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## The Interpretation of Imperfect Arbitration Agreements: In Search of the Parties' Intention to Arbitrate

O wykładni wadliwych zapisów na sąd polubowny: w poszukiwaniu intencji stron poddania sporu pod rozstrzygnięcie sądu arbitrażowego

### Abstract

This article aims to review several arbitration agreements governed by Polish law and some arbitration clauses subject to foreign law, which may be considered flawed or imperfect. Furthermore, it will demonstrate how Polish and foreign courts handled these agreements. It is worth noting that the approach of courts to interpreting these agreements may vary from case to case. In some decisions, courts disregard the parties' intention to arbitrate, prioritizing the jurisdiction of state courts, while in others, they employ a 'pro-arbitration' interpretation, thereby closing the door to state courts' involvement in the case. In summary, our primary focus will be to identify the parties' intention to engage in arbitration within the various cases we examine.

**Keywords:** imperfect arbitration agreements, intention to arbitrate.

### Streszczenie

W niniejszym artykule poddano analizie szereg wadliwych zapisów na sąd polubowny (podlegających prawu polskiemu albo obcemu). Pokazano, w jaki sposób sądy polskie i zagraniczne traktują takie zapisy. Warto odnotować, że podejście judykatury do wykładni poszczególnych zapisów jest zróżnicowane. W niektórych orzeczeniach sądy zdają się pomijać intencję stron co do poddania sporu pod rozstrzygnięcie sądu polubownego, dając priorytet właściwości sądu państwowego. W innych z kolei judykatach prezentuje się podejście pro-arbitrażowe, które zamyka drogę do rozstrzygnięcia sporu przez sąd państwowy. Celem artykułu jest analiza poszczególnych zapisów na sąd polubowny (a także zapadłych na ich kanwie orzeczeń sądów państwowych) pod kątem wyrażonej w tych zapisach hipotetycznej woli stron co do rozstrzygnięcia sprawy przez sąd arbitrażowy.

**Słowa kluczowe:** wadliwość zapisu na sąd polubowny, zamiar poddania sporu pod arbitraż.

## 1. Introduction

The significance of arbitration agreements is crucial, as without an arbitration agreement, disputes cannot be settled and awards cannot be passed by the arbitration tribunal<sup>1</sup>. Where the parties' intention to arbitrate is lacking, waiving the jurisdiction of a state court is not effective, and the latter is still competent to decide the case. In contrast, where the intention to arbitrate does exist, it effectively abolishes the authority of the state court over a dispute<sup>2</sup>.

In some instances, however, the process of expressing the parties' intention to refer the case to arbitration is flawed. This may be physically reflected in the contents of arbitration agreements. The ultimate form of those agreements may even undermine the parties' intention to arbitrate<sup>3</sup>. In such instances, the deficiencies in arbitration agreements may effectively invalidate the parties' intention to arbitrate. However, in the event of minor deficiencies, the intention to arbitrate may endure, effectively excluding the jurisdiction of a state court.

The question is how to distinguish minor imperfections of arbitration agreements from those that render an arbitration clause devoid of any effect. The answer will vary from jurisdiction to jurisdiction, as some legal systems may be more "arbitration-friendly" than others. As a result, state courts in "pro-arbitration jurisdictions" will be more likely to prioritize *in favorem validitatis* interpretation designed to uphold the parties' intention to have their dispute resolved by an institution of international arbitration, while courts in other countries will be more inclined to recognize the jurisdiction of state courts. In the latter situation, the pro-arbitration approach, or interpretation in favour of validity, will need to give way to an interpretation that favours the authority of state courts.

This article seeks to review a number of arbitration agreements governed by Polish law and a few arbitration clauses subject to foreign law. We will also look

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<sup>1</sup> F. Ferrari, F. Rosenfeld, *International Commercial Arbitration. An Introduction*, Cheltenham 2021, p. 5, 21. See also Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Vienna 2008, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf) [access: 1.09.2023] and Article V (1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> [access: 1.09.2023]. Regarding Polish law, see Articles 1161 § 1, 1206 § 1(1), and 1215 § 2(1) of the Polish Code of Civil Procedure.

<sup>2</sup> M. Tomaszewski, *Skutki prawne umowy o arbitraż* [in:] *Arbitraż handlowy. System Prawa Handlowego*, ed. A. Szumański, Vol. 8, Warsaw 2015, p. 328; S. Frejowski, *Umowa o międzynarodowy arbitraż handlowy*, „Monitor Prawniczy” 2007, No. 9, p. 521–527.

<sup>3</sup> M. Werner, *Defective Arbitration Clauses* [in:] *Arbitraż i mediacja. Księga jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi*, eds. M. Łaszczuk, M. Furtek, S. Pieckowski, J. Poczo-but, A. Szumański, M. Tomaszewski, Warsaw 2012, p. 333–337.

at decisions passed by Polish or foreign state courts that heard cases in which the question of imperfect arbitration agreements arose. The article is intended to demonstrate that the approach of courts may vary from case to case: in some decisions, courts disregarded the parties' intention to arbitrate and prioritized the jurisdiction of state courts, while in others, they employed a "pro-arbitration" interpretation and made relevant procedural decisions aimed at thwarting the path of protection before a state court.

## **2. Negotiations, Mediation, or Arbitration?**

In order to determine whether the parties had the intention to arbitrate their disputes, a look at specific words used in an agreement may be of some help. The following example is intended to demonstrate that the wording of an agreement, even though it may suggest that the parties had had the intention to arbitrate, does not need to be decisive in establishing the true will of the parties. As the example illustrates, while specific language used in an agreement may suggest the parties' intention to arbitrate, it is not always conclusive, and other parts of the agreement, such as references to schedules or additional clauses, may clarify or even contradict the apparent intent of the parties, as seen in the case of the agreement where the use of the word "arbitration" was qualified by Schedule 1.

In the case in question, the parties explicitly stated that they would "settle their dispute through arbitration in accordance with the rules specified in Schedule 1", and they agreed "to be bound by decisions made in arbitration proceedings and to waive their right to appeal against those decisions". The use of specific language may suggest that the parties' intention was to refer the dispute to arbitration. However, making reference to Schedule 1 clarifies that the insertion in an agreement of such words as "arbitration" does not need to imply that the parties desired to submit the case to an institution of international arbitration. On the contrary, Schedule 1 provided that "in case of a dispute, the parties will inform each other of their positions, hold a meeting, and try to settle the dispute amicably". The agreement also provided that the parties would have 120 days to settle the dispute amicably, and if they failed, either party could bring the case to court.

In this context, although the parties expressly agreed "to be bound by decisions made in arbitration proceedings", their true intention remains vague as they also defined "arbitration proceedings" as a procedure aimed at settling potential disputes amicably, rather than submitting those disputes to be decided by an arbitration institution. This example shows that, in some cases, the use of the words

“arbitration” or “arbitration proceedings” may be a clear indication of the parties’ intention to refer the case to arbitration, but in other cases, when considered together with other provisions of the agreement, they may suggest the opposite.

It should be noted that in the examined case, the parties’ use of the term “arbitration” is accompanied by provisions that emphasize the parties’ intention to attempt to settle the dispute amicably, the specification of a time frame for dispute settlement, and the affirmation that the case may be brought to court if attempts to settle the dispute fail. These provisions indicate that the parties did not intend to have their disputes settled by an arbitration tribunal. Instead, they provided that the jurisdiction of a state court should not be excluded, but before initiating the proceedings before that court, the parties should attempt to settle the dispute amicably. Thus, the true meaning of the terms “arbitration” or “arbitration proceedings” in this context does not include referral to arbitration, but instead, they demonstrate the parties’ intention to mediate or negotiate before going to court.

In the Rzeszów Court of Appeal’s hearing of this case, it did not make a definitive assessment of the agreement’s defects. On the one hand, the court held that no arbitration agreement had been concluded because the parties failed to concede jurisdiction to settle the dispute to an arbitration tribunal, but instead established an internal procedure for negotiating or mediating the case. On the other hand, the court held that the agreement’s provisions were so unclear that the potential arbitration agreement should be considered incapable of being performed<sup>4</sup>. Despite the differing approaches, the procedural consequences were the same: in both cases, the court would have to hear the case rather than reject the action under Article 1165 § 1 of the Polish Code of Civil Procedure<sup>5</sup>.

In conclusion, the use of specific language in an arbitration agreement may suggest the parties’ intention to arbitrate, but it is not always conclusive, and other parts of the agreement may clarify or even contradict this intent. The example provided shows that, when considered together with other provisions of the agreement, the use of the words “arbitration” or “arbitration proceedings” may not imply referral to an arbitration tribunal but instead demonstrate the parties’ intention to mediate or negotiate before going to court.

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<sup>4</sup> See Judgment of the Court of Appeal in Rzeszów of 22 March 2018, I AGa 53/18. See also Decision of the Polish Supreme Court of 27 October 2022, II CSKP 470/22.

<sup>5</sup> Article 1165 § 1 of the Polish Code of Civil Procedure provides: „In the event of bringing an action to a court in a matter which is the subject of an arbitration agreement, the court shall reject the action if a party so requests not later than when submitting his first statement on the substance of the dispute”. However, according to Article 1165 § 2 of this Code, there are exceptions to this rejection, including cases where the arbitration agreement is null and void, inoperative, or incapable of being performed.

### 3. Referral to arbitration rules

The problem which arose in the previously discussed case touched upon the proper understanding of specific words used by the parties. Although such words may point out to the intention to arbitrate, that case demonstrates that in the interpretation of the wording of a hypothetical arbitration agreement, the context in which words were used is of crucial importance.

In another agreement the parties also agreed to settle disputes amicably through negotiations. What distinguishes this case from the previously discussed is that they additionally provided that “if negotiations fail, the dispute shall be referred to arbitration following the Rules of the International Chamber of Commerce in Paris”. Unlike the previous agreement, this one includes a precise reference to the arbitration rules of an international organization, however there is no direct indication of an arbitration tribunal. The intention to arbitrate may only be construed from an express reference by the parties to the rules of an international organization. *Notabene*, in the case in question, the parties also provided for the seat and language of arbitration specifying that the seat shall be in Warsaw and the language shall be Polish.

Unfortunately, there was no final court decision in this case since the parties reached a settlement<sup>6</sup>. However, the court of first instance, after the claimant disregarded the arbitration agreement and filed a claim in court, ruled that the claim should be rejected according to Article 1165 § 1 of the Polish Code of Civil Procedure. This decision shows that the court believed that the parties had effectively excluded the state court jurisdiction and referred the case to arbitration.

In a similar case, the Court of Appeal in Krakow held that the referral to arbitration rules used by a tribunal is insufficient to indicate the specific tribunal<sup>7</sup>. In the Court’s view, a reference to a permanent arbitration tribunal must be precise enough to identify it correctly, including at least the tribunal’s location and name if there are multiple tribunals in that location. As a result, the Court of Appeal held that the parties had not entered into an arbitration agreement.

The Court of Appeal in Krakow’s reasoning could be easily applied to the arbitration agreement we previously discussed, even though the parties in that case chose to settle the dispute using the rules of the Arbitration Court of the National Chamber of Commerce in Warsaw, not the International Chamber of Commerce in Paris as in the previous example. The crucial point is that in both

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<sup>6</sup> The reference number of this case before the District Court in Rzeszów is VI GC 128/16, but the Court’s decision is not officially published.

<sup>7</sup> Judgment of the Court of Appeal in Krakow of 18 September 2013, I ACa 782/13.

cases, the parties did not explicitly name the arbitration tribunal but instead specified the arbitration rules to be used for resolving the dispute.

The reasoning of the Court of Appeal in Krakow seems to align with a concept previously endorsed by the Polish Supreme Court, which held that “the interpretation of contractual provisions concerning the submission of specific disputes to arbitration must be precise. Such agreements constitute limitations on the right to court, as guaranteed by Article 45(1) of the Constitution of the Republic of Poland”<sup>8</sup>. According to this perspective, broad or extensive interpretations of arbitration agreements should be avoided. Instead, a textual or literal interpretation should be favoured, in line with the principle encapsulated by the Latin maxim, “*Exceptiones non sunt extendendae*”<sup>9</sup>.

The problem in question is not unique to a particular jurisdiction. It extends to other legal systems as well. For example, in *Paul Smith Ltd v H&S International Holding Inc*<sup>10</sup>, the parties agreed that “If any dispute or difference shall arise between the parties hereto concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules”. As evident from this example, the parties did not explicitly specify the jurisdiction of the Arbitration Court of the International Chamber of Commerce. However, similar to the two Polish cases mentioned earlier, they did agree on the arbitration rules to govern dispute resolution. Based on the language used in this agreement, the English Queen’s Bench Division (Commercial Court) acknowledged and upheld the parties’ intent to arbitrate. This perspective contrasts with the decisions of the two Polish courts discussed earlier, which, as a reminder, were more inclined to question the parties’ intent to arbitrate when it was expressed solely through a reference to the arbitration rules of an international organization.

<sup>8</sup> Judgment of the Polish Supreme Court of 30 October 2008, II CSK 263/08.

<sup>9</sup> This rule of interpretation, with a focus on legal text interpretation rather than the interpretation of parties’ intentions “hidden” in contracts, has earned recognition in Polish legal scholarship. See S. Sołtyński, *Adresat oświadczenia o rezygnacji z pełnienia funkcji piasuna spółki kapitałowej*, „Przegląd Prawa Handlowego” 2013, No. 12, p. 7; P. Popardowski, *Zakaz dokonywania czynności „z samym sobą” (art. 108 k.c.) przy reprezentacji osób prawnych (ze szczególnym uwzględnieniem spółek kapitałowych)*, Glosa 2022, No. 2, p. 11; M. Dąbroś, *Prawny skutek skazania za przestępstwo wymienione w art. 18 par. 2 KSH jako ograniczenia zdolności prawnej*, „Przegląd Prawa Handlowego” 2014, No. 8, p. 31; A. Szumański, *Wpływ uczestnictwa spółki kapitałowej w grupie spółek na związanie zapisem na sąd polubowny dokonany przez inną spółkę z grupy*, „Przegląd Prawa Handlowego” 2008, No. 5, p. 49, 52, 57.

<sup>10</sup> Judgment of the Queen’s Bench Division (Commercial Court) of 18 February 1991, [https://www.trans-lex.org/303000/\\_/paul-smith-ltd-v-h-s-lrep-127/](https://www.trans-lex.org/303000/_/paul-smith-ltd-v-h-s-lrep-127/) [access: 1.09.2023].

Another example where mere referral to arbitration rules instead to a specific institution of international arbitration was considered sufficient to uphold the intention to arbitrate is *Pricol Limited v Johnson Controls Enterprise Ltd*<sup>11</sup> in which the Indian Supreme Court examined the clause under which the parties referred to “the rules of arbitration of the Singapore Chamber of Commerce”, failing to expressly specify an institution of international arbitration. The Court upheld the agreement, construing that the reference to “the rules of arbitration of the Singapore Chamber of Commerce” should be understood as submitting disputes to the Singapore International Arbitration Centre.

Even when we acknowledge the pro-arbitration stance towards clauses that reference arbitration rules rather than specifying a particular arbitration tribunal, the situation can become muddled when considering other provisions within arbitration agreements. As a reminder, the clause which referred a dispute to arbitration following the Rules of the International Chamber of Commerce in Paris<sup>12</sup> also provided for the seat and language of arbitration specifying that the seat shall be in Warsaw and the language shall be Polish. Assuming the liberal approach to the interpretation of the phrase “the dispute shall be referred to arbitration following the Rules of the International Chamber of Commerce in Paris” (instead of a more accurate “the dispute shall be settled by the Arbitration Court of the International Chamber of Commerce in Paris”), the question is how the choice of the arbitration venue and language affects the alleged intention of the parties to arbitrate their case by the ICC in Paris. The answer to this question hinges on whether we adopt a permissive or strict interpretation. A permissive or pro-arbitration approach would aim to uphold the intention to arbitrate. It would argue that the selection of Warsaw as the venue and Polish as the arbitration language does not necessarily conflict with the provision that the case should be decided by the Arbitration Court of the International Chamber of Commerce in Paris, following the Rules of that institution. According to this perspective, the parties may have intended for the ICC proceedings to occur in Warsaw, conducted in Polish, while still adhering to the ICC Rules in essence. Conversely, a strict interpretation would suggest an irreconcilable conflict between the choice of Warsaw and the Polish language with the provision that the case should be decided by the ICC’s Arbitration Court. Under this view, the agreement becomes internally contradictory, as it seemingly cannot fulfil both requirements simultaneously.

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<sup>11</sup> Judgment of the Supreme Court of India of 16 December 2016 in *Pricol Limited v Johnson Controls Enterprise Ltd*, <https://indiankanoon.org/doc/168474344/> [access: 1.09.2023].

<sup>12</sup> The one in which the parties reached a settlement before the District Court in Rzeszów (the reference number is VI GC 128/16).

In conclusion, the determination of whether these provisions harmonize or create internal contradictions depends on the interpretative lens applied. A pro-arbitration perspective seeks to preserve the intent to arbitrate, while a rigorous interpretation may open the door to state courts deciding the case by emphasizing the apparent conflicts within the agreement.

The problem of reconciliation of different provisions of arbitration agreements arose in a number of decisions passed by foreign courts. In *Insignia v Alstom*<sup>13</sup>, the Singapore Court of Appeal analysed the clause in which the parties agreed that “disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce”. The Court found that referral to the rules of an institution of international arbitration which are to be applied by another institution of international arbitration does not disrupt the intention of the parties to arbitrate. In the Court’s view, the two provisions are obviously reconcilable as the Singapore International Arbitration Centre may adjudicate upon the dispute pursuant to the arbitration rules of another institution.

Likewise, in *HKL v Rizq International Holdings*<sup>14</sup>, the Singapore High Court upheld the clause under which disputes shall be “settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce”, even though the Arbitration Committee did not exist. The Court noted that, despite the fact that the clause specified a non-existent institution as the administering institution, it would be open to the parties to approach any arbitral institution in Singapore which would be able to administer the arbitration applying the ICC Rules<sup>15</sup>.

#### **4. Referral to arbitration without the exclusion of state courts jurisdiction**

Examples presented above show that relying on “arbitration-friendly” interpretation can help in upholding imperfect arbitration agreements which would otherwise fail. Individual provisions of those agreements, even though they seem

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<sup>13</sup> Judgment of the Court of Appeal of Singapore of 2 June 2009, <https://jsumundi.com/en/document/decision/en-alstom-technology-ltd-v-insigma-technology-co-ltd-judgment-of-the-court-of-appeal-of-singapore-2009-sgca-24-tuesday-2nd-june-2009> [access: 1.09.2023].

<sup>14</sup> Judgment of the Singapore High Court of 22 March 2013, [https://www.elitigation.sg/gd/s/2013\\_SGHCR\\_8](https://www.elitigation.sg/gd/s/2013_SGHCR_8) [access: 1.09.2023].

<sup>15</sup> It should be noted that the ICC revised its Rules in 2012 to clarify that “the [ICC] Court is the only body authorized to administer arbitration under the [ICC] Rules” (see article 1(2) of the 2017 ICC Rules).

to diverge, may sometimes be reconciled and the parties' intention to arbitrate can be finally re-constructed. In some instances, however, this pro-arbitration approach will not suffice to heal the defects. Statements made by the parties in a single arbitration agreement may be so contrasting, that any attempts to reconcile them seem to be pointless.

An arbitration clause included in a franchise agreement between a Dutch company and a Polish entrepreneur may serve as a relevant example. It provided that "a party must commence and pursue arbitration to resolve a dispute before commencing legal action. The arbitration will be held in accordance with the United Nations Commission on International Trade Regulations and Law (UNCITRAL) Arbitration Rules administered by an arbitration agency, such as the International Centre for Dispute Resolution, an affiliate of the American Arbitration Association". However, such referral to arbitration was accompanied by the statement that "Any court having jurisdiction may enter judgment on the arbitrator's award".

In this agreement the parties' intention to arbitrate is sufficiently clear as not only did they referred to arbitration rules (like in previous examples), but they also indicated the institution of international arbitration competent to hear the case. What may be considered as making this agreement flawed is that the parties also expressly provided for the jurisdiction of a state court. The question is whether the parties' intention to arbitrate should prevail or state courts would have jurisdiction over the dispute<sup>16</sup>.

Assuming that the aforementioned clause is subject to Polish law, the interpretation should consider Article 1163 § 1 of the Polish Code of Civil Procedure. This provision dictates that a valid, effective, and enforceable arbitration agreement, still in force, effectively extinguishes state court jurisdiction, transferring the case's authority to an arbitration tribunal<sup>17</sup>. In contrast, where parties concluded no arbitration agreement, or they did, but it proved null and void, inoperative, incapable of being performed (or is no longer in force), no arbitration court may hear the case and enter an award, and state courts retain the jurisdiction to recognize the case<sup>18</sup>.

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<sup>16</sup> A. Garnuszek, A. Orzeł, *Enforceability of Multi-tiered Dispute Resolution Clauses under Polish Law*, "Arbitration Bulletin" 2016, No. 24, p. 166–180, <https://sakig.pl/wp-content/uploads/2018/12/Young-Arbitration-nr-24.pdf> [access: 1.09.2023].

<sup>17</sup> As mentioned earlier in this article, state court jurisdiction can be abolished if a party objects to the case being heard by a state court, in accordance with Article 1165 § 1 of the Polish Code of Civil Procedure.

<sup>18</sup> In this sense, both paths remain exclusive. State courts may interfere in arbitration proceedings only exceptionally, primarily when considering an application for setting aside an arbitration award. However, such interference is purely formal and never involves state courts altering or rectifying the award on its merits (Article 1206 of the Polish Code of Civil Procedure). State courts also lack the authority to approve awards issued by arbitration tribunals.

The agreement in question appears to disregard this principle. Its provisions evidently exhibit a degree of inconsistency. The arbitration referral conflicts with the parties' intention to endorse state court jurisdiction, and the assumption of the latter jurisdiction contradicts the submission of the case to arbitration. Proposed resolutions may vary. It could be argued that the parties' intent to arbitrate was not adequately expressed, rendering the agreement void as an arbitration agreement. Alternatively, it could be posited that the agreement is internally contradictory. In either scenario, the jurisdiction of the arbitral tribunal would yield to that of a state court.

It should be noted that the Polish Supreme Court heard a case where the arbitration agreement was exactly the same as the agreement discussed above. However, the Court refrained from interpreting the clause in the way presented so far, even though the final conclusion was precisely the same, that is a state court was held as having jurisdiction over the case. We will return to arguments raised by the Court later. Now it is worthwhile to point out to a few decisions given by foreign courts where the problem of two contradicting paths leading to the settlement of a dispute arose.

Let us take a look at a decision rendered by the England and Wales High Court (Commercial Court) in *Kruppa v Benedetti*<sup>19</sup>. This decision was based on the parties' agreement, which stated that they "will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction". In light of this agreement, the Court determined that "The very nature of that obligation shows that there is not a binding agreement but merely an agreement to attempt to resolve the matter by a process of arbitration which has not been set out in the clause or elsewhere in the contract [...]. The requirement to submit finally to a binding arbitration is absent and would, on the face of the clause, be inconsistent with its terms because of the two stage process envisaged". In conclusion the Court held that "the clause does not require to refer any dispute to arbitration" and that it "provides for the English courts to have jurisdiction". Thus, the Court disregarded the vague intention of the parties to arbitrate and prioritized the jurisdiction of state courts, even though on a non-exclusive basis<sup>20</sup>.

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<sup>19</sup> Judgment of the England and Wales High Court (Commercial Court) of 11 June 2014, <https://www.casemine.com/judgement/uk/5a8ff73960d03e7f57ea9f44> [access: 1.09.2023].

<sup>20</sup> Compare R. Morek, *Wielostopniowe klauzule rozwiązywania sporów w praktyce kontraktowej i orzecznictwie wybranych systemów prawa kontynentalnego* [in:] J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka (eds.), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, Warsaw 2010, p. 51–67.

In the previously quoted case of *Paul Smith Ltd v H&S International Holding Inc*<sup>21</sup>, the parties agreed to resolve their disputes through arbitration while also specifying the exclusive jurisdiction of English courts. In contrast to the previously discussed judgment, the Queen's Bench Division (Commercial Court) upheld the arbitration agreement, emphasizing that the reference to the English courts should be interpreted as the choice of English law to govern the contract. In this case, the reference to English courts did not disrupt the parties' intention to arbitrate. The parties' intention to arbitrate remained intact.

As we can observe, when parties refer a dispute to arbitration while also indicating state courts as having jurisdiction, this may not definitively determine the adjudicating institution. This is exemplified by the diverse interpretations provided by foreign courts. However, under Polish law, the interpretation should be that the parties' intention to arbitrate, when combined with the indication of a state court as having jurisdiction over the case, has not been really expressed. Alternatively, it can be construed that there may be an arbitration agreement, but its individual provisions contradict each other, rendering the arbitration agreement incapable of being performed.

## **5. Referral to arbitration without the intention of both parties**

Setting aside arguments based on the assertion that referral to arbitration is in clear opposition to the parties' intention to have their case decided by a state court, potentially leading to internally contradicting agreements or no agreement at all, let us return to the arguments presented by the Polish Supreme Court, which led that Court to render the arbitration agreement null and void<sup>22</sup>. Those arguments are based on the assertion that one party did not voluntarily express the intention to arbitrate. Recall that the arbitration agreement, along with the entire contract, was concluded between a Dutch company, a franchisor and subsidiary of an American corporation, and a Polish entrepreneur, the franchisee. The subject matter of the agreement was the operation of a sandwich bar by the franchisee using the franchisor's trademark. More importantly, disputes between the parties were to be referred to arbitration by the International Centre for Dispute Resolution, an affiliate of the American Arbitration Association, with the venue of arbitration set in New York. It should be noted that the contract, as well

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<sup>21</sup> Judgment of 18 February 1991, [https://www.trans-lex.org/303000/\\_/paul-smith-ltd-v-h-s-irep-127/](https://www.trans-lex.org/303000/_/paul-smith-ltd-v-h-s-irep-127/) [access: 1.09.2023].

<sup>22</sup> Judgment of the Polish Supreme Court of 27 October 2016, V CSK 66/16.

as the arbitration clause, was subject to the law of Liechtenstein, where the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*, hereinafter referred to as ABGB) was in force<sup>23</sup>.

In determining the case, the Court focused on Section 879 paragraph 3 of the ABGB, which provides that provisions of general conditions of contracts and contract templates that do not specify the main obligations of the parties and are, taking into account all the circumstances of the case, flagrantly harmful to one of the parties, are null and void.

In the opinion of the Supreme Court, the provision that submitted the dispute between the Polish entrepreneur and the Dutch company to arbitration by an American arbitration tribunal is flagrantly harmful to the Polish entrepreneur and, as such, is null and void. The Court held that it would be a hardship for the Polish entrepreneur to adhere to the arbitration agreement, bearing in mind the venue of arbitration (New York) and the excessive costs of seeking satisfaction. Such difficulties were not experienced by the Dutch company, which was associated with the parent company in the United States. The Supreme Court also noted that, apart from the convenience of the parent company, there were no rational reasons for disputes involving European entrepreneurs running salad-sandwich bars as franchisees on the European continent to be resolved in New York.

It should be added that the conclusion of the franchise agreement was not preceded by negotiations of the conditions between the franchisee and the franchisor. Instead, the contract was entered into by accession, i.e., through acceptance by the franchisee of the ready-made contract template submitted for signature by the franchisor. The franchisee had no influence on the content of the agreement, especially on the provision indicating New York as the venue of arbitration and the American arbitration tribunal as the institution competent to settle the dispute. Such a provision was imposed by a large corporation that took advantage of the weaker position of a smaller entrepreneur. The latter had the choice either to accept the ready-made contract template or to give up cooperation with the franchisor altogether.

There are reasons to conclude that even if the agreement had been governed by Polish law, it could have been rendered invalid pursuant to Article 58 § 2 of the Polish Civil Code, which provides for the nullity of juridical acts (including contracts) if they violate the so-called “principles of social coexistence”. It can be argued that a contractual provision in which one party is forced to waive the possibility of seeking satisfaction before the competent state court and is obliged to seek satisfaction before an American arbitration tribunal, which has its seat far

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<sup>23</sup> <https://www.gesetze.li/konso/1003.001> [access: 1.09.2023].

from the place of business, is inconsistent with the principles of fair trade. This rule of fair cooperation between entrepreneurs (between the franchisee and the franchisor) is violated when the economically much stronger entrepreneur (the franchisor) takes advantage of the weaker entrepreneur (the franchisee) by putting them in front of an alternative: either disputes will be subject to arbitration in the US, or the franchise agreement will not be signed at all. Such unethical and morally reprehensible conduct cannot benefit from legal protection, leading to the nullity of the arbitration agreement.

In summary, the parties' intention to arbitrate is of crucial importance for the very existence of an arbitration agreement. Both parties must freely and voluntarily enter into it. This is because the fundamental principles of contract law require that a contract must be based on the mutual consent of the parties, and arbitration agreements are definitely subject to such principles. In the case in question, no true intention to arbitrate has ever been expressed by the weaker party. This, in turn, must be interpreted as the lack of waiver, by one party, of the jurisdiction of a state court which will remain competent to recognize the case.

## 6. Conclusions

In this article, we have endeavoured to navigate the intricate terrain of imperfect arbitration agreements and their interpretation. We have delved into cases where arbitration agreements displayed imperfections, resulting in a spectrum of court interpretations. Notably, the language employed in these agreements, although indicative, does not invariably furnish conclusive evidence of the parties' intent.

In our exploration of deciphering the genuine intentions of the parties, we've recognized that context and the surrounding clauses often play pivotal roles. This is exemplified in instances where the mere use of terms like "arbitration" or "arbitration proceedings" has been construed as a prerequisite for negotiation before resorting to court, rather than a direct contractual invocation of arbitration. Furthermore, our scrutiny has unearthed the nuanced interpretations that can emerge from references to international arbitration rules, such as those of the ICC, within arbitration agreements. While some courts endorse these references, others insist on more explicit identification of the arbitral institution. We have also ventured into the realm of agreements where both arbitration and state court jurisdiction coexist. Herein lies the challenge of reconciling ostensibly contradictory provisions, a conundrum that frequently results in divergent interpretations. Additionally, in scenarios marked by significant disparities in bargaining

power, courts rigorously examine agreements that compel the weaker party to engage in arbitration proceedings situated in distant venues. In such cases, unethical conduct by one party may render the arbitration agreements null and void. Throughout our analysis, it has become apparent that the principles of fairness, fair trade, and social coexistence significantly influence the assessment of the validity of arbitration agreements.

As we bring this article to a close, it is evident that interpreting imperfect arbitration agreements is an intricate and context-dependent undertaking, marked by subtle distinctions in each case. In conclusion, the realm of imperfect arbitration agreements remains a complex terrain, demanding meticulous scrutiny and an acute awareness of the multifaceted nuances that shape their interpretation.

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