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New technologies in Polish commercial arbitration on the background of European Union regulations

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Abstract: Commercial arbitration in Poland has to face contemporary problems, including those related to the constant development of information technologies, and therefore new technologies. It is seen during the COVID pandemic. This article is intended to assess the state of Polish regulation on the background of European Union regulations in the above-mentioned area and to propose potential changes to the Polish legislation[1] if they are needed.

1. Introduction

In this article, I will describe the role of new technologies in Polish commercial arbitration. This article hypothesizes that the Polish provisions are sufficient in the field of the new technologies in the Polish commercial arbitration, but with an exception for cases involving consumers. To prove this hypothesis I will check the current Polish regulations and how they work in practice[2], especially during the COVID pandemic.

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1 Karol Ryszkowski, "New technologies in the Polish commercial arbitration," in *Právo, obchod, ekonomika: zborník príspevkov (Právo - obchod - ekonomika)*, eds. Jozef Suchoža, Ján Husár, and Regina Hučková (Košice: Univerzita Pavla Jozefa Šafárika Vydavateľstvo Šafárik Press, 2020), 249.

2 Ryszkowski, "New technologies in the Polish commercial arbitration," 249.

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2. Results

2.1. New technologies in the Polish regulations in the matter of commercial arbitration

Generally, we can say that there is no special procedure concerning using new technologies in the Polish Code of Civil Procedure (further "CCP"[3])[4]. But due to art. 1184 CCP, arbitration courts in Poland may have wide freedom both in the choice of grounds and adjudication procedure, and thus also with regards to the use of new technologies in proceedings before them. According to the above-mentioned art. 1184 CCP "§1. Unless otherwise provided by statute, the parties may agree upon the rules and procedure before the arbitral tribunal.

§2. Unless otherwise agreed by the parties, the arbitral tribunal may, subject to statutory provisions, conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal shall not be bound by the provisions on procedure before the court"[5].

However, the freedom to apply new technologies in Polish commercial arbitration is not complete.

There is a special regulation about arbitration in consumer matters in the CCP. It is worth mentioning because one of these provisions is connected with new technologies[6]. According to art. 1164^1 CCP "§1. An arbitration agreement covering disputes arising out of contracts to which a consumer is a party may be made only after the dispute has arisen and shall be in writing. Art. 1162 §2 shall not apply.

§2. In an arbitration agreement referred to in §1, it must also be indicated, under pain of invalidity, that the parties are aware of the consequences of the arbitration agreement, and more specifically with respect to the legal force of an arbitral award or settlement concluded before the arbitral tribunal equal to that of a judgment of the court or settlement

3 The Polish Code of Civil Procedure of 11 November 2014, Journal of Laws 1964, No. 43, as amended.

4 Ryszkowski, "New technologies in the Polish commercial arbitration," 249.

5 POLISH CIVIL PROCEDURE CODE, http://arbitration-poland.com/legal-acts/print,139.html.

6 Ryszkowski, "New technologies in the Polish commercial arbitration," 250.

concluded before the court upon recognition or enforcement thereof by the court"[7].

According to the above-mentioned art. 1162 CCP "§1. The arbitration agreement shall be in writing.

§2. The requirement as to the form of the arbitration agreement shall also be met if the agreement is contained in correspondence exchanged between the parties or statements made using telecommunications enabling the content thereof to be recorded. Reference in a contract to a document containing a provision on submission of a dispute to arbitration shall meet the requirement as to the form of the arbitration agreement if the contract is made in writing and the reference is such that it makes the clause an integral part of the contract"[8].

So in consumer matters, papers or statements exchanged by means of distance communication that make it possible to consolidate their content cannot be considered as an arbitration clause, so it can be said that the consumer protection does not take into account the development of the new technologies[9]. The reason for such strict regulation is the safety of the consumer as the weaker party.

We can see the new technologies not only as a useful tool but also as the object of the arbitration as well. There is no special regulation about the arbitrability of new technologies in Polish arbitration. Regardless of the kind of qualification of the new technologies disputes matters in the field of Polish law, because of art. 1157 CCP. On 8th September 2019, the amendment to the arbitration proceedings entered into force. The amendment covered, among other provisions art. 1157 CCP regulating the arbitrability[10]. According to it "Unless a special provision provides otherwise, the parties may subject to arbitration:

1) disputes regarding property rights, with the exception of cases regarding maintenance;

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7 POLISH CIVIL PROCEDURE CODE, http://arbitration-poland.com/legal-acts/print,139.html.

8 POLISH CIVIL PROCEDURE CODE, http://arbitration-poland.com/legal-acts/print,139.html.

9 Ryszkowski, "New technologies in the Polish commercial arbitration," 250.

10 Karol Ryszkowski, "Spory ze stosunku spółki w postępowaniu przed sądem polubownym w świetle nowelizacji KPC," *ADR. Arbitraż i Mediacja*, no. 2(50) (2020): 85.

2) disputes regarding non-property rights, provided they can be the subject of a court settlement"[11].

Because of the current wording of art. 1157 CCP, the view that, in art. 1157 CCP, a reservation has been made that disputes over property or non-property rights - which might be the subject of a court settlement, might be submitted for arbitration, except for maintenance cases. This reservation ought to be understood in such a way that if the dispute were subject to the resolution of a state court, the parties, as to the rights in dispute, could conclude a settlement, therefore the arbitrability is subject to the settlement of the dispute (amicable settlement)[12]. It is nowadays only valid for non-property rights disputes[13]. Based upon art. 184 CCP "Insofar as their nature so permits, civil cases may be settled before an action is brought in court. The court shall consider a settlement agreement to be inadmissible if the content thereof is contrary to the law or principles of community life or if it seeks to circumvent the law"[14].

2.2. Online Dispute Resolution (ODR)

Information technologies support in various ways not only the court settlement of disputes but also (...) out-of-court amicable forms. Firstly, by providing the parties with communication tools enabling synchronous (teleconference, chat) or asynchronous (e-mail) remote communication. (...) Secondly, legal information databases may play an important role in the settlement of disputes, providing negotiating parties with information on applicable regulations or court rulings issued by courts in a given jurisdiction. (...) Thirdly, computer programs called negotiation decision support systems (NDSS) generate prompts regarding the decisions of individual parties at a given stage of the negotiation process, as well as present important information of a different type (...). Fourthly, a computer program might propose a comprehensive solution to the dispute between the parties by a fully

11 POLISH CIVIL PROCEDURE CODE, http://arbitration-poland.com/legal-acts/print,139.html.

12 Karol Ryszkowski, "Klauzula porządku publicznego w postępowaniu przed sądem polubownym a zdatność arbitrażowa," *ADR. Arbitraż i Mediacja*, no. 1(21) (2013): 77.

13 Ryszkowski, "New technologies in the Polish commercial arbitration," 250.

14 Code of Civil Procedure, Art. 184. Admissibility of a settlement agreement., Legalis, accessed February 08, 2021.

automated allocation of individual disputed issues between the parties. (...) The research and practical-IT trends related to the use of new information technologies, especially network technologies, in alternative dispute resolution is known as Online Dispute Resolution (ODR)[15].

Online Dispute Resolution (ODR) is a form of online dispute resolution using ADR methods. There are many terms in the doctrine that describe the same phenomenon, including Electronic ADR (eADR), Internet Dispute Resolution (iDR), and Online ADR (oADR), but ODR is the most common. There are many categories of online dispute resolution, including online arbitration[16].

The ODR is regulated in the following EU normative acts[17]:

– directive 2013/11/EU of the European Parliament and of the Council of 21st May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, "Directive on consumer ADR"[18],
– regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, "Regulation on consumer ODR"[19].

The issue of new technologies in Polish arbitration is not included in the CCP. Regardless of the regulation of the ODR matter, the European Union legal acts do not contain any provisions regarding arbitration in consumer matters, including online arbitration[20].

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15 Adam Zienkiewicz, "Nowe technologie informatyczne na tle pozasądowego rozwiązywania sporów konsumenckich w prawie Unii Europejskie," *Edukacja Prawnicza*, no. 11 (2014): 14.

16 Karolina Mania, "ODR (Online Dispute Resolution) – podstawowe zagadnienia," *ADR. Arbitraż i Mediacja*, no. 1(9) (2010): 74.

17 Ryszkowski, "New technologies in the Polish commercial arbitration," 251.

18 Directive 2013/11/EU of the European Parliament and of the Council of 21st May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, (O.J.E.C. L 165, 18.6.2013), p. 63–79.

19 Regulation (EU) of the European Parliament and of the Council No. 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (O.J.E.C. L 165, 18.6.2013), p. 1–12.

20 Ryszkowski, "New technologies in the Polish commercial arbitration," 251.

2.3. New technologies in the EU regulations in the matter of commercial arbitration

In addition, it should be noted that there is no regulation in the European Union law regarding arbitration as a whole. Aside from the issue of new technologies, Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[21] has been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[22], which, in accordance with a recital (12) and Art. 1 clause 2. lit. d) does not apply to arbitration. Additionally, pursuant to recital (12) of this Regulation "This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'[23]), which takes precedence over this Regulation". Furthermore, in accordance with the art. 73 point 2 this regulation does not affect the application of the New York Convention[24]. The current trends in the bodies of the European Union are consistent with the position resulting from the EU legal acts. Since there are convention provisions, such as the New York Convention and soft law acts, such as the UNCITRAL Model Law on Commercial Arbitration[25], EU legislative intervention is not needed in this area.

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21 Regulation (EC) of the Council No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J.E.C. L 12, 16.1.2001, p. 1–23).

22 Regulation (EU) of the European Parliament and of the Council No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J.E.C. L 351, 20.12.2012, p. 1–32).

23 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10th June 1958.

24 Karol Ryszkowski, *Klauzula procesowego porządku publicznego w arbitrażu handlowym w prawie polskim na tle innych systemów prawnych* (Warszawa: C.H. Beck, 2019), 235–236.

25 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19–09955_e_ebook.pdf.

We cannot say that the EU is inactive on the new technologies ground. The EU's efforts can be seen in the creation of the European Commission for the Efficiency of Justice (CEPEJ) on 18 September 2002[26].

In this creation was "… demonstrated the will of the Council of Europe to promote the rule of law and fundamental rights in Europe, on the basis of the European Convention on Human Rights [the Convention for the Protection of Human Rights and Fundamental Freedoms[27]], especially its Articles 5 (Right to liberty and security), 6 (Right to a fair trial), 13 (Right to an effective remedy) and 14 (Prohibition of discrimination)"[28].

The activity of this entity may be useful in the development of new technologies in court proceedings, including commercial arbitration. An example of a solution that may prove helpful is the CEPEJ study "… on the establishment of a certification mechanism for AI tools and services used in the fields of justice and the judiciary. The study begins to implement the CEPEJ Charter on the use of AI in judicial systems and their environment, adopted in late 2018. Broadly, the CEPEJ proposes certification and labeling criteria for AI tools based on principles outlined in the Charter, including (1) the Principle of respect of fundamental rights; (2) the Principle of non-discrimination; (3) the Principle of quality and security (with regards to the processing of judicial decisions and data, using certified sources and intangible data in a secure technological environment); (4) Principle of transparency, impartiality, and fairness; and (5) Principle of "under user control" (ensuring users are informed actors and in control of their choices). The proposed CEPEJ certification requirements will likely impact

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[26] Council of Europe, Resolution Res(2002)12 establishing the European Commission for the efficiency of justice (CEPEJ) (Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804ddb99.

[27] Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177.

[28] Council of Europe, "MAKING JUSTICE MORE EFFICIENT, 15 years serving justice in Europe," https://rm.coe.int/prems-083118-bil-2013–15e-anniversaire-cepej-web/16808b5ee4: 4.

a number of "Legal Tech" areas, such as case law search engines, online dispute resolution, predictive analysis, automated legal drafting, and so on"[29].

Moreover, this study directly refers to the New York Convention in the paragraph which stated that the "… certification of artificial intelligence systems in the judicial sphere would also make it possible to support private and public projects and to establish standards that reach beyond Europe, justifying, for example, the development of international mechanisms for the recognition and enforcement of foreign decisions (..) or arbitral awards (..) made by or with the assistance of artificial intelligence"[30].

From the EU soft law acts which have their influence on ADR, and thus commercial arbitration, it is worth mentioning the Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Text with EEA relevance) (notified under document number C(2001) 1016)[31], in Poland known as 2001/310/EC or 2001/310/WE.

In paragraph (14) of the preamble of 2001/310/EC, its aim is stated. According to it "(14) In accordance with Article 6 of the European Human Rights Convention, access to the courts is a fundamental right".

Recommendation 2001/310 / EC formulates four rules for the functioning of ADR bodies. These are 1) impartiality, 2) transparency, 3) efficiency (easy availability, low cost or no payment for consumers), 4) fairness. In fact, these principles differ little from the previous ones. This is just a different approach to similar requirements[32].

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29 Eric Chang, "A Roundup of Tech and Dispute Resolution News, March 9, 2021," http://arbitrationblog.kluwerarbitration.com/2021/03/09/a-roundup-of-tech-and-dispute-resolution-news/.

30 European Commission for the Efficiency of Justice, "Possible introduction of a mechanism for certifying artificial intelligence tools and services in the sphere of justice and the judiciary: Feasibility Study," https://rm.coe.int/feasability-study-en-cepej-2020–15/1680a0adf4, 31.03.2021, p. 27.

31 European Commission, Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Text with EEA relevance) (notified under document number C(2001) 1016) O.J.E.C. L 109, 19/04/2001 P. 0056 – 0061.

32 Bartosz Ziemblicki, *Arbitraż online, Online Arbitration Press* (Wrocław: Online Arbitration Press, 2017), 100.

Moreover, these rules are commonly accepted in commercial arbitration, maybe with the exception of effectiveness which is not always connected with lower costs. However, in cases with a low amount of value of the dispute, there is a simplified type of procedure called small claims.

Small claims have fundamental importance for the arbitration proceedings because of guaranteeing the implementation of speed in arbitration[33].

2.4. Implementation of EU regulations in the matter of commercial arbitration in the Polish legal system

Solutions from the Directive on consumer ADR were introduced to Polish arbitration by the Act of 23rd September 2016 on Out-of-Court Consumer Dispute Resolution[34]. Pursuant to the justification for this Act, the Polish legislator having to bear in mind the fact that under the out-of-court consumer dispute resolution system there will also be ADR entities that currently resolve disputes using the mediation or arbitration procedure regulated in the provisions of the Code of Civil Procedure (CCP), in order to maintain the coherence of the system, these procedures had to be adapted to the requirements of the ADR directive[35].

In the case of arbitration, the situation is more attractive for the parties, as there is greater freedom of both the arbitration court and the parties in

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33 Karol Ryszkowski, "Problem small claims w arbitrażu handlowym w prawie polskim," in *Maloznačnì spori: êvropejskij ta ukraïns'kij docvìd virìšennâ*, eds. Ìrina Ìzarova, Radoslav Flejszar, and Roksolana Hanik-Pospolìtak (Kiïv: VD "Dakor", 2018), 148. About small claims institution see also Andrzej Olaś, "Some remarks on the pending reform of the polish domestic small claims procedure," in *Maloznačnì spori: êvropejskij ta ukraïns'kij docvìd virìšennâ*, eds. Ìrina Ìzarova, Radoslav Flejszar, and Roksolana Hanik-Pospolìtak (Kiïv: VD „Dakor", 2018), 100, Karol Ryszkowski, "Kwestia small claims w arbitrażu handlowym w prawie polskim," *Zeszyty Naukowe Uniwersytetu Rzeszowskiego*, no. 114, *Seria Prawnicza, Prawo* 32 (2021) and Joanna Szumańska, "Postępowanie przyspieszone w arbitrażu (*fast track*)," *Przegląd Prawno-Ekonomiczny*, no. 2(39) (2017): 259.

34 Act on Out-of-Court Consumer Dispute Resolution of 23 September 2016, Journal of Laws 2016, Item 1823, as amended.

35 Karol Ryszkowski, "The Arbitration in Consumer Matters and New Technologies in Polish Law Against the Background of European Union Law," in *Právo, obchod, ekonomika 10: zborník vedeckých prác = Law, Commerce, Economy 10: Collection of Scientific Works*, eds. Jozef Suchoža, Ján Husár, and Regina Hučková (Košice: Univerzita Pavla Jozefa Šafárika Vydavatel'stvo Šafárik Press, 2021), 184–195. Full text: https://unibook.upjs.sk/img/cms/2021/pravf/pravo-obchod-ekonomika-10.pdf, 186.

shaping the rules of the procedure itself. Nowadays, with the COVID-19 epidemic, the common courts work to a very limited extent. They practically do not hold hearings in open court, while meetings by videoconference are limited for technical reasons. On the other hand, in arbitration proceedings the question of whether to hold a hearing in open court, i.e. summon the parties to an arbitration court, or conduct a hearing by videoconference, teleconference, through the exchange of documents containing the parties' statements, or otherwise - for example by via instant messaging, it is, in fact, the responsibility of the arbitration court itself. In this respect, it is usually only bound by its regulations. Evidence can be taken through just such a videoconference where, for example, a witness, expert, or party can be heard. You can also hear a witness in writing, moreover, CCP now also introduces such a possibility, but here arbitration was the leader and it showed the way to such simplified evidence proceedings. Arbitral tribunals, especially electronic ones, commonly use electronic services[36].

Arbitral tribunals conduct online proceedings - without paper service (except for the lawsuit), and traditional hearings are replaced by teleconferences. For instance, the Court of Arbitration at the Polish Chamber of Commerce in Warsaw is technically prepared for them. Thanks to that, even during the COVID pandemic, hearings (in the form of audio and audiovisual) are held there continuously[37]. So as we can see that the CCP regulations are in general sufficient for the new technologies in the Polish commercial arbitration, even during the COVID-19 pandemic[38], especially due to the above-mentioned art. 1184 CCP.

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36 Patrycja Rojek-Socha, "Prof. Gołaczyński: Arbitraż szansą dla przedsiębiorców w czasie epidemii," https://www.prawo.pl/prawnicy-sady/arbitraz-szansa-dla-przedsiebiorcow-w-czasie-epidemii-prof-dr,500636.html.

37 Marcin Zawistowski, "Czy sądy polubowne mogą zastąpić sądy powszechne?," https://prawo.gazetaprawna.pl/artykuly/1470813,sady-polubowne-sady-powszechne-koronawirus.html.

38 Ryszkowski, "New technologies in the Polish commercial arbitration," 252.

3. Conclusions

The provisions about arbitration in consumer matters in the CCP do not take into account the development of new technologies. However, Polish arbitration practice is not endangered in the field of the new technologies. As the practice shows the Polish provisions are sufficient in the field of the new technologies in Polish commercial arbitration, but with the exception in consumer matters due to consumer protection. So my hypothesis is confirmed[39], especially due to the freedom guaranteed by art. 1184 CCP.

The role of new technologies in Polish commercial arbitration is important, mainly from the time when the COVID-19 pandemic has begun. Generally, Polish provisions are not an obstacle to the new technologies in the Polish commercial arbitration[40]. We cannot say that Polish regulation is not consistent with EU legal acts, because there is no regulation in the European Union law regarding arbitration. The current trends in the bodies of the European Union are consistent with the position resulting from EU legal acts. Since there are convention provisions, such as the New York Convention and soft law acts, such as the UNCITRAL Model Law on Commercial Arbitration, EU legislative intervention is not needed in this area. However, actions taken by the European Commission for the Efficiency of Justice may have a positive impact on the use of new technologies in court proceedings, also in the field of commercial arbitration.

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[39] Ryszkowski, "New technologies in the Polish commercial arbitration," 252.

[40] Ryszkowski, "New technologies in the Polish commercial arbitration," 252.

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