ALLERHAND INSTITUTE

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At the beginning of the Congress, the members of Allerhand Institute **Wojciech Rogowski, PhD** and **Kamil Zawicki, attorney at law** welcomed the guests, thanked the patrons and officially opened the Congress. The previous speaker **Mariusz Haładyj, Deputy of the Ministry of Economy**, who had been a guest of the ADR Congress for the third time, emphasized the uniqueness of the events organized by the Allerhand Institute and its role in promoting issues that was not entirely „mainstream" and still very substantial from the point of view of the economy. During the speech he assured that the congressional debates had a huge impact to the on-going legislative work, and also towards the undertaken non-legislative actions. Moreover Mariusz Haładyj explained that the increased interest of the Ministry of Economy in the leading theme of the Congress, i.e. mediation and arbitration, arose from the discussions between the Ministry and the entrepreneurs on the barriers which, as they considered, hampers pursuit of economic activity. He said that the most frequently problems, which were raised during the disputes concerned especially such issues as the duration of judicial proceedings or the cost of proceedings) and as a result the Ministry decided to take steps in order to retrieve the situation in this matter and collectively with the Ministry of Justice started working on a bill. The minister underlined that in Poland only 30% of the judiciary costs were covered by the parties to the proceedings, that meant

Min. Mariusz Haładyj

that 70% of those costs had to be covered by citizens that stand outside of all court cases, what should have brought this topic into consideration in planned changes.

The Minister divided the economic relations into four stages:

1) before an agreement, when the most important issue is to verify the credibility of a potential partner,

2) after the conclusion of the agreement, when some problems with payment and disputes have occurred, but there is no insolvency yet,

3) insolvency or close insolvency stage (here a new restructuring law is to be helpful),

4) the enforcement proceedings.

As the Minister noticed on the second of these stages of the ADR economic cycle could be very useful for entrepreneurs, since it allowed to reduce the inconvenience of this stage and shortening the duration of the disputes. The Minister stressed that he perceived mediation and arbitration not as abstract concepts from an academic book, but as a useful business tools. He hoped the entrepreneurs also would perceive the benefits of alternative dispute resolution method . That was the reason why was so important to popularize it. The Ministry of Economy involved to promote alternative dispute resolution methods by preparation the bill and the plan of the establishment of Arbitration and Mediation Centres (AMC) in six Polish cities.

The aforementioned bill was focused on four basic fields:

1) the introduction of procedural improvements under civil procedure,

2) combining a number of economic incentives „stimulating the thinking in the direction of wondering whether it is worth to try mediation" before entering a hot court dispute,

3) tax solutions; agreement on the settlement of costs was reached in cooperation with the Ministry of Finance (e.g. the correction of invoices in the current period),

4) improving the quality and increasing the availability of mediation services (entrepreneurs drew attention to this more than once during the discussion with the Ministry).

> "The information about mediation should be focused on the first stage, after a case reaches to the court"– Min. Mariusz Haładyj

The Minister said "The information about mediation should be focused on the first stage, after a case reaches to the court - preferably even before the first hearing, which is usually set only after several months. If a part of the existing disputes were averted within the mediation carried out, it would relieve the courts and as a result would reduce the time of investigation of those court cases that could not end at the stage of mediation."

Mariusz Haładyj mentioned that the second field was achieved by building arbitration and mediation centres in six cities - Warsaw, Katowice, Lublin, Poznan, Bialystok and Cracow. The project would be financially supported by the European Union. The arbitration and mediation centres would be responsible for popularizing ADR in a non-legislative manner, training of mediators, organizing meetings with entrepreneurs and also promotional meetings and training programs, conducting mediation in such a manner as to lend credibility to the message that mediation pays off, i.e. by showing on vivid examples that it would be an advantageous tool for managing disputes.

The Minister also referred to the barriers hindering the popularization of mediation. He said that apart from legal barriers, which the Ministry attempted to remedy, the following were found as the most important: lack of awareness among entrepreneurs and mental barriers in society. The Minister emphasized

necessity to change attitude towards alternative dispute resolution methods. In his opinion some attorney at law should change the way of resolving the legal dispute and instead of litigation, they should encourage their clients to the alternative dispute resolution method. The Ministry also undertook the difficult task of changing the mentality of people running businesses. He was convinced that public economic law might prove to be another area well suited for ADR. Among others, the introduction of mediation in fiscal relations between the authority and the taxpayer has recently been proposed.

Minister Mariusz Haładyj noted that he was not expecting any spectacular overnight results, but he believed that the sum of the actions undertaken by the Ministries, non-governmental organizations and universities might cause the value of mediation and arbitration in resolving disputes to increase steadily. The minister would like to see as much extra-judicial mediation as possible, but he claimed that the role of judges is crucial in the first period. In his opinion the judge, who has been talking about mediation in a positive manner as regards the case, which already reached the court, enjoys an exceptionally high level of message credibility. The Minister also mentioned the National Moot Court Competition - Commercial Arbitration, organized this year by ELSA, as well as the so-called „mine of consent" - a court hall in Katowice, which is a place of mediation. He pointed out that these types of initiatives had huge significance and it was very important to initiate more similar actions in the further.

Ist PANEL

The protection of foreign investments in Poland and the European Union - will the wind of change blowing from Brussels influences on the current system of protection of mutual investments (BITS)?

Kamil Zawicki, attorney at law (Partner, Kubas Kos Gałkowski law officee), Błażej Błasikiewicz (General Manager, EFILA- European Federation of Investment Law and Arbitration in Brussels), Marcin Asłanowicz, PhD, legal counsel (Partner, Baker & McKenzie law office), Paweł Kuglarz, legal counsel (Partner, Wolf Theiss law office), Krzysztof Wierzbowski, attorney at law (Managing Partner, Wierzbowski Eversheds law office).

Kamil Zawicki, attorney at law, Substantive supervisor of the Summit

The moderator of the panel was **Kamil Zawicki, attorney at law** (Partner, Kubas Kos Gałkowski law office, Chairman of the Dispute Resolution Section of the Allerhand Institute, Member of the ADR Public Council at the Ministry of Justice) and the panellists were **Błażej Błasikiewicz** (General Manager, EFILA- European Federation of Investment Law and Arbitration in Brussels), **Marcin Asłanowicz, PhD, legal counsel** (Partner, Baker & McKenzie law office), **Paweł Kuglarz, legal counsel** (Partner, Wolf Theiss law office) and

Błażej Błasikiewicz

Krzysztof Wierzbowski, attorney at law (Managing Partner, Wierzbowski Eversheds law office).

In their speeches, the panellists referred to the proposed changes in the scope of investment dispute resolution mechanisms and the entire system of protection of investments within the EU. They agreed about the fact that the further of the system seemed to be uncertain, the current events performed significant role and the long – term effects of these action would be known in the further.

Błażej Błasikiewicz relied on the basis of the Comprehensive Economic and Trade Agreement between EU and Canada (CETA) generally characterized this "wind blowing from Brussels". In his opinion, the wind is rather a dangerous typhoon, which could impoverish the current system of protection of the investors rights. He suspected the aim of the Commission was not any simplification the problem, but rather the aggravation of conducting disputes concerning intra-EU investments by the investors.

He drought attention that until 2009, EU Member States had the exclusive right to conclude investment treaties, and the Union was competent on the field of economic treaties, but after entering into force of the Treaty of Lisbon the situation has changed. Then the Union acquired competence also with respect to foreign investment. As the 28 EU countries signed a total of nearly half of the existing BITs (Bilateral Investment Treaties) - more than 1,400 out of 3,236 on a global scale - including both investment intra-EU treaties and investment treaties with third countries have been introduced, the newly acquired competence of the EU proved to be a problem. Since 2009, a discussion has been held between the EU Member States and the Commission on what needed to be done with the existing treaties. In 2012, transitional arrangements for investment relations with third countries have been introduced (Regulation 1215/2012), but the issues related to intra-EU BITs remain unregulated.

After drawing a historical background Błażej Błasikiewicz took a searching look at CETA negotiated by the Commission, the basic of which standards would most likely remain unchanged also for TTIP (*Transatlantic Trade and Investment Partnership*). He said that the definition of the investment in CETA required that the investment was to be of a certain length of time, although this length was not specified in the CETA text. As the speaker noticed the definition of an investor required a significant economic activity on the territory of the host country, which was introduced in order to avoid disputes or use of investment arbitration by so- called "shell companies". The provision *fair & equal treatment* in CETA was not as wide as in the old BITs. The Commission made use of examples here. Another novelty in CETA was a method of determining the applicable law and the admissibility of interpretation of specific provisions of CETA

by the Commission. The so-called "financial filter" structure was also note-worthy. For Member States, CETA provided the *de facto* possibility of expropriation of an investor, which was threatened by bankruptcy (insolvency).

The speaker said that as for intra-EU treaties, the Commission falsely assumed that the judiciary of the Member States did not differ from one another and remained at the same level in every country. Therefore, the Commission believed that investment treaties between the Member States might be lifted with no negative consequences. Błażej Błasikiewicz raised that the discrepancies between the countries was enormous, e.g. as regards the matter of the facility of enforcing agreements. According to the speaker, the European Commission strived primarily to secure more protection against lawsuits from the investors and ultimately would probably try to invalidate existing BITs by recognizing them as incompliant with the EU regulations by the Court of Justice. In his opinion the case Micula vs Romaniais is a good illustration of the problems resulting from the current lack of regulation without any interpretational doubts on intra-EU investment treaties. The negative activity of the Commission is not building a sense of system stability among potential investors and this is probably one of the most important factors which influenced on decreasing in the number of intra-EU investments.

Marcin Asłanowicz, PhD, legal counsel, in his speech concerned about the Transatlantic Trade and Investment Partnership (TTIP) which was currently being negotiated. The speaker focused on ISDS (investor-state dispute settlement) arbitration clauses in TTIP. From the very beginning

Marcin Asłanowicz, PhD, legal counsel

the speaker admitted that he was a supporter of redirecting cases to arbitration in this procedure. He mentioned at that moment the concerns of the investors - not necessarily justified, but still quite real - among whom there was a general belief that vindication of claims through the courts against the State Treasury had no sense.

The speaker said that a precise answer to the question on the scope of TTIP commercial treaty between the EU and the United States was not possible at this stage, because TTIP still was under a confidential negotiation. He indicated that consultations with pressure groups were also being held, but the circle of people involved was hardly representative. In his opinion one may try to predict what would not be comprised within TTIP. Marcin Asłanowicz indicated the sectors, which was said to be presumably excluded from the treaty was: audio-visual, financial, energy, aviation. The importance of the treaty would depend on the decision which sectors would be included in the final version, as well as whether it would provide ISDS clauses. Such clauses was present in 1,400 bilateral agreements concluded by the EU countries, including 60 agreements signed by Poland and 9 investment agreements concluded by the United States with the

EU. There was no doubt about the fact that the ISDS clauses are of fundamental importance for the global economy. To answer to the question about the importance of arbitration clauses for Poland was vital, whether Poland was a country striving for foreign investment, or an investor country. In his opinion the truth was that Poland still was partly in need of investment, but the direction of the development of our country was that it would become a country which invests abroad more and more - an exporter of capital. Consequently, Poland has been operating in accordance with its long-term interest, being an advocate of an introduction of the ISDS clause to TTIP.

Marcin Asłanowicz assumed that arguments in favour of introducing the ISDS clause to the TTIP treaty was as follows:

- the disputes would be resolved by an independent arbitral tribunal,

- it was an effective obligation to respect the rules once adopted by the countries, which was intended to prevent discrimination against foreign entities (arguments for the fact that it could be a discrimination against domestic entities was being raised, but this is not supported by facts),

- TTIP without the ISDS clause has basically no raison d'ètre,

- resignation of the ISDS clause in TTIP would set a precedent that could undermine the protection of the EU investors in Brazil, India or other emerging markets in the future.

The only argument against the ISDS clause, which the panellist shared, was high costs of arbitration applying international investment.

Marcin Asłanowicz,PhD, said that the role and the value of TTIP for the development of Polish and European economies and for the US economy might be enormous, but this would depend on the final shape of the treaty, especially the issue if the treaty would be included the ISDS clause.

After the speech a discussion began. **Kamil Zawicki, attorney at law** asked the other panellists what position, in their opinion, should Poland took regarding the ISDS clauses in TTIP. He also noted the issue of the lack of transparency of the negotiation of the TTIP Treaty, which had been signalled by Marcin Asłanowicz PhD. He added that the choice of arbitrators was of great importance for the outcome of the dispute and mentioned that it was common belief that the arbitrators was more favourable to investors than the countries. The debaters agreed on the fact that Poland actually hadn't a choice as regarded the ISDS clause in TTIP. **Krzysztof Wierzbowski, attorney at law,** drew attention to the limited capacity of the common courts and to the fact that the judges had to master a very broad subject matter each time (which they do not normally have to deal with), if the arbitration clauses were not adapted to TTIP. He noted that Polish courts was not prepared for this, and this was precisely what ISDS courts specialize in, therefore, despite many weaknesses of arbitration, Poland generally could not afford to forgo the ISDS clauses. On the issue of arbitrators, he pointed out that they did not need to be in favour of investors from the assumption and that a large group of arbitrators more favourable to the countries can probably be found as well. Błażej Błasikiewicz added that in his opinion the same arbitration proceedings would be more transparent in the future

than proceedings before the courts of law. Marcin Asłanowicz PhD admitted that arbitration had many flaws, but there was not better way. He said: "one of the disadvantages of arbitration is that the choice of a super arbiter most often settles the case, because the arbitrators appointed by the parties, in principle, represent the interests of the said party. However, there are some exceptions to this. What is more, in the investment disputes the settlements are often concluded."- Quoting the statistics regarding an arbitration proceedings initiated by the investors against the states, the speaker argued that the state being a party to the arbitration proceedings absolutely was not at a lost position.

Paweł Kuglarz, legal counsel

Paweł Kuglarz, legal counsel disputed on the actual importance of the provisions concerning the protection of investments from the point of view of the investors and the investments - looking at the confusion surrounding the TTIP. The speaker admitted that the provisions could encourage and discourage to invest, and the regulation did not always lead to the allegedly intended objective. He took the view that it was important to draft the regulations well, and in this regard the TTIP gave the cause for concern. According to the speaker, before an investor decided to invest in the country he asked himself three questions:

1. What is the general legal framework for investment?

2. To which law will he be subject, if he invests?

3. How will the possible enforcement of judgments proceed?

Negotiations on the TTIP have actually been suspended for over a year since there have been many votes against that emerged from the consultations. Paweł Kuglarz, legal counsel also opposes the TTIP in such a form, in which it was presented for negotiations. He noted that more than 90% of organizations participating in the negotiations were against the ISDS clause, and in a survey ballots conducted, 4 of the 14 committees of the European Parliament were in favour, 5 were against and 5 abstained. Therefore, proposals to modify the ISDS clause emerged. One of them was to add a clause declaring that the countries may change the legal framework, and the companies have any guarantee that the law would not change. There was also a proposal to create a certified list of arbitrators submitted by the Member States, to which the discussant responded very

Paweł Kuglarz:"the question of the TTIP acceptance (without focusing on the ISDS clause) also remains in doubt: in France 30% of the votes against, 24% in favour, in Germany 43% against, 26% in favour, in the UK 19% against, 19% in favour. A realistic prospect of adopting the TTIP seems to be diminishing."

sceptically. The third idea was to introduce an instance of appeals against a verdict of the court of arbitration – an international commercial court would be established as a second instance.

As Paweł Kuklarz said:"the question of the TTIP acceptance (without focusing on the ISDS clause) also remains in doubt: in France 30% of the votes against, 24% in favour, in Germany 43% against, 26% in favour, in the UK 19% against, 19% in favour. A realistic prospect of adopting the TTIP seems to be diminishing." The speaker even wondered whether there wouldn't be protests against the TTIP similar to those that were against ACTA. In Poland, two mythical arguments concerning TTIP was reportedly being evoked:

- TTIP would protect us from aggression from Russia,

- TTIP favours large economies.

Paweł Kuglarz considered the first argument as an absurd, but he agreed with the second debating point and he said that in fact Poland would not be the biggest beneficiary of the implementation of the TTIP, i.e. Poland would benefit on a smaller scale than Germany, Sweden or the United Kingdom." According to the speaker to the speaker significant argument for the TTIP was that entry into the force of these act would enable Poland to break free from its existing commitments.

The speaker also quoted the consequences of the functioning of the agreement signed with Korea. He said: "the implications are positive - the increase in EU exports to Korea amounts to over 30%. As for the cost of the proceedings - 2/3 of them are received by large corporations, and these are usually staggering sums. From the perspective of small and medium-sized companies, an arbitration clause raises many doubts. Although arbitration affects the development of the professionalism of judges and plenipotentiaries, but in fact the entire issue does not apply to a great group of subjects, since only a few entities use this method of dispute resolution."

At the end of the speech Paweł Kuglarz said that probably no one would sign the TTIP without an arbitration clause. He admitted that an alternative would be a modification of the clause in such a manner that would be acceptable for all, but the political reality was as follows, and if the main actors of the EU would not be able to reach a consensus in their own countries, then the TTIP would not be signed, e.g. if, in Germany, the SPD would not be for the TTIP, then the Germans would not be in favour of the TTIP. This was the reason why it was so difficult to predict the fate of the TTIP.

Krzysztof Wierzbowski, attorney at law

Krzysztof Wierzbowski, attorney at law, dedicated his lecture to the issue of judgments in the BITs cases in the context of EU regulations on public aid. To show the problem more clearly he focused on the Micula et al. vs. Romania case, which was treated by the European Commission in the controversial way. His presentation

was another voice full of doubt about the future of intra-EU investments.

At the beginning of his speech he said: "investment treaties are bilateral international agreements, which are supposed to encourage the investors from one country to invest in an another country by providing mechanisms of protection against the damage, which they might incur as a result of actions or omissions by the host country. Typical security measures are the FET records - fair and equal treatment. BITs also often include arbitration clauses. The common market in the EU can cause the problems with the investment treaties due to the fact that such acts could lead to inequalities between investors from countries, which are covered by BITs and other investors, who also invest in the host country. The situation is particularly visible when the contracts are not concluded in a fully transparent and competitive manner. The differentiated treatment of investors can lead to the discrimination some of them. The amount of BIT cases in the ICSID (International Centre for Settlement of Investment Disputes) has been continuously increasing since the 1990s. There is lots of ISDS cases every year. A serious problem arises in connection with the existence of EU regulations concerning public aid. The granted aid by a Member State from the public resources, which lead to unsettle of competition or has a negative impact on the common market constitutes prohibited public aid The exclusive jurisdiction of the European Commission on matters concerning public aid (Article 108 TFEU, the Treaty on the Functioning of the European Union) means that the investor can experience an unpleasant surprise when, for example, the host country will be obligated to limit the promised support as a result of the Commission's decision. The European Commission has been very active as amicus curiae in the ISDS disputes that have emerged on this background."

The speaker presented the details of famous case Micula et al. vs. Romania as an example for the active stance and intransigence of the European Commission. The BIT concluded between Romania and Sweden before the entry of Romania into the EU has caused great confusion just as Romania became a Member State of the EU. The Swedish investor has suffered a damage as a result of the withdrawal of the support by Romania and brought the case to ICSID. A payment of USD 250 million was awarded for the benefit of the investor. Romania executed the sentence partially by deducting of tax debts. However, the Commission issued an interesting decision, which under pending a decision as to the nature of the public aid provided by Romania, i.e. whether it was compatible with the common market or not, Romania was prohibited from exercising ICSID judgment. After subsequently establishing that the aid was selective and inconsistent with the common market, the Commission imposed an obligation to recover the money paid by the country. The question was whether the Commission was able to block the execution of the ICSID judgment and how it relates to international agreements such as the ICSID Convention, the New York Convention or to the investment treaty concluded between Sweden and Romania. The Commission argued that the privilege granted in a selective manner cannot be protected and EU law should have taken precedence over other regulations in this regard. The moment of assessment by the Commission was

the moment of delivering the judgment by ICSID, therefore, the fact that BIT was signed before the entry of Romania into the EU was not relevant (moreover, the investor had been aware that Romania was preparing for accession, so he should have taken this issue into consideration when he decided to invest) - this was the opinion of the Commission. Of course the case was controversial. An interesting fact was that one of the plaintiff filed motion in the court in the United States for granting the ICSID judgment an enforcement clause. If this manoeuvre succeeds, Romania would be forced to pay since e.g. some of its assets located in the United States might be seized. One thing was certain - the Commission would take all available measures to prevent the enforcement of the ICSID judgment which, as it was believed by the EU Commission, violates the fundaments of the EU. That was why it was worth to follow this case.

Marcin Zawicki, attorney at law, noticed that a dispute about the primacy of one of the two legal systems was currently being held - of the EU law and of public international law. In his opinion the dispute had a practical dimension and the chosen direction would be of crucial importance. Elżbieta Buczkowska of the Attorney General of the State Treasury during the open discussion with the audience asked how the issue of the primacy of EU law over other jurisdictions in the light of TTIP and other agreements with third countries concluded by the EU would look and whether the further fate of the Micula vs. Romania case would have a decisive importance in this issue. She also drew attention to the fact that arbitration procedure was very expensive for the State Treasury, even when it ends with a victory – the reimbursement of the cost was not always possible. Elżbieta Buczkowska said that in case of litigation, which are conducted transparently and involved sensitive sectors of the economy, the cost became higher as a result of necessity to protection of classified information. Krzysztof Wierzbowski, attorney at law did not expect a decrease of trial costs. In the Micula vs. Romania case, which lasted for several years, the costs have exceeded EUR 30 million, but were lifted between the parties. "After Lisbon" the Commission was a party of the concluded investment agreements, but in the case of disputes, the Member States would also bear the costs of coordinating the cases that concerned them - the Member States would need to have their representatives as well as the Commission. Błażej Błasikiewicz emphasized that one had to strive to improve the current system, because it was the common interest of the countries and the investors. Marcin Asłanowicz, PhD, pointed out that the defines of one's interests cost and the State Treasury had to also bear these costs, as they was borne by participants of economic relations. He mentioned that contrary to what could be read in the books, the advantage of arbitration was not definitely inexpensive. Unfortunately, the costs was high and they could not be avoided. Paweł Kuglarz, legal counsel mentioned that one of the conditions that would be put forward by the SPD fraction before agreeing to the ISDS clause in the TTIP might be determining a fixed amount of litigation costs in advance (e.g. a set amount of fees for plenipotentiaries and arbitrators).

II PANEL

The EU ADR Directive and the Polish case - the importance of the implemented changes for the development of the current system of mediation and amicable settlement of civil and consumer disputes.

Moderator: Cezary Rogula, attorney at law, (Jagiellonian University, University of Antwerp, MCAiM from PKPP Lewiatan)

Panellists: Paweł Zagaj, Head of the Department of Consumer Policy in the Department of Consumer Interest Protection of the OCCP, Karolina Mania, PhD, (Jagiellonian University), Tomasz Cyrol, PhD, attorney at law, (Centre for Alternative Dispute Resolution at the Jagiellonian University), Piotr Gałązka, attorney at law, Secretary of the Court of Arbitration at the Polish Bank Association.

The first panellist to speak was **Paweł Zagaj**, Head of the Department of Consumer Policy in the Department of Consumer Interest Protection of the OCCP, whose presentation focused on extrajudicial solving of consumer disputes, and on placing the mentioned implementation in the Polish system. At the beginning, Mr. Zagaj pointed to the use of the expression "dispute resolution" and not "settlement of disputes". He said that his matter was due to the fact that "resolving" was not limited to certain forms, it had a much broader nature and, therefore, this distinction was not indifferent. The presentation showed the creation of the system introduced by the Directive and on the way of functioning of ADR entities in the Member States. The project of global ODR (Online Dispute Resolution) which at the beginning - at the level of the United Nations – was only designed for e-commerce disputes between entrepreneurs, latter the project also covered consumer issues. However, there appeared a problem, which concerned the connection of the solutions proposed by the United Nations with the solutions that were represented by the EU.

> Paweł Zagaj: "we should use the expression "dispute resolution" instead of "settlement of disputes".

Paweł Zagaj, OCCP

The panellist came back to the directive and indicated that it provided a great flexibility in the case of entities, which might be of concern, that is why with its implementation there were different possibilities taken into consideration: from those extreme, based on the reliance on the ADR entities created by business organizations and consumer entities, to the solutions on the other side, which provided solely the reliance on public entities. Finally, a mixed variant was adapted which combines both of these systems. In the opinion of the speaker it would be best if the system was based on non-state entities, where entrepreneurs feel the need to take such

measures themselves. It was indicated that there was number of issues which required to be profoundly reanalyzed in order to achieve the desired objective which was an efficient functioning system of mediation and arbitration. Above all, the system had to meet requirements concerning independence that was specific for solutions such as mediation and arbitration, and it was required to provide for the costs of the availability of the system and the costs of the information obligation. Mr. Paweł Zagaj indicated that first of all, "our task is to promote the system."

Paweł Zagaj: "our task is to promote the system"

Paweł Zagaj indicated that very important was the fact that the directive provided for both mediation and arbitration proceedings, as well as the conciliation that would the parties to find a solution of their problems. The introduction of an obligation of replying to the complaint was a novelty - so far there were only rudimentary sectored regulations in this matter. Now the general obligation was introduced and sanctioned. Another obligation, which has been introduced by the project was the obligation of providing the information arising from the ADR Directive and the ODR Regulation, which obligates the entrepreneurs to inform about the possibility of conducting such proceedings and its entities. In this case there has been a sanction which in some way forced the entrepreneur to such activity - the sanction for failure of providing the information in a negative response to the complaint. If an entrepreneur does not agree with a claim raised by the consumer, then the entrepreneur should provide information in his response whether he agrees or not to participate in mediation proceedings in accordance with the directive. If he does not provide such information, it results in the adoption of the presumption of consent in participating in such proceedings.

Karolina Mania, PhD

The next speech belong to the panellist **Karolina Mania, PhD** (Jagiellonian University), whose commented on the legislative changes on the field of ways of alternative dispute resolution in civil and consumer cases in Poland. She pointed to the fact that the level of changes concerned not only consumer disputes, because at the same time a project of the Ministry of Economy was dealing with alternative dispute resolution methods also in a broader scope was being formed. She said "the work on improving the Polish ADR system is carried out on two planes, resulting in two bills. The Act prepared by the OCCP applies only to the consumer disputes, which can be both domestic and cross-border. The second act is, however, prepared by the Ministry of Economy and completes all the requirements of the Directive of 2008 in the field of mediation in civil and commercial matters. Although both of these bills are being prepared separately, together they will provide a holistic

way of regarding alternative dispute resolution methods."

> "The Act prepared by the Office of Competition and Consumer Protection is based on the ADR Directive and the ODR Regulation. The ADR Directive requires Member States to modify their specific procedure"

As she noted "the Act prepared by the Office of Competition and Consumer Protection is based on the ADR Directive and the ODR Regulation. The ADR Directive requires Member States to modify their specific procedure". According to the speaker, the most crucial amendment concerned the provisions of the Code of Civil Procedure. The Directive required Member States to develop a comprehensive legal market which has no loopholes in the system of alternative consumer dispute resolution methods - the Member States, assuming the obligation, autonomously decided to what shape of system to choose . In Poland, as has been previously noted, we have a mixed system based on the Trade Inspection, which includes permanent courts of arbitration and ADR entities of sectored nature. The model of the future, which will take place after the implementation of this Act, shall change the centre of gravity, i.e. the Trade Inspection is complementary, and because the directive requires all sectors to have ADR institutions, therefore within the statutory range all the entities will be formed along with public administration. Karolina Mania, PhD, repeatedly stressed that the most important element of the project was the changes of the Code of Civil Procedure, both in mediation and arbitration. It also should have been noted that the scope of the Act prepared by the Ministry of Economy applies to commercial disputes and the matter of civil disputes. As the regulations are to be of a universal nature, it will also cover consumer disputes.

As the most important changes on the field of mediation proceedings we may qualify the fact that mediation proceedings will be possible to perform over the entire proceedings and will not be limited to one group. With regard to the obligation of information, they mainly concern: the plaintiff's obligation to inform if there was an attempt of extra-judicial procedures before filing a lawsuit, the duty to inform the parties by the court on alternative dispute resolution methods, the possibility of the court to order arrangement briefing in this regard, and the obligation of the mediator to make a declaration of impartiality. A final great step forward is the creation of the profession of the court mediator and its legal regulation. In terms of the changes concerning arbitration one should notice the diminishing of the instance, a postulate raised since 2005, which will now be implemented.

The next speaker was **Tomasz Cyrol, PhD, attorney at law**, (Centre for Alternative Dispute Resolution at the Jagiellonian University), who started his speech with a rather controversial remark: "Consumer protection is hopeless and pointless" It was result because of is artificial. The problem was that the division between consumers and entrepreneurs is artificial in itself. Since often it was difficult to determine whether a person at a given moment appears as a consumer or perhaps as an entrepreneur. Tomasz Cyrol, PhD proposes a model of an average consumer, because

the current model leaded to malpractice. Tomasz Cyrol, PhD in his sceptical opinion pointed to the very low rate of the cases submitted for mediation proceedings. The question was asked why mediation in Poland was not working. Consumers often do not believe that someone can help them, whereas entrepreneurs have a permanent legal assistance, a larger cash budget at their disposal and therefore are not afraid of litigation, whilst bearing in mind that the situation of the consumer is just the opposite, i.e. for fear of a protracted dispute he would probably withdraw his claims. The conclusion was that entrepreneurs had no interest in using ADR.

Tomasz Cyrol, PhD, attorney at law

Tomasz Cyrol, PhD expressed his approval for the draft act by the Office of Competition and Consumer Protection, but at the same time he expressed concern about its function. "What is the recipe for this? First, there is a need to educate people. They should see that it is better to come to an agreement than to fight with each other. Moreover, the entrepreneurs should not be forced to anything; instead they should be instructed that the client is their treasure, because without clients the entrepreneurs do not have anyone to conduct their business for. Please note that in addition to the fact that we have to make reasonable and

Tomasz Cyrol: "People should see that it is better to come to an agreement than to fight with each other"

good law, we have to think about the social mentality, about our characters. Therefore, such institutions as the OCCP should start a long-term campaign that will not only show the entrepreneurs that is in their interest to respect the customers, but also demonstrate the consumers that they also need to respect the entrepreneur as a person who provides them with certain services.

The next panellist to take the floor was **Piotr Gałązka, attorney at law**, Secretary of the Court of Arbitration at the Polish Bank Association, who presented the dispute resolution in the banking sector. He addressed the significant fact that the Consumer Bank Arbitration being an ADR institution met most of the requirements of the ADR Directive, particularly in terms of autonomy, and made a very good example of a functioning institution for resolving disputes. He indicated that the Court of Arbitration at the Polish Bank Association dealt with disputes between the banks and the consumers who was clients of the bank.

Piotr Gałązka, attorney at law

The procedure begun only at the request of the consumers; it could not be initiated by the entrepreneur. As regards to the cost, the speaker referred to the postulate of the OCCP concerning free proceedings, but in his opinion the procedure should not have applied to the case of consumer bank arbitration. If there would be possibility to free directing such cases for examination, proceedings would not work properly, because of the great number of cases.

It is worth to mention that if as result of the proceedings before the Court of Arbitration at the Polish Bank Association it turns out that the consumer lost the case, he does not bear any additional costs on this account, as opposed to the situation in which the bank is on the losing side. Regarding the already lifted postulate of the information obligation, it is the prior informative proceeding that is the condition of filing request for the performance of such a procedure. As regards the enforcement, the bank is obliged to comply with the judgment, but the consumer is not bound by it and may refer the matter to the court. Piotr Gałązka, attorney at law, noted the significance of the need to distinguish the arbitration court of a court arbitrator which institutions was often equated with each other.

Cezary Rogula, attorney at law

The next speaker was moderator **Cezary Rogula, attorney at law** (Jagiellonian University, University of Antwerp, MCAiM from PKPP Lewiatan). The aim of the lecture was to show how ADR operates on the example of Belgium in fact, where the directive has already been implemented. The construction of the Belgian ADR system with its accompanying procedures was widely discussed. The Belgian system provides both voluntary mediation and judicial mediation, and also between entrepreneurs, as well as in consumer disputes. The main body operating in the field of alternative dispute resolution methods in Belgium is the Federal Commission for Mediation, which regulates the profession of a mediator and keeps an updated list of entitled mediators. The Act implementing the directive established a Consumer Mediation Centre - a new public institution with legal personality, whose principal organ is the Commission. Cezary Rogula, attorney at law, recalled an interesting fact concerning the procedure which was that the Centre might issue a recommendation for the company as to how to resolve the dispute. As regards the cost, the proceedings are completely free of charge.

After the presentations the all the speakers started to discuss. The first question concerned whether ADR, in particular mediation, would catch on in Poland and whether the upcoming amendment of the regulations would change the perception of mediation. This question was answered by Karolina Mania, PhD, who stated that the changes which would enter into force within the provisions of the Code of Civil Procedure would help to support the development of both mediation and arbitration. She said: "We must do everything possible to promote alternative dispute

resolution methods and do not retreat in the discussion whether they are required in the system - because they are required". Marta Kiszowara, District Judge in Bialystok drew attention to the fact that the present Belgian model seemed to be better than the Polish model, at least when it came to the issue of the imposed rigor introduced in Poland (e.g. at a negative response to a complaint), rather than the principle of full voluntariness as it is in Belgium. According to Marta Kiszowara, District Judge, the imposition of anything was not a good direction. It would be better to promote mediation clauses in the agreements. Paweł Zagaj expressed his opinion in the issue, and he observed that the consumers were inclined to agree to dispute resolution method, but the entrepreneurs still were not convinced. "Consequently, during the legislate, it was agreed to not insert any obligation in order not to discourage the parties, as the result the parties are able to make an unfettered decision which instruments they want to use. The entrepreneurs are more willing to enter into mediation than into arbitral proceeding because of the concerns about the solutions that it can involve. The question of whether the change on the grounds of alternative dispute resolution methods is indeed possible in Poland appeared in the discussion again. There was raised an argument about the Polish mentality and lack of social awareness. The opinion that a change is needed for the approach of Polish society to mediation, hence the need to inform and educate on the possibility of using alternative dispute resolution methods, and on the benefits they bring was common among the commentators."

III PANEL

Are we really protected from legislative and decision-making lawlessness of public authorities? A moment of reflection on the effectiveness of the provisions of Article 417 et seq. of the Civil Code from the perspective of experience and in light of planned recent amendments.

Moderator: Andrzej Kubas, Professor of Jagiellonian University, (Partner in law office Kubas Kos Gałkowski)

Debaters: Monika Gładoch, PhD, legal counsel an organization of employers in Poland – "The Confederation of Polish Employers"), Jerzy Modrzejewski, PhD, legal counsel (University of Warsaw, Partner, Modrzejewski & Partners law office), Paweł Lewandowski, PhD, legal counsel, (Domański Zakrzewski Palinka law office), Mikołaj Wild, legal counsel, (Office of the Attorney-General of the State Treasury).

The third panel was an attempt to discuss the experiences of entrepreneurs and the attorneys who represent them about as to the effectiveness of the protection against illegal actions of public authorities - at the stage of administrative proceedings (taxation, customs, expropriation and other), and in proceedings for damages. The background for the discussion were the planned legislative changes, such as the new draft on economic activity prepared by the Ministry of Economy or the amendments to the Tax Code Act.

Professor UJ Andrzej Kubas, PhD, as the moderator, took the floor as the first speaker, who colourfully presented the historical backdrop of the currently adopted solutions. He spoke of how the legislative power attempted to tackle the lawlessness of activities performed by the public authority bodies in the past, and outlined the path the Polish legislation and judicial practice (particularly the Supreme Court) in terms of attributing the premises of liability of state authorities.

Professor UJ Andrzej Kubas, PhD

Subsequently, **Monika Gładoch, PhD, legal counsel** (an organization of employers in Poland – "The Confederation of Polish Employers") shared her views on subjects close to Polish entrepreneurs, commencing her speech with a statement "the problem in Poland is not to start a company, but to sustain it", due to the actions of the state authority bodies. According to Monika Gładoch, PhD the biggest problem was the negligence, and long-lasting uncertainty of the tax payer in the scope of the decision making processes of the state administration. The Administrative Procedure Code did not set out clear deadlines which leaded to multiple abuses. Another problem lies in the possibility to alter decisions, chiefly by the tax office or the

Monika Gładoch, PhD, legal counsel

Jerzy Modrzejewski, PhD, legal counsel

Polish Social Insurance Institution, since it suddenly emerged that what once was not considered as a tax, suddenly became one. Monika Gładoch, PhD mentioned also that people who visited her, they was often helpless and they asked how they could defend against such situations. The observation of current experiences, unfortunately, leaded to a rather pessimistic conclusion that the polish provide clerk with too much freedom of action. Another problematic issue stood in the causality of lack of decision making, since this type of causality is difficult to prove. The fact of drawn out court proceedings along with the frequency of situations whereby the authority might change its decision even after a few years did not contribute to building trust to the law. Monika Gładoch, PhD, provided examples from her own experience that brought about many disappointments. "I would never believe such events could occur in a state of law" - she concluded her speech.

Another important issue was brought up by the **Jerzy Modrzejewski, PhD, legal counsel**, (University of Warsaw, Partner, Modrzejewski and the Partners, law office), who made a reference to Article 77.1 of the Constitution: "Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law." - the question was whether this constitutional rule was in force to, in comparison with the regulations discussed. As it turned out the regulations did not fulfil their purpose. Once again, the regulations of the Administrative Procedure Code were quoted and the fact that they do not give the right to enforce lengthiness. A citizen was faced with a variety of limitations, difficulties in the securing compensation and the occurrence of damage was difficult to prove. Jerzy Modrzejewski, PhD noticed that sufficient causal link raises a lot of issues, because , as it was mentioned earlier, was difficult to prove. Additionally, there are issues like the questions of time, costs of proceedings, the burden of proof - which make seeking compensation exceptionally difficult. Jerzy Modrzejewski, PhD also pinpointed that the consequence of a situation in which the regulations fail to fulfil their compensational function was that they cannot perform their preventive function, resulting in further abuses by the state authority bodies.

Pawel Lewandowski, legal counsel drew attention to the problem of prejudication and erroneous negligence in the judicial practice and decision making, which was tied to the need to acquire a decision that confirms this legal incongruity. How did it

Paweł Lewandowski, legal counsel

transfer into practice? The only person that might pursue damages due to this type of was a party to the proceedings. Contrary to popular belief, it posed a problem inasmuch as it narrows down the persons eligible for claiming compensation to a certain group - third parties are omitted and was in consequence left without the possibility to receive the compensation payable to them. Pawel Lewandowski, PhD brought up a problem that arises during the process of making the existence of damage plausible, which in the case of institutions that support the acquisition of a prejudication was brought down to the shift of the plausibility to prove the damage. Towards the end, the speaker mentions the liability issue for the violation of the European Union laws - he raised the question of whether it is possible and necessary to acquire a prejudication in this context, and if so, who was supposed to issue such prejudication?

A more positive opinion was presented by **Mikolaj Wild, legal counsel**, Director of the Attorney General of the State Treasury Research and Analysis Department. He began by asking whether the classic liability for damages actually was an appropriate means to secure the citizens. The liability for damages based on civil laws naturally assumed a form of a "tug-of-war" scenario. Was the liability for damages supposed to truly remedy the lacklustre actions of the legislator and lack of professionalism of the clerks? The speaker made a reference to the compensation and preventive functions of the provisions at hand, whereby the compensation function was to render the damaged party in a condition before the event which provoked damage. Conversely, what was meant by the preventive function in this respect? Should we look for it in damages? In the opinion of Mikolaj Wild, the preventive function assumes a misdemeanour outside damages, which was not based in automatic action whereby every ruling that revokes a decision or every statement of incongruity was equivalent to the duty to sustain the liability for damages. The preventive function was aimed at a just fair division of risk and thus cannot be brought down to a situation where every revoking ruling , it was understood per se that the duty to remedy the damage applies.

Therefore, is it important to think how of liability from Article 417 of the Civil Code have worked? Was it based on risk - for every judgment that was eventually deemed as defective? Or an unlawful act? The answers to the above questions were of great significance, since in the first case we are only interested in the result, we did not analyse whether the judge had the possibil-

Mikołaj Wild, legal counsel

ity to act otherwise. Following the speaker, the illegality should have been evaluated through unlawful behaviour, which was what we need to bear in mind so as not to fall into the other extreme when assessing the activities of the state authority bodies.

Furthermore, the speaker quoted a Constitutional Tribunal ruling No. SK77/06 and the intricacies it caused in the legislative process. The systemic rationale defending the current situation state that after the ruling of SK77/06 an infinite number of cases could be generated through just one proceeding, and these would have to be investigated by the Supreme Court - this model was bound to fail. That was why the legislative power correctly identified the problem to lie not in whether we need to acquire a prejudication, but whether it would not be better to transfer the duty to examine in casu to courts, in the scope of the ruling not being in compliance with the law. The Supreme Court control has been secured, since the cassation against sentence in the cases of damage caused by a defective court ruling applies regardless of the value of the object of litigation. In the final part of the performance, the speaker touched upon the issue of liability for non-final decisions, providing the tax decisions as an example. He spoke of the "self-healing of the system."

After the last speech, a vigorous discussion broke out. Professor Andrzej Kubas spoke of a differential theory of claim. He mentioned the issues with interpretations of the existing provisions. He drew the attention to the problem of unimplemented laws of the European Union. **Maciej Jóźwiak, attorney at law** (Wierzbowski Eversheds law firm) broached the issue of the role of the court and suggested that in current reality, considering unclear regulations, the court

"The court should take on more responsibility for its rulings instead of running from a categorical rulings over certain circumstances"

"should take on more responsibility for its rulings", instead of running from "a categorical rulings over certain circumstances". He also asked about the preventive function of compensation, following Mikolaj Wild. He disagreed with a claim that pursuing damages does not perform this function. He mentioned the institution of "punitive damages" which did not exist in the Polish law, as well as the civil liability of a clerk, which they could insure themselves against. Mikolaj Wild disagreed with this concept completely and insisted that this idea was totally foreign to him. The fallacy of the activities of a clerk was pathological, and neither the National Treasury or the damaged party should have been able to use it. It was without merit to assume a priori that such situation would occur. The rule of "whoever profits, takes the risk" was not applicable to a clerk, since they did not run their own business activity. Insurance imposed on the clerks would provide benefits for the insurance sector but would not secure the citizens from defects, they would only protect the clerks - hence, they are not the answer to this problem. The aim of insurance was to protect from insolvency, but the state has the money, it was fully solvent. The introduction of the suggested changes could trigger a situation whereby the clerk fears to issue a decision, which could spur similar problems to issuing lacklustre decisions. Professor Andrzej Kubas mentioned about the possibility to file recourse claims. Pawel Lewandowski, PhD stated that the implementation of

personal liability could block the system - the liability of the state was sufficient enough. Monika Gładoch, PhD admitted that having heard the presentations, she was now disillusioned - the entrepreneurs would have to announce a form of an uprising, as without it the situation would remain unchanged. Unissued decisions, decision changes and an utter uncertainty of the law are, according to Mikolaj Wild, a systemic pathology, but Monika Gładoch, PhD claimed that as of today, the pathology stands immune to the entrepreneurs - the attempt to fight it could be compared to "a fistfight against tanks". The idea of insuring the clerks, however, seemed to spark interest in her. **Kamil Zawicki, attorney at law**, enquired of the *de lege ferenda* stipulations. He made a reference to the subject of the first panel, i.e. the protection of foreign investments. He remarked that a foreign investor would always avoid the domestic court system. Professor Andrzej Kubas said he was against BITs, because it was an institution that leaded to an unequal legal situation and discriminates against Polish investors - they cannot enjoy the privileges promised to foreign investors. BITs should remain a relic of the past. He emphasised that "our legal system is not bad - it is stable, and the provisions set forth in the system, once can 'squeeze out a lot'. What we do need is a courageous judicial decisions". Jerzy Modrzejewski, PhD spoke of the need for building a clerk's ethos. The state should not feel impune and one needs to seek the preventive function also in other areas. It does not have to be a liability for damages of the clerks, but there are plenty of other institutions - sanctions, not necessarily financial, that would fulfil this function. Professor Andrzej Kubas and Jerzy Modrzejewski, PhD both spoke of abolishing the predication. Mikolaj Wild added that as far as the regulations go, Poland is very avant-garde - we have some solutions in our country that would be considered a luxury in others, e.g. liability for legislative negligence. The discussion made by this remark continued for a long time after the official closing of the Congress.

Professor Andrzej Kubas: „our legal system is not bad - it is stable, and the provisions set forth in the system, once can 'squeeze out a lot'. What we do need is a courageous judicial decisions"

HONORARY PATRONS



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