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The Constitutional Status of the Amicable Judiciary (Arbitration) and the Right to a Trial in the Context of the Concept of "Administration of Justice" in the Constitution of the Republic of Poland of 1997. Selected Aspects of the Definition and Doctrine

Keywords: arbitration, administration of justice, right to a trial, alternative dispute resolution methods
Słowa kluczowe: arbitraż, wymiar sprawiedliwości, prawo do sądu, alternatywne metody rozwiązywania sporów

Abstract
The study discusses amicable dispute resolution in the light of the constitutional principle of the right to a trial and the constitutional concept of the "administration of justice". In the paper, the author outlines the definitions and doctrinal approaches present in the ongoing debate in the Polish literature on the status of forms of amicable dispute resolution in the Constitution of the Republic of Poland of 1997. *De lege ferenda*, the author considers it practical and socially justified to amend the Constitution of the Republic of Poland by explicitly specifying the place of arbitration dispute resolution in the hierarchical system of the Basic Law, hence, as the principle of the right to a trial in its broad meaning, i.e., as the right to an effective means of dispute resolution, as well as by defining relevant relations with the conceptual scope of the "administration of justice".

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Streszczenie

Konstytucyjne umocowanie sądownictwa polubownego (arbitrażowego) a prawo do sądu w kontekście pojęcia „wymiar sprawiedliwości" w Konstytucji RP z 1997 r. Wybrane aspekty definicyjno-doktrynalne

Przedmiotowe opracowanie stanowi próbę odniesienia się do zjawiska polubownego rozwiązywania sporów w świetle konstytucyjnej zasady prawa do sądu oraz konstytucyjnego ujmowania pojęcia „wymiaru sprawiedliwości". W pracy autor przedstawia aspekty definicyjne oraz ujęcia doktrynalne w toczącej się w literaturze polskiej debacie nad umocowaniem form polubownego rozwiązywania sporów w Konstytucji RP z 1997 r. *De lege ferenda* autor uznaje za praktyczne i społecznie zasadną zmianę Konstytucji RP precyzującą wprost miejsce polubownego rozwiązywania sporów w systematyce ustawy zasadniczej jako urzeczywistnienie szeroko rozumianej zasady prawa do sądu – tj. jako prawa do efektywnego środka zakończenia sporu jak również określającą w tym względzie relacje z zakresem pojęciowym „wymiaru sprawiedliwości".

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I. General Remarks

The existence and the possible role of arbitration in the Polish constitutional order are still discussed in the literature[2]. As a rule, there is no doubt that it is acceptable for arbitration courts, even though they are not state courts, to hear and decide on some instances instead of state courts[3]. However, it remains disputable from which constitutional norm the "legality" of arbitration should be derived – *in generali*. Since the following considerations could be presented in a much broader way, the scientific reflection will be limited only

[2] T. Ereciński, K. Weitz, *Sąd arbitrażowy*, Warsaw 2008; R. Morek, *Mediacja i arbitraż. Komentarz*, Warsaw 2006; M. Romanowski, *Znaczenie niezależności i bezstronności arbitra w postępowaniu arbitrażowym w świetle konstytucyjnego prawa do sądu*, [in:] *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, eds. J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka, Warsaw 2010, pp. 376–384; A.W. Wiśniewski, *Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów*, Warsaw 2011.

[3] T. Ereciński, K. Weiz, op.cit., pp. 18–22.

to explaining and analyzing the key concepts indicated in the title. The lack of constitutionalized arbitration and the legal status of other forms of amicable dispute resolution is an issue that affects not only the Polish Constitution[4]. In foreign literature, one can find extensive descriptions of the admissibility of the use of mediation or arbitration. Furthermore, one can find opinions that entirely question the admissibility of using ADR methods due to the omission of these issues in the constitutions[5]. At the same time, in the context of ADR methods, I. Field writes about mediation being the third wave of "access to justice", which can improve the quality and effectiveness of civil proceedings[6]. It corresponds to the traditional jurisprudence of the CJEU[7], which emphasizes that the content and scope of the right to effective judicial protection are to be understood in the same way or even more broadly compared to the meaning and scope of the rights defined in Art. 6 and 13 of the ECHR[8].

In that regard, the author believes that it is worth making an expert attempt to adapt the Polish Constitution to the new principles and trends resulting from European law or even new generations of human rights, such as the right to a clean environment or even to clean air or the right to an effective legal remedy (not necessarily a judicial remedy within the meaning of national law)[9], including arbitration and mediation[10]. The Constitution itself

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[4] V.F. Comella, *The Constitution of Arbitration*, Cambridge 2021; I. Field, *Judicial mediation and Ch III of the Commonwealth Constitution*, [in:] https://pure.bond.edu.au/ws/portalfiles/portal/18370621/JUDICIAL_MEDIATION_AND_CH_III_OF_THE.pdf (24.02.2021); P.B. Rutledge, *Arbitration and the Constitution*, Cambridge 2012.

[5] J.W. Stein, *Mediation and The Constitution*, "Dispute Resolution Journal" 1998, vol. 53, No. 2.

[6] I. Field, op.cit.

[7] CJEU judgment of 30/06/2016, C-205/15, Toma and Birouiul Executorului Judecătorese Horatiu – Vasile Cruduleci, item 40 and the case law cited therein.

[8] K. Szczepanowska-Kozłowska, *Prawo do skutecznego środka prawnego i bezstronnego sądu – art. 47 Karty Praw Podstawowych w relacjach horyzontalnych – kilka uwag w związku z wyrokiem TSUE w sprawach połączonych C-585/18; C-624/18; C-625/18*, "Palestra" 2020, No. 5, p. 106.

[9] Judgment of the ECHR, *Oleksandr Volkov v. Ukraine*, No. 21722/11, see in: European Union Agency for Fundamental Rights, *Handbook on European law relating to access to justice*, Luxembourg 2016, p. 54.

[10] In the *Green Paper on alternative dispute resolution in civil and commercial law* of April 10, 2002 (COM (2002) 196, April 2002), the European Commission has taken the view that

cannot be a monument to law but should be a living document and testimony to the principles by which Poland's modern European society operates.

II. The Amicable Judiciary (Arbitration)

The key point for further discussion will be to establish a definition of arbitration. Regarding the genesis of the word "arbitration", it should be noted that it comes from the Latin word: *Arbitrarium,-ii*, which means an arbitration court[11]. In historical changes, it was subsequently "taken over" by the French language and made popular as *arbitrage*[12].

In this context, one should mention an institution that has been absent from the organizational structure of the administration of justice for almost 30 years and yet continues to shape public opinion, i.e., the State Economic Arbitration (PAG), an entity typical of the economies of socialist countries, which has little to do with the arbitration judiciary in the proper sense of this notion. The very establishment of such "economic arbitration" was connected with the existence of a "socialized", centrally managed, and planned socialist economy[13], having nothing to do with arbitration.

Despite this historical background, however, the notions of arbitration and amicable judiciary should be treated as synonyms in contemporary political and economic realities[14].

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forms of ADR should also be analysed from the perspective of their role in the implementation of access to justice. In the cited document, the Commission also states that ADR is particularly important in the era of the development of electronic communication, when the importance of the court institution in direct relations between the parties (without the involvement of the court) in relation to virtual transactions (Online Dispute Resolution) will continue to grow. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52002DC0196 (24.02.2021); see also: A. Zienkiewicz, *Studium mediacji. Od teorii ku praktyce*, Warsaw 2007, pp. 223–224. Such special mechanisms are used especially now during the SARS-CoV-2 pandemic, when the number of disputes grows proportionately to the number of online transactions.

[11] J. Sondel, *Słownik łacińsko- polski dla prawników i historyków*, Kraków 2003 – electronic version; cf. W. Litewski, *Słownik Encyklopedyczny Prawa Rzymskiego*, Kraków 1998, p. 25.

[12] *Słownik Wyrazów Obcych EUROPA*, ed. I. Kamińska-Szmaj, Wrocław 2001, p. 57.

[13] *Encyklopedia Popularna PWN*, ed. A. Karwowski, Warsaw 1984, p. 39.

[14] Cf.A. Tynel, *Międzynarodowy Arbitraż Handlowy w krajach Europy Środkowej*, Warsaw 1999, p. 15.

After discussing some aspects briefly relating to the elements of the definition and the historical background, it would be appropriate to provide a binding (preferably legal), generally accepted definition of arbitration. Unfortunately, Part V of the Polish Code of Civil Procedure[15] does not define the "amicable judiciary (arbitration)". As a result, the doctrine employs different – albeit somehow similar – definitions of arbitration, developed by M. Wójcik, A. Jakubecki[16], T. Ereciński[17], K. Piasecki[18], and others. A. Szumański[19] made an in-depth review of the doctrine in this respect. This paper assumes that arbitration consists of the parties concerned unanimously appointing a third party to issue an award resolving their dispute[20]. In this context, arbitration should be defined as a non-state court established by the unanimous will of the parties to resolve their dispute with an award having the same legal value as a state judgment[21]. That definition should be treated as an extension because the second proposal is closer to the intent of the authors of the regulations on arbitration in the Code of Civil Procedure. The universality of the first definition, in turn, can be demonstrated by the fact that it remains compatible with the definition of "international arbitration" – obviously in the specific conditions of international public law.

III. The Concept of the Administration of Justice

The proper understanding of the concept of the "administration of justice" is based on Roman law and the Latin terminology, in which the word

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[15] Act of November 17, 1964, *Code of Civil Procedure* (Dz.U. 2020, item 1575).

[16] M.P. Wójcik, *Cześć Piąta. Sąd polubowny (arbitrażowy)*, [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. A. Jakubecki, Warsaw 2008, p. 1581 et seq.

[17] T. Ereciński, *Cześć Piąta. Sąd polubowny (arbitrażowy). Kodeks postępowania cywilnego: Komentarz. Tom V*, ed. T. Ereciński, Warsaw 2009, p. 347 et seq.

[18] K. Piasecki, *Komentarz do Kodeksu postępowania cywilnego, Tom III, Cześć Piąta. Sąd polubowny (arbitrażowy)*, Warsaw 2007, pp. 231–233.

[19] A. Szumański, *Pojęcie arbitrażu handlowego*, [in:] *Arbitraż Handlowy Tom* 8 *System Prawa Handlowego*, ed. A. Szumański, Warsaw 2015, pp. 8–12.

[20] A.W. Wiśniewski, *Międzynarodowy arbitraż…*, p. 29.

[21] A. Tynel, op.cit., p. 15.

iurisdictio, iusdicere meant "jurisdiction"/"judicial power"/"the right to adjudicate"[22], while *iustitia* – "justice"[23]. The Latin meaning makes it possible to better grasp the importance of this concept and outline the context in which it should be read, particularly considering that the current Polish Constitution of 1997 does not contain a definition of the administration of justice.

The point of departure for the discussion should be Art. 175 (1) in Chapter VII entitled "Courts and Tribunals" of the Constitution of the Republic of Poland of 1997, which states that "the Supreme Court shall implement the administration of justice, the common courts, administrative courts, and military courts"[24]. Thereby, the article explicitly indicates a closed list of entities (courts) implementing the administration of justice[25] in the Republic of Poland.

However, it does not imply any definition of the administration of justice. The legislator only indicates who implements it. Therefore, it also appears appropriate to define the nature of the entities that implement this "administration of justice" more broadly. In this context, in the light of Art. 10 (2), 173, and 175 of the 1997 Constitution of the Republic of Poland, it should be accepted that "the court to which the State may entrust the implementation of the administration of justice is only a state body within the structure of the judiciary"[26], in other words – a state court. It is thus difficult to find even an implicit competence for an arbitration court as a body implementing the administration of justice in the mentioned legal qualification[27].

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[22] J. Sondel, op.cit., electronic version; *Słownik Wyrazów…*, p. 345.

[23] K. Piasecki, *Organizacja wymiaru sprawiedliwości w Polsce*, Kraków 2005, pp. 13–14.

[24] Ł. Błaszczak, M. Ludwik, *Sądownictwo polubowne (arbitraż)*, Warsaw 2007, p. 47 et seq.

[25] Cf.P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, Warsaw 2000, p. 228; B. Banaszak, *Prawo konstytucyjne*, Warsaw 1999, p. 534 et seq.; K. Kaczmarczyk, *Rozdział V: Wymiar sprawiedliwości*, [in:] *System organów państwowych w Konstytucji Rzeczypospolitej Polskiej*, ed. H. Zięba-Załucka, Warsaw 2005, p. 150 et seq.; K. Piasecki, op.cit., pp. 6–17; D. Górecki, *Polskie prawo konstytucyjne*, Warsaw 2009, p. 202 et seq.; W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. Komentarz*, Kraków 1998, pp. 185–187; P. Sarnecki, *Prawo konstytucyjne*, Warsaw 2008, pp. 391–395.

[26] L. Garlicki, *Art. 175*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, vol. 4*, ed. L. Garlicki, Warsaw 2005, p. 7.

[27] Ł. Błaszczak, M. Ludwik, op.cit., p. 47.

A. Zienkiewicz proposes (and partially reiterates)[28] the postulate of pluralism of the forms of justice and respect for parties' autonomy regarding the choice of the method with which they wish to pursue their claims. As a natural consequence, this will lead to the abandonment of "empire" modes in favor of contractual modes such as mediation or arbitration, whereby the court process itself should lose its dominant position to other forms of justice.

One should accede to the opinion that since the concept of the justice system has not been legally defined, it is necessary to refer to the jurisprudence of the Constitutional Tribunal[29]. Interestingly, already in the previous constitutional state, the Constitutional Tribunal took a position on the principle of the judicial administration of justice, focusing on aspects such as the jurisdiction of courts[30], or the scope of the authorities administering justice[31]. At this point, it is worth becoming acquainted with the Judgment of the Constitutional Tribunal of March 13, 1996[32], in which the Tribunal analyzed the issue of whether the judiciary is integral to the court, how to understand the judiciary and what are its functions. Notably, the Constitutional Tribunal argues that "The prevailing view in the jurisprudence, however, is that the concept of *justice* should be understood in terms of its object, i.e., as an activity involving the resolution of legal conflicts, and not in terms of its subject, i.e., as being the exclusive competence of judicial authorities. It is a fact that the Constitution and ordinary legislation, by granting courts and judges special powers and guarantees, make courts the most credible institutions to administer justice. For these reasons, it is assumed that if courts do not resolve legal conflicts themselves, then at least in the area of justice, they should exercise control over the judgments of quasi-judicial bodies"[33].

A. Zienkiewicz understands the concept of justice in a broader sense (in terms of its object and function) as an activity involving the control of legal

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[28] L. Morawski, *Proces sądowy a instytucje alternatywne (na przykładzie sporów cywilnych)*, "Państwo i Prawo" 1993, No. 1, p. 22.

[29] See also A. Zienkiewicz, op.cit., p. 219.

[30] Judgment of the Constitutional Tribunal of December 8, 1992, file No.K. 3/92.

[31] Judgment of the Constitutional Tribunal of April 12, 1989, file No.Uw. 9/88; Judgment of the Constitutional Tribunal of February 25, 1992, file No.K. 4/91. See: A. Zienkiewicz, op.cit., p. 219.

[32] File No.K.11/95.

[33] Ibidem, p. 220.

disputes, which is not an exclusive competence of the courts (no court monopoly)". In this sense, *justice* encompasses alternative forms of resolving legal disputes (ADR), which (without infringing the right to a fair trial) should supplement rather than replace the mechanisms of the judicial administration of justice[34].

Ł. Błaszczak and M. Ludwik, however, have presented an interesting doctrinal approach in this respect. They hold that the concept of the administration of justice should be examined on two levels: subjective and objective[35].

The definition adopted most often within the framework of the objective level is one that associates the administration of justice strictly with "activity consisting exclusively in conflict resolution". However, it does not appear justified to claim at this point that it would be appropriate to limit this phenomenon to the function of conflict resolution, as this would essentially eliminate other activities undertaken by courts from the administration of justice, including serving penalties in criminal proceedings, adjudicating on the dissolution of marriage or examining registration cases[36]. Therefore, it is necessary to extend the definition in question to include those activities of courts that, while not being aimed at conflict resolution, are imperative and have specific effects, whether in terms of enforceability or legitimacy[37].

As far as the subjective level is concerned, Ł. Błaszczak and M. Ludwik indicate that it is directly connected with the bodies defined in Art. 175 of the Constitution. They do not include, however, the arbitration courts. In this context, the authors refer to the historical situation of the People's Republic of Poland, when under the Constitution of 1952[38], initially under Art. 46 and then under Art. 56, quasi-judicial bodies were authorized to implement the administration of justice. However, it should be noted at this point that jurisdiction could be entrusted to extra-judicial bodies only by way of legislation. Under the currently applicable Polish Constitution of 1997, this possibility is excluded. Consequently, one can hardly speak of the arbitration court

[34] Ibidem, p. 221.

[35] Ł. Błaszczak, M. Ludwik, op.cit., p. 48; cf. T. Ereciński, K. Weitz, op.cit., p. 19.

[36] Ibidem.

[37] Ibidem.

[38] Constitution of the Polish People's Republic of July 22,1952 (Dz.U.No. 33, item 232), as amended of February 10, 1976 (Dz.U.No. 5, item 29).

as a body implementing the administration of justice[39]. This conclusion also arises from the private legal nature of arbitration and the private nature of the institutions involved in conducting arbitration proceedings in the case of institutional and administered arbitration. Otherwise, this type of institution would have to be granted at least a quasi-public-legal nature.

IV. The Constitutional Principles of the Administration of Justice and Arbitration

The notion of the "constitutional principles of the administration of justice" in the context of arbitration is used, as mentioned previously, by Ł. Błaszczak and M. Ludwik. By analyzing the three principles resulting from Chapter VIII of the Constitution of the Republic of Poland of 1997, they have demonstrated that arbitration is not capable of fulfilling the requirements and guarantees of the principles provided for the administration of justice. In this respect, it is justified to present their view as the prevailing one in the literature on the subject.

Considering the principle of judicial independence, the authors indicate that it is secured by guarantees of the following nature[40]: organizational, functional procedural, and concerning the position of the judge. When analyzing the principle of two instances of court proceedings, which is an important guarantee of the rights of each party in pending proceedings, it should be stressed that the provisions of the Polish Code of Civil Procedure in Art. 1205 § 3 provide only for an optional possibility to have recourse to the second instance with respect to the arbitration court. However, it should be borne in mind that according to the "economics" of arbitration, the single-instance nature of the arbitration court is recommended. On the one hand, it must be acknowledged that a single instance is an advantage, as it shortens the duration of the case; on the other hand, however, there is still a risk of making a mistake without the possibility of correcting it during a review by a higher instance[41].

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[39] Cf.Ł. Błaszczak, *Nadzór sądu powszechnego nad działalnością sądu polubownego (cz. II)*, "Przegląd Prawa Sądowego" 2006, No. 4, p. 37.

[40] Ł. Błaszczak, M. Ludwik, op.cit., p. 49–50.

[41] Ibidem, p. 50–51.

Following further the line of argumentation presented by Ł. Błaszczak and M. Ludwik, it should be noted that, under Art. 174 of the 1997 Constitution of the Republic of Poland, courts and tribunals pass judgments on behalf of the Republic of Poland (the principle of passing judgments on behalf of the Republic of Poland). The awards of arbitration courts, by contrast, do not have such an attribute, which emphasizes their private and legal character. Furthermore, it should be mentioned that, once they are issued, they do not fall within the sphere of official decisions of judicial bodies because it is only upon their recognition or declaration of enforceability that they acquire the same legal force as judgments of a common court (Art. 1212 § 1 of the Code of Civil Procedure). Moreover, one should also remember that an arbitration award does not always have to be based on a specific legal standard (whether from the Polish or foreign legal system); it can be based directly on the principle of equity – *aequitas*. It means that, in the administration of justice, the Supreme Court, the common courts, administrative courts, and military courts resolve contentious issues based on the law. A judgment cannot be based on the "principle of equity" but on a specific legal standard.

In the light of these facts, the alternative view of R. Morek, also present in the subject-matter doctrine (the so-called concept of implementation of the right to legal protection in arbitration proceedings), explaining the collision between the inalienability of the right to a trial and the possibility of excluding the common courts by the implementation of this right is also in arbitration, is subject to criticism. According to this author, the constitutional right to a trial is not waived; only the forum within which this right is exercised changes[42]. However, proceedings before the arbitration court do not offer the same guarantees as those provided for in the Polish Constitution in the court proceedings. Błaszczak and M. Ludwik suggest assuming that the supervision of the state courts over the arbitration judiciary is in itself sufficient to implement the constitutional right to a trial (the so-called concept of implementation of the right to legal protection through the review of an arbitration award by the common court). Therefore, in the absence of interference from the legislator, the latter approach should be considered more justified.

[42] R. Morek, *ADR w sprawach gospodarczych*, Warsaw 2004, p. 49, R. Romanowski, op.cit., p. 379 et seq. Criticism of the view by A.W. Wiśniewski, *Międzynarodowy arbitraż…*, pp. 62–63.

V. The Right to a Trial and Arbitration

It is also important to mention the significance of Art. 45 (1) in connection with Art. 77 (2) of the Constitution from the perspective of arbitration. This point of view is proposed by T. Ereciński and K. Weitz[43]. The provision of Art. 45 (1) of the Constitution, which states that everyone has the right to a fair and public hearing of their case, without undue delay, before a competent, impartial, and independent court, contains, among other things, the order to open court proceedings for every type of case within the meaning of constitutional regulations (the so-called principle of the right to a trial). Article 77 (2) of the Constitution of the Republic of Poland of 1997, which states that "statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights, protects the right to a trial by establishing a prohibition to bar the recourse to the courts"[44].

T. Ereciński and K. Weitz hold that submitting a case to the jurisdiction of the arbitration court may be treated as a waiver – within certain limits (cf. Art. 1165 § 1 of the Code of Civil Procedure) – of the constitutional right to a trial, i.e., the right to request a state court to hear and resolve a case. In this case, however, it is not a matter of waiving the right to a trial in general nor giving up the entire judicial legal protection provided by the state courts. The fact that the parties decide to submit a case to arbitration means only that they do not intend to seek legal protection in the case in question or in cases which may arise from a particular legal relationship (cf. Art. 1161 § 1 of the Code of Civil Procedure) directly before any state court. Nevertheless, the fact that the arbitration courts operate under the control of the state courts means that the road to the state court is still open to a certain extent[45].

[43] Tadeusz Ereciński and Karol Weitz are the authors of the concept of equivalent of legal protection in arbitration with respect to the state judiciary.

[44] T. Ereciński, K. Weiz, op.cit., p. 21.

[45] Ibidem, pp. 21–22.

VI. The Constitutional Status of Arbitration Based on the Autonomy of the Parties to an Arbitration Agreement. The Democratic State of Law

The previous part of this paper has made three attempts to put arbitration in the framework of constitutional law. The author of the original list of concepts regarding arbitration (R. Morek and his concept of implementation of the right to legal protection in arbitration proceedings; Ł. Błaszczak and M. Ludwik and their concept of implementation of the right to legal protection through the review of an arbitration award by the common court, and T. Ereciński and K. Weitz and their concept of equivalence of legal protection in arbitration concerning the state judiciary) is A. Wiśniewski, as already quoted, who analyzed these three views in practical terms as early as ten years ago, showing that they are untenable in the broader context of the discussion. At this point, I briefly discuss A.W. Wiśniewski's approach to each of these views.

As regards R. Morek's view – which has been already discussed earlier – his concept of implementation of the right to legal protection in arbitration proceedings has been criticized in a way analogous to the view presented by Ł. Błaszczak and M. Ludwik[46], by demonstrating the lack of constitutional guarantees for proceedings and only the "possibility" of excluding a dependent and biased arbitrator at the request of one of the parties to the dispute under Art. 1174 §2 of the Code of Civil Procedure[47].

The concept of implementing the right to legal protection through the review of an arbitration award by the common court has also been criticized. A.W. Wiśniewski notes that the common court (appointed to implement the administration of justice under Art. 175 (1)) does not "remedy" an arbitration award that, in their opinion, is erroneous. It can only prevent "an arbitration award that grossly violates the elementary rules of conduct or substantive public order"[48] from entering legal transactions. It means that, in the context of legal protection, it is not the subject matter part (and thus the protection of the subjective right of the party as such) that will be the subject of such a judgment of the common court, but only the procedural aspect. Therefore, the common court cannot administer justice to the extent covered by an

[46] Ł. Błaszczak, M. Ludwik, op.cit., p. 49–55.

[47] A.W. Wiśniewski, *Międzynarodowy arbitraż…*, p. 62–63.

[48] Ibidem, p. 63.

effective arbitration award. Consequently, the claim that "the right to a trial "survives" an arbitration agreement" (if only partially) cannot be accepted[49]. A.W. Wiśniewski concludes that, following the conclusion of an effective arbitration agreement, the right to a trial in its essence expires, and its "resurrection" is possible when, for instance, as agreed by the parties to the arbitration agreement, the case is examined by a common court. However, in the author's opinion, it is not possible to waive the constitutional right to a trial with such a justification. It would mean the possibility of contractual, *inter partes*, "temporary" suspension of applying the constitutional norms.

It should be noted that, in the author's opinion, the amicable judiciary does not involve so much the waiver of the right to a trial – as indicated by T. Ereciński and K. Waitz – but rather its purposive "supplementation", acceptable also at the level of international law, according to the European right to an effective means of legal protection – within the framework of the right to personal freedom (the right to a free choice of legal protection means – Art. 41 of the Constitution of the Republic of Poland of 1997) and the democratic state of law under Art. 2 of the Constitution of the Republic of Poland, implementing the principles of social justice. Social justice – in this context should be understood not only as of the justice of the institutional apparatus of the state[50] – but more broadly as the right of society *in gremio* to participate in it. As a result, all forms of alternative dispute resolution methods, in particular mediation, will also be applicable to dispute resolution, in addition to the amicable judiciary.

VII. Conclusion

To summarize the preceding discussion on the administration of justice and arbitration, it must be noted that the practical definition of the administration of justice in so-called mixed terms, i.e., both subjective and objective, does not cover the operation of arbitration courts. It leaves no space for this form of dispute resolution. The following question thus arises: how to qual-

[49] Ibidem.

[50] A.W. Wiśniewski, *Charakter prawny instytucji arbitrażu w świetle nowelizacji polskiego prawa arbitrażowego*, "ADR. Arbitraż i Mediacja" 2008, No. 2.

ify an arbitration court? It appears that it would be sufficient to simply state that an arbitration court is a form of extra-judicial legal protection authority, supervised by a procedural body in the form of a common court[51], and the possibility of using it is provided by the appropriately applied interpretation of Art. 2 in connection with Art. 41 of the Polish Constitution of 1997.

De lege ferenda, it would be reasonable for the legislator to interfere with the provisions of the Constitution of the Republic of Poland of 1997 by specifying/amending them so that the concept of implementation of the right to legal protection in arbitration proceedings is given real shape. Only in this way is it possible to logically prove the legitimacy of arbitration or other forms of ADR – and especially mediation – without running the risk of praxeological contradictions/doubts.

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