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List of Abbreviations

ADR	Alternative dispute resolution
APC	Arbitrazh Procedure Code of Russian Federation
ArbAct	The Act of the Czech Republic No. 216/1994 Coll., on Arbitration and the Enforcement of Arbitral Awards
CC	The Act of the Czech Republic No. 89/2012 Coll., the Civil Code, in effect since 1 January 2014
CC 1964	The Act of the Czech Republic No. 40/1964 Coll., the Civil Code, in effect to 1 January 2014
CCP	The Act of the Czech Republic No. 99/1963 Coll., the Code of Civil Procedure
CIDS	Centre for International Dispute Settlement
ConCourt	Constitutional Court of the Czech Republic
ECJ	European Court of Justice
Enforcement Code	Act of the Czech Republic No. 120/2001 Coll., Enforcement Code
EU	The European Union
Charter	Charter of Fundamental Rights and Freedoms of the Czech Republic – Resolution of the Presidium of the Czech National Council No. 2/1993 of 16 December 1992 on the promulgation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, as amended by the Constitutional Act of the Czech Republic No. 162/1998 Coll.
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIAs	International investment agreements
ISDS	Investor-State Dispute Settlement
LDA	Act of the Czech Republic No. 82/1998 Coll., Act on Liability for Damage Caused by a Decision or Maladministration in the Exercise of Power by Public Authorities

NY Convention	The New York Convention
PCA	Permanent Court of Arbitration
PILA	The Federal Act on Private International law
SC	Supreme Court of the Czech Republic
SDGs	Sustainable Development Goals
UDELAR	The University of Uruguay
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	The United States
USD	United States dollar
WTO-ACWL	Advisory Centre on World Trade Organization Law

Articles

Maciej Durbas | Angelika Ziarko

Preclusion of Plea of Lack of Jurisdiction Under Polish Arbitration Law

Key words:
jurisdiction | plea of lack of jurisdiction | right of defense | Polish arbitration law

Abstract | *This article discusses the issue which seems obvious but, in some instances, is not, namely the effects of a party's failure to raise the plea of lack of jurisdiction under the Polish arbitration law. The Polish legal system has developed coherent and comprehensive mechanisms for examining the arbitral tribunal's jurisdiction. This system e.g. introduces specific time constraints in which a party may challenge the arbitral tribunal's jurisdiction. Failure to meet the statutory deadline to raise such a plea of lack of jurisdiction has severe consequences. If the party raises a plea of lack of jurisdiction after the expiry of the time limit set in the Code of Civil Procedure, it generally should not be evaluated by either the arbitral tribunal or the state court in post-arbitration proceedings as time-barred (precluded).*

This article provides a comprehensive insight into how the preclusion of the plea of lack of jurisdiction is regulated under Polish law. First, the issue of scope and subject matter of the plea of lack of jurisdiction is discussed. Second, the article covers the issue of the entities entitled to raise the plea of lack of jurisdiction and the time limit to do so. Third, the authors address the problem of

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the preclusion of a plea of lack of jurisdiction under Polish law. The last fourth part discusses the public interest in introducing time constraints to raise a plea of lack of jurisdiction under Polish law.

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I. Introduction

1.01. Determining the jurisdiction of an arbitral tribunal is the cornerstone of any arbitration proceedings. The analysis of the existence, validity, and effectiveness of a given arbitration agreement should be the first step to conducting arbitration proceedings at all. That is because 'arbitration is a creature that owes its existence to the will of the parties alone.'[1] If there is no agreement to arbitrate, the arbitral tribunal will not be competent to resolve the dispute brought before it.

1.02. The Polish legal system has developed coherent and comprehensive mechanisms for examining the arbitral tribunal's jurisdiction, both by the arbitral tribunal itself and by the state court for example during the post-arbitration proceedings. The mechanism adopted in Poland allows the issue of jurisdiction to be identified and properly examined, as well as prevents the raising of pleas of a dilatory nature, in order to prolong the proceedings or torpedo their smooth running.

1.03. For this purpose, the Polish arbitration law introduces specific time constraints in which a party may challenge the jurisdiction of the arbitral tribunal. If the party raises a plea of lack of jurisdiction after the expiry of the time limit set in the Code of Civil Procedure (CCP),[2] it generally should not be evaluated by the arbitral tribunal and the state court as it is time-barred (precluded).

1.04. This article provides a comprehensive insight into how the preclusion of the plea of lack of jurisdiction is regulated under Polish law.

[1] *Dell Computer Corp.* v. *Union des consommateurs*, 2 S.C.R. 801 [2007], 2007 SCC 34.

[2] Code of Civil Procedure, Act of 17 November 1964, Journal of Laws 2021 item, Part V of which regulates arbitration proceedings.

II. Plea of Lack of Jurisdiction Under Polish Law

II. 1. Subject and Scope of the Plea of Lack of Jurisdiction

1.05. Article 1180(2) of the Code of Civil Procedure allows a party to raise a plea of lack of jurisdiction of the arbitral tribunal. Under this provision:

> a plea of lack of jurisdiction of the arbitral tribunal may be raised no later than in the statement of defense or within such other time limit as the parties may specify unless before the lapse of the time limit the party did not know and by exercising due diligence could not have known the basis for such plea or the basis for such plea arose only after the lapse of the time limit. In either case, the arbitral tribunal may consider the objection raised out of time if it considers the delay to be justified. The appointment of an arbitrator by a party or the party's participation in the appointment of an arbitrator does not deprive the party of the right to raise this objection. A plea that a demand made by the opposing party in the course of the proceedings exceeds the scope of the arbitration clause should be raised immediately after such demand is made. The arbitral tribunal may consider a plea raised after this time limit if it considers the delay justified.

1.06. The plea of lack of jurisdiction of the arbitral tribunal may be either comprehensive or partial, e.g., relating to the entirety of the claims brought before the arbitration tribunal or only to some of them.[3] Therefore, if the jurisdiction of the arbitral tribunal is contested in its entirety, a party claims that the arbitral tribunal has no jurisdiction over the case in question. Thus, it should decline jurisdiction to hear the case. This may or may not mean that the party is challenging the existence or validity of the arbitration agreement. It will depend on the procedural situation; it may be that the arbitration agreement is flawed in some other way, such as, it is ineffective due to the

[3] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, Oxford: Oxford University Press (2015), paragraph 5(92).

non-fulfillment of a condition precedent or non-arrival of a deadline.[4]

1.07. A partial challenge to the jurisdiction of the arbitral tribunal will, in turn, consist of the existence of claims (the subject-matter scope) or persons or entities (the personal scope) over which the arbitral tribunal has no jurisdiction. In such a case, however, in principle, the applicant acknowledges that there are other claims or entities – not covered by the plea of lack of jurisdiction they raised – over which the arbitral tribunal has jurisdiction and over which the proceedings may still proceed.

1.08. There is also the possibility to raise a plea that the claims brought before the arbitral tribunal go beyond the scope of the arbitration agreement. In this scenario, the plea concerns only the scope of the subject matter of the arbitration agreement, and that the claim is not covered by the arbitration agreement. In such a case, however, there are other claims or other parties for which the proceedings may still proceed and over which the arbitral tribunal has jurisdiction.

II.2. Entities Entitled to Raise the Plea of Lack of Jurisdiction

1.09. In addition to the question of what can be the basis of the plea of lack of jurisdiction under Polish law, there is also a question of who can raise such a plea. Under Article 1180(2) of the Code of Civil Procedure, the entity entitled to submit the plea of lack of jurisdiction is referred to as 'a party'. This seems relatively self-explanatory; however, in some instances may create certain doubts.

1.10. That is because it would seem at first glance that only the defendant (or counterclaimant) should be entitled to challenge the jurisdiction of the arbitral tribunal.[5] Thus, generally, the claimant would not be entitled to. On that note, the Court of Appeals in Warsaw stated that the claimant:

> as the party initiating the arbitration proceedings, should carefully analyze the factual and legal situation of the case, including the issues related to the grounds for initiating the proceedings before that court and, if

[4] Andrzej Kubas, Maciej Durbas, *Conditional Effectiveness of the Arbitration Agreement*, in ALEXANDER J. BĚLOHLÁVEK, NADĚŽDA ROZEHNALOVÁ, CZECH (& CENTRAL EUROPEAN YEARBOOK OF ARBITRATION) YEARBOOK OF ARBITRATION, The Netherlands: Lex Lata BV (2016), et. 128.

[5] Włodzimierz Głodowski, *Adjudication by the arbitral tribunal on its jurisdiction and review of those decisions by the state court*, in JOZEF OKOLSKI, ANDRZEJ CALUSA, MAKSYMILIAN PAZDAN, STANISLAW SOLTYSINSKI, TOMAS WARDYNSKI, STANISLAW WLODYKI, COMMEMORATIVE BOOK OF THE 60TH ANNIVERSARY OF THE COURT OF ARBITRATION AT THE POLISH CHAMBER OF COMMERCE IN WARSAW, Warsaw: The Court of Arbitration at the Polish Chamber of Commerce (2010), et. 680.

it concludes that the arbitration clause is ineffective, should bring the case before a state court which, upon the plea raised by the defendant, may decide the issue of the effectiveness of the arbitration agreement.[6]

1.11. Some scholars generally share the above view.[7] This may, however, be debatable.

1.12. Firstly, since the legislator used the term 'party' in Article 1180(2) of the Code of Civil Procedure, it does not exclude the possibility for both parties – including the claimant – to challenge the jurisdiction of the arbitral tribunal. As the provision itself does not state that only the defendant is entitled to raise the plea of lack of jurisdiction, the possibility that the claimant could be allowed to do so should not be generally excluded.

1.13. Secondly, in some instances, not only the defendant may be interested in challenging the jurisdiction of the arbitral tribunal. That is because the jurisdiction of the arbitration tribunal may terminate due to the expiry or termination of the arbitration agreement during the course of the proceedings. If the claimant in such a scenario were to be deprived of the right to raise a plea of lack of jurisdiction and also the right of the arbitration tribunal to decide on the issue of its jurisdiction *ex officio*, it could lead to a stalemate. The defendant, aware of the lack of jurisdiction of the arbitration tribunal, could refrain from raising the plea of lack of jurisdiction to paralyze the future enforcement of the claim against them or to cause the expiry of its statute of limitations. It is, of course, possible to assume that in that case, the raising of the plea of lack of jurisdiction is time-barred (precluded). Thus, the arbitral award would be subject to successful recognition or enforcement. However, the claimant may be interested in challenging the award regardless, mainly if the claim was dismissed. Thus, the claimant should not be generally deprived of the right to raise the plea of lack of jurisdiction.

II.3. Time Limit to Raise a Plea of Lack of Jurisdiction

1.14. The statutory time limit for filing a plea of lack of jurisdiction of the arbitral tribunal is provided for in Article 1180(1) sentence 1 of the Code of Civil Procedure. As a rule, the plea should be raised in the statement of defense, or any other deadline agreed upon by the parties. Failure to set a deadline for submitting

[6] Judgement of the Court of Appeals in Warsaw of 15 December 2014, VI ACa 311/14.

[7] ANDRZEJ ZIELIŃSKI, CODE OF CIVIL PROCEDURES. COMMENTARY, Warsaw: C.H.Beck (2014), Article 1180(4).

the statement of defense by the parties, or the arbitral tribunal, allows a party to submit a statement of defense at any stage of the proceedings and simultaneously raise the plea of lack of jurisdiction therein.

III. Preclusion of a Plea of Lack of Jurisdiction Under Polish Law

III.1. Legal Basis for the Preclusion of a Plea of Lack of Jurisdiction Under Polish Law

1.15. Polish arbitration law, just like the New York Convention[8] does not expressly prejudge whether a party failing to raise a plea lack of jurisdiction of the arbitral tribunal on time should deserve protection. That is because there is no explicit provision in this regard. However, if one interprets the provisions of the Code of Civil Procedure, taking into account the international treaties regarding arbitration,[9] there should be no doubt that the Code of Civil Procedure provides for the preclusion of the possibility of raising a plea of lack of jurisdiction of an arbitral tribunal if raised after the expiry of the time limit provided for it.

1.16. However, the legal basis for such a statement is still not clear, and there is no common view on the issue between scholars. Several legal provisions are indicated as the proper legal basis for the said preclusion.

1.17. Firstly, it is argued that the preclusion of the plea of lack of jurisdiction stems from Article 1193 of the Code of Civil Procedure.[10] Under this provision:

> If any provision of this Part from which the parties may derogate or any of the rules of procedure agreed by the parties are violated, the party who was aware of such violation may not allege such violation before the arbitral tribunal or in an application to set aside the award, if the party failed to do so promptly or within

[8] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958.

[9] Article V of the European Convention on International Commercial Arbitration.

[10] MACIEJ ŁASZCZUK, JUSTYNA SZPARA, in ANDRZEJ SZUMAŃSKI, COMMERCIAL LAW SYSTEM, VOLUME VIII, COMMERCIAL ARBITRATION, Warsaw: Łaszczuk (2010), et. 594.

thetime limit set by the parties or by the provisions of this Part.

1.18. This provision was modeled on Article 4 of the UNCITRAL Model Law[11] and regulates the issue of the waiver of the right to object by a party.

1.19. Secondly, it could be argued that the preclusion of the plea of lack of jurisdiction stems from Articles 1180(2) of the Code of Civil Procedure. That is because this provision regulates the issue of the time limit to submit a plea of lack of jurisdiction during the arbitration proceedings. On this basis, the failure to comply with the time limits prescribed in the said provision shall mean that further objections in this regard are time-barred (precluded). This includes in the application to set aside an arbitral award on the basis of lack of jurisdiction (Article 1206(1)(1) of the Code of Civil Procedure) and also in claims of exceeding the scope of the arbitration agreement (Article 1206(1)(3) of the Code of Civil Procedure). Both legal scholars and case law support this view.[12]

1.20. There are also a few judgments in which the courts did find that the principle of the preclusion of a plea of lack of jurisdiction exists under Polish law, however, without specifying the applicable legal basis.[13]

1.21. There is also a contrary view. Accordingly, the preclusion of the pleas relating to jurisdiction can only occur in proceedings before an arbitral tribunal and not in post-arbitration proceedings.[14]

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[11] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

[12] See also TADEUSZ ERECIŃSKI, KAROL WEITZ, COURT OF ARBITRATION, Warsaw: Lexis Nexis (2008), et. 240-243, and the Supreme Court judgement of 11 October 2013, I CSK 769/12. Alike view was presented by Andrzej Wiśniewski, Tadeusz Szurski, National Report for Poland (2012) in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, JAN PAULSSON, LISE BOSMAN, Alphen aan den Rijn: Kluwer Law (1984), et. 42; Andrzej Torbus, *Arbitration in the system of civil proceedings (selected issues) in Alternative dispute resolutions*, 2 ARBITRATION AND MEDIATION 46 (2008); SŁAWOMIR DALKA, ARBITRATION IN THE PEOPLE'S REPUBLIC OF POLAND, Warsaw: Wydawn Prawnicze (1987), et. 71; Tomasz Strumillo, *Commentary to Articles 730-1217* in JANUSZ JANKOWSKI, CODE OF CIVIL PROCEDURE, volume 2, Warsaw: Journal of Laws (2019), et. 10; Michał Pełczyński, *Adjudication by the arbitration tribunal of its own competence*, 16 MONITOR PRAWNICZY 855 (2015); BEATA GESSEL-KALINOWSKA VEL KALISZ, MACIEJ ZACHARIASIEWICZ, WHITE BOOK. PROPOSALS FOR LEGISLATIVE CHANGES TO IMPROVE THE LEGAL FRAMEWORK OF ARBITRATION IN POLAND, Warsaw: Konfederacja Lewiatan (2014), et. 54. See also a judgement of the Court of Appeal in Gdańsk of 15 December 2016, no. V ACa 187/16, and of Court of Appeal in Warsaw of 6 April 2017, no. VI ACa 1182/16.

[13] Decision of the Court of Appeal in Poznań of 10 June 2016, I ACa 465/16 and of the Court of Appeal in Łódź of 31 April 2017, I ACo 51/17.

[14] Andrzej Kubas, Agnieszka Trzaska, *Two Examples of Interaction between State Courts and Arbitration: Ruling on the Competence of an Arbitral Tribunal to Adjudicate and Injunctive Relief in Arbitral Proceedings* in ALEXANDER BĚLOHLÁVEK, NADĚŽDA ROZEHNALOVÁ, CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION, New York: Juris (2015), et. 146. A similar view was also expressed by ADAM MARCINIAK, CODE OF CIVIL PROCEDURE. COMMENTARY, Warsaw: Warsaw University Press (2017), Article 1180(9); Włodzimierz Glodowski, *Adjudication by an arbitral tribunal on the subject of its jurisdiction and control of these rulings by a state court* in JÓZEF OKOLSKI, MEMORIAL BOOK OF THE 60TH ANNIVERSARY OF THE COURT OF ARBITRATION AT THE NATIONAL CHAMBER OF COMMERCE IN WARSAW, Warsaw: Sad Arbitrazowy (2010), et. 689 (with the authors arguing that

Adopting this view may lead to the conclusion that the party could virtually freely challenge the jurisdiction of the arbitral tribunal during the post-arbitration proceedings.

1.22. The basis for the preclusion of allegations concerning the jurisdiction of the arbitral tribunal is Article 1193 of the Civil Procedure Code. There are two arguments in favor of the fact that this provision may refer to a plea of lack of jurisdiction of the arbitral tribunal.

1.23. Firstly, Article 1193 of the Code of Civil Procedure concerns the issue of a possible violation of the dispositive provisions of Part V of the Code of Civil Procedure, which regulate the arbitration proceeding, or a failure to comply with the rules of arbitration proceeding agreed by the parties. However, the respondent must raise such an appropriate plea for the arbitral tribunal to violate these rules or principles, for example in a case of erroneously dismissing a plea of lack of jurisdiction. In the absence of such a plea, according to the prevailing view of doctrine, deciding on jurisdiction is, in principle, not possible.[15]

1.24. Secondly, under Article 1193 of the Code of Civil Procedure, the preclusion of pleas occurs if a party has not raised a plea immediately or within a time limit set by the parties or the provisions of Part V of the Code of Civil Procedure. In other words, the legislature provided that Article 1193 of the Code of Civil Proceedings may also apply in a situation where the law expressly provides a time limit to perform a specific action such as, filing a motion to the court for exclusion of an arbitrator. Challenging the jurisdiction of an arbitral tribunal according to Article 1180(2) of the Civil Procedure Code is also one such situation, as the legislature set an express deadline to raise the plea of lack of jurisdiction.[16]

preclusion, however, refers to the plea regarding going beyond the scope of the subject matter of the record); Andrzej Zielony, *Initiation of Proceedings Before the Arbitration Court*, 3 PRZEGLAD SADOWY 31 (2008); Andrzej Kubas, Agnieszka Trzaska, *Two Examples of Interaction between State Courts and Arbitration: Ruling on the Competence of an Arbitral Tribunal to Adjudicate and Injunctive Relief in Arbitral Proceedings* in ALEXANDER BĚLOHLÁVEK, NADĚŽDA ROZEHNALOVÁ, CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION, New York: Juris (2015), et. 146.

[15] Andrzej Wach, *Application of the Kompetenz-Kompetenz principle in arbitration proceedings*, 1 RADCA PRAWNY 73 (2007); Józef Okolski, Małgorzata Wach, *The Kompetenz-Kompetenz principle in arbitration law with particular reference to the regulations of the Court of Arbitration at the Polish Chamber of Commerce* in JÓZEF OKÓLSKI, MEMORIAL BOOK OF THE 60th ANNIVERSARY OF THE COURT OF ARBITRATION AT THE NATIONAL CHAMBER OF COMMERCE IN WARSAW, Warsaw: Sad Arbitrazowy (2010), et. 247-248. The authors argue that depriving the arbitral tribunal of the possibility to rule on its jurisdiction ex officio is also due to the fact that a party can only raise a plea of lack of jurisdiction within a certain time limit.

[16] ANDRZEJ JAKUBECKI, HENRYK DOLECKI, TADEUSZ WIŚNIEWSKI, CODE OF CIVIL PROCEDURE. COMMENTARY, Warsaw: Wolter Kluwer (2022), Article 1193(2).

III.2. Failure by the Party to Initiate Proceedings on the Basis of Article 1180(3) of the Code of Civil Procedure

1.25. In addition to the situation when a party does not raise the plea of lack of jurisdiction at all during the arbitration proceedings, there is also a possibility that the party did raise such a plea, which was dismissed, and failed to take further steps, namely the party did not challenge the arbitral tribunal's decision in this regard before the state court, as prescribed by Article 1180 § 3 of the Code of Civil Procedure . There might also be a question of whether the plea of lack of jurisdiction is subject to preclusion in this scenario. It seems, however, that this issue was settled by the Supreme Court, which in 2021 stated that:

> according to the case law so far, if the arbitral tribunal dismisses by a separate decision the plea raised by a party on the lack of jurisdiction of that tribunal or on the plea that the claim of the opposing party made in the course of the proceedings exceeds the scope of the arbitration clause (Article 1180 § 2 of the Civil Procedure Code), the review of the validity of this position by the state court may take place only in the manner provided for in Article 1180 § 3 of the Civil Procedure Code. [...] the mode of the review provided for in Article 1180 § 3 of the Civil Procedure Code is intended to prevent a situation in which the issue of the jurisdiction of the arbitral tribunal would be bindingly resolved only after the arbitration proceedings are concluded. Therefore, this special mode of review - which opens following the issuance by the arbitral tribunal of a decision dismissing the plea of lack of jurisdiction - precludes the possibility of effectively invoking in an application for setting aside an award of an arbitral tribunal the grounds outlined in Article 1206 § 1 sec. 1 and 3 of the Civil Procedure Code.[17]

1.26. This would seem to be the correct approach.

1.27. This, in turn, means that the scope of pleas and objections to the arbitral tribunal's jurisdiction that may be raised successfully in post-arbitration proceedings is relatively narrow and limited to a few factual and procedural situations.

[17] Judgement of the Supreme Court of 10 May 2021, I CSKP 64/21.

III.3. Scope of the Preclusion of the Plea of Lack of Jurisdiction

1.28. It seems a bit problematic that Article 1193 of the Code of Civil Procedure provides for the loss of the right (waiver) to invoke a plea (objection) in arbitration proceedings and in proceedings to set aside an arbitral award while, at the same time, such preclusion would not occur if the applicable grounds for challenging the arbitral award are those which shall be taken into account *ex officio*. In the case of the jurisdiction of the arbitral tribunal, this will primarily be the lack of arbitrability (Article 1206(2)(1) of the Code of Civil Procedure).[18]

1.29. Moreover, the above-mentioned provision does not expressly provide for the preclusion of pleas (objections) in post-arbitration proceedings for recognition or enforcement of an arbitral award. The provision itself refers explicitly to only the setting aside. Therefore, there is a doubt whether Article 1193 of the Code of Civil Procedure would also apply in recognition and enforcement proceedings. This gap in Part V of the Code of Civil Procedure has not yet been dealt with in detail.

1.30. Article 4 of the UNCITRAL Model Law, which was the prototype of Article 1193 of the Civil Procedure Code, does not narrow the application of plea preclusion to a specific type of proceedings, stating that a party loses their right to object if they fail to raise a plea in time. The explanatory memorandum of the amendment to the Code of Civil Procedure does not provide any guidance on interpreting Article 1193 of the Code of Civil Procedure.

1.31. On the one hand, it may be argued that, given the precise wording of Article 1193 of the Civil Procedure Code, preclusion will not occur in the case of proceedings not mentioned in the cited provision, in other words not in proceedings for recognition or declaration of enforceability of an arbitral award. On the other hand, for the sake of regulatory consistency, the loss of the right to invoke a given infringement indicated in Article 1193 of the Civil Procedure Code should apply to all post-arbitration proceedings and not only to proceedings based on a petition to set aside an arbitration award mentioned directly in the cited provision.[19] The Supreme Court also adopted this view in its judgment of 13 September 2012.[20] Such a formulation of the cited provision will ensure consistency of regulations and promote the

[18] TADEUSZ ERECIŃSKI, KAROL WEITZ, COURT OF ARBITRATION, Warsaw: Lexis Nexis (2008), et. 242.

[19] BEATA GESSEL-KALINOWSKA VEL KALISZ, RAFAŁ SIKORSKI, DIAGNOSIS OF ARBITRATION. THE FUNCTIONINF OF THE LAW ON ARBITRATION AND THE DIRECTIONS OF THE POSTULATED CHANGES, Wrocław: Konfederacja Lewiatan (2014), et. 260.

[20] Judgement of the Supreme Court of 13 September 2012, V CSK 323/11.

certainty and speed of proceedings before the arbitral tribunal.[21] It will also be in line with Article 4 of the Model Law, which was the prototype of Article 1193 of the Civil Procedure Code. If a party could be prevented from invoking the issue of jurisdiction of the tribunal in the annulment proceedings, all the more so, this rule should apply in the proceedings that aim, under Article 1212(1) of the Civil Procedure Code, to recognize or enforce an arbitration award.

1.32. There are certain exceptions to the principle of preclusion described above. For example, it does not apply to those pleas concerning the jurisdiction of the arbitral tribunal, which the state court may take into account *ex officio*. Under the Code of Civil Procedure, this would pertain to a lack of arbitrability. Therefore, if a given claim is not arbitrable, regardless of whether a party has raised an appropriate plea in the course of the proceedings, and in due time or not, it may challenge the award rendered in the case regardless. It is also claimed, under EU law, that the said preclusion does not apply to consumers.[22]

IV. Public Interest in Introducing Time Constraints to Raise a Plea of Lack of Jurisdiction Under Polish Law

1.33. The adoption of the time limits for the plea of lack of jurisdiction is also supported by considerations that do not arise from the mere interpretation of legal norms. It is strongly justified as the lack of said time limits would create a substantial risk for the arbitral awards being set aside or denied recognition or enforcement, even though jurisdiction was not raised as an issue during the arbitration itself. This, in turn, could infringe on both the particular interests of different parties and the overall interest of the justice system.

1.34. A particular risk would arise if time limits for the plea of lack of jurisdiction were not introduced. First, this could create a possible situation that a party aware of the lack of jurisdiction of the arbitral tribunal purposefully did not raise the plea during the arbitration proceedings and wanted to 'save it for later', namely their application for setting aside an arbitral award which was

[21] This is the *ratio legis* of the obligation to raise a plea of violation of the rules of procedure is pointed out by the scholars; see also TADEUSZ ERECIŃSKI, KAROL WEITZ, COURT OF ARBITRATION, Warsaw: Lexis Nexis (2008), et. 290; BEATA GESSEL-KALINOWSKA VEL KALISZ, MARIA DUDZIŃSKA, PROCEEDINGS BEFORE THE ARBITRATION COURT. COMMENTARY TO THE RULES OF THE COURT OF ARBITRATION AT THE CONFEDERATION OF LEWIATHAN, Warszawa: Wolters Kluwer (2016), et. 481.

[22] Judgements of the Court of Justice of the European Union of 6 October 2009 in the case between *Asturcom Telecomunicaciones SL* v. *Cristina Rodríguez Nogueira*, C-40/08, and of 26 October 2006 in the case between *Elisa María Mostaza Claro* v. *Centro Móvil Milenium* SL, C-168/05.

unfavorable to them. Thus, on the one hand, the parties acting disloyally in the arbitration and post-arbitration proceedings could create unnecessary costs and time commitments on behalf of the parties that were acting loyally. This could also unnecessarily burden the judicial system with pleas and applications that could and should have been recognized and resolved by the arbitral tribunals.

1.35. Therefore, it is not only in the interest of the parties but also in the public's interest to introduce specific mechanisms and time limits for determining and evaluating the arbitral tribunal's jurisdiction at the earliest stage.

1.36. Moreover, the notion supporting the public interest in the introduction of the discussed time limits of raising the plea of lack of jurisdiction was importantly confirmed by the Supreme Court in 2012.[23] In its decision, the Supreme Court stated that a party that did not raise a plea of lack of jurisdiction in the arbitral proceedings loses the right to do so during the enforcement proceedings. The Supreme Court emphasized that 'the essence of the New York Convention is that the parties are ordered to act in accordance with the principles of good faith and therefore prohibited from acting contrary to those principles.'

1.37. As indicated by some commentators, it also mitigates the risk of initiating a 'mock arbitration proceeding,'[24] one that is aimed at testing one's legal standing and disloyally reserving pleas that should have been raised earlier. Said understanding was recently again confirmed by the Supreme Court's decision of 3 March 2022.[25]

1.38. There is also an issue of the statute of limitation. Under Polish law, subject to the exceptions provided by law, pecuniary claims are subject to limitation. The limitation period may be subject to suspension or interruption. One of the ways that the limitation period can be interrupted based on the provisions of the Civil Code[26] (Article 123(1)(1) of the Civil Code) is if the creditor undertakes 'any action before a court or (…) before an arbitral tribunal taken directly to assert or establish, or to satisfy or secure a claim'. On that note, the Supreme Court stated that if such action was undertaken before an arbitral tribunal that did not have jurisdiction to hear the case, such action would not interrupt the limitation period. Thus, the issue

[23] Judgement of the Supreme Court of 13 September 2012, V CSK 323/11.

[24] Andrzej W. Wiśniewski, *Effects of entering into a dispute in international arbitration despite the absence of an effective arbitration agreement. Gloss to the decision of the Supreme Court of 13 September 2012, V CSK 323/11*, 4 POLSKI PROCES CYWILNY 571-582 (2013).

[25] Judgement of the Supreme Court of 3 March 2022, II CSKP 28/22.

[26] Civil Code of 23 April 1964, consolidated text in Journal of Laws of 2022, item 1360.

of jurisdiction of an arbitral tribunal may also come into play when evaluating whether the limitation period was successfully interrupted: 'the commencement of proceedings before an arbitral tribunal interrupts the limitation period for a claim arising from a proceeding before it if the arbitration agreement was effective. If such proceedings were conducted on the basis of an ineffective arbitration agreement, the limitation period should run uninterrupted.'[27] Scholars criticize such a position of the Supreme Court.[28] However, if one accepts it as correct, it is all the more necessary to resolve the issue of jurisdiction of the arbitral tribunal so that a party can pursue its claims in a proper forum.

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Summaries

DEU [***Präklusion der Einrede der mangelnden Zuständigkeit (Gerichtsbarkeit) gemäß dem polnischen Schiedsrecht***]

Dieser Artikel befasst sich mit einer scheinbar offensichtlichen Frage, die dann aber im Einzelfall doch nicht ganz klar ist, nämlich, wie sich die Nichteinrede der mangelnden Zuständigkeit (Gerichtsbarkeit) gemäß dem polnischen Schiedsrecht auswirkt. Im polnischen Recht haben sich kohärente und umfassende Mechanismen zur Beurteilung der Zuständigkeit und Gerichtsbarkeit des Schiedsgerichts herausgebildet. Dieses System führt u.a. spezielle Fristen ein, innerhalb derer eine Partei Einwendungen gegen die Zuständigkeit bzw. Gerichtsbarkeit des Schiedsgerichts erheben kann. Die Nichteinhaltung der gesetzlichen Frist für die Geltendmachung solcher Einrede der mangelnden Zuständigkeit/Gerichtsbarkeit hat schwerwiegende Folgen. Erhebt eine Partei die Einrede erst nach Ablauf der hierfür in der Zivilprozessordnung vorgesehenen Frist, so gilt generell, dass diese Einrede als unzulässige (verwirkte) Einrede weder

[27] Judgement of the Supreme Court of 18 February 2005, V CK 467/04.

[28] PIOTR MACHNIKOWSKI, CIVIL CODE. COMMENTARY, Warsaw: C. H. Beck (2017), Article 123(9); Aleksandra Pokropek, *Legal Problematics of the Arbitration Court Provision in the so-called Option Cases*, 1 AMERICAN ARBITRATION ASSOCIATION. ARBITRATION AND MEDIATION 121-122 (2012); Szczesny Kazimierczak, *On the Possibility of Interrupting Before the State Court the Course of the Limitation Period of Claims Subordinated to the Cognition of the Arbitration Court*, 4 ARBITRATION BULLETIN (2011), et. 97 and the literature cited therein, in particular Joanna Kuźmicka-Sulikowska, *Entry into an arbitration court and proceedings before that court v interruption of the course of the statute of limitations*, 4 AMERICAN ARBITRATION ASSOCIATION. ARBITRATION AND MEDIATION 28-34 (2010); ANNA STEPIEŃ-SPOREK, FILIP SPOREK, STATUTE OF LIMITATIONS AND THE CONCLUSION TIMELIMITS, Warsaw: LexisNexis (2009), et. 114; MARIA JEDRZEJEWSKA, INFLUENCE OF PROCEDURAL ACTIONS ON THE COURSE OF THE STATUTE OF LIMITATIONS, Warsaw: Wyd. Prawn (1984), et. 49.

vom Schiedsgericht noch vom allgemeinen Gericht in einem ans Schiedsverfahren anschließenden Gerichtsverfahren zu beurteilen ist.

Dieser Artikel bietet eine umfassende Abhandlung zur Präklusion der Einrede der mangelnden Zuständigkeit (Gerichtsbarkeit) nach polnischem Recht. Zunächst analysiert er die Frage des Umfangs und Inhalts der Einrede der mangelnden Zuständigkeit (Gerichtsbarkeit). In dem zweiten Schritt lotet der Artikel den zur Vorbringung solcher Einrede berechtigten Personenkreis aus, sowie Fristen, innerhalb derer dies zu geschehen hat. Drittens widmen sich die Autoren der Präklusion der Einrede der mangelnden Zuständigkeit (Gerichtsbarkeit) gemäß polnischem Recht. Ein letzter, vierter Abschnitt behandelt das öffentliche Interess an einer Befristung für die Geltendmachung der Einrede der Zuständigkeit (Gerichtsbarkeit) gemäß polnischem Recht.

CZE **[*Prekluze námitky nedostatku pravomoci (příslušnosti) dle polského práva rozhodčího řízení*]**

Tento článek analyzuje otázku, která se sice jeví být zřejmá, nicméně v některých případech zcela jasná není, a sice účinek nevznesení námitky nedostatku pravomoci (příslušnosti) stranou dle polského práva rozhodčího řízení. V polském právu se vytvořily soudržné a komplexní mechanismy pro posuzování pravomoci a příslušnosti rozhodčího soudu. Tento systém například zavádí zvláštní lhůty, v nichž může strana vznášet námitky proti pravomoci a příslušnosti rozhodčího soudu. Nedodržení zákonné lhůty pro vznesení takové námitky nedostatku pravomoci/příslušnosti má závažné důsledky. Pokud strana vznese námitku nedostatku pravomoci (příslušnosti) po uplynutí lhůty stanovené v občanském soudním řádu, pak obecně platí, že by taková námitka neměla být, jakožto námitka nepřípustná (prekludovaná), posuzována rozhodčím soudem ani soudem obecným v soudním řízení navazujícím na rozhodčí řízení. Tento článek nabízí komplexní pojednání o tom, jak je prekluze námitky nedostatku pravomoci (příslušnosti) upravena v polském právu. Zaprvé je analyzována otázka rozsahu a předmětu námitky nedostatku pravomoci (příslušnosti). Zadruhé se článek zabývá problematikou subjektů oprávněných vznášet námitku nedostatku pravomoci (příslušnosti) a lhůty k tomu určené. Zatřetí se autoři věnují problému prekluze námitky nedostatku pravomoci (příslušnosti) dle polského práva. Poslední čtvrtá část pojednává o otázce veřejného zájmu na zavedení časových omezení pro vznášení námitky pravomoci (příslušnosti) dle polského práva.

POL [***Prekluzja zarzutu braku właściwości sądu polubownego w polskim prawie arbitrażowym***]
Artykuł stanowi kompleksowe omówienie prekluzji zarzutu braku właściwości sądu polubownego w polskim prawie arbitrażowym. Autorzy analizują zakres podmiotowy i przedmiotowy zarzutu braku jurysdykcji oraz podstawę prawną takiej prekluzji, a także jej wpływ na postępowania post-arbitrażowe. W artykule został omówiony również interes publiczny we wprowadzeniu ograniczeń dla możliwości podniesienia zarzutu braku właściwości w prawie polskim.

FRA [***La forclusion de l'exception d'incompétence en droit polonais de la procédure arbitrale***]
Le présent article propose une analyse complexe des règles relatives à la forclusion de l'exception d'incompétence dans le droit polonais. Les auteurs examinent la portée, l'objet et le champ d'application personnel de l'exception d'incompétence, le fondement juridique de sa forclusion, ainsi que les effets de la forclusion sur les procédures judiciaires suivant la procédure arbitrale. L'article soulève également la question de l'intérêt public quant à la limitation dans le temps des exceptions d'incompétence en droit polonais.

RUS [***Отказ от возражения об отсутствии компетенции (подсудности) в соответствии с польским арбитражным законодательством***]
В данной статье предлагается всестороннее обсуждение того, как отказ от возражения об отсутствии компетенции (подсудности) регулируется в польском законодательстве. Авторы анализируют объем, предмет и персональное действие возражения об отсутствии компетенции (подсудности), а также правовую основу такого отказа, влияние отказа на судебные разбирательства, следующие за арбитражом. Предметом обсуждения также является вопрос публичного интереса к введению сроков, ограничивающих направление возражения об отсутствии компетенции (подсудности) в соответствии с польским законодательством.

ESP [***Preclusión de la excepción de incompetencia (jurisdicción) en el derecho de arbitraje polaco***]
Este artículo ofrece un análisis exhaustivo de cómo se regula la preclusión de la excepción de incompetencia (jurisdicción) en la legislación polaca. Los autores analizan el ámbito de aplicación, el objeto y el ámbito personal de la excepción de incompetencia y el fundamento jurídico de dicha preclusión, así como el efecto de la preclusión en los procedimientos judiciales posteriores al

procedimiento arbitral. También se discute la cuestión del interés público relativo a la introducción de plazos para impugnar la competencia (jurisdicción) en el derecho polaco

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