# ACCESS TO JUSTICE IN EASTERN EUROPE

*Supported by Law Faculty, Taras Shevchenko National University of Kyiv*

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# Access to Justice in Eastern Europe

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# ABOUT ISSUE I/2019

Issue 1 (2) of 2019 contains very interesting and insightful research articles from Croatia, Lithuania, Poland, Germany and Ukraine according to the specific area of the Journal scope.

The current reforms in civil justice continue, directing to the best practices in rights' protection and access to justice, as well as alternative disputes resolution, which are a very effective way to find the compromise between parties. Therefore, this Issue is opened by a brilliant essay written by ***Alan Uzelac***, dedicated to the current state of affairs regarding challenges to investor-state arbitration in Europe, in particular, the new policy of the European Commission to move away from arbitration in investor-state disputes under international trade treaties, and the aftermath of the decision of the CJEU in the Achmea case in which the Court found that ISDS clauses in the bilateral investment treaties violate European law.

***Tadeusz Zembrzuski`s*** article is related to the extraordinary complaint in civil proceedings in Poland, which was introduced as a new legal measure allowing rebuttal of final judgments and terminating respective proceedings. The possible consequences connected with the new instrument of procedural law in Poland were summarised by the author.

The most important features of Lithuanian Civil Procedure were examined by Vigita Vėbraitė in her article, in particular, the electronification of civil justice, the preparatory stage of civil proceedings as well as the group action as one of examples of unsuccessful reforms of Lithuanian civil justice.

Access to justice in small claims as a novel of Ukrainian procedural reform was assessed by ***Nazar Panych,*** in particular, the purpose and principles of small claims procedure, problems of claim's value definition, consideration and representation of the parties etc. The comparative analysis presented in this research gives us grounds for reflexions concerning the successfulness of judiciary and procedural reform in Ukraine.

Unfortunately, different approaches to the Ukrainian law are implemented by the courts when it comes to the nullity of transactions. In ***Iryna Dzera's*** essay the legal nature and grounds of nullity of transactions were analyzed according to the civil legislation of Ukraine and modern civil law doctrine achievements and the correlation between invalid, void and illegal transactions is set.

We are sincerely happy to see the new Editorial Board's Members among us – prof. **Dr. hab. Dobrosława Szumiło – Kulczycka**, Chair of Criminal Procedure Department, Jagiellonian University, **Dr. hab. Tomasz Długosz,** prof. at Public

Economic Law Department, Jagiellonian University, **Dr. hab. Monika Niedźwiedź**, Prof. of European Law Deaprtment, Jagiellonian University, **Prof. Dr. hab. Kinga Flaga – Gieruszyńska**, Head of Civil Procedure Department, Szczecin University, **Dr. hab. Tadeusz Zembrzuski**, Prof. of Civil Procedure Department, Warsaw University, and **Dr. hab. Robert Kulski,** prof. at Civil Procedure Department II, Łódź University.

On behalf of the Editorial and Advisory Boards of the Journal I want to express my gratitude for all the authors and reviewers, who help us within the publishing process. We hope that the contributions will be in demand and useful for a wide audience interested in judiciary and procedural law in Eastern Europe development.

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# WHY EUROPE SHOULD RECONSIDER ITS ANTI-ARBITRATION POLICY IN INVESTMENT DISPUTES

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Summary: 1. Introduction. – 2. Moving away from arbitration and towards 'investment courts' in investor-state disputes. – 3. The Achmea case: a further blow to the popularity and use of arbitration in Europe. – 4. Follow-up: the aftermath of the Achmea case. – 5. Arguments behind the current European anti-arbitration stance. – 6. Are proposed alternatives an adequate reply to the weaknesses of investor-state arbitration? – 7. Conclusion

*This paper addresses the current challenges to investor-state arbitration in Europe. Two parallel developments are outlined: the current change in the EU policy towards arbitration provisions in multilateral and bilateral investment treaties, and the consequences of the Achmea case decided by the Court of Justice of the European Union in March 2018. The author analyses the critical arguments behind the current European anti-arbitration stance and concludes that while some of them (but not all) may have some foundation, a sufficient number of reasons speak against the radical dismantling of the system of international investment arbitration. An analysis of the proposed alternatives shows that they fail to deliver viable solutions for diagnosed problems. In particular, the replacement of ad hoc tribunals by a multilateral investment court (MIC) seems to be a step in the wrong direction. The ISDS has played an important role in the global fostering of international investment by securing a basically fair system of dispute resolution in a very specific field. Its deficiencies are not beyond repair; on the other hand, the alternatives offered suffer from flaws that are the same or much more troubling. The author concludes that the consequences of the 'change of tide' in the approach to investor-state dispute resolution are likely to be detrimental to the very goals of those who advocate the abandoning of investment arbitration.*

*Keywords: investor-state arbitration, European Union, multilateral investment court, ISDS, Achmea case, CJEU, NAFTA, USMCA, TTIP*

## 1. INTRODUCTION

Today, the use of international commercial arbitration as a means of resolving international commercial disputes has reached an unprecedented level. However, while arbitration was progressing from an alternative to an almost standard dispute resolution mechanism for solving complex international disputes, new challenges which may turn the tide started to evolve. In this paper I will briefly present the current state of affairs regarding challenges to investor-state arbitration in Europe. Two topics discussed herein deal with two different but complementary developments: the new policy of the European Commission to move away from arbitration in investor-state disputes under international trade treaties, and the aftermath of the decision of the Court of Justice of the European Union (CJEU) in the Achmea case in which the Court found that investor-state dispute settlement system (ISDS) clauses in bilateral investment treaties violate European law. After an analysis of these developments, I will evaluate criticisms of the ISDS and suggest the reasons why alternative proposals do not meet the desired standards of quality and efficiency. My conclusion is that the current anti-arbitration wave in Europe should be moderated and partly reconsidered to avoid adverse consequences for international dispute settlement and international trade.

## 2. MOVING AWAY FROM ARBITRATION AND TOWARDS 'INVESTMENT COURTS' IN INVESTOR-STATE DISPUTES

The conventional concept of investment arbitration or ISDS is well known, so for the purposes of this paper I will give only a short summary of its main features.[1] Treaties on protection of foreign investments often include a system of dispute resolution which allows that, in case of a dispute between the foreign investor and the state in which the investment was made, a dispute may be submitted to the forum selected by the claimant, who is most often the investor. This form of arbitration is based on the text of the treaty and does not need a pre-existing arbitration agreement between the investor and the state.[2] Standard options that can be selected always involve arbitration under the UNCITRAL Rules, or certain institutional arbitration rules. The most prominent multilateral treaty which provides for ISDS is the ICSID Convention (also referred to as the Washington Convention) of

1 For more on investment arbitration see C McLachlan, L Shore, M Weininger, *International Investment Arbitration. Substantive Principles* (Oxford UP 2007); C Dugan, D Wallace, N Rubins, B Sabahi, *Investor-State Arbitration* (Oxford UP 2008); RD Bishop, J Crawford, W Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer 2005).

2 On the concept of treaty-based arbitration see J Paulsson, 'Arbitration Without Privity' (1995) 10 (2) ICSID Review – Foreign Investment Law Journal 232-257.

1966, ratified globally by 154 countries.[3] The convention established the International Centre for Settlement of Investment Disputes (ICSID) which provides facilities for arbitrations between the foreign investors and the member states of the convention.

A good example of ISDS in multilateral treaties is Chapter 11 of the North American Free Trade Agreement (NAFTA).[4] The agreement has been in existence since 1994 and will continue to be in force until the coming into force of the latest US-Mexico-Canada agreement (USMCA) concluded in 2018.[5] NAFTA Chapter 11 allows investors of one NAFTA party (Canada, the United States or Mexico) to bring claims directly against the government of another NAFTA party before an international arbitral tribunal, excluding thereby jurisdiction of local courts in any of the three countries.[6]

The arbitration-friendly position in NAFTA (which, however, is changing, see below) is typical for the pro-investment climate of the late 1980s and early 1990s, when over 3,000 international instruments, including a number of bilateral investment treaties (BITs), were concluded.[7] All of them, just like NAFTA, allowed for a treaty-based arbitration as 'a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal'.[8] Under investment treaty arbitration provisions, the host governments would automatically give consent to be sued by foreign investors for violation of a number of substantive rights enumerated in such treaties, for instance the prohibition of expropriation or violation of the standard of fair and equitable treatment.

However, after a massive wave of investor claims raised in the late 1990s, the climate changed.[9] As soon as it showed its effectiveness, the 'emerging global

3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, enacted by the International Bank for Reconstruction and Development (the World Bank) in 1965 and entered into force on 14 October 1966. See more in L Reed, J Paulsson, N Blackaby, *Guide to ICSID Arbitration* (Kluwer 2004); C Schreuer, *The ICSID Convention: A Commentary* (Cambridge UP 2009).

4 On NAFTA Arbitration see F Bachand (ed), *Fifteen Years of NAFTA,* Chapter 11: Arbitration (Juris 2011); T Weiler, *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational Publishers 2004). See also <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx> accessed 21 February 2019.

5 Compare materials at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> accessed 21 February 2019.

6 See Arts 1115-1120 of NAFTA. Options for the investor are to submit a claim either under the ICSID Convention (or the Additional Facility Rules of ICSID) or the UNCITRAL Arbitration Rules.

7 Almost half of the total number of these instruments were concluded by EU Member States. See A Henke, 'Report on desirability of the investment arbitration in the context of TTIP negotiations (Wiesbaden ELI SIG Meeting on ISDS, 19-20 February 2016).

8 Art 1115 NAFTA.

9 According to UN-collected data, in 1998 the global number of treaty-based ISDS cases initiated in a year was for the first time (and continually afterwards) more than 10; the largest annual number was 80 in 2015. Up to the end of 2017 there were 855 known ISDS cases. In 2017, 65 new cases were reported; the amount in dispute (according to information from about one-quarter of the cases) ranged from US$15 million to US$1.5 billion. See UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017' (2018) 2 IIA Issues Note p 2 and 4.

regime for investment' elaborated in thousands of international instruments started to face major challenges.[10] The European Union joined the anti-ISDS movement, which was labelled the 'backlash against investment arbitration'.[11] This position was most obviously taken by the European Union in the context of negotiations regarding the EU-US trade agreement, the notorious Transatlantic Trade and Investment Partnership (TTIP), which turned out to be among the most controversial treaty projects on trade ever conceived by either of the two sides of the Atlantic.[12]

One stepping stone in the TTIP negotiations, which started in July 2013, was the investor-state dispute settlement system.[13] At the beginning of the negotiations, many European politicians and NGOs moved against inclusion of ISDS in the treaty.[14] Some European governments procured studies on the impact of ISDS in international treaties.[15] Other studies suggested that there was little evidence on the meaningful benefits that investor-state arbitration could provide to the EU, and that its collateral effects might impose non-trivial costs for the European states.[16] The European Parliament voiced support only for a state-to-state dispute settlement system and opposed any bypassing of national courts.[17] After online public consultations conducted in 2014,[18] in its 2015 concept paper the European

10 See JW Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harvard International Law Journal, 427-473..

11 Compare M Waibel, A Kaushal, A Liz Chung, C Balchin, *The Backlash against Investment Arbitration. Perceptions and Reality* (Wolters Kluwer 2010).

12 See more on the evolution of European views on ISDS in W Hummer, 'Was haben TTIP, CETA und TISA gemeinsam? "Investor-To-State Dispute Settlement" (ISDS) als umstrittenes Element der EU-Freihandelsabkommen' (2015) 38(1) Integration 3-25; see also N Lavranos, 'The Impact of EU Law on ISDS' in D Roughton, K Beale (eds), *The International Comparative Legal Guide to Investor-State Arbitration 2019* (GLG 2018) 41-44.

13 On endorsing the project of TTIP in 2013 see <http://europa.eu/rapid/press-release_MEMO-13-564_en.htm> accessed 21 February 2019. See also <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> accessed 21 February 2019 (on EU-US trade negotiations in general) and <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 21 February 2019 (official EU site on TTIP negotiations).

14 For a summary of political discussions see EurActiv 'TTIP and the Arbitration Clause' (Special Report, 8-12 December 2014) <http://www.euractiv.com/sections/ttip-and-arbitration-clause>accessed 21 February 2019.

15 See eg the study prepared for the Dutch Foreign Ministry: C Tietje, F Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (Study prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, MINBUZA-2014.78850) <https://www.eumonitor.eu.> accessed 21 February 2019..

16 Compare L Poulsen, J Bonnitcha, J Yackee, 'Transatlantic Investment Treaty Protection' (Paper No 3 in the CEPS-CTR Project on 'TTIP in the Balance' and CEPS Special Report No 102, March 2015).

17 See European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), recommendation 2(c)(xv).

18 For a report on this public poll see European Commission, 'Online Public Consultation on Investment Protection and Investor to state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)', (SWD 2015, 3 final, Brussels 13 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> accessed 21 February 2019. The EU claims that about 150,000 replies were received during the consultations.

Commission finally announced that it was moving from 'current ad hoc arbitration towards an Investment Court'.[19]

In the next stage of negotiations, the draft text of the TTIP proposed by the EU excluded ISDS provisions and included provisions on a special, hybrid body for investor-state dispute resolution – a standing investment tribunal that would be established under the treaty once it came into effect.[20] The only traces of arbitration which remained in this draft were visible in the rules on recognition and enforcement of foreign 'arbitral awards' (*inter alia*, by the reference to the New York Convention).[21]

In the end, the Transatlantic Treaty negotiations discontinued, but for a different reason: the hostile position of the current US administration towards multilateral trade treaties. However, while TTIP – at least at this moment – seemed to be a failed project, in the meantime another instrument for the protection of trade and foreign investments was adopted, the EU trade agreement with Canada, better known as CETA (Comprehensive Economic and Trade Agreement).[22]

In CETA, the policy of moving away from arbitration materialised in its dispute resolution provisions, which are based on a new investment court system. The EU advertised this system as a 'replacement of the ISDS' by 'a new and better' system. This system, according to official announcements, enshrines the right of governments to regulate in the public interest, but also introduces a system which is public, professional, and transparent.[23]

From the text of CETA[24] it is obvious that the 'permanent dispute settlement tribunal' provided by the agreement is everything but an arbitral body. It is composed of judges appointed by the two state parties (the EU and Canada) and does not allow the typical features of arbitration such as party-driven selection of adjudicators (in particular by the investors), exclusion of appeals and autonomy in the selection of the applicable

19 See 'EU Commission Concept Paper Investment in TTIP and beyond – the path for reform' <http://trade.ec.europa.eu/doclib/html/153408.htm> accessed 21 February 2019. See also 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations'<http://europa.eu/rapid/press-release_IP-15-5651_en.htm> accessed 21 February 2019.

20 On this proposal see 'EU finalises proposal for investment protection and Court System for TTIP' <http://europa.eu/rapid/press-release_IP-15-6059_en.htm> accessed 21 February 2019.

21 Latest Commission draft of investment protection provisions of the TTIP, see <http://trade.ec.europa.eu/doclib/html/153807.htm> accessed 21 February 2019.

22 See 'EU-Canada: Comprehensive Economic and Trade Agreement (CETA)' <http://ec.europa.eu/trade/policy/in-focus/ceta/> accessed 21 February 2019. The consolidated text of CETA is available at <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 21 February 2019. The CETA entered provisionally into force on 21 September 2017. The national parliaments of all EU countries need to take action before CETA can take full effect (as of January 2019 only about half of all EU Member States had notified their accession; see <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017> accessed 21 February 2019.

23 'CETA Explained' <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm> accessed 21 February 2019.

24 Arts 8.18-8.45 CETA.

law and procedure.[25] Moreover, it is clear that the policy of avoiding arbitration as a means of resolving investment disputes is not meant to be limited to particular trade agreements. In Article 8.29 of CETA, Europe and Canada commit to 'pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes'. This confirms that rejection of arbitration options will be an element of future policies in international investment treaties that are concluded both by the EU and by Canada.

In the meantime, the EU either has signed or is negotiating a number of trade agreements with countries and regions around the world. These include trade agreements with Japan, Vietnam, New Zealand, Australia, Singapore and Mexico, as well as the EU-Mercosur trade agreement that includes the four South American states Argentina, Brazil, Paraguay and Uruguay.[26] In most of these concluded or contemplated agreements,[27] some forms of dispute resolution mechanisms are envisaged, with a tendency to have less and less reference to any form of proper international arbitration.

Europe is not alone in its suspicious attitude towards investment arbitration. On the other side of the Atlantic, the rejection of ISDS has already been confirmed in the agreement that will replace NAFTA and its Chapter 11 ISDS mechanism. Namely, under the USMCA[28] the US investors in Canada and Canadian investors in the United States will only find recourse in national courts.[29] In US-Mexico investment disputes, claimants will continue to have the right to submit a claim to arbitration alternatively under the ICSID Convention and Additional Facility Rules or under the UNCITRAL Arbitration Rules.[30] Interestingly, Canadian investors in Mexico and Mexican investor in Canada seem to be, under the current text, authorised to initiate investment arbitration under another multilateral treaty, the Trans-Pacific Treaty (CCTPP) which has still not been ratified by the required number of signatories (but will certainly not be ratified by the United States, at least not under its current administration).[31] This, as described in the next section, is much

25 On other features of CETA dispute resolution see L Pantaleo, 'Investment Disputes Under CETA. Taking the Best from Past Experience?' (February 27, 2016) <https://ssrn.com/abstract=2739128 or http://dx.doi.org/10.2139/ssrn.2739128> accessed 21 February 2019.

26 See European Commission 'Negotiations and agreements' <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> accessed 21 Februar 2019.

27 One of the trade agreements currently negotiated is TISA (Trade in Services Agreement) where the issue of ISDS also proved to be controversial. See 'Trade in Services Agreement (TiSA)' <http://ec.europa.eu/trade/policy/in-focus/tisa/> accessed 21 February 2019.

28 See Chapter 14 on investment, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14_Investment.pdf> accessed 21 February 2019.

29 See 'USMCA Scales Back on Investor-State Arbitration but Preserves Trade Dispute Resolution in North America', <https://www.lexology.com/library/detail.aspx?g=44d1dcd0-8f81-4fea-a023-cd6706d33933> accessed 21 February 2019. Eventually, arbitration may be conducted, but only as state-to-state arbitration under Chapter 31 USMCA.

30 See Art 14-D USMCA (Mexico-United States Investment Disputes).

31 Anyway, there is still some good news for investment arbitration under the USMCA. Namely, its provisional regime allows for continuation of ISDS for at least three more years. In other words, existing arbitrations under NAFTA will remain unaffected, but it will also be possible to initiate new arbitrations even when NAFTA ceases to be in force, since the old NAFTA system of ISDS will remain available for three years after NAFTA's termination for protection of those investments that were made in the period during its validity.

more favourable for continuation of investment arbitration compared to the present situation in Europe after the Achmea judgment.

## 4. THE ACHMEA CASE: A FURTHER BLOW TO THE POPULARITY AND USE OF ARBITRATION IN EUROPE

The trend of anti-arbitration actions by the bodies of the European Union continued also in 2018. This time, the blow to arbitration was not caused by the executive bodies of the EU, but by its judicial branch. In March 2018, the CJEU issued a decision in a case initiated by the highest German court, the Federal Court of Justice (BGH), which had submitted a request for a preliminary ruling in proceedings between the Slovak Republic and the Dutch company Achmea BV.[32]

The request for a preliminary ruling, dealing with the validity of the arbitration conducted between the Dutch investor and the Slovak state, at first looked like a pure formality. All the tribunals and courts which participated in this process, including the BGH itself, held the same position; thus, most of the observers were of the opinion that the CJEU would follow this position and routinely confirm the validity of the arbitral award made against Slovakia, thereby only restating the customary position on ISDS. The same could be forecast based on the opinion delivered in this case by Advocate General Wathelet, on 19 September 2017, who shared the same line of reasoning and found no incompatibility of this ISDS arbitration with EU law.[33] Therefore, everyone was caught by surprise when the judgment of the Court reversing the position of its AG was published.

Before turning to the reasoning of the CJEU, a brief recapitulation of the facts in the Achmea case is in order. The request submitted to the CJEU concerned the case of enforcement of an arbitral award which was made 2012 in an arbitration conducted under the bilateral investment treaty (BIT) concluded in 1991 between the governments of the Netherlands and the (then) Czech and Slovak Federative Republic. The 1991 BIT (which continued to be applicable due to state succession as the Dutch-Slovak BIT) contained in its Article 8 a provision very common in many similar BITs. Under this provision, the investors from either side were entitled to initiate arbitration against the state in which the investment was made. The arbitration under this BIT was governed by the UNCITRAL Arbitration Rules.

Using the provisions of this BIT, a Dutch investor – the Dutch private health insurance company Achmea – brought in 2008 arbitration proceedings against the Slovak Republic. In 2012, this arbitration ended with an arbitral award in which the Slovak Republic was ordered to pay damages to Achmea in the amount of €22.1 million. Instead of paying this amount, the Slovak Republic launched the application for the setting aside of the award. Since the place of arbitration selected

32 *Slovak Republic v Achmea*, C-284/16, judgment of the CJEU of 6 March 2018. See also the BGH request, decision of 3 March 2016, I ZB 2/15, ECLI:DE:BGH:2016:030316BIZB2.15.0.

33 Opinion of AG Wathelet, C-284/16, 19 September 2017.

by the parties was Frankfurt, the application was decided by the German courts. The German courts rejected the application by the Slovak Republic both in the first instance proceedings, conducted before the Higher Regional Court (OLG) in Frankfurt, and, in principle, in the proceedings at the BGH, which held that the position of the Slovak state was not justified.[34]

The Slovak Republic argued that the arbitration court did not have the jurisdiction to decide the case since the arbitration clause in the Dutch-Slovak BIT was not in line with Articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (TFEU). The German Federal Court made clear that it did not agree with this position, but for the avoidance of doubt referred the case to the CJEU. The Advocate General agreed with the BGH and opined in September 2017 that European law 'must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union'.[35]

But, in its judgment, the CJEU overruled its Advocate General and finally found that the arbitral provision from the Dutch-Slovak BIT (Art 8) has an adverse effect on the autonomy of EU law since the only bodies authorised to interpret EU law are EU bodies (and the Luxembourg Court itself).[36] To that extent, the CJEU ruled that EU law precludes such agreements, which essentially means that the arbitration was concluded under a clause that is contrary to EU law, and from the perspective of EU law needs to be considered invalid. Reluctantly, such a position had to be adopted by the BGH, which in turn finally concluded that the arbitral clauses contained in the 'intra-EU BITs' (bilateral treaties for protection of investments concluded between two EU Member States) are 'not applicable' (*unanwendbar*), thereby leading to the same consequences as if the arbitral agreement was inexistent or invalid.[37]

In short, from the Achmea decision of the CJEU it seems that all ISDS clauses allowing for investor-state arbitration contained in the BITs concluded between two Member States of the EU have to be viewed as contrary to EU law. If this is the case, then it is not only foreseeable that the awards issued in these arbitration proceedings can be annulled in setting aside proceedings, but it is also likely that such awards will not be recognised and enforced, at least if the place of enforcement is in a Member State of the EU.

34 See summary of facts in the Achmea judgment, (n 33) 6-14.

35 Opinion Wathelet (n 33)273.

36 The conclusion of the Court was that, 'Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.' Achmea, cit. at 62.

37 BGH, decision of 31 October 2018, I ZB 2/15, ECLI:DE:BGH:2018:311018BIZB2.15.0.

## 5. FOLLOW-UP: THE AFTERMATH OF THE ACHMEA CASE

Since the Achmea decision, there have been no further reported court cases in which the arbitral awards made under intra-EU BITs arbitration provisions were finally set aside. However, some such cases are already pending where various European states, when ordered to pay the investors various sums under investment treaty claims, either objected to the jurisdiction of the arbitral tribunal or started setting aside proceedings based on the reasoning analogous to that in the Achmea decision.

The issues raised in several proceedings relate to the eventual broadening of the scope of the CJEU decision. Namely, in two such cases – Masdar v. Spain[38] and Vattenfall v. Germany[39] – the defendant EU Member States raised the Achmea arguments in arbitrations which were not based on the ISDS clauses in a bilateral treaty, but in a multilateral instrument, the Energy Charter Treaty (ECT).

In terms of importance and the scope of signatories, this treaty is much more important than the BITs, as it was concluded with the involvement of the United Nations and the World Trade Organization (WTO), and a number of other organisations too, and has been signed by some 50 countries as well as by the European Union itself.[40] The treaty also gave rise to some of the most voluminous arbitral awards in the world, such as the award in the Yukos case in which damages in the amount of US$50 billion were awarded against Russia in 2014, but due to non-ratification was later set aside in the Netherlands.[41]

In the Masdar case, Spain invoked the Achmea decision against a Dutch investor, and argued that the tribunal had no jurisdiction to act due to the violation of EU law. The reason for this was that both Spain and the Netherlands are EU Member States, and Spanish lawyers interpreted the Achmea decision in the sense that EU investors cannot bring investment treaty arbitration proceedings under an international agreement if the other side is also an EU Member State. This objection was rejected by the arbitrators in the arbitral proceedings. They concluded that the Achmea case literally relates only to the Dutch-Slovak BIT, and that – even if it were to apply to all intra-EU BITs – the ECT is not a bilateral treaty between EU Member States. It was also noted that the EU is itself a party to the ECT, which could indicate that it knew and accepted the ISDS provisions contained therein.[42]

38 *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No ARB/14/1.

39 *Vattenfall v Germany*, ICSID Case No ARB/12/12.

40 On the ECT in general see more in T Wälde, *The Energy Charter Treaty. An East-West Gatewey for Investment and Trade* (Kluwer 1996); on the ECT ISDS see T Roe, M Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge UP 2011). See also 'The Energy Charter Treaty' <https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> accessed 22 February 2019.

41 See B Knowles, K Moyeed, N Lamprou, 'Set Aside an Arbitral Award, Yukos' (Kluwer Blog, 13 May 2016) <http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/> accessed 22 February 2019; see also 'The Yukos Case' <https://www.yukoscase.com/news/> accessed 22 February 2019.

42 *Masdar v Spain*, 678-683.

Similarly, Germany invoked the Achmea decision in the arbitral proceedings initiated by a Swedish nuclear energy investor Vattenfall. The decision of the arbitral tribunal presided over by Professor Albert Jan van den Berg in this ISCID case was the same – they concluded that the Achmea decision does not directly apply to the arbitrations arising out of multilateral treaties since, among other reasons, the rules of such treaties (in particular Art. 16 ECT) have to be interpreted as *lex specialis* in relationship to Article 351 of the TFEU.[43]

The same avenue was taken in some other investment disputes, in particular in the recent decision of the arbitral tribunal at the Stockholm Chamber of Commerce (SCC) which affirmed its jurisdiction in the arbitration initiated on the basis of the ECT against two Luxembourg, two Italian and one Danish companies which made investments in Spain related to renewable energy legislation.[44] The tribunal found no carve-out from ECT protection provided under Article 26 which would relate to intra-EU disputes and concluded that EU law is not relevant to the issue of its jurisdiction.[45]

Indeed, whether or not this will be affirmed it will eventually be addressed by the CJEU in the near future. It is reported that Spain has already requested in the cited SCC proceedings that this issue be submitted to the CJEU, and similar pressure has been exerted by other EU countries which are involved in intra-EU investor-state arbitrations. One such case is the Croatian Gavrilović case decided by the ICSID dealing with the arbitration proceedings brought by an Austrian investor under an Austrian-Croatian BIT.[46] Though this arbitration is based on an intra-EU BIT, the case was decided by the ICSID in Washington DC pursuant to the provisions of the 1965 Washington Convention. Therefore, it will be interesting to see how a number of occurring questions are treated in the future reasoning of the CJEU.

But, no matter whether this questioning of conformity with EU law will lead to further broadening of the scope of investor-state arbitrations considered to be invalid, the damage has already been done. Many arbitrations initiated on the basis of a presumably impeccable legal basis, ie on the basis of valid ratified international

43 The tribunal opined that, 'Article 16 poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT. The application of Article 16 confirms the effectiveness of Article 26 and the Investor's right to dispute resolution, notwithstanding any less favourable terms under the EU Treaties. If the Contracting Parties to the ECT intended a different result, and in particular if they intended for EU law to prevail over the terms of the ECT for EU Member States, it would have been necessary to include explicit wording to that effect in the Treaty.' *Vatenfall v Germany*, cit., Decision on the Achmea issue of 31 August 2018, 229.

44 See *Foresight Luxembourg Solar 1 S.à.r.l., Foresight Luxembourg Solar 2 S.à.r.l., Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A. and GWM Renewable Energy II S.P.A. v The Kingdom of Spain*, SCC Arbitration V (2015/150), award of 14 November 2018.

45 See K Hough, 'Achmea judgment analyzed and FET claim granted in ECT case against Spain' (21 December 2018) https://www.iisd.org/itn/2018/12/21/achmea-judgment-analyzed-and-fet-claim-granted-in-ect-case-against-spain-kirrin-hough/ accessed 22 February 2019.

46 See *Gavrilović v Croatia*, ICSID Case No ARB/12/39, award of 26 July 2018. In this case, Croatia expressly relied on Achmea in its request of 4 April 2018. It was rejected by the decision of the tribunal on 30 April 2018, mainly because the objection was not raised in due time. See the Decision at <https://www.italaw.com/sites/default/files/case-documents/italaw9871.pdf> accessed 22 February 2019.

agreements, face the prospect of being invalidated or not enforced. The final effect triggered by the CJEU in the Achmea case will be – in stark contrast to the approach in the case of NAFTA arbitrations which will be possible even after cancellation of the treaty – fundamentally retroactive in nature. In other words, a likely prospect in arbitrations which were initiated and, in some cases, concluded a long time ago may now be refusal of recognition and enforcement, especially if the EU Member State has an acute interest in refusing recognition.[47]

## 5. ARGUMENTS BEHIND THE CURRENT EUROPEAN ANTI-ARBITRATION STANCE

In a way, it seems that the investor-state arbitration was a victim of its own success. The backlash against arbitration in investor-state disputes originated with the boom in high-value investor-state arbitrations in which states were ordered to pay substantial sums to foreign investors. History shows that most states are open and benevolent when declaring high principles, but equally outraged when the same principles are applied to their actions and associated with sanctions, as showed by a similar backlash against the decisions of the international tribunals in other sensitive areas.[48] Many capital-exporting countries, such as Canada or Germany, never thought that an ISDS case could be successfully initiated against them, relying on the idea that investment treaties awarded special protection to investors only in order to protect the companies from developed Western states from the unreliable justice systems in the developing world.[49] But, the boom in investor-state cases in the 2000s showed that investments do not conform to the customary developed/

47 Another example of disrespect for finality of the arbitral awards, and of a retroactive application of EU law to investment arbitration, is the Micula case. In an ICSID arbitration based on a Romanian-Swedish BIT signed in 2003, an arbitral tribunal after eight years of arbitration issued an award in favour of claimants, awarding in December 2013 €200 million to the Micula brothers (see *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No. ARB/05/20). The dispute related to tax incentives given for investing in disadvantageous areas of Romania in early 2000. Due to Romanian accession to the European Union, the incentives were abolished in 2005 in order to comply with EU rules on prohibition of state aid. The final and binding award, on 369 pages, was issued in 2013, finding that Romania did not act unreasonably or in bad faith when it abolished the incentives, but that it still violated the claimants' legitimate expectations that incentives would be available until 2009, in particular because the state did not inform the claimants in a timely manner that the regime would be terminated prior to its stated date of expiration, and by insisting nonetheless on further fulfilment of the claimants' obligations. Soon after the award was issued, in a letter from January 2014, the European Commission (which played an *amicus curiae* role in the arbitration) obliged Romania 'to suspend any action which may lead to the execution or implementation of the part of the Award that had not yet been paid, as such execution would constitute unlawful State aid'. Compare EC letter, C(2014) 6848 final (<https://www.italaw.com/sites/default/files/case-documents/italaw4066.pdf> accessed 22 February 2019).

48 Compare KJ Alter, JT Gathii, LR Helfer, 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 European Journal of International Law 293-328 which under the same title ('backlash') list three case studies related to various African states which attempted to restrict the jurisdiction of various international courts in response to politically controversial rulings.

49 Regarding the latter point see M Schneider, 'The Role of the State in Investor-State Arbitration. Introduction' in S Lalani, RP Lazo (eds), *The Role of the State in Investor-State Arbitration* (Martinus Nijhoff Publishers 2014) 4.

developing divide, so not only the 'usual suspects', but also those states that like to view themselves as investors only started to appear as respondents before various arbitral fora, and that started to influence their attitude towards the ISDS.[50] The bigger the country, the stronger the resistance to defeat, as anecdotally proven by the fact that the United States have never lost a single ISDS case.[51]

While current criticisms voiced by EU authorities often accuse the ISDS of (anti-governmental) bias, it is interesting to recollect the history. Some evidence from particular investor-state arbitrations shows how (un)principled states have behaved in upholding the independence and impartiality of arbitrators when their own interests were at stake. Jan Paulsson tells us a story about the1903 Alaskan Boundary case in which President Theodore Roosevelt himself wrote 'personal and confidential instructions' to 'three impartial jurists of repute' selected as American arbitrators in the border case.[52] One hundred years later, as showed again by Paulsson, the same attitude had spread to the area of investment arbitration. In the infamous Lowen case, the American arbitrator appointed to act in a NAFTA arbitration publicly admitted that he was under considerable political pressure, and that he had been summoned by governmental officials and warned that the state party which appointed him must prevail.[53]

The relative fairness of the ISDS mechanism may have been a reason for its unpopularity with some states unfamiliar with losing litigation in international fora. Ominously, it was not the withdrawal of Venezuela, Bolivia and Ecuador from the ICSID Convention that changed the ISDS landscape, but the change of policies in the United States, Canada and the EU.

On the other hand, there are indeed valid conceptual reasons for the current 'legitimacy crisis' in investment treaty arbitration.[54] Here are a few prominent criticisms which deserve attention:

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50 According to UNCTAD data, the most frequent respondent states in the 1987-2017 period were Argentina, Venezuela, Spain, the Czech Republic, Egypt, Canada, Mexico, Poland and India. At the same time, the most frequent home states of claimants were the United States, the Netherlands, the United Kingdom, Germany, Canada, France and Spain. While the divide between the capital-importing and capital-exporting countries is still visible, some countries, eg Canada and Spain, occupy high places on both lists.

51 S Puig, G Schaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 400.

52 J Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 (2) ICSID Review – Foreign Investment Law Journal 341-343.

53 The arbitrator was warned that, 'If we [ie the USA] lose this case, we could lose NAFTA' – and the arbitrator conformed to expectations. Ibid, 345-346. On the Lowen case see more in M Mendelson, 'The Runaway Train: The "Continuous Nationality Rule" from the *Panevezys-saldutiskis Railway Case* to *Lowen*' in T Weiler, *International Investment Law and Arbitration: Leading Cases* (Cameron May 2005) 97-149.

54 The notion of a 'legitimacy crisis' is used by Franck (SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521 <https://ssrn.com/abstract=812964> accessed 21 February 2019), though only related to a limited field of (in)consistency of decisions. On this matter, for a plausible opposite point of view (arguing that consistency is not possible or even desirable) see Schneider (n 49) 10. More recently on the legitimacy crisis see Ch 9 of J Bonnitcha, LNS Poulsen, M Waibel, *The political economy of the investment treaty regime* (Oxford UP 2017).

1. The closed nature of the world of investment treaty arbitrations – excessive specialisation that creates a narrow field which is removed both from commercial arbitration and from public international law;[55]

2. An alleged lack of democratic accountability and lack of sensitivity to allegations of corruption;[56]

3. Lack of diversity, e.g. the dominance of male arbitrators and the lack of female arbitrators;[57]

4. Insufficient space for balancing the regulatory policies of the state against the interests of the private investors;[58]

5. Built-in bias in favour of investors, often connected with problems regarding the impartiality of arbitrators who appear in the role of counsels in other arbitrations (double-hatting) or with other forms of conflicts of interest;[59]

6. Absence of transparency and appeal options; no uniform case law;[60]

7. Lack of symmetry in procedure, forum shopping and possible parallel proceedings.[61]

The purpose of this paper is not to offer an extensive debate on the mentioned (or any other) potential deficiencies of the investment-state arbitrations. Rather, we will deal with these features within the discussion in the next section, where they will be put in the context of other, often equally imperfect alternatives.

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55 Schneider (n 49) 8.

56 See A Ali, ES Romero, 'Arbitration of Corruption Allegations' in: *The International Comparative Legal Guide to Investor-State Arbitration 2019* (GLG 2018) 10-14.

57 Compare K Polonskaya, 'Diversity in Investor-State Arbitration: Intersectionality Must Be a Part of the Conversation' (2018) 19(1) Melbourne Journal of International Law 259-298.; G Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (2012) 59 Colum FDI Persps <https://academiccommons.columbia.edu/doi/10.7916/D8HT2XHM> accessed 21 February 2019.

58 See more in A Turyn, F Perez Aznar, 'Drawing the Limits of Free Transfer Provisions' in M Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 51-71. This reason also played a prominent role in the European Commission (EC) move against ISDS; see the EC Concept Paper (2015) where the EC noted the need to protect the EU's 'right to regulate' and the need to have ISDS options which 'do not affect the ability of the EU and its MS to pursue public policy objectives'. The limitation of the state power to regulate was among the most common criticisms in a line of cases that dealt with regulatory measures in Canada (the Myers, Chemtura and Ethyl Corp. cases), Ecuador (the Occidental Petroleum case) and Australia (the Philip Morris case).

59 Compare WW Park, 'Arbitrator Integrity' in Waibel et al (eds), *The Backlash Against Arbitration 189* (Kluwer 2010) 189-251 – with a number of sub-issues.

60 See Feldman (M Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32 ICSID Review 528-544), raising also the need to evaluate all competing policy interests.

61 Compare R H Kreindler 'Parallel Proceedings: A Practitioner`s Perspective' in M Waibel et al (eds), *The Backlash Against Investment Arbitration* (Kluwer, 2010) 127 and A Reinisch 'The Issues Raised by Parallel Proceedings and Possible Solutions' in M Waibel et al (eds), *The Backlash Against Investment Arbitration* (Kluwer, 2010) 113-114.

## 6. ARE PROPOSED ALTERNATIVES AN ADEQUATE REPLY TO THE WEAKNESSES OF INVESTOR-STATE ARBITRATION?

While many of the critical arguments against ISDS may have some foundation, there is, in my opinion, a sufficient number of reasons which speak against the radical dismantling of the system of international investment arbitration. There may be some periods in the future when more control and more transparency is needed, but in the current political discussions which are generally negatively coloured, at least in the European Union, one should not forget the arguments in favour of investment arbitration, as well as the weaknesses of the alternative options.

In the current 'change of tide', the pendulum has swung back to the other side: while until about a couple of decades ago a polished, overly laudable picture of investment arbitration prevailed, the current criticisms show how short the way from euphoria to hysteria might be. Policies of international trade and their dispute settlement mechanisms may be an important topic, but when they attract disproportionate public attention, populist arguments start to cast a shadow over real problems. Is it actually true that ISDS in general has to be abolished, because it 'threatens public welfare' and 'undermines democracy' – to quote assertions from a public campaign conducted under the slogan 'End corporate courts now!'? To what extent is it correct that ISDS 'undermines environmental standards, prevents regulation or pockets taxpayers' money'?[62]

Leaving the assessment of more serious criticisms for later, we should first address some widespread prejudices regarding investment arbitration which, although untrue, play an important part in framing the negative picture of ISDS in the public eye.

The first prejudice relates to *a supposed general bias of the ISDS in favour of investors and against the host states*, and the opinion that the majority of investment arbitrations end with awards in favour of the investors.[63] While in regular litigation it may be expected that slightly more claimants win than lose (starting litigation is, after all, not a step that is undertaken easily and without good cause), according to the UN-collected data the situation with ISDS is different – significantly more cases are decided in favour of the defendants. So, according to an UNCTAD survey, in the 1987-2017 period, 28 per cent of cases were decided in favour of the investor, and 37 per cent in favour of state parties (23 per cent are settled, and 10 per cent are discontinued).[64]

62 Statements by the spokesmen of the Stop TTIP alliance Karl Bär, <https://stop-ttip.org/europeans-dont-want-investor-state-dispute-settlement-trade-agreements/> accessed 22 February 2019; see also <https://www.usw.org/get-involved/rapid-response/AFLCIO_ISDS_No_Corporate_Courts.pdf> accessed 22 February 2019.

63 See answers in the European Commission ISDS Public Consultation (n 18) 15.

64 UNCTAD ISDS Review (n 9) 6. The success of the states is often the result of the tribunals finding lack of jurisdiction. Counting only decisions on the merits, 61% of cases are decided in favour of the investor, and 39% in favour of the state (ibid). See also on this point C Brower, J Ahmad, 'From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court' (2018) 41 Arbitration International 818 (speaking about the need to 'separate facts from fiction').

The *impact of the ISDS on state regulatory policies* (an argument that has played a prominent role in the new anti-ISDS wave in the EU) seems to be grossly exaggerated and partly misunderstood. There is not enough independent research regarding the extent of the impact of the ISDS arbitrations on state regulatory policies.[65] Still, the percentage of the arbitral decisions which have an impact on state policies is proportionately small. According to available information, many other issues related to host state conduct have given rise to ISDS claims, such as unfair domestic court judgments, illegal contract terminations, alleged nationalisations and imposition of discriminatory taxes.[66] And, while some regulatory issues have a legitimate public policy grounds (for instance health concerns or environmental protection), others may just be an attempt by the state to indirectly expropriate foreign investors – and to that extent present exactly the kind of cases for which the whole system of ISDS was developed.

Another criticism related to ISDS arbitrators addresses the *lack of diversity*.[67] One of the points raised is the *small number of female arbitrators* in comparison to their male counterparts. Admittedly, this is to a degree true, but one should not forget the fact that the choice of arbitrators is up to the parties, so that the result reflects their preferences.[68] And, according to UNCTAD data on the most frequently appointed ICSID arbitrators, though there are only two women among the thirteen people listed, they are among the most sought-after arbitrators, occupying number one and number three on the list of the most appointed investor-state arbitrators.[69] If it is argued that this is still too small a number, these figures should be compared with the higher level international institutional tribunals, such as the WTO Appellate Body, where male members also make up the vast majority, in spite of the fact that they are appointed by bodies which can consciously implement pro-diversity policies.[70]

Leaving aside the prejudices regarding ISDS, we should return to the basics: *why arbitration was in the first place preferred as the method of international dispute resolution in the field of international trade*, be it regarding the 'pure' commercial disputes between private companies, or in cases in which states participate as parties. There is still some value in the statement that arbitration is good for international

65 For some, but still insufficient attempts to deal with the investment treaty from the perspective of political economy, see Bonnitcha,Poulsen,Waibel (n 54).

66 Compare information on individual cases, eg in UNCTAD reviews.

67 See Polonskaya (n 57).

68 Thus, to the extent that it exists, the lack of diversity would not be attributable to the ISDS mechanisms as such, but to the 'glass ceiling' of the elite business communities and their legal representatives. As noted by Baetens (F Baetens, 'The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators Are under Fire and Trade Adjudicators Are Not: A Response to Joost Pauwelyn' (2015-16) 109 American Journal of International Law Unbound 304), 'The higher diversity of WTO panelists versus ICSID arbitrators is indeed apparent in the relative proportions of panelists from developing countries and women - although a cynic might remark that the less prestigious a job is, the more likely it is that women and non-Westerners do it.'

69 Brigitte Stern is the most frequently appointed ICSID arbitrator with 87 appointments, and Gabrielle Kaufman-Kohler is in third place, with 49 appointments, after Yves Fortier with 51 (UNCTAD data, ibid 6).

70 See WTO, 'Appellate Body Members' <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 22 Februar 2019. In the past, the number of women on that body was: 0 out of 7 (in 2001) to 1 out of 7 (in 2018).

trade,[71] not only because the UN General Assembly 'recognizes the value of arbitration as a method of settling disputes arising in the context of international commercial relations' and is convinced that the establishment of good rules in that field 'contributes to the development of harmonious international economic relations'.[72] The existence of arbitration options was in the years of the Cold War, but also later, a *de facto necessity* in order to maintain some form of international trade among economic players from rather different and often mutually rather hostile political environments. Though not perfect, the practice of international commercial arbitration effectively granted legal protection to countless foreign companies, and thus encouraged their willingness to invest and make trade deals in the countries with unstable and unfamiliar legal systems. Has so much changed since the 1980s, when the UNCITRAL Model Law was enacted, in terms of removal of disparities between national laws, greater confidence of the business community in local courts in foreign jurisdictions or the need to find a neutral, unbiased forum in which to overcome differences and settle disputes?

Indeed, one could argue that the current political rage against the ISDS is limited to arbitration options in the BITs and the other forms of treaty-based arbitration that are not expressly grounded on arbitration agreements which are otherwise regarded as the 'cornerstone of arbitration'. Can the dusk of the ISDS be the new dawn of more conventional arbitration options? Some authors have already started to promote agreement-based arbitration alternatives, eg International Chamber of Commerce (ICC) arbitration, as the dispute resolution methods superior to the treaty-based ISDS.[73] Unfortunately, it seems that the snowball-effect has already started, with the anti-ISDS stance growing ever larger and taking on an increasingly anti-arbitration attitude. For instance, while many arbitration practitioners (and several arbitral tribunals in concrete cases) hold that the Achmea judgment of the CJEU has to be limited to BITs, the European Union makes it increasingly clear that it wishes to stretch the effects of this decision as far as possible. In its statement of 15 January 2019, 22 EU Member States declared that they consider intra-EU BIT *and* ECT claims to be non-arbitrable and warned the 'investor community' not to initiate new intra-EU investment arbitration proceedings.[74] The general policy of the EU is already clearly oriented not only against the ISDS (both in intra- and in extra-EU investment disputes), but also against arbitration in general. At least some of the loudly voiced criticisms of the ISDS can equally be applied to customary forms of international commercial arbitration, such as the lack of appeals, the confidentiality of the proceedings and the possible impact that the party appointment can have on the impartiality of the arbitrators. In any case, it is hardly imaginable that in the present climate any EU Member State would lead a pro-arbitration policy, actively

71 Compare JM Mustill, 'Arbitration: History and Background' (1989) 6 (2) Journal of International Arbitration 50.

72 See UN Resolution 40/72 adopted at the 112th plenary meeting on 11 December 1985 (adopting the UNCITRAL Model Law on International Commercial Arbitration).

73 See eg in this sense HG Gharavi, 'The Advantages of the ICC over ICSID in Investment Arbitrations' in A Carlevaris, L Lévy, A Mourre, E Schwartz (eds), *International Arbitration Under Review. Essays in honour of John Beechey* (ICC Publication 772E 2015).

74 See Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 22 February 2019.

encouraging the insertion of arbitration clauses into business contracts concluded between the state (or any of its state agencies) and the foreign private parties. From the suspicious attitude towards arbitration in state-related commercial disputes to a suspicion against (international) commercial arbitration in general is only a few small steps – and this is why the current ISDS debate can also have a long-term negative effect on the use and development of arbitration and ADR in general.[75]

Turning back to the conventional wisdom that arbitration is good for international trade (the wisdom so far most effectively spread and promoted by UNCITRAL), it would follow that the consequences of current developments may mark the beginning of a chilling period for international investments[76] – unless a new system is established that could effectively replace the protection of investments provided by the current ISDS options and international commercial arbitration in general. Is such a system found?

The EU Member States, in their recent declaration, emphasised that *investors from one EU Member State do not need additional protection when they invest their capital in any other Member State*, since the fundamental freedoms of the Union, such as freedom of establishment or the free movement of capital, are protected by EU law.[77] It is also argued that non-discrimination, proportionality, legal certainty and the protection of legitimate expectations belong to the general principles of EU law, which all EU Member States must recognise and provide effective legal protection to intra-EU investors in case of violation of their rights.[78] However, even in their joint declaration the EU Member States do not argue that such an effective legal (and in particular judicial) protection does exist everywhere in Europe, but only that EU law obliges every Member State to ensure such protection before its courts or tribunals. In reality, the comparative data on European judicial systems show that the narrative about the effective protection is deceptive, as effectiveness of judicial protection is still among the most problematic issues in a number of EU Member States. The situation in this respect is partly deteriorating, as attacks on judicial independence have started to reoccur in several former transition countries.[79] Even when the state courts operate independently, the excessive length

75 The turn in the approach to arbitration can be felt even in the work of UNCITRAL, where, according to the observers, the methods of work and approach to arbitration are no longer 'business as usual'. Compare A Roberts, 'UNCITRAL and ISDS Reform: Not Business as Usual' [2017] European Journal of International Law, Blog TALK <http://ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/> accessed 21 February 2019.

76 Some observers predict that current policies will especially have a negative effect particularly on smaller investors, which will either not invest at all, or will convert the costs of the higher risk factor into higher costs and expenses; the large corporations, on the other hand, may have sufficient bargaining strength to impose dispute-settlement provisions which will be even more favourable to them. Compare Brower, Ahmad (n 64) 819-820.

77 Declaration of the Member States of 15 January 2019, cit at 2.

78 Ibid.

79 Compare the data on European judicial systems of the CEPEJ <http://www.coe.int/cepej> accessed 22 Februar 2019, as well as the information collected in the European Judicial Scoreboards <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en> accessed 22 February 2019. For attacks on the judiciaries in Hungary and Poland see reports of the Helsinki Foundation for Human Rights <https://www.helsinki.hu/wp-content/uploads/Attacking-the-Last-Line-of-Defense-June2018.pdf> accessed 22 February 2019 and the Human Rights Watch; see also <https://euobserver.com/opinion/143624> accessed 22 February 2019.

of judicial proceedings can render legal protection illusory, as often confirmed by the judgments of the European Court of Human Rights. The court cases including substantive foreign investments are often highly sensitive and politicised, and can be a serious challenge for quite a few European national judiciaries. All that is very well known by potential investors.[80] It is not accidental that for any serious lawyer the notion of 'litigating international investment disputes' is synonymous with investment arbitration.[81]

In the context of extra-EU trade relations, the EU refrained from using the argument that *an investor-state dispute resolution mechanism is unnecessary due to adequate protection at local courts*. Instead, since 2010 it gradually started to advocate a more institutional system of dispute settlement, with quasi-permanent arbitrators, appellate mechanisms and increased transparency of the proceedings.[82] Until 2014, this 'movement away from current ad hoc arbitration' further grew and became the policy of promoting an 'investment court system' (ICS) or a 'multilateral investment court' (MIC). In its 2015 Concept Paper, the European Commission declared the need for 'a new EU approach' and referred to the institutional set-up of the WTO Appellate Body as a model for reform.[83] According to analysts, it is too early to say what level of support the EU vision of such a multilateral investment court will have, but it is certain that the debate in international fora has been steered in the direction of such a proposal, which is 'a game changer with potentially far-reaching consequences for investment treaty arbitration'.[84]

These are important reasons for closer examination of the feasibility of an investment court, promoted as 'a panacea that would solve most, if not all, the perceived shortcomings of the current ISDS system'.[85] Can it really solve the problematic issues? If adopted, will it bring improvement, satisfy the critics and award adequate protection to investors? Many (too many) elements of such a future system are unknown, but there are already sufficient grounds for concern regarding some fundamental elements of the existing MIC proposals.

Starting with the sources of such proposals, it should be noted that they have not originated from the circles of experts in international commercial dispute resolution, but from the Brussels administration which has not much experience with the concrete problems encountered in the course of complex international commercial litigation. The problematic appeal of the proposed solution lies in its simplicity – *replacing the ad hoc arbitration tribunal with a permanent court* – but this *simplicity*

80 An UNCTAD study shows that investors considered the existence of a BIT rather important when deciding on making investments in a foreign jurisdiction. See C Brower, S Blanchard, What's in a Meme? The Truth about Investor-State Arbitration: 'Why it Need Not, and Must Not, Be Repossessed by States', 52 Columbia Journal of Transnational Law, 52 (2014)704.

81 See the title of a guide edited by C Giorgetti, *Litigating International Investment Disputes* (Leiden/Boston, Brill-Nijhoff 2014)), covering the practice of investment arbitration.

82 Lavranos (n 12) 43.

83 European Commission Concept Paper, 'Investment in TTIP and beyond: the path for reform', <http://trade.ec.europa.eu/doclib/html/153408.htm> accessed 22 February 2019.

84 Lavranos (n 12).

85 Ibid.

*can be misleading*. The underlying assumption is that a permanent court can render the same, if not better, services as an international arbitral tribunal. But, references to the WTO Appellate Body as a source of inspiration demonstrate a disregard of its fundamental difference. The title of an article published by Joost Pauwelyn in 2015 clearly indicates the extent of the difference, asking, 'Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus?'.[86] He argues that two closely related subjects of global economic affairs – cross-border *trade* and cross-border *investment* – have developed into two distinct parallel worlds, and finds a part of the reasons for this cleft in the rather different nature of WTO adjudicators in comparison with the arbitrators who deal with the ISDS. This analysis is not isolated: already in 2001, Joseph Weiler was writing about the WTO dispute settlement mechanisms in terms of the 'rule of lawyers' versus the 'ethos of diplomats', warning that, in spite of the juridical nature and mandatory character of the WTO dispute resolution system the institutional setting remained much the same as in the times of GATT, reflecting more diplomatic than legal considerations.[87] While this diplomatic stance of the WTO may make its dispute resolution system 'more palatable and easy to digest' for internal players – primarily the states – the author argues that at times this practice 'accounts for some serious dysfunctions of dispute settlement system' and undermines its external legitimation.[88] Almost twenty years later, new research shows that nothing has changed in the two worlds: the WTO panelists 'continue to be predominantly diplomats or ex-diplomats, often without law degrees and mostly with relatively little experience', while the ICSID arbitrators by contrast 'are typically high-powered, elite jurists with a much deeper level of expertise and experience than the average WTO panelists.'[89]

Evaluated by strictly legal standards, this difference indicates that a WTO-modelled investment tribunal would in most ISDS cases render a decision of lower and not higher quality. The complex nature of international commercial disputes, particularly in the context of substantial investments and transfers of technology, calls for *special competence of the decision makers*. Most investor-state disputes are highly sophisticated, both legally and technically, and need specialist knowledge in the respective field. Whether they relate to green-field investments or to privatisation of state assets in key fields like energy or mining, whether they relate to industry or to investments into national infrastructure such as roads or airports, the efficient processing of such cases which conforms to the rule of law standards is an immense task. Its challenges are both efficiency and quality – and for meeting these challenges one needs a lot of skill, experience and knowledge. The practice of investor-state arbitrations managed to live up to the expectations of (most) parties: the boom in ISDS has been indirectly a confirmation of its efficiency.

86 J Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109(4) American Journal of International Law 761-805 doi:10.5305/amerjintelaw.109.4.0761 (2015).

87 JHH Weiler, 'Rule of Lawyers and the Ethos of Diplomats' (2001) 35(2) Journal of World Trade 35(2)191-207. His position is summarised in the statement that '[t]he diplomatic ethos which developed in the context of the old GATT dispute settlement tenaciously persists despite the much transformed juridified WTO/ Ibid 193.

88 Ibid.

89 Pauwelyn (n 86) 763.

Naturally, ISDS proceedings are not short, and sometimes two, three or four years are needed to complete the process. *The length of the ISDS proceedings* is, however, caused by the need to undertake comprehensive examination of technical and legal issues, not by attempts to delay the process or by sloppy case management. In fact, there is hardly any other method of dispute resolution capable of dealing with such complexity and sophistication while maintaining strict legal standards of due process. Huge arbitration cases really need a tailor-made court, and the full-time work of arbitrators selected for the particular case. And there may be only a few people in the world capable of effectively dealing with certain complex and specialised issues. Such people have to be paid accordingly, also in a certain proportion to the huge responsibility which they bear and the impact that their decisions produce. It is hard to apply any salary-based model for adjudicators in this context, especially if the salary is determined by the lump-sum criterion, and awarded as side-remuneration to a part-time judge. The same goes for standardised procedures and methods of case management. The "one size fits all" solutions which provide fixed case management rules may be entirely inapplicable when a case involving hundreds of thousands of documents, dozens of experts and witnesses, with huge implications locally and globally. The eventual availability of appeals brings further challenges for the duration of the process and its effectiveness.

The proposed solutions for the challenges of effectiveness and quality of the future MIC have so far not showed that their authors understand (or care about) practical details. In the draft Chapter on Investment Court System in the European Commission draft text of TTIP, the instructive time limits are fixed: 18 months for the issuing of a provisional award ('decision in the first instance') and 180 (or a maximum of 270) days for the duration of the appeal procedure.[90] There is, however, no guarantee that these limits are anything but a political declaration, and in any case they seem to be quite unrealistic for actual investor-state disputes, if they are to be conducted according to high professional standards.

Apart from the concerns regarding its effectiveness, there may be serious concerns regarding *the integrity of the process*. The criticisms of the customary ISDS mechanisms often relate to the asymmetric nature of the choice of forum, arguing that investors have disproportionate powers since only they may choose the forum which suits them.[91] Yet, the asymmetric right to choose the forum and have a recourse to the selected (arbitration) tribunal can to a large extent be justified by the asymmetric power that parties possess, and the potentially vulnerable position of the investors when faced with the court system of the host country. On the other hand, there would be no appropriate justification for the system which would favour the state as the stronger party – and still the proposed MIC solution does have some elements which may have exactly that effect.

The first element that should be observed is *the potential bias in favour of the states in the selection of the adjudicators*. A good example is the WTO dispute resolution process which was cited by the EU in a positive light as the system according to

90 See Ch II – Investment, Arts 28(5) and 29(3).

91 On such arguments (and their validity) see Brower, Blanchard (n 80) 712.

which future permanent investment bodies should be modelled. As observed in 2001 by Joseph Weiler, no matter how much the GATT dispute resolution process got 'juridificated', in this process the 'diplomatic ethos … tenaciously persists'.[92] The panelists of the standing WTO dispute resolution tribunals were often diplomats or ex-diplomats who belong to the same internal WTO network, often without law degrees and with relatively little experience[93] – something that Weiler regarded as only a temporary feature. Fifteen years later, Pauwelyn concluded that this structure is not changing, arguing that a part of the success of the WTO dispute resolution process is to be attributed to the fact that it is run by relatively inexperienced trade diplomats.[94] While it may be true that the diplomatic elements and a degree of political participation by governments and civil society organisations help in legitimising the dispute resolution process, one should not forget that the WTO dispute resolution process is a state-to-state process where both parties stand on equal footing. If, as provided by CETA, an investor-state dispute is decided by the members of the tribunal who 'shall have demonstrated expertise in public international law' (and only optional knowledge of international investment law),[95] ie by WTO-like former diplomats who have spent their lives representing the interests of the state, it may be legitimately doubted whether these panels have a built-in bias in favour of state parties.

This assessment of bias is not dependent on the nationality of the tribunal members of the present and future 'investment courts'. Indeed, the concrete tribunals will be chaired by a third-party national, and one of the tribunal members will have to be appointed from a jurisdiction close to the investor party.[96] But, lacking a business perspective and experience, it is likely that those part-time tribunal members who were appointed to a closed list of adjudicators assembled by a joint committee appointed by (state) parties (for CETA: by Canada and the EU) will give a disproportionate weight to the political and not the legal aspects of the case. Unless political arguments strongly speak in favour of the investor as the private party to an investor-state dispute (eg due to the investor's close connection with the state party that upholds a pro-investor policy), there is arguably much less leverage on the investor side than on the state side. Thereby, *the partisan nature of appointment of decision makers* of conventional investor-state arbitration, which has been cited as the 'single most undermining factor of the public trust in the ISDS system',[97] is in the architecture of the 'permanent investment tribunals'

92 Weiler (n 87) 763.

93 Research for the 1995-2009 period showed that 80% of WTO panelists have a government background (compared to 76% of ICSID arbitrators who have a private sector background, not counting academics). Pauwelyn (n 86) 772. Baetens (n 68) at 304 points to the fact that a similar problem relates to both ICSID and the WTO: 'Closed and elitist networks are omnipresent in both systems - how else would one describe a system in which nearly two out of every three adjudicators was at some point a Geneva-based diplomat?'

94 Pauwelyn (n 86) 764.

95 See Art 8.27(4) CETA.

96 Compare Art 8.27(6) CETA. Note that, under CETA, for disputes initiated by European investors the 'investor's' member can come from any EU state, which may further diminish the level of participation of views close to its side.

97 Baetens (n 68) 304.

replaced by another sort of partisanship marked by a structural bias of the one-sided appointments by state (or state-like) organisations.[98] Essentially, while in the present model of investor-state arbitration each side, the investor and the state, has at least the same chance to make partisan appointments, the future model of investment tribunals displays even more troubling, unilateral partisanship.[99] The attempts to explain that a multilateral court system in which states only appoint judges need not necessarily be biased since states act in dual roles (as disputing parties and treaty parties) and are able to distinguish their functions in a proper way[100] seem to be overly academic and factually unrealistic, taking into consideration the background of the whole ISDS discussion and the concrete cases outlined here above.

This partisanship is even more evident in the light of the structural influence that is exercised in the future model by administrative officials[101] involved in the institutional framework of dispute resolution bodies. When the adjudication is entrusted to those that have less experience, and in-depth knowledge will be 'more amenable to being led by a Secretariat',[102] this may be reinforced by the 'embeddedness in a thicker normative/bureaucratic regime or community'.[103] All this will certainly not help in the creation of trust of the investors in the new ISDS model. As if this were not enough, in the current European model of 'investment courts', there are also several other potentially troubling elements, such as the possibility of discretionary rejection of 'claims manifestly without legal merit' upon application of the respondent state,[104] rules excluding investment tribunals' jurisdiction to review the legality of the state measures

98 It may be argued that the partisan appointments mutually abrogate the partisanship, unless one of the parties is not sufficiently informed or skilful. The same is true for other, legitimate procedural strategies and tactics. Generally, it seems that a part of the initial low success rate of some states in investor-state arbitration can be attributed to the lack of serious preparation for the representation of state interests in the context of an international arbitration. The strategic decisions in the arbitral proceedings on the state side were often done at a political level, without sufficient legal expertise and without proper representation. The states often save money on their lawyers and fail to attract the best legal minds to their legal teams. Those states which have formed their teams of specialists for the ISDS (Argentina for example) turned out to be much more successful in protecting the legal position of the state in the process.

99 Compare for a similar assessment Brower, Blanchard (n 80). See also S Schwebel, 'The Proposals of the European Commission for Investment Protection and an Investment Court System' (ISDS BLOG 17 May 2016) <http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf> accessed 21 February 2019. According to Schwebel, the fundamental objection to the new investment court system is that it replaces 'the current system, which on any objective analysis works reasonably well, with a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing'.

100 See eg A Roberts, 'Would a Multilateral Investment Court be Biased? Shifting to a Treaty Party Framework of Analysis' (EJIL: TALK! 28 April 2017) <https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis> accessed 21 February 2019.

101 Baetens refers to an '… invisible back-row of adjudicators who are not accountable, whose names are not on the report, whose personal conflicts need not be disclosed, but who may nevertheless exert influence on the decision'. Ibid at 306.

102 Ibid.

103 Pauwelyn (n 86) 796.

104 CETA, Art 8.32.

and their obligation to follow the 'prevailing interpretation of the domestic law' by its 'courts or authorities'.[105]

## 7. CONCLUDING REMARKS

Challenges are generally healthy for future development, if we manage to survive them. Nietzsche's famous 'What doesn't kill me makes me stronger' may also be applied to investment arbitration. Only, the prospects for investor-state arbitration surviving in the short and medium run as the dominant method of investor-state dispute resolution are far from certain, at least as regards the European Union and its Member States.

Before the Eurocrats put the final nail in the coffin of the ISDS, just how likely it is that the alternative offered will be better than the existing options should be thoroughly examined. So far, the ISDS has played an important role in the global fostering of international investment, by securing a basically fair system of dispute resolution in a very specific field. Of course, no system is perfect, and it is true that investor-state arbitration has proved to have certain shortcomings. At the same time, it is far from having been proved that the shortcomings are of such a nature that they render the whole ISDS mechanism beyond repair.

In this paper I have showed that many criticisms of the ISDS are misguided or overstated, and that the current fuzzy contours of the 'multilateral investment courts' (MIC) – a mechanism which should replace the ISDS – do not guarantee cure for its faults. While the basic criticisms related to lack of impartiality, openness and diversity have not been resolved beyond doubt in the MIC model, new issues related to efficiency, fairness and quality of the new model are appearing. Also, while the new model fails to prove that it is encouraging for foreign investments, the dismantling of the ISDS may have a chilling effect on international commercial arbitration, and, in consequence, may adversely impact international trade.

The negative impact on international arbitration does not mean a positive impact on (international) litigation. National courts will not become a better place for the settlement of international commercial disputes if the use of arbitration fades away. On the contrary, a politically-coloured adjudication process like the one which is likely to develop under MIC may provide the wrong role model for the commercial courts of the host countries. From the perspective of civil procedure, an argument for reconsideration of the current hostility towards investment arbitration may be in the contribution of international arbitration to innovation in dispute resolution. The innovation is visible in the ability to introduce the most modern – and most appropriate – case management techniques, adjusted to the nature of each case, and in the ability to create ad hoc structures which can cope with the most complex factual and legal issues in an increasingly complex world. Some of such innovations have later been exported to the area of state justice, where they have been used by the courts, judges and parties. They also inspired legislative changes that have improved

105 CETA, Art 8.31.

civil procedures worldwide.[106] By introducing innovations developed and tested in the field of international commercial arbitration, we have not only an opportunity to build a better system of civil justice, but also an opportunity to achieve greater harmonisation in the field of dispute resolution on a global level.

On this background one should evaluate the future steps in the reforms of the ISDS. Some scholars have already catalogued the alternative avenues of change, and labelled them as *incremental, systemic* and *paradigmatic reforms*.[107] Yet, according to the description of the three models,[108] something seems to be missing: a fundamental reform which goes beyond modest cosmetic changes in the outlook of the investment arbitration, but preserves the specific advantages of arbitration, including its flexibility, its ability to select the best adjudicators for the specific case, its significant degree of party autonomy and its procedural efficiency. This, apparently missing link of fundamental *arbitration* reforms of ISDS, is the most promising path.

Such fundamental reforms would need to address the fundamental criticisms, such as the issue of transparency (already discussed within UNCITRAL); the concerns regarding the proper balance between the right of the state to regulate in the public interest and the need to secure stability and foreseeability for foreign investments (based on a thorough and impartial research into the real proportions of the problem) and the issue of party appointments as a potential threat to the integrity of the process. Whether appeals would be an element of the reformed ISDS architecture might depend on the outcome of the other reforms. If, indeed, the reforms found an adequate answer for the 'moral hazards' of party appointments,[109] the addition of appeals – ie of a lengthy and costly process of full review that is a necessary evil if we distrust the original adjudicators – may turn out to be unnecessary.

Yet, whether fundamental but reasonable reforms of the ISDS would take place will ultimately depend on the policy decision. The European Union at present seems to have made up its mind – though we seriously doubt that its current preference is the result of a prudent and thorough study of the problem. The preceding analysis indicates rather that the European anti-ISDS stance evolved due to a mix of diverse elements: political pressures (arising from different sides, from populist politicians to trade unions and NGOs); the selfish interests of particular states that want to avoid enforcing particular arbitral awards, when and if they oblige the states to

106 The practice of combining experts and expert witnesses, the managing of witness evidence, the introduction of procedural calendars and procedural compacts between the court and the parties on the conduct of the proceedings, the time-management techniques (eg distribution of time by chess clock rule): all these methods have been popularised and further developed in the context of international arbitration, and now they contribute to worldwide improvement of civil justice systems.

107 See A Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 410-432; see also Puig, Schafer (n 51).

108 According to Roberts, *incrementalists* only want 'modest reforms' of the ISDS; *systemic reformers* advocate multilateral investment courts, and *paradigm shifters* dismiss the existing system entirely, referring to domestic courts or state-to-state arbitration.

109 See Paulsson (n 52); A van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in: Looking to the Future: Essays on International Law in Honor of W.M.Reisman* (Brill 2011).

compensate particular investors; and the wish of the EU institutions (from the European Commission to the CJEU) to strengthen and reaffirm the powers of the Union regarding trade policies vis-à-vis the Member States. This is not the best basis for the future development in the area of international commercial dispute resolution.

Hopefully, policy decisions can change. If, as predicted, the current anti-ISDS (and anti-arbitration) does not produce beneficial effects, the new turn in the approach to mechanisms of dispute resolution between investors and states will happen sooner or later – hopefully not too late. Consequently, my advice for the policymakers faced with the ISDS dilemma can be summarised in the words of an old proverb: Fix it, don't throw it away! Otherwise, the consequences are likely to be detrimental to the very goals these policymakers wish to pursue.

# EXTRAORDINARY COMPLAINT IN CIVIL PROCEEDINGS UNDER THE POLISH LAW

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Summary: 1. Introduction. – 2. Evolution of Appeal Measures in Civil Proceedings under the Polish Law. – 3. The Origin and Nature of the Extraordinary Complaint. – 4. Grounds for Appeal with the Use of an Extraordinary Complaint. – 5. Authority to File and Dates of Filing an Extraordinary Complaint. – 6. Judicial Resolution Following Extraordinary Complaint Examination. – 7. Concluding Remarks

*The system of appeal measures in civil proceedings under the Polish law has been subject to profound evolution over the years. The Supreme Court Law of 8 December 2017 has introduced a new legal measure called the extraordinary complaint, which allows rebuttal of final judgments terminating respective proceedings. Extraordinary complaint examination has been entrusted to the newly established Extraordinary Control and Public Affairs Chamber of the Supreme Court.*

*Literature has referred to this extraordinary measure of appeal as a total instrument with considerable material and temporal scope, allowing contestation of final judgements regardless of whether any legal measures had been applied in the course of respective proceedings and the type of measures used. Although parties to civil proceedings have gained another extraordinary measure of appeal, they have no real influence over its application.*

*The expansion of the extraordinary appeal measures catalogue in Polish civil law proceedings has triggered multiple reservations as to the connection between parallel complaints. One should not assume a priori that the new extraordinary measure of appeal shall destabilise the legal system in Poland – albeit certain operational distortions seem realistic.*

*Key words: measures of appeal, extraordinary measures of appeal, extraordinary complaint, setting aside of the judgment under appeal, filling gaps in the appeal measures system, stability of court judgments.*

## 1. INTRODUCTION

Certainty of law requires respect for the principle of formal validity of judgments, and consequences of the *res iudicata* in civil proceedings. Concern for adjudicating a dispute correctly in civil proceedings is of particular importance until the moment of securing a valid judgment – once a judgment is pronounced valid, any cases of further examination should be an exception and unique in nature.[1] While efforts ought to be made to improve the quality and general level of adjudication, this purpose does not necessarily have to be achieved only by increasing the number of potential control measures.[2] A tendency to restrict the catalogue and scope of appellate measures has been recently observed in the European legal culture.[3] It has been unanimously accepted – in the Polish case law and in the civil procedure jurisprudence alike – that the right to fair trial requires that access to the judiciary as well as reliable court proceedings and a judgment be secured. Nonetheless, such a right does not comprise the authority to question judicial determinations,[4] in particular, the possibility of challenging valid court judgments.[5]

Notwithstanding the above, the occurrence of judicial missteps and misconduct in the process of passing a judgement is unavoidable. Main reasons for faulty judgments include errors in reasoning – on legal as well as factual grounds – and in proceeding. Due to a wide diversity of legal interpretations and the frailty of human nature, the need for or even the necessity of existence of an extensive system of appellate measures in civil proceedings are unquestionable.

In civil proceedings under the Polish law, legal measures serving the purpose of eliminating a faulty judicial judgment are by no means a uniform group.[6] Their nature may be complete or restricted in terms of the catalogue and types of deficiencies potentially justifying the questioning of a judicial determination. Any appeal against a judgment is fundamentally intended to annul or amend it, unless the legislator specifies some other particular procedural consequences. Regular (ordinary) measures of appeal are intended to challenge non-final judgments, whereas extraordinary measures of appeal allow for the questioning of legally binding rulings. The role and importance of mechanisms recognised

1 T Ereciński (ed), 'Środki zaskarżenia' in J Gudowski (ed), *System Prawa Procesowego Cywilnego,* vol III part 1 (Wolters Kluwer Polska 2013) 31 ff.

2 W Siedlecki, 'Z prac Komisji Kodyfikacyjnej nad nowym kodeksem postępowania cywilnego PRL' (1961) vol I Studia Cywilistyczne 287 ff; T Ereciński, 'Ograniczenia w dostępności do kasacji w sprawach cywilnych' in Z Banaszczyk (ed), *Prace z prawa prywatnego. Księga pamiątkowa ku czci sędziego Janusza Pietrzykowskiego* (CH Beck 2000) 73 ff.

3 M Michalska-Marciniak, 'Formy ograniczenia dostępu do sądu wyższego w sprawach cywilnych (analiza modelu teoretycznego)' in K Flaga-Gieruszyńska, G Jędrejek (eds), *Aequitas sequitur legem. Księga jubileuszowa z okazji 75. urodzin Profesora Andrzeja Zielińskiego* (CH Beck 2014) 379 ff.

4 A Zieliński, 'Konstytucyjny standard instancyjności postępowania sądowego' (2005) No 11 Państwo i Prawo 4 ff.

5 T Zembrzuski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym* (Wolters Kluwer 2011) 76 ff, and reference sources quoted therein.

6 S Hanausek, 'System zaskarżania orzeczeń sądowych w nowym polskim postępowaniu cywilnym'(1967) No 9 Studia Cywilistyczne 141 ff.

as part of the latter category ought to be considered from the viewpoint of ascertaining correctness in adjudication, as well as in the context of uniformity in the interpretation and application of law by the justice system.[7] Their number and nature have been undergoing major change over the years.

## 2. EVOLUTION OF APPEAL MEASURES IN CIVIL PROCEEDINGS UNDER THE POLISH LAW

The system of appeal measures in civil proceedings under the Polish law has been subject to profound evolution over the years, all change and transformation arising from discussions and debates in legal communities in the wake of system, social, and political changes introduced in Poland in 1989. Optimal solutions were sought[8] with intent to warrant the right to a fair trial and the option of implementing the postulate of error-free adjudication to any party concerned by introducing and specifying the nature and boundaries of appeal measures. Efforts were made to recognise the role and importance of the validity and stability of court judgments.[9]

The most significant changes include the 1996[10] abandonment of the review system, which provided for a ruling review by a second-instance court and an extraordinary review supplement as a non-instance measure of appealing against final judgments. In imitation of pre-war procedural solutions, the Polish legislator restored[11] the appeal and cassation system.[12] The appeal was restored to replace reviews,[13] whereas extraordinary reviews – as a measure unfit for the rule of law – were duly replaced with cassation.[14] Transforming cassation into the cassation complaint in 2004[15] and conferring upon it the nature of an

7 See J Gudowski, 'Pogląd na kasację' in P Grzegorczyk, K Knoppek, M Walasik (eds) *Proces cywilny. Nauka – Kodyfikacja – Praktyka. Księga jubileuszowa dedykowana profesorowi Feliksowi Zedlerowi* (Wolters Kluwer Polska 2012) 155 ff.

8 T Ereciński, 'Kilka uwag o modelu kasacji w sprawach cywilnych' in Ewa Łętowska Tomasz Dybowski et al, *Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci prof. Tomasza Dybowskiego,* vol XXI (Wydawnictwa Uniwersytetu Warszawskiego 1994) 97 ff.

9 P Grzegorczyk, 'Stabilność prawomocnych orzeczeń sądowych w sprawach cywilnych w świetle standardów konstytucyjnych i międzynarodowych' in T Ereciński, K Weitz (eds) *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego* (Lexis Nexis 2010) 151 ff.

10 Law of 1 March 1996 on amendments to the Civil Proceedings Code, to ordinances of the President of the Republic of Poland (Bankruptcy Law and Arrangement Law), to the Administrative Proceedings Code, to the Law on Legal Costs in Civil Cases, and to selected other laws (*Journal of Law* 1996, No 43 item 189).

11 The appeal and cassation system was operational in Poland until 1950, when numerous procedural solutions were duly adapted to reflect the Soviet system. Z Resich, *Nauka o ustroju organów ochrony prawnej* (Wydawnictwa Uniwersytetu Warszawskiego 1970) 128 ff.

12 S Rudnicki, 'Nowy środek odwoławczy: apelacja' (1993) No 6 Przegląd Sądowy 42 ff.

13 The review model had been operational in Poland for over 40 years. For details concerning advantages and disadvantages of the institution, see J Gudowski, 'Pogląd na apelację' in J Gudowski, K Weitz (eds), Aurea Praxis. Aurea Theoria. Księga pamiątkowa ku czci profesora Tadeusza Erecińskiego, vol 1 (Lexis Nexis 2011) 246 ff.

14 T Ereciński, 'O nowelizacji kodeksu postępowania cywilnego w ogólności' (1996) 10 Przegląd Sądowy 8 ff.

15 Law of 22 December 2004 on amendments to the Civil Proceedings Code and the Common Court System Law (Journal of Law 2005, No 13 item 98).

extraordinary appeal measure constituted another major step in restructuring the appeal measure system.[16]

The phased revolution served to restore procedural instruments typical for West European state systems, ultimately resulting in the abandonment of the three-instance for the two-instance system based on a quadruple-tiered judicial structure. The two-instance system of judicial proceedings and the right to appeal against the judgment of a first-instance court have been duly reflected in the Constitution of the Republic of Poland – Articles 78[17] and 176 clause 1.[18] The system has been recognised as entirely sufficient in terms of delivering targets to be met by the practice of appealing against judicial judgments – from the perspective of constitutional requirements and international standards alike.[19]

The appeal remains the fundamental ordinary measure of challenging substantive rulings in Poland. It is an instrument of appellation available with regard to any substantive judgment of a first-instance court, whereas – in cases duly specified in the law – a complaint may be filed against non-substantive judgments. Extraordinary measures of appeal against formally valid judgments include cassation complaints, applications for revision (reopening), and complaint for declaring a final judgment contrary to law.[20] The first two measures are cassatorial in nature, ie they allow annulment of a final and valid judgment; the third one serves the purpose of assessing the legality of juridical activities of common courts, allowing a prejudicial guideline to be secured in conjunction with state responsibility for any damage caused by action taken by one of its authorities.[21]

The use of extraordinary appeal measures in civil law proceedings has been enjoying favourable reception. It is commonly held that the system has been expanded above and beyond any measures required by the European Union, international treaties, or even the needs of addressees of procedural norms.[22] Yet the Polish legislator has

16 T Zembrzuski, 'Ewolucja charakteru skargi kasacyjnej w polskim postępowaniu cywilnym' in H Dolecki, K Flaga-Gieruszyńska (eds), *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych* (CH Beck 2009) 329 ff.

17 Pursuant to Article 78 of the Constitution of the Republic of Poland, parties to any proceedings shall have the right to challenge judgments and decisions passed by a court of first instance. The law shall determine any exceptions to the aforementioned principle as well as the course of appealing.

18 Pursuant to Article 176 clause 1 of the Constitution, all judicial proceedings shall comprise at least two instances.

19 W Siedlecki, 'System środków zaskarżania według nowego kodeksu postępowania cywilnego' (1965) Nos 5-6 Państwo i Prawo 696 ff.

20 Proceedings before the Supreme Court initiated by the motion of the Prosecutor General to annul a judgment passed in a case not subject as of the date of ruling to the adjudication of Polish courts (for reasons associated with the person in question) or precluding the allowability of judicial action altogether (Article 96 of the Supreme Court Law) are of particular importance.

21 J Gudowski, 'Węzłowe problemy skargi o stwierdzenie niezgodności z prawem prawomocnego orzeczenia' (2006) No 1 Przegląd Sądowy 4 ff.

22 A Góra-Błaszczykowska, 'Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017' in A Barańska, S Cieślak (eds), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 58.

yielded to the temptation of multiplying instruments of control. The Supreme Court Law of 8 December 2017[23] has introduced a new legal measure allowing rebuttal of final judgments terminating respective proceedings.[24] The said measure has been called the 'extraordinary complaint' (*skarga nadzwyczajna*). The aforementioned law entered into force on 3 April 2018.

According to the authors of the referenced legislation, the system of extraordinary appeal measures had featured a gap requiring immediate supplementation. It was claimed that the previously applied appellate instruments had been 'insufficient in terms of safeguarding constitutional civic freedoms and rights in case of their breach pursuant to court judgments', given the fact that 'the legal system features final judgments which diverge from duly expected standards'.[25] The authors of the draft saw the introduction of the complaint as a response to very poor public trust in the justice system.

## 3. THE ORIGIN AND NATURE OF THE EXTRAORDINARY COMPLAINT

The Polish legislator has described the extraordinary complaint as a 'radically different measure of control applicable to the issued court judgments', intended to amend valid court judgments.[26] Yet the reasoning of the draft extraordinary complaint law comprises a direct reference to the extraordinary review institution (*rewizja nadzwyczajna*) – the non-instance measure of final judgements' overhaul, imitating procedural solutions applicable in the USSR (Soviet law), reminiscent of the previous era of socialist law.[27] The extraordinary review had been the product of a totalitarian state lacking standards of division of powers, independence of courts of law or autonomy of judges.[28] The contemporaneous socialist process assumed coherence of individual and state interests, the sense of the availability principle meaning that any rights due to an individual would be enforceable in conformity with socialist interests.[29] Apart from the possibility of reopening the proceedings, all socialist systems provided for an extraordinary review, designed to warrant a judgment's conformity with the so-called objective truth.[30]

23 *Journal of Law* 2018 item 5, with subsequent amendments. Hereinafter referred to as *'the Law'*.

24 The Law applies in civil and criminal proceedings. It is not applicable in judicial administrative proceedings. All further comments reference issues of civil procedural law.

25 Justification of the draft Supreme Court Law of 8 December 2017 <www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=38360B23CA93D0BCC12581D80035FD77> accessed 4 February 2019. Hereinafter referred to as *'justification of the draft'*.

26 Justification of the draft.

27 J Krajewski, *Nadzór judykacyjny nad prawomocnymi orzeczeniami w polskim procesie cywilnym* (Toruń 1963) 36 ff; Z Resich, 'Rewizja nadzwyczajna w procesie cywilnym' (1975) vol XXV-XXVI Studia Cywilistyczne 245 ff.

28 T Ereciński, K Weitz, 'Skarga nadzwyczajna w sprawach cywilnych' (2019) Przegląd Sądowy (forthcoming).

29 Krajewski (n 27) 101.

30 Krajewski (n 27) 106 ff; K Piasecki, *Wpływ postępowania i wyroku karnego na postępowanie i wyrok cywilny*, (Warsaw 1970) 53.

The extraordinary review measure which had been in use in times of the Polish People's Republic allowed state authorities to appeal against any final judgment[31] 'in the name of public interest',[32] in case of 'blatant breach of law or interest of the Polish People's Republic'.[33] The measure was intended to 'remedy any damage caused by judicial system-related infringement'.[34] An extraordinary review could be based on a breach of law as well as on any inconsistency of findings with the actual status quo, thus warranting the truth being established even once judgments had become legally binding.[35]

Parties to proceedings were not authorised to file for a review. Such power could only be exercised by the Minister of Justice, First President of the Supreme Court, Prosecutor General, Ombudsman, or Minister of Labour, Remuneration, and Social Affairs in the field of labour law or social insurance.

The extraordinary review frequently became an instrument of manipulation by state authorities.[36] In practice, although the complaint had mostly been used 'in the interest of the people's state' and the measure itself was appraised very critically from a historical perspective,[37] it became a role model for the contemporary legislator, who proceeded to reconstruct numerous mechanisms while adapting the new instrument to conditions of the current system.[38] Introducing the new instrument as a direct repetition of solutions applied in earlier times was not an option – yet assorted structure-related similarities may be observed when comparing the current extraordinary complaint and the extraordinary review in its previous form.

The extraordinary complaint has been designed, formed and introduced as a measure of extraordinary appeal; it may be applied against final judgments of the courts of general jurisdiction, thus excluding the challenging ability of Supreme Court judgments. While the unfortunate phrasing of some provisions of the Law[39]

31 It was also possible to apply the extraordinary review to appeal against judgment justification only. See B Dobrzański, J Krajewski, *Środki odwoławcze. Wznowienie postępowania. Rewizja nadzwyczajna* (Katowice 1965/66) 76 ff.

32 A Miączyński, 'Z dyskusyjnej problematyki rewizji nadzwyczajnej w postępowaniu cywilnym' (1967) vol X Studia Cywilistyczne 146 ff; F Rusek, 'Review Założenia i podstawy rewizji nadzwyczajnej' (1973) No 9 Nowe Prawo 1225 ff.

33 Article 417 para 1 of the Civil Proceedings Code, 1964 version.

34 Krajewski (n 27) 105.

35 S Kalinowski, *Rewizja nadzwyczajna w polskim procesie karnym* (Wydawnictwo Prawnicze 1954) 35.

36 Ereciński (n 8) 95.

37 J Gudowski, 'Kasacja w świetle projektu Komisji Kodyfikacyjnej Prawa Cywilnego (z uwzględnieniem aspektów historycznych i prawnoporównawczych)' (1999) No 4 Przegląd Legislacyjny 21.

38 Justification of the draft.

39 Pursuant to 89 para 3 of the Law, the extraordinary complaint shall be filed within a term of five years as of the appealed judgment becoming valid, or within one year as of the date of examining the cassation or cassation complaint if duly filed. Conversely, pursuant to Article 94 para 2 of the Supreme Court Law, should an extraordinary complaint apply to a judgment passed in the course of proceedings involving a Supreme Court ruling, the case shall be examined by the Supreme Court, the panel comprising five Supreme Court justices adjudicating in the Extraordinary Control and Public Affairs Chamber, and two Supreme Court jurors.

may point to the use of the complaint as an instrument of appeal against judgments passed by the Supreme Court and concluding all proceedings in a case, such an option has to be unquestionably rejected for systemic reasons. The complaint makes it possible to appeal against all final judgements of the courts of general jurisdiction,[40] the rule applying to substantive decisions as well as rulings formally concluding proceedings in a given case.

The introduction of the complaint instrument has been conjoined with the necessity of securing conformity with the principle of a democratic state of law implementing rules of social justice (Article 89 para 1 of the Law). Literature has referred to this extraordinary measure of appeal as a *'total instrument'*[41] with considerable material and temporal scope, allowing contestation of final judgements regardless of whether any legal measures had been applied in the course of respective proceedings, and the type of the measures used. The complaint shall be admissible if it is impossible to annul or amend the questioned ruling by applying other extraordinary measures of appeal. Consequently, the respective party shall be obliged to file an appeal, a cassation complaint, or a complaint to reopen proceedings. The objective inability to revoke a ruling shall otherwise give rise to the right to submit a motion to file an extraordinary complaint. The above shall apply accordingly if a respective party has exhausted all other measures of appeal, and to rulings becoming final as a result of a measure of appeal not having been filed.[42] The option of filing a complaint might become dubitable once it has been established that a party did not take expected action as a result of negligence or disregard. Adopting such a solution is a repetition of models followed in the socialist process, and undermines the assumption of a party's obligation to handle the proceedings with a sense of accountability for his/her own actions[43]. Such a solution may further encourage parties to consciously abandon other legal measures in the hope that an extraordinary complaint shall be duly drafted and filed in their case.

## 4. GROUNDS FOR APPEAL WITH THE USE OF AN EXTRAORDINARY COMPLAINT

Pursuant to the intent of the Polish legislator, the introduction of the extraordinary complaint was designed to 'restore the fundamental legal order by eliminating from legal relations all rulings breaching the Constitution, blatantly violating the letter of

40 The extraordinary complaint shall not be admissible against a judgment establishing the non-existence of a marriage, annulling a marriage, and/or in divorce cases, if one or both parties remarries after such judgment having become valid, or against an adoption judgment (Article 90 para 3 of the Law). An analogous solution had been adopted for purposes of the extraordinary review.

41 D Gruszecka, 'Podstawy skargi nadzwyczajnej w sprawach karnych – uwagi w kontekście „wypełniania luk w systemie środków zaskarżania"'(2018) No 9 Palestra 27.

42 In case of the former extraordinary review mechanism, over 60% of motions filed concerned cases not examined by courts of second instance. Ereciński (n 8) 98.

43 J Gudowski, 'O kilku naczelnych zasadach procesu cywilnego – wczoraj, dziś, jutro' in A Nowicka (ed), *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu* (Wydawnictwo Naukowe UAM 2005) 1029.

law, and indisputably contradicting the content of evidence gathered in the case'. It was claimed that 'the extraordinary complaint secures corrective justice, restoring adequate order to the distribution of assets, and remedying public shortages in market economy mechanisms'.[44]

These assumptions have been reflected in the extremely broadly defined grounds for the extraordinary complaint as such, general foundations specified alongside detailed basics.[45] The complaint has been developed upon the general premise of ensuring conformity to the democratic state of law implementing rules of social justice, whereas Article 89 para 1 of the Law specifies three specific premises referencing the following circumstances: a) a ruling breaching the principles or freedoms and rights of persons and citizens as stipulated in the Constitution (item 1); b) a ruling blatantly violating the letter of law through its faulty interpretation or application (item 2); c) an indisputable contradiction between significant findings of the court and evidence gathered in the case (item 3).

The admissibility of drafting complaint charges concerning contradiction between significant findings of the court and evidence gathered in the case renders the complaint similar to a regular measure of appeal. Furthermore, the Law applies a variety of unspecific concepts, their scopes frequently intersecting. Conversely, the option of interpreting the *'principle of social justice*' diversely as stipulated under Article 89 para 1 of the Law gives rise to a possibility of judgments falling under the threat of extensive discretion of the court.[46]

The assumption – formerly adopted and consistently unquestioned – of the Supreme Court's cognition and activities primarily serving the purpose of safeguarding public interest, has been modified. The rule of safeguarding public interest in judicial activities of the Supreme Court has been reflected in efforts to secure uniformity of case-law.[47] Proceedings before the Supreme Court should fundamentally be limited to supervision of the application of law,[48] otherwise its function and purpose are modified so as to resemble the role of courts of general jurisdiction. Drafting complaint premises according to the form and manner specified in Article 89 of the Law makes the Supreme Court an authority directly appointed to administrate justice through the control of final court judgments passed by common courts of all levels.

The possibility of verifying factual findings by the Supreme Court examining extraordinary complaints also raises concerns.[49] In such a case, the Court ceases operating in the natural role and function duly assigned to it – that of

44 K Szczucki, *Ustawa o Sądzie Najwyższym. Komentarz* (Wolters Kluwer 2018) 56.

45 Szczucki (n 44) 460 ff.

46 Ereciński, Weitz (n 28) (forthcoming ).

47 Gudowski (n 7) 156 ff.

48 FK Fierich, 'Postępowanie przed Sądem Najwyższym (Skarga w przedmiocie kasacji)' in *Polska Procedura Cywilna. Projekty referentów z uzasadnieniem*, vol II (Kraków 1923) 20 ff.

49 The option had raised doubt with regard to the extraordinary review. See M Waligórski, 'Gwarancja wykrycia prawdy obiektywnej w procesie cywilnym' (1953) Nos 8-9 Państwo i Prawo 276 ff.

a court of law.[50] Furthermore, European procedural law systems follow the standard of a dual examination of the factual grounds of a dispute; in some cases, they may be examined only in the course of one-instance proceedings[51]. The Polish legislator espoused the possibility of examining the factual grounds in civil proceedings on three separate occasions. The multiplication of stages of proceedings to examine and verify facts of the case, while not warranting any improvement in the clarification of factual circumstances, is most definitely conducive to an extension in proceedings and contributes to their lengthiness.

The scope of an extraordinary complaint application is partially convergent with other extraordinary measures of appeal. There is a similarity between the premises of an extraordinary complaint and certain premises of a cassation complaint, a complaint for declaring a final judgment contrary to law, and applications for reopening of proceedings. For example: in case of a cassation complaint, premises may only involve a breach of material law through its misinterpretation or faulty application, or procedural error, if such an infringement has a significant impact on the ultimate result of the case (Article $398^3$ para 1 of the Code of Civil Proceedings).[52] The scope of the extraordinary complaint most definitely extends beyond the circumstances described above.

Aforementioned comments give rise to serious doubts with regard to the transparency and coherence of the adopted solutions.[53] Overly general premises of the extraordinary complaint deserve particular criticism. With regard to the previously used extraordinary review, the Law had also been employing the unspecific concept of the 'interest of the Polish People's Republic'. In hindsight, it may well be concluded that 'the interest of the Polish People's Republic had become an unlimited value, attacks on any inconvenient ruling encountering no major difficulty; consequently, the certainty of legal relations deteriorated, the value of finality of judgements diminishing'.[54] Although those legal premises cannot be equated with the contemporary reference to the 'principle of a democratic state of law implementing rules of social justice', greater precision and unambiguousness ought to be expected from a statutory regulation in terms of specifying the scope of a measure of appeal.

50 W Sanetra, 'O roli Sądu Najwyższego w zapewnianiu zgodności z prawem oraz jednolitości orzecznictwa sądowego' (2006) No 9 Przegląd Sądowy 14 ff.

51 P Grzegorczyk, 'Dopuszczalność i kształt apelacji w postępowaniu cywilnym – perspektywy przyszłej regulacji z uwzględnieniem standardów konstytucyjnych i międzynarodowych' in K Markiewicz, A Torbus (eds), *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego* (CH Beck 2014) 282 ff.

52 Zembrzuski (n 5) 316 ff.

53 M Balcerzak, 'Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka' (2018) Nos 1-2 Palestra 19; Gruszecka (n 41) 28 ff.

54 Gudowski (n 13) 247 ff.

## 5. AUTHORITY TO FILE AND TERMS OF FILING AN EXTRAORDINARY COMPLAINT

Pursuant to Article 89 para 2 of the Law, an extraordinary complaint may be filed by the Prosecutor General, an Ombudsman, and – within the scope of his/her competence – the President of the General Counsel's Office to the Republic of Poland,[55] the Ombudsman for Children's Rights, the Ombudsman for Patients' Rights, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium-Sized Enterprises, and the President of the Office of Competition and Consumer Protection.[56] The legitimacy for filing the appeal measure has been fully stipulated in the Law.

The decision to draft the extraordinary measure of appeal does not rest with the parties. As in case of the extraordinary review, parties have been deprived of the right to file it, in favour of specific entities and institutions that are public in nature. The interested party may only apply to a duly authorised body – or even to a number of them. Yet the Law does not specify the manner, or the form of filing a request with the duly authorised entity, which may ultimately approve or reject the party's application, or even leave it unexamined in some cases. Legitimate entities are obliged to verify whether 'principles arising from the rule of justice had been blatantly breached' in the given case.[57]

Such shape of legitimacy to file an extraordinary complaint ultimately means that the party questioning a ruling concerning his/her rights and responsibilities shall be assigned the mere role of an applicant to state agencies. It had been duly pointed out – in case of the extraordinary review – that entrusting appeal measure availability to an official body gives rise to a tool of manipulation, and is conducive to clientelist attitudes being formed and fostered in the society.[58] This is clearly an anti-civic solution, whereas from the perspective of parties to a legal relationship, the complaint can hardly be considered as rational or effective legal measure. Moreover, the drafting and filing of an extraordinary complaint may be triggered by actions other than a simple application by an interested party – it may also proceed ex officio, should relevant justifying information be revealed and found out. Depriving parties to proceedings under civil law of any influence over the initiation or course of extraordinary complaint-related proceedings constitutes an infringement of the right to fair trial.

55 Doubt is cast with regard to authority to file an extraordinary complaint being vested with the President General Counsel's Office to the Republic of Poland, as the entity remains at the helm of the institution handling legal representation for the State Treasury and other duly specified entities – and may thus have an interest in revoking rulings passed in cases involving the Prosecutor General's Office. See A Góra-Błaszczykowska, 'Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017' in A Barańska, S Cieślak (eds), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 59 ff; Ereciński, Weitz (n 28) (forthcoming).

56 In the original draft version, the authority to file a complaint was to be vested in a group of no less than 30 deputies or 20 senators.

57 Justification of the draft.

58 Gudowski (n 13) 247.

Pursuant to Article 90 para 1 of the Law, an extraordinary complaint shall only be filed once against a specific ruling concerning the interest of a given party[59] – yet the restriction does not apply to the proceedings in case, but rather to the specific judgment. A complaint in the interest of the other party is admissible – consequently, complaint proceedings may be repeated; conversely, in non-procedural proceedings involving a larger number of parties, the complaint may be filed multiple times. If the extraordinary complaint is admitted and the appealed judgment annulled, a new judgment shall be passed; as of the date of such a new judgment becoming final, it may be subject to appeal under a (subsequent) extraordinary complaint. Thus, a real risk of extraordinary complaint multiplication arises for proceedings regarding a specific civil law case.

The time limits for an extraordinary complaint admissibility are considerably broad. An extraordinary complaint shall be filed within five years since the appealed judgment became final, or within one year as of the date of examining the respective cassation complaint, if filed (Article 89 para 3 of the Law). Such an extensive period of time undermines the stability of court judgments, casting doubt upon their durability. Legal protection becomes uncertain, thus failing to fully ascertain the function of adjudication with a view to determine the outcome of the dispute in a legally binding and lasting way.[60]

Furthermore, within a term of three years as of the Law coming into force, putting into question all rulings which became final after 17 October 1997, ie after the enactment of the current Constitution, becomes an actual possibility. Practice will duly prove the extent to which the said capacity shall be taken advantage of by entities authorised to file an extraordinary complaint.

## 6. JUDICIAL RESOLUTION FOLLOWING EXTRAORDINARY COMPLAINT EXAMINATION

Extraordinary complaint examination has been entrusted to the newly established Extraordinary Control and Public Affairs Chamber of the Supreme Court. The Court shall adjudicate in a panel comprising two Supreme Court justices and a Supreme Court juror.[61] It has been assumed that the so-called social factor involvement in the Supreme Court adjudication shall serve the purpose of due public supervision. Such a solution is rare in European legal systems, it has never been employed in proceedings under the Polish civil law, and it has been critically received upon its introduction.[62]

59 In case of the extraordinary review, Article 417 para 3 of the Civil Proceedings Code introduced a ban on extraordinary reviews against a Supreme Court judgment passed in consequence of an extraordinary review having been filed.

60 Ereciński, Weitz (n 28) (forthcoming).

61 Supreme Court jurors shall be elected by the Senate (Article 61 para 2 of the Law), ie by a body of the legislative power.

62 It has been raised that adjudication in the Supreme Court requires legal education and many years of experience. See A Góra-Błaszczykowska, 'Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017' in A Barańska, S Cieślak (eds), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 64 ff.

Once it has been found that there are no grounds for annulling the appealed judgment, the extraordinary complaint shall be dismissed. Extraordinary complaint recognition shall be tantamount to the annulment of the appealed judgment in part or in whole. Pursuant to Article 91 of the Law, the Supreme Court – results of proceedings pending – shall rule as to the essence of the case, refer the case for re-examination, or discontinue all proceedings. Ruling on the subject matter of an extraordinary complaint blends in both potential consequences of examining an appeal measure – a reforming effect *(iudicium rescissorium*) and a cassatorial effect (*iudicium rescindens*). While the ultimate ruling is dependent on the type of identified infringement(s), stipulations of the Law suggest that the alteration of an appealed judgment is a preferred consequence of examining an extraordinary complaint.[63] The legislator has pointed out that a cassatorial ruling shall only be issued once it has been ascertained that the Supreme Court cannot rule on the merits of the case.

If the appealed judgment had caused irreversible legal consequences,[64] the Supreme Court shall only rule that the appealed judgment was passed with breach of the law. In such a case, the court shall be obliged to duly indicate reasons justifying the original judgment.

The Civil Proceedings Code's provisions concerning the cassation complaint shall apply to all and any circumstances of proceeding with an extraordinary complaint, unregulated by the provisions of the Supreme Court Law.

## 7. CONCLUDING REMARKS

The introduction of the extraordinary complaint into the Polish system of appellate measures was accompanied by a belief that its intent would be to meet public expectations of 'judicial rulings being just, passed on the basis of properly interpreted legal provisions, and reflective of a duly gathered and correctly appraised body of evidence'. While such argumentation was favourably received by the general public, it has been based on a dubitable assumption that the introduction of yet another legal measure shall definitely eliminate the criticised phenomenon of grossly unjust final judicial rulings. A judgment issued following the examination of an extraordinary complaint may also be objectively assessed as grossly unjust and harmful to a given party. Consequently, the following question arises: once such a line of reasoning is applied, should not another legal measure be secured to somehow restrain the volume of faulty court judgments identified and remaining in the legal system?

Ostensibly, the number of instances and appellate measures available ought to become a compromise between the tendency of safeguarding proper and well-controlled court judgments and that of securing a swift and definitive conclusion

63 In case of the cassation complaint, the usual solution involves an annulment of the appealed judgment – reforming rulings are rare.

64 Examples of such circumstances catalogued by the Law include the expiry of a five-year term as of the date of the appealed judgment becoming valid, and the risk of violation to international obligations of the Republic of Poland.

to a dispute.[65] Solutions introduced by the Law of 8 December 2017 distort the established compromise between the absolute stability of valid judgments and the need to rectify each erroneous judgment. The contemporary Polish legislator concluded that while the stability of final court judgments remains a Constitution-ingrained value, it does not necessarily deserve to be defended at all cost. The scope and form of defending the said value has been considerably restricted. In a sense, the stability of judgments has been juxtaposed against the principle of justice.[66]

The expansion of the extraordinary appeal measures catalogue in the Polish civil law proceedings has triggered multiple reservations as to the connection between parallel complaints. This is due in part to these matters having remained unregulated by the legislator, or to the exercise having been fragmentary in nature.[67] Notably, the extraordinary complaint should be a subsidiary instrument – consequently, the respective party should exhaust all legal measures available prior to such a complaint being filed. It seems that from the viewpoint of the order of filing of appellate measures, the extraordinary complaint – while yielding to other measures of appeal (ordinary and extraordinary alike) – prevails over the complaint for declaring a final judgment contrary to law, which (as opposed to the cassation complaint and the application for revision) has not been designed to revoke valid judgments.[68] Early experiences have already demonstrated that the introduction of the extraordinary complaint has had considerable influence over the admissibility of complaint for declaring a final judgment contrary to law; the vast majority of the latter is currently being rejected as inadmissible.[69] [70]

Literature is dominated by concerns that the operation of legal order and the entire justice system may be subject to disturbance.[71] Doubts have been cast with regard to the fact that filing extraordinary complaints in civil cases against judgments already involving other extraordinary appellate measures may produce an increase in the number of appellate measures employed and result in lengthiness of proceedings,

65 A Oklejak, 'Z problematyki zaskarżalności orzeczeń sądowych w postępowaniu cywilnym' (1975) vol XXV-XXV Studia Cywilistyczne 222 ff.

66 Szczucki (n 44) 458.

67 The draft Law justification only references the association between the extraordinary complaint and the cassation complaint and the constitutional complaint.

68 T Zembrzuski, 'Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia' (2019) Przegląd Sądowy (forthcoming).

69 In a decision of 30 August 2018, Ref. No III CNP 9/18, unpublished, the Supreme Court ruled that in the wake of the new Supreme Court Law coming into force, the party filing the complaint for declaring a final judgment contrary to law shall be obliged to prove that it had submitted a motion for the filing of an extraordinary complaint with an authorised body, and that such motion had not been recognised. Conversely, in a decision of 24 October 2018, Ref. No CNP 48/17, unpublished, the Supreme Court pointed to the fact that a party who had filed the complaint for declaring a final judgment contrary to law prior to the Law introducing the extraordinary complaint having come into force shall be obliged to prove that an extraordinary complaint cannot be filed, or else said action for annulment shall be declared void and duly rejected.

70 Zembrzuski (n 68) (forthcoming).

71 M Balcerzak, 'Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka' (2018) Nos 1-2 Palestra 11 ff; Gruszecka (n 41) 27 ff; Ereciński, Weitz (n 28) (forthcoming).

which may pose a real threat to legal certainty and stability of judgments.[72] Although parties to civil proceedings have gained another extraordinary measure of appeal, they have no real influence over its application.

Given numerous similarities to the extraordinary review employed in the previous era, one might well ask whether the appellate measure provided for under the 2018 Law shall prove to be a valuable solution, bearing a resemblance to the so-called cassation in the interest of law functioning in some legal systems – or rather a source of chaos, doubt, and controversy. The negative record of the times of the Polish People's Republic – especially the one referring to the anti-democratic and bureaucratic nature of the extraordinary review[73] – has proven that the option of discretionary attempts to undermine final judgments, designed to 'correct wrongful and unjust judgments on a state-wide scale',[74] may produce legal uncertainty.

Practice will verify both hopes and concerns connected with the new instrument of procedural law in Poland. One should not assume a priori that the new extraordinary measure of appeal shall destabilise the legal system in Poland – albeit certain operational distortions seem realistic. One may express hope that the scope of application of the extraordinary complaint shall prove limited in practice, and that it shall only apply to cases of particular and gross violations of the letter of law. Depriving parties of actual influence over the possibility to file the measure shall be a factor largely limiting the number of complaints filed. Another vital factor involves the expectation that the party filing the complaint should prove beyond doubt that the questioned judgment cannot be annulled or amended under other extraordinary measures of appeal, and that particular circumstances duly described under Article 89 para 1 of the Law have arisen. In all probability, the Supreme Court shall conclude in selected cases that the need to re-examine a case prevails over the need to safeguard a judgment's stability, thus justifying the abandonment of a ruling's formal finality and undermining the consequences of the *res judicata* in respective proceedings.

72 See A Góra-Błaszczykowska, 'Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017' in A Barańska, S Cieślak (eds), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 61ff.

73 Gudowski (n 13) 247 ff.

74 L Penner, 'Rewizja nadzwyczajna. Kilka uwag na tle praktyki' (1953) Nos 8-9 Nowe Prawo.

# SOME IMPORTANT FEATURES OF LITHUANIAN CIVIL PROCEDURE

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Summary: – 1. Introduction. – 2.Electronification of civil justice. – 3. Preparatory stage of civil proceedings. – 4. Possibilities of group action in Lithuanian civil procedure. – 5. Concluding remarks

*Abstract: As in all Eastern and Central European countries, legal system in Lithuania, including civil justice, has undergone many reforms since 1990. In 2003 new Lithuanian Code of Civil Procedure came into force and finally traditions of Western Europe (mainly German and Austrian ones) were systematically introduced into civil litigation in Lithuania. The aim of this article is to present some distinct aspects of Lithuanian civil procedure. It has been chosen to present electronification of civil proceedings because if it's broadly known success throughout Europe. Preparatory stage is described because this stage of civil proceedings was reformed drastically in 2003. Group action is discussed as one of examples of unsuccessful reforms of Lithuanian civil justice.*

*Keywords: Lithuania, civil procedure, electronification, preparatory stage, group action, access to justice*

## 1. INTRODUCTION

New Lithuanian Code of Civil Procedure (CCP) was adopted on the 28th of February 2002 and came into force on the 1st of January 2003. After this date it has been amended several times according to the legal doctrine of Lithuanian Constitutional Court and Lithuanian Supreme Court, also regarding fast changing technologies and their impact on civil justice. EU law has not been a huge factor for amendments of CCP until now.

A court system of Lithuania is made up of courts of general jurisdiction and courts of special jurisdiction. Special jurisdiction nowadays relates only to administrative courts. Courts of general jurisdiction, which deal with civil and criminal matters consist of the Supreme Court of Lithuania, the Court of Appeal, five regional courts and 12 district courts (and their chambers in different smaller towns).[1] Regional courts are first instance courts for civil cases assigned to its jurisdiction by law, and appeal instance for judgments, decisions of district courts. The Court of Appeal is appeal instance for cases heard by regional courts as courts of first instance. It also hears requests for the recognition of decisions of foreign or international courts and foreign or international arbitration awards and their enforcement in Lithuania. The Supreme Court of Lithuania is the only court of cassation instance for reviewing effective judgements, rulings of the courts of general jurisdiction and is responsible for developing a uniform court practice in the interpretation and application of laws and other legal acts.

Most civil cases in first instance are heard by one judge. Although there is a possibility that a chairman of the court, considering the complexity of the civil case, can form a judicial board of three judges. Usually civil cases are heard and the judgments are passed quite quickly in Lithuania. According to statistics of the EU Justice Scoreboard[2] and according to the Lithuanian National Courts Administration on average judgments in civil cases in the first instance are adopted within 100 days after the filing the claim in the court. This is the second best result in the whole of EU.

In general 196 439 civil cases were heard in Lithuania in 2017. That is about 5 per cent fewer than in 2016. Around 44 000 of these civil cases were court (payment) order cases.[3]

In this article some important features of Lithuanian civil procedure, such as electronification, preparatory stage and possibilities of group action will be described and discussed. Such description will hopefully be useful for legal scholars and practitioners in other Eastern European countries.

## 2. ELECTRONIFICATION OF CIVIL JUSTICE

Modern technologies can be used in civil justice at three levels:
– Personal (judges, their assistants, court clerks, administrative staff, etc.);
– institutional (individual courts and the whole system of courts);
– inter-institutional (relations of courts with other participants in proceedings, state registers and information systems).[4]

1 For more information about the courts in Lithuania, see: <http://www.teismai.lt/en/courts/judicial-system/650> accessed 12 February 2019.

2 For more information, see: <https://ec.europa.eu/info/publications/2018-eu-justice-scoreboard_lt> accessed 12 February 2019.

3 More statistics can be found here: < www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/statistika/4641> accessed 12 February 2019.

4 The European Commission for the Efficiency of Justice (CEPEJ), *Use of information technologies in European courts* (CEPEJ Studies No 24 2016).

The same report stresses that Estonia and Lithuania have a 100 % equipment rate and have fully deployed informational tools already, not only in civil and commercial law, but also for criminal and administrative cases.

A quality leap in the development of information and communication technologies in Lithuanian courts took place between 2004 and 2005 when the unified information system of Lithuanian courts, LITEKO was launched. Another major shift towards increasing the efficiency of technologies in civil justice and accelerating the development of available technologies took place when the Lithuanian parliament adopted a package of amendments to the Law on Courts and the CCP in year 2011.[5]

It was laid down in Article $37^1$ of the Law on Courts that the electronic data related to judicial and enforcement proceedings shall be managed, registered and stored using information and communication technologies. It legitimised the digitalisation of 'paper' files and procedural documents. Article $175^1(9)$ of the CCP stipulated that attorneys at law, assistants of attorneys at law, bailiffs, assistant bailiffs, notaries, state and municipal enterprises, institutions and organisations as well as financial and insurance undertakings must ensure the submission of procedural documents by electronic means. Later bankruptcy and restructuring administrators were included in the list. According to the latest statistics more than 70 % of civil cases are electronic in Lithuania.[6]

Also electronic management of judicial mediation procedures has been launched. If both parties agree judicial mediation can take place only online via electronic means. Enforcement procedure can also take place electronically. Parties to the dispute are able to submit applications to the bailiff and receive enforceable instruments electronically. Auctions of debtor's property have been taking place only electronically since year 2011. Electronic system of the bailiffs has been integrated with LITEKO system.

From the year 2014 there is an obligation to audio record all court hearings. This completely eliminated the use of 'paper' records as it was established that an audio recording is considered to constitute the record of the hearing and is an integral part of the proceedings. From the 1st March 2013, Article $175^2$ of the CCP came into force and legitimised the use of information and communication technologies (video conferencing, teleconferencing, etc.) in questioning witnesses, experts, persons involved in the proceedings and other parties to the proceedings, as well as during site surveys and collection of evidence. The law notes that the procedure and technologies applied have to guarantee the objectivity of evidence capturing and presentation as well as enable a reliable identification of the persons involved in the proceedings.

It can be also mentioned that all civil cases are allocated to the judges or to the judicial panels via special IT programme. Such programme must ensure that the

5 Law Amending and Supplementing the Code of Civil Procedure of the Republic of Lithuania [2011]Official Gazette 85-4126; Law Amending Articles 36, 37, 93, 94, 120 of the Law on Courts of the Republic of Lithuania and Supplementing the Law with Article 371 [2011] Official Gazette 85-4128.

6 More statistics can be found here: <http://www.teismai.lt/data/public/uploads/2018/04/d2_galutine-ataskaita-10.pdf> accessed 12 February 2019.

civil cases are allocated to the judges and judicial panels of judges taking into account the specialisation of judges, even distribution of work load, complexity of cases, the rotation of judicial panels. The chairman of the court is still capable to change the allocation of civil cases if the circumstances of dismissal of judges or their opting out, temporary incapacity of a judge for work occur.

## 3. PREPARATORY STAGE OF CIVIL PROCEEDINGS

After the new CCP has been adopted, the main hearing model of civil procedure has been introduced and the goals of preparatory stage have been set according to this model. The main idea is to organize preparation in such manner that it would be possible to hear the civil case in the main single oral hearing. Legal doctrine in Lithuania usually states that the goals of preparatory stage are.[7]
– to guarantee that the parties would indicate all their claims, arguments, evidence;
– to formulate finally the claims and counterclaims of the parties;
– to inform all the necessary participants to the proceedings about the civil case;
– to try to reconcile the parties to the dispute.

Pre-action phase is not really relevant up till now in Lithuania. There is no obligation for parties to the dispute to disclose evidence or to go through mandatory mediation before filling a statement of claim to the court. From year 2020 mandatory mediation will be introduced for most of family disputes. Until now there is an obligation for some specific civil disputes to go throuh prior court obligatory extrajudicial dispute resolution. Such obligation must be prescribed in special laws. Otherwise it is not possible to file a statement of claim to court for such civil claims. Such obligation has been established for all labour disputes; also for some specific civil disputes as defamation or refutation or disputes concerning some energy or public procurement laws.

In most civil cases a preparatory stage is obligatory. However, in year 2011 it was allowed that the judge can decide not to organize preparatory stage. Having received the response from the defendant the judge can instantly decide that further procedural actions for preparation the case for the civil hearing are not necessary and the ruling to hear the case can be passed at the main hearing. Also in small claims disputes (up to 2000 Euros) a preparatory stage is not obligatory.

Preparatory stage can be written or oral in Lithuania and it is not possible to mix it and to arrange a written and oral preparation stage in the same civil case. There were attempts to allow courts to mix both forms of preparation several years ago, but consensus was not found between legals cholars, judges and Ministry of Justice and it was agreed that it was not the right time to amend preparatory stage.

If court believes that a peaceful settlement can be achieved in the civil case or when the law sets the obligation for the court to take measures to take judicial settlement

7 A Driukas, V Valančius, *Civilinis procesas: teorija ir praktika* (Teisinės informacijos centras 2007) 193.

efforts (for instance family or labour cases) or when this is a way for better and more comprehensive preparation for the hearing in the court then preparatory court hearing must be organised. Under the CCP, one preparatory court hearing should be enough to prepare the case hearing in the court, but in exceptional instances or believing that the case may be ended in a settlement, the court is entitled to assign the date of the second preparatory court hearing that may not be later than thirty days afterwards. There cannot be more than two preparatory court hearings, but unfortunately in practice this rule is quite often infringed.

If both parties are represented by attorneys at law or assistants of attorneys at law; or parties are legal entities which have legal counsellors or it is obvious for the court that both parties understand legal side of the dispute good and are able to express themselves well in the form of documents, preparatory stage is organised in written form without a hearing. Such form of preparation is applied always in disputes regarding public procurement. The court cannot allow to prepare case in written form if there are possibilities to reach settlement or there is an obligation for the court to try to reconcile parties to the dispute.

If the civil case is prepared in written form, plaintiff must submit a *duplicatio* (plaintiff's replication to the plea submitted by the defendant) and the defendant must submit a *triplicatio* (defendant's replication to the *duplicatio*).

The closing of preparatory stage is usually ended by a ruling of the court. Such ruling in Lithuania has a function to consolidate all the actions performed in preparatory stage and it should be quite difficult to change something regarding the essence of the civil case after passing this ruling.[8] It should be allowed only in exceptional cases to change the grounds or subject of the claim, increase claim requirements, submit a counterclaim or present more evidence. In practice civil cases can be found where a plaintiff or defendant is allowed to change his legal position quite easily during the main hearing and in such way civil proceedings are delayed. It is allowed not to pass such ruling in civil cases when during the preparatory hearing it turns out that additional actions of preparation are not necessary and the court decides to start oral hearing and resolve the case on the merits right after the preparatory court session.

Preparatory stage is designed to collect all necessary evidence for the civil case in order to hear the case later in one of the court hearings and to pass a judgment within a reasonable time. The duty of the parties to bring matters to the court in an appropriate time is also a component of the cooperation principles[9]. It is important that Article 181 (2) of CCP stresses that a court is entitled to disallow acceptance of evidence if it could have been presented earlier and later presentation thereof will delay the proceedings. Nevertheless, application of this legal norm is quite problematic and parties to the dispute often still try to present evidence later and courts allow it so far.

8 Driukas, Valančius (n 7) 204.

9 V Nekrošius, *Civilinis procesas: koncentruotumo principas ir jo įgyvendinimo galimybės* (Justitia 2002) 78.

## 4. POSSIBILITIES OF GROUP ACTION IN LITHUANIAN CIVIL PROCEDURE

Lithuanian CPC establishes rules on certain case categories which enable to hear cases in different ways and, consequently, help parties to the disputes and the court to accelerate civil proceedings and to differentiate hearing of civil cases according to the nature of the claim and other important circumstances. The most popular kind of such tools is court (payment) order. Likewise, for instance, documentary or small claims procedure can be applied if all requirements are met.

The beginning of year 2015 was important for the Lithuanian civil procedure because the new amendments to the CCP entered into force and group action (or so called class action) was introduced. Unfortunately, this possibility is not really effective hitherto and successful civil case according to the rules group action still cannot be found.

The institute of group action is developed as an organisational and administrative response to challenges of individual civil procedure. Group actions are special as they aim at aggregating identical or similar claims held by a large group of individuals into one hearing on account that all claims originate from the same legal infringement violated on a massive scale.[10]

In Lithuanian so called opt-in system of group actions has been introduced. It means that each member of a group must express a wish to participate in civil proceedings. It is said that in the opted-in systems, concentration of all potential plaintiffs into single proceedings has more complex obstacles to overcome.[11] Even when all the available modern information communication tools (such as internet, mass media of all kinds, etc.) are used, information about a class being formed may not reach all potential members. According to Article 441[3] of CCP no less than twenty natural or legal persons can lodge group claim and representation of the attorney at law is necessary. After a group is formed, it must elect one member from within it – the so-called representative of the group – who acts on the group's behalf. In some cases, the representative may be an organization – for instance, an association or a trade union.

CCP also provides that a group action may be applied provided that the court established the group action procedure as a more reasonable, effective and appropriate procedure to resolve a specific dispute than an individual dispute resolution. Therefore, when assessing the issue of admissibility of a group action the court has to verify whether the group action procedure would ensure a more reasonable, effective and appropriate dispute resolution in the case of a specific dispute. We believe that such rule makes it really difficult to apply such procedure in Lithuania. The court, if it wishes, can always somehow argue that individual dispute resolution would be more effective and reasonable. On the other hand, in

10 A Brazdeikis,V Nekrošius, R Simaitis, V Vėbraitė, 'Grupės ieškinys kaip civilinio proceso spartinimo priemonė'(2016) 98 Teisė 17.

11 J Blackhaus, A Cassone, G B. Ramello (eds), *The Law and Economics of Class Actions in Europe. Lessons from America* (Edward Elgar 2012) 70.

the absence of case-law, it is a bit premature only to criticize such rule. Hopefully, courts are going to use their discretion properly as they should.

CPC sets three types of court judgments in group action lawsuits. The court could adopt a general court judgment, mandatory for all the members of the group. However, in civil cases where it is impossible to adopt one judgment because separate members of the group have different individual requests, the court first passes an intermediate judgment on the factual background common to the group and then subsequently rules on individual requests, without needing to re-establish the facts, which were already established in the intermediate judgment.

It could be asked what the differences are between the institute of optional joinder in civil procedure and the group action. In smaller civil cases to answer this questions is quite difficult. It should be remembered that the scope of group actions is a massive legal infringement.[12] Not just any type of infringements, but rather the ones which, due to a potential number of co-plaintiffs and individual lawsuits, might raise serious organisational, administrative, technical and economic problems to courts and other parties to the civil proceedings.

## 5. CONCLUDING REMARKS

System of civil justice in Lithuanian cannot be assessed only as positive and homologous. It was aimed in this article to describe one of the most successful aspects of Lithuanian justice system – its electrification. Furthermore, it was wished to characterize one of the least successful institutes in Lithuanian civil procedure – group action. We believe that not only wrong legal regulation, but also the absence of legal culture of group litigation in Lithuania destines that group action does not function and the goals of this institute are not achieved. The importance of preparatory stage in civil proceedings is already understood well in Lithuania, although some problems connected with applying of the rules are still arising.

12 Blackhaus, Cassone, Ramello (n11) 65.

# ACCESS TO JUSTICE AS ILLUSTRATED BY THE INSTITUTE OF SMALL CLAIMS: AN ASSESSMENT OF THE PROCEDURAL LAW REFORM IN UKRAINE

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Summary: 1. Introduction. – 2. Sources of Law of Small Claims. – 3. The Purpose and Principles of the Institute of Small Claims. – 4. Value of a Claim. – 5. Change of the Value of a Claim. – 6. Consideration of Small Claims. – 7. Representation of the Parties during Small Case Consideration. – 8. Evidence and Prooving when Considering Small Claims. – 9. Appeal against Court Decisions in Small Claims. – 10. Cassation Appeal against Court Decisions in Small Claims. – 11. Conclusions

*On 15-16 October 1999, a meeting of the European Council, whose influence on the development of civil process in the EU cannot be overestimated, took place in Tampere. It was at this meeting that the need was declared to develop and implement the EU level rules of procedure, which should simplify and accelerate cross-border litigation (within the EU). As a result, the Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European small claims procedure was adopted.*[1] *On the basis of this Regulation, the European legislators sought to introduce a small claims procedure directly in the EU. However, their intentions and efforts have also become the guideline for legislators of those states that (so far) are not members of the EU, in particular, Ukraine. In more than a decade, the institute of small claims has found its consolidation in the reformed civil process of Ukraine, an associate partner of the EU. In this context, the question arises: have the goals and results of the institutes' implementation coincided within the law of the EU and Ukraine? Is there a positive experience of such an*

1 Regulation (EC) No 861/2007 of the European Parliament and the Council 11 July 2007 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX: 32007R0861&from=de> accesed 15 February 2019.

*introduction and does this institute need further reforms? This publication is an attempt to provide answers to these questions.*

*Key words: small claims, regulations, law, justice, court, claim, proof, simplicity, speed, proportionality of the trial*

## 1. INTRODUCTION

The consolidation of the rule of law is characteristic of constitutions of many European countries.[2] To answer the question whether such a constitutional provision is (more) of a declarative nature or is really implemented in practice, one should take a look at other national legislator's initiatives. After all, it is their analysis that will allow us to assess the effectiveness of the intentions to reform the national law in order to secure the rule of law. For the purpose of achieving this goal in the Ukrainian context, promising is the analysis of access to justice illustrated by the institute of small claims.[3] This institute was introduced by the national legislator in Ukrainian procedural law in the framework of the 2017 reform.

The Law of Ukraine 'On Amendments to the Commercial Procedure Code, Civil Procedure Code, Code of Administrative Procedure and Other Legislative Acts' entered into force on 15 December 2017. This law marked the consolidation of a number of novels in the Ukrainian legislation, including in civil procedural law.[4] The novels were intended to reform this branch of Ukrainian law by bringing it in line with the European standards. In this regard, the question arises whether this goal was achieved and whether the novels correspond to the EU law and the law of particular EU members, such as the Federal Republic of Germany (hereinafter referred to as Germany). The volume of this work does not allow analysing all the novels of the Civil Procedure Code, and therefore the emphasis in this work will be put on the general analysis of one of them – the institute of small claims

## 2. SOURCES OF LAW OF SMALL CLAIMS

At the pan-European level, the central source of law for small claims is the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure. Like other EU legal acts, the Regulation (EC) No 861/2007 has a clear structure: it consists of four

2 For example, Article 1 of the Constitution of Ukraine of 28 June 1996 (with amendments); comparable rules are stipulated in Article 28 of the Fundamental Law of the Federal Republic of Germany of 23 May 1949 (with amendments) and in the Constitution of the Kingdom of Spain of 29 December 1978 (with amendments).

3 This text is a supplemented and revised edition of the publication of NY Panych, 'Small Claims According to Part 6 Article 19 of the CPC of Ukraine in Comparison with Para 495a of the CPC of Germany and Part 1 Article 2 of the Regulation (EC) No 861/2007: Is the reform a Success?' in I Izarova, R Fleishar, R Hanyk-Pospolitak (eds), *Small Claims: European and Ukrainian Experience of Consideration* (Materials of International Scientific and Practical Conference, Dakor 2018) 120-133.

4 O Kovalyshyn, 'Novellierung der ukrainischen Zivilprozessordnung' (2018) 3 WIRO 72.

chapters comprising a total of 29 articles. In addition, the Regulation includes four annexes with forms aimed at standardizing written (as a rule) proceedings in small claims.[5] Such annexes are, in particular, claim form (A), request by the court or tribunal to complete and/or rectify the claim form (B), answer form (C) and certificate concerning a judgment in the European small claims procedure (D). According to the summary decision, the Regulation (EC) No 861/2007 shall be binding in its entirety.[6] In accordance with the Treaty of Rome of 25 March 1957 in the wording of 30 November 2009, its provisions shall be directly applicable in all the Member States with the exception of Denmark.[7]

In the German law, the rules governing the institute of small claims are concentrated in the Civil Procedure Code of Germany (Zivilprozessordnung) (hereinafter referred to as the CPC of Germany)[8] in the wording of 5 December 2005. The CPC of Germany contains two blocks of rules that govern the institute of small claims. First of all, it is Para 495a of the CPC of Germany, which regulates small claims proceedings (Bagatellverfahren). Despite the extraordinary generality of the wording in this paragraph and the absence of clear contours[9] in them, its practical relevance remains indisputable.[10]

In addition, a separate set of norms of the CPC of Germany is enshrined in Chapter 6 of the eleventh book of the CPC. The subject of the regulation of this chapter is 'The European Small Claims Proceedings in Accordance with Regulation (EC) No 861/2007'. Thus, in Germany, a person who seeks to go to court following the procedure provided for by law for small claims has two options for such an appeal. First of all, when applying to a national court, he/she can apply for a proceeding on the basis of national law (Para 495a of the CPC of Germany). In addition, in the event of a cross-border dispute within the EU following the statutory prerequisites, such person may also take advantage of applying for proceedings under the Regulation (EC) No 861/2007.[11]

In the Ukrainian law, the institute of small claims is regulated by the Civil Procedural Code of Ukraine of 18 March 2004, with corresponding amendments (hereinafter referred to as the CPC of Ukraine).[12] The rules of this Code concerning the institute of small claims are not concentrated in a single subdivision. On the contrary, they are constituent parts of several units of the CPC of Ukraine, for example, Para 1 of the second chapter of the first section of the CPC of Ukraine 'Subject Matter

5 J Adolphsen, *Europäisches Zivilverfahrensrecht* (2 Aufl, Springer Verlag 2015) para 10 Rn 2.

6 For critique of this rules, see W Hau in *MüKoZPO: EG-BagatellVO* (5 Aufl, CH Beck 2016) Art 29 Rn 1.

7 A Brokamp, *Das Europäische Verfahren für geringfügige Forderungen* (Mohr Siebeck 2008) 3.

8 Bundesamt für Justiz: Zivilprozessordnung <www.gesetze-im-internet.de/zpo/> accessed 16 February 2019.

9 See critique Kammergericht Berlin, Beschluss vom 15.06.2001 – 20010615 Aktenzeichen 28 W 22/01.

10 See section 3 of this article for the number of small claims considered by the courts of Germany.

11 G Deppenkemper in *MüKoZPO* (5 Aufl, CH Beck 2016) para 495a Rn 3.

12 Civil Procedure Code of Ukraine <https://zakon.rada.gov.ua/laws/show/1618-15> accessed 16 February 2019.

and Personal Jurisdiction' and the tenth chapter of the third section of the CPC 'Consideration of Cases under Simplified Procedure'. Thus, the Ukrainian legislator abandoned the concept of accumulation of *lex specialis* concerning small claims in one particular subdivision, preferring to include these norms in various thematically formed parts of the CPC of Ukraine.

## 3. THE PURPOSE AND PRINCIPLES OF THE INSTITUTE OF SMALL CLAIMS

Before analysing the regulation of the institute of small claims, it is worth to mention the reasons that have led to its introduction at the EU level. One of these reasons was the desire to create a single integrated consumer protection system in the EU, by regulating, in particular, the procedural aspects of such protection.[13] Thus, the purpose of consumer rights protection was, and still remains, one of the leitmotifs of the legislator when adopting the Regulation (EC) No 861/2007. It is manifested in many of its provisions and is one of the main incentives for the modernization of the EU legislation, including the abovementioned Regulation.[14]

Many Member States have already provided for appropriate regulation in the national law, but there was no all-European harmonized system of rules. To this end, aiming at facilitating access to justice for the EU citizens, the efforts of the European legislator were directed towards the development of a unified legal framework for the institute of small claims. The basic principles of this institute have become the simplicity, speed and proportionality of consideration of small claims.[15] Having facilitation of access to justice in mind as the purpose of small claims, it is the abovementioned three principles that should be central criteria for assessing the effectiveness of the relevant national rules.

Consideration of the institute of small claims should be focused on two aspects. First of all, of high interest are the preconditions for qualifying claims as small. In addition, a comparative analysis of the peculiarities of small claims consideration in Ukraine and Germany is relevant.

## 4. VALUE OF A CLAIM

Both at the EU level and in the national law of Germany the criterion of the value of a claim is foreseen as a precondition for qualifying the claim to the category of small ones. The EU law provides for a fairly high threshold for eligible small claims. According to Part 1, Article 2 of the Regulation (EC) No 861/2007, the category of small claims comprises ones with the value not exceeding 5,000 Euro.[16] It should

13 B Hess, *Europäisches Zivilprozessrecht* (Müller 2010) para 10 Rn 87.

14 See, for example, section 3 of this article for change of the threshold of small claims value with the aim of expanding the list of subjects covered by the rules oft he Regulation (EC) No 861/2007.

15 Item 7 of the Proposals to the Regulations (EC) No 861/2007.

16 See item 5 of the Proposals to the Regulations (EC) No 861/2007.

be mentioned that, until 14 July 2017, the Regulation (EC) No 861/2007 in the old wording provided for a limit of the value of a claim which was more than twice lower. According to Part 1, Article 2 of the Regulation (EC) No 861/2007 in the old wording, the matters where the value of a claim did not exceed 2,000 Euro were considered as small claims. However, the Regulation (EC) No 2015/2421 of 16 December 2015[17], which entered into force on 14 July 2017, provided for an increase of the threshold for eligible small claims up to 5,000 Euro in Part 1, Article 1. The reason for this increase was the desire of the European legislator to improve the access of parties (consumers and small and medium-sized enterprises above all) to effective and affordable legal protection (Para 5 of the Proposals for a Regulation).[18]

The procedural law of Germany is also familiar with the criterion of the value of a claim. Unlike the Regulation, Para 495a of the CPC of Germany at the national level provides for a substantially lower threshold for eligible small claims. In particular, a matter is considered as a small claim, if the value of a claim does not exceed 600 Euro. Interest and other costs declared as an additional requirement are not subject to consideration when determining the value of a claim.[19] Data from the Federal Statistical Office of Germany show the practical relevance of the legal regulation of the institute of small claims. According to the latest published data of this office as of 1 January 2019, of the total number of completed procedures (952,413 procedures), approximately 7.69% belonged to small claims procedures (73,298 procedures).[20]

The criterion of the value of a claim is also present in the Ukrainian law. According to Part 6 of Article 19 of the CPC of Ukraine, the cases in which the value of a claim does not exceed one hundred sizes of the subsistence minimum for able-bodied persons are considered as small claims. In addition, matters of low complexity recognized by the court as small claims may also be classified as small claims, except cases that are to be considered only under general procedure, and those cases where the value of a claim exceeds five hundred subsistence minimum sizes for able-bodied persons. Thus, one of the criteria for crediting a case to a category of small claims in procedural law of Ukraine is the value of a claim. In addition, independently from the previous criterion, the matter may be qualified as a small claim by Ukrainian court. Taking into account the size of the subsistence minimum for able-bodied persons as of 1 February 2019[21] in the amount of 1,921 UAH, and in the sense of Part 6 of Article 19 of the CPC

17 Regulation (EC) No 2015/2421, 16 December 2015 <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX%3A 32015R2421> accessed 15 February 2019.

18 In the process of reforming the institute of small claims, the European Committee has even prepared a proposal for the additional increase of the threshold of the value of small claims up to 10,000 Euro. Agrumentation for such a step were, among others, the results of the survey, according to which 66% of the respondents said that an increase of the threshold of the value of small claims was one of the ways of facilitating access to justice, see COM (2013) 794, Clause 2.

19 G Toussaint in V Vorwerk, C Wolf (eds), *BeckOK ZPO* (30 ed 15.9.2018), para 495a Rn 2.

20 Statistisches Bundesamt, *Rechtspflege, Zivilgerichte* (Fachserie 10, Reihe 2.1, Destatis 2017) 38.

21 For the size of the subsistence minimum for able-bodied persons according to Art 7 of the Law of Ukraine 'On the State Budget of Ukraine for 2019', see <https://zakon.rada.gov.ua/laws/show/2629-19> accessed 16 February 2019.

of Ukraine, a small claim is the matter, in which the value of the claim does not exceed 192,100 UAH. Considering the official NBU rate as of 7 February 2019[22] in the equivalent of 1 Euro / 30.58 UAH, a small claim, in the sense of Part 6 of Article 19 of the CPC of Ukraine, is a case in which the value of the claim does not exceed approximately 6,281 Euro.

## 5. CHANGE OF THE VALUE OF A CLAIM

Under certain conditions, one of the parties of the proceeding may apply to the court for an increase in the amount of claims or for changing the subject of the claim. If such procedural action leads to an increase in the value of a claim, then it should also lead to a new legal assessment of the conformity of such a case with the criteria of small claims.

The Regulation (EC) No 861/2007 does not contain a direct rule that would regulate the legal consequences of exceeding the value of a claim beyond the amount set forth in Part 1 of Article 2 of the Regulation. Such a rule was set by the European legislator only for cases of exceeding the value of a counterclaim in part 7 of Article 5 of the Regulation.[23] At the same time, the literature rightly notes that in case of exceeding the value of a claim, the legal consequences, stipulated by Part 3 of Article 4 of the Regulation, are subject to application. According to this rule, the procedure is re-qualified from the category of small claims procedure to the general procedure with its subsequent consideration under the rules of lex fori.[24]

Comparable legal consequences in the event of a change in the value of a claim were also foreseen by the CPC of Germany. In case of exceeding the value of the claim stipulated by Para 495a of the CPC of Germany due to a change in claim or an increase in the amount of claims, such a dispute is subject to review under the rules of general proceedings.[25]

The Ukrainian legislator also resolved the issue of changing the value of a claim and its impact on the legal assessment of the qualifications of the matter as a small claim. Appropriate legal consequences were stipulated in Part 5 of Article 274 of the CPC of Ukraine. According to this provision, the court refuses to consider a matter under simplified procedure or decides to hear a case under general procedure, if the relevant small claim cannot be considered in simplified proceedings after a court's admission of the claimant`s application for increasing the value of a claim or changing the subject of a claim.

22 See official currency exchange rate of the NBU <https://bank.gov.ua/control/uk/curmetal/detail/currency?period=daily> accessed 16 February 2019.

23 J Kropholler, J von Hein, *Europäisches Zivilprozessrecht: EuGFVO* (9 Auflage, Deutscher Fachverlag GmbH) Art 3 Rn 14.

24 I Varga in T Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR* (Bd II, 4 neu bearbeitete Auflage, EG-BagatellVO, Otto Schmidt 2015) Art 2 Rn 10.

25 HJ Musielak,W Voit, J Wittschier, *ZPO* (15 Aufl, Vahlen 2018) para 495a Rn 4.

## 6. CONSIDERATION OF SMALL CLAIMS

The Regulation (EC) No. 861/2007 as well as German and Ukrainian procedural law regulate the procedure for small cases consideration under simplified procedure.

The central provision of the Regulation (EC) No 861/2007 which defines the procedure for small cases consideration is Article 5 of the Regulation. Part 1 of this article stipulates that the small claims procedure shall be a written procedure.[26] Exceptions to this rule are possible in the presence of conditions established in Part 1 of Article 5 of the Regulation. In particular, according to the first sentence of this part, a court may hold an oral hearing if it considers that it is impossible to make a decision on a case only on the basic written evidence. In addition, the court may hold an oral hearing if one of the parties so requests. Both rules are formulated as 'rules of authority', that is, the court may, but is not obliged to hold an oral hearing. It is confirmed by the second sentence of Part 1a of Article 5 of the Regulation. According to it, the court may refuse a party's request for an oral hearing if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings. In this case, the court is obliged to substantiate in writing the refusal of such a request of the party. Separate appeals against such a refusal without appeal of the decision itself are not allowed. And although there are separate voices in the literature in support of the abovementioned broad powers of the court to consider cases 'at its own discretion,' most scholars are united in the rigorous critique of such a dubious European legislator's approach to this aspect.[27]

The German legislator has refused to give a judge broad powers to consider small cases at their own discretion. According to the clear wording of Para 495a of the CPC, in the presence of a respective request of one of the parties, consideration of the case by the court should be carried out orally, that is, with the notification (summons) of the parties.[28] The German doctrine emphasizes the importance of this postulate, which seeks to guarantee the right to a fair and public trial under Article 6 Para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[29] The need to comply with this right had already been enshrined in Para 495 of the CPC at the stage of its development and inclusion in the CPC of Germany.[30] Its immutability has been repeatedly confirmed and is still being confirmed by German judicial practice, including the decision of the Federal Constitutional Court. Although some scholars admit that the German court has the right to refuse an oral hearing of a case if the decision is taken in favor of the claimant, however, this position is clearly challenged by most scholars.[31] Justifying their opinion, the latter fairly point out that the course of the process, the behavior of the parties in court and the instructions of the court during the oral hearing of the case may lead to new petitions on the evidence

26 F Netzer, 'EuBagatellVO' in *Hk-ZV* (CH Beck, 2016) Art 5, Rn 2; Brokamp (n 7) 3.

27 See, for example, Hau (n 6) Art 5 Rn 2; Hess (n 13) para 10 Rn 93.

28 N Thum, *Der Antrag auf mündliche Verhandlung im Verfahren nach billigem Ermessen* (NJW 2014) 3198.

29 Toussaint (n 19) para 495a Rn. 17.

30 M Zwickel, *Bürgernahe Ziviljustiz: Die französische juridiction de proximité aus deutscher Sicht: zugleich ein Beitrag zur Definition eines Gesamtmodells bürgernaher Justiz* (Mohr Siebeck 2010) 79.

31 Deppenkemper (n 11) para 495a, Rn 17.

base and other direction of the process, which cannot be known in advance. Thus, even with conditional prospect of approving a decision in favor of the claimant, the case should still be considered with the notification (summons) of the parties.

The basic principle of small claims consideration by the courts of Ukraine is provided in Part 5 of Article 279 of the CPC of Ukraine.[32] According to this rule, a court may hold an oral hearing with the notification (summons) of the parties at the request of one of the parties or on its own initiative. In the event that there is no such request, the court shall consider the case under simplified procedure without notification of the parties on the materials available in the case. At the same time, the court's consideration of the case (with the summons) of the parties in the presence of the corresponding request is not an obligation, but a right of the Ukrainian court. According to Part 6 of Article 279 of the CPC of Ukraine, a court has the right to refuse the request for an oral hearing of one of the parties in simultaneous presence of certain conditions. First of all, if the subject of the claim is the collection of a monetary amount that does not exceed the abovementioned 5 772 Euros. In addition, if the nature of the controversial legal relationship and the subject of proof in the case do not require holding of a court session with the notification of the parties for full and complete establishment of the circumstances of the case.

## 7. REPRESENTATION OF THE PARTIES DURING SMALL CASE CONSIDERATION

The representation of the parties during small case consideration is subject to the regulation of Article 10 of the Regulation (EC) No 861/2007. This article contains a clear indication that representation by a lawyer or other attorney is not mandatory.

The German procedural law contains rules of general action, which oblige parties to represent their interests in court by lawyers. The relevant provisions are enshrined in Paras 78-78 of the CPC of Germany. At the same time, such 'compulsory participation of a lawyer' (Anwaltszwang) does not apply to certain categories of cases, including small claims.[33]

The issue of representation of the parties in Ukraine is decided in a way similar to the German one. Since 2016, the process of introduction of the so-called 'lawyer's monopoly' has begun in Ukraine.[34] As of November 2018, Ukraine's lawyers have the exclusive right to represent the interests of legal entities and persons in courts of appeal and cassation. Since 1 January 2019, the monopoly

32 For principles of civil proceeding, see more detailed analysis by I Izarova, 'Simplified Action Proceeding: a Novel of Ukrainian Legislation' in I Shutak (ed) *Problems of Legislative Regulation of the Development and Adoption of Statutor Instruments* (reports of III International Scientific and Practical Conference, Kyiv 2-3 November 2017, Pravo 2017) 214.

33 F Pukall in I Saenger (ed), *Hk-ZPO* (Nomos 2017), para 495a Rn 5.

34 See, for example, K Livinska, 'Monopolization of Advocacy: Problematic Issues' (2015) No3 Bulletin of Kyiv University of Law 398; S Bychkova, H Churpita,'Issues of a Lawyer Participation in Civil Process of Ukraine' (2014) No9 Bulletin of the Ministry of Justice of Ukraine 116.

of lawyers for representation will be introduced also in courts of first instance. The legislator has set exceptions from this rule, small claims being one of them. In particular, according to Part 2 of Article 60 of the CPC of Ukraine, during the consideration of small claims (insignificant cases), not only a lawyer may be a representative, but also any other person who has attained eighteen years of age and has civil procedural capacity, except for persons defined in Article 61 of the CPC of Ukraine. Taking into account the abovementioned provisions, one should only welcome the conclusions of the court practice that the allegation of obligatory participation in the case of a lawyer as a plaintiff's representative (provided that the relevant matter belongs to small claims) is erroneous.[35]

## 8. EVIDENCE AND PROOVING WHEN CONSIDERING SMALL CLAIMS

The Regulation (EC) No 861/2007, as well as German and Ukrainian law regulate in detail the issue of evidence and prooving during small claims consideration.

According to the European legislator, one of the prerequisites for the simplicity, speed and proportionality of considering small claims is, among others, the use of modern communications technology by courts.[36] In this regard, it is logical to set out the obligation of the Member States to promote the use of appropriate technologies by national courts in the Regulation. The wording of Article 8 of the Regulation also indicates the encouragement of more active use of modern technologies by courts in the consideration of small claims. In the previous version of this article (in effect until 13 July 2017), the legislator used the wording 'the court may ... if available...'.[37] Instead, in the new edition of Part 1 of this article (in effect since 14 July 2017), the preferability of using such technologies by using the wording 'the court shall use...' is emphasized.[38]

The Regulation has not provided for an exhaustive list of communication technologies. This is evidenced, for example, by the use in Part 1 of Article 8 of the Regulations of the wording 'such as. Thus, the legislator provided the addressees of the rule with a peculiar 'field for maneuver' in order to improve the procedure for small claims consideration. As a result, the current version of Article 8 allows courts, if necessary, to change obsolete communication technologies to more modern ones. Today, the legislator defines video and teleconferences (part 1 of Article 8 of the Regulations) as standard ones.[39] These two types of conferences should also be used if it is necessary to hear persons during the examination of evidence by the court during the written procedure (part 3 of Article 9 of the Regulations).

The basic principle of taking evidence is the principle of the simplest and least burdensome method of taking evidence. Thus, Part 1 of Article 9 of the Regulations

35 Decree of the Supreme Court of Ukraine of 30 January 2019 (No ЄДРСР 79684602).

36 Para 20 of the Proposals for a Regulation (EC) № 861/2007.

37 Varga (n 24) Art 8 Rn 1.

38 Hau (n 6) Art 8 Rn 2.

39 Hau (n 6) Art 8 Rn 3.

opens the possibility for courts to consider small claims under the so-called procedure of free proof.[40] Due to this procedure the court is authorized to organize the examination of evidence on its sole discretion regardless of the consent of the parties to the case.[41] In particular, the court may carry out the investigation of evidence on the basis of written explanations of witnesses or experts, as well as by written hearing of the parties (part 2 of Article 9 of the Regulations).

By including Para 495 in the national CPC, the German legislator also sought to simplify the court's procedures relating to evidence and prooving.[42] However, this goal was achieved without restricting the parties in the ways and means of reporting their legal position to the court, for example, by presenting testimony of witnesses to the court. To this end, the German legislator exempted the national court from being bound to mandatory procedures in the field of evidence and prooving. However, the measures have been taken to comply with the basic principles of procedural law.[43] For this, it granted the national court the power to receive the testimony of witnesses not only in writing, but also in telephone mode. Moreover, in small claims consideration, the German court has received the right to consider not only information from witnesses but also other potentially important carriers of information, in particular, experts.

In the Ukrainian law, the national legislator differentiated the consideration of small claims with the notification (summons) of the parties to the case and without such a summon (Part 8 Article 279 of the CPC of Ukraine). In the event when the court considers a small claim without notice (summons) of the participants to the case, it examines only the evidence and written explanations set forth in the statements on the merits of the case. If the court is considering a case with a notification (summons) of the parties to the case, then it will also hear their oral explanations and testimony.

## 9. APPEAL AGAINST COURT DECISIONS IN SMALL CLAIMS

The issue of challenging court decisions in small claims is regulated differently in the Regulation (EC) No 861/2007, in German and in Ukrainian law.

The Regulation (EC) No 861/2007 contains Article 17, the subject of regulation of which, in accordance with the title of the article, is the issue of 'Appeal'. This heading is rather deceptive, since this article does not regulate the procedure for appealing judicial decisions taken as a result of small claims consideration. The subject of its regulation (in particular, Part 1) is only the informational obligation of the Member States. The essence of this obligation is the need for the Member States to inform the Commission whether lex fori regulates the judicial appeal as a result of small claims consideration. Part 2 of Article 17 of the Regulation is also referencing. In the event when national law allows the appeal of court decisions in

40 Kropholler, Hein (n 23) Art 19, Rn 1.

41 Varga (n 24) Art 9 Rn 1; Hess (n 13) para 10 Rn 97; Brokamp (n 7) 3.

42 BT-Drucksache 11/4155, s 10.

43 C Paulus, *Zivilprozessrecht. Erkenntnisverfahren, Zwangsvollstreckung und Europäisches Zivilprozessrecht* (4 Aufl, Springer 2009) Rn 498.

small claims, the issues of court fees (Article 15a) and funds (Article 16) pursuant to Part II of Article 17 of the Regulations are regulated by the autonomous rules of the Regulations.[44] Thus, Article 17 of the Regulation does not establish restrictions or obligations for the Member States to regulate the issue of contesting court decisions in small claims at national level. [45] Its provisions perform primarily a referencing function. The European legislator was forced to refrain from attempts to settle the appeal procedure at the level of the the Regulations, as the lex fori of the Member States had significant differences with regard to this issue.[46]

In the German procedural law, the appeal procedure is regulated in Articles 511-541 of the national CPC. The general preconditions for appealing the decisions of the court of first instance – without a special provision for small claims – are established in Part 2 of Article 511 of the CPC of Germany. According to this rule, a decision of a court of first instance may be appealed in an appellate order, if the value of the appeal is more than 600 Euros, or if the court of first instance has admitted such an appeal in its decision. Thus, the first precondition may be the basis for appealing against decisions of the court in small claims only if the value of the appeal is more than 600 Euros.[47] In addition, an appeal to a court of first instance in a small claim is possible if the court of first instance has admitted such an appeal in its decision. The procedural law clearly regulates the cases in which such admission is possible. According to Part 4 of Article 511 of the CPC of Germany, the court of first instance admits an appeal against the decision, if the value of the appeal does not exceed 600 Euros and the case is of fundamental importance, or the need to make a decision on the case by an appellate court is conditioned by the formation of the law or ensuring the unity of judicial practice. If there is no such admission from the court of first instance and the party cannot appeal this decision in an appellate order, it has the right to appeal to the court of first instance with a complaint of violation of their right to a trial under Para 321 of the German CPC. After (mostly unsuccessful)[48] consideration of this complaint, the party has the opportunity to appeal to the Constitutional Court with a constitutional appeal against the decision of the court of first instance and violation of their right to trial of the said small claim.[49]

The Ukrainian law allows for an appealof a court decision in a small claim (Part 1 of Article 369 of the CPC of Ukraine). The peculiarity of such an appeal under Ukrainian law is that the court of appellate instance is authorized to consider the indicated appeals without notice to the participants of the case. And it is only on its own initiative that the court of appeal may consider such a case in a court session with the notification (summons) of the participants of the case, if the specific circumstances of the case (Part 3 of Article 369 of the CPC of Ukraine) indicate in favor of such a notice (summons).

44 Hau (n 6) Art 17 Rn 1.

45 Netzer (n 26) Art 17, Rn 1.

46 Varga (n 24) Art 17, Rn 1.

47 Adolphsen (n 5) para 10 Rn 41.

48 Deppenkemper (n 11) para 495a Rn 50.

49 Musielak, Voit, Wittschier (n 25) para 495a Rn 11.

## 10. CASSATION APPEAL AGAINST COURT DECISIONS IN SMALL CLAIMS

The Civil Procedural Code of Ukraine contains a clear provision regarding the possibility of cassation appeal in small claims. According to Para 2 of Part 3 of Article 389 of the CPC of Ukraine, court decisions in small claims are 'filtered'[50] and generally not subject to appeal. Exceptions to this rule are permitted only when the cassation appeal concerns a right which is fundamental to the formation of a single law enforcement practice. In addition, a cassation appeal in a small claim is possible if the person submitting the cassation appeal, in accordance with the CPC of Ukraine, is denied the opportunity to refute the circumstances established by the contested court decision in the consideration of another case. Also, a cassation appeal is possible if such a small claim is of significant public interest or is of exceptional importance to the party which filed the cassation appeal. And finally, a court decision on a small claim can be appealed against in cassation order if the court of first instance has classified the claim as small by mistake. The analysis of the court practice of the Supreme Court of Ukraine shows that a significant number of its decisions on cassation complaints in small claims contain general refusals and refusals to open cassation proceedings without detailed justification.[51] The reason for such refusals by the court is only the absence of circumstances, in the presence of which a court decision in a small claim is subject to appeal.

Unlike the CPC of Ukraine, the German procedural law does not contain any special rules on the possibility of cassation appeal of court decisions in small claims. It only establishes the procedure and prerequisites for a cassation appeal in general. According to Part 1 of Article 542 of the German CPC, final decisions of the appellate instance are subject to cassation appeal.[52] The procedure for cassation appeal is settled by the German legislator in Part 1 of Article 543 of the National CPC. According to this article, the decision of the Court of Appeal may be appealed against in cassation if the appeal was admitted by the court of appeal in its decision, or such admission was made by the cassation court as a the result of the consideration of the application for the decision of the court of appeals against admitting the cassation appeal. The German CPC binds the court in Part 2 of Article 543 to admit the decision of the appellate instance to a cassation appeal if the relevant case (as in Ukrainian law) passes the relevant 'filters'[53], in particular, it is of fundamental importance or the need to make a decision on the case by a court of cassation is conditioned by the formation of the law or ensuring the unity of judicial practice.

50 B Hulko, 'Small Claims in the Supreme Court Practice' (2018) No 12-14 (431-433) Judicial and Legal Newspaper 11.

51 See, for example, the Decree of the Supreme Court of Ukraine of 7 Februaty 2019 (case number 79671263), the Decree of the Supreme Court of Ukraine of 7 Februaty 2019 (case number 79684789), the Decree of the Supreme Court of Ukraine of 6 February 2019 (case number 79684729), the Decree of the Supreme Court of Ukraine of 5 February 2019 (case number 79616443).

52 Krüger in *MüKoZPO* (5 Aufl, CH Beck 2016) ZPO para 542 Rn. 1.

53 S Kessal-Wulf in V Vorwerk, C Wolf (eds), *BeckOK ZPO* (30 Ed, 15.9.2018) ZPO para 543 Rn 14.

## 11. CONCLUDING REMARKS

The consolidation of the institute of small claims in the EU law, as well as in the national law of Germany as a member state of the EU, testifies to the urgency and relevance of this institute. Therefore, this novel of the Ukrainian legislator in the national civil process undoubtedly deserves approval and support.

The rules for regulating the qualification of claims as small and their consideration aim at achieving several goals. First of all, the legislator seeks to give potential participants of the case an effective mechanism for judicial protection of their rights and interests. This goal can be achieved by making it easier for participants to access justice by simplifying and speeding up a case consideration following the principle of proportionality.

In addition, these rules are intended to deccrease the load on the judicial system, making it easier for courts to consider such cases. Between these two goals, there must be a balance, since imbalances in favor of the parties or the court will threaten either the first or the second of the stated objectives. Thus, the legislator should provide in the procedural law the levers which will serve as a guarantee and assurance of this balance. And even if one of these or other levers do not work at the stage of consideration of the case by the court of first instance, the appeal and/or cassation instance should resolve this situation.

The findings of this study should be divided into two groups. The first group of conclusions will deal with the formal aspects of appealing to the court within the framework of the small claims institute. The second group of conclusions will touch upon the content of the legal regulation of the small claims institute.

The position of the procedural law of Ukraine, according to which representation of the interests of the parties by lawyers during the small claims consideration is not obligatory, should be assessed positively. The introduction of a lawyer's monopoly in Ukraine in this category of cases would be a significant burden on individual parties of the trial. In Germany, the participants of a process in other categories of cases have the opportunity to take advantage of effective mechanisms of state or non-state (in particular, insurance) support in paying lawyers' fees. In Ukraine, some of these mechanisms are rather ineffective, while others are almost absent.

However, by releasing potential plaintiffs from the duty to use lawyers' services, the Ukrainian legislator only made a half-step towards ensuring access of such plaintiffs to justice. The prerequisite for such access is, among other things, the preparation and filing of a suit. And it is at this stage that the average plaintiff may have difficulties. They will be substantially reduced by the standardized forms for claims to the court. This tool is not new, it has been tested by a European legislator and its efficiency is proven. The consolidation of such forms at the legislative level in Ukraine will facilitate access to justice of future plaintiffs, which would not be an overwhelming burden on justice itself. In this way, not only the principles of simplicity and speed, but also proportionality will be adhered to.

The comparative analysis of Part 6 of Article 19 of the CPC of Ukraine and Para 495 of the CPC of Germany testifies that today the Ukrainian procedural law establishes considerably wider, in comparison with the German procedural law,

limits for assigning the relevant claim to a category of small claims. In addition, taking into account the powers of the Ukrainian court to consider as the small claims cases of insignificant complexity, which claim value exceeds approximately EUR 31,405[54], the differences within small claims legislation according to the Ukrainian and German law become apparent. And only in comparison with the norms of the EU law, in particular, Part 1 of Article 2 of the Regulation (EC) No 861/2007 concerning the aspect of threshold of small claims, these differences lose their essential character.

Both Ukrainian and German procedural law resolved the legal consequences of changing the value of a claim in small claim procedure. In general, these legal consequences are comparable, in particular, in the part where such a case is subject to review under the general procedure.

The essential difference between the CPC of Ukraine and the CPC of Germany lies within the regulation of the powers of the court to decide whether the small claim is to be considered with the notification (summons) of the parties or without it. While the German court should consider a small claim with the notification (summons) of the parties in the presence of the corresponding request, the Ukrainian court has the right (even if there is a corresponding request) to decline it. Although the CPC of Ukraine theoretically sets a high barrier for a court that would prevent its potentially arbitrary rejection of the relevant request, it would be impossible to exclude a possibility of a formal reference by the court to the lack of a need for a court hearing, given the nature of the controversial legal relationship and the subject of evidence. Thus, Part 6 of Article 289 of the CPC creates the prerequisites for simplifying the consideration of small claims by the court by confining the participants of the case in their participation in the case. Its provisions, being tendentiously similar to Part 1, Article 5 of the Regulation, contribute to a potential imbalance between the interests of the court and the parties of the case in Ukraine. Practice will show how the Ukrainian courts of first instance will use this tool and how the higher courts will react. However, the abuse of such a liberal wording of Part 6, Article 279 of the CPC will create a risk for the participants of the case and may become one of the prerequisites for their further appeal to the ECHR. And even if Western European scholars warn against possible cases of judicial arbitrariness caused by the wording of Part 1, Article 5 of the Regulations[55], then what can you expect from similar legislation in the Eastern European states, in particular, in Ukraine, whose judicial system is just beginning to take shape?

Significant differences not in favor of the Ukrainian model of small claims consideration are also observed regarding issues of evidence and prooving. If the Ukrainian court considers a small claim without notifying (summons) the participants of the case, then it will not hear their verbal explanations or testimony. However, it is the testimonies of participants and witnesses that may have a critical significance for the participants themselves. The Ukrainian legislator does not list

54 See n 21-22 in Section 3 of the article for the established by the Ukrainian legislator threshold for the value of a claim for qualifying of a claim as a small one.

55 Varga (n 24) Art 5 Rn 2.

the ability to take evidence in telephone mode for court's consideration, not to mention the experts' conclusions.

Critically important differences in the Ukrainian and German procedural laws lie in such an important procedural instrument as appealing against the decision of the court of first instance. And although the procedural laws of both states allow such an appeal, the disproportion not in favour of the parties is concealed in the Ukrainian law. Theoretically, the Ukrainian court of appellate instance may consider such a case in a court session with the notification (summons) of the participants in the case. However, would the courts of appeal that place their interest in discharging from the influx of cases above the interests of the parties to bring their legal position to court, taking directly the participation in the court session, pay attention to this rule? At the stage of formation and reform of the judicial system in Ukraine, it is impossible to exclude the danger of ignoring this rule completely. Thus, Part 3 of Article 369 of the CPC of Ukraine contains serious risks for balancing the interests of the court and the parties. The more perfect wording also requires prerequisites for a cassation appeal of decisions of the Ukrainian court in small claims.

Summarizing the above, it should be noted that the Ukrainian legislator made the first steps towards the small claims consideration in the national process. However, this should not be a final stop. Given the social significance of the category of small claims, the regulation of this institute should be actively and urgently improved, including in the light of European experience. Time will tell how fast a Ukrainian legislator can make progress in this matter.

# ISSUES IN THE LEGAL FRAMEWORK OF INVALIDITY OF TRANSACTIONS IN UKRAINE

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Summary: 1. Introduction. – 2. Definition of a transaction and its specifics compared to other legal notions. – 3. Editorial and contextual issues with the provision of sec. 204 as to the presumption of legitimacy of a transaction. – 4. Terminological issues with the legal status of persons, that entered into an invalid transaction. – 5. Usage of the term 'invalidity' in other legal constructions. 6. Definition of an invalid transaction and its correlation with a void transaction. – 7. Grounds of invalidity of transactions: definition and issues in its framework. 8. Declaring transaction as unconcluded as a legal remedy. – 9. Conclusions.

*This essay analyzes legal nature and grounds of nullity of transactions according to the civil legislation of Ukraine and modern civil law achievements. Correlation between invalid, void and illegal transactions is set. It establishes the specifics of invalid transactions, that demarks them from other similar legal categories. The essay discloses gaps and contradictions in the legislation of Ukraine, while pointing out different approaches of the application of law by the courts when it comes to the nullity of transactions, as well as offers solutions as to its improvement. The legal nature of articles of incorporation (articles of association, except for the articles of association of a partnership) is analyzed. And issue of possibility to use provisions as to invalidity of transactions to invalidating the incorporation documents of a legal person and/or decisions of the general meeting of the partnerships is set.*

*Key words: nullity of transactions, void transactions, illegality of transactions, valid, entered into, lawful.*

## 1. INTRODUCTION

Transactions are one of the most common grounds for creation, modification and termination of civil matters. That is why determination of specific features of valid transactions is very important.

There are gaps in legislation and contradictions in the regulation of invalidity of transactions, starting from terminology governing invalid transactions.

It is very important to make correlation between invalid, void and illegal transactions, that will be done in this essay. It establishes the specifics of invalid transactions, that demarks them from other similar legal categories. The essay discloses gaps and contradictions in the legislation of Ukraine, while pointing out different approaches of the application of law by the courts when it comes to the nullity of transactions, as well as offers solutions as to its improvement.

## 2. DEFINITION OF A TRANSACTION AND ITS SPECIFICS COMPARED TO OTHER LEGAL NOTIONS

According to section 202 (1) of the Civil Code of Ukraine (hereinafter referred to as 'the CC') a transaction is defined as an action of a person, aimed at obtaining, modifying or terminating civil rights and duties.[1]

In order to define the specifics of this type of legal fact, as well as in order to distinguish it from other similar legal notions, it is necessary to determine the main features of transactions.

As such, the first characteristic is the *fact that a party to a transaction has its own will* to accomplish an act of transaction, which will does not normally depend on the will of other persons. This is how the principle of the freedom of contract comes into play. However, in order to make a transaction, it is not enough to have an inner will to reach a legal result. It is necessary to demonstrate in front of others such inner will of a party to a transaction.

Subject of a transaction can be any physical or legal person whose civil capacity necessarily includes accomplishing such acts. Also, a state, territorial communities, Autonomous Republic of Crimea, could be subjects of transactions, as they have a legally recognized status of a participant of civil relations (sec. 2 of the CC of Ukraine), subject to limitations imposed by the laws of Ukraine.

Hence, a transaction shall not be considered legally concluded if the outer expression of the will of a party does not adequately reflect its inner will.

The second essential characteristic of a transaction is its *aim of attaining a specific legal result*, as directly appears from sec. 202 (1) of the CC of Ukraine. However, this feature is also present with other types of legal facts – legal acts. For instance,

1 Civil Code of Ukraine of 16 January 2003 <http://zakon1.rada.gov.ua/laws/show/435-15> accessed 22 February 2019.

such acts as creation of literary or art works, inventions, as well as other products of intellectual and creative work (sec. 11 (2) of the CC of Ukraine).

Lawful acts which are purely technical by nature cannot be qualified as transactions (for example, driving one's own automobile, personal agricultural work by a farmer, construction work carried out personally by a homeowner, consumption of groceries). At the same time, acts of technical (physical) nature may support making of or carrying out a transaction. For instance, delivery of the sold goods by the seller to the buyer using seller's own means of transportation. However, handing over of these goods by the seller to the buyer by means of a bill of lading may be considered an additional transaction to the principal transaction of sale.

Acts of state authorities and local government, judicial decisions may not be considered transactions, as they are constituting governing powers delegated to them by the State in accordance with the Constitution of Ukraine.

Acts (orders, resolutions, etc.) of the executive structures of legal persons, aimed at the governance of the legal person and organisation of its activity do not constitute a transaction. An issue of the legal nature of the incorporating documents, articles of incorporation, minutes of the meeting of the legal person is rather complex. According to sec. 153(2) of the CC, if a joint-stock company is created by several persons, they conclude among themselves an agreement that establishes the carrying out of their joint activity as to creation of the company, which is not considered an incorporation document of a joint-stock company. At the same time, such an agreement is a transaction.

There are two positions in Ukrainian civil law when it comes to the legal nature of incorporation documents: 1) articles of incorporation are a local regulatory act, not a transaction; 2) articles of incorporation, rules and resolutions are a type of acts made by their corresponding bodies and contain corporate norms, which, in turn, are part of social norms.

Absence of a clear definition of the legal nature of the articles of association in the governing law led to the necessity to formulate legal views of the higher judicial instances in Ukraine, which could be summarized as follows.

'According to clause 14 of the Order of the Plenum of Supreme Court of Ukraine dated 24 November2008 No 13 'Articles of incorporation of a legal person as provided in sec. 20(2) of the Commercial Code constitute an act which determines the legal status of the legal person, given that they contain mandatory rules in regard to its shareholders, its officers and other workers, as well as determines the order of ratification and modification of the articles of association.

Grounds of invalidity of the acts, including the articles of incorporation, are as follows: its non-conformity to the current legislation and/or specified by law jurisdiction of the authority that issued (approved) such an act, as well as running contrary to the rights and legally protected interests of a claimant that occurred following such issuance or approval.

Articles of incorporation are not a one-party transaction, as they are approved (modified) by a general assembly of participants (founders, shareholders), while the

latter constitutes neither subject of law nor authority that represents the partnership. Articles of incorporation cannot be classified as a contract, as they are approved (modified) by the majority of votes of shareholders or simple majority of votes of participants of a partnership, rather then by an agreement of all participants of a partnership (founders, shareholders) товариства, (sec. 42, 59 of the Law of Ukraine on commercial partnerships).

Hence, provisions as to invalidity of transactions do not apply to disputes as to invalidating articles of incorporation.'

Similar position is found in clause 5.3. of the Order of the Plenum of Resolution of the Plenum of the Supreme Commercial Court of Ukraine dated 25 February 2016 No 4, according to which 'articles of incorporation are a local normative act, not a transaction, hence sections 203 and 215 of the CC of Ukraine that govern grounds of invalidity of transactions do not apply thereto.'[2] However, this position of the Plenum of the SCCU does not fully correspond to the position of the SCU, nor does it correspond to the norms of the Constitution of Ukraine that define the authorities capable of passing normative acts.

We believe, when dealing with this issue, it is necessary to follow the Ruling of the Constitutional Court of Ukraine in the case of a constitutional request by the Limited Liability Partnership 'Likhner Beton Lviv' for the official interpretation of the provisions found in sec. 58 (4) and 64 (1) of the Law of Ukraine on 'Commercial Partnerships' dated 5 February 2013. In paragraph 3.1. of this Ruling of the CCU it is stated that 'an incorporation document of a Partnership is its Articles of Incorporation (section 143 (1) of the CC of Ukraine, section 80 (1) of the CC of Ukraine, 4 (1) of the Act). Articles of incorporation constitute a local legal act and all participants must follow and execute it.'[3] It may be assumed that the Ruling of the CCU refers to a 'local legal act' for a reason, as opposed to a 'local normative act', as we believe they are not synonymous.

Given the above, it is our view that the legal definition of the articles of incorporation could be that of a local legal act, that establishes legal personality of a legal person and its scope of use by authorised bodies and persons, as well as establishes general rules of execution of labour and corporate rights and obligations of participants and officers of a legal person. At the same time, features of normative-legal act are also common for model and typical articles of incorporation, which are approved by the authorised bodies of the state.

Decisions of the general meetings of a joint-stock company to liquidate the partnership, as well as decisions aimed at creation, modification or termination of civil rights and duties of shareholders contain features of transactions.

2 Order of the Plenum of the Supreme Commercial Court of Ukraine of 25 February. 2016 No 4 <http://zakon.rada.gov.ua/laws/show/v0004600-16> accessed 22 February 2019.

3 Ruling of the Constitutional Court of Ukraine in the case of a constitutional request by the Limited Liability Partnership 'Likhner Beton Lviv' for the official interpretation to of the provisions found in sec. 58 (4) and 64 (1) of the Law of Ukraine on 'Commercial Partnerships' of 5 February 2013 <https://zakon.rada.gov.ua/laws/show/v001p710-13> accessed 23 February 2019.

At the same time, jurisprudence has a wide opposing view as to the decisions of the general meetings of the participants (shareholders) and other organs of commercial partnerships, considering them as *acts*, 'given such decisions lead to creation of legal consequences, aimed at regulating commercial relations, and are mandatory for subjects of such relations.' Grounds of their invalidity may be: running contrary to the requirements of laws and/or incorporation documents during the convocation and holding of general meetings of the partnership; depriving a shareholder (participant) of the partnership of its right to take part in general meetings; violation of rights or legal interests of a shareholder (participant) of a partnership contained in a decision of a general meeting.[4]

Third feature of a transaction *is making a transaction in accordance with the legal requirements*, as it belongs to a category of lawful legal facts.

These requirements are formulated in sec. 203 of the CC, according to which:

'1. Contents of a transaction cannot contradict this Code, other acts of civil legislation and moral principles of the society.

2. A person that effects a transaction shall have a required scope of civil capacity.

3. Expression of the will of a participant to a transaction shall have to be free and shall correspond to his/her inner volition.

4. A transaction shall be effected in the form established by the law.

5. A transaction shall be aimed at realistic occurrence of legal consequences stipulated by it.

6. A transaction effected by parents (adoptive parents) cannot contradict the rights and interests of their infants, minors or disabled children.'[5]

However, this rule has exceptions, established by the law. For instance, sections of the CC that allow transactions with certain defects to be legalized (made lawful) in a judicial manner or that allow for them to be approved by authorised persons, defined by the law (sec. 220, sec. 221, sec. 226 of the CC). Hence, the statement by some Ukrainian authors that believe that a transaction is 'necessarily a lawful act' cannot be supported.

Besides, a transaction that does not meet all the listed requirements is not invalid. For example, according to sec. 218 of the CC of Ukraine, if the parties do not conform to the legal requirements of a written form of a given transaction, as a rule such transaction is not invalid. Moreover, the legislator may provide for a possibility of proving the fact of making a transaction by witness testimony.

Transactions differ from other legitimate legal facts by their features, as grounds for creation of civil rights and duties.

4 Order of the Plenum of the Supreme Court of Ukraine of 24 October2008 No 13 'About Practice of Consideration of Corporate Disputes' p. 17 < https://zakon.rada.gov.ua/go/v0013700-08> accessed 23 February 2019.

5 Civil Code of Ukraine.

Only if a transaction meets the listed requirements fully, its validity is secured, so as to obtain the given legal result which is recognized by other participants of civil relations. Such conformity of a transaction to the requirements of sec. 203 of the CC is presumed, given that according to sec. 204 of the CC a transaction is legitimate, unless the law directly establishes its invalidity or the court invalidates it.

## 3. EDITORIAL AND CONTEXTUAL ISSUES WITH THE PROVISION OF SEC. 204 AS TO THE PRESUMPTION OF LEGITIMACY OF A TRANSACTION

Based on the title of section 203 of the CC –'General Requirements Necessary for Validation of a Transaction', a conclusion can be made that non compliance with the requirements listed it the six paragraphs of this section should lead to the legal result of a void transaction. Instead, sec. 204 of the CC confirms the presumption of legitimacy (rather then validity) of a transaction, which is not used unless its invalidity is not directly provided for by law or the court invalidates it.

The provisions under review have the following illogical and contradictory issues: 1) definition of the legal meaning and the conditions of validity of a transaction in the absence of conditions of its invalidity; 2) the law provides for a presumption of validity of transactions and does not deal with the legal consequences of an illegitimate transaction; 3) absence of definition in law of the correlation between the terms 'validity', 'illegitimacy', 'invalidity'.

We believe that *validity of a transaction* refers to the latter having legal features that insure legitimacy of the acts of its party (parties) and a legal effect of the accomplished legal result.

*Legitimacy of a transaction* should be defined as conformity of its integral parts (subjects, form, content etc) to the general requirements of the sec. 203 of the CC and other special provisions of the law, which secure the transaction's own validity. Hence, lack of legitimacy of a transaction leads to its invalidity. Therefore, there is a certain correlation between the validity and legitimacy of a transaction, that reflects dependency of the act of validity from its legitimacy. Normally, the term 'validity' is used to establish the moment of entering into force of a legal act, for instance, the subsection 1 of the Final and Transitional Provisions of the CC state, that 'This Code enters into effect on January 1, 2004'. Therefore, it would be logical to view the notion of 'validity' in terms of establishing of the moment of entry info effect of a transaction and/or normative-legal act.

## 4. TERMINOLOGICAL ISSUES WITH THE LEGAL STATUS OF PERSONS, THAT ENTERED INTO AN INVALID TRANSACTION.

Provisions of section 16 of the CC of Ukraine dealing with persons who entered into a valid and invalid transaction use one term - parties. Usage of such a term in regards to the persons who made a valid transaction is a legally correct and logical method of determining their legal status as subjects of a legitimate civil relation. However,

doubts occur as to whether persons who entered into a transaction invalidated by the court may be described as parties. We believe such persons should not have the status of a party. However, civil legislation tends to use the term 'party'. For instance, according to sec 231 (1) of the CC a transaction concluded by a person against his/her true will due to the application of physical or psychological force by the other party or by the other person, shall be invalidated by the court.

Other terms are also used – 'person – participant'. For instance, Interpretation of the Supreme Arbitration Court of Ukraine dated March 1999 'On some Practical Issues of Dispute Resolution, Related to Recognition Contracts as Invalid' (no longer valid)[6], used to state that 'an interested person – participant to a contract invalidated by the court is not deprived of its right to demand performance by its counteragent from a third person that is not party to such a contract, as it was obtained without due legal grounds'. We believe that such terminology does not allow conferring a legal status of a party to a valid transaction, to a person involved in an invalid transact. Other acts of the supreme judicial authorities in Ukraine use terms 'parties' [7] and 'participants' [8] of an invalid transaction.

We believe it is more appropriate to use the term 'participant' of an invalid transaction, then the term 'party'.

## 5. USAGE OF THE TERM 'INVALIDITY' IN OTHER LEGAL CONSTRUCTIONS

As mentioned above, chapter 16 of the CC of Ukraine deals with the grounds and consequences of invalidity of transactions in relation to the consequences of a failure to follow the conditions of validity of transactions.

At the same time, civil legislation regulates cases of invalidity of other related legal constructions, to which chapter 16 does not apply, as their legal nature is different. For instance, according to sec. 1301 of the CC of Ukraine, a court may declare invalid a certificate of right of inheritance. It is obvious, that a certificate of right of inheritance is different in legal nature from a transaction.

A certificate of right of inheritance is, in our opinion, a legalizing document affirming the presumption of a lawful acquisition of the right of ownership by its holder. Certificate of right of ownership, certificate of right to a part of family patrimony, state act of ownership of a parcel of land can be classified as such legalizing documents. That being said, invalidating such documents is done

6 Interpretation of the Supreme Arbitration Court of Ukraine of March 1999 'On some Practical Issues of Dispute Resolution, Related to Recognition Contracts as Invalid' (no longer valid) <http://zakon.rada.gov.ua/laws/show/v_111800-99> accessed 23 February 2019.

7 Order of the Plenum of the Supreme Court of Ukraine of 6 November 2009 No 9'On Court Practice of Civil Cases Consideration on the Recognition of Contracts as Invalid' <http://zakon.rada.gov.ua/laws/show/v0009700-09> accessed 23 February 2019.

8 Order of the Plenum of the Supreme Court of Ukraine of 29 May 2013 No 11 'On Some Issues Related to the Recognition of Commercial Contracts as Invalid' <http://zakon.rada.gov.ua/laws/show/v0011600-13> accessed 23 February 2019.

according to special provisions such as those contained in section 1301 of the CC of Ukraine establishing procedure of invalidating a certificate of the right of ownership of inheritance.

Invalidity as a sanction is also applied to decisions of state authorities and municipal bodies. For instance, according to sec. 21 of the Land Code of Ukraine non-compliance of the order of creating and modification of the primary usage of the land constitutes a ground of invalidity of decisions of state authorities and local municipalities regarding granting of land parcels to citizens and legal persons. Same as in the case above, rules applicable to the invalidity of transactions do not apply to decisions of the mentioned authorities and municipalities. However, judicial practice does not always follow this definition. For instance, Resolution of the Supreme Court of Ukraine dated 14 May 2014 is entitled 'On Declaring Illegal of the Decisions of Village Council, Declaring Invalid of a State Act of Ownership of a Parcel of Land and Abolishment of the State Registration of the Right of Ownership of a Parcel of Land', despite the fact that the resolution correctly refers to sec, 213 of the Land Code of Ukraine containing such terms as 'invalidating decisions', 'invalidating registration'. It is possible to assume that the title of the Resolution is explained by an incorrect usage of terminology by the claimant of the lawsuit in the given case. However, even under such circumstances the Supreme Court of Ukraine should have expressed its legal position as to the correlation of the notions of 'invalidity' and 'illegality', given that, in our opinion, they are not synonymous and may lead to different legal consequences. It is to be noted that the mere fact of declaring illegal of a decision of a state authority or a local municipality does not carry a binding act and does not determine certain legal consequences that would occur should a court declare such decisions illegal. Examples of such consequences could be restoration of the prior state of the subjects to an illegal decision or abolishment of state registration of the right of ownership of a parcel of land. This is how sec. 393 of the CC of Ukraine deals with a similar issue, it provides that a legal act of a state authority, an authority of the Autonomous Republic of Crimea or a local municipality that run contrary to law and breach the rights of an owner, may be declared illegal by a court and abolished upon the property owner's claima, moreover, property owner has the right to demand re-establishment of the prior state that had existed before adoption of the act, or claiming material and moral damages in case such re-establishment is not possible. Formulation of sec. 393 of the CC of Ukraine is constructive, as not only it provides for the possibility to declare a legal act illegal, but also establishes specific legal consequences, up to its abolishment, which are common to the provisions as to invalidity of transactions and its legal consequences. It would be logical to use such approach in provisions dealing with invalidity of legalizing documents dressed as certificates, or other formats, legal acts or decisions of state authorities or municipal bodies, despite the fact that they are not transactions within the meaning of provisions of chapter 16 of the CC of Ukraine.

Apart from the terms unconcluded or invalid, legislation uses such other terms as – 'voidance of administrative agreements' (sec. 19 of the Code of Administrative Proceedings of Ukraine), unlawfulness of normative-legal acts (illegality or non-conformity to a legal instrument of higher legal hierarchy) and voidance as its

consequence (sec. 264 of the CAPU). However, given that the nature of such acts is not that of civil law, provisions of the latter do not apply to such acts when it comes to declaring them invalid.

## 6. DEFINITION OF AN INVALID TRANSACTION AND ITS CORRELATION WITH A VOID TRANSACTION

Sec. 215 of the CC of Ukraine lacks definition of an invalid transaction, rather it establishes grounds of invalidity of transactions. For instance, first paragraph of the above section states: 'A ground for invalidity of a transaction shall be non-compliance of a party (parties) with the requirements established in paragraphs 1-3, 5 and 6 of Article 203 of this Code at the moment of the transaction concluding'

Contrary to the new CC of Ukraine, the CC of the USSR dated 1963 contained a laconic definition of an invalid transaction (agreement), according to which an agreement that runs contrary to law is invalid[9] (sec. 48 (2). However, such definition may not be used in modern times as chapter 16 of the CC of Ukraine, non-compliance of the law is only one of the grounds of invalidity of transactions (ex: sec. 228 of the CC).

It is difficult not to point out a certain legal inconsistency of the notion of an 'invalid transaction', since given its nature of a legal fact (it is declared so in legislation), then logically speaking we should must also consider actions of a party (parties) as invalid, which is contrary to the laws of objective reality. Although such actions are not lawful, they may not be classified as invalid in principle (non-existing in fact), as they did occur. Their unlawful (illegal) nature is another subject, they should be considered void and not leading to the desired legal consequences, other than those that according to sec 216 (1) of the CC relate to its invalidity.

Invalidity of a transaction results from a wrong-doing by its participants at the time of them carrying out the unlawful acts. This means that inadequate performance of the duties of a transaction by its parties, or a wrong-doing by its parties following the conclusion of a transaction, may not form a ground of its invalidity. This rule is undisputed din civil law and jurisprudence.

For instance, a decision of the District Court of Starokyivsk of the City of Kyiv dated 30.09.1999 invalidated an agreement of a lifetime maintenance on the ground of improper performance of the apartment buyer of its obligations before the seller. This decision was declared in force by a court panel in civil matters of the Kyiv city court (resolution dated 08.12.1999 ). Deputy Chairman of the SCU applied to dismiss these judicial decisions to the Presidium of the Kyiv City Court, stating, among others, that non-performance by the buyer of its duties under a contract may not lead to its invalidity, but rather may constitute a ground for terminating a contract upon request of the seller. The application to dismiss was allowed by the Resolution of the Presidium of the Kyiv City Court dated 09.04.2001.

9 Civil Code of the USSR of 1963 <http://zakon.rada.gov.ua/laws/show/1540-06#o193> accessed 23 February 2019.

At the same time, some normative legal acts contain provisions that are contrary to the stated rule, creating difficulties in their application in jurisprudence.

For instance, the Law of Ukraine 'On Privatization of the State and Communal Property' states the following provisions as to the grounds of declaring invalid a contract of sale and purchase of the state or communal property via privatization:

May be terminated or invalidated by a court, upon a request of one party to a contract of sale and purchase, including by a court decision, in the event of non-performance by the other party of its obligations under the contract of sale and purchase within the specified term (sec. 26(9);

– Privatization agency should demand from the new owner performance of the obligations under the contract of sale and purchase of the privatization objet, and in the case of non-performance apply sanctions to the former in accordance with the law, as well as protect interest of the state or territorial community in other manner, including filing a legal claim as to terminating the contract of sale and purchase of the object of privatization or declaring it invalid (sec. 27 (11).[10]

In our opinion, this issue can only be solved by modifying the Law of Ukraine «On privatization of state and communal property» in regards to a provision that would allow termination of the contract of sale and purchase of the object of privatization upon the claim of one of the parties or of the authority mandated with management of the objects of state property upon a ruling of a court in the event of non-performance of the other party of its duties under the contract of sale and purchase, or in the event of being declared invalid following non-compliance with the legal requirements during the contract's conclusion.

## 7. GROUNDS OF INVALIDITY OF TRANSACTIONS: DEFINITION AND ISSUES IN ITS FRAMEWORK

The main issue in the area of invalidity of transactions is defining the grounds of invalidity in order to choose the most appropriate civil remedy and the proper formulation of the claims.

As mentioned before, sec. 215 (1) of the CC provides that non-compliance of a party (parties) with the requirements established in paragraphs 1-3, 5 and 6 of Article 203 of this Code at the moment of concluding the transaction shall be a ground of its invalidity. It should be noted that sec. 203 formulates such conditions of validity rather directly, and they cannot receive wide interpretation. The conditions are as follows: 1) Contents of a transaction cannot contradict this Code, other acts of civil legislation and moral principles of the society; 2) required scope of civil capacity of a person that effects a transaction; 3) Expression of the will of a participant to a transaction being free and corresponding to his/her inner volition; 4) Aim of a transaction at realistic occurrence of legal consequences stipulated by it; 5) A

10 Law of Ukraine 'On Privatization of the State and Communal Property' <https://zakon.rada.gov.ua/laws/show/2269-19> accessed 23 February 2019.

transaction effected by parents (adoptive parents) cannot contradict the rights and interests of their infants, minors or disabled children.

Particular attention must be made in correctly formulating the grounds of invalidity in a given claim while using invalidity of transactions as a civil remedy. For instance, in the case of a null transaction, according to sec. 215 of the CC claims must state a demand to apply consequences of invalidity of a null transaction, without asking to declare such transaction as invalid. This flows from the content of sec. 215 (2), according to which a transaction is null, if invalidity of the transaction is proclaimed by law, in which case declaration of invalidity by a court is not required.

The above-mentioned provision implies two important legal positions. Firstly, transactions are declared null only directly by law, which does not have a general list of specific null transactions, which are pronounced as such in specific sections of the CC and other legal instruments. Secondly, nullity of a transaction provided by the law does not require a declaration of invalidity of the transaction in accordance with sec. 215 of the CC. In other words, there is no necessity in declaring the null transaction as invalid by the court. This provision was viewed in a mixed manner by the civil doctrine and interpreted differently in jurisprudence.

At the same time, the legislator does not follow the rule contained in sec. 215 of the CC throughout the Code neither. For instance, sec. 228, that deals with legal consequences of concluding a transaction that is contrary to the public order and is null, provides that a transaction contrary to the requirement of agreeing with the interests of state and society or moral principles of society may be declared invalid. Therefore, despite the nullity of a transaction that is against public order, it is necessary to declare it invalid in order to resort to the remedies provided in sec. 228 of the CC, which contextually and literally conflicts with sec. 215 (2) of the CC that states that invalidating a null transaction by the court is not required.

It is our opinion that legislator's decision to insert a presumption of invalidity of a null transaction into this section did not purport to establish the fact of nullity outside of the court, but rather to empower the court to confirm presence of irregularity as such that does not require evidence of legal irregularity of a null transaction in accordance with all the procedural steps, allowing therefore to resort to the available legal remedies. AT the same time, most null transactions against public order may not be considered invalid without a judicial confirmation of this fact both in terms of material and procedural law. Optional nature of declaring a transaction that is against public order null outside the court in the legal provision contained in sec. 215 of the CC and its interpretation by higher courts is deprived of legal logic and does not assist in removing the violation of the requirements of the law. An interesting idea has been put forth in the 'General concepts of the courts' practices in the field of invalidating transactions' dated 24 November 2008, which state that a claimant may address the court with a demand to confirm nullity of a transaction if there is a dispute as to presence of absence of such fact; courts may be addressed with claims of invalidating a disputed transaction and applying the appropriate remedies, as well as claims confirming nullity of transactions and applying the appropriate remedies. In this case, authors of the General Concepts believe, with reason, that courts deal with claims as

to 'confirmation of nullity of a transaction', rather then 'declaring a transaction as null'. Unfortunately, the Supreme Court of Ukraine, in its Resolution of the Plenum dated 6 November 2009 №9 'On court's practices in the field of civil claims to invalidate transactions' did not take this legal position.

Final dots can only be placed by modifying sec. 215 of the CC of Ukraine accordingly.

## 8. DECLARING TRANSACTION AS UNCONCLUDED AS A LEGAL REMEDY

In order to answer the issue in question it is necessary to look into the norms of the Civil and the Civil Procedure Codes of Ukraine (hereinafter referred to as 'CPC') the dealing with the grounds for application of a remedy. For instance sec. 16 of the CC contains an non-exclusive list of remedies of civil rights and interests, among which appears invalidating transaction. Paragraph 2 of this section (modified by the Law dated 3 October 2017) establishes a special warning, according to which a court may protect the civil right or interest using another remedy if so stipulated contractually, legally or judicially in cases defined by the law. The new version of this section allowed for a possibility of using another remedy to protect civil rights and interests, besides those mentioned in the contract or the law, which is a remedy chosen by *court*. Sec 5(2) of the CPC also considered this special circumstance, drafted as follows: 'In cases where the law or the contract do not provide for an efficient remedy of an infringed, undeclared or disputed right, freedom or interest of a person applying to the court, the latter may establish in its decision a remedy that does not run contrary to law, in accordance with the claims laid out in the application.'[11] Analogous norm is found in sec. 5 of the Economic Procedural Code of Ukraine. Adoption of this provision is progressive and positive, as in the past the Constitutional Court of Ukraine annulled court decisions of the lower jurisdiction on the ground of them using a remedy not specified by law.

Hence, the modifications allow the court to use the most efficient remedy of protecting the infringed civil rights in those cases where such remedy is not offered by the law. Such remedies may be offered as, inter alia, invalidating a transaction, proclaiming it as unconcluded etc.

At the same time, Plenum's Resolution № 9 makes an opposite conclusion : requirement to declare a transaction (contract) as unconcluded does not fall within the possible remedies of protection of civil rights and interests established by law. Courts may deny such claims. In such cases, only claims mentioned in chapter 83 of Book 5 of the CC may be made.[12]

11 Civil Procedure Code of Ukraine of 2004 (with amendments) <https://zakon.rada.gov.ua/laws/show/1618-15> accessed 23 February 2019.

12 Resolution of the Plenum of 06 November 2009 No9 'On Court]s Practice in the Field of Civil Claims to Invalidate Transactions' <https://zakon.rada.gov.ua/laws/show/v0009700-09> accessed 23 February 2019.

It is our position that to solve this issue we should first analyze the current legislation. For instance, according to sec. 638 (1) of the CC of Ukraine, an agreement shall be concluded if the parties have duly reached consensus on all its essential conditions. A similar provision is found in sec. 180 of the Economic Code of Ukraine, according to which a business agreement is deemed to be concluded if the parties reach an agreement in accordance with the procedure and the forms envisaged by law in regard to all the material terms thereof. As such, if we follow legal logic, we can easily come to a conclusion that a concluded agreement should have a corresponding notion of an 'unconcluded agreement', given that the legislator recognizes the fact of existence of both valid and invalid transactions. Hence, it is possible to encompass a claim of non-conclusion of an agreement due to the lack therein of its essential term to provide for an appropriate remedy of protecting civil rights and interests, despite the lack of such remedy in the list established by sec. 16 of the CC, given that according to this section a court may protect civil rights and duties in other manner than that established by contract or by law.

If we consider the current formulation of sec 181 (7) of the Economic Code of Ukraine, we would come to this conclusion, it states 'If the parties fail to agree on all the material terms of a business agreement, this agreement shall be deemed as unconcluded (the one that was never concluded).' At the same time, a conclusion can be made based on this provision, that only a business agreement where parties failed to agree on all the material terms, rather than only one or a few of them, shall be deemed unconcluded.

Similar provision is also found in other normative-legal acts, for instance in General terms of conclusion and performance of subcontracts in construction, approved by the Order of the Cabinet of Ministers of Ukraine on August 1, 2005 No 668. (para. 12)[13]. Law 'On the rental of land' provides for such a remedy as declaration of conclusion of a contract of rent by the court in the event of a dispute as to the conclusion of contract by its parties (sec. $8^2$).[14]

At the same time, absence of a material term in the contract shall not be regarded as an absolute ground of its non-conclusion. For example, it is not reasonable to view the contract as unconcluded if one or a few material terms are missing, in the event of a full performance of the contract by its parties, including a term that was not provided for.

Mutually exclusive statements of the Supreme Court appear contradictory insofar as stating that only a concluded agreement (transaction) may be declared invalid, and then establishing that lack of a material term violates requirements of sec. 203 of the CC of Ukraine, which constitutes on its own a ground of invalidity of a contract.

Legal doctrine is lacking an integral and conceptual approach when it comes to interpreting definitions of invalidity and non-conclusion of agreements, and to

13 Decree of the Cabinet of Ministers of Ukraine of 1 August 2005 No 668, para. 12 <https://zakon.rada.gov.ua/laws/show/668-2005-%D0%BF> accessed 23 February 2019.

14 Law of Ukraine 'On the rental of land' <https://zakon.rada.gov.ua/laws/show/161-14/> accessed 23 February 2019.

determining their legal nature and legal consequences. The issue had been subject of relatively quiet discussions in civil and economic legal doctrine with two contrary approaches.

Authors of the first approach believe that absence of a material term in an agreement is a ground of its invalidity with the appropriate consequences. Followers of the second approach believe that in the event of a finding that the agreement is unconcluded due to lack of a material term, provisions as to unjust enrichment should apply in the event of handing over the property by the counteragents, while in the event of loss or damage of property, – a damages claim.

In order to avoid such an absurd situation, it is necessary to differentiate the legal nature of the violation of requirements listed in sec. 203 of the CC, compliance thereof being essential to the validity of the transaction, and violation of the requirements of sec. 638 of the CC which are required for an agreement to be concluded.

Correspondingly, the first violation may serve as a ground of invalidity of the transaction, while the other as a ground of its non-conclusion. The Supreme Court should consider reviewing its legal position as to the legal consequence of a lack of material terms in a contractual transaction and the legal consequences of an unconcluded contractual transaction. Of course, review of its legal position by the Supreme Court will not resolve the entire issue. In any case, it is suggested to perform the relevant legislative corrections. For instance, sec. 638 of the CC of Ukraine should be complemented by a third paragraph of the following content: 'In the event of lack of a material term in the agreement, such agreement may be declared by the court as unconcluded and legal consequences mentioned in chapter 83 of this Code should be applied'.

Moreover, parties may stipulate the most efficient remedy directly in their agreement. Hence, the main accent in establishing a possibility of dealing with these cases is the remedy's goal to protect the infringed, disputed or unrecognised rights or interests, as well as impossibility to select another remedy.

## 9. CONCLUDING REMARKS

Main features of transactions that help differentiate them from other types of legal facts are: *fact that a party to a transaction has its own will; parties to a transaction may be all subjects of civil law within their jurisdiction; aimed at occurrence of a certain legal consequence; carrying out the transaction according to the requirements of the law.*

Articles of incorporation (articles of association, except for the articles of association of a partnership) are not a type of transactions, but a local legal act that determines the legal status of a legal person and its modalities of use by the authorised bodies and persons, as well as establishes general terms of carrying out the labour and corporate rights and obligations of the participants and officers of the legal person.

Based on the above, it is important to point out impossibility to use provisions as to invalidity of transactions to invalidating the incorporation documents of a legal person and/or decisions of the general meeting of the partnerships. In presence of the grounds stipulated by law, they may be invalidated according to special provisions.

Civil legislation also provides for a mechanism of invalidating other types of legal facts, besides transactions. For instance, such facts as certificates of the right of inheritance, certificates of the right of ownership of a part of family patrimony, a state act of the right of ownership of a parcel of land, decisions of the state authorities and local municipalities etc. Same as in the prior case, provisions of invalidity of transactions do not apply to invalidity of such certificates and decisions.

It is important to differentiate notions of validity and legitimacy of transactions as follows. *Validity of a transaction* refers to the latter having legal features that insure a lawful nature of the acts of its party (parties) and a legal effect of the accomplished legal result. Whereas legitimacy constitutes conformity of its integral parts to the general requirements of sec. 203 of the CC and other special indications of the law, which ensure validity of the very transaction. Hence, these notions are related, and validity depends on its legitimacy.

When determining the subject of a transaction, it is important to use the term 'party', and when it comes to an invalid transaction, the term 'participant' of an invalid transaction.

When declaring a transaction invalid, it is necessary to establish at least one violation of the terms of validity of transactions.

Invalidity of transactions is the result of a violation that occurred during the carrying out of unlawful acts by its participant(s). This means that inadequate performance of the obligation by the parties to a transaction, or their violation after the conclusion of the transaction cannot be a ground of its invalidity. In relation thereto, it is important to describe as legally incorrect provisions of the Law of Ukraine on 'Privatization of the State and Communal Property', which provides for a possibility to declare invalid a contract of sale and purchase in the field of privatization, in the event of non-performance or inadequate performance of its terms, besides the possibility to terminate the contract.

An invalid transaction is an act of one or several persons – subjects of civil law, aimed at acquisition, modification or termination of civil rights with such a violation of the law that legal consequences of lawful legal facts would not be allowed to occur, with the exceptions directly provided in the law, for instance, in presence of the grounds of invalidity with defects of actions, or using a mechanism of sanitation (healing) of the actions performed defectively by way of declaring them invalid in court.

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