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1. Introduction

The progressing globalization together with the growing need for certainty of economic trading caused that in complex and complicated corporate disputes, the common judicature no longer fulfills its role. The excessive length of proceedings, doctrinal doubts (e.g. regarding the legal nature of resolutions of the general meeting of shareholders), the lack of separate economic courts combined with the lack of specialized knowledge of corporate governance judges, and the two-instance nature of the judicial path mean that legal system does not provide sufficient guarantee and legal protection to capital companies.

For the large capital, a global remedy for the ills of common judiciary throughout the world has been corporate arbitration in the last decade, increasingly used both in the countries of continental legal culture and common law. The speed and flexibility of arbitration, the secrecy of proceedings, the professionalism of arbitrators (the so-called cachet behind the name) [1], as well as the high enforceability of arbitration awards around the world make more and more countries to adopt pro-arbitration reforms. Noticeable is also strong competition between individual legislations, the rate of which is to attract as many investors as possible - seduced by user-friendly law to secure their vital business interests.

Many countries, recognizing correctly the latest challenges of the arbitration law, have recently decided to amend their arbitration law, liberalizing the issue of the objective arbitrability of shareholders' resolution disputes (and other

[1] See J. D. M. Lew, L. A. Mistelis, S. M. Kröll (ed.), Comparative International Commercial Arbitration, The Hague/London/New York 2003, pp. 36-37.

disputes arising from the company's legal relationships[2]). Beginning with the countries from which our legal system has originated, Austria decided to take such a step in 2012, while France in 2011. In Germany, in turn, in 2009, a landmark judgment was issued by the Federal Tribunal "Objective Arbitrability II"[3], which pushed the discussion on broadly understood objective arbitrability into new tracks, opening the way to awarding arbitration tribunals in disputes for appealing against companies' resolutions.

Looking as an example at the other countries, that have made the latest changes in the field of arbitration law over recent years: Belgium reformed its law in 2013, Singapore in 2012, Colombia in 2012, and Spain in 2011. A similar tendency applies to institutional arbitration courts, whose regulations have also been subject to a thorough revision in order to adjust to the prevailing economic realities. Among them, in the most recognizable order, one can mention the UNCITRAL Regulations (2010), as well as the various regulations of: the Swiss Chamber of Commerce ICC (in 2012), the Austrian Federal Chamber of Commerce VIAC (in 2013), the International Arbitration Center in Hong Kong, HIACK (in 2013), the Chinese International Trade Commission CIETAC (in 2012) and the International Arbitration Center in Singapore SIAC (in 2013).

Visible global trends in corporate arbitration and shareholders' resolution disputes are also being created by a common belief that properly conducted arbitration proceedings equals de-escalation of tensions and resolving disputes in a fast, professional and efficient manner[4]. Even Russia, being traditionally prejudiced towards arbitration, beginning from 01.02.2017 introduced extensive changes in regard of the objective arbitrability[5], which enable most of the corporate disputes (except for listed exemptions), including shareholders' resolution disputes, to be submitted before the arbitration courts.

Unfortunately, Polish legislator seems to be overlooking the global tendencies in liberalization of the approach towards the objective arbitrability. As a result,

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[2] Analysis based on: S. L. Brekoulakis, *On arbitrability: Persisting Misconceptions and New Areas of Concern*, [in:] *Arbitrability: International and Comparative Perspectivesm*, L. A. Mistelis, S. L. Brekoulakis, 2009, and M. Orecki, *Polskie przepisy o sądzie polubownym (arbitrażowym)- uwagi de lege ferenda*, Polski Proces Cywilny 2014, no. 2.

[3] S.L. Brekoulakis, *On arbitrability…*, p. 16.

[4] A. Szumański, *Przeszkody prawne w przyjęciu kognicji sądów arbitrażowych w sporach o zaskarżanie uchwał zgromadzeń spółek kapitałowych (uwagi de lege lata oraz de lege ferenda),* not published, p. 5, and *K. Pörnbacher, A. Dolgorukow, Zdatność arbitrażowa sporów korporacyjnych (o zaskarżanie uchwał) - perspektywa niemiecka*, PPH 2015, no. 10, p. 46.

[5] See Cleary Gottlieb Steen & Hamilton LLP, *New Russian Rules on arbitrability of disputes* [access: 05.02.17]: https://www.clearygottlieb.com/~/media/cgsh/files/new-russian-rules-on-arbitrability-of-disputes.pdf.

Poland is currently regarded as the most anti-arbitration country in the European Union, which in consequence has a negative impact on investors' willingness to invest their capital therein. On the basis of Polish law, a number of legal obstacles are indicated by the doctrine, which subject jurisdiction to arbitration in matters concerning shareholders' resolution disputes. The basic problem of Polish corporate arbitration is the abstract criterion of "objective arbitrability"[6], having its basis in article's 1157 k.p.c (Polish Code of Civil Procedure, hereinafter also referred to as "k.p.c.") content[7], which is also defined by another equally vague and unprecise notion of "ability to settle"[8].

2. The problem with the linguistic interpretation of art. 1157 k.p.c.

The nucleus for the ongoing controversy was the discussion[9] that aroused around the issue of objective arbitrability already during the work on the amendment to k.p.c, which was ultimately finalized in form of a bill from 28th of July 2005 amending of the Code of Civil Procedure[10]. Eventually, the provision regulating the issue of the objective arbitrability of disputes, introduced by the amendment of k.p.c of 2005[11], received the following wording:

Unless otherwise provided for by specific regulations, the parties may bring disputes involving property rights or disputes involving non-property rights which can be resolved by a court settlement, except for maintenance cases, before an arbitration court.

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[6] A. Szumański, *Zapis na sąd polubowny w sprawie zaskarżenia uchwały zgromadzenia spółki kapitałowej: Prawo w XXI wieku, Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk*, W. Czapliński (ed.), Warszawa 2006, p. 889 et seq.

[7] Act of 17 November 1964 Code of Civil Procedure, consolidated text J.L. of 2014 item 101, as amended.

[8] A. Szumański, *Przeszkody prawne*…, p. 5.

[9] A.W. Wiśniewski, *Rozstrzyganie sporów korporacyjnych przez sądy polubowne w świetle nowej regulacji zdatności arbitrażowej sporów,* [in:] *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*, Warszawa 2008, pp. 269-271, also W. Jurcewicz, C. Wiśniewski, *Zdatność arbitrażowa sporów korporacyjnych- perspektywa polska,* PPH 2015, no. 10, p. 5.

[10] Act of 28 July 2005 on amending the Act – Code of Civil Procedure, J.L. 2005.178.1478, came into force on 17 October 2005 by adding to CCP part five, regarding arbitration proceedings.

[11] Act of 28 July 2005 on amending the Act – Code of Civil Procedure, J.L. 2005.178.1478.

In the above provision, a number of doubts[12] and discrepancies[13] in interpretation are caused mostly by imprecise construction of art. 1157 k.p.c., which does not give a clear answer to the question whether the stated "ability to settle" condition is applicable only to "disputes involving non-property rights" or also to disputes involving property rights. Faulty formulation of the indicated provision is usually met with a firm disapproval of the doctrine[14]. A. Szumański speaks here directly about the "opportunism of the legislator"[15], who instead of deciding on an important (and more importantly- recognized by itself) legal problem, prefers to leave a decisive voice to doctrine and judicature.

As a consequence of such an unfortunate wording of art. 1157 kp.c. part of the doctrine[16] clearly advocates the position that the "settlement ability test" applies only to disputes involving non-property rights. Such a liberal approach would lead to a complete independence of the disputes involving shareholders' resolution disputes from the ability to settle. Therefore, since the corporate disputes are essentially disputes over property rights, the problem of ability to settle, and therefore objective arbitrability, would not apply to legal actions against the validity of companies resolutions. To support this thesis, one raises arguments of purely lingual and formal nature, as if the placement of the hyphen in art. 1157 k.p.c. referred only to disputes involving non-law, with the exception of cases for maintenance.

However, in the opinion of the opponents of that view[17]- constituting a vast majority- if one takes into the account that firstly, cases for maintenance are disputes about property rights and secondly, the legislator's desire was to exclude them from the cognition of courts of arbitration, it becomes clear that the ability to settle test should be assigned both to disputes involving property rights and disputes involving non-property rights[18]. Bringing both kinds of disputes under the uniform criteria of settlement ability test also found its reflection in

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[12] W. Wiśniewski, [in:] A. Szumański (ed.), *Arbitraż handlowy, System prawa handlowego*, vol. 8, Warszawa 2010, pp. 287-288, side number 24.

[13] M. Tomaszewski, *O zaskarżaniu uchwał korporacyjnych do sądu polubownego- uwagi de lege ferenda*, Przegląd Sądowy 2012, no. 4, p. 26 and literature called therein .

[14] A. Szumański, *Zapis na sąd polubowny…*, pp. 890- 892.

[15] A. Szumański, *Przeszkody prawne…,* p. 5.

[16] E.g. A. Zieliński, *Kodeks postępowania cywilnego, t. II. komentarz do art. 507-1217*, Warszawa 2006, p. 1359, R. Morek (ed.), *Mediacja i arbitraż*, Warszawa 2006, p. 115; and also K.A. Piwowarczyk, *Umowa o arbitrażw świetle ustawyz 28.07.2005 r. o zmianie kodeksu postępowania cywilnego,* Prawo Spółek 2006, no. 6, p. 51.

[17] M. Tomaszewski, *O zaskarżaniu…,* p. 26 and literature called therein.

[18] A.W. Wiśniewski, *Rozstrzyganie sporów…*, p. 271.

judicature, including the decisions of Supreme Court [19] (in particular in the reasoning of the resolution of 07.05.2009)[20].

2.1. The legal nature of corporate disputes

In the context of the discussed options of the scope of impact of the settlement ability test, the issue of the legal character of corporate disputes (including shareholders' resolution disputes) and the need to answer the question whether these disputes should be regarded as disputes over property rights or non-property rights remains important and still debatable. Therefore, in order to determine the legal character of a corporate dispute, it should first be considered whether the challenged resolution concerns strictly property rights, or only those of a purely organizational nature (for example, disciplinary and staff matters within the company)[21]. Some commentators consider them to be non-property rights[22]. Other representatives of the doctrine, in turn, belieporve that disputes arising from company's legal relationship are, as a rule, disputes over property rights, and corporate rights aim is just to bring them into fruition[23].

According to A. Szumański, corporate rights cannot be subject to independent trading in isolation from property rights[24]. In this context, M. Tomaszewski indicates[25] significant differences of views in this matter in the settlements of the arbitration courts (which decide their cognition in accordance with the principle known as Competence- Competence) [26].

Also, the common courts articulated the various discrepancies in its jurisprudence, the best example being the rich case law of the Supreme Court[27]. *Summa summarum*, on several occasions, the Supreme Court came to the conclusion

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[19] M. Tomaszewski, *O zaskarżaniu…*, p. 26 and judicature called therein.

[20] Decision of the Supreme Court of 7 May 2009, No. III CZP 13/09, OSNC 2010/1/9.

[21] Cf. M. Tomaszewski, *O zaskarżaniu…*, p. 23, and E. Marszałkowska-Krześ, *Zaskarżenie uchwały wspólników do sądu polubownego*, PPH 1998, no. 3, p. 37.

[22] I. Weiss, A. Szumański , [in:] W. Pyzioł, A. Szumański, I. Weiss, *Prawo Spółek*, Warszawa 2014, p. 370 et seq, side number 964 et seq.

[23] Cf. M. Tomaszewski, *O zaskarżaniu…*, p. 23; A. Szumański, [in:] S. Włodyka (ed.), *Prawo spółek*, Kraków 1981, p. 148; A.W. Wiśniewski, *Prawo o spółkach. Podręcznik praktyczny*, *t.3, Spółka Akcyjna*, Warszawa 1993, pp. 122-124.

[24] I. Weiss, A. Szumański , [in:] W. Pyzioł, A. Szumański, I. Weiss, *Prawo Spółek*, Warszawa 2014, pp. 634-635.

[25] M. Tomaszewski, *O zaskarżaniu…*, p. 24.

[26] Meaning that arbiters are able to evaluate their own competence to settle the relevant dispute.

[27] M. Tomaszewski, *O zaskarżaniu…*, p. 24.

that the nature of the case concerning resolutions of the assemblies should be assessed *in casu* - it shall depends on its subject and particular content and therefore should be subject to specific individual examination[28].

However, taking into account purely functional reasons[29] as well as the mere nature of the capital companies, it seems accurate for the majority of doctrine that shareholders' resolution disputes are essentially of a property rights character. Any differentiation within this group would lead to a dangerous conclusion from the point of the stability of legal transactions that some shareholders' resolutions could be questioned before the common court, while some before the arbitration court, which again is not a functionally accurate solution.

2.2. The criteria of 'ability to settle' in the context of shareholders' resolution disputes - arguments against.

The above analysis ultimately shifts the burden of answering the question about the objective arbitrability of the shareholders' resolution disputes towards the issue of their settlement ability. Formulating an unambiguous thesis in this respect is not a simple task, in particular because of the imprecise definition of ability to settle under Polish law. Complicated legal structure of a capital company[30] escalates the complexity of this issue. We are not dealing here with a simple situation in which the two parties of the legal relationship have mutual rights, but with a number of parties in a so-called "multi-party disputes" (shareholders' meeting or general meeting adopting the resolution at issue, shareholders filing a lawsuit against the company and a company most often represented by the governing board) whose ability to reach a settlement of particular content therefore remains controversial[31].

According to the generally accepted view, "ability to settle means the possibility of concluding a settlement in a case in which the subject of the proceedings is a legal relationship in which, in the light of substantive law, exists the possibility of the parties to independently enjoy the rights or claims (resulting from this relationship)"[32]. Therefore, according to some of the doctrine, the settlement ability

[28] T. Ereciński, K. Weitz, *Sąd arbitrażowy*, Warszawa 2008, p. 119; M. Tomaszewski, *O zaskarżaniu*…, p. 24, and also W. Jurcewicz, C. Wiśniewski, *Zdatność arbitrażowa*…, p. 5.

[29] W. Jurcewicz, C. Wiśniewski, *Zdatność arbitrażowa*…, pp. 6- 9.

[30] A. Szumański, *Zapis na sąd polubowny*…, pp. 893- 895.

[31] G. Suliński, *Zdolność ugodowa sporów o zaskarżanie uchwał spółek kapitałowych*, ADR Arbitraż i mediacja, 2014, no. 3, W. Jurcewicz, C. Wiśniewski, *Zdatność arbitrażowa*…, p. 5 et seq.

[32] T. Ereciński, K. Weitz, Sąd…, p. 119.

is completely "unsuitable" for the purpose of shareholders' resolution disputes, because of the general disharmony[33] between civil procedure and commercial law regimes[34].Therefore, a number of critical arguments are presented regarding the granting it to these disputes[35].

The first of these arguments concerns the fact that the parties to the dispute allegedly lack the competence to autonomously enjoy and use the subject of the dispute. One makes it clear that the right to question a resolution's validity is a right exercised in the interest of law and public order, and not the entitlement available to the individual as an "own"[36] claim that can be freely enjoyed. This concept, affecting the special nature and characteristics of shareholders' resolution disputes, was expressed already in the inter-war period[37]. This view is reflected in the assessment of today's critics of the settlement ability of those disputes, who deny the possibility of settling the issue of compliance with the mandatory provisions of law which is violated by this particular resolution[38].

Another questionable point touches on the issues of the consequences of the arbitration decision's influence on third party's legal situation due to the lack of an extended effectiveness of the judgment in the case when it leads to the resolution's downfall (both as a result of its annulment or declaring it invalid). According to many representatives of the doctrine, it also influences, indirectly, the negative assessment of the settlement ability of the shareholders' resolution disputes, since the mere possession of the competence to independently make use of the subject matter may not be sufficient if it does not have the force of res iudicata.

Moreover, the very specific nature of the shareholders' resolution disputes, as well as the complicated configuration of the actors involved causes many legitimate objections. In this case, other persons take part in adopting resolutions (partners, shareholders), while others appear as the parties in the judicial proceedings to verify their compliance with the mandatory provisions of law or other rules (company represented by the governing board, supervisory board or special attorney). In turn, some authors argue that the company itself cannot

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[33] E.g. M. Tomaszewski, *O zaskarżaniu…,* p. 28.

[34] Act of 15 September 2000 Commercial Companies Code, consolidated text J.L. 2016 item 1578, as amended.

[35] R. Kos, *Zdatność arbitrażowa sporów o ważność uchwał spółek kapitałowych*, PPH 2014, no. 3, p. 29.

[36] *Ibidem*, p. 29.

[37] A. Jackowski, *Sprawy o unieważnienie uchwał zgromadzeń w spółkach kapitałowych a sąd polubowny*, Polski Proces Cywilny 1937, no. 11–12, p. 359.

[38] R. Kos, *Zdatność arbitrażowa…*, p. 31.

be even considered as the party to the arbitration agreement provided under the company's articles of association or statute. Therefore, it could not be able to make any concessions regarding the content of the company's internal legal relationship[39]and there is no shareholder that would be entitled to reach a settlement with the defendant company.

What is more, in order to deprive the corporate resolution of its binding force, one has to either challenge it before the common court, in order to obtain a final judgment repealing it (or declaring it invalid), or by adopting a new resolution repealing the former one. This shall be done by the same body that adopted the original resolution, which is however highly controversial concept. Many authors claim that these resolutions cannot be amended, revoked or declared invalid in the way of an agreement or amicable settlement, as no agreement between the parties can heal defects and deficiencies resulting from the from the actions being contradictory to law[40]. According to the vast majority of the doctrine, these concerns altogether effectively bring the discussion to an end and definitely determine that there is no such thing as objective arbitrability of the shareholders' resolution disputes.

2.3. The criteria of settlement ability in the context of shareholders' resolution disputes - arguments in favor of the concept

Despite the arguments above, particular commentators are trying to justify the potential situations when it is possible to grant them settlement ability. In their opinion it shall not be excluded that in return for a compromise or benefits, a partner or shareholder will agree to give up on supporting the claim[41]. Some however postulate a complete change of the structure of the discourse on the matter of ability to settle[42]. They notice that the same issue of the admissibility (or inadmissibility) of reaching a settlement of specific content should not be associated with the criteria of settlement ability of annulment or declaring of invalidity disputes. Therefore, the general criteria of settlement ability would

[39] *Ibidem,* p. 29.
[40] R. Kos, *Zdatność arbitrażowa…*, p. 29.
[41] W. Jurcewicz, C. Wiśniewski, *Zdatność arbitrażowa…*, p. 6.
[42] *Ibidem*, p. 7.

relate to a respective category of disputes and not an individual and specific factual situation of the dispute[43].

As an example, A. W. Wiśniewski proposes differentiating between the issues of a potential settlement ability of disputes from a respective category and a specific arbitration clause, realization's possibility (and so the settlement ability) of which has to be established ex ante in a particular dispute or if need be, submit it to court's supervision *ex post*[44]. The author supports therefore a general granting of settlement ability and objective arbitrability to shareholders' resolution disputes *in abstracto*. He claims that objective arbitrability of a specific dispute should be assessed *in concreto*, which in effect would result in an approval or disapproval in the matter of granting ability to settle to designated disputes in post-arbitrary stages, i.e. within the framework of the control of the verdict conducted by the common court, from the *ordre public* clause point of view[45].

R. Kos mentions that one cannot deny granting to shareholders' resolution disputes the quality of agreeability/amicability merely due to considering a decision in the matter of an invalidated resolution, as well as even a strongly increased probability of reaching a legally defective settlement (e.g. due to a complicated multi-entity configuration in these disputes)[46].). In the author's opinion, the acceptability and possibility of concluding a settlement should be looked into *in abstracto* and the common court's inspection has no ex post impact on the evaluation of objective arbitrability ex ante. The supporters of ability to settle also do not agree with the statement that one cannot make the compliance with imperative norms (mandatory provisions of law) the subject of the agreement. That would in their view lead to an absurd conclusion that no disputes touching on the imperative provisions (binding laws)[47], can be the subject of conciliation courts' cognition, which the Supreme Court negated itself [48].

In order to support the thesis of settlement ability and objective arbitrability of shareholders' resolution disputes, one brings up a number of various verdicts[49]. In the view of part of the doctrine, it leads to a conclusion as if the concept was about a purely hypothetical eventuality of the end of the arisen dispute through

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[43] A. W. Wiśniewski, *Międzynarodowy arbitraż…*, p. 275; T. Ereciński, K. Weitz, *Sąd…*, p. 119.

[44] A. W. Wiśniewski, *Międzynarodowy arbitraż…*, p. 276.

[45] *Ibidem…*, pp. 239-240.

[46] R. Kos, *Zdatność arbitrażowa…*, p. 31.

[47] Ibidem, p. 31, A. W. Wiśniewski, *Międzynarodowy arbitraż…*, p. 240.

[48] Decision of the Supreme Court dated 21 May 2010, No. II CSK 670/09: http://arbitraz.laszczuk.pl/orzecznictwo (337).

[49] R. Kos, *Zdatność arbitrażowa…*, p. 31.

reaching a settlement[50], so de facto about whether the end of a dispute in this way may fall under the discretion of the parties (assuming that their actions correspond with one another). Therefore, the fact whether an agreement of particular content violates the law and fulfills a condition of mutual conceptions from the art. 917 k.c. (Polish Civil Code)[51], would not have an influence on settlement ability, because the admissibility of coming to an agreement in accordance with art. 917 k.c. is not semantically identical to the notion of objective arbitrability, referred to in art. 1157 k.p.c[52]. The content of a particular settlement and also the criteria of mutual concessions are admittedly subject to the analysis from the acceptability of reaching such a settlement point of view, however such a test is conducted only ex post and does not have an impact on the primal settlement ability, which every dispute has.

As the jurist argues, ability to settle and objective arbitrability should be then completely isolated from both a specific subjective configuration, resulting from an existence of the dispute between specified parties and from various claims addressed towards the defendant company. All it takes is demonstrating the competence of the parties of the basic relationship to dispose of the subject of the dispute that is the validity of the adopted resolution. According to the commentator, an abstract evaluation of this competence should concern purely and simply a hypothetical possibility to dispose of the subject of the dispute by all shareholders (stockholders). It would mean that no matter how complicated the entity system and shareholders (stockholders) ranks configuration is in the company, identifying just a potential way of an agreeable way resolving a particular disputed issue by the parties proves the existence of settlement ability and objective arbitrability of shareholders' resolution disputes of a designated category.

3. A complicated relation between art. 1157 k.p.c. and art. 1163 § 1 k.p.c.

Although the ability to settle was adopted as a general determinant of objective arbitrability the doctrine still raised arguments speaking for the admissibility of arbitration courts' cognition in cases regarding shareholders' resolution disputes.

[50] R. Kos, *Zdatność arbitrażowa…*, p. 32; A. Wolak-Danecka, *Rozstrzyganie sporów przez sąd polubowny,* p. 131.

[51] Act of 23 April 1964 Civil Code, consolidated text J.L. 2016 item 38, as amended.

[52] Decision of the Supreme Court… (337); R. Kos, *Zdatność arbitrażowa…*, p. 32.

Some of the commentators bring up a concept, as an adequate reasoning for this direction of thinking, in accordance of the key regulation being here the art. 1163 § 1 k.p.c. with the following wording:[53]

> *„An arbitration agreement included in the articles of association or statute of a commercial company concerning disputes arising out of the corporate relationship shall be binding upon the company and its shareholders."*

According to the representatives of literature opting for objective arbitrability of the discussed disputes[54], a proper interpretation of art. 1163 § 1 k.p.c. indicating *explicite* the acceptability of corporate arbitration in Polish reality, allegedly conflicting in regard of the earlier mentioned art. 1157 k.p.c., may prove being helpful in this matter. As per their presented view, the provision constitutes a special norm (lex specialis) to art. 1157 k.p.c. regulating the issue of objective arbitrability *in extenso*. In the case of respectively a formulated arbitration clause of the contract or the articles of association, an intra-corporate dispute might be the subject to the proceeding before the conciliation court. At least a few substantive arguments are supposed to speak for that statement, which are cited by the supporters of this thesis. In reality, this concept has greatly divided the doctrine[55].

A. Szumański believes that „it's not accurate to say that art. 1157 k.p.c. holds a monopoly over the regulation of objective arbitrability, since it starts with words: u*nless otherwise provided by a specific regulation*"[56]. The author also identifies that the "legislative formula" itself being able to point *explicite* in art. 1157 k.p.c. to a reference to art. 1163 k.p.c. would have the nature of "over-regulation". Placing art. 1163 in the Second Title of the 5th part of k.p.c. entitled "arbitration agreement" had a pragmatic dimension, not ruling out the fact of regulating the range of objective arbitrability through this article as well. It is also stated that art. 1163 k.p.c. (contrary to art. 1157 k.p.c., which addresses objective arbitrability in general) describes the competence of the conciliation court in the cases *stricte* in the field of capital company law.

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[53] W. Jurcewicz, C. Wiśniewski, *Zdatność arbitrażowa…*, p. 6.

[54] A. Szumański., *Dopuszczalność kognicji sądu polubownego w sprawach o zaskarżanie uchwał zgromadzeń spółek kapitałowych, Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków 2005, pp. 528, 534.

[55] A. Szumański, *Sąd polubowny a ugoda sądowa*, Glosa 2010, no. 1, p. 15.

[56] A. Szumański, *Przeszkody prawne…*, p. 4, and A. Szumański, *Zapis na sąd polubowny…*, p. 892.

Another quite common argument raised by the doctrine is an argument of a historical nature[57], bringing meanders of works on the new regulation from 2005 closer to the reader. The so-called "conservative" provision standing out the most is art. 1157 § 2 k.p.c., which was deleted as a result of a final discussion between the supporters and the opponents of objective arbitrability of shareholders' resolution disputes. According to G. Suliński "it proves that the legislator's will is allowing the cognition of the conciliation court in these matters"[58].

In other words, approving of such an approach would mean in practice that performing a test of settlement ability, referred to in art. 1157 k.p.c., has a meaning only through the prism of the arbitration agreements, which are not a part of the company's articles of association)[59]. However, entering the arbitration clause would cut short any discussion on ability to settle and therefore objective arbitrability, disputes arisen from the company's relationship (especially intra-corporate disputes)[60].

The opposition to the given statement points out that the function of art. 1163 k.p.c. lies only in including the people who did not sign the record of the arbitration agreement but only conclusively agreed to it by accepting a share in the company as a shareholder or starting to perform a function in the company (e.g. being a member of the board of directors or the audit committee).

It is worth mentioning that the proponents of embracing the thesis that art. 1163 k.p.c. is *lex specialis* towards art. 1157 k.p.c. are A. Szumański[61], G. Suliński[62], P. Bielarczyk[63], T. Kurnicki[64], A. Kąkolecki[65], K. Falkiewicz, R. L. Kwaśnicki[66].

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[57] A. Szumański, *Przeszkody prawne…,* p. 5 oraz G. Suliński, *Rozstrzyganie sporów ze stosunku spółki kapitałowej przez sąd polubowny*, Warszawa 2008, p. 103.

[58] G. Suliński, *Rozstrzyganie sporów…,* p. 103; G. Suliński, *Dopuszczalność poddania sporu ze stosunku spółki pod rozstrzygniecie sądu polubownego*, PPH 2005, no. 12, pp. 31 i 34.

[59] G. Suliński, *Rozstrzyganie sporów…*, p. 104.

[60] M. Tomaszewski, *O zaskarżaniu…,* p. 27; G. Suliński, G. Suliński, *Dopuszczalność poddania sporu ze stosunku spółki pod rozstrzygniecie sądu polubownego*, PPH 2005, no. 12, p. 31; G. Suliński, *Rozstrzyganie sporów…,* p. 104.

[61] A. Szumański, *Dopuszczalność kognicji…*, p. 528.

[62] G. Suliński, *Rozstrzyganie sporów…*, p. 103; G. Suliński, *Dopuszczalność kognicji…*, pp. 31, 34.

[63] P. Bielarczyk, *Nowelizacja Kodeksu postępowania cywilnego w zakresie sądownictwa polubownego*, MP 2005, no. 22, p. 4.

[64] T. Kurnicki, *Znowelizowane postępowanie przed sądem polubownym*, MP 2005, no. 22, p. 1120.

[65] A. Kąkolecki, *Nowelizacja k.p.c. w zakresie sądownictwa polubownego (arbitrażowego)*, Radca Prawny 2005, no. 5, pp. 100-101.

[66] K. Falkiewicz, R.L. Kwaśnicki, *Arbitraż i mediacja w świetle najnowszej nowelizacji kodeksu postępowania cywilnego*, PPH 2005, no. 12, p. 34 .

When it comes to the adversaries of this interpretation, one must name such authors like: T. Ereciński[67], A. W. Wiśniewski[68], R. Uliasz[69], M. Kocur, B. Sołtys[70].

Ultimately, the formation of the court in the Supreme Court's resolution from May 7th 2009[71] (in the panel SSN Marian Kocan, SSN Huber Wrzeszcz, SZN Józef Frąckowiak[72]) ruled in favor of the second group stating, that the provision of the art. 1163 k.p.c. does not contain a special norm in relation to art. 1157 k.p.c. in the field of an obligation to confer the disputes to a resolution of a conciliation court and have them be a subject of a settlement. The Supreme Court found that firstly, art. 1157 k.p.c has an exclusivity to what the term objective arbitrability entails and secondly, putting the art. 1163 k.p.c. in the Second Title of the 5th part of k.p.c entitled "arbitration agreement" determines its exclusion from this matter. The court dismissed the arguments of the historical value maintaining, that despite the implicit consent of the employer to a potential cognition of arbitration in the issues listed above, one cannot derive from it an interpretation of the regulations of art. 1157 and 1163 k.p.c. Moreover, the Supreme Court argued, that objective arbitrability of the disputes (through being subjected to the test of settlement ability) cannot depend on the fact whether the record of the arbitration agreement entered the articles of association of the company or a separate contract (an arbitration agreement or a so called compromise) between parties. De facto, more in the conclusion, it ends the discussion on the cognition of conciliation courts in the matters of shareholders' resolution disputes.

As a reminder, keeping the following considerations on a side note, one has to also identify that in the reasoning of the presented resolution, the Court adopted a position that the dispute's test of settlement ability determines the objective arbitrability of both the disputes about property and non-property rights[73].

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[67] T. Ereciński, *Zdatność arbitrażowa (art. 1157 KPC)*, [in:] *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*, Warszawa 2008, pp. 10-12.

[68] A.W. Wiśniewski, *Rozstrzyganie sporów…*, pp. 272-273.

[69] R. Uliasz, *Zdolność arbitrażowa sporów wynikłych z zaskarżania uchwał zgromadzeń spółek kapitałowych*, [in:] J. Oszewski, B. Sagan, R. Uliasz, *Arbitraż i mediacja jako instrumenty wspierania przedsiębiorczości*, Rzeszów 2006.

[70] A. Szumański, *Zapis na sąd polubowny…*, pp. 205-206.

[71] Decision of the Supreme Court of 7 May 2009, No. III CZP 13/09, OSNC 2010/1/9.

[72] R. Sikorski, *Diagnoza arbitrażu*, *Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian*, B. Gessel-Kalinowska vel. Kalisz (ed.), Wrocław 2014, p. 54.

[73] *Ibidem*, p. 25.

4. Conclusion

Putting the doubts presented above in perspective, especially including the rejection by the majority of the doctrine of the view about these disputes' settlement ability and facing the disapproval towards the theory of the art. 1163 k.p.c. being *lex specialis* to art. 1157 k.p.c (which in the opinions of A. Szumański and G. Suliński would enable the objective arbitrability of the disputes not having ability to settle in their nature), one adopts for pragmatic reasons the lack of objective arbitrability of shareholders' resolution disputes[74].

It mostly comes from an excessive exposure to a high risk, which the approval in the economic practice of an edgy view on objective arbitrability (no matter the reasoning)[75] entails. There is a severe danger of refusal of the recognition of an award or declaring the enforceability of conciliation court's decision issued in this matter (art. 1215 § 1 pt 1 k.p.c.), and even its annulment (art. 1206 § 1 pt. 1 k.p.c.) by the common court in post-arbitrary supervision stage. The effect of including an arbitration agreement (arbitration clause) in articles of association may not work as intended, because a shareholder may de facto lose the right to challenge shareholders' meeting resolutions. Contesting a case before the common court (with referring to an existing record of an arbitration agreement by the defendant company) may result in a refusal to hear a case by the court due to its lack of jurisdiction (art. 1180 k.p.c.). Taking into the account the short time-bars (even 30 days in public companies), it might mean an irreversible loss of the legal protection of a legitimate shareholder[76].

Currently, a real possibility of losing an effective way of pursuing one's claim both before the conciliation and common court tempts the economic legal entities to lean towards a categorical resignation from making the records of arbitration agreements, which frankly equals a lack of practical use for art. 1163 k.p.c. As a consequence, one must follow A. Szumański's footsteps and find that the current state of the discussion on objective arbitrability leads to an utter marginalization of commercial arbitration in shareholders' resolution disputes and taking into the account the dominant role of this type of disputes in the disputes arisen from the capital company's relationship – de facto the whole corporate arbitration[77].

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74 G. Suliński, *Rozstrzyganie sporów…*, pp. 191-192.

75 *Ibidem,* p. 168.

76 *Ibidem,* p. 168.

77 A. Szumański, *Przeszkody prawne….*, p. 3.

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Streszczenie

W wielu państwach na świecie arbitraż korporacyjny uważany jest za skuteczny sposób rozwiązywania tzw. sporów uchwałowych, czyli sporów w sprawach o zaskarżanie uchwał zgromadzenia wspolników. W Polsce w wyniku wadliwej regulacji art. 1157 k.p.c. (a zwłaszcza wprowadzenia kryterium zdatności ugodowej sporów majątkowych) oraz art. 1163 k.p.c. zdatność arbitrażowa tych sporów jest kwestionowana i stanowi przedmiot licznych kontrowersji w doktrynie. Próba znalezienia odpowiedzi na pytanie o rzeczywiste istnienie i ewentualny zakres kognicji sądownictwa polubownego w sprawach o zaskarżanie uchwały zgromadzeń spółek kapitałowych wymaga przeprowadzenia pogłębionej analizy prawnohistorycznej, dokładnej oceny majątkowego charakteru sporów korporacyjnych oraz rekonstrukcji pojęć zdatności ugodowej i arbitrażowej. Warto przy tym zauważyć zarówno przeszkody prawne przemawiające przeciwko uznaniu zdatności arbitrażowej sporów uchwałowych, jak i argumenty systemowe i funkcjonalne, dla przyznania zdatności arbitrażowej tym sporom (szczególnie koncepcję, *zgodnie z którą art. 1163 k.p.c miałby stanowić lex specialis względem art. 1157 k.p.c.).*

SŁOWA KLUCZOWE: arbitraż korporacyjny, spory uchwałowe, zdatność arbitrażowa

Summary

In many countries around the world, corporate arbitration is considered as an effective way of solving the intra-corporate disputes, such as challenging the shareholder's resolutions. In Poland as a result of a defective regulation of art. 1157 k.p.c. (in particular, the introduction of the "ability to settle" criterion) as well as art. 1163 k.p.c. the objective arbitrability of these disputes is questioned and is the subject of numerous controversies in Polish doctrine. In order to find an answer to the question about the possible scope of objective arbitrability in cases concerning challenging shareholder's resolutions, an in-depth legal-historical analysis, as well as thorough reconstruction of ability to settle and other arbitration concepts are required. It is also important to analyze legal obstacles against the recognition of arbitrability of resolution disputes, as well as some systemic and functional arguments, in order to grant objective arbitrability to these disputes (in particular the concept that the article 1163 k.p.c. would constitute a lex specialis in relation to the article 1157 k.p.c.).

KEY WORDS: corporate arbitration, intra-corporate disputes, objective arbitrability

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