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Sąd Arbitrażowy przy Konfederacji Lewiatan
Lewiatan Court of Arbitration
Zbyszka Cybulskiego Str. 3
00-727 Warsaw, Poland
tel. (+48 22) 55 99 970
fax (+48 22) 55 99 910 (with notice: for the Court)
e-mail: sadarbitrazowy@pkpplewiatan.pl
www.sadarbitrazowy.org.pl

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ARBITRATION e-REVIEW

SPECIAL ISSUE 2014 – CONFERENCE

„ARBITRATION DIAGNOSIS. FUNCTIONING OF POLISH ARBITRATION LAW."

Welcome and introduction

- Prof. Marek Michalski
- Prof. Maksymilian Pazdan
- Dr. Maciej Zachariasiewicz
- Undersecretary of the State at the Ministry of Economy Mariusz Haładyj
- Judge Agnieszka Rękas
- Dr. Beata Gessel–Kalinowska vel Kalisz

Beata Gessel

Ladies and Gentlemen,

I am very glad we can meet today. Six years ago the Lewiatan Court of Arbitration held a debate which attracted numerous participants, the majority of whom I can see today in this room. This was the first step initiating a debate on arbitration law issues calling for organizational and institutional changes. Back then, we were discussing three topics. The first one was the virtues and rules of arbitration, and the question whether it is worth while to invest in arbitration and go in for this dispute resolution method. Second, we were considering issues relating to the petition to set aside an arbitral award and involved in postarbitration proceedings. Third, we were wondering whether Poland, Warsaw, might become one of the centers of international arbitration. The answer to that question was affirmative.

Today, we are meeting at a conference which is also a culmination of a longer process, namely, the process of drafting legislative proposals to be submitted to the competent public authorities for consideration. We embarked on this task a year ago as a group of academics. The outcome of our work has taken the form of the publication "Diagnosing Arbitration." It is divided into four parts. The first one is a comparison of the Polish arbitration law with the UNCITRAL Model Law. The second and the third parts are an analysis of the case law. As regards the fourth part, it will be the topic of our discussion today. Tomorrow, we are meeting in working groups at Cardinal Stefan Wyszyński University to discuss in detail the proposals and comments to be made today.

I am pleased to see that so many communities close to arbitration have accepted our invitation. Among our guests there are both arbitrators, judges, representatives of the business community and administrative authorities as well as academics. So I would like to welcome Minister Mariusz Haładyj of the Ministry of Economy, who takes an active part in the process of change and is also its driving force with respect to arbitration. Mr. Haładyj also represents today the Minister of Economy who took honorary patronage over this Conference. I am equally delighted to welcome Justice Agnieszka Rękas, representing the Minister of Justice, who also took honorary patronage over our Conference. May I also welcome Prof.

Marek Michalski, Dean of the Faculty of Law at Cardinal Stefan Wyszyński University, who was kind enough to join the group of our partners. I would also like to take this opportunity to welcome Prof. Maksymilian Pazdan, who offered to share with us his comments from the viewpoint of the Codification Committee. I also welcome the representatives of all the organizations which partner us in this Conference and have expressed their wish to take part in it, i.e. the Polish Arbitration Association, the Internet Domains Arbitration Court at the Polish Chamber of IT and Telecoms, the Arbitration Court of the Consulting Engineers and Experts Association, ICC Poland, the Arbitration Court at the Chamber of Commerce in Nowy Tomyśl, the Arbitration Court at the Regional Chamber of Commerce in Katowice, the Allerhand Institute, the Iustitia Association of Polish Judges, Cardinal Stefan Wyszyński University, Koźmiński University, the Jagiellonian University, the University of Silesia, Adam Mickiewicz University, the University of Warsaw, and the University of Wrocław.

My special thanks go to Prof. Rajski, who will be our guest throughout the day today and who has offered to sum up our efforts but also, I feel obliged to warn you, to judge whether they make sense. So, Prof. Rajski, thank you very much for undertaking this exhausting task which is of an immense value to us. Lastly, I would like to thank Dr. Zachariasiewicz, who will preside over today's Conference and take us to task throughout the day, as well as Agnieszka Różalska who, together with the team of the Court of Arbitration, took care of all the organizational arrangements. Have an intellectually stimulating day. Thank you very much.

Marek Michalski

Ladies and Gentlemen, I have the honor of welcoming you at the Royal Castle and Cardinal Stefan Wyszyński University to a two-day conference dedicated to arbitration. In relation to the previous one, this conference is a kind of retrospection, offering a chance to set a path for the future and see what areas call for substantial changes. All this will be the subject of our discussion in the course of the Conference today and tomorrow.

Maksymilian Pazdan

Ladies and Gentlemen, speaking on behalf of the Codification Committee, I would like to join Mrs. Gessler in her welcoming Prof. Jerzy Rajski, who chaired the Codification Committee just after it had been appointed and prepared the first draft Arbitration Law based on the Model Law. Unfortunately, as a result of political turbulence and government changes, this draft law got stuck. Intended at that time as a draft law on international arbitration, this document offered to parties the possibility of selecting those rules which best fitted the needs. We did not have a chance to see how such permission to select private regulation would operate in practice. In the end, the draft prepared by another group within the Legislative Committee was substantially different. Not everything proposed by the Committee was included in the law, as changes were made in the course of the legislative process. The solutions adopted in the regulations in force at present do not always correspond to such proposals. Nevertheless, we are and will be following with much interest the discussions held within the various groups. The Codification Committee also takes much interest in the conclusions of this Conference. Actually, conferences

dedicated to arbitration have abounded of late. Personally, I am pleased to see that knowledge about arbitration is getting widespread. I wish the number of conferences would translate into the number of arbitration agreements, as this would mean an actual growth in arbitration popularity and turning to courts of arbitration instead of common courts. Which is what I would like all of us to see. Thank you very much.

Maciej Zachariasiewicz

And now I would like to invite Mr. Mariusz Haładyj to take the floor and outline the assumptions underlying the draft documents of the Ministry of Economy.

Mariusz Haładyj

Ladies and Gentlemen, I would like to express my heartfelt thanks for inviting the Ministry of Economy to this Conference. I would like to congratulate you on the choice of the formula for this Conference. From the point of view of administrative authorities, such conferences can prove to be very useful because they offer a diagnosis and end in specific conclusions drawn. In addition to being an opportunity to exchange views, this Conference will also offer a chance to formulate specific demands. Why have we taken up the issue of mediation and arbitration? From the perspective of what is in the interest of both the economy and the entrepreneurs themselves, development of alternative dispute resolution methods and making them popular are of importance at least for two reasons. First of all, thanks to the efficiency of such methods, entrepreneurs are less distracted from their core activity and also experience the uncertainty as to the object of dispute for a shorter time. And the Minister of Economy aims to ensure that disputes absorb entrepreneurs, and thus distract them from purely business activities, as little as possible. Lengthy disputes also result in a spiral of other problems hindering growth and, in consequence, affecting liquidity and reducing the employment level. Secondly, a dispute settled before a mediator or an arbitral tribunal gives the hope of maintaining the business relation holding between the parties. That is why the Minister of Economy put forward a proposal last fall, as a result of which a Group was appointed in cooperation with the Minister of Justice to suggest solutions for making ADR more popular in business transactions. The Group's focus was on mediation. We assumed the draft prepared by the Civil Law Codification Committee as our point of departure. As regards mediation, the Group also analyzed the possibility of proposing legislative solutions outside of the Code of Civil Procedure and the Act on Court Fees in Civil Cases, as well as of undertaking acts outside of the legislation. This is the reason underlying the initiative. Concurrently, several issues in the field of arbitration were outlined. I would like to thank the Group members for the enormous amount of work they performed. The meetings with leading experts who were not members of the Group, i.e. representatives of arbitration institutions and outstanding arbitration jurisprudence authors, including the Codification Committee members, proved to bear much fruit. The precious suggestions and comments you provided us with were an invaluable contribution to the Group's work. The amendments to the arbitration law that we propose need not be of exhaustive nature. Lewiatan's initiative and the debate that followed with the participation of so many

and so outstanding persons can result in a broader scope of proposed legislative changes. Personally, I am also glad to see that this topic is being debated in the legal community and that the Minister of Economy's and Lewiatan's initiatives coincide in time. We have proposed four changes which, in our opinion, should free up right away the basic potential carried by arbitration, that is in the first place, promptness and efficiency of dispute resolution, and which concurrently seem to be approved of, at least in terms of their intended goal, both by the academic community and by practitioners. As Prof. Pazdan pointed out, our arbitration law, that is Part V of the Code of Civil Procedure, is based on the UNCITRAL Model Law. These regulations have been in force for nearly ten years now. So it is a convenient moment to make a review of the provisions of law on both mediation and arbitration. As a matter of fact, it is clear from what other countries are doing that, despite being harmonized to a considerable extent, arbitration law has not ceased to develop and national legislative authorities are seeking tailored solutions permitting the establishment of both a regulatory framework optimal to arbitration development and competitive advantages from the perspective of international arbitration. Over the last two or three years, arbitration regulations changed in Austria, Belgium, Spain or Portugal among others. Work on comprehensive changes is under way for instance in the Netherlands, Sweden and Russia. We also take into consideration the opinions on certain legislative solutions which are expressed in the literature. Significantly, however, such opinions tend to refer to specific institutions rather than the overall concept. The need for a debate and change can also be proven by the still limited scale of use of arbitration in Poland. In the course of our debate, we decided that we should focus on the crucial and most urgent issues which are the most needed ones from our point of view and concurrently acceptable to the academic and business communities. Based on such recommendations, we developed assumptions which were subsequently adopted by the Senior Officials of the Ministry of Economy and which are at present being consulted and agreed upon. That is, we have entered the most difficult stage because, as Prof. Pazdan said, the proposals can substantially evolve in the course of this process. It is a pity that, for reasons of previously scheduled engagements, neither Prof. Paweł Grzegorczyk nor Mr. Rafał Kos could join us, as they would be the most competent persons to present our proposals to you. I will try to cope with this task in their absence. So, in the first place, we propose to reduce the duration of postarbitration proceedings, that is proceedings instituted before common courts under the petition to set aside an arbitral award and proceedings for recognition or declaration of enforceability of arbitral awards rendered either in Poland or abroad, by transforming them into single-instance proceedings. To ensure a superior standard and consistency of judgments rendered in such proceedings, we suggested that such cases be adjudicated by courts of appeal, acting as the courts of the first and only instance. The option of filing a cassation appeal in the proceedings instituted under a petition to set aside an arbitral award rendered in Poland would be retained. It would also be possible to make a cassation appeal in the course of proceedings for recognition or declaration of enforceability of domestic arbitral awards, but only on

condition that no cassation appeal was filed in the course of the proceedings instituted under a petition to set aside an arbitral award. A judicial review of a single judgment could thus be made by the Supreme Court only once. Hence, there is no risk of proceedings being "doubled," as this would be in conflict with the assumed necessity to reduce the duration of postarbitration proceedings. Concurrently, the Supreme Court's cognizance over such cases will be maintained. Owing to the fact that one of the fundamental virtues of arbitration is time--efficiency of dispute resolution, it is of great relevance for the practice of business transactions to ensure that postarbitration proceedings do not take longer to complete than the proceeding before an arbitral tribunal. And it is due to an excessive judicial review, which assumes at least two-instance postarbitration proceedings plus cassation proceedings, that the arbitration regulations currently in force make postarbitration proceedings take longer than necessary. Especially that, in postarbitration proceedings, common courts do not decide cases on the merits but only inquire whether specific rules of procedure and the fundamental rules of the Polish legal order were not violated. The proceedings are restricted to formal issues, which is a consequence of the fact that the case was already decided on the merits by an arbitral tribunal. Such a restricted notion of the object of postarbitration proceedings has been established in the Supreme Court's case law. Hence, such proceedings should not contradict the principle of two instances stipulated in Article 176.1 of the Constitution, due to the fact that, in line with the case law established by the Constitutional Tribunal itself, the principle of two instances applies to cases decided by common courts on the merits. In addition, we proposed that the time limit for filing a petition to set aside an arbitral award be reduced from the currently applicable three months down to two months. The three-month time limit for filing a petition to set aside an arbitral award seems to be too long, especially when compared with the two-month time limit stipulated in the Code of Civil Procedure for filing a cassation appeal with the Supreme Court in "regular" civil proceedings held before common courts. The cassation appeal is a sophisticated type of pleading, subjected by the legislative authority to the most stringent requirements as to its form, as well as to requirements in the form of a restricted list of circumstances authorizing acceptance of a cassation appeal for consideration, and an exhaustively enumerated categories of pleas allowed to be raised in a cassation appeal. A reduced time limit will make the proceedings take less time to complete and reduce the period of uncertainty as to the fate of the arbitral award. Furthermore, we suggest introducing the arbitrator's obligation to make a written statement to the parties on his/her impartiality and independence in the case he/she is to decide. This amounts to making the solution used in the rules of permanent courts of arbitration generally applicable. As our discussions with entrepreneurs have revealed, inspiring their confidence in mediation and arbitration, as well as in mediators and arbitrators, continues to be a major challenge. Especially in view of the fact that an arbitral award produces effects equivalent to those of a common court judgment (in terms of its final and unappealable nature, *res judicata*). The last of the proposed solutions consists in introducing a single standard for court and arbitration proceedings in terms of the

impact of the effects produced by a declaration of bankruptcy on such proceedings. An arbitration proceeding which is under way, and which was thus instituted prior to declaring a party bankrupt, will be continued, and the arbitration agreement will not expire. This will be especially convenient wherever the proceeding before an arbitral tribunal has already reached an advanced stage and the parties have borne its costs. This solution was developed in response to one of the demands that arbitration practitioners have been making for years now. The automatic expiration of the arbitration agreement does not always serve the purpose of protecting the interests of the bankrupt's creditors and the public interest. In the case of disputes which are covered by an arbitration agreement but in respect of which proceedings were not instituted prior to declaration of a party's bankruptcy, our proposal corresponds to that in the previous case but for our suggestion that, under such circumstances, the official receiver have – by way of exception - the right to opt out of the arbitration agreement (the "opt–out option") if he/she decides that, given that specific conditions are met, a valid arbitration agreement in place would make it substantially difficult or impossible to attain the goals of the bankruptcy procedure, and especially wherever the bankruptcy estate would not be sufficient to pay the costs of the arbitration proceeding. We introduced this option following a meeting with arbitration practitioners and having analyzed the solutions adopted in other countries. The official receiver's right to opt out of an arbitration agreement would be exercised on the basis of a judge-commissioner's decision, which would operate as a safeguard preventing the official receiver from exercising the opt-out right in too free a manner. In the event the official receiver evades participation in the costs of the arbitration proceeding, the right to opt out of the arbitration agreement would also be vested in the other party. In my opinion, if the proposals I mentioned, and in particular those affecting bankruptcy procedures and postarbitration proceedings, entered into force, this would make a fundamental difference in terms of confidence put by the legislative authority in arbitration as a method of settling disputes in Poland. We also aim to improve the competitive advantage of Polish arbitration across worldwide. And to have our courts of arbitration selected more often in international arbitration. The proposals I have discussed are being consulted, but I would like to emphasize that the conclusions you will reach can certainly prove to be helpful to us. Our proposals are not exhaustive in nature and what deserves being discussed is, among other things, issues relating to arbitrability, *ex parte* safeguards or the arbitral award itself, that is the question what elements should be obligatory. Concurrently, we have launched a project the purpose of which is to establish in six cities Centers for Arbitration and Mediation, operating according to uniform standards. I would like to make it perfectly clear that such centers are not intended to compete with the existing courts or centers of arbitration. Their purpose is to serve as a catalyst for development of mediation and arbitration in Poland. Our intention is to support arbitration and mediation. As can be seen from the experience of other countries where mediation and arbitration are used on a larger scale, support provided by the state had an important role to play. Qualitative changes have been made, resulting not only in good law having been enac-

ted, but also in a substantial number of disputes being resolved with the use of this method. Thank your for your patience and attention. I wish you all effective and fruitful conclusions. Thank you very much.

Agnieszka Rękas

Mrs. Gessel, Ladies and Gentlemen,

On behalf of the Minister of Justice, I would like to express my heartfelt thanks for inviting the Ministry of Justice to today's Conference and to congratulate our hosts on the conference formula they have chosen. This Conference is another step, and a very important one, taken by arbitration practitioners to work out an arbitration procedure more accessible to parties, and to encourage entrepreneurs to have their disputes resolved in arbitration. Ensuring the availability of all kinds of methods designed to resolve conflicts and disputes in an amicable manner has become a worldwide trend. In the Polish system of law, this trend is reflected primarily in civil law disputes. As a matter of fact, arbitration, among other things, has been made use of in this respect for a long time. And, in addition, new institutions emerged, especially mediation. Mediation can become a method of conflict and dispute resolution even more desirable than a formal court procedure, both before and in the course of court proceedings. The Ministry of Justice takes great interest in both mediation and arbitration as the key alternatives to court proceedings. The trend to make amicable settlement of disputes a reality became stronger lately, as the Minister of Economy and the Minister of Justice entered into an agreement under which, in September 2013, a Group for systemic solutions dedicated to methods of amicable settlement of economic disputes, streamlining business activity, was established and commenced its work. The Group completed its tasks in June 2014. Its recommendations, referring to two institutions, namely mediation and arbitration, contain proposed solutions in the field of law and non-legislative actions which are likely to make methods of amicable and non-judicial settlement of disputes more popular in business relations, while concurrently ensuring the appropriate standard of mediation and arbitration services, as well as their general availability. Entrepreneurs should be encouraged to use ADR methods not only as a solution to major issues such as the costs of court proceedings or their duration, but also as a mechanism supporting the development of civil society. I am very glad to see that many specialists who deal with those issue on a daily basis take interest in this Conference. The discussions to be held in the course of the Conference will certainly end in specific conclusions as to what should be done to make arbitration more efficient, and will encourage entrepreneurs to refer to courts of arbitration more frequently when seeking resolution of economic disputes. I would like to wish you fruitful work.

Beata Gessel

Before we move on to discuss detailed issues, I would like to make an introduction to the substantive debate we are about to have.

As I already mentioned, the Model Law served as a benchmark for the analysis the findings of which are presented in "Diagnosing Arbitration." Why is that so? This was obviously no accident. In the first place, because Part V of the Code of Civil Procedure is based on the Model Law, though on its ear-

lier version of 1985. At present, the 2006 version is in force, which took effect one year after Part V of the Polish Code of Civil Procedure had been enacted.

Secondly, the Model Law sets the trends observable in arbitration development both in the jurisprudence and legislation. It is the product of opinions expressed by experts from various countries.

Analyzing how the Model Law evolved in the period from 1985 to 2006, we will notice that the changes follow a quite clearly defined path. They are said to be pro-arbitration in nature. What does it mean?

It means that the proponents of the Model Law chose to liberalize the arbitration law, or perhaps I could even venture the opinion that they returned to the roots in this respect. This means a departure from the formalized approach to regulating arbitration in favor of a more liberal methodology which is generally more typical of business relations, as what we are talking about today is primarily arbitration for entrepreneurs.

This direction in which changes to the Model Law proceed can be easily noticed in the context of the element which is fundamental to arbitration as a whole, that is the approach to the arbitration agreement and, to be more precise, to the form of the arbitration agreement.

According to the Interpretation Recommendation issued by the proponents of the Model Law in 2006, what is of relevance from their perspective is the will to enter into the agreement. This issue is of utmost importance when deciding on the form of the arbitration agreement. The form as such comes only second. The purpose of the form of the arbitration agreement is to be of use to the parties, whom we call "arbitrating parties" in "Diagnosing Arbitration," to prove that they expressed their will to enter into such agreement. As a side note, I would like to point out that we suggest in our publication introducing a new term to be used in the arbitration law, that is an "arbitrating party," which is a short form of a "party to an arbitration agreement" or, in some contexts, refers also to a party to an arbitration proceeding.

Coming back to the main topic, I would like to say that the findings of the analysis of changes made in the course of the work on the Model Law are also something to think about. What is the direction we would like to proceed in when amending our arbitration law? I think there are two options to choose from; generally, in line with one view, the institution of arbitration is a very special institution. An institution the essence of which is to deprive the parties of a specific right, that is the right to a fair trial. As this is a fundamental matter, we have to be very cautious when approaching arbitration and very strictly regulate any issues, whether the form of the arbitration agreement or judicial review of awards rendered.

The other view perceives arbitration as some natural method of dispute resolution, specific to entrepreneurs. It is a method often said to be an emanation of social capital. This view assumes a liberal approach to regulating arbitration.

It also takes into account how business transactions are changing. Trade is getting more and more simplified. The forms and means of communication keep changing, and we, as a community which can have some influence on the arbitration law, need to take

this fact into consideration. So whenever we talk about an amendment to the arbitration law, we should invariably keep the purpose of such amendment in mind. What is our goal; do we want to make arbitration more liberal or still more formalized?

At this point, I will refer once more to the issue of the form of the arbitration agreement. I have lately been very preoccupied with and intrigued by this issue, and, more specifically, the question what regime should prescribe the written form of the arbitration agreement, i.e. whether the purpose of a stipulation to that effect is to test the agreement for invalidity, serve as evidence or as a basis for determining the agreement effectiveness.

Opinions on this point differ. As a rule and pursuant to the provisions of Part V of the Code of Civil Procedure, an arbitration agreement should be made in writing. However, we do know that this does not quite mean the written form. In the context of the arbitration agreement, Article 1162 of the Code of Civil Procedure extends the written form concept to cover forms which are, colloquially speaking, more "frivolous," such as an exchange of e-mail messages. So there arises the question whether such a form, that is a form either "frivolous" or not, may be stipulated for the purpose of testing the agreement for invalidity? A failure to comply with this form requirement renders the agreement invalid. Or we can say, and I think this is an opinion one can come across ever more often in legal transactions, that this form is stipulated for evidence purposes. If we consider the latter view to be legitimate, this means that – in jurisprudential terms – we opt for a more liberal interpretation. I have been thinking what arguments are raised in the jurisprudence in favor of assuming that the purpose of this form stipulation is to test the agreement for invalidity.

Actually, two arguments are considered. One of them, which is of a very basic nature, says that the right to a fair trial is a fundamental right and the deprivation of such right is, as I mentioned at the beginning, a material event the occurrence of which needs to be limited. The arbitrating parties are not fully aware what risks are involved in the execution of an arbitration agreement. They should be prevented from acting hastily. The question that immediately comes to mind is why then do we not protect entrepreneurs from making tax-law-related errors. I think that the old *paremia ignorantia juris nocet* should apply equally in both the above cases.

In principle, I agree that the right to a fair trial is our fundamental right. However, let us view this issue in a broader context. Let us consider a value such as human life and health. There is such a legal institution as "informed consent of the patient to a medical procedure." What is this institution concerned with? It is concerned with an equally fundamental value, I would even say the most fundamental one, that is the health and life of patients. As is the case with the arbitration agreement, the provisions of law do not contain any regime for this form of declaration. However, the Supreme Court had no doubts that the form was stipulated for evidence purposes. The written form is to ensure the existence of evidence confirming that a patient indeed consented to a specific medical procedure.

The other argument frequently raised in the jurisprudence, which is, however, more difficult to challenge, is that these provisions are obviously not suitable for application to the arbitration agreement. How can this argument

be challenged? For one thing, we say that the provisions of the Civil Code apply to the arbitration agreement *mutatis mutandis* or directly, and we do so regardless of whether we are in favor of the procedural, substantive or autonomous theory of arbitration. It would appear obvious that since we apply these provisions, we also apply the ones containing the written form requirement. Thus, one should show why it is this specific provision that we do not apply, while applying the other ones. A literal interpretation would seem to lead to the single conclusion that the provisions of the Civil Code pertaining to the form of agreement are to be applied without exception. A systemic interpretation of the provisions of Part V of the Code of Civil Procedure looks similar. Article 1180 of the Code of Civil Procedure permits the arbitration proceeding to be conducted even in the absence of an arbitration agreement or in the event such agreement was executed in a defective manner.

In line with the rules of *mutatis mutandis* application, one may omit to apply a specific provision when such provision is in conflict with a regulation in place, which is not the case with Part V of the Code of Civil Procedure, or in conflict with the purpose of a regulation. If we consider the meaning of Article 1180 of the Code of Civil Procedure, we have to assume that the form of the arbitration agreement required *ad probationem* is not in conflict with the purpose of the regulation.

The issue of the form of the arbitration agreement is an excellent example based on which we can, in the first place, determine what the purpose of the intended changes should be, which is concurrently one of the topics of our meeting today. Secondly, it is an illustration of how a single provision acquires a different meaning depending on the adopted interpretation. Clearly, if we interpret the provision of Article 1162 of the Code of Civil Procedure with the *ad probationem* form in mind, which is the case more and more frequently, its meaning is consistent with the liberal trend set by the new regulation of the Model Law, as a result of which the "liberal" wing of the arbitration community will not demand any changes in this respect.

We will face similar dilemmas also in other fields of the arbitration law. Thank you very much.

Summary – Key Note Speech

Prof. dr hab. Jerzy Rajski
Dr. Maciej Zachariasiewicz
Dr. Katarzyna Michałowska

Jerzy Rajski

Ladies and Gentlemen, what I am going to say will be neither a diagnosis nor a summary, as this would require more time, nor an assessment of the course of the debate, as such an assessment would require more prior deliberation. I would only like to share with you a few reflections on the three groups of issues raised in the course of the very interesting and absorbing debate. One such group of issues is, in my opinion, not only of immense theoretical and intellectual significance, but also of relevance to the prospects for development of our arbitration law. These are the comments made in response to the very interesting question: Arbitration law – how should it be positioned within our system of law?

We are used to looking for the arbitration law in the code of civil procedure, as this is the tradition dating back to the 19th century. The first arbitration regulation in European law goes back to 1896 and is to be found in the Italian code of civil procedure, which contained five articles on arbitration and mediation. This is what arbitration was like at that time and how much regulation it needed. Just five articles, of which two provided for mediation and only three for arbitration. However, times have changed. Arbitration has developed. In recent years, we have been witnessing a dynamic development of arbitration, and this has to have an impact on regulations. This development dynamics has certain properties which are intrinsic to and already inherent in modern arbitration, that is, its professional nature, which naturally has to contribute to its increasing judicialization. If we consult the map of the modern world, we can see that arbitration legislation clearly tends to take the form of separate arbitration acts. The countries which continue to follow the tradition of incorporating arbitration regulations in their codes of civil procedure are already in the minority, globally and across the world. What are the arguments I consider to be in favor of such a solution? I will go back to one of them because a very interesting question was asked here, which, in my opinion, we and the legislative authority should always have in mind in relation to arbitration development. The question is: Who is arbitration intended for? There are no easy answers to this question. Who does Uncitral work for? Uncitral works for the international business community. What it does is to prepare draft arbitration laws to govern commercial arbitration. Not consumer arbitration. Not general arbitration. Not arbitration for small retailers trading in butter and parsley. As a matter of fact, when clearly setting out to harmonize arbitration laws, we actually reproduce this single model. That is, the model law tailored to the needs of commercial arbitration, and not its

other types. But arbitration is by no means a homogenous institution. So I do not have a simple answer to your question: Who is arbitration intended for? Your focus is primarily on arbitration intended for the business community, as this is the institution used predominantly at present. But a single garment was made for all types of arbitration to wear. Interestingly, this single garment does not seem to fit all types of arbitration equally well. So, from this viewpoint, the need for arbitration regulation to take the form of a separate new arbitration act is an issue to be addressed *pro futuro*. It seems that this is the issue, among those under discussion, which the legislative authority might be called upon to address in the future. In this way, we will get answers to the questions raised here: Who is arbitration intended for? Why is arbitration not very popular? Why do people who might use it not do so? When looking at Part V of the Code of Civil Procedure, which contains provisions on arbitration, it is only natural to ask which of the more than 1,150 preceding provisions might be of relevance to the arbitration regulation. Not even all lawyers can navigate through this field. The legislative authority should make law with its specific addressee in mind. This law should be clear, easily accessible and intelligible. It was already centuries ago that the Emperor Napoleon was drafting a civil code with the civic ideals in mind, a code accessible to every citizen. Written in a clear and simple manner. Easily accessible arbitration law can be one of the factors attracting a broader group of people. Especially that, in the years to come – although I know that what I'm going to say does not perhaps hold true today, but it probably will in the future – we will have to consider some diversification of the arbitration regulations. We need to consider fast-track arbitration procedures to be introduced for minor disputes. Our meeting today seems to end in the conclusion that there is a need to commence work on an arbitration act.

This is a task for the future, however. And now back to the present day. The law in force was, generally speaking, judged to be good, which is hardly surprising as it is based on a well-tried Uncitral model. But this does not necessarily mean that it does not require amendments. Many of them were discussed today, and what deserves to be emphasized is the directive *in dubio pro lex lata*. Whenever a solution raises some concerns but we are not completely certain that it needs to be changed, then let's not change it! If something works, don't change it. This is the first legislative principle we should follow. The other one says: any change needs to be made with great caution and after much deliberation. No treatment is worse than hastily made changes.

And now, in a nutshell, a few comments on the issues which were the subject of a very interesting discussion. As for reducing the duration of arbitration proceedings, there is a consensus in place. The only question is which route to take. This needs further consideration. It is beyond doubt that the law has to change with respect to the impact the institution of a bankruptcy procedure has on arbitration proceedings. The solution in force is incompatible with the majority of the solutions adopted in other legal systems. It needs to be promptly changed.

Arbitrability. Provisions of law should be amended or supplemented only if a good solution cannot be achieved through the correct interpretation. So I do not see here any need for prompt legislative changes. The safegu-

ards with respect to the ex parte procedure require specific regulation. Arbitration agreement. Let us bear in mind the fact that the arbitration agreement is the foundation supporting the entire juridical infrastructure of arbitration. As the saying goes, "like arbitrators, like arbitration" (that is, the quality of arbitration is determined by the qualifications of the arbitrators). One can add, like the foundation, like the arbitration. If the foundation is not firm enough and well-constructed, this can adversely affect the entire arbitration regulation. Therefore, I do not consider it necessary to urgently make the provisions of law in this respect more liberal. The Swedish have recently permitted the arbitration agreement to be entered into orally under their law. A student writing her MA thesis on Swedish arbitration did research at several Swedish law firms. She did not identify any instance of an arbitration agreement having been executed orally. What is the purpose of enacting provisions of law that will not work in practice? The adoption of such a solution would not only trigger the consequences Dr. M. Tomaszewski and other participants in the discussion were talking about, but would, in the first place, downgrade arbitration itself. If I can execute an arbitration agreement in the same way as a contract on purchase of a newspaper or a bottle of water… The issues relating to the arbitration agreement are extremely important. The agreement which is of such significance, fundamental to the entire arbitration system, is an agreement which is unnamed and not regulated under law. Many arbitrating parties do not realize that they entered into an agreement with the arbitrator. The essence and the legal nature of this agreement, which are the subject of controversial opinions expressed by the few authors addressing this issue at all, remain unknown to arbitrators and numerous lawyers alike.

Therefore, the arbitration agreement should be provided for under arbitration law. In the course of the Conference, a number of interesting comments have been made of the nature of *de lege lata* and *de lege ferenda*, which need to be considered by the legislative authority. Many of them are a valuable contribution to our jurisprudence. They can also help improve the contractual practice.

The hosts of this Conference deserve thanks for having organized it in a superb manner, and the panelists and the moderators for a superior handling of discussions on numerous difficult arbitration issues.

Maciej Zachariasiewicz

As our meeting is coming to an end, I would only like to share one thought with you, especially in relation to what Mr. Jamka said, namely, that arbitration is a function of the open society. And, certainly, arbitration means business to the majority of us; this is something we too want to make money on. But I think what is really appealing about arbitration is that we somehow find it close – or, anyway, probably closer than the system of state courts - to the most original notion of administration of justice. Two parties involved in a dispute choose a third party, an impartial person who is the wise man sitting under a tree, and entrust him with the task of resolving the dispute. They choose him because they have confidence in him and therefore they, as a rule, abide by his decision. Certainly, as we said today and as Prof. Rajski also pointed out, arbitration is nowadays much more professional and institutionalized than it used to be, but it probably still retains to some extent the ori-

ginal idea of administration of justice.

I can only thank all of you for attending this Conference. The fact that you have found the time to come and are here despite so many other engagements you undoubtedly have, is the greatest appreciation for us. Taking this opportunity, I would also like to thank Mrs. Beata Gessel, who was the initiator and the driving force of this event, and who made her best endeavors to make it a success. My thanks also go to Agnieszka Różalska and all her team, all those who do the chores but are out of the spotlight. Thank you.

Katarzyna Michałowska

Ladies and Gentlemen, just a few words. We have spent all day here, having discussions, listening and speaking on so many interesting issues. But I want to point out that our Conference had one more participant who kept watching us, namely, Stanisław August, King of Poland. We are in the place which bore witness to the adoption of the Constitution of May 3. Article 8 of the Constitution was concerned with courts and provided for the appointment of a committee which was intended by the prudent legislators to draft in the future a civil code and criminal law provisions. I think we bore witness to how law was being made. We had the rare privilege of taking part in today's event. And for some of us the law-making process will be work taking long weeks, months or years. I think the King and the proponents of the Constitution would be glad to see that many people care so much about public affairs. After all, arbitration, dispute resolution, guaranteeing fair and just decisions, all form part of public affairs.

COURT OF ARBITRATION
LEWIATAN

Sąd Arbitrażowy przy Konfederacji Lewiatan
Lewiatan Court of Arbitration

Zbyszka Cybulskiego Str. 3
00-727 Warsaw, Poland
tel. (+48 22) 55 99 970
fax (+48 22) 55 99 910 (with notice: for the Court)
e-mail: sadarbitrazowy@pkpplewiatan.pl
www.sadarbitrazowy.org.pl