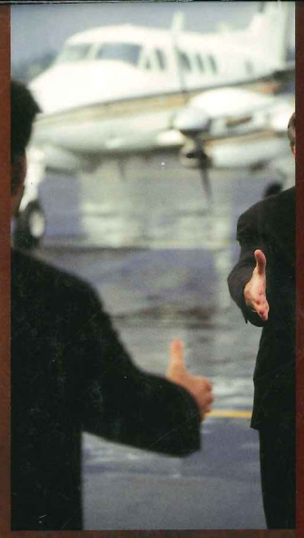

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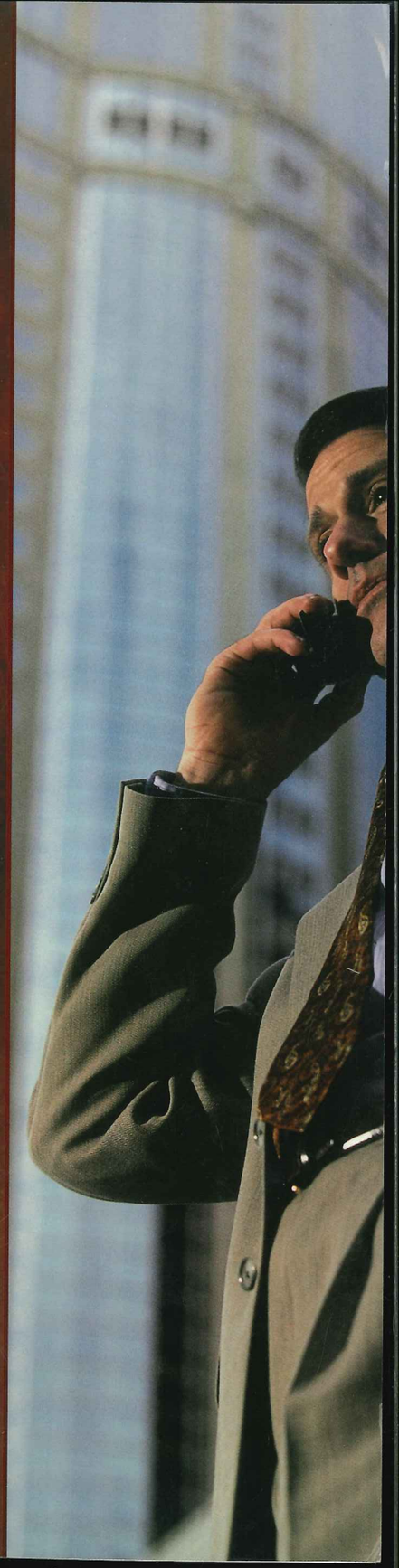
Cooperation of Universities supporting the development of the Lublin and Lviv regions



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CONTENTS

*Jan Olszewski**

Arbitration courts as an instrument to activate transborder economic cooperation

1. Defining the instrument of activation

Reviving transborder cooperation has been a priority task for local authorities for some years now. However, the task is not easy as there are political, bureaucratic, cultural, and – above all – legal obstacles.

One must first identify the obstacles have to be identified and then efficiently overcome them.

Identifying problems only seems to be a simple task; in fact, it requires thorough examination, especially if the results are to ensure the development of precise solutions.

In the field of recognizing the legal difficulties, different lawyers could present equally numerous proposals. Such complexity can be justified by the fact that the law is divided into branches, and within each branch there can be numerous complications regarding concepts and definitions and other difficulties.

However, the aim of this article is not a detailed review of legal factors inhibiting the cooperation, but finding institutions, which would support the cooperation in a simple way, within the law.

We are not looking for impediments to cooperation, but some institution, which will create a bridge over the obstacles, or maybe will circumvent them (hopefully, without any conflicts and without breaking the law).

Finding such a legal instrument is not a very complex task as business experience and positive practice from the countries where transborder cooperation is developed gives us a range of guidelines. Entrepreneurs dealing with border trade, as well as lawyers connected with this type of activity, frequently emphasize the special role of arbitration courts in allaying the fears accompanying cooperation with partners coming from a different legal system.

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2. General characteristic of the activation programme

As I learned from the interviews carried out with the entrepreneurs from the Podkarpackie province, one of the factors discouraging them from undertaking international economic cooperation is their fear of future problems connected with resolving problems. This is not about national prejudices but about typical differences in opinion, which frequently accompany efforts at cooperation. There is a common belief that court procedures are lengthy and therefore expensive. In order to minimize this danger, it is advisable for the representatives of academic institutions to organize training sessions which feature presentations of foreign law. However, this solution is appropriate only for larger entrepreneurs due to potential costs.

Yet, there is a solution that can encourage greater cooperation. It is based on presenting the activities of courts of arbitration and offering comprehensive help in creating agreements with arbitration clause. This institution is known in international law. It is also found in almost all Poland's neighbouring countries. Although arbitration courts already function in Podkarpackie and Lublin provinces on both the domestic and international levels, many small and medium businesses are not familiar with them.

The role of this article is not only to indicate the institution which activates transborder cooperation, but also to describe the special activation programme.

The aim of the Special Programme would be the popularization of the institutions followed by assistance in using it. The programme would consist of three stages. The first stage is training and presenting the institution's legal basis followed by demonstrating the procedure of arbitration agreements. The second stage would include practical case analyses by showing activities in a "step by step" way, that is, what one is supposed to do to initiate action by an already existing arbitration court whenever a conflict between sides exists. In both stages it would be advisable to clarify the procedural complexities and costs connected with the proceedings led by a Common Court of law and to compare them with the significantly faster and cheaper arbitration court. The training sessions carried out in both stages should conclude with practical conferences which would constitute the third part of the programme. During the conferences judges and practitioners would present their comments resulting from the research into the functioning of arbitration courts.

Within the review of foreign law it is recommended to present a usually more modest arbitration court, which, however, is extremely important in certain conditions for border countries.

3. Examples of research topics recommended for inclusion in training plans

The training programme should include a couple of theoretical and practical topics. The choice of topics has been set based on problems presented during an international conference organized by Economic and Trade Law Unit at the Department of Law, Rzeszów University on 22-23 September 2006 in Rzeszów. The list given below is only suggestive. The choice of problems emerged from the author's current experience. However, it should be remembered that changing a legal and political environment will require a dynamic reaction from arbitration courts. Therefore, new topics will continue to appear.

- Mediation, conciliation and arbitration court

Due to the amendment of the Code of Civil Procedure, which was enacted by the Sejm on 28 July 2005, we should first discuss new institutions. Then the connection of mediation and conciliation with the procedure of arbitration agreement will follow.

A lecture should also include a review of cases which show successful (and unsuccessful) mediations. Similarly, mediation settlements of the more important arbitration courts will be clarified.

A review of various Polish mediation regulations should take place here (for example, consumer, banking, electronic media, Internet domain regulations etc.) and it should be followed by a survey of transborder regulations. It is advisable to show mediation as an institution which should precede the appropriate proceedings in arbitration court. Then, the aspect of creating mediation incentives should follow.

- The notion of arbitration and arbitration agreements

Despite the fact that there are numerous definitions of arbitration, the problem lies in determining clear boundaries of this institution. Therefore, it would be advisable to do research in this field by means of reviewing the literature, which would be concluded with the assessment of current definitions.

The next research stage is determining when the given arbitration agreement is complete and sufficient and when it is not. It is recommended to examine the legal effects of arbitration agreement and to consider which factors are necessary for an agreement to be made, and which are not necessary or not sufficient.

- The notion of pending agreement

Arbitration agreement is sometimes regarded as "pending" as it is applicable only when a conflict arises on the grounds of the basic agreement. If a conflict does not exist, the arbitration agreement is not carried out[1]. However, within the doctrine of arbitration law it is considered that an arbitration court is competent not only when a conflict arises, but also

[1] SZURSKI T.: *Podstawowe aspekty arbitrażowego rozstrzygania sporów (Basic Aspects of Settling of Conflicts by Arbitration)*. "PUG" 1999, No 3, p. 7.

in order to explain the contents and aims of agreements which contain such regulations.

It would be suitable to refer here to mediation, conciliation and other agreements, the character of which is typical for ADR (Alternative Dispute Resolution).

- The problem of a multitude of arbitration agreements

An arbitration agreement can be created in at least two ways. The first one is based on forming an agreement concerning resolving conflicts from the determined legal relationship in arbitration court. This agreement can be formed even after other agreements have been made. Therefore, it will comprise one or more agreements. Its main advantage is broad regulation of the whole range of aspects.

The second way is called an "arbitration clause", which is placed in the main agreement. The weakness of this type of agreement is its generality.

The research problem here should concern the obligation aspect, which is connected with the structure and contents of the agreement. Another thing that is essential here is noticing the claim rights, which should result from the appropriate phrases (which are sometimes direct or in the form of scattered clauses but leading to the same goal).

- Looking for practical regulations in arbitration clauses

Popularizing knowledge about arbitration courts, apart from outlining the basic knowledge about their activity, should lead to looking for practical solutions in the existing courts. Analysis of arbitration regulations and clauses (from domestic and foreign agreements) is almost non-existent in Polish literature. This lack of analysis is the consequence of the factors discussed above and, above all, of the very small number of such courts. A recent superficial review of regulations yields similar results. An example of a practical regulation is the obligation of the sides to appoint reserve arbitrators, in addition to the principal and decisive ones and it is important that these appointments take place at the same time.[2] Provision for reserve arbitrators is by all means practical so that an obstacle preventing the decisive arbitrator from acting will not curb the proceedings[3]. Apart from individual cases it will be useful to collect such experiences from literature[4].

[2] A regulation of this type is included in the Regulation of the Arbitration Court of the Krajowa Izba Gospodarcza (Domestic Economic Chamber) in Warsaw.

[3] SZURSKI T.: *Podstawowe aspekty arbitrażowego rozstrzygania sporów (Basic Aspects of Settling Conflicts by Arbitration)*. "PUG" 1999, No 3, p. 11.

[4] Recent literature has referred to other interesting regulations, for example, concerning the appointment of arbitrators. T. Szurski writes that: "On the whole, the lists of arbitrators do not have binding character for the sides, although regulations of rare arbitration institutions give this kind of character to their lists. One can also find arbitration regulations according to which only the arbitrator-chairperson of the arbitration court and the only arbitrator must be chosen exclusively from the list

- Types of Arbitration Courts

The most basic division of arbitration courts results directly from the Civil Code. It distinguishes between permanent courts and ad hoc courts (appointed just for one case). The role of both courts should basically be identical for the case settled.

However, finding essential differences which determine the further process will be a problem here. One possible difference from the practical perspective, for example, is the quickness of the proceedings. From the theoretical perspective certain legal notions will act differently in the two institutions.

- Legal form in Polish agreements, the agreements of transborder countries and in international law.

One thing that is extremely essential in arbitration clauses is providing the legal form which would be consistent with legal requirements. It should be noted here that in international turnover, a much wider catalogue of forms is acceptable[5], for example, letters and telegrams, telexes and recently e-mails.

As far as the form is concerned, it will therefore be advisable to determine the boundaries of the legal form in Polish law and the law of transborder countries. For practical reasons it will be useful to introduce the catalogue of forms from the system of common law, as well as the new guidelines which result from the changes in UNCITRAL.[6]

- Practical attempts at establishing the proper form in international law

In the majority of countries there is a legal obligation to sign an arbitration agreement. However, there are new tendencies in the model law UNICITRAL, which is basically about electronic means of communication. There is also a problem of signatures made by the sides, since the New York Convention does not openly require such signatures. Hence it is recommended that an interpretation of the New York Convention be presented in that particular respect. The presentation will proceed through an analysis of several contractual models.

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of arbitrators of the given arbitration institution, but 'the arbitrators of the sides' can be appointed regardless of the list. However, there are also such arbitration institutions, which do not have any lists, giving the sides full freedom in choosing the arbitrators. An example is, first of all, the International Arbitration Court at the International Chamber of Commerce in Paris. However, this court maintains a special procedure for approving arbitrators by the Court on the basis of forms received from the potential candidates, which contain the most important personal data and information concerning their qualifications, arbitration experience and relationship with the sides."

5 [Online:] www.prawo.lex.pl arbitraz.xml downloaded on 27 April 2005.

6 SZUMAŃSKI A.: *Kierunki zmian ustawodawstwa w międzynarodowym arbitrażu handlowym (The Directions of Changes in the UNCITRAL Legislation in International Trade Arbitration)*. PPH, January 2007, p. 51-58.

- Recognizing the court which is competent to determine the validity of the arbitration agreement

In the doctrine there is a widespread view that the arbitration clause is autonomous in nature. Its autonomy lies in the fact that it is assessed regardless of whether the agreement itself is valid. Such a condition makes it possible for arbitration courts to assess the validity of the arbitration clause as well as the main agreement. The abovementioned premises give a solid foundation to determine whether the court is competent or not in each of the contentious issues[7].

- Selected foreign procedure.

It is worthwhile to touch upon, and even analyze in greater detail, special procedures used in the countries that have significant arbitration experience. It especially applies to the rich literature of the United States of America. There is one factor worth mentioning, the so-called equity principle. It stipulates that a ruling can be made without reference to the material law of either party. In practice arbitrators make decisions based on their knowledge, experience, trading traditions etc. Such rulings ultimately might not be in accordance with material law, and therefore rulings cannot be questioned on the basis of material law. It should also be stressed that application of the equity principle has certain limitations — in particular, public order.

In the transborder practice it is much harder to find reference to general clauses. Thus the research should be preceded by determining the scope of meaning of the phrase: 'public order'.

- The functions of an arbitrator

It is still difficult to determine what the function of an arbitrator is in the arbitration agreement (basically it is also not fully defined in the relevant literature). This is due to the fact that apart from the juridical function the arbitrator also carries out the action resulting from the arbitration agreement. In the actions performed by the arbitrator both functions manifest themselves equally. It would be advisable to investigate which functions exist (and to what extent) in the legal system of the countries under investigation.

- Foreign arbitration courts — overview, description and specification

In international relations the argument for expanding arbitration courts (both in terms of development of that type of court, and the issues resolved by them) would be their universality. In fact, only in developing and former socialist countries are they still in the process of creation. As stressed by the relevant literature and practice in Western

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7 This ruling may be appealed right after its announcement as well as later, in the application for repeal of the ruling issued by the arbitration court.

Europe, and especially in the USA, these courts accept the majority of contentious issues resulting from international agreements and play a significant role in internal, administrative cases. This undervaluing of arbitration courts, or even unfamiliarity with them, is not really the result of economic backwardness, but rather the result of the isolation of Poland and other Central European countries from the market economy during communism. Thus learning about selected, usually more efficient, courts in Western Europe and the USA should decrease the number of organizational barriers, as well as increase motivation to create laws for existing institutions.

- The problem of the application of New York Convention regulations and domestic regulations

For the entrepreneurs who know only the basic regulations of their trade, the need to use foreign or international law may discourage them from signing long-term contracts with foreign clients.

As research shows, entrepreneurs are afraid of:

- o the necessity to employ a local lawyer who obviously is not personally interested in quick finalization of the process.
- o the necessity to translate the whole documentation connected with the trial into the official language of the national court
- o multi-instance character and precisianism of legal proceedings, and thus the risk of prolonging its time by one of the interested parties
- o very often, a limited familiarity with the issues of international economic turnover as well as lack of knowledge of foreign languages by the national judges, who are as a rule overwhelmed by their domestic cases.

All these factors mean that legal proceedings can be very long and costly, including in Poland. We cannot totally exclude the possibility of prejudice in favour of the side which comes from the country whose court is ruling. Moreover, the court proceedings are public, which puts the parties at risk of revealing confidential information connected to their activity, which especially in relations of an administrative nature is not beneficial for them[8].

One of the main problems, which can appear during international conflicts, is the diverse regulation in the activity of arbitration courts. Despite the fact they are common, whenever there are no detailed regulations as far as the method of the arbitration court is concerned, it will be necessary to apply the law of the country, which has been identified as the one in which the conflict will be settled.

[8] SZURSKI T.: *The basic aspects of arbitrary resolution of conflicts*. The Overview of Economic Legislation 1999, No 3, p. 4.

- The sentence in arbitration courts (an application to revoke the sentence)

The issue of pronouncing the sentence in an arbitration court is rich in formal questions, which have to be explained. The situation is especially complex in transborder legal cases.[9]

One of the leading issues is the time of pronouncing the sentence. In fact, it depends on the decisions written in regulations. Sometimes a problem arises when the time limit is too short for complex cases. However, the time can be prolonged as the deadlines are usually administrative[10]. Therefore, lengthening the time does not entail legal effects. But real problems arise when an application to revoke the sentence is filed.

The practical rule is checking the sentences of arbitration courts in a formal respect by a body of the arbitration institution.

- The review of the benefits under Polish law of settling conflicts in arbitration courts (especially benefits in international conflicts).

There are additional benefits in international cases, apart from the benefits afforded by using arbitration court in domestic procedures. Here are the most important ones:

1) Independent, stable regulation contained in the New York Convention on 1958.
2) Lower costs of procedeedings.
3) Increase in the number of business entities.
4) Ethical benefits – suitable resolution of conflicts, which encourages further cooperation.
5) The pressure on the speed of proceedings exerted by judges.

In the United States, ethical codes require that the lawyers inform clients about the possibility of resolving the conflict by means of alternative institutions in every case. It is not only a question of information, but each lawyer is supposed to encourage the use of mediation by arbitration courts[11] etc. This attitude has meant that federal courts are the last resort in settling conflicts, while alternative institutions are being developed and modified.

Assessing the judges with respect to the quickness of settling conflicts is of significance not only for the budget of the country. Quickness also prevents cases from landing in trial courts. In order to increase the number of settlements (or suit with-

[9] Read more about it in OLSZEWSKI J.: Uwagi o sądownictwie polubownym (arbitrażowym) na Ukraini (Comments on arbitrary judiciary in Ukraine). [In:] *Sądy Polubowne i mediacja (Arbitration Courts and Mediation)*, Warsaw, C.H. Beck (forthcoming).

[10] Regulation can contain a different rule.

[11] ROZDEICZER Ł.: *Negocjacje w cieniu sądów (Negotiations in the shadow of the courts)*. "Rzeczpospolita", No 157, 7 July 2005, p. C-5.

drawals), rewards are encouraged and alternative methods are supported. In almost all economically developed countries judges prompt the clients to choose mediation or arbitration courts (or they even sometimes oblige them to do so)[12].

The strongest economy in the world, the economy of the United States, proves that arbitration courts and mediation influence the state of economy. Despite the increase in the number of entrepreneurs federal courts do not examine more civil cases. According to the literature, only 2% of cases end with a court ruling. All the others are settled by means of so-called alternative methods[13].

[12] This example from the USA is given by ROZDEICZER Ł.: *Negocjacje w cieniu sądów (Negotiations in the shadow of the courts)*. "Rzeczpospolita", No 157, 7 July 2005, p. C-5.

[13] ROZDEICZER Ł.: *Negocjacje w cieniu sądów (Negotiations in the shadow of the courts)*. "Rzeczpospolita", No 157, 7 July 2005, p. C-5.

** Translation from the Polish language by Marek Marczak.

*Volodymyr Kossak**

Legal problems related to the execution of investments by the European Union states in Ukraine

Upon Ukraine's adoption of the Law "On Foreign Investments" of 13 March 1952 (henceforth, Law 92), foreign investors that registered foreign investment while this Law was in operation were granted a number of customs, financial and tax allowances, as well as a set of national guarantees concerning the protection of the investment. Among these is the guarantee of changes not being introduced in the law in force, which is included in Article 9 of the above Law. This article guaranteed that, should further special Ukrainian legislation concerning foreign investments change the terms of the protection of foreign investments included in this Law, for a period of ten years following the changes, any special legislation that was in force at the time of the registration of investment would be applied on the foreign investor's demand.

Thus, the ultra-active form of operation of a normative act was established, which meant that the operation of a normative act would extend to relations that take place after the expiry of this act. Under the decision of the Constitutional Court of Ukraine of 9 February 1999 on the constitutional inquiry by the National Bank of Ukraine concerning the official interpretation of the provision of part 1 of Article 58 of the Constitution of Ukraine, it was established that by the term 'an ultra-active form of operation of a normative act', we should understand the transition from one form of regulation of relations to another, by way of a transition period.

It is not the only example of the strengthening of the norm of ultra-active operation in legislation. An ultra-active norm of operation is also the norm implemented in part 1 of Article 8 of the Law "On the Regime of Foreign Investments" of 19 March 1996, which stipulates that if in further special Ukrainian legislation on foreign investments there are changes in the guarantees protecting of foreign investments, specified in chapter II of this Law, then for a period of ten years from the date of enforcement of such legislation, state guarantees specified in this Law concerning the protection of foreign investments will be applied on the foreign investor's demand. Also in the

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