Chapter 3

Arbitration Agreement

Paweł Lewandowski

1. General nature of an arbitration agreement

1.1. Introduction

It is understandable that the power of an arbitral tribunal to resolve disputes must result from the intention of the parties. In this respect Polish Code of Civil Procedure follows general global rules. For an arbitral tribunal to be able to examine disputes, an arrangement has to be made between the parties to a future dispute. This translates into an arbitration clause (or an arbitration agreement).

Under Polish law, two types of an arbitration agreement can be distinguished, i.e. compromise and arbitration clause. A compromise is an agreement under which the parties submit a specific existing dispute to arbitration. Meanwhile, an arbitration clause is an agreement to submit to arbitration disputes that may arise in the future out of a specific legal relationship.

In practice, we usually deal with an arbitration clause included in a specific principal agreement. Arbitration agreements are rarely made if a legal dispute has already arisen. Under Polish law, there is basically no distinction between a compromise and an arbitration clause. However, it is worth noting that pursuant to Article 1164 CCP, in the case of disputes covered by labour law, an arbitration agreement may only be made after the dispute has arisen (therefore it must be a compromise).

1.2. Legal nature of an arbitration agreement

In Polish legal doctrine there are conflicting opinions on the legal nature of an arbitration agreement. Generally, there are two theories: according to

the first one, an arbitration agreement is an agreement governed by substantive civil law, while in the second, arbitration agreement is a procedural agreement, i.e. a procedural act in the broad sense of the term. This debate is not purely theoretical. In practice, the question could be raised as to whether a term may be specified within which the arbitration agreement may be made and whether either party may avoid the effects of the declaration of intent if it is defective, e.g. contains an error (as these are concepts inherent in substantive law agreements only), or whether an arbitration agreement as a procedural act can, e.g. be freely revoked (under Polish civil procedure, parties' procedural acts may generally be revoked unilaterally). Another related issue is succession in the event of an arbitration agreement.

Without getting into theoretical discussions and an assessment of detailed argumentation for each of the foregoing opinions, it should be accepted that an arbitration agreement is a so-called procedural act in the broad sense of the term and should be classified as a procedural agreement (an agreement concerning jurisdiction of a common court or an agreement regarding jurisdiction of courts of a given country is also a procedural agreement). If an arbitration agreement is classified as this type of procedural action, this does not preclude application to the arbitration agreement of specific provisions of substantive law, e.g. those relating to the effects of an agreement having been executed under the influence of an error, an arbitration agreement having been made with a condition or term stipulated. A decisive factor in classifying arbitration agreement as a procedural act in the broad sense of the term is that this an agreement basically has procedural effects only, i.e. it excludes common court jurisdiction in favour of an arbitral tribunal.

1.3. Law governing an arbitration agreement

The question of which law (of which state) governs when assessing an arbitration agreement is fairly complex. The problem of governing law can and should arise prior to proceedings starting in an arbitral tribunal, when the common court to which the statement of claim was filed, has to examine a plea of arbitration agreement. It may also be necessary to establish governing law during the arbitration proceedings (when the arbitral tribunal assesses whether it has jurisdiction) and afterwards (when a domestic court rules to recognise or confirm enforcement of an arbitration award or if an appeal is filed for the award to be overturned).

The following complication is that the arbitration agreement issue covers various question for which separate connections can be distinguished specifying governing law (validity of the arbitration agreement, arbitrability, capability of the parties to execute an arbitration agreement, form of the agreement, etc.). Finally, it should also be noted that the question of the

law governing an arbitration agreement could also be included in international treaties or in domestic provisions.

Thus we should first discuss the scope of action of the so-called law applicable to the arbitration agreement. It should be deemed that this law regulates questions such as effect (execution) and effectiveness of an arbitration agreement, interpretation and subject-based scope of the agreement, the principle of independence of arbitration from the main agreement, termination or reason for expiry of the agreement, or issues related to defects in the declaration of intent and a description of the scope of the said arbitration clause.

The law applicable to an arbitration agreement is mainly specified in the New York Convention and the European Convention. In light of Article V(1)(a) of the New York Convention the law applicable to an arbitration agreement is decided by which law the parties choose. If no law is chosen by the parties, the law of the state in which the arbitration award is to be issued is deemed to govern (this should be identified with the law of the state on whose territory the arbitration proceedings are held). If at the time the plea is heard by a domestic court the place of arbitration is not specified, then the conflict of law rules of the forum state, or the provisions of the law governing the matter to which the arbitration agreement relates should be applied. Basically, a similar regulation is provided for in Article VI(2) of the European Convention.

If, however, we are talking about internal provisions of Polish law (in cases where the above discussed conventions do not apply), then Article 39(1) of the Polish Private International Law indicates that an arbitration agreement is first subject to the law chosen by the parties. If, however, no law has been chosen, then in accordance with Article 39(2) of Private International Law the arbitration agreement is subject to the law of the state where as agreed by the parties the arbitration proceedings are held. If no such agreement is made, the arbitration agreement is subject to the law governing the legal relation to which the dispute relates; it is, however, sufficient for the agreement to be effective according to the law of the state in which the proceedings are held or in which the arbitration court makes an award.

As mentioned above, the law applicable to the arbitration agreement does not cover issues such as the form of the arbitration agreement, the capacity of the parties to execute an arbitration agreement, or arbitrability. It should be mentioned here that the capacity of parties to execute an arbitration agreement (capacity to be party to arbitration proceedings) should be assessed in light of the law referred to the parties, i.e. personal statute (cf. Article V(1)(a) of the New York Convention, Article VI(2) and Article IX(1)(a) of the European Convention). A similar regulation is provided for in Article 11(1) and Article 17(1) of Polish Private International Law.

Referring, however, to the provisions governing the form of the arbitration agreement, both Article II(2) of the New York Convention and Article I(2) of the European Convention contain a regulation of a merit-based nature as regards the form in which an arbitration agreement should be executed. If it is not possible to apply the New York Convention or the European Convention, Article 40 of Private International Law states that the form of an arbitration agreement depends on the law of the state in which the arbitration proceedings are held, while it is sufficient to follow the form provided for by the law of the state by which the arbitration agreement is governed.

2. Content of an arbitration agreement

The provisions of the CCP distinguish mandatory elements and voluntary elements of the arbitration agreement. Although mandatory elements must be found in the arbitration agreement for it to be valid, voluntary elements constitute provisions that are not required but that are in practice, however, often incorporated in arbitration agreements. There is also practical justification for the distinction between these elements, as the provisions on form only relate to mandatory elements, while voluntary elements can be drawn up in any way. Similarly, the validity of an arbitration agreement *sensu stricto* is not the same as validity of additional arrangements (voluntary elements) and *vice versa*.

2.1. Constitutive elements

Article 1161 § 1 CCP states that the constitutive elements of an arbitration agreement should include: submitting a dispute to arbitration, an indication of the subject in dispute and the legal relation from which the dispute arose or could arise. Moreover, the clause must indicate the arbitral tribunal.

The intent of the parties to submit a dispute to arbitration must be consistent. The arbitral tribunal must also appoint to examine the entire dispute (it is not, e.g. admissible to split tasks between an arbitral tribunal and a domestic court in the same matter). It is, however, possible to introduce a provision by which the parties will be given the right to choose between proceedings before an arbitral tribunal and proceedings in a domestic court (with certain restrictions that are referred to in Article 1161 § 2 CCP, on which more is said in the discussion on the principle of equality of the parties).

An arbitration agreement can only cover a dispute over a right, not over a fact. Therefore a provision in which the parties authorise a certain person to establish certain facts or elements of the state of affairs (e.g. an expert in some field or other) will not be covered in an arbitration clause.

Only an existing or future dispute can be submitted to arbitration (with

the exception of labour law disputes only, when under Article 1164 CCP the clause can be drawn up only after the dispute has arisen).

It should be accepted here that it is inadmissible to submit to arbitration all disputes that either exist, or could exist between the parties in the future. Thus it should be said that the clause should indicate the subject of the dispute, or the legal relation from where any dispute arises can be settled by an arbitral tribunal. The said legal relation(s) must be appropriately specified and individualised, not merely described in an abstract manner.

Referring, however, to the second constitutive element of an arbitration agreement, i.e. indication of the arbitral tribunal that is to resolve the dispute, it is possible here to indicate either the dispute will be settled by an *ad hoc* arbitral tribunal (without even indicating how the composition of the arbitral tribunal is to be constituted), or if the parties wish to submit the dispute to arbitration in a permanent arbitral tribunal, an indication of this tribunal in a manner enabling it to be identified.

2.2. Voluntary elements

Apart from constitutive elements, an arbitration agreement can also contain a range of voluntary provisions. In practice, these provisions can appear in an arbitration agreement to *ad hoc* arbitration, as in the case of permanent arbitration courts the rules of proceedings are regulated in detail in the tribunals' rules. For example, voluntary provisions could include those that relate to place of arbitration proceedings, delivery of arbitration pleadings, an indication of the language of the proceedings, a description of the number of arbitrators and how they are appointed, third party authorisation to appoint an arbitrator or presiding arbitrator, a description of the rules and method of proceedings before an arbitral tribunal, adjudicating or examining the case requires a hearing to be held, establishing the issue of allowing expert evidence, allowing witness testimony in written form, arrangements as to supplementing the award, and introducing a second instance arbitral tribunal.

The above list is not of course exhaustive, and if the parties do not make the above arrangements, the dispositive provisions of the CCP apply.

We should also mention here that the parties can draw up an arbitration agreement subject to a condition (either precedent or subsequent) or term. For example, a condition precedent could involve the effectiveness of the clause being contingent on whether the parties will carry out mediation proceedings beforehand or whether a specified person will take over the function. It must, however, be indicated that introducing a condition or term to an arbitration agreement could give rise to doubts in practice as it

will lead to uncertainty over the scope of applicability of the arbitration agreement.

3. Arbitrability

The problem of arbitrability (i.e. assessment of matters that parties could take to arbitration) is currently one of the most controversial issues relating to arbitral judicature. According to Article 1157 CCP, the parties can take disputes over proprietary rights or non-proprietary rights to arbitration – they can be the subject of a court settlement, except for alimony cases. After entry into force of new provisions on arbitral judicature (i.e. in 2005) doubts arose as to whether the criterion for settleability also applies to disputes over proprietary rights and non-proprietary rights. In the final determination the stance was taken that the criterion for settleability applies to both types of dispute.

As the litmus test for arbitrability is the possibility of reaching a settlement, the question arises in what type of civil cases a settlement is admissible. The widely accepted theory is that most cases involving family and guardianship law are not settleable (and therefore not arbitrable). It is also accepted that it is not possible to reach a settlement in cases involving probate. It should also be noted that the CCP contains several provisions which clearly state that in a given type of case it is inadmissible to execute a settlement (this applies to cases involving social insurance and cases on deeming provisions of modal agreement unlawful in consumer trade).

However, the most controversial issue is that of admissibility of giving over to the jurisdiction of arbitral tribunals certain cases involving company law, especially disputes involving overturning or invalidating authorities of capital companies, matters involving winding up a company or excluding shareholders. Most authors accept that in cases of this type it is impossible to execute a settlement and thus that these cases cannot be taken to arbitration. The argument that can be put forward here is that this type of case involves rights and obligations of third parties that are not parties to the arbitration proceedings. Other authors, however, take the view that issues of breach of third party rights in arbitration proceedings should be considered in terms of being contrary to, and should not be linked globally under arbitration.

In recent times the Polish Supreme Court issued several judgments that cut thorough certain doubts as to arbitrability of specified disputes. For example, the Supreme Court rightly stated that cases to declare agreements invalid are arbitrable, pointing out that arbitrability does not depend on the content of a specific settlement but the question of whether in a given type of legal relations the parties can make mutual concessions. This stance should be deemed correct, though there are still doubts about the arbitra-

bility of the above described corporate disputes, meaning that special care should be taken when taking these types of cases to arbitration, as it is common practice in such cases to overturn resolutions of shareholders' meetings or general meetings of capital companies to the extent that the Polish Code of Commercial Companies (CCC) provides for quite short terms for bringing this type of claim, thus filing a claim with an arbitral tribunal that may not have jurisdiction to examine the claim could deprive the claimant of the right to effectively challenge the appealed resolutions.

4. Capacity to be a party to an arbitration agreement

Given the aforementioned differences of opinion regarding the legal nature of an arbitration agreement (whether it is an action governed by substantive law or rather a procedural action), there are some controversies in the doctrine about whether the parties' ability to execute an arbitration agreement should be assessed in light of substantive civil law or procedural law.

While the CC uses the terms "legal capacity" and "capacity to perform acts in law", the CCP provides for the "litigation capacity" and "capacity to perform procedural acts". In practice, the above controversies are of little importance because the CCP provides that any natural or legal person and certain unincorporated organisational units having statutory legal capacity have litigation capacity. Accordingly, an arbitration agreement may be made by natural persons having full legal capacity and by all legal persons. In turn, unincorporated organisational units include but are not limited to partnerships such as registered partnerships and limited partnerships.

It should be noted that under Article 1167 CCP, a power of attorney to perform a legal act granted by a business entity also includes the authority to make an arbitration agreement with respect to disputes arising under such legal act unless the power of attorney provides otherwise.

5. Form of an arbitration agreement

The provisions of the CCP on form of an arbitration agreement do not apply in cases where the New York Convention or the European Convention apply, as these Conventions contain autonomous and merit-based standards for forms of arbitration clause.

According to Article 1162 § 1 CCP, an arbitration agreement should be drawn up in writing. It is not necessary (though such solution is often found) for the signatures of the parties to be placed on one document, as written form is observed when documents are exchanged covering an arbitration agreement and each of them is signed by one of the parties.

According to Article 1162 § 2 CCP, requirements concerning form of an arbitration agreement are also met when the clause is incorporated in letters or declarations exchanged between the parties or declarations made using means of distance communication enabling their content to be recorded. The CCP means here means such as telephone, fax, radio, television, automatic communication equipment, or videotext and email. It is not then necessary for these declarations to bear the parties' signatures.

Finally, an arbitration agreement may be executed by the arbitration clause being incorporated in a model agreement or in regulations applied by one of the parties and only the main (basic) agreement is signed if the agreement contains a reference to the regulations or model in which the arbitration clause is incorporated (so-called arbitration clause by reference). This is usually done by it being stated in the signed main agreement that, e.g. the general terms and conditions of agreements (in which the arbitration clause is incorporated), constitutes part of the agreement (and applies thereto).

Detailed regulations on the form of an arbitration agreement are set out in Article 1163 CCP, which states that an arbitration agreement can be incorporated in the articles of association (statute) of a commercial company. In this case an arbitration agreement incorporated in a company's articles of association or statute are binding on all shareholders and thus also on those who did not sign the articles of association or statute but merely took up shares in the company. These regulations also apply accordingly to the statute of a co-operative or association.

The sanction for breaching provisions on the form of an arbitration agreement is invalidity of the clause.

6. Autonomy of an arbitration agreement

As an arbitration agreement is usually incorporated in one of the clauses of the main agreement regulating substantive law relations between the parties, this clause constitute a physical part of the main agreement. In this context the problem arises of the so-called „principle of independence" (autonomy) of the arbitration agreement. This generally means that the arbitration agreement is treated as a legal act independent of and separate from the main agreement and one that should be assessed individually, i.e. an independent assessment should be made of issues such as existence of the clause, its validity, and conditions as to form and capacity of the parties to draw up such a clause.

In this respect the Polish legislator followed the principle of independence adopted in the UNCITRAL Model Law, i.e. Article 1180 § 1 sentence 2 CCP states that invalidity or expiry of the basic agreement in which the arbitration agreement is incorporated does not in itself mean invalidity or expiry

of the clause. This means that if a contract is declared invalid by an arbitral tribunal, this does not lead by force of law to invalidity of the arbitration clause. In certain situations the scope of application of the said independence principle could give rise to doubts. This applies primarily to questions such as the effect potential defects in the declaration of intent concerning the main agreement (if the main agreement was executed under the influence of deceit, threat, or by error. It should be noted here that a ban on applying any autonomy arises from the said independence principle. Particularly, and in these cases potential defectiveness of the arbitration agreement should be examined separately from defectiveness of the main agreement, which does not alter the fact that in certain situations the same circumstances will lead at the same time to defectiveness of the main agreement and the arbitration clause.

7. Principle of equality of the parties and arbitration agreement

According to Article 1161 § 2 CCP the provisions of an arbitration agreement cannot violate the equality of the parties. As an example of a clause provision violating this principle, the CCP indicates a provision awarding one party the right to bring a claim before an arbitral tribunal or before a common court. Any such provision is ineffective and should be understood to mean that the provision is ineffective to the extent to which it excludes the other party's right to take a matter to arbitration. Ineffectiveness of these provisions of the clause that violate the principle of equality of the parties does not automatically mean that the entire arbitration agreement is invalid.

8. Legal effects and scope of an arbitration agreement

8.1. Procedural and substantive effect of an arbitration agreement

The approach generally taken in Polish doctrine of the concept of an arbitration agreement as a procedural act in the broad sense is that the most important effect of an arbitration agreement is exclusion of common court jurisdiction to resolve a given dispute. This is the basic effect of an arbitration agreement. It does not, however, mean that common courts are excluded entirely from carrying out specified actions or from controlling proceedings pending in an arbitral tribunal, as a common court retains a range of powers (primarily control powers) in respect of arbitration proceedings. Neither does an arbitration agreement exclude the possibility of injunctive relief being issued by a common court for a claim (Art. 1166 CCP).

It is, however, disputable whether an arbitration agreement gives rise to any substantive effect, particularly whether by bringing a case to common court a party to the clause is exposed to any sanctions for damages towards the other party. It is generally accepted that such substantive effects do not arise, and violation by one of the parties to the clause of its obligations (e.g. to appoint an arbitrator) does not lead to sanctions for damages. It is also accepted that an arbitration agreement does not interrupt the running of the limitations period (limitations period can only be interrupted by initiation of arbitration proceedings).

8.2. Objective scope of an arbitration agreement

Generally, an arbitration agreement is only binding on the parties that executed the clause and does not interfere with the rights and obligations of third parties. There are, however, certain exceptions to this rule. First, in light of Article 1163 § 1 CCP an arbitration agreement incorporated in a company's articles of association (statute) concerning disputes under the company's relations is binding on the company and its shareholders. This means that the clause is also binding on shareholders of a commercial company who joined the company after the articles of association or statute containing the arbitration agreement were signed. This rule also applies to members of co-operatives and associations. Second, there is no doubt that an arbitration agreement is binding on general successors (heirs or companies arising as a result of a merger or division of commercial companies). Third, it is widely accepted that an arbitration agreement is also binding on specific legal successors (e.g. in the case of a transfer of receivables).

8.3. Subject-based scope of an arbitration agreement

The current tendency in Polish doctrine is to widely interpret the subject-based scope of an arbitration clause that is to correspond to the intention of the parties that when executing the arbitration agreement usually intend to exclude from common court jurisdiction any disputes arising or that could arise from a specified legal relationship. Thus it is accepted that in the case of execution of an arbitration clause in a specified agreement the power of the arbitral tribunal covers an examination of the existence, effectiveness and validity of the agreement, claims for agreement performance, and claims arising form non-performance or improper performance of the agreement. Such an arbitration clause also covers claims for return of undue enrichment, tort claims, and claims for improper carrying out of negotiations (*culpa in contrahendo*).

An arbitration agreement incorporated in a company's articles of association (statute) applies to all disputes under the company's relations between

shareholders and between the company and its shareholders. It does not, however, apply to disputes involving disposal of shares in the company between the seller and the buyer, as such disputes do not result from the company's relations.

It is, however, disputable whether the arbitral tribunal has the power to examine counterclaims of the respondent or set-off pleas filed by respondent, if counterclaims are not covered by the arbitration clause. It is, however, accepted that in the case of a counterclaim, the claimant can raise a plea of inappropriateness of the arbitration agreement and then the arbitral tribunal will not be able to examine such claims. However, as regards a set--off plea, the proper stance to take is that the arbitral tribunal can uphold a set-off plea made by the respondent even if the respondent's receivable was not covered by the clause and if it was claimed in separate proceedings, it cannot be claimed in proceedings before the same arbitral tribunal.

8.4. Plea of arbitration

If a claim is filed by any party for an arbitration agreement with a common court, the other party should raise a plea to an arbitration agreement being executed. This means that the common court does not *ex officio* take execution of this agreement into consideration.

According to Article 1165 § 1 CCP, a plea to an arbitration agreement should be reported before entering into a dispute over the merits of the case. A plea to an arbitration agreement can be filed whether the tribunal hearing the case is domestic or foreign. There are certain discrepancies in Polish doctrine as to what "entering into a dispute over the merits of the case" means. According to one viewpoint it means the moment when the respondent submits merit-based or procedural objections. A divergent viewpoint is that a dispute over the merits of the case is entered into if only merit-based objections are relied on (according to this second viewpoint objections to an arbitration agreement can be filed even after earlier procedural pleas have been filed concerning, e.g. legal force of a judgment or lack of domestic jurisdiction).

Entering into a dispute over the merits of a case takes place either in the first merit-based pleading (statement of defence) or at the first hearing. It could also take place in an objection to a default judgment (which is issued in the case of a passive respondent). It is irrelevant whether the plea to an arbitration agreement is set out in the statement of defence at the start of the document or only after other objections.

The burden of proof in drawing up an arbitration agreement lies with the person who is relying on drawing up the arbitration agreement (i.e. respondent in a common court), though the burden of proving that the arbitration

agreement is invalid, ineffective or has lost force lies with the other party.

If a common court upholds the plea of an arbitration agreement, it will reject the statement of claim. This decision can be appealed and an appeal can also be filed with the Supreme Court against a second instance court decision (with certain restrictions). If the common court in turn deems the objection to an arbitration agreement to be groundless, it will issue a decision refusing to reject the statement of claim; this decision can also be appealed.

A final decision issued by a common court regarding an arbitration agreement (both positive and negative) is binding on the arbitration court that parallelly hears the claim itself.

9. Invalidity, ineffectiveness and unenforceability of an arbitration agreement

The provisions of Polish law provide for a number of situations in which we can speak of irregularities in execution of an arbitration agreement and their effects. A distinction is made here between sanctions in the form of invalidity of the arbitration agreement and its ineffectiveness and also the concept of unenforceability of the clause.

We can speak of invalidity of the arbitration agreement primarily in situations where the clause is contrary to the law or was aimed at circumventing statutory provisions (Art. 58 CC). For example, an arbitration agreement covering disputes that are not arbitrable is not valid (Art. 1157 CCP). Also invalid is a clause that does not contain the minimum content (constitutive elements), i.e. does not indicate the legal relationship under which disputes were taken to arbitration. It should also be accepted that a clause in which the parties take to court a dispute arising from a transaction prohibited by law is also invalid.

A clause executed by an entity that has no capacity to execute an arbitration agreement, and also one executed for show, is also invalid. To wind up, it should be said that the sanction of invalidity will apply to an arbitration agreement drawn up in breach of the provisions on the form of an arbitration agreement.

A distinction should be made in terms of Polish law between cases of original invalidity (existing from the beginning) and so-called mutability (relative invalidity) of the arbitration agreement. According to the provisions of the Polish CC, in the event of execution of an arbitration agreement under the influence of an error or deceit, the party affected by this defect in the declaration of intent can within one year of execution of the arbitration agreement avoid the effects of the declaration of intent. It should, however, be noted that in situations of this type avoiding the effects of a declaration

of intent should take place in the form of a plea of lack of jurisdiction of the arbitral tribunal, i.e. no later than in the response to the statement of claim (Art. 1180 § 2 CCP), unless the arbitral tribunal deems that filing a plea of lack of jurisdiction of the arbitral tribunal at a later date is justified.

We will be dealing with ineffectiveness of an arbitration agreement, e.g. in the case of an arbitration agreement without the required third party consent (Art. 63 CC) or if the arbitration agreement is drawn up by an alleged attorney-in-fact (*falsus procurator*), i.e. a person acting without authorisation or exceeding the scope of the power of attorney (Art. 103 CC). In both situations full effectiveness of the arbitration agreement will depend on execution of the arbitration agreement being confirmed by this third party or by the principal.

Finally, an arbitration agreement may be unenforceable, i.e. not possible to perform. This group covers rare cases of improper editing of the arbitration agreement by, e.g. including requirements for qualifications that are impossible to meet or by indicating the jurisdiction of a permanent arbitral tribunal that, however, cannot be identified.

10. Loss of force of an arbitration agreement

Apart from the situations discussed in the previous point above where there are certain defects in the arbitration agreement from the beginning, the situation should be distinguished where an arbitration agreement is at the time of execution fully effective, while as a result of certain circumstances arising after its execution it loses force. Loss of force of an arbitration agreement usually operates *ex nunc*, which means specifically that an arbitral award issued before the clause expired cannot be overturned by a common court only due to the fact that the clause has lost force.

The CCP distinguishes specific situations where an arbitration agreement loses force. First, according to Article 1168 § 1 CCP, an arbitration clause loses force if the person appointed in the arbitration agreement as arbiter or presiding arbitrator refuses to fulfil the function or if he/she is unable to fulfil the function for other reasons. These other reasons for not fulfilling the function of arbitrator are, e.g. death of the arbitrator, incapacitation of the arbitrator, exclusion of the arbitrator, removal by a party or removal by a common court on the application of a party. It should be pointed out here that the parties can agree that the above cases do not lead to loss of force of the arbitration agreement. In particular, the rules of permanent arbitral tribunals in Poland provide in such situations for nomination of a replacement arbitrator.

Another instance of loss of force of an arbitration agreement is set out in Article 1168 § 2 CCP, under which unless the parties decide otherwise, the

arbitration agreement loses force if the arbitral tribunal indicated in the clause does not take the case or if it turns out to be impossible for the tribunal to resolve the case for other reasons. This type of situation most frequently arises when cases are referred, e.g. to a specialist arbitral tribunal, that states that it is organised to examine disputes of a specific type only or appointed to resolve disputes between members of a specific organisation. Such situations do not often arise.

Finally, Article 1195 § 4 CCP states that if, when an award is issued, the required unanimity or voting majority of the arbitrators on the whole or part of the dispute cannot be attained, an arbitration agreement in this respect loses force. However, the parties can agree that in the circumstances the clause does not lose force but a new panel of arbitrators will be appointed.

Particularly controversial provisions on loss of force of an arbitration agreement are contained in the provisions of Polish bankruptcy and reorganisation law. As in the case of both bankruptcy through arrangement and a petition in bankruptcy, an arbitration agreement loses force on the date of the petition in bankruptcy and pending arbitration proceedings are discontinued (Art. 142 and 147 of the Bankruptcy and Reorganisation Law). These provisions are assessed extremely critically in Polish doctrine. The theory was formed for their introduction that given the nature of arbitral judicature and the possibility of arbitral tribunals ruling on the grounds of equity, it is necessary, in order to protect creditors' rights, for disputes to be examined by domestic courts. According to this theory, a bankrupt entity should not have the right for disputes to be settled by way of arbitration without creditors' control. However, it should be said that these arguments are not convincing. They proclaim the legislator's total lack of trust in the arbitral judicature, as in light of the said provisions the situation could arise where arbitration proceedings are already well advanced and just before the award is issued the bankruptcy is declared of one of the parties to the proceedings, which will lead to the arbitration proceedings being discontinued and having to be started from the beginning. Thus doctrine postulates for these provisions to be repealed.

To finish with, we should add that according to Article 1211 CCP an arbitration agreement does not lose force (unless the parties agree otherwise) when an arbitral award is overturned by a common court. This means that if an arbitral award is overturned the parties can again take the case to the arbitral tribunal chosen in the clause.