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Multi-step arbitration clauses: the application and impact of their infringement on arbitration proceedings in Poland on the example of FIDIC Contract Conditions

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I. Introduction

The dynamics of the practice of economic turnover and the increase in market competitiveness inevitably entail disputes. The intensely changing conditions of trade cooperation translates into the need to create conflict management instruments that would be sufficiently effective and adapted to the complexity of specific legal relationships. In practice, apart from the improvement of two competing adjudication systems: common and arbitration courts, the requirement of effective trade is the need to popularize and institutionalize alternative dispute resolution (ADR). This tendency is reflected in the multi-step dispute resolution clauses[1] that pass the

[1] This term is also referred to interchangeably as: multi-tier/multi-tiered alternative dispute resolution/arbitration clauses; MDR-clauses. See, for instance, S. Chapman, *Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith*, Journal of International Arbitration, vol. 27, issue 1, pp. 89 et seq.; D. Campbell [in:] Comparative Law Yearbook of International Business, vol. 28, Kluwer Law International 2006, p. 136; A. Jolles, *Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement, Arbitration*, Arbitration 2006, vol. 72 (4), pp. 329 et seq. Literature also uses an identical concept in terms of mean-

test in the practice of international trade. They are contractual provisions under which the parties undertake to submit the dispute to the chosen ADR method before bringing an action in a common court or in arbitration. As integrated contractual dispute resolution systems, before the agreement is terminated, they first provide for consensual methods. In this sense, they constitute a kind of safeguard mechanism aimed at ensuring the prompt resolution of potential conflicts of interest arising under the contract before they turn into a dispute that will have to be submitted to an adjudication body for final resolution.

The article provides an overview of not only the issues of the functioning and enforceability of MDR-clauses, but also the impact of their infringement on arbitration proceedings in Poland. Enforceability will be understood as the result of the raising an allegation of a breach by a party of a clause which provides for the dispute to be submitted to an appropriate ADR procedure prior to bringing a claim to court or by arbitration. Such clauses have so far been popularized in international trade. The author focuses on the FIDIC Contracts Conditions (hereinafter: FIDIC CC), which in recent years has aroused particular interest in their effectiveness in the Polish practice of implementing large-scale infrastructural investments.

It is argued in the literature[2] that the above-mentioned contractual templates are characterized by the use of an effective project management model, comprehensive and balanced allocation of risks related to the implementation of infrastructure investments, and a characteristic multi-step method of resolving disputes arising as part of the construction works procedure. The last of the indicated features is the most essential and, at the same time, the most controversial legal institution provided for under the FIDIC CC. The contractual provisions on the dispute resolution model are based on a specific cascade (multi-step), which ultimately ends with referring the case to arbitration based on the arbitration clause provided for in clause[3]

ing – escalation clauses – cf. Ch. Bühring-Uhle et al., *Arbitration and mediation in international business*, Kluwer Law International 2006, p. 201; K.P. Berger, *Rechtsprobleme von Eskalationsklauseln*, [in:] P. Schlosser, B. Bachmann, *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedgerichtsbarkeit. Festschrift für Peter Schlosser zum 70. Geburstag*, Tübingen 2005, pp. 19 et. seq. K.P. Berger also calls MDR clauses "ADR-first clauses" to emphasize that they have gained popularity with increasing interest in ADR methods.

2 See, for instance, N.G. Bunni, *The FIDIC Forms of Contract*, Wiley-Blackwell, Oxford 2005, pp. 3–16; G. Wujek, *Arbitraż handlowy*, [in:] A. Szumański (ed.), *System prawa handlowego*, vol. 8, Warszawa 2010, pp. 770–772; M. Topór, *Wielostopniowa klauzula arbitrażowa jako sposób rozstrzygania sporów w sektorze budowlanym w świetle warunków kontraktowych FIDIC*, [in:] A. Garnuszek (ed.) et al., *Quo Vadis, Arbitraż?*, Warszawa 2013, pp. 578–579.

3 The clauses in this paper should be understood as clauses and sub-clauses with appropriate numbers, included in *Conditions of Contract for Construction; for building and engineering Works designer by employer General Conditions; Guidance for preparation of particular condi-*

20.6 of the FIDIC CC. Thus, in the practice of applying the law, a severe problem arose from the legal consequences of the non-compliance with the pre-arbitration steps of the FIDIC arbitration clause. In the author's opinion, this problem is not a solely academic dispute since its solution has a bearing on the level of rights and obligations of the parties to the disputed relationship and frequently affects the success of the entire investment.

The article also demonstrates extreme interpretive models regarding the enforceability of MDR-clauses. They tend to consider these pre-arbitration procedures as prerequisites for the possibility of pursuing a claim through arbitration (compulsory exhaustion of pre-arbitration procedures) or as purely optional additional methods of supporting litigation. The author supports the thesis that the result of non-compliance with any of the steps is the ineffectiveness of the arbitration clause contained in the contract. This means that a party to a conflict is unable to effectively raise an objection, which directly results from the nature of the FIDIC arbitration clause. Due to the lack of regulations in this respect in the Polish legislation on arbitration, it seems justified to make contribution to the discussion on the search for an answer to the question posed in the title. Namely, if and how can multi-step arbitration clauses function without obstacles and significant risks in the Polish legal system?

II. Dispute resolution model within the FIDIC CC – introductory issues

FIDIC CC constitute a comprehensive set of contract templates for contracts used in technology industries. The special recognition within this collection is enjoyed by the FIDIC CC Red Book. In practice, it functions as a uniform and standardized model of the contract concluded between the investing party and the Contractor[4] for the project. This standard was developed by the International Federation of Consulting Engineers[5] in the field of investment and construction projects. The universal and transnational character of the model quickly contributed to its widespread use in several infrastructure projects throughout Europe. The best

tions forms of letter of tender, contract Agreement and dispute adjudication agreement, International Federation of Consulting Engineers, First Edition 1999.

[4] For the transparency of the paper, participants in the construction process – the Employer, the Contractor and the Engineer – are in capital letters.

[5] This organization brings together an association of consultant engineers – one representative association from each of several dozen countries, creating a platform for the exchange of views and experiences for consultant engineers from around the world. The Polish Consulting Engineers and Experts Association (Stowarzyszenie Inżynierów Doradców i Rzeczoznawców, hereinafter: SIDiR) is a member of FIDIC.

illustrating example of this are the activities of the European Commission, which explicitly recommended using FIDIC CC in a contractual partnership with Contractors for construction tasks in projects financed by the European Union (in Poland in the pre-accession period they were mandatory for programs financed from the Cohesion Fund), the World Bank, the European Bank for Reconstruction and Development or the Asian Development Bank.

FIDIC CC includes a complicated dispute resolution procedure, leading to the rapid elimination of legal disputes arising during the construction investment. The first thing that draws attention to the conclusion of this type of contract is the fact that the parties to the construction contract using these forms can freely arrange their contractual relationship in determining the content of the arbitration agreement in accordance with the principle of freedom of contract (art. 353^1 of the Civil Code[6]). The case-law of the Polish Supreme Court[7] comes with confirmation, according to which the binding of the FIDIC parties is autonomous, not heteronomous. Individual provisions of the contractual template are incorporated by reference; hence their interpretation is carried out in accordance with the rules for the interpretation of declarations of will, which is set out in art. 56 and art. 65 § 1 and 2 of the Civil Code. The resulting freedom of the parties to a works contract is mainly reflected in the creation of a multi-step arbitration clause, as arbitration itself, as a means of resolving legal disputes, results from the free will of the parties to the contract.

In addition to indicating the dominant feature of the structure of these contract templates, which makes its use attractive, it is worth mentioning other factors raised in the literature:[8]

- comprehensive and balanced allocation of risks related to the implementation of infrastructure investments;
- application especially in economically developed countries;
- significant simplification in the field of investment management by professionalized entities through provisions allowing to increase the predictability and transparency of the investment implementation,

6 The Civil Code of 23 April 1964 (J.L. of 2020 item 1740).

7 See, for instance, Judgment of the Supreme Court of 19/03/2015 (IV CSK 443/14), LEX No. 1656288; Judgment of the Supreme Court of 06/02/2015 (II CSK 327/14), LEX No. 1652381.

8 Cf. N.G. Bunni, *op. cit.*, pp. 3–16; S.M. Kröll, *Arbitration*, [w:] J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Chaltenham 2012, p. 88; L. Bing, R.L.K. Tiong, *Risk management model for international construction joint ventures*, Journal of Construction Engineering and Management 1999, no. 5, pp. 377–384. From Polish literature see, for instance, M. Topór, *Problem skutków prawnych niezrealizowania przedarbitrażowych etapów wielostopniowej klauzuli arbitrażowej FIDIC*, Przegląd Prawa Handlowego 2016, pp. 17–26.

- application most often when implementing the so-called cross-border investments, i.e. large-scale investments where the Employer and the Contractor are based in different countries;
- the state has the most considerable freedom and possibilities in carrying out substantial infrastructure projects.

The indicated features become more significant when we refer them to the Polish public procurement regime, where a formalized public procurement procedure precedes the investment process for the selection of the Engineer and the Contractor in the FIDIC contract formula. In this document, although it is only a draft of a construction contract and requires appropriate adaptation of solutions to a specific investment, it takes into account the regulations *iuris cogentis* of the specific country. Thus, when the Employer is a public entity, there must be modifications considering the national public procurement law regime. All this contributes to the attractiveness of the FIDIC CC, supporting the thesis that their presence in Polish practice of economic turnover is a positive and desirable phenomenon.

III. The concept and construction of the FIDIC arbitration clause

The multi-step dispute resolution clause, also called an "escalation clause", is a doctrinal concept.[9] Its increase in popularity on an international scale is due to a lively interest in the use of ADR methods. The most fundamental essence of these clauses is precisely specified by R. Morek:

> This kind of agreements create two or more steps, integrated contractual dispute resolution systems. Typically, they provide that in the event of a dispute regarding a given contractual relationship, the parties will proceed to resolve it, using first of all consensual methods, such as negotiations, mediation or various proceedings involving experts, e.g. Dispute Review Expert (DRE), Dispute Adjudication Board (DAB) or Dispute Review Board (DRB). Only if they do not lead to the resolution of the dispute does the adjudication method apply, leading to binding and final settlement of the dispute by a third party, i.e. not being a party to it. This method is most often arbitration; therefore, the preceding steps are referred to as pre-arbitration proceeding.[10]

[9] J.H. Carter, *Report – Issues Arising from Integrated Dispute Resolution Clauses*, [in:] A.J. van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond*, International Council for Commercial Arbitration Congress series 2005, no. 12, p. 447.

[10] R. Morek, *Wielostopniowe klauzule rozwiązywania sporów w praktyce kontraktowej i orzecznictwie wybranych systemów prawa kontynentalnego*, [in:] J. Okolski (ed.), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, Warszawa 2010, pp. 51–52.

To relate the above interpretation to the realities of using FIDIC CC, first look at their structure. There is no doubt that the process of implementing a construction investment, which entails considerable financial outlays, increases the risk of disputed issues. These, in turn, directly affect the relationship between the parties and, therefore, the success of the investment. FIDIC CC, in response to this situation, offers a comprehensive mechanism to prevent arising disputes, and when they occur – to eliminate them. By involving both professionals and impartial people in this process, there is a real chance to obtain a quick and optimized resolution. The construction of FIDIC CC boils down to a specific internal procedure that the parties to the dispute should follow to pursue their claims before they decide on arbitration.

Model clause 20 of the FIDIC CC provides for six steps of the dispute resolution procedure:

1. submitting a claim to the Contract Engineer,
2. submitting the dispute in writing to the Dispute Adjudication Board's (hereinafter: DAB) decision,
3. notification of rejection of the Dispute Adjudication Board's decision,
4. attempting to resolve the dispute amicably,
5. the expiry of the 56-day time limit since the notification of the rejection of the Dispute Adjudication Board's decision,
6. submission of an action to an arbitral tribunal.

All the indicated steps form the FIDIC arbitration clause, which ends by referring the case to arbitration proceedings based on the arbitration clause provided for in clause 20.6 of the FIDIC CC. There is a considerable amount of controversy surrounding this. It should be noted that this model remains justified by the specifics of resolving construction disputes, whose basic premise remains the desire to ensure the uninterrupted conduct of the construction process. This is the first step to avoid escalating the dispute at its earliest stage. It leaves no doubt that any escalating conflict, which finally reaches an arbitration resolution, carries a real risk of the interruption of work and the possibility of not completing the project on time. The essence of applying the clauses is most aptly summarized by R. Morek:

> The basic justification for the increasing use of escalation clauses is the assumption that conflict resolution should, as far as possible, begin at the lowest level of institutionalization and formalization, and the transition to a higher level should generally only be made when the possibilities of resolving the conflict at a lower level have been exhausted.[11]

[11] Cf. R. Morek, *op. cit.*, p. 52.

The submission to arbitration is undoubtedly a type of *inter partes* agreement. Noteworthy is the presence of two restrictions on the freedom of contract under art. 353[1] of the Civil Code, which accompany the formation of the provisions of the arbitration agreement. First of all, it is a restriction resulting from legal provisions, i.e. provisions determining arbitrability (art. 1157 of the Code of Civil Procedure[12]), and thus they indicate disputes that may be submitted to arbitration in the event of a subscription, which at the same time excludes the jurisdiction of the court (art. 1161 § 1 of the Code of Civil Procedure). Secondly, the most significant limitation for these considerations is the nature of the legal relationship itself. The characteristic of an arbitration clause is primarily due to its function, i.e. to bring about a binding settlement of a specific dispute arising between the parties, however, only if the dispute falls within the subject and object scope of the arbitration clause and the limits of the capacity for arbitration. This makes it possible to put forward a thesis on the nature of a multi-step arbitration clause, which foreign authors also debate.[13]

The article demonstrates the interpretive models regarding the meaning of clauses providing for specific steps of pre-arbitration claim analysis. Namely, recognition of these pre-arbitration procedures as prerequisites for the possibility of pursuing a claim by arbitration (mandatory exhaustion of pre-arbitration procedures) or only as additional optional method to support the dispute.

IV. The enforceability of ADR clauses in arbitration

The assessment of the functioning of the multi-tier dispute resolution mechanism in arbitration[14] must be made by taking into account the specificities for arbitration,

[12] The Code of Civil Procedure of 17 November 1964 (J.L. of 2020, item 1575, 1578).

[13] S. Chapman, *op. cit.*, pp. 89 et seq.; A. Jolles, *op. cit.*, pp. 329–331; C. Boog, *How to Deal with Multi-tiered Dispute Resolution Clauses – Note – 6 June 2007 – Swiss Federal Supreme Court*, ASA Bulletin 2008, vol. 26, issue 1, p. 103; A.J. Bělohlávek, *Arbitration agreement. MDR Clauses and Relation thereof to Nature of Jurisdictional Decisions on the Break of Legal Cultures*, [in:] J. Okolski (ed.), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, Warszawa 2010, pp. 420–421.

[14] Reaching for national regulations and deriving from them the effects of violating the obligation to carry out pre-arbitration ADR procedures is a common practice when discussing multi-step dispute resolution clauses in the context of international commercial arbitration. See: G. Born, *International Commercial Arbitration*, Second Edition, vol. 11, 2014, p. 842 et seq.; S. Leonard, K. Dharmananda, *Peace Talks before War: The Enforcement of Clauses for Dispute Resolution Before Arbitration*, Journal of International Arbitration 2006, vol. 23, issue 4, p. 301; M. Pryles, *Multi-Tiered Dispute Resolution Clauses*, Journal of International Arbitration 2001, vol. 18, issue 2, p. 159.

i.e. the adjudication system subject to control by the common judiciary, the application of which depends on the parties' agreement. The vague procedural regime of arbitration clauses that the integration of the ADR mechanism and its enforceability raises several problem issues. A kind of legislative deadlock is due to the fact that the arbitral tribunal should apply the relevant national law to assess the effects of a breach of the obligation to carry out the settlement procedure set out in the contract. At this point, it should be recalled that the standard for the enforcement of ADR clauses has not been harmonized in any international regulation. Unlike arbitration clauses, ADR clauses are not covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards from 1958. The effects of mediation contracts are also not specified in the Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.[15] Consequently, the existence of MDR-clauses in the context of international arbitration is not associated with the option of using the instruments to ensure a uniform standard of conduct, and the parties must rely on the appropriate regulations of national legal regimes.

The article focuses on the practical dimension of this problem, which is the legal consequences of non-compliance with the FIDIC arbitration clause. The growing link in legal controversy is a situation in which one of the parties to a dispute submits a case to arbitration bypassing any of the earlier steps, e.g. without mediation or before obtaining a DAB decision. As indicated earlier, the search for a remedy has repeatedly referred to the concept of nature of the multi-step dispute resolution clause. The practice has exposed the divergence of positions in jurisdictions around the world.

4.1. The practice of foreign legal systems

In Switzerland, the basic differences are visible in the jurisprudence and literature in classifying the legal nature of a mediation contract that generates the obligation of pre-arbitration proceedings. Voices are divided into understanding it as a substantive law contract involving liability for damages[16] or a procedural contract that

[15] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Official Journal L 136, 24/05/2008, p. 0003–0008.

[16] M. Liatowitsch, J. Menz [in:] E. Geisinger, N. Voser, *International Arbitration in Switzerland. A Handbook for Practitioners*, Wolters Kluwer, 2013, p. 327; D. Brown-Berset, *La Médiation commerciale: le Géant s'éveille*, Revue de Droit Suisse 2002, pp. 364–368, 372; F.M.R. Walther, *E-Confidence in E-Commerce durch Alternative Dispute Resolution*, Aktuelle Juristische Praxis 2001, no. 7, p. 762; From the jurisprudence, cf. 15 März 1999 – Kassationsgericht Zürich (2002) 20, ASA Bulletin, p. 373.

results in procedural sanctions, e.g. the rejection or dismissal of a claim[17]. Importantly, among the positions supporting the compulsory nature of pre-arbitration procedures (otherwise discontinuing arbitration proceedings) is perceived as too strict by most representatives of the Swiss literature.[18] In turn, until 2010, the literature signaled with concern the extreme tendency of almost marginalizing this type of proceedings manifested by the courts of the Russian Federation.[19]

On the other side of the equation, the German and French systems are consistently in favor of the effects of closing or limiting the exercise of the right to raise a plea. In Germany, this position was reinforced based on two decisions of the Federal Supreme Court of November 23, 1983[20], and then of November 18, 1988.[21] Pre-trial mediation agreements were considered effective if the party invoking the mediation clause was able to demonstrate a legitimate interest. Thus, German law honors *pactum de non petendo*. Similarly, in France, the judgment of Cour de Cassation in the case of *Poire v. Tripier* of February 14, 2003[22] is considered a landmark. In this judgment, in the face of previously existing discrepancies in the case-law, it confirmed that the parties may reserve the inadmissibility of an action on the basis of the obligation to conduct pre-trial mediation in contracts. Currently, the decree no. 2015–282 of March 11, 2015[23] issued in this spirit is of key importance. It requires under sections 18 and 19 that, save in case of a documented emergency, every summons and complaint filed in civil or commercial matters state the action taken towards an amicable resolution of the dispute.

The essential review of individual positions taken from foreign legal systems shows the problem and the scale of risk in cross-border trade related to the non-uniform approach to the nature and legal relationships of such agreements in different legal systems. The most crucial conclusion is that the imprudent use of multi-tier dispute resolution models in the form of imprecise contractual provisions may complicate the case and be used by the defendant to effectively slow down proceedings. Consequently, this brings about the paralysis of investment implementation, which

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17 C. Boog, *op. cit.*, 108; A. Jolles, *op. cit.*, p. 336; N. Voser, *Sanktion bei Nichterfüllung einer Schlichtungsklausel: Kantonsgerichte Ü Kassationsge- richt Zürich, Entscheid vom 15. März 1999*, ASA Bulletin 2002, p. 376; J.-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, s. 13. From the jurisprudence, cf. Bundesgericht, I. Zivilabteilung, 17 August 1995, ASA Bulletin, p. 673.

18 A. Jolles, *op.cit.*, p. 329.

19 Cf. R. Morek, *op. cit.*, pp. 64–66.

20 Bundesgerichtshof (VIII ZR 197/82).

21 Bundesgerichtshof (III ZR 29/87).

22 Rev. Arbitrage 2003, p. 403.

23 Décret n° 2015-282 du 11 mars 2015 relatif à la simplification de la procédure civile à la communication électronique et à la résolution amiable des différends.

may be particularly acute in construction contracts for high-cost infrastructure facilities. Although because the proposed solutions from foreign legal systems often do not comply with Polish regulatory standards, unfortunately the Polish doctrine and judicature has also not developed a uniform position.

4.2. The first interpretation model – optionality of pre-arbitration procedures

Considerations in this regard should begin with a reflection on art. 1161^1 of the Code of Civil Procedure:

> Submission of a dispute to an arbitral tribunal requires an agreement of the parties, in which the subject of the dispute or legal relationship should be indicated, from which the dispute arose or may arise (arbitration clause).

The provision defines the scope of the arbitration court's jurisdiction to hear specific disputes but does not prejudge the consequences of the parties adopting a model based on multi-step clauses. The literal wording of the provision does not explain the issue of obligatory *versus* the optionality of pre-arbitration procedures. It does not directly determine whether the parties are free to determine them. However, it treats that the sole element of the arbitration clause is to indicate the subject of the dispute or legal relationship from which the dispute arose or may arise. This gives grounds for claiming that the provision has a one-line dimension, and the contractual freedom of the parties suffers from limitations in this respect. The art. 1161^1 of the Code of Civil Procedure does not provide for such permission, which means that it cannot be presumed. Otherwise, this could lead to the creation of a temporary limitation on legal action without explicit statutory authorization. In this perspective, if provided for by the parties, any pre-arbitration procedures should be considered optional, which means treating them as an additional factor that can contribute to the termination of the disputed relationship, without eliminating the possibility of initiating a dispute on a formal level.

Thus, this position argues for the lack of impact of the FIDIC arbitration clause on the conduct of both judicial and arbitration proceedings, according to the arbitration clause contained in FIDIC CC. Interestingly, this position was supported by the Court of Appeal in Gdansk, which ruled that the content of FIDIC CC does not support the claim that a party to preserve claims should exhaust all possibilities of establishing DAB.[24] According to this position, since the FIDIC arbitration clause provides only for the possibility of establishing a DAB, however, the parties

[24] Judgment of the Court of Appeal in Gdańsk of 28.11.2013 (I ACa 550/13), LEX No. 1422342.

did not provide for sanctions for the ineffectiveness of the arbitration clause (DAB decisions do not bind the arbitrators), this should be interpreted as follows – proceedings before the DAB are not obligatory. They do not affect the possibility of raising a plea to arbitration. Sceptics of the obligatory features of pre-arbitration procedures such as H. Mularczyk and H. Drynkom argue, as the main argument, that one cannot rely on Anglo-Saxon assumptions granting the primacy of contractual arrangements over the right to court, hence the provisions of clause 20 of the FIDIC CC should be an optional way, which is to enable the parties to resolve the dispute efficiently.[25]

4.3. The second interpretation model – obligatory pre-arbitration procedures

When considering the option of the mandatory dimension of pre-arbitration procedures, one should intuitively cite the premises of the certainty of turnover and the actual guarantee of exercising the constitutional right of the individual to court. In this perspective, at first glance, the introduction of any procedures as mandatory would cause a temporary suspension of the possibility of pursuing the claim in court, both before the court and before an arbitration court. One of the functioning positions is the approach according to which the mandatory dimension boils down to adopting the condition of the dependence of the effectiveness of the FIDIC multistage arbitration clause on the exhaustion of the entire FIDIC CC pre-arbitration procedure. According to this position, the effect of the lack of cooperation of one of the parties is the temporary lack of jurisdiction of the arbitral tribunal, and the common court is also inappropriate until the necessary procedures have been exhausted. An excellent example of this relationship is the decision[26] of the Court of Arbitration at the Confederation of Lewiatan in Warsaw in 2009, which rejected the lawsuit after settling its jurisdiction, according to art. 1180 of the Code of Civil Procedure and § 20 of the Rules of the Arbitration Court. The arbitral tribunal believed that if the arbitration clause stipulates that the initiation of arbitration proceedings should take place when obligatory attempts to resolve the dispute by other means have failed, by that time the defendant may form an allegation of temporary inadequacy of the arbitration court. Following this interpretation, the parties include a *pactum de non petendo*[27] under the FIDIC multistage arbitration clause,

[25] K. Mularczyk, H. Drynkorn, *Specyfika rozstrzygania sporów przez Komisję Rozjemczą oraz charakter prawny jej decyzji w świetle dopuszczalności drogi sądowej*, ADR. Arbitraż i Mediacja 2014, no. 2, p. 13.

[26] e-Przegląd Arbitrażowy 2010, no. 1, pp. 28–30.

[27] Following the German model cf. K.P. Berger, *Law and Practice of Escalation Clauses*, Arbitration International 2006, no. 22, pp. 6 et. seq.

committing themselves to not institute arbitration (common court) proceedings until the previous steps of the pre-arbitration procedure have been consumed based on the clause. The right way of thinking is proposed by M. Topór, suggesting:

> Since the clause does not explicitly provide for its expiry (...), there is no return to the jurisdiction of the common court. Even in the event of a lack of arbitration, it is the parties' will to submit the disputes finally and unconditionally to arbitration. In contrast, the non-compliance with the pre-arbitration steps of the dispute resolution means that, as it were, for a given claim, court action is temporarily inadmissible.[28]

This interpretive model is also presented by A. Olszewski, who, in his opinion, believes that the exhaustion of superstitious dispute resolution procedures (specified in FIDIC CC), can be treated as a complement to the substantive premise for successful claim settlement.[29]

In this regard, it is impossible not to refer to the concept represented in Polish legal doctrine. In this matter, M. Jamka and A. Barczewski claim:

> In the 1999 FIDIC CC Red Book version, the DAB was established. It consists of members whose appointment is influenced by both parties to the contract. Before referring a case to arbitration, the parties are required to submit it to the DAB. (...) The problem arose when such a procedure was not used, and the case was not presented to the DAB. Most of the international literature recognizes that the non-exhaustion of such pre-arbitration dispute resolution should result in dismissal of the claim as premature.[30]

It is also worth recalling the words of M. Pochodyła:

> The scope of the arbitration clause is limited to disputes (claims rejected by the opposing party), submitted for DAB resolution, with the decision of which either party disagrees. The exception is clause 20.8, providing for the possibility of direct submission of the dispute to the arbitral tribunal in a situation where the contract giving rise to the conciliation commission has expired or when for another reason it is impossible to transfer the dispute. In other cases, each dispute must undergo a multi-step procedure to reach arbitration.[31]

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28 M. Topór, *op. cit.*, p. 23.

29 A. Olszewski, *Kontraktowe procedury rozwiązywania sporów w umowach o roboty budowlane opartych na wzorcach umownych FIDIC – w świetle prawa polskiego*, Monitor Prawniczy 2010, no. 21, p. 1208.

30 M. Jamka, A. Barczewski, *Arbitraż w sprawach budowlanych – wybrane problemy praktyczne*, [in:] J.B. Gessel-Kalinowska vel Kalisz (ed.), *Arbitraż w Polsce*, Warszawa 2011, pp. 48–49.

31 M. Pochodyła, *Rozwiązywanie sporów budowlanych według nowej czerwonej książki FIDIC*, Biulietyn Arbitrażowy 2008, no. 7, p. 73.

The cited representatives of legal doctrine recognize the obligatory nature of pre-arbitration procedures, based on two methodological assumptions regarding the proceedings before the DAB. Firstly, the authors acknowledge the primacy of the freedom and autonomy of the will of the parties, which should be absolutely honored in the context of arbitration. This allows trading participants to introduce certain modifications to the arbitration clauses. For example, it is preventing the arbitration court proceeding without first meeting certain conditions by the parties, and thus exhausting pre-arbitration procedures. Secondly, the subject nature of the multi-step FIDIC clause was emphasized. This means that FIDIC CC have indicated the necessary steps for a dispute resolution. The sequence and preclusive effect of the implementation deadlines speak for their obligatory nature. Arbitration seems to be advisable as a stage dedicated to disputes that will pass through the so-called a sieve of preceding FIDIC arbitration clauses. The last element – judicial or arbitration proceeding – is reserved utilizing contractual freedom to settle disputes whose resolution has failed at lower pre-arbitration steps in the agreed manner.

The Polish Supreme Court took a legitimate position regarding MDR-clauses based on FIDIC CC, their effectiveness and legal consequences in the context of the mandatory or optional nature of pre-arbitration procedures in a judgment of 19 March 2015, which should be considered as a precedent. The verdict is a breakthrough for practitioners because it sets the rules on which the parties to the contract determine the participation of DAB and its impact on further arbitration. First, as the court emphasizes, FIDIC CC is a standard contract and therefore subject to interpretation under the principles of interpretation of declarations of will. Secondly, as the court pointed out in its ruling:

> Interpretation of clauses 20.2 and 20.3 of the FIDIC CC leads to the conclusion that the appointment of a DAB is obligatory. In particular, if the parties are unable to agree on the appointment of a DAB member, then at the request of one or both parties, the designating unit (here: the President of SIDiR) shall appoint such a member after consultation with both parties. (...) According to clause 20.4 FIDIC CC, "If there is a dispute of any kind between the parties related to or arising from the contract or performance of works (...), either party may submit the dispute to DAB in writing". The use of the word „may" in this clause should be understood only in such a way that pursuing claims is the party's right and not its obligation. However, if a party decides to pursue a claim, then according to clause 20 FIDIC CC it must submit it to DAB.[32]

The above position shows the main conclusions for practitioners in the field of works contracts based on FIDIC CC. As M. Robenek rightly observes, on the one

[32] Judgment of the Supreme Court of 19/03/2015 (IV CSK 443/14), LEX No. 1656288.

hand, it gives the parties a certain margin of discretion as to the contractual formation of the rules for DAB participation. On the other, it sets out the consequences of adopting the FIDIC CC without significant modifications:

> This means that the arbitration process initiated with an unjustified omission of the DAB can be considered fundamentally flawed, and the sentence rendered may be set aside in proceedings on a petition for the reversal of an award of a court of arbitration.[33]

Multi-step safeguard mechanisms based on the cooperation of the parties meet the need for the efficient and effective settlement of the dispute so that it does not paralyze a construction project. The statement that these procedural systems should be seen not as competitive but complementary to arbitration proceedings seems to be eminently reasonable. The exception is clause 20.8 FIDIC CC (Expiry of DAB's Appointment). According to it, if the DAB will not be able to settle the dispute (due to the expiration of the contract or other reason independent of the parties), when the dispute may be referred directly to arbitration under clause 20.6, without the need to obtain a DAB decision and the need to make a settlement attempt. The argument *a contrario* allows us to deduce that, since the FIDIC CC indicates the non-obligatory DAB decision in the exception category, the principle is that it is an obligatory stage. The FIDIC arbitration clause is concluded provided that all pre-arbitration steps of dispute resolution are exhausted.

4.4. The third interpretation model

Finally, the third option, and the most appropriate according to the author, is one which, assuming that the *sine qua non* condition for the effectiveness of the FIDIC arbitration clause exhausts the entire pre-arbitration procedure, supports the effect of the lack of jurisdiction of the arbitration court in the dispute. Although it is not possible to effectively raise the plea for an arbitration clause, the common court is still competent. Unless the parties conclude a new arbitration clause (the so-called compromise), before entering a dispute as to the merits of the case before a common court, and one of them will raise the appropriate plea.[34] The indicated interpretive model is in favor of the relative inadmissibility of court proceedings, which in practice means that a party may choose the method of protecting its rights before an arbitration court or a common court. There should be no doubt that, according to the literal wording of art. 1165 § 1 of the Code of Civil Procedure common court

[33] M. Robenek, *Komisja Rozjemcza w modelu rozstrzygania sporów przewidzianym w Warunkach Kontraktowych FIDIC – organ fakultatywny czy obligatoryjny*, e-Przegląd Arbitrażowy 2015, no. 1–2.

[34] See: M. Topór, *op.cit.*, pp. 23–25.

retains its jurisdiction. Any entity that is not able to exercise its rights with the voluntary cooperation of the obliged entity retains the right to bring the case to court. As R. Kos rightly points out,

> the right to formally initiate civil proceedings to hear a civil case is not part of the content of civil rights, but only a mechanism for their judicial implementation.[35]

It should be emphasized that the arbitration agreement, based on the principle of freedom of contract, should first and foremost apply substantive law, including foreign law. The procedural effects of the arbitration clause are assessed according to the relevant procedural law. This is important when assessing the admissibility of contractual reservations, i.e. conditions and deadlines. It is worth emphasizing that if the parties decided in specific conditions that individual steps are only their right, then the arbitration clause would retain its effectiveness through a specific decision of the parties to use arbitration at optional preliminary levels.

To sum up, it is worth returning to the fundamental issue of the legislator's *ratio legis*. Do the provisions of Book Fifth of the Code of Civil Procedure provide any restriction on the formulation of multi-step arbitration clauses? According to the author, supported by the arguments raised in the above paragraphs, the answer should be in the negative. The principle of the parties' freedom to submit a given dispute to other authorities than common courts remains the primary assumption, and exceptions to this rule have been precisely and exclusively defined by the provisions of the Code of Civil Procedure. The lack of restrictions on the parties' freedom as to the creation of escalation clauses, allows stating *a contrario* that it appears in the full extent. Additionally, it is possible to construct MDR-clauses, in respect of which the arbitration court's power to settle the case will only be updated after the use of earlier steps of the proceeding in the face of the dispute. If such tiers were foreseen (here the pre-arbitration procedures of the FIDIC CC), then they should be considered as mandatory in principle.

V. Conclusions

The multi-step security mechanisms based on the cooperation of the parties meet the need for efficient and effective dispute resolution in such a manner that it does not paralyze the implementation of the construction project. It is justified to say that these procedural systems should be perceived not as competitive but complementary

[35] R. Kos, *O związaniu cesjonariusza zapisem na sąd polubowny – glosa do wyroku SN z dnia 3 września 1998 r.*, I CKN 822/97, Glosa 2013, no. 4.

to arbitration proceedings. However, the unclear procedural regime of arbitration means that the incorporation of the ADR mechanism and its enforceability creates several problematic issues. Something akin to legislative deadlock arises due to the fact that the arbitral tribunal should apply the relevant national law to assess the effects of a breach of the obligation to carry out the settlement procedure set out in the contract. Meanwhile, the standard of enforceability of ADR clauses has not been standardized in any international regulation. As a consequence, the existence of multi-step dispute resolution clauses does not entail for the parties the possibility of using instruments ensuring a uniform standard of conduct, and the parties must rely on the relevant regulations of domestic legal systems. The Swiss, German, French and Russian systems mentioned highlighted the problem and the scale of risk in cross-border trade related to the non-uniform treatment of the nature and legal relationships of such agreements.

The problem of multi-step arbitration clauses and the procedure for settling disputes adopted in FIDIC CC based on practical and jurisprudence is not resolved. In the reality of Polish legislation regarding arbitration (cf. Book Fifth of the Code of Civil Procedure), the issue of MDR-clauses has not been regulated, which generates additional fields of legal risk in their contractual structure. The analysis presented above all highlights the need for the accurate formulation of the content of clauses providing for multi-step dispute resolution mechanisms. Then, it is worth emphasizing that, since the legislator resigned from defining the framework for an arbitration clause concerning its multi-step, the limits of freedom of the parties in this respect are determined by the principle of freedom of contract (cf. art. 353^1 of the Civil Code), and therefore the parties may also introduce certain pre-arbitration stages into their model of settlement litigation steps (clause 20 of the FIDIC CC). The legal assessment of escalation clauses is carried out *ad casum*, each time examining the parties' intentions regarding the arbitration agreement. If the parties to the dispute accept the standard clause template from the FIDIC CC, then they are obliged to implement subsequent pre-arbitration steps under pain of losing the possibility of using arbitration. Non-compliance with the procedure does not reduce the jurisdiction of the common court. The cognition of this court is a rule due to the inability to raise the plea for an arbitration clause effectively. Non-performance or improper performance of an obligation by the parties in the implementation of subsequent steps of the FIDIC escalation clause is the basis for *ex contract* liability. It allows independent claims for damages in this regard.

Differences in the enforceability of ADR clauses can nullify the effect of multi-tier clauses if the contract mechanism is not designed with sufficient precision and there is no doubt as to the parties' intentions to create a state of binding contractual

dispute resolution. This perspective seems to be valid, especially in a cross-border context in which multi-step dispute resolution clauses are widely used. As there is no uniform legal regulation regarding the enforceability of ADR clauses, MDR-clauses in international contracts are exposed to discrepancies resulting from the approach adopted in individual legal systems.

Summary

The article provides an overview of not only the issues of functioning and enforceability of multi-step dispute resolution clauses, but also the impact of their infringement on arbitration proceedings in Polish law. These issues are presented on the example of FIDIC Contracts Conditions, which in recent years has aroused particular interest in their effectiveness in the Polish practice of implementing infrastructural investments. The article demonstrates the possible legal consequences of the non-compliance with pre-arbitration proceedings, presenting the individual interpretive models.

The article also highlights that the differences in the approach to the enforceability of ADR clauses may nullify the effect if the contractual mechanism is not designed in a sufficiently precise manner and does not raise doubts as to the parties' intention. Due to the lack of a uniform legal regulation, also in Poland, multi-tier arbitration clauses in cross-border trade are exposed to discrepancies resulting from the approach adopted in the different legal systems.

Key words: multi-step dispute resolution clauses, Conditions of Contract for Construction FIDIC, alternative dispute resolution, pre-arbitration procedures

Streszczenie
Wielostopniowe klauzule arbitrażowe: zastosowanie i wpływ ich naruszenia na postępowanie arbitrażowe w Polsce na przykładzie Warunków Kontraktowych FIDIC

W artykule omówiono nie tylko problematykę funkcjonowania i egzekwowalności wielostopniowych klauzul rozstrzygania sporów, ale także wpływ ich naruszenia na postępowanie arbitrażowe w prawie polskim. Zagadnienia te zaprezentowano na przykładzie Warunków kontraktowych FIDIC, które wzbudzają w ostatnich latach szczególne zainteresowanie swoją skutecznością w polskiej praktyce realizacji inwestycji infrastrukturalnych na dużą skalę. W artykule poddano rozwadze możliwe skutki prawne niezrealizowania przedarbitrażowych etapów klauzuli eskalacyjnej, przybliżając poszczególne modele interpretacyjne.

W artykule starano się dowieść, że różnice w ujęciu egzekwowalności klauzul ADR mogą zniweczyć skutek wielostopniowych klauzul arbitrażowych, jeśli kontraktowy mechanizm

nie będzie zaprojektowany w sposób dostatecznie precyzyjny i niebudzący wątpliwości co do intencji stron. Ze względu na brak jednolitej regulacji prawnej, także w Polsce, wielostopniowe klauzule rozstrzygania sporów w obrocie transgranicznym narażone są na rozbieżności wynikające z ujęcia poszczególnych systemów prawnych.

Słowa kluczowe: wielostopniowe klauzule rozwiązywania sporów, Warunki kontraktowe FIDIC, alternatywne metody rozwiązywania sporów, procedury przedarbitrażowe