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The role of the international public law and „soft law" in the area of alternative dispute resolution between public entities and private entrepreneurs in Poland

In recent years can be observed in Poland the development of extrajudicial (alternative) dispute resolution (ADR[1]) with the participation of entrepreneurs. In the Polish system apart from mediation and the judiciary regulations in Code of Civil Procedure there are no other regulatory mechanisms disseminating alternative civil dispute resolution between public entities and private entrepreneurs.

Accordingly, it is worth seeking additional regulatory mechanisms that could be used in the promotion of ADR between public entities and private entrepreneurs. In the authors evaluation the essence of inspiration in this scope can be a source of public international law or regulations of so-called soft law, which may be used by national authorities in the legislative and non-legislative actions.

For a special attention deserve international treaties, corporate governance rules and public declarations about the use of ADR which oblige in countries of the Western Europe and United States. This article is a contribution to the further legal analysis which will be continued in future publications.

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[1] ADR – alternative dispute resolutions.

ADR is an institution of private dispute resolution and in this sense is an alternative to the state of justice. In this sense, the term ADR includes arbitration institution. Other authors as the main criterion for distinguishing accept voluntary and nieadjudykacyjny nature of ADR; in this context, the term ADR is clearly narrower concept and does not include arbitration.

Operation of public entities in the use of ADR with private entities should be based on detailed valid law regulations as well as Polish and international standards of a so-called soft law. Promoting the use of ADR by public entities is extremely difficult due o the overall skepticism about the use of ADR by enterpreneurs which in this case is reinforced with so-called clerical opportunism. Therefore, activity of public entities in this aspect should be based on detailed guidelines and directed to specific recipients.

Accordingly, there is a need to precise subjective scope of disputes between public entities and private entrepreneurs which are:

1. Public entities.
   "Public entities" may include institution described in the act on computerization of entities performing public tasks from 17th February 2005[2]. According to the art. 2 par. 1 of that act category of public entities include: government administration, national control and law protection, courts, organizational units of the prosecution, as well as local government units, budgetary units, government budgetary establishments, appropriated funds, independent public health care, Social Security Institution, Agricultural Social Insurance Fund, National Health Fund, state or local government legal entities established under separate laws.
2. Private entrepreneurs.
   Entrepreneurs are private entities as defined in Article. 43 [1] of the *Civil Code* (further C.C.) which states that: entrepreneur is a natural person, legal person and an organizational unit referred to in article. 33 [1] § 1 C.C. conducting on its own business or professional activity.
3. Public corporations.
   "Public corporations" are so-called special companies referred to in article. 611 of the *Code of Commercial Companies* (further C.C.C.) which indicates in point 10) on the companies resulting from the commercialization and privatization of state enterprises (companies with the participation of the National Treasury) and in point 11 on other commercial companies regulated in separate laws (companies with the participation of local government units).

[2] DzU 2005, nr 64, poz. 565.

In the event of disputes between public entities and private entrepreneurs who are resident abroad the sources of public international law and the regulations of a soft law should be primarily used. Referring to the treaties of international public law, bilateral international agreements, in particular: Bilateral Investments Treaties – BITs should be used directly or assimilated into Polish law. The Convention of 18.03.1965 r. On the Settlement of Investment Disputes between Countries and Citizens of Other Countries (Washington Convention) came into force on 10.14.1966. To 2009 the Convention was ratified by 148 countries[3]. Poland does not belong to the Washington Convention as the only EU Member State. The Convention established the International Centre for Settlement of Investment Disputes (ICSID). Parties concerned by the Convention (*ratione personae* requirement) may subject certain types of dispute (*ratione materiae* equirement) to ICSID arbitration, which also provides services for the conciliation. The rules for the settlement of disputes are contained in the Convention itself and in the ICSID Regulations. ICSID jurisdiction covers all disputes, which result directly from the investments referred to in the Convention, if the parties in writing agreed to submit the dispute to ICSID[4].

On the other hand, soft law is a collection of quasi-legal rules regulating relations between the partners. Not having the character of generally applicable law derive its binding power from the will of the parties and generally vested their freedom in shaping the content of the legal relationship. The content of soft law is often convergent with the legislation contained in the hard law but also take into account the customs and practices of developed and applicable in the various fields of economic cooperation[5].

Soft-law Solutions constitute the guidelines for legislative activity individual countries. Under the term of soft-law the rules of quasi-legal are understanded, so not such legal norms that were created by the will of the national legislature or supranational and apply essentially (*ex lege*) but one which, although like any legal norm are generic, abstract and act for the future and are the result of standard-setting by specific national or supranational institutions but still they

[3] Ł. Nowak, *ICSID – Międzynarodowe Centrum Rozstrzygania Sporów Inwestycyjnych*, „Biuletyn Arbitrażowy" 2006, nr 8, p. 28–40; M. Świątkowski, *Investment Treaty Arbitration*, [in:] *Arbitration in Poland*, Warszawa 2011, p. 159–170; E. Zagórska-Prątnicka, *Dwustronne umowy o ochronie inwestycji*, „Biuletyn Arbitrażowy" 2009, nr 9, p. 55–69.

[4] P. Nazaruk, *Zapis na sąd polubowny dotyczący sporów ze stosunku spółki akcyjnej*, Gdańsk 2013, p. 123–125.

[5] D. Gałkowski, *Soft law w umowach handlowych z zagranicznymi partnerami*, „Prawo w Firmie" 2008, nr 1, p. 42.

act as binding only the will of the recipients, the will of the parties of the legal relationship (*lex contractus*)[6].

On the other hand, as a soft-law regulation should be indicated the model law on International Commercial Arbitration (hereinafter referred to as the Model Law UNCITRAL or ModelU)[7] which as the source of a soft law constituted and constitutes a model arbitration law for many national regulations, including part fifth of the Code of Civil Law.

Another soft law regulation is UNCITRAL Arbitration Rules which was developed and established by UNCITRAL. There are currently two versions of the UNCITRAL Arbitration Rules that is version of 1976 and of 2010. UNCITRAL Arbitration Rules (Regulations) must be classified as soft law so right, which unlike standard hard law (Thus, for example International conventions, national laws) is not valid under the law (ex lege) but they apply only to the will of the parties of legal relationship and in this case the will of the parties to the dispute – future or already pending. In other words will of the parties to the dispute seeking to resolve this dispute by Arbitration Rules UNCITRAL should be expressed in the text of the arbitration clause (in case of future dispute) whether in the form of a separate agreement referred to as a compromise.

Another issue is, however, a problem of the need to be made in writing of the expression of the unanimous will of the parties as well as the scope of the will of the parties to the dispute in consultation of the content of the amendments to the Regulations - in case of its adoption - for the use of their particular dispute. In art. 1 of the Rules of UNCITRAL is presented its scope. Regulations regulates the selection of the panel of the court of arbitration ad hoc (part II), then the conduct of the arbitration proceedings in front of the arbitral tribunal ad hoc (part III) and finally judgment by the court (part IV), not counting the regulation of general issues eg., such as: the scope of the Regulations or the principles of notifications and the calculation of time limits, etc. (part I) – common to all of these above issues. Uncitral regulations should be seen as a pattern which undertakes the regulation of new issues in the field of arbitration law and sets the new standards of international importance despite it is only the rules for ad hoc arbitration courts, and not the new model law[8].

[6] A. Szumański, *Arbitraż handlowy*, „System Prawa Handlowego" 2015, t. 8, p. 62.

[7] *General Assembly Resolution* 61/33, 4 December 2006, United Nations Publications 2008, Sales No. E.08.V4.

[8] A. Szumański, *Możliwy wpływ regulaminu arbitrażowego Uncitral w wersji z roku 2010 na polskie prawo arbitrażowe (zagadnienia wybrane)*, [in:] *Księga pamiątkowa dla T. Erecińskiego*, t. II, red. J. Gutowski, K. Weitz, Warszawa 2012, p. 1896; P. Nazaruk, op. cit., p. 124;

Furthermore, there should be used a fully effective formula of "good practices" and even codes of conduct, and other non-legal norms. Business needs – apart from the written laws and strict regulation (the nature of which well expresses the black-letter law) – soft standards, arising from trading practices, known as lex mercatoria or soft law. In the authors opinion corporate governance in companies and corporate social responsibility, should be the main inspiration for the implementation of the concept of "Public Liabilities to use ADR." In addition, the *Database Best Practices of local government units* should be take into account. This is joint venture of Association of Polish Cities, Union of Rural Communes of the Republic of Poland and the Polish Association of Counties. It collects descriptions of good and best practices in the field of improving the management of public services and the development of local government units, as well as local governments cooperation (including more than 380 standardized and consistent with the adopted methodology, descriptions of practices)[9].

The first statement of this kind, which has gained more recognition, was developed in the eighties by the International Institute for Conflict Prevention & Resolution (CPR). It was defined as the Corporate Policy Statement on Alternatives to Litigation (*Corporate Policy Statement on Alternatives to Judicial Proceedings*). CPR Declaration was signed by more than 4,000 entrepreneurs and 1,500 law firms. The essence of the Declaration is a (non-binding in the sense of legal consequences) "obligation" to consider ADR before filing a lawsuit in court. Since some time CPR promotes new declaration entitled *21st Century Corporate ADR Pledge*. In addition, there should be pointed out: Dispute Resolution Commitment in the UK and La Charte de la Mediation interentreprises in France. On the other hand, in Poland there is a declaration on the use of mediation and other alternative dispute resolution (ADR), developed in 2013 by the Social Council. Alternative Methods of Conflict Resolution and Disputes at the Ministry of Justice has not received approval from its recipients. This public declaration: "I know and I use" due to the lack of effective mechanisms for encouraging or forcing their use did not contribute to the social promotion of mediation and ADR more widely. In addition, the declaration does

E. Gmurzyńska, *Rola prawników w alternatywnych metodach rozwiązywania sporów*, Warszawa 2014, p. 273 & al.; *Rola miękkiego prawa (soft law) w funkcjonowaniu organizacji gospodarczych w kontekście zasad ładu korporacyjnego (corporate governance) w polskich spółkach kapitałowych*, [in:] *Problemy zarządzania we współczesnych organizacjach. Teoria i praktyka*, red. W. Polak, T. Noch, Gdańsk 2008 r.

[9] Ibidem, p. 153–156.

not include public entities – stationes fisci Treasury or other state legal persons[10].

The conclusion

The conclusion is that the role of public international law and the so-called soft law in the development of non-judicial resolution of disputes between public entities and private entrepreneurs is very high and constantly underestimated in Poland. Accordingly the issues indicated in this article should be deeply analyzed and appropriate legislative and non-legislative solutions should be developed.

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Rola miękkiego prawa (soft law) w funkcjonowaniu organizacji gospodarczych w kontekście zasad ładu korporacyjnego (corporate governance) w polskich spółkach kapitałowych, [in:] *Problemy zarządzania we współczesnych organizacjach. Teoria i praktyka*, red. W. Polak, T. Noch, Gdańsk 2008.

Szumański A., *Arbitraż handlowy*, „System Prawa Handlowego" 2015, t. 8.

[10] R. Morek, *Deklaracja ADR – po polsku*, http://www.rozwiązywaniesporów.pl/2013/06/19/deklaracja-adr-po-polsku/ (dostęp: 18.12.2015); P. Nazaruk, *Wpływ zasad corporate governance na kompetencje rad nadzorczych spółek akcyjnych w krajach Unii Europejskiej*, [in:] *Polskie prawo prywatne w dobie przemian. Księga Jubileuszowa dedykowana Profesorowi Jerzemu Młynarczykowi*, ed. W. Adamczak, Gdańsk 2005, p. 159–167.

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Summary

The article presents the sources of public international law and so-called soft law which can be used in legislative and non-legislative actions concerning the regulations of non-judicial dispute resolution between public entities and private entrepreneurs in Poland.

The analysis includes international agreements and treaties, corporate governance and public declarations on the use of ADR as those in Western Europe and the United States.

In the opinion of the author these regulations should be applied as far as possible used in the Polish practice of ADR.

Keywords: international public law, soft law, mediation, investment arbitration