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Arbitrability of corporate disputes

I. Introduction

The legal grounds for the applicability of the jurisdiction of an arbitration court to review a dispute between the parties are provided by an arbitration clause executed by them. In the Polish legal system it is expressly provided for by art. 1161 of the Code of Civil Procedure[1], which refers to the fundamental regulations included in the model law and in international conventions[2].

Significant complications appear when a dispute between the parties involves third party interests, which are not encompassed by an arbitration clause. The problem is being faced in the legal practice and theory, in particular in the context of operation of legal persons of the corporate type, where the interests of shareholders, members of the governing bodies and the corporation itself having a separate legal capacity meet. Thus, no wonder that the so-called arbitrability of corporate disputes, or at least a certain category thereof, has for a long time evoked concerns and controversies among the representatives of the science and the legal practice in Poland. On the one hand, the supporters of arbitration argued that it is convenient in resolving the disputes in question. On the other hand, certain hazards have been indicated, arising from the fact that firstly it may sometimes lead to the situation in which an entity which is not a party to an arbitration clause will be bound by such arbitration clause and secondly it may lead to the situation in which an entity to which the dispute pertains may be completely deprived

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[1] Act dated 17 November 1964, Code of Civil Procedure, consolidated text: Journal of Laws of 2016 Item 1822, as amended (hereinafter: the Code of Civil Procedure). Art. 1161 § 1 of the Code of Civil Procedure states as follows: *Submission of the dispute to be resolved by arbitration requires the agreement of the parties, in which the subject-matter of the dispute or the legal relationship from which the dispute may arise or has arisen should be mentioned (arbitration agreement).*

[2] *Ibidem*. Uncitral Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 and art. 5 of the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards.

of the possibility of participating in the proceedings in which the issue affecting its interests is to be resolved.

The two basic reservations cause that in respect of some kinds of corporate disputes the possibility of submitting them to the jurisdiction of an arbitration court is being challenged in the context of an objection based on the lack of arbitrability.

To begin with, it should however be pointed out that the term "corporate disputes" constitutes a relatively broad category. Therefore, it should be above all ascertained to which categories of corporate disputes such concerns pertain, in the context of the Polish legislation. It is hardly surprising that irrespective of the actual intent of the legislative bodies at the time of adopting the regulation, it was met with divergent opinions of commentators regarding its actual content and effects. Such issues are presented in the further part of this article, which will end with the presentation of the view of such authors who, being aware of the imperfection of the present legal system, postulate a change thereof to regulate this issue clearly and in a manner not evoking any concerns, and the conclusions of the authors of this article.

II. The notion of the corporate dispute and its scope

Some authors try to define the term in question in a simple manner by stating that "corporate disputes are disputes arising from relationships of corporations"[3]. G. Suliński precisely captures the issue by assuming that: "the concept of a dispute arising from a company relationship encompasses conflicts between particular shareholders, between the shareholders and the company, between the company and its governing bodies or their particular members and between the company and persons who caused harm to it, arising in the context of membership in a company"[4].

It is beyond any doubt that the category of "corporate disputes" is highly differentiated[5]. As a matter of fact, we are dealing with very different types of factual and legal circumstances. On the one hand, these are disputes of an undoubtedly financial nature and pertaining to a bilateral relationship (e.g. a dispute between the transferor and the transferee concerning the transfer of shares), the resolution of which usually does not affect directly any third parties. At the other extreme, there are disputes arising in the context of multilateral relationships, with at least equivocal financial nature, involving

[3] [sic] R. Uliasz, *Resolution of disputes by an arbitral tribunal – selected issues*, ADR 3/2008.

[4] G. Suliński, *Resolution of disputes arising from corporation's relationships by an arbitral tribunal*, Warsaw 2008, p. 37, Lex.

[5] *List of various categories of corporate disputes was presented for example by A.W. Wiśniewski in the following monograph: International commercial arbitration in Poland, legal status of arbitration and arbiters*, Warsaw 2011, p. 241.

inevitably and directly third party interests (it happens e.g. in the case of disputes concerning the validity and effectiveness of resolutions of corporate meetings). Accordingly, certain concerns are expressed whether it is possible to give a uniform answer to the question regarding arbitrability of such disputes. In this respect, the legal literature presented a view[6] that it is not controversial to consider that the following disputes between a company and a shareholder are arbitrable: related to contributions, concerning the shareholders' obligation to make additional contributions, related to a shareholder giving recurring non-monetary considerations to the company, concerning payments of dividends, concerning the determination of the value of shares or stock being redeemed, as well as disputes concerning the exercise of pre-emption rights or put or call options[7]. There are also no doubts as to the arbitrability of disputes related to trading in shares (stock) which may occur between shareholders (stockholders) on the one hand and various kinds of entities on the other (other shareholders (stockholders), third parties and the company itself).

However, there is a principal controversy as to whether disputes related to lodging appeals against the company's resolutions may be subject to the jurisdiction of an arbitral tribunal[8]. The main source of the dispute is a specific range of entities involved. Namely, a resolution is passed by shareholders (stockholders) realizing their interests by exercising their rights arising from shares (stock). Similarly, the shareholders' (stockholders') interests are realized most often at the time of lodging an appeal against the resolution[9]. However, the entity defending the resolution in the proceedings is usually

[6] R. Sikorski, [in:] *Analysis of arbitration. Operation of arbitration law and directions of postulated changes*, ed. B. Gessel-Kalinowska vel Kalisz, p. 75-77.

[7] R. Sikorski, *ibidem*, p. 76. A similar view is represented by A. Szumański, *Subjective scope of the arbitration clause in a dispute arising from a relationship of a corporation with particular emphasis on a dispute arising in the context of disposal of equity interests*, [in:] *International and domestic arbitration at the turn of the 20th century. Commemorative book dedicated to Tadeusz Szurski, PhD*, ed. P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel, Warsaw 2008, p. 229-230.

[8] It should be noted that the Polish Commercial Code provides two possibilities for attacking a resolution of shareholders. It is possible to seek to have an unlawful resolution of shareholders pronounced invalid by a court or to request a court to revoke the resolution even if it is not unlawful but is contrary to the company deed and good practice and prejudicial to the interests of the company or intended to wrong a shareholder. See art. 249 and 253 of the Polish Commercial Code with respect to resolutions of limited liability companies and art. 422 and 424 with respect to resolutions of joint stock companies.

[9] Pursuant to art. 250 of the Polish Commercial Code *the right to bring an action for the revocation of a resolution of shareholders of a limited liability company shall be vested in: 1/ the management board, supervisory board, audit commission and individual members of the said bodies; 2/ a shareholder who voted against the resolution and, upon the resolution's being adopted, demanded that this objection be put on record; 3/ a shareholder who was unduly prevented from participating in a meeting of shareholders; 4/ a shareholder who was absent from a meeting of shareholders, exclusively in the event that the meeting of shareholders had been improperly summoned or a resolution was adopted on a matter not included in the agenda; 5/ in respect of voting in writing, a shareholder who voted against the resolution and, upon being informed of the resolution, lodged an objection within two weeks.* The same persons are authorized to seek

not the other shareholders (stockholders), who voted in favor of its adoption, but the company itself represented usually by its management board[10]. Moreover, a resolution which was passed by the majority of shareholders (stockholders) may be challenged by one shareholder (stockholder). However, one cannot imagine the situation in which the result of arbitration proceedings between one shareholder and the company consisting of the revocation of the resolution will only be binding upon the participants of the proceedings, and in relationships of the company with other shareholders the resolution will remain in force. The provisions of the Commercial Companies Code provide for a general rule (in art. 254 in respect of a limited liability company and in art. 427 of the Commercial Companies Code[11] in respect of a joint stock company, respectively), according to which a legally valid judgment revoking a resolution is binding in relations between the company and all shareholders (stockholders) and between the company and the members of its governing bodies. Further, it may happen that the management board (or particular members thereof) and the supervisory board (or particular members thereof) will challenge, pursuant to the Commercial Companies Code, a resolution passed by the shareholders meeting (general meeting). In any such case, the structure of interests realized by particular persons participating in the adoption of a resolution and – subsequently – in the proceedings intended to challenge it becomes even more complicated[12]. Although all such complications do not evoke any reservations since the common court is the body resolving the dispute, there are certain concerns as to the possibility of their resolution in arbitral proceedings since in such a case, there is space for far reaching abuses[13].

The issue of the arbitrability of corporate disputes can be observed in a worldwide context. Taking into consideration other jurisdictions, various perceptions of the problem are visible[14]. According to Ch. Borris, in most common-law countries the issue

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that a resolution of a liability company be pronounced unlawful. Pursuant to art. 422 and 424 of the Polish Commercial Code similar rules are established in respect of joint stock companies.

[10] See art. 253 § 1 of the Polish Commercial Code pursuant to which *in a dispute over revoking or pronouncing invalid a resolution of shareholders, the defendant company shall be represented by the management board, unless an attorney has been appointed for this purpose under a resolution of shareholders*. The same rule applies to joint stock companies under art. 426 of the Polish Commercial Code.

[11] Act dated 15 September 2000 Commercial Companies Code, Journal of Laws No. 94, Item 1037, as amended (hereinafter: the Commercial Companies Code).

[12] In such a case, the challenging person should promote the company's interests.

[13] It is indicated e.g. by M. Tomaszewski, *Challenging corporate resolutions in an arbitral tribunal – de lege ferenda,* "Przegląd Sądowy" 2012/4, p. 30-33.

[14] Perales Viscasillas in her comparative research observed that there is a general presumption in favour of using arbitration as a method of resolving intra-corporate disputes. The countries in which such approach is used are, among others, Spain, Switzerland, and the United States. The element that may restrain such practice is the exclusivity of the jurisdiction of national courts or where public policy is involved. (M. del Pilar Perales Viscasillas, *Arbitrability of (Intra-) Corporate Disputes*, [in:] L.A. Mistelis & S.L. Brekoulakis, *Arbitrability, International & Comparative Perspectives*, Wolters Kluwer, 2009, p. 285-6).

of the arbitrability of corporate disputes is a problem of a smaller scale and is not widely discussed. In England and Wales the possibility of using arbitration as a method of resolving intra-corporate disputes was confirmed by the Court of Appeal decision in the *Fulham Football Club [1987] Ltd v. Richards and Another*[15] case. Meanwhile, in the Unites States the approach towards arbitrability mainly arises in the context of the "arbitrability of (internal) trust disputes"[16]. Kennett notes growing judicial support for arbitration in relation to such disputes, however it is limited to private companies only[17].

In Italy the concept of arbitrability, which has been previously debated[18], has been changed by Legislative Decree 5 of 17 January 2003 on Company and Commercial Proceedings, where in Articles 35(5) and 36 of the Decree, the arbitration procedure includes the possibility to determine the validity of resolutions of shareholders meetings enacted at that time[19]. Spain has provided a model arbitration clause for intra-corporate disputes that can be incorporated into the by-laws of any kind of corporation[20]. Swiss law can be characterized as one that enables intra-corporate disputes to be solved by arbitration, including resolutions. In regard to the latter example, A.W. Wiśniewski stresses the fact that in order for such solution to be effective, it needs to be included in the statute of the company.

III. *Travaux préparatoires* regarding arbitrability in the Polish Code of Civil Procedure

Reservations as to the possibility of challenging resolutions of companies in arbitration proceedings were expressed in the Polish legal literature as early as in the interwar period[21]. After the Second World War the issue was for a long time insignificant due to the fact that in the Polish economy a company structure was almost not used at all. The discussion was only resumed after the market economy was reinstated in Poland and concurrently to the broad use of the company structure in commercial dealings.

[15] [2011] EWCA Civ 855; [2012] Ch. 333.

[16] Ch. Borris, *Arbitrability of Corporate Law Disputes in Germany*, "International Arbitration Law Review" 2012, p. 161.

[17] W. Kennett, *Arbitration of intra-corporate disputes*, "International Journal of Law & Management" 2013, p. 346.

[18] A.-M. Gaillet, *Arbitration procedures under the new Italian company law*, "International Business Law Journal" 2005, p. 743, 747.

[19] A.W. Wiśniewski, *International Commercial Arbitration*, Warsaw 2011, p. 251.

[20] See M. del Pilar Perales Viscasillas, *Arbitrability of (Intra-) Corporate Disputes*, [in:] L.A. Mistelis & S.L. Brekoulakis, *Arbitrability, International & Comparative Perspectives*, Wolters Kluwer, 2009, p. 281-282.

[21] *Ibidem*. A. Jackowski, *Actions for annulment of resolutions of shareholders meetings in corporations and an arbitral tribunal*, "Polski Proces Cywilny" 1937, p. 353 at seq.

A broader discussion concerning this subject was conducted during the work on the new regulation of arbitration proceedings in the Code of Civil Procedure, finally promulgated in 2005[22]. The history of work on this legislative act seems to deserve a little more attention, since it illustrates quite well the evolution of the views of the authors of this regulation on the issue being discussed here. A particular attention should be paid to the regulation of the arbitrability of disputes, since it is a certain kind of criterion used by the legislative bodies to permit the possibility of referring some categories of disputes for resolution of arbitral tribunals or exclude such a possibility and leave such disputes subject to the exclusive jurisdiction of common courts.

The initial draft of art. 1157 defining the arbitrability in the new legal regulation was as follows[23]:

> *Unless a special provision states otherwise, the parties may refer for resolution of an arbitral tribunal disputes concerning monetary value rights, except any disputes concerning alimonies, and any disputes concerning non-monetary value rights to the extent they may be the subject to settlement.*

In the draft, the factor deciding about the arbitrability was in principle the fact whether the dispute is monetary value related or not. All monetary value related disputes, except disputes regarding alimonies, were arbitrable (unless otherwise stipulated by special regulations). However, as regards disputes of a non-monetary value nature, the possibility of referring them to an arbitral tribunal existed as long as such a dispute could be the subject of a settlement agreement (again, subject to the general reservation that certain far reaching limitations could arise from special regulations).

The general regulation concerning arbitrability, included in the subsequent versions of art. 1157, was accompanied by a special regulation included in art. 1163 whereby:

> *An arbitration clause included in the articles of association (statute) of a commercial company, concerning disputes arising from the company's relationships, is binding upon the company and all shareholders*[24].

The two provisions triggered a discussion about the arbitrability, and in particular the settleability, of corporate disputes. Due to the hazards which may arise from the expanded effectiveness of judgments concerning revocation of resolutions in the

[22] As the fifth part of the Code of Civil Procedure added by the Act dated 28 July 2005 (Journal of Laws No. 178, Item 1478), which took effect on 17 October 2005.

[23] Such evolution is presented on the basis of the publications of A.W. Wiśniewski, *Resolution of corporate disputes by arbitral tribunals in the context of the new regulation of the arbitrability of disputes*, [in:] *International and domestic arbitration at the turn of the 20th century. Commemorative book dedicated to Tadeusz Szurski, PhD*, Warsaw 2008, p. 267 et seq.

[24] This provision was slightly modified in the next bills, but such modifications were not very significant for the issue being analyzed here.

situation in which all parties interested in such decision may be deprived of the possibility of participating in the proceedings concerning the challenged resolution, it was decided to expressly exclude the arbitrability of such disputes. Consequently, the second paragraph was added to art. 1157 which reads as follows:

> *It is not possible to refer for resolution of an arbitral tribunal any request to revoke or invalidate resolutions of the governing bodies of legal entities and organizational units other than legal entities who are assigned legal capacity by the law.*

During the further discussion between the supporters and the opponents of the idea of submitting disputes related to challenging resolutions to the jurisdiction of arbitration courts, art. 1157 evolved further to the extent that the previously added paragraph 2 expressly excluding such a possibility was deleted and the provisions of paragraph 1 were changed as follows (and have not been further amended):

> *Unless otherwise provided by special provisions, the parties may refer for resolution of an arbitral tribunal any disputes concerning monetary value rights or disputes concerning non-monetary value rights which may be subject to a court settlement, except for disputes concerning alimonies.*

IV. Different interpretations of the new regulation regarding arbitrability in the Polish Code of Civil Procedure

Despite the fact that during the work on the new legal regulation concerning arbitration, the arbitrability of corporate disputes was intensely discussed, as a result of which art. 1157 of the Code of Civil Procedure was repeatedly amended and art. 1163 of the Code of Civil Procedure was introduced; the final result of such work does not unfortunately give a clear answer to the question regarding the scope of arbitrability of corporate disputes *de lege lata*. Consequently, many arguments leading to different conclusions in this respect appear in the legal doctrine concerning the regulation being analyzed[25].

In the discussion regarding arbitrability of corporate disputes, several views can be distinguished but each of them has certain weaknesses.

1. Firstly, the most radical view, whereby disputes related to challenging resolutions do not have the required settleability and therefore are also not arbitrable. The reason is a specific range of entities involved in such disputes which justifies the exclusion of arbitrability in respect of this category of disputes. Namely, a resolution

[25] Detailed presentation of views and their nuances, vide e.g. A.W. Wiśniewski, *International commercial arbitration* …, p. 278 et seq.

passed by the shareholders meeting may be challenged by each shareholder who is not satisfied therewith[26] and by the members of the management board or the supervisory board of the company, and the defendant in any such action is always the company represented by the management board. Thus, the parties to the proceedings are different than the persons who passed the resolution (the shareholders present at the shareholders meeting); therefore, during the proceedings it is not possible to enter into a settlement agreement concerning the resolution but only to eliminate such resolution from legal transactions. This view principally ends any further research intended to find a way to make disputes related to challenging resolutions arbitrable. Presently, we may probably say that this is the prevailing view in the legal doctrine[27].

2. The view whereby art. 1157 of the Code of Civil Procedure may be interpreted in such a way that the settleability constitutes a test of arbitrability only in the case of disputes concerning non-monetary value rights, and disputes regarding monetary value rights are arbitrable, unless otherwise stipulated by special regulations. Since in respect of disputes related to challenging resolutions there is no express statutory exclusion, it should be considered that as a matter of principle they are arbitrable, but to the extent that they may be treated as disputes concerning monetary value rights. However, this view has two weak points. Firstly, the very interpretation of art. 1157 of the Code of Civil Procedure according to which the settleability test applies only to disputes of a non-monetary value nature is not fully convincing. The legal literature presents a different interpretation of this provision, according to which it should rather be considered that the wording thereof means that the settleability test relates to all kinds of disputes. Secondly, under the laws of Poland it is not obvious that all disputes related to challenging resolutions are monetary value related disputes. Although this view is expressed quite strongly in the legal doctrine[28], judicial decisions of the Supreme Court represent a prevailing view that it is the content of the challenged resolution that determines the nature of the dispute, i.e. whether the dispute is monetary value related or not[29]. However, there are certain discrepancies in this respect; therefore, the adoption of this concept causes that a certain duality will be possible, consisting in the fact

[26] After the fulfillment of certain additional conditions such as voting against the resolution and expressing an objection for the record during the shareholders meeting or the situation in which a shareholder was not unreasonably admitted to the shareholders meeting.

[27] Vide T. Ereciński, K. Weitz, *Arbitration court*, Warsaw 2008, p. 121 and other authors indicated in footnote 212.

[28] Vide e.g. S. Sołtysiński w S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Commercial Companies Code*, V. III, *Commentary to articles 301-458*, ed. C.H.Beck, Warsaw, p. 244-245.

[29] Vide T. Ereciński, K. Weitz, *Arbitration court*, p. 118-119 and the jurisprudence referred to therein.

that some resolutions (which are undoubtedly monetary value related) will be challenged in arbitration proceedings and other (non-monetary value related resolutions) will be challenged in arbitration proceedings only if it is possible to ascertain that they are settleable. Finally, this concept also goes back to the settleability test and depending on the adopted interpretation it may be justifiable to conclude that either all disputes are arbitrable (since they constitute disputes concerning monetary value rights or disputes concerning non-monetary value rights but in the case of such disputes each of them is settleable, in an abstract sense) or alternatively a dual method of challenging resolutions will be justified, whereby some of them will be challenged in arbitration proceedings and others in court proceedings.

3. The concept whereby art. 1157 of the Code of Civil Procedure does not apply at all to disputes arising from the company relationships since such disputes were comprehensively regulated in art. 1163 of the Code of Civil Procedure[30]. However, there are serious doubts whether art. 1163 of the Code of Civil Procedure may be treated as *lex specialis* in respect of art. 1157 of the Code of Civil Procedure. The legal literature pointed out that art. 1163 is only limited to the ascertainment of expanded effectiveness of arbitration clauses for persons who did not participate in the execution thereof. However, this provision does not apply to arbitrability, which is generally regulated by art. 1157 of the Code of Civil Procedure. Also, the Supreme Court shared this view by upholding that "art. 1163 § 1 of the Code of Civil Procedure does not contain a special provision in respect of art. 1157 of the Code of Civil Procedure regarding the requirement that disputes referred for resolution of an arbitral tribunal must be settleable"[31]. An additional shortcoming of this solution consists in the fact that art. 1163 of the Code of Civil Procedure pertains only to shareholders and companies and it does not extend onto other persons who, under the provisions of the Commercial Companies Code, have the title to challenge resolutions, such as the company's governing bodies and members of such bodies. Accordingly, if an arbitration clause is included in the articles of association/statute of a company, we will deal with a dual method of challenging resolutions: by the shareholders – through arbitration proceedings and by the management board or supervisory board or by particular members of such bodies – through a court action. However, please note that the Supreme Court did not approve of this concept.

[30] [sic] in concreto: A. Szumański, *Scope of entities* …., p. 227 et seq. and G. Suliński, *Resolution of disputes arising* …., p. 103

[31] Vide Resolution of the Supreme Court of 7.05.2009 (III CZP 13/09) OSNC 2010/1, item 9.

4. Finally, the concept whereby art. 1157 of the Code of Civil Procedure, and in particular the settleability test provided for therein, applies to disputes related to challenging resolutions; however, the test should be applied in a special manner, by evaluating the category of the dispute *in abstracto*, through examining whether the persons authorized to pass a resolution are at the same time able to achieve the result similar to the one which may be achieved through lodging an effective appeal against the resolution[32]. In this approach, the expanded validity of a judgment invalidating or revoking a resolution should be treated as an element that is significant but not deciding about arbitrability of disputes (more precisely: deciding about the necessity to exclude arbitrability). It is rather an element of evaluation whether the arbitration clause is properly formulated and the arbitration proceedings are conducted in such manner as necessary to ensure that all persons who may be affected by the judgment will be able to participate in the proceedings and properly express their standpoint. However, this issue is subject to assessment at a different stage than the decision about the arbitrability of a dispute.

Due to significant differences in views represented in the context of the applicable laws, in practice the number of instances in which shareholders exercise their rights to challenge resolutions by way of arbitration proceedings is insignificant. It is hardly surprising since due to the fact that the deadlines prescribed by the Commercial Companies Code for lodging an appeal against a resolution are very short, the risk involved in choosing arbitration proceedings to challenge a resolution is too high given that an arbitration court may consider that it has no jurisdiction to resolve the dispute due to the fact that it is not arbitrable, or worse still, there is a risk that such decision may be issued in post-arbitration proceedings revoking the judgment of the arbitration court which has recognized its jurisdiction and resolved the dispute.

V. Proposals for the amendment of the Polish Code of Civil Procedure with the purpose of clarifying the issue of the arbitrability of corporate disputes

In connection with that, the supporters of the possibility of resolving disputes related to challenging resolutions in arbitration proceedings also present radical proposals consisting of clear and unequivocal regulation of this issue in the Polish law. Generally speaking, such proposals are based on the assumption that disputes related

[32] [sic] in concreto A.W. Wiśniewski in many publications, most recently in the monograph: International commercial arbitration …, p. and R. Kos, *Arbitrability of disputes concerning the validity of resolutions in corporations*, "Przegląd Prawa Handlowego" 2014, no. 3, p. 32.

to challenging resolutions are not immanently deprived of arbitrability. And that the imposition of a filter in the form of settleability, to which certain concerns may exist, but at least according to the majority of commentators it presently eliminates arbitrability of such disputes, is as a matter of fact only an instrument intended to exclude the possibility of abuses which may occur in resolution of such disputes in connection with a very specific range of entities involved in such proceedings. However, the possibility of eliminating the risk of such abuses exists through proper formulation of an arbitration clause and its realization during the pending arbitration proceedings. If such conditions are met, then there is no problem with submitting disputes related to challenging resolutions to the jurisdiction of an arbitration court; just the opposite, it is possible to use many advantages of arbitration proceedings in resolving such disputes.

As part of this trend, concrete proposals how to amend the laws regulating arbitration proceedings were developed. One of them was presented by M. Tomaszewski, in the above-referenced article: *About challenging of corporate resolutions in an arbitral tribunal – de lege ferenda*. Simultaneously with this proposal, a proposed amendment to the provisions of the Code of Civil Procedure concerning arbitration proceedings was prepared and presented during a meeting of the Civil Law Codification Commission in 2010[33].

Although the proposals are different, they principally represent the same approach to solutions.

Firstly, they expressly state that disputes related to revocation or invalidation of resolutions are arbitrable. It arises from the very fact that the statute expressly provides for the possibility of executing an arbitration clause submitting such disputes to the jurisdiction of an arbitration court. A. Szumański's bill further provides for modification of art. 1157 of the Code of Civil Procedure by clearly stating that the settleability, as a condition of arbitrability, refers only to disputes relating to non-monetary value rights and does not apply to disputes concerning monetary value rights.

Secondly, a requirement is introduced to announce the commencement of such proceedings in such manner as necessary to ensure that all interested parties (shareholders /stockholders) become aware thereof, in order to allow them to join the proceedings on the side of one of the parties. It is worth noting that both proposals provide for the introduction of such obligation in different ways. A. Szumański's bill states that the introduction of the relevant requirements to the arbitration clause constitutes a condition of its effectiveness, and according to M. Tomaszewski's proposal this obligation arises directly from the law.

[33] The proposal, hereinafter referred as A. Szumański's bill was prepared by a team composed of the following individuals: A. Szumański, M. Furtek, S. Pieckowski, A.W. Wiśniewski, W. Jurcewicz, M. Tomaszewski.

Thirdly, both proposals state that in the situation where there is more than one person on the side of the claimant or defendant, all persons acting on the same side appoint an arbiter or arbiters unanimously (although A. Szumański's bill provides for a possibility of regulating this issue differently in the arbitration clause).

Further, both proposals provide for modification of art. 1163 of the Code of Civil Procedure whereby an arbitration clause included in the articles of association (statute) would be binding not only upon the company and all shareholders (stockholders) but the company's governing bodies and their members.

VI. Comparison of the Polish and German approaches to the arbitrability of corporate disputes

The possibility of referring corporate disputes, and in particular disputes related to challenging corporate resolutions, to resolution of arbitral tribunals is problematic both in Poland and in Germany, although the German legal doctrine and jurisprudence is slightly more advanced in resolving this problem.

Nevertheless, the conclusion which does not evoke any doubts is that in both legal systems there seems to be space for arbitration in corporate disputes. The justification of this argument has strong axiological and constitutional grounds. In Germany, arbitration as a method of resolving disputes is treated equally with litigation and it is only a matter of decision of autonomous parties which path to choose in a concrete case[34]. In Poland the opinion about constitutional grounds of arbitration in the dispute resolution system is not so expressly established. However, it seems that there are no axiological or dogmatic reasons why the opinion in this respect should differ from the one prevailing in Germany.

Certain differences arise from the legal regulation adopted in the German law where since 1998 a very clear rule has applied that all disputes concerning monetary value rights are arbitrable and the settleability constitutes an additional filter for arbitrability only in respect of disputes concerning non-monetary value rights[35].

[34] In relation to arbitration as a method of resolving disputes, in the past, Austrian law was similar to that in Germany. Following the changes to the Austrian Arbitration Act as amended by SchiedsRÄG 2013 it is suggested by A.W. Wiśniewski that Austria, in terms of lodging appeals against corporate resolutions, would follow in the footsteps of Germany (A.W. Wiśniewski, *International Commercial Arbitration,* Warsaw 2011, p. 250).

[35] It arises from the Act on New Regulation of Arbitration Proceedings in force since 1 January 1998 (Schiedsverfahren-Neuregelungesgesetzes). Bearing in mind the legislative bodies aim at this direction, the German Federal Tribunal upheld, still prior to the enforcement of this amendment, that corporate disputes are settleable since they have a dispositive nature in a sense that they may be revoked by all shareholders acting jointly (the judgment known as Schiedsfahigkeit I (Arbitrability I) BGH, Urteil vom 29. März 1996, Az. II ZR 124/95, NJW 1996,1753). The judgment constituted a principal change in the

However, it does not change the fact that the German legal doctrine and jurisprudence felt very strongly that there was a need to treat corporate disputes in a special way due to the fact that the judgment which is issued for the parties to the proceedings may affect the rights and interests of persons who do not participate in the proceedings. In the above-referenced judgment Arbitrability I the Federal Tribunal pointed that out and expressed the view that the issue should be regulated in a special way by the German legislative bodies.

However, it appeared that the substantial amendment of the arbitration law in Germany taking effect soon after the date of the above judgment did not resolve that issue; just the opposite, the justification thereof demonstrated that the legislative bodies, due to the difficulties they perceived they would face to clearly regulate this issue, left it deliberately to the discretion of courts[36].

Only after 10 years was that issue substantially addressed by another judgment of the Federal Tribunal known as "Arbitrability II"[37]. The judgment sets out four conditions which should be met by an arbitration clause to validly submit corporate disputes to the jurisdiction of an arbitral tribunal. In simple terms, such conditions are as follows:

a. All shareholders must consent to the arbitration clause,
b. All shareholders and all governing bodies of the company should be informed about the commencement and progress of arbitration proceedings, so that they should be able to join the proceedings at least as a side intervener,
c. All interested parties who may be potentially affected by the judgment of the arbitral tribunal should be given the possibility of participating in the selection and appointment of an arbiter (unless the appointment is made by an impartial institution),
d. The arbitration clause should guarantee that all disputes related to challenging resolutions, pertaining to the same resolution, will be resolved by the same arbitration court.

The above-referenced judgment known as Arbitrability II[38] set out certain general rules to be met by an arbitration clause submitting corporate disputes to the jurisdiction of an arbitration court in order to be valid. In the German legal practice it is quite

hitherto jurisprudence, according to which disputes regarding resolutions were not settleable and accordingly were not arbitrable.

[36] Reference to Karl's article or to the justification cited by Karl.

[37] Schiedsfahigkeit II of 6 April 2009, BGH, Urteil vom 6. April 2009, Az. II ZR 255/08, NJW 2009, 1962.

[38] For further analysis of the judgment see: R. Kos, *The „Arbitrability II" Decision on the German Supreme Court (BGH) – The German Benchmark for Arbitrating Corporate Disputes in Poland?* [in:] J. Rajski, B. Gessel-Kalinowska vel Kalisz, *The Challenges and the Future of Commercial and Investment Arbitration, Court of Arbitration Lewiatan*, Warsaw 2015, p. 75-91.

commonly considered that the level of complexity of such clauses is so great that the most advisable solution is to comprehensively regulate this issue in the regulations of a permanent arbitration court, to which the parties may refer in a relatively simple arbitration clause included in the articles of association. In order to promote such an approach DIS prepared special rules of procedure regarding corporate matters[39].

The recognition of the jurisdiction of arbitration courts to resolve corporate disputes does not eliminate concerns as to the practical risks which may arise from the choice of this method of dispute resolution for the interests and rights of persons who may be affected by judgments of arbitral tribunals. The discussion demonstrates that the source of the problem is not the theoretical definition of settleability, or even arbitrability of certain kind of disputes, *in abstracto*, but the practical protection of the interests in question in the course of and after the arbitration proceedings.

When we analyze the issue from the Polish perspective, it seems that the opinion that becomes increasingly popular is the one according to which the actual problem we face in the case of corporate disputes, in particular disputes concerning corporate resolutions, does not consist of the lack of settleability of such disputes but – similarly to Germany – the need to ensure protection of rights and interests of persons who do not participate in arbitration proceedings, but may be affected by a judgment issued in such proceedings. The settleability test introduced by the Polish legislative bodies as the prerequisite for arbitrability is rather only an instrument which makes it possible to completely exclude the possibility of submitting disputes concerning resolutions to the jurisdiction of an arbitral tribunal. However, the instrument was used not because it was objectively necessary but because at the time when the final text of the amendment of the Code of Civil Procedure was adopted in 2005 the legislative bodies were not able to use more subtle instruments which, on the one hand, would ensure protection of all persons whom a judgment may affect, and, on the other hand, would not completely block the possibility of referring such disputes to arbitration courts, and by the same using certain advantages of arbitration proceedings in resolving such disputes.

The German example demonstrates that looking for such a solution is possible and purposeful. The way chosen by the German practitioners is very interesting, but looking at it from the historical perspective one can have certain doubts whether it is an optimal solution. It should be pointed out that in Germany the legislative bodies and jurisprudence mutually indicated the right place to resolve this issue, and to determine the conditions of arbitrability of corporate disputes. The final effect is the result of decisions taken at both levels. Namely, on the one hand, at the statutory level the

[39] Vide Erganzende Reglen fur gesellschaftsrechtliche Streitigeiten (DIS-ERGeS), which took effect on 15 September 2009.

criterion of settleability as the condition for arbitrability of disputes concerning monetary value rights was expressly eliminated, and on the other hand the jurisprudence independently developed the conditions of validity of an arbitration clause, concerning corporate disputes, which significantly differ from the general conditions of validity of an arbitration clause.

In Poland, the starting point is even more complicated since additionally there is no agreement as to the nature of corporate disputes (in particular, disputes concerning resolutions), in particular whether they should be treated as disputes concerning monetary value rights or non-monetary value rights, or whether the classification of a dispute to one of such categories depends on the subject of the resolution itself or not. It seems that we can assume that legislative bodies (although it has not been expressly indicated in the justification of the bill introducing new solutions in the arbitration law) clearly had doubts as to the method of regulating the arbitrability of corporate disputes, and – therefore – decided to leave this issue open hoping that the relevant opinion will be developed by jurisprudence. Almost 10 years have passed since the date of enforcement of the new arbitration law, but there are still no grounds to believe that we can expect the Supreme Court to issue a judgment which in Poland would play a similar role as the judgment known as "Arbitrability II" in Germany. Therefore, it seems that in Poland the only way to confirm the permissibility of submitting corporate disputes to the jurisdiction of arbitration tribunals is to clearly regulate this issue in the law.

It seems that the discussions about an appropriate solution should be conducted at several levels. Firstly, with respect to the very arbitrability of corporate disputes it seems necessary to eliminate the criterion of settleability as the condition for arbitrability of such disputes, and to state that all such disputes constitute disputes concerning monetary value rights (or to make them arbitrable even if we permit various opinions regarding that – as a special case). Secondly, in respect of an arbitration clause whereby jurisdiction of arbitration courts is chosen for such disputes, the criteria such clause should meet and the consequences of the failure to meet them (invalidity, ineffectiveness or the possibility of validation through ensuring certain factual circumstances even if they do not directly arise from the clause) should be indicated. Thirdly, in respect of proceedings conducted on the basis of the clause, the conditions for correctness of such proceedings should be determined, in particular the level of protection of the rights of persons who may be affected by a judgment issued in arbitration proceedings[40].

[40] In particular, it needs to be ascertained e.g. whether proper protection of persons which may be affected by an arbitral judgment requires their participation in the appointment of an arbiter and in the proceedings, or whether it is sufficient that all such persons are given the possibility of participating in such actions, provided that any failure to use such possibilities within a reasonable period of time does not prevent the proceedings from being continued.

Finally, one should also consider the consequences of the failure to meet the requirements so imposed, and – accordingly – the method of monitoring compliance with the requirements and the consequences of non-compliance, both discovered during the proceedings and after the completion thereof.

German experiences also demonstrate that, in looking for practical solutions, one may place them at various levels. The discussion conducted for years as part of the legal doctrine and jurisprudence in both countries demonstrates that there are three possibilities in this respect: firstly, to leave this issue only to contractual regulations; secondly, to rely on court decisions; and thirdly, to regulate them in a legislative act.

The above-mentioned experiences also demonstrate that it is extremely difficult to find a satisfactory solution at the first of the indicated levels because bearing in mind a usually multilateral nature of corporate disputes, appropriate contractual regulations would have to be extremely complicated and expanded. Their negotiation at the stage when the dispute between the parties has not yet arisen is usually considered too burdensome and useless, and often evokes suspicions as to the intentions of the party opting for such a regulation and is rejected even for this very reason.

The solution based on jurisprudence which now exits in Germany on the basis of the judgment of the Federal Tribunal called Arbitrability II is from this perspective a much better solution, but is not free from certain defects. In particular, it is about the precision of criteria which condition an effective choice of arbitration as the dispute resolution method by the parties of a corporate relationship. One should bear in mind the possibility that the court jurisprudence may change, which has been repeatedly seen in the Polish judicial decisions. From this perspective, in Poland a statutory interference in the matter being analyzed is strongly recommended.

The attempts made thus far to resolve the issue *de lege lata* in line with a pro-arbitration spirit, in our opinion, cannot assumedly bring the anticipated effect. Not to take anything away from the legal craft and the sophistication of the presented views, they are based on an axiological choice of the author who tries to subsequently demonstrate that the existing legislation in force may be reconciled with the choice so made. However, it does not guarantee sufficient safety for the parties submitting to an arbitration clause, since they are fully aware that there is no guarantee that the common court assessing the effectiveness of the clause will also adopt such a pro-arbitration approach. We are deeply convinced that only a solution which will ensure the greatest safety of the choice made by the parties will make sense for the legal practice, and this may only be ensured by a solution based on a consensus between the legislative bodies' intent, the standpoint represented by jurisprudence and the approval of the arbitration experts and practitioners.

It seems that the choice of statutory intervention through comprehensible regulation of this issue in the law allows Poland to achieve the goal in a relatively simpler manner than in the German legal system. The proposal presented above as Szumański's bill seems to meet all necessary conditions of a statutory regulation which guarantees proper protection the interests of all entities who may be affected by a judgment in connection with a dispute related to revocation or invalidation of a resolution. Therefore, it seems that it constitutes a good starting point for work on the amendment of the Code of Civil Procedure which would make it possible to review corporate disputes, in particular the disputes regarding resolutions also in arbitration proceedings.