Piotr Nazaruk

Nature of the Evidence Procedure Before the Arbitration Court

The author characterizes the specificity of the evidence proceeding before the arbitration court, which manifests itself primarily in the distinctness of the evidence proceeding regulated in k.p.c. and the autonomy of the parties' will to the arbitration in terms of shaping the rules of evidentiary proceeding. The author broadly discusses the issues of arbitration contracts and evidence contracts in the context of the principle of contract freedom and the issues of witness testimonies. The interpretation was made with Art. 1184 k.p.c. according to which: unless a provision of the Act provides otherwise, the parties may agree on the rules and manner of proceeding before the arbitration court. Suppose arbitration contracts in the broad sense (including the so-called evidence contracts) are substantive law institutions. In that case, it should be recognized that the only limitation in shaping the rules of evidence proceeding is Art. 353[1] k.c. and the imperative provisions of k.p.c. regulating proceedings before an arbitration court (Art. 1183-1193 k.p.c.). The freedom of parties and the arbitration court must respect the rules of procedure under Art. 1183 of k.p.c., i.e., the right of the parties to a fair trial, the right to be heard, the principle of equal treatment of the parties, guaranteeing the party the possibility to defend its rights.

Piotr Nazaruk

assistant professor
European School of Law and Administration in Warsaw

ORCID – 0000-0002-7579-9190

e-mail: piotr.nazaruk@pnazaruk.pl

Key words:
arbitration, evidence proceeding, arbitration clause, freedom of contracts, evidence contracts

https://doi.org/10.36128/priw.vi42.531

1. General issues in the context of statutory regulations

The nature of evidentiary proceeding before an arbitration court consists in its distinctiveness from proceeding before common courts, which is regulated in part one of the Code of Civil Procedure[1] [PL: *Kodeks postępowania cywilnego*] (*hereinafter referred to as k.p.c.*). The only common assumption shall be that evidentiary proceedings are part of the so-called instruction stadium of examination proceedings aimed at establishing the factual merit of the decision. Considering that approximately 60-70% of Polish arbitration

1 Act of November 17, 1964 – Kodeks Postępowania Cywilnego (Dz. U. No. 43, item 296, as amended).

court judgments are based on the analysis and assessment of factual circumstances and not on the analysis of legal issues[2], it should be recognized that the evidentiary proceeding is the most crucial part of the arbitration proceeding.

The essence of an arbitration court is that the parties in civil law relation jointly designate a third party to resolve their dispute. In this particular case, the basis are constituted by individually established rules and procedures, along with evidentiary proceeding, which is included in the arbitration clause based on the structure of Art. 1161 k.p.c., et seq. (constituting an arbitration contract in the narrow sense) and the so-called evidence contract (constituting an arbitration contract in the broad sense).

According to Czech, evidentiary proceedings in international arbitration can be understood as all activities carried out to establish the factual merit, and in some cases, the legal basis of an arbitration judgment (arbitration court, relatively arbitration tribunal, or investment tribunal). The purpose of evidentiary proceeding in international arbitration is, therefore, broadly consistent with the purpose of evidentiary proceedings before the Polish state court[3], but definitely only in some cases.

The regulation of the evidentiary proceeding before the arbitration court is limited to a few articles of k.p.c., which constitute the only limitation of the parties' freedom in establishing the rules of evidentiary proceeding before the arbitration court. Under Art. 1184 k.p.c. unless a provision of the Act provides otherwise, the parties may agree on the rules and manner of proceeding before the arbitration court (§ 1). On the other hand, unless the parties agree otherwise, the arbitration court may, subject to the provisions of the Act, conduct the proceeding in the manner it deems appropriate. The arbitration court is not bound by the provisions on proceeding before a [common] court (§ 2)[4].

According to Art. 1184 k.p.c. the provisions of the Act of *ius cogens*[5] nature constitute the limitation of the parties' freedom. However, this is about only some of the provisions of k.p.c., since under Art. 1184 § 2 sentence 2

2 Witold Jurcewicz, „Dowody i postępowanie dowodowe w arbitrażu. Warsztaty arbitrażowe w Sądzie Arbitrażowym przy Krajowej Izbie Gospodarczej" *Biuletyn Arbitrażowy*, No. 20 (2013): 24.

3 Konrad Czech, *Dowody i postępowanie dowodowe w międzynarodowym arbitrażu handlowym oraz inwestycyjnym. Zagadnienia wybrane* (Warsaw: Wolters Kluwer, 2017), 22

4 Andrzej Marciniak in: *Kodeks postępowania cywilnego*, Vol. V, *Komentarz do art. 1096-1217*, ed. Andrzej Marciniak (Warsaw: C. H. Beck 2020), komentarz do art. 1191.

5 Tadeusz Ereciński in: *Kodeks postępowania cywilnego. Komentarz*, Vol. 6, *Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*, ed.

k.p.c. the arbitration court is not bound by the provisions on proceedings before the state court but by the mandatory provisions of k.p.c., relating to proceedings before the arbitration court (Art. 1183-1193) of k.p.c. This attitude of interpretation has been confirmed in jurisprudence, and it is a symptom of a constant tendency that has been shaped over many years[6].

Under Art. 1191 § 1 k.p.c. the arbitration court may examine the evidence from the hearing of witnesses, documents, visual inspection, and other necessary evidence, but is not allowed to use coercive measures[7]. This regulation only exemplifies evidence that may be used in arbitration proceedings unless the parties agree otherwise. Due to the above, the scope of the evidence may be much wider than those indicated in k.p.c. Currently, k.p.c. does not contain the equivalent of Art. 705 § 2 sentence 3 k.p.c., which stipulated that the arbitration court 'may not cease to provide a comprehensive explanation of the circumstances necessary to resolve the case'.

Under Art. 1192 § 1 k.p.c. an arbitration court may turn to a district court in whose jurisdiction the evidence or action should be performed[8] in the matter of taking evidence or performing of another action that the arbitration court cannot perform. A common court may not refuse legal aid to an arbitration court if this action falls within the scope of procedural acts performed by courts in the examination proceeding. On the other hand, the district court may refuse to perform such an action, which is not provided for by the provisions of procedural law[9].

Tadeusz Ereciński (Warsaw: Wolters Kluwer, 2017), komentarz do art. 1184.

6 Decision of the Supreme Court as of November 29, 2007, file ref. No. III CSK 176/07, Lex 361297, as well as the referred justification to this decision: judgment of the Supreme Court as of May 6, 1936, file ref. No. III C 81/47, OSN 1948, No. 1, item 17, judgment of the Supreme Court as of November 14, 1960, file ref. No. II CR 1044/59, OSN 1962, No. 1, item 24, and the judgment of the Supreme Court as of December 13, 1967, file ref. No. I CR 445/67, OSNCP 1968, No. 8-9, item 149.

7 Andrzej Marciniak in: *Kodeks postępowania cywilnego*, Vol. V, *Komentarz do art. 1096-1217*, ed. Andrzej Marciniak (Warsaw: C. H. Beck 2020), komentarz do art. 1191.

8 For instance, it is about imposing a fine on a witness or expert in the event of their unjustified failure to appear.

9 *Łukasz Błaszczak*, „Nadzór sądu powszechnego nad działalnością sądu polubownego, część 1" *Prawo Spółek*, No. 3 (2006): 36; Tadeusz Ereciński, „Arbitraż a sądownictwo państwowe" *Przegląd Ustawodawstwa Gospodarczego*, No. 2 (1994): 6; Rafał Morek in: *Kodeks postępowania*

2. Rules of permanent arbitration courts and soft law regulations

In practice, the parties to arbitration rarely individualize the rules of evidentiary proceedings in an arbitration clause or the so-called evidence contracts. Most often, the parties refer to the rules of specific permanent arbitration courts and in the case of ad hoc arbitration - to soft law regulations, which include UNCITRAL Arbitration Rules [PL: *Regulamin Arbitrażowy UNCITRAL*] as of 2010[10] or Rules on the Taking of Evidence in International Arbitration [PL: *Regulamin dotyczący postępowania dowodowego w międzynarodowym arbitrażu*] as of 2010 adopted by the International Bar Association [PL: *Międzynarodowe Stowarzyszenie Prawników*].

An analysis of the two most popular Polish rules of permanent arbitration courts, i.e. Rules of the Lewiatan Court of Arbitration[11] [PL: *Regulaminu Sądu Arbitrażowego przy Konfederacji Lewiatan]* as of 2012 and the Rules of the Court of Arbitration at the Polish Chamber of Commerce [PL: *Regulaminu Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej]* as of 2021[12], shows that the standards contained therein do not create any new solutions. These regulations come down to stating that the court is free to assess the evidence motions and the collected evidence. As a result, the competences of the arbitrators in the analyzed case remain intact, within limits specified by the provisions of k.p.c.

More detailed rules can be found in the UNCITRAL Arbitration Rules as of 2010. The Rules give arbitrators the freedom to request such documents or evidence as the court deems appropriate (Art. 25.3.) as well as to appoint experts on their own initiative (Art. 27). Moreover, the last issue was quite widely debated whether such competence can be granted to the court[13].

---

cywilnego. Komentarz, ed. Elwira Marszałkowska-Krześ (Warsaw: C. H. Beck, 2021), uwagi do art. 1193 k.p.c.

10 UNCITRAL, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration. [accessed: 27.09.2022].

11 Sąd Arbitrażowy Lewiatan, *Regulamin Sądu Arbitrażowego przy Konfederacji Lewiatan*. https://www.sadarbitrazowy.org.pl/Content/Uploaded/files/Przepisy/regulamin2017-PL-99x210-nowy.pdf. [accessed: 27.09.2022].

12 Regulamin Arbitrażowy Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej. https://sakig.pl/wp-content/uploads/2022/03/REGULAMIN-ARBITRAZOWY-tekst-jednolity-ze-zmianami-z-dn.-8-listopada-2021-obow.-od-1-kwietnia-2022.pdf. [accessed: 27.09.2022].

13 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (London: Wolters Kluwer 2000), 161; Beata Gessel-Kalinowska vel Kalisz, „Przyczynek do rozważań na temat odrębności

In recent years, the Rules of the Court of Arbitration at the Polish Chamber of Commerce as of 2010 have been used more often, which, due to more detailed regulation of evidentiary proceedings, has become a commonly recognized set of rules for evidentiary proceedings. Considering the solutions of various legal systems, they have become primarily valuable for ad hoc arbitration disputes. By the intention of the IBA, these Rules are intended to provide parties and arbitrators with an efficient, economical, and fair process of evidentiary proceeding in international arbitration. The rules offer mechanisms for presenting documentation, appointing witnesses for facts, and experts, conducting inspections, and conducting evidence hearings. The IBA rules should be applied and adopted in conjunction with institutional, ad hoc, or other rules or procedures relating to international arbitration. The rules reflect the procedures used in many different jurisdictions and can be particularly useful when parties come from different legal cultures.

3. Influence of contractual freedom on an evidentiary proceeding before an arbitration court

It is up to the parties to make the final decision regarding the rules by which the arbitration will be conducted. Even if the arbitration clause refers to the rules of a permanent arbitration court or, for example, the UNCITRAL Rules, the parties, if they so agree, may, also in the course of the proceeding, define certain procedural issues differently. The mutual consent of the parties in this regard is binding to the arbitrators. The principle of the parties' autonomy in determining the evidentiary proceeding is reflected in Art. 19 of the UNCITRAL Model Act in most national arbitration regulations and most leading arbitration institutions. In Polish arbitration law, this principle is expressed in Art. 1184 § 1 k.p.c.[14].

Art. 1184 § 1 k.p.c. regulates the principle of freedom to establish standards of evidence before an arbitration court by the parties on two levels. First, the parties are entitled to normative competence pursuant to Art. 1184 § 1 k.p.c. according to which, unless a provision of the Act provides otherwise, the parties may agree on the rules and manner of proceeding before the arbitration court. Secondly, if the parties have not agreed on anything in this regard, the normative competence pursuant to Art. 1184 § 1 k.p.c. passes to

postępowania dowodowego w sprawach rozstrzyganych przez sądy polubowne" *ADR Arbitraż i Mediacje*, No. 1 (2009): 95-96.

14 Justyna Szpara, Maciej Łaszczuk, „Czy autonomia stron w ustalaniu reguł postępowania przed sądem polubownym jest ograniczona w czasie?", [w:] *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, ed. Józef Okolski (Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej, 2010), 280.

an arbitration court, i.e., an adjudication panel comprised of arbitrators adjudicating in a specific case[15].

From Art. 1184 k.p.c. it is not straightforward until which moment the parties are entitled to determine the rules of procedure, and from which moment the arbitrators are entitled to decide on the rules of procedure, and whether such a limit can be set at all. It shall be assumed that the right of the parties to regulate the procedure continues throughout the whole arbitration proceeding. As long as a given act in the proceeding is not carried out, the parties have the right to determine the manner in which it will be carried out, even if the arbitrators previously indicated in the procedural instruction how they intend to carry out the given act[16].

It is necessary to consider what regulations define the limits of the parties' freedom or the court, respectively, to create standards of evidence. Generally, it is all about the provisions pursuant to Art. 1183-1193 k.p.c. Kurnicki in his gloss to the above-cited decision of the Supreme Court [PL: *Sąd Najwyższy*] as of November 29, 2007, file ref. no. III CSK 176/07, PS 2008, no. 10[17], lists the basic principles that also apply to an evidentiary proceeding, including the right to a fair trial, the right to a fair hearing, the principle of equal treatment of the parties (the principle of equality of arms) or the principle of guaranteeing the party's defense of its rights. The above rules are derived from the content of Art. 1183 k.p.c. Other provisions that the arbitration court is obliged to take into account in the scope of the proceeding are included in Art. 1183-k.p.c.[18]

The principle of the freedom to create procedural norms is subject to limitations resulting from the content of Art. 353^1 of the Civil Code [PL: *Kodeks Cywilny*] (*hereinafter referred to as k.c.*) establishing the limits of the autonomy of the will of the parties to the arbitration proceeding, which is limited by the provisions of the Act, the principles of social coexistence and the nature of the legal relationship. If the arbitration contract is considered as a substantive law contract, there is no doubt that Art. 353^1 k.c. will apply here[19]. It

15 Piotr Pruś in: *Kodeks postępowania cywilnego. Komentarz*, Vol. II, ed. Małgorzata Manowska (Warsaw: Lex 2022), komentarz do art. 1184.

16 Anna Krysiak in: „Dowody i postępowanie dowodowe w arbitrażu. Warsztaty arbitrażowe w Sądzie Arbitrażowym przy Krajowej Izbie Gospodarczej" *Biuletyn Arbitrażowy*, No. 20 (2013): 23.

17 Tomasz Kurnicki, „Związanie sądu polubownego bezwzględnie obowiązującymi przepisami postępowania. Glosa do postanowienia Sądu Najwyższego z 29.11.2007 r., III CSK 176/07" PS, No. 10 (2008): 55.

18 Gessel-Kalinowska vel Kalisz. *Przyczynek do rozważań*, 91-92.

19 Karolina Siedlik, „Charakter prawny umowy arbitrażowej w prawie niemieckim i polskim" *Monitor Prawniczy*, No. 10 (2000): 672.

should be emphasized, however, that even if the opposite solution is adopted, it is mainly recognized that classifying an arbitration clause as procedural acts in the broad sense does not preclude the application - by analogy - of general provisions on the validity of legal acts[20], on contracts[21]. This situation leads to the conclusion that the limits of the parties' freedom to the arbitration contract in terms of the so-called evidence contracts may be appointed by Art. 353^1 k.c. by law, the principles of social coexistence and the nature (property) of the legal relationship[22].

Considering the above conclusion, restricting the parties' freedom by law will not be limited only to the provisions of Art. 1183-1193 k.p.c., but it will also include the provisions of k.c., which will apply to a type of contract such as an arbitration contract. In addition, the evidence contract shall comply with the principles of social coexistence. As for determining the limits of contracts' freedom in the scope of creating standards of evidence through the criterion of the nature of the legal relationship, the meaning of using this concept in the construction of the norm of Art. 3531 k.c. leads to significant discrepancies in doctrine[23].

The parties' great freedom in shaping the course of the arbitration proceeding is one of the features of arbitration that practitioners appreciate. Unless the parties agree otherwise, the arbitrators may take evidence in the manner they consider appropriate to establish the factual merits of the case. Unfortunately - despite this freedom - many Polish arbitrators unreasonably follow the procedures in k.p.c. They follow such a pattern due to the need for deeper reflection that differences are accepted in Polish law. Many of them also have unfounded concerns that the decision issued during a procedure different from the standard procedure will be revoked due to a common court considering a complaint to revoke an arbitration judgment under Art. 1206 § 1 point 4 k.p.c.[24].

Contracts' freedom during evidence proceeding in arbitration courts applies primarily to the content of arbitration clauses (interchangeably referred to as an arbitration contracts) and to evidence contracts, the nature of which will be discussed later in this article.

---

20 Tadeusz Ereciński in: *Kodeks postępowania cywilnego. Komentarz*, 367.

21 Piotr Machnikowski, *Swoboda umów według art. 353^1 k.c. Konstrukcja prawna* (Warsaw: C. H. Beck, 2005), 171.

22 Piotr Nazaruk in: *Kodeks cywilny. Komentarz aktualizowany*, ed. Piotr Nazaruk, Jerzy Ciszewski (Lex: 2022), komentarz do art. 353^1.

23 See more: Siedlik, *Charakter prawny umowy arbitrażowej*, 672; Gessel-Kalinowska vel Kalisz, *Przyczynek do rozważań,* 93-95.

24 Gessel-Kalinowska vel Kalisz, *Przyczynek do rozważań*, 89.

4. Legal nature of an arbitration clause as a source of evidence proceeding

The rules of evidence proceeding before the arbitration court are initially established by the parties already in the arbitration contract, which in its broader scope also covers the so-called evidence contracts. These contracts are an institution of the so-called *Substantive civil law*. According to this concept, developed by Trammer an arbitration contract is a substantive law contract and not a typical procedural contract. The provisions governing the evidence proceeding before the arbitration court are not proceeding provisions in the strict sense. Usually, for purely practical reasons, the legislator includes provisions regulating civil law relations in acts on the regulations of civil procedure and vice versa[25]. The location of the arbitration law in part V of k.p.c. and not a separate act in the field of substantive law can be explained by the Polish legislative tradition, but by the common legal nature of arbitration and proceedings before common courts, regulated in the first part of k.p.c. In many countries, such as England and Sweden, separate legal acts that strictly adopt the UNCITRAL model act[26] work perfectly well.

Pursuant to Art. 1161 § 1 k.p.c. submission of a dispute for resolution by an arbitration court requires a contract between the parties in which the subject of the dispute or the legal relationship from which the dispute has arisen or may arise should be indicated. Other arrangements of the parties permitted by law, such as proceedings before an arbitration court, can be included in the broadly understood arbitration contract. Polish law provides *expressis verbis* that the parties may agree on the rules and manner of proceeding before an arbitration court (Art. 1184 §1 k.p.c.); the obligation to hold a hearing or to be released from this obligation (Art.1189 §1 k.p.c.) and to take expert evidence (Art.1191 § 2-3 k.p.c.).

Optional content of an arbitration contract and arrangements as to the rules and manner of proceeding before an arbitration court may be formed by the parties directly (independently) or indirectly - by indicating model rules for ad hoc arbitration or by indicating a permanent arbitration court, the rules of which then bind the parties somewhat automatically[27]. It should

25 Henryk Trammer, „O właściwe miejsce dla „czystych" norm materialnego prawa cywilno-jurysdykcyjnego" *Przegląd Notarialny*, No. 12 (1949): 20-22.

26 Piotr Nazaruk, *Zapis na sąd polubowny dotyczący sporów ze stosunku spółki akcyjnej* (Gdańsk, 2013), 122 et seq.

27 Tadeusz Ereciński, Karol Weitz, *Sąd arbitrażowy* (Warsaw: Lexis Nexis, 2008), 41-42.

be obvious that no rules and regulations may exclude the application of mandatory provisions of applicable law or modify[28] them.

When classifying an arbitration clause under the Polish legal system, one should take into account, first of all, the complex legal nature of this institution, and not only the fact that it is regulated in k.p.c. The classification of an arbitration clause in the field of substantive law cannot be determined solely by the fact that it is a contract. In order to correctly qualify a given contract one should take into account its subject and the so-called main legal effects it causes. The view that the legal nature of a given activity cannot be determined through the prism of legal effects is incorrect, as there are many acts of substantive law influencing the course of a trial and many procedural acts affecting the sphere of substantive law. Obviously, material and legal activities may have side effects, and vice versa, but the legal nature of activities is always determined by the main effects, not the side effects[29].

One should express disapproval of the concept that an arbitration clause is an institution of civil procedure. Therefore, it is incorrect to say that this is a typical procedural contract[30]. According to Radwański, the doctrine of procedural law does not include actions performed by the parties outside the trial, which, however, have procedural effects and should be considered worthy of attention. Their legal nature is unclear and controversial in science. Such contracts are subject to the rules of substantive civil law as regards the manner of their conclusion and the consequences of defectiveness. In this respect, they are regulated by norms constructing substantive civil law actions, and on their basis the validity of the parties' declarations of will is determined. However, due to the purely procedural consequences they cause, they cannot be considered civil law issues belonging to the category of procedural issues - apart from procedural activities[31].

De lege ferenda, it should be postulated that in the future, the arbitration regulation should constitute an independent act detached from k.p.c., which will fully implement the theory of autonomous arbitration.

28 „Decision of the Supreme Court as of 03.06.1987, file ref. No. I CR 120/87, OSNC 1988, No. 12, item 174 and related glosses by Maciej Tomaszewski" *Państwo i Prawo*, z. 7 (1989): 147 as well as Sławomir Dalka, Pal. 1990, No. 2-3, p. 76. See also Maciej Tomaszewski in: *System Prawa Handlowego*, Vol. 8, *Arbitraż handlowy*, ed. Andrzej Szumański (Warsaw: C. H. Beck, 2010), 285-286; *Łukasz Błaszczak*, Małgorzata Ludwik, *Sądownictwo polubowne (arbitraż)* (Warsaw, 2007), 69-71.

29 Maciej Tomaszewski, „Arbitraż handlowy", 285-286.

30 For instance: Robert Kulski, *Umowy procesowe w postępowaniu cywilnym* (Krakow: Kantor Wydawniczy Zakamycze, 2006), 169 et seq.

31 Zbigniew Radwański in: *System Prawa Prywatnego. Prawo cywilne – część ogólna*, Vol. 2 (Warsaw: C. H. Beck 2008), 30 et seq.

5. Evidence contracts as a manifestation of autonomy of will in evidence proceeding

Evidence contracts concluded in arbitration proceedings are generally regarded as a bilateral dispositive act in a formal sense. In the doctrine of the civil trial, Kulski distinguished several categories of evidence contracts[32]. The broad understanding of the evidence contract adopted by Kulski in civil proceedings can be narrowed down and used to define the essence of the evidence contract in international arbitration. For his monograph, the author proposes to understand the 'evidence contract' as contracts excluding (or selecting) a given type of evidence (*in abstracto*) as inadmissible (or only admissible) or agreements excluding precisely indicated evidence (*in concreto*). Further considerations focus on this dual understanding of the evidence contract. Contracts excluding the right to use specific means of evidence or specific evidence are unfamiliar to the Polish civil procedure and native legal tradition and are, therefore, considered illegal[33].

The admissibility of the freedom to shape the content of evidence contracts in arbitration proceedings is indisputable. According to Kuratowski, the parties may only adopt specific predetermined facts or evidence[34] as the basis for adjudication in an arbitration contract. According to Allerhand, under Art. 501 of d.k.p.c. the parties may have decided that the arbitrator cannot use specific means of evidence. The author allowed the parties to exclude the possibility of taking evidence from witnesses' testimony or some precisely mentioned. He also assumed that the parties could define in advance the evidence on which the arbitration court could base its decision[35].

Ereciński argued that the contracts should be considered inadmissible if they infringed the party's right to be heard[36]. In this context, an important role is played by the principle of equality of the parties under Art. 1183 k.p.c., the interpretation of which is sometimes different from the principle of equality of the parties in a civil trial. Violation of the principle of hearing in a civil trial may deprive the ability to defend one's rights in court and entail the invalidity of the decision and the entire proceeding[37]. Usually, this

32 Błaszczak, Ludwik, *Sądownictwo polubowne*, 141.

33 Czech, *Dowody i postępowanie dowodowe*, 104.

34 Roman Kuratowski, *Sądownictwo polubowne* (Kraków: F. Hoesick, 1932), 109.

35 Maurycy Allerhand, *Kodeks postępowania cywilnego*, Vol. I (Lviv: Spółka Wydawnicza Kodeks, 1932), 510.

36 Tadeusz Ereciński in: *Kodeks postępowania cywilnego. Komentarz*, Vol. 1, *Postępowanie rozpoznawcze*, ed. Tadeusz Ereciński (Warsaw: 2016), 397.

37 Agnieszka Góra-Błaszczykowska, *Zasada równości stron w procesie cywilnym* (Warsaw: C. H. Beck, 2008), 88-89.

is not the case in arbitration where the parties to the evidence contract consciously waive their right to be heard. (e.g., in favor of written clarifications).

The admissibility of evidence contracts in the arbitration proceedings, in which the parties extend the possibility of taking evidence within the limits of evidence provided by k.p.c., does not raise any objections. These contracts make it easy to explain the case's circumstances. In the arbitration proceedings, the admissibility of evidence contracts based on which the parties' consent to the taking of evidence not provided for by the act should be considered admissible, supported by the principle of freedom of the procedure and the lack of an obligation by the arbitration court to comply with the provisions of k.p.c. (Art.1184 § 1 and 2). This means the parties may adopt such rules of conduct as they deem appropriate to resolve the dispute. Therefore, it should be borne in mind that any evidence allowed in the proceeding before the arbitration court may contribute to a comprehensive explanation of the case circumstances. There are no restrictions resulting from the provisions of k.p.c. regarding the evidence in the proceeding. The parties may extend the catalog of evidence to include evidence not provided for by the law of civil procedure but considered essential, meaningful, and valuable for dispute resolution[38].

According to the Polish arbitration doctrine, evidence contracts are regularly mentioned as a real example of implementing the principle of disposition in arbitration proceeding[39]. The admissibility of evidence contracts, excluding the use of certain means of evidence or submission of specific evidence, would, therefore, result from both the principle of disposition and the absence of the ex officio principle in arbitration proceedings. The absence of restrictions resulting from the *ex officio* principle means that the arbitration court is not obliged to comprehensively explain all case circumstances[40].

It should be determined whether a judgment issued in a proceeding before an arbitration court and evidence not provided for by law conducted by the will of the parties may be revoked by the court under Art. 1206 k.p.c. or whether there is a reason for refusing to recognize or declare of enforceability of the judgment under Art. 1214 § 3 k.p.c.. The question is whether such a judgment is not contrary to the fundamental principles of the legal order of the Republic of Poland (the public order clause). Considering the above, it cannot be concluded that the arbitration judgment is inconsistent with the clause mentioned above because the decision is based on the evidence specified in advance in the evidence contract. Therefore, it was not taken in

38 Kulski, *Umowy procesowe w postępowaniu cywilnym* (Krakow: Wolters Kluwer, 2006).

39 Radosław Flejszar, „Zasada dyspozycyjności w postępowaniu przed sądem polubownym" *ADR. Arbitraż i* Mediacja, nr 4 (2011): 58.

40 Czech, *Dowody i postępowanie dowodowe*, 105.

violation of the rules of evidence procedure specified in k.p.c. The arbitration court is not bound by these rules at all. To sum up, it should ultimately be assumed that in a proceeding before an arbitration court, evidence contracts may be concluded within the limits of Art. 353^1 k.c.

Violation of the procedural provisions of an imperative nature may result in revoking the arbitration judgment under Art. 1206 § 1 point 4 k.p.c. A party to the procedure may, by way of a complaint, request to revoke the arbitration judgment only 'if the basic rules of procedure before that court, arising from the Act or specified by the parties, have not been complied with.' In this context, one should consider, among other things, the problem of proceeding by the arbitration court based on evidence contracts, the content or purpose of which exceeds the limits of Art. 3531 k.c., which results in the invalidity of a legal act, i.e., an evidence contract. Conducting the proceeding on the basis of invalid evidence rules may constitute a premise specified in Art. 1206 § 1 point 4 k.p.c., leading to the revoking of the judgment, if the rules were of fundamental importance for the resolution of the case[41].

6. Distinctiveness of evidence proceeding before the arbitration court in k.p.c.

In civil proceeding before common courts, there are many detailed rules of absolute nature with regard to taking evidence. The situation varies in arbitration proceeding. Arbitration is, in a sense, a type of a contract, hence the parties have considerable freedom in determining the manner of conducting the evidence proceeding[42]. On the other hand, the rules of arbitration generally do not define precisely the rules of taking evidence, although they usually contain guidelines in this regard[43]. Therefore, it is up to the parties and the arbitrators[44] to make this procedural matter more concrete.

The most important examples of the distinctiveness of evidence proceeding before an arbitration court include: a) the possibility of using multiple means of evidence not provided for by k.p.c.; b) the lack of possibility to use coercive measures, which are reserved to organs of state authority, with the simultaneous possibility of using the help of a common court under Art. 1193 k.p.c.; c) the possibility of taking evidence only based on documents; d) no obligation for witnesses to participate in the arbitration proceeding, and

41 Gessel-Kalinowska vel Kalisz, *Przyczynek do rozważań*, 92.

42 Robert Kulski, „Sposób prowadzenia dowodów w postępowaniu przed sądem polubownym", [in:] *Sądy polubowne i mediacja*, ed. Jan Olszewski (Warsaw: C. H. Beck, 2008), 269.

43 Kulski, *Sposób prowadzenia dowodów*, 272 et sec.; Ereciński, Weitz, *Sąd arbitrażowy*, 313 et sec.

44 Maria Hauser-Morel, Tadeusz Wiśniewski in: *Arbitraż* handlowy, ed. Andrzej Szumański (Warsaw, 2015), 490.

e) the possibility of appointing an expert by the party itself and not only by the arbitration court (the expert appointed by the party obtains the status of a witness).

The most popular means of evidence in arbitration courts include: 1) documentary evidence; 2) evidence from witness testimony and expert opinion, and 3) inspection evidence.

Particularly important is the issue of the admissibility of taking affirmations from witnesses. In Polish doctrine and arbitration practice, the problem of liability for making false statements under Art. 233 § 1 of the Criminal Code [PL: *Kodeks Karny*][45] (*hereinafter referred to as k.k.*). There is a disagreement as to whether arbitrators can receive an affirmation from witnesses and whether they are allowed to instruct witnesses before their hearing that they are responsible for giving false testimony[46]. Before the amendment of the arbitration regulation in 2005, Art. 706 § 1 k.p.c. was in force and provided *expressis verbis* the right of the arbitration court to take affirmations from witnesses. Currently, k.p.c. does not directly decide about this right of the arbitrators. The legislator omitted the wording in the text of Art. 1192 § 1 k.p.c. regarding the taking of affirmation.

Art. 233 § 1 k.k. concluded the so-called blanket reference to other legal acts. Therefore, it is necessary to determine what features a normative regulation should have so that the proceeding provided for therein could be classified as conducted based on the activities within the meaning of Art. 233 k.k. In the justification of the decision of February 2, 2004[47], the Supreme Court indicated that the requirement of statutory regulation of non-judicial proceedings must be understood literally and strictly. The Supreme Court pointed out that the constitutional and penal-substantive rule required it (Art. 42 item 1 of the Constitution, Art. 1 § 1 k.k.), from which the application of an extended interpretation is prohibited. In the decision of the Supreme Court as of February 2, 2004 it was indicated that the right to inform a witness about criminal liability must have its source in the act. Therefore, it cannot be assumed that the arbitration proceeding is conducted under Act[48].

45 Pursuant to Art. 233 § 1 k.k. – „Whoever, in giving testimony which is to serve as evidence in court proceedings or other proceedings conducted on the basis of a law, gives false testimony or conceals the truth shall be subject to the penalty of deprivation of liberty for up to 3 years".

46 Izabela Szmit, „Znaczenie dowodu z zeznań świadków w postępowaniu arbitrażowym" *Przegląd Prawa Handlowego*, No. 7 (2013): 49.

47 Decision of the Supreme Court as of February 2, 2004, (V KK 168/03), OSNKW 2004/3, item 29.

48 Maciej Łaszczuk, „O dopuszczalności odbierania przyrzeczenia od świadków przez sąd polubowny", [in:] *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana*

De lege lata, there are no grounds to argue that giving false testimony in proceedings before an arbitration court constitutes a crime specified in Art. 233 k.k., consequently, an arbitration court accepting testimony from a witness may not instruct a witness about criminal liability for giving false testimony or take an affirmation referring to such liability from them. The lack of a criminal sanction for giving false testimony by a witness in arbitration proceedings is typical for most European countries and results from voluntary participation in arbitration[49].

7. Final remarks and conclusions

The scope of differences in evidence proceedings about proceeding before an arbitration court and a state court depends on how the parties and the arbitration court apply their competence to establish the standards of evidence. The parties' freedom is limited by statutory provisions, including, in particular Art. 1183-1193 k.p.c.

Recognizing the evidence contract as a substantive law contract to which the provisions on contractual obligations apply, certain norms proper to contractual obligations, principles of social coexistence, and the nature of the legal relationship. The autonomy of the will of the parties and the arbitration court must respect the rules of procedure under Art. 1183 k.p.c, i.e., the right of the parties to a fair trial, the right to be heard, the principle of equal treatment of the parties, guaranteeing the party the possibility to defend its rights.

Breaching k.p.c. of an imperative nature may result in revoking the arbitration judgment if the basic rules of procedure before the arbitration court, arising from the Act or specified by the parties, have yet to be complied with. In this context, the evidence contract, the content of which violates the boundaries of Art. 353^1 k.c. is invalid and constitutes the basis for revoking the arbitration judgment under Art. 1206 § 1 point 4 k.p.c.

The specificity of evidentiary proceedings before an arbitration court has advantages and disadvantages. The disadvantages of evidentiary proceeding before an arbitration court about a proceeding before a common court include the inability to accept a witness' affirmation or the impossibility of coercing a given measure of evidence (Art.1191 §1 k.p.c.), even though in this respect recent changes to k.p.c. however, they gave the court new measures in the form of the possibility to apply to a common court for assistance in such a case (Art. 1192 k.p.c.). The advantages of an arbitration court are the principle of freedom to establish formal and legal norms in force before

doktorowi habilitowanemu Tadeuszowi Szurskiemu (Warsaw: C. H. Beck, 2008), 76 et seq.

49 Volker Triebel, „An Outline of the Swiss/German Rules of Civil Procedure and Practice Relating to Evidence" *Arbitration*, No. 3 (1982): 223.

a given court, including the norms determining the manner of conducting a dispute. The normative competence in this respect was expressed in Art. 1184 § 1 k.p.c.

Bibliography

Allerhand Maurycy, *Kodeks postępowania cywilnego*, Vol. I. Lviv: Spółka Wydawnicza Kodeks, 1932.

Binder Peter, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*. London: Wolters Kluwer, 2000.

Błaszczak Łukasz, „Nadzór sądu powszechnego nad działalnością sądu polubownego, cz. 1" *Prawo Spółek*, No. 3 (2006): 35-42.

Czech Konrad, *Dowody i postępowanie dowodowe w międzynarodowym arbitrażu handlowym oraz inwestycyjnym. Zagadnienia wybrane*. Waraw: Wolters Kluwer, 2017.

Ereciński Tadeusz, „Arbitraż a sądownictwo państwowe" *Przegląd Ustawodawstwa Gospodarczego*, No. 2 (1994): 2-8.

Ereciński Tadeusz, Karol Weitz, *Sąd arbitrażowy*. Warsaw: Lexis Nexis, 2008.

Flejszar Radosław, „Zasada dyspozycyjności w postępowaniu przed sądem polubownym" *ADR. Arbitraż i* Mediacja, 4 (2011): 35-63.

Gessel-Kalinowska vel Kalisz Beata, „Przyczynek do rozważań na temat odrębności postępowania dowodowego w sprawach rozstrzyganych przez sądy polubowne" *ADR Arbitraż i Mediacje*, No. 1 (2009): 89-96.

Góra-Błaszczykowska Agnieszka, *Zasada równości stron w procesie cywilnym*. Warsaw: C. H. Beck, 2008.

Jurcewicz Witold, „Dowody i postępowanie dowodowe w arbitrażu. Warsztaty arbitrażowe w Sądzie Arbitrażowym przy Krajowej Izbie Gospodarczej" *Biuletyn Arbitrażowy*, No. 20 (2013).

Kodeks cywilny. Komentarz aktualizowany, ed. Piotr Nazaruk, Jerzy Ciszewski. Lex, 2022.

Kodeks postępowania cywilnego, Vol. V, *Komentarz do art. 1096-1217*, ed. Andrzej Marciniak. Warsaw: C. H. Beck, 2020.

Kodeks postępowania cywilnego. Komentarz, ed. Elwira Marszałkowska-Krześ. Warsaw: C. H. Beck, 2021.

Kodeks postępowania cywilnego. Komentarz, Vol. II, ed. Małgorzata Manowska. Warsaw: Lex, 2022.

Kodeks postępowania cywilnego. Komentarz, Vol. I, *Postępowanie* rozpoznawcze, ed. Tadeusz. Ereciński. Warsaw: Wolters Kluwer, 2016.

Kodeks postępowania cywilnego. Komentarz, Vol. 6, *Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*, ed. Tadeusz Ereciński. Warsaw: Wolters Kluwer, 2017.

Krysiak Anna, „Dowody i postępowanie dowodowe w arbitrażu. Warsztaty arbitrażowe w Sądzie Arbitrażowym przy Krajowej Izbie Gospodarczej" *Biuletyn Arbitrażowy*, No. 20 (2013).

Kulski Robert, „Sposób prowadzenia dowodów w postępowaniu przed sądem polubownym", [in:] *Sądy polubowne i mediacja*, ed. Jan Olszewski. Warsaw: C. H. Beck, 2008.

Kulski Robert, *Umowy procesowe w postępowaniu cywilnym*. Krakow: Kantor Wydawniczy Zakamycze, 2006.

Kurnicki Tomasz, „Związanie sądu polubownego bezwzględnie obowiązującymi przepisami postępowania. Glosa do postanowienia Sądu Najwyższego z 29.11.2007 r., III CSK 176/07" *PS*, No. 10 (2008).

Łaszczuk Maciej, „O dopuszczalności odbierania przyrzeczenia od świadków przez sąd polubowny", [in:] *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*. 69-77. Warsaw: C. H. Beck, 2008.

Machnikowski Piotr, *Swoboda umów według art. 353[1] k.c. Konstrukcja prawna*. Warsaw: C. H. Beck, 2005.

Nazaruk, Piotr. *Zapis na sąd polubowny dotyczący sporów ze stosunku spółki akcyjnej*, Gdańsk, 2013.

Roman, *Sądownictwo polubowne*. Krakow: F. Hoesick, 1932.

Siedlik Karolina, „Charakter prawny umowy arbitrażowej w prawie niemieckim i polskim" *Monitor Prawniczy*, No. 10 (2000): 21-24.

System Prawa Handlowego, Vol. 8, *Arbitraż handlowy*, ed. Andrzej Szumański. Warsaw: C. H. Beck, 2015.

System Prawa Prywatnego. Prawo cywilne – część ogólna, Vol. II. Warsaw: C. H. Beck, 2008.

Szmit Izabela, „Znaczenie dowodu z zeznań świadków w postępowaniu arbitrażowym" *PPH*, No. 7 (2013): 48-52.

Szpara Justyna, Maciej Łaszczuk, „Czy autonomia stron w ustalaniu reguł postępowania przed sądem polubownym jest ograniczona w czasie?", [in:] *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, ed. Józef Okolski. Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej, 2010.

Trammer Henryk, „O właściwe miejsce dla »czystych« norm materialnego prawa cywilno-jurysdykcyjnego" *Przegląd Notarialny*, No. 12 (1949).

Triebel Volker, „An Outline of the Swiss/German Rules of Civil Procedure and Practice Relating to Evidence" *Arbitration*, No. 3 (1982): 221-226.