitration proceedings. It is worth mentioning here the opinion of E. Gaillard, who points out that this also occurs in cases where the basis of an action is a claim made in connection with an act that is contrary to public policy[38]. In such cases, arbitrators usually consider themselves competent to resolve the case, even though this gives rise to a risk that the award of the arbitration tribunal may be subsequently challenged in order to ensure the correct application of authoritative rules of this kind[39].

M. Tomaszewski emphasises that the issue is clear where the parties conclude an arbitration agreement after the emergence of a dispute relating to a non-contractual obligation[40]. However, one can argue that such situations rarely occur in practice.

---

[34] Conf e.g. Leitner v. TUI GMBH&Co., ECJ 12.03.2002, C-168/00. EurLex nr 62000J0168. See more V.V. Palmer: *General introduction*. In: *The Recovery of Non-Pecuniary Loss in European Contract Law*. Ed. V.V. Palmer. Cambridge 2015, p. 1 ff.

[35] M. Tomaszewski, in: "System Prawa Handlowego". T. 8: *Arbitraż handlowy*..., p. 326.

[36] E. Gaillard, in: *Fouchard, Gaillard, Goldman*..., p. 306.

[37] *ICC Final Award in case 6216*. "ICC International Court of Arbitration Bulletin" 2002, vol. 13, No. 2, p. 58 *et seq*.; *ICC Final Award in case 6618*. "ICC International Court of Arbitration Bulletin" 2002, vol. 13, No. 2, p. 64 *et seq*.; Interim Award in case 9517. "ICC International Court of Arbitration Bulletin" 2002, vol. 13, No. 2, p. 87.

[38] Cf. the remarks made on this term in a comparative context: J.-F. Poudret, S. Besson: *Comparative Law*..., pp. 856—858.

[39] E. Gaillard, in: *Fouchard, Gaillard, Goldman*..., p. 306.

[40] M. Tomaszewski, in: "System Prawa Handlowego". T. 8: *Arbitraż handlowy*..., p. 326.

An even less likely possibility — although one that cannot be excluded — is that the parties may conclude an agreement providing, *a priori*, that all disputes potentially arising between them in connection with any torts committed will be resolved by an arbitration tribunal[41]. The problem is, however, that, unlike in the case of contractual obligations, the parties to a legal relationship cannot, as a rule, be determined in advance with sufficient certainty with respect to torts, and the involvement of third parties in such cases is always likely. This is important since, in principle, arbitration agreements do not cover third parties[42].

Another situation occurs where an arbitration clause is contained a contract and one of the parties commits a tort causing the infringement of a personality right of the other party in the course of performing the contract in question, or in connection with performing it, as well as where the very conclusion of the contract, or the inclusion of a specific provision therein, constitutes a tort[43].

In a case of concurrent liability in contract and in tort, unlike in other cases where arbitrability is the only issue at stake, the scope of the competences of the arbitrators also need to be considered in light of a specific arbitration agreement. These are determined on the basis of the interpretation of the statements of intent made by the parties to the arbitration agreement in question[44]. The prevailing opinion among legal commentators and academics is that the interpretation of the arbitration clause to be applied in such cases must allow for the clause in question to be extended also to *ex delicto* claims (claims in tort) arising concurrently with *ex contractu* claims (claims in contract), where the relevant arbitration clause expressly states that it is intended to apply also to disputes arising in connection with the given contract, and provided that the governing law for the given contract allows for such a concurrence of claims[45].

---

[41] G. Żmij: *Arbitration agreement*, in: Ł. Błaszczak, R. Sikorski, M. Zachariasiewicz, K. Zawiślak, G. Żmij: *Polish Arbitration Law*. Transl. B. Filipowicz, J. Rewiński, B. Gessel Kalinowska vel Kalisz (ed.)..., p. 137.

[42] Ibidem.

[43] Conf. as to the act of unfair competition, see more G. Żmij: *Arbitration*..., pp. 132 ff. Because of the present consent of the aggrieved party it may rarely concern the "classical" torts affecting personality rights.

[44] J.-F. Poudret, S. Besson: *Comparative Law*..., p. 265.

[45] E. Gaillard, in: *Fouchard, Gaillard, Goldman*..., p. 306; M. Tomaszewski, in: "System Prawa Handlowego". T. 8: *Arbitraż handlowy*..., p. 327; G. Żmij: *Arbitration*..., s. 138.

In the statement of reasons for the decision dated 5 February 2009[46], the Polish Supreme Court emphasised that, "according to the views presented by legal scholars, including disputes on contractual relations within the jurisdiction of the arbitration tribunal means that the jurisdiction of the tribunal would extend to all claims for the performance of a contract, claims arising in the event of the non-performance or improper performance of a contract, claims for the restitution of unjustified benefits arising due to the invalidity of a contract or the withdrawal from such a contract, as well as claims in tort in cases where they arise from events that concurrently constitute the non-performance or improper performance of a contract"[47].

This view was repeated in the decision of the Supreme Court dated 24 October 2012[48]. However, in concluding its reasoning, the Court emphasised that, "whether such a situation has indeed taken place is dependent upon the terms and conditions of the contract concluded by the parties"[49].

By the way, it could be mentioned that labour law disputes may also concern personal rights (e.g. cases of bullying in the workplace), where Article 1164 KPC provides for stricter requirements concerning arbitration agreements encompassing such disputes. In accordance with the provision in question, such agreements may only be concluded after a dispute has arisen, and must be made in writing.

As an aside, it should be mentioned that corporate rights are considered in the literature merely as economic rights[50]. Without trying to

---

[46] Decision of the Supreme Court dated 5 February 2009, case ref No I CSK 311/08, http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/I%20CSK%20311-08-1.pdf (accessed on 4 August 2017).

[47] Conf. G. Żmij: *Arbitration*..., p. 119.

[48] Decision of the Supreme Court dated 24 October 2012, case ref. No IV CKN 35/12, LEX No. 1232776, http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/III%20CSK%2035-12-1.pdf (accessed on 4 August 2017).

[49] Conf. G. Żmij: *Arbitration*..., p. 119.

[50] Conf. i.a. A.W. Wiśniewski: *Prawo o spółkach. Podręcznik praktyczny*. T. 3: *Spółka akcyjna*. Warszawa 1993, pp. 122—124; M. Romanowski: *Podział*..., p. 32; M. Tomaszewski: *O zaskarżaniu uchwał korporacyjnych do sądu polubownego — uwagi „de lege ferenda"*. „Przegląd Sądowy" 2012, No. 4, p. 23; S. Sołtysiński: *Granice zdatności arbitrażowej sporów korporacyjnych ze szczególnym uwzględnieniem zaskarżania uchwał organów spółek: zarys najważniejszych kwestii spornych*. In: *Spory korporacyjne w praktyce arbitrażowej — perspektywa polska i niemiecka / Gesellschaftsrechtliche Streitigkeiten in der Praxis der Schiedsgerichtsbarkeit — Polnische und Deutsche Perspektiven*. Eds. W. Jurcewicz, K. Pörbacher, C. Wiśniewski. Warszawa 2017, p. 36, German version, p. 211; A. Szumański: *„Przeszkody prawne" w przyjęciu kognicji sądów arbitrażowych w sporach o zaskarżanie uchwał zgromadzeń spółek kapitałowych (uwagi „de lege lata" oraz „de lege ferenda")*. In: *Spory korporacyjne w praktyce arbitrażowej*..., pp. 114—115, German version p. 296 *(with some doughts)*;

resolve the problem of the legal character of corporate disputes (which is finally not decisive for arbitrability), here it can only be mentioned that the Polish regulations on arbitration also contain provisions dedicated to corporate disputes. Pursuant to Article 1163 § 1 KPC, an arbitration agreement concerning disputes over the relationships between a company and its shareholders contained in the deed of the company's formation (articles of association) of a commercial partnership or company will bind the company and the partners (members) or shareholders thereof. This provision — pursuant to § 2 of the article in question — applies accordingly to arbitration agreements contained in the articles of association of cooperatives or associations.

Last, but not least, it can be stressed that, in spite of the fact that some aspects of disputes concerning intellectual property rights may be of a non-economic nature, the question can always arise as to whether they can be examined by a court of law. Personal (or moral) rights are closely related to, and discussed in the context of, copyrights, design rights, and trademarks[51]. Nothwithstanding the general differences between the common law and Continental laws (which also do not represent any common approach), claims concerning liability for the infringement of a personal right should be treated as arbitrable[52].

The other question may occur with respect to disputes that have, to a certain extent, been placed within the scope of special administrative proceedings — e.g. contentious proceedings before the Polish Patent Office[53]. Thus, it is widely accepted in the doctrine that only those disputes that could be examined by the court will be considered arbitrable[54]. Notwithstanding the latter, I. Bałos argues that disputes concerning the personal rights of the inventor, i.e. his or her authorship, are to be classified as arbitrable[55]. She also proposes to establish a permanent court

---

W. Jurcewicz, C. Wiśniewski: *Zdatność arbitrażowa sporów korporacyjnych — perspektywa polska*. In: *Spory korporacyjne w praktyce arbitrażowej*..., p. 160, German version, p. 349; contrary to that opinion T. Ereciński, K. Weitz: *Sąd arbitażowy*..., pp. 118—119 and judicial decisions there.

[51] Conf. P. Chrocziel, B. Kosolowsky, R. Whitener, W. Prinz zu Waldeck und Pyrmont: *International Arbitration*..., München 2017, p. 18.

[52] Ibidem, pp. 18, 19. See also the Table presenting the question of arbitrability of main IP rights in key jurisdictions on pp. 19—24.

[53] R. Sikorski: *General Issues*..., p. 44. Contrary to that opinion I. Bałos: *Zdatność*... , p. 211.

[54] T. Ereciński, K. Weitz: *Sąd arbitrażowy*..., p. 117; R. Sikorski: *General Issues*..., p. 44.

[55] I. Bałos: *Zdatność*..., pp. 221, 222.

of arbitration specialising in the settlement of disputes concerning intellectual property rights[56].

In the Swiss judicature[57] and literature[58] there appears a view whereby non-economic rights can be decided by the arbitration tribunal within the frame of an economic dispute only as the preliminary question (*Vorfrage*). Transposing this opinion to the Polish law of arbitration, it would be possible to argue that, also in Poland, the arbitration tribunal can decide over the preliminary question of a non-settleable personal right as a preliminary question. However, it is rather doubtful whether such a (preliminary) decision would be binding on the competent court of law in its decision in this regard as a main question.

At the end of the day, facing the modern tendency of commercialising personality rights (the spreading category of so-called "hybrid" rights[59]), the division of rights into economic and non-economic rights as a criterion used by the lawmaker in shaping arbitrability, seem slowly to lose its significance in the future. Despite the global tendency to increase the arbitrability of disputes[60], it is of course understandable for the lawmaker to tend to control the scope of admissibility of arbitration as a dispute resolution mechanism (because of the protection of important public or social interests)[61]. However, the main problem remains the certainty of law.

In conclusion, it can be argued that the solution taken by Polish lawmaker in Article 1157 KPC is rather unnecessarily complicated. The ostensibly unambiguous wording of that article does not suffice the requirement of legal certainty. Thus a group of experts in Polish arbitration law has presented among others a proposal of amendment of the present regulation in a *White Book*[62], which reads "Subject to the exceptions

---

[56] I. Bałos: *O potrzebie utworzenia stałego sądu polubownego do spraw własności przemysłowej*. "Przegląd Prawa Handlowego" 2014, No. 2, p. 51.

[57] BGE 118 II 193, E 5.a.

[58] J. Krenn-Kostkiewicz: *IPRG LugÜ Kommentar, Bundegesetz über das Internationale Privatrecht, Lugano* Überaeinkommen *und weitere Erlasse*. Zürich 2015, p. 266.

[59] M. Romanowski: *Podział*..., p. 24

[60] See more J. Zrałek: *Znaczenie miejsca arbitrażu w erze globalizacji postępowania arbitrażowego*. Warszawa 2017, p. 34 ff.

[61] Critical arguments against the criterion of public interest as the justification of arbitrability of disputes concerning economic rights with doubts of a constitutional character are expressed by A.W. Wiśniewski, in: "System Prawa Handlowego". T. 8: *Arbitraż handlowy*..., pp. 242, 243.

[62] Ł. Błaszczak, R. Sikorski, M. Zachariasiewicz, K. Zawiślak, G. Żmij: *Biała księga. Propozycje zmian legislacyjnych mających na celu ulepszenie ram prawnych sądownictwa polubownego w Polsce*. Eds. B. Gessel Kalinowska vel Kalisz, M. Zachariasiewicz. Warszawa 2014. That proposal is very similiar to the earlier proposal of the Codification Comission of the Civil Law (2010) presented in: A. Szumański: *„Przeszkody prawne"*..., p. 129.

provided for by law, the parties may refer disputes concerning economic rights to an arbitration tribunal with the exception of cases involving the payment of alimony. Parties may refer disputes concerning non-economic rights to an arbitration tribunal as long as such rights may be subject of a court settlement"[63]. Such a small change seems to be a little step in the right direction.

[63] Ibidem, pp. 17, 18.