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CONTENTS

INTRODUCTION	7
1. Aleknaitė – Van der Molen L. Alternative Dispute Resolution in Banking and Finance Sector	11
2. Bělohávek A. J. Extent of Procedural and Substantive Law in Arbitration and Litigation	31
3. Białecki M. The practical application of alternative dispute resolution in selected sectors of the economy and business and in civil cases. Recent developments in Poland	58
4. Kozubovska B. The arbitrability criteria	86
5. Kozubovska B. Arbitrability of labour disputes	120
6. Okinczyc S. Yukos Arbitration – Past, Present... Future?	145
7. Sriubaitė-Stepurienė S., Šatas J. Business disputes and calming mediation and the mediation centres in Lithuania, efficiency problems and in the promotion guidelines	162
8. Tajti Tibor. The Dynamic Conception of Alternative Dispute Resolution	177
9. Urzhumov I. The Symbiotic Relationship between Arbitration and Litigation	201

The dynamic conception of alternative dispute resolution

Tibor Tajti (Thaythy), Prof. Dr.¹©

1. INTRODUCTION

1.2. STATIC VERSUS DYNAMIC PERCEPTION OF ADR DEFINED

One could hardly contest that the English (and other) language publications on alternative dispute resolution (hereinafter: ADR) have significantly increased during the last few decades. This applies primarily to international commercial arbitration, though mediation – perhaps domestic rather than international – seems to have caught up lately as well. No matter whether books written by arbitrators or mediators are at stake, however, they suffer from a weakness this paper would like to focus upon: the *static* picture they present on the targeted form of ADR.

Put simply, this article vouches for a shift from a *static* to a *dynamic* perception of alternative dispute resolution for the 21st century. Contrary to what intuition would dictate, however, such a shift would require more than just adding a few more pages to the introductory, evolution-related parts of these works.² The task would be rather to create a picture that

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2 The first edition of the venerable text & case-book of Tibor Várady, John J. Barceló III and Arthur T. von Mehren, *International Commercial Arbitration* (West, St. Paul, 1999) had a total of eight pages (out of 812) devoted specifically to the relationship of arbitration and mediation. *See Id.*, at 9-16. The fifth edition of the book dated 2012 contains the same eight pages plus eight pages on escalation clauses (with excerpt from the article of Klaus Peter Berger) and a few more pages devoted to mediation –

would emphasize the presence of dynamic forces constantly reshaping the contours of ADR; both internally and externally. This paper, by no means a complete account of the topic, aims to cast a novel light on some of the *entrenched assumptions* characteristic to the ADR law by putting forward a number of somewhat eclectically chosen yet hopefully quite telling international and historical examples.

1.2. WHY IS IT IMPORTANT TO PERCEIVE ADR AS A DYNAMIC PHENOMENON?

First and foremost, the aim of this paper is not to denigrate ADR in general or any of its forms; quite to the contrary. It rather proceeds from the presumption that a distorted picture is not serving the interests of ADR itself either. For example, just as it makes sense to openly communicate to the client looking for the most appropriate dispute resolution avenue what the disadvantages of arbitration vis-à-vis litigation are, it is equally reasonable to make students aware that the exponential growth of international commercial arbitration characteristic to the later part of the 20th century might not recur in the 21st century. Or that decline of ADR, or one of its specific forms, may occur even in a shorter period of time due to known or sometimes even unpredictable factors.

Secondly, it should not be forgotten that the time-span in the purview of text and casebooks as well as scholarly publications on ADR is very limited and is typically concentrated on present time law and practices. This should not come as surprise as these are written for students and practitioners that would like to exploit them in their daily work – today, not in ten years. Likewise, law review articles overwhelmingly deal with living problems, questions and topics. Yet if we look at ADR from the

what could be taken as the recognition of the increased importance mediation has gained during the last decade. The book will be referred to hereinafter as “Várady, Barceló and von Mehren”.

perspective of policy-makers who would like to disburden courts by promoting (for example) mediation, it may be useful to know not only that mediation is not necessarily suitable to or favored by certain industries but that any one form of ADR might “burn out” and become discredited in the eyes of an industry or by certain classes of a society.

Thirdly, a related but distinct issue is that text and casebooks on arbitration or mediation are as a rule written by the representatives of the industry, arbitrators or mediators that make a living out of ADR; something that is inevitably often reflected on the positions expressed in related publications. Often the problem is that the reader is not capable of placing the narrative of an otherwise brilliantly written book or article on ADR into a broader context. Naturally, nothing of this means that critical scholarship is lacking from the domain.³ Yet the below-commented paper of Martin Hunter on “dispute management”⁴ as the future substitute of arbitration seems to be an exception rather than the rule.

Finally, historical experience – not being limited to the “last-generation wisdom” and to any one niche of our globe – might easily reveal as well that backpedaling by policy-makers as far as some ADR forms are concerned is not unknown either. The US experience from the beginning

³ See, e.g., Thomas Buergenthal, *the Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, in: *Arbitration International*, vol. 22, No. 4 (2006), pp. 495 – 499. Judge Buergenthal (Int’l Court of Justice) complained, among others, of the ICSID practice of “allowing arbitrators to serve as counsel, and counsel to serve as arbitrators [as that generates] due process of law issues.” This being so as the arbitrators might “be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel.” Given the very nature of ICSID, “[it] is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments (the bilateral investment treaties, for example) are regularly at issue in different cases before it.” *Id.* at 498.

⁴ See Martin Hunter, *Inaugural Victoria University of Wellington Foundation’s Annual Dispute Resolution Lecture*, NZ Centre for Conflict Resolution (Wellington, 15 March 1999), pp. 10 and 11. Hereinafter the “Hunter Wellington Lecture 1999”.

of the 20th century – evidencing a complete failure of arbitration as a dispute resolution method in the context of labor disputes – might be eye-opening in that respect.

1.3. THE ROADMAP TO THE PAPER

In the light of the above, this article will exemplify the central postulate by pointing to the following four classes of examples: *first*, the impact of lawmaking (both legislation and case law); *second*, the altering relation (and eminence) of various ADR forms – with focus on arbitration and mediation (from rivalry to peaceful co-habitation, and vice versa); *third*, the challenges the expansion of ADR to ever newer fields of substantive law brings; and *finally*, the impact of the specific needs, interests and preferences of various industries on ADR.

2. FACTORS THAT MAKE ADR DYNAMIC: EVIDENCE

2.1. THE MOST OBVIOUS GENERATOR OF CHANGES: LAWMAKING

Let us start perhaps with the obvious: law-making. It is generally subscribed to that the New York Convention (1958)⁵ is due to the exponential growth of international commercial arbitration, the ripple effects of which boosted domestic arbitration as well (though not with such a widespread success as in the international arena and with meaningful country-by-country variations). As it is also known, of equal importance was that after the ball was once set rolling on the international scene, most of the developed legal systems have followed suit by passing arbitration-favoring laws. Suffices to mention the example of the United

⁵ The New York Convention on the Recognition and Enforcement off Foreign Arbitral Awards (June 10, 1958; hereinafter the “New York Convention”).

Kingdom (UK) though similarly worded qualifications could be added in relation to most of the other countries. Here, as John J. Barceló put it “[*The new Arbitration Act in 1996 [...] went beyond the [previous] 1979 Act to ensure that international commercial arbitration could be conducted in the United Kingdom without unwanted judicial intrusion.*”⁶

Another quintessential corollary of the New York Convention was that it brought to an end the earlier period characterized by judicial hostility. This was primarily due to the fact that “[*together with the ensuing international agreements and national arbitration-favoring laws, it has] brought about an international value of arbitral awards that is actually higher than the international value of court decisions.*”⁷ Needless to say, due to this volte face, important pro-arbitration high court decisions were subsequently made especially from the 1980s on, starting with the famous Mitsubishi decision of the US Supreme Court.⁸ If these success stories, often stemming from the jurisdictions hosting one of the leading arbitral centers of the world, are juxtaposed and arbitral law is studied only based on them, unwittingly such an image could be entrenched in the student of arbitral law that might be in stark contrast with reality, not necessarily looking so benevolently on arbitration (if at all).

Scholars, mediators and often also policy makers tend to speak quite positively of mediation (and conciliation) as well in our times. This is often due to the genuine success of mediation as a dispute resolution

⁶ John J. Barceló, *A Postscript from 1999*, in: Várady, Barceló & von Mehren (4th ed., 2009), at 64.

⁷ See Tibor Várady, *How did the Hostility towards Arbitration End? – Another postscript from 2008*, in: Várady, Barceló and von Mehren (West-Thomson, 4th ed., 2009), at 67.

⁸ *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, US Supreme Court, 1985, 473 U.W. 614. The case, expression of the policy that “national courts [ought] to subordinate domestic notions of arbitrability to the international policy of favoring commercial arbitration” proclaimed antitrust claims arbitrable. Quoted from the reasoning of the decision.

mechanism, however, only in some industries and some jurisdictions. Further, the high praise often is unsubstantiated by concrete empirical evidences but rests on some entrenched presumptions. Although it might be premature to cast a final verdict on the success of the 2008 Mediation Directive of the European Union (EU)⁹ and the concomitant national implementing laws,¹⁰ the first generation experience readily proves that in quite a number of the Member States further substantial governmental and other efforts will be needed to jumpstart the initiative¹¹ and that the entrenched presumptions the drafters in Brussels were departing from are questionable, to say the least.

⁹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2009 on certain aspects of mediation in civil and commercial matters (L-126/3) [hereinafter: EU Mediation Directive 2008].

¹⁰ The Member States of the EU were required to implement the Directive on Mediation (2008/52/EC) by 20 May 2011. Note that the Directive applies only to civil and commercial matters and only to cross-border disputes. Hence, it would be a mistake to adjudge the position of mediation and mediators in a country (EU Member State) without the implementing laws as well as the pertaining laws and regulations. It is also of importance that many of the Member States have seized the opportunity and not only “merely” implemented the Mediation Directive but have additionally also taken a fresh look at mediation and ADR and have revamped the underlying regulatory framework. As Hopt and Steffek put it “*the Directive has certainly triggered thought and discussion processes in practice, legislature and academia on the structures and practices of dispute resolution.*” See Klaus J. Hopt & Felix Steffek, *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*, at 7, in: Klaus J. Hopt & Felix Steffek (eds.), *Mediation – Principles and Regulation in Comparative Perspective* (Oxford, 2013).

¹¹ This might be the case in Lithuania, where mediation is discussed but much less practiced; at least, this is what the author of this paper has learned from the mediation-related presentations at the conference. Yet this is not without precedent. In Hungary, for example, although public notaries may also serve as mediators according to the law, the practice seems to have been non-existent until the time of the completion of this paper. See, e.g., the recent Hungarian language article of Renata Revicky, who confirms that – even in the lack of exact quantitative data (statistics) – one should conclude that the possible number of cases mediated by public notaries is minimal. See Renata Revicky, *A közjegyzők és a közvetítők lehetséges kapcsolódási pontjai Magyarországon*, in: *Közjegyzők Közlönye* [Bulletin of Public Notaries], vol. 2013, No. 5 (Sept. – Oct.), pp. 65-

2.2. RIVALRY OF ADR FORMS

2.2.1. PRESENT TIME: MEDIATION VERSUS ARBITRATION

Although one may legitimately object to a title that posits arbitration and mediation as foes, it should go without saying that the relationship of the two most important ADR forms has been hectic in modern times. The picture gets complicated also because they sometimes, or at some specific geographic locations, enjoy the fruits of peaceful co-existence, and yet are rivals at other times or places. The future will hardly be any different because of why it is more than justified to look at their relation in their dynamism.

2.2.1.1. RIVALRY

Here, China may be a good starting point because, before the redirection of development towards market economy and capitalism – a sui generis combination of socialism and market-economy elements – somewhere in the late 1980s or early 1990s, the crown there belonged to mediation (including conciliation) as something inherent to Confucianism. With the continuing infiltration of western transplants, entrepreneurship and the emergence of wealthier social classes, social and ethical standards began to change as well. As a result of these, though partially generated by dissatisfaction with the court and the legal system lagging behind developments, litigation and arbitration began to take prevalence in an ever-growing portion of the market.

71. This notwithstanding that two of the leading Hungarian public notaries & scholars, Judit Bokai and Tibor Anka, wrote an article about and have tried to promote mediation among public notaries already in 2000. See Tibor Anka & Judit Bokai, *Mediáció, egyeztetés, választott bíraskodás*, in: *Közjegyzők közlönye* [Bulletin of Public Notaries], vol. XLVII, Nos. 7-8 (2000), pp. 12-15. On mediation in Hungary (legal environment, practices) see Tibor Tajti, *Mediation in Hungary*, in: David Richbell (ed.), *How to Master Commercial Mediation* (Bloomsbury Professional, UK, 2014).

It is a less known fact, but a similar process unfolded in Europe in the 20th century. Namely, “[the caseload of the ICC International Court of Arbitration], prior to World War II, consisted almost entirely of conciliation proceedings [...] [and] arbitration, with its promise of enforceable finality, has overtaken mediation and conciliation as the prime mode of transnational dispute resolution”¹² primarily due to the success of the 1958 New York Convention. The ensuing virtually unhindered growth of arbitration, especially international commercial arbitration, looked and still looks unstoppable. Had it not been for some negative concomitant developments, one would not hesitate concluding that, for example, the 2008 EU Mediation Directive would not be in the position to break the upward-directed growth of arbitration. The truth is, however, that mediation does not seem to be the weaker brother of arbitration anymore. As a result mediators and arbitrators see each other as competitors for the same, or substantially the same, market. As arbitration has lost a portion of its flexibility due to the drive toward increased formalism, often ending in complex procedural rules outperforming even those on civil procedure, there is a meaningful dose of truth in these (and some other) fears.

2.2.1.2. PEACEFUL CO-HABITATION: THE CASE OF ESCALATION CLAUSES

Examples of peaceful co-habitation of arbitration and mediation – and the connected industries as well – could also be found. Perhaps the ‘multi-tiered’ – or escalation – clauses, popular especially in construction and engineering contracts might be mentioned as examples.¹³ These are

¹² See Michael F. Hoellering, Comments on the Growing Inter-Action of Arbitration and Mediation, in: Albert Jan van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture*, ICCA Congress Series 1996 Seoul (Kluwer Law Int’l, 1998), pp. 121-124, at 122.

¹³ See Klaus Peter Berger, *Law and Practice of Escalation Clauses*, Arbitration International, vol. 22, No. 1, pp. 1- 6.

particularly suitable for complex, major projects made of multitude of phases, where the interests of the parties, the nature of the potential disputes and thus also the most appropriate ADR form may differ from phase to phase. Typically the adversarial – arbitral – phase ensues only after “*informal discussion or formal negotiations between technicians or decision-makers at management level, mediation proceedings, expert adjudication by a ‘Dispute Review Expert’ (DRE), a ‘Dispute Adjudication Board’ (DAB) or a ‘Dispute Review Board’ (DRB)’*”¹⁴ have already been completed.

Martin Hunter’s primer on the construction of a Hong Kong airport, involving many different parties “*operating under a complex spider’s web of contracts worth many billions of US dollars,*” might properly show that workable solutions do exist. Here, a so-called Disputes Review Group was established to be led by a former Hong Kong judge, who was supported by experts of various disciplines. The group had spent considerable time on site in search for sources of disputes and eventually was in the position to resolve them before they arose; actually only one major dispute ended up before arbitrators. Put simply, to a great extent due to the synergy inherent to combination of ADR forms, the project was completed in due time – not necessarily a natural outcome in case of many other similarly complex projects.

2.2.2. FUTURE CHALLENGES: DISPUTE MANAGEMENT

Foretelling the future course of events is hard; this equally applies to ADR. Apart from the fact that the few – some historic, some living – examples mentioned in this paper might reappear in the future in some nuanced forms, and one might find Martin Hunter’s thoughts on dispute

¹⁴ *Id.* p. 1.

management as the future substitute of ADR particularly eye-opening; though this perhaps primarily applies to arbitration. As he put it somewhere at the beginning of the 1990s, dispute management denotes a complex hybrid of ADR techniques focused first and foremost on **dispute avoidance**. Then, “secondly, it means that where the parties cannot avoid falling into dispute, they enter into a **structured direct negotiation** process designed to limit the instances in which they will need to involve a third party to the barest possible minimum. [...]”¹⁵

As coming from the industry and having about ten years of experience as a corporate counsel, I could fully understand the underlying logic of this claim given that, for the management, litigation or arbitration – or any other ADR form distracting the daily routines of running of the business – is normally the least wanted alternative. To what extent the thoughts of Martin Hunter have materialized in the meantime seems to be as yet uncharted. But if one takes a look at the services offered by major law firms, one may realize that now many offer a complex package of dispute resolution techniques already, instead of pressing arbitration only. Often the issue is that businesses, save perhaps multinationals, banks and other financial strong entities, have no pre-formulated dispute resolution strategies to a great extent due to the lack of knowledge of even the more widely established ADR forms.

2.3. THE CHALLENGES OF ADR’S EXPANSION TO NEW FIELDS

ADR law and scholarship cannot be stagnant for another important reason: as law develops, becomes transplanted and travels across borders, the question of resolution of connected disputes by way of one form

¹⁵ See Martin Hunter, *International Commercial Dispute Resolution: Challenges of the Twenty-First Century*, Arbitration International, vol. 16, No. 4, pp. 379-392 (2000), p. 379.

of ADR emerges. A related challenge is the detection of whether there are such idiosyncratic characteristic of the new field of [substantive] law that would require special considerations. Three examples should properly illustrate the dimensions and complexity of this issue.

2.3.1. ARBITRATION OF ISLAMIC FINANCE DISPUTES

As it became known by the second decade of the 21st century, due to its spectacular growth during the last few decades, Islamic finance is not limited to the Islamic countries any more. The discourse on whether disputes arising between the client and the Shari'a compliant financial organization are arbitrable seems to be at its inception.¹⁶ Not so long ago, this was an issue for domestic law only, a question that was to be resolved based on the applicable (thus Islamic) law. Today, however, this issue has become genuinely international given that the products of Islamic financial organizations have increasingly been sold abroad, among others, also to customers of other religions and western investment companies. One good example is the functional equivalents (if at all) of fixed income securities (bonds), the *sukuk*.¹⁷ Established financial

¹⁶ As an example, let us mention the '2014 Casablanca Arbitration Days', an international conference held in Casablanca, Morocco, on 28-29 November 2014 < [https://sites-mwe.vutturevx.com/14/473/compose-email/draft-2-with-bigger-font---save-the-date---2014-casablanca-arbitration-days---november-28-29\(2\)\(1\).asp](https://sites-mwe.vutturevx.com/14/473/compose-email/draft-2-with-bigger-font---save-the-date---2014-casablanca-arbitration-days---november-28-29(2)(1).asp) > .

¹⁷ "*Sukuk*" is the plural of the Arabic word "*sakk*," the literal translation of which is 'certificate', as opposed to its legal meaning that is 'financial instrument'. Otherwise, "[s]ukuk are a financial instrument through which a transfer of ownership occurs. The underlying property, the ownership of which is transferred, may be an asset of an existing project, a leased object, a sleeping partnership (*mudarabah*), or participation in a business (*musharakah*)". As one may see, primarily due to the fact that the investor into the bonds becomes of a sui generis owner of the underlying assets, the Islamic *sukuk* are only conditionally the equivalents of non-Islamic bonds. See Raj Bhala, *Islamic Law (Shari'a)*, (LexisNexis, 2011), at 762-63. As an article from the *Financial Times* has reported, due to the "double digit growth of the Islamic banking industry,"

centers are trying to tap these vast new markets as well.¹⁸ Multinationals, on the other hand, cooperate with Islamic banks to forge financing solutions compliant with Shari'a for sale of their products in Islamic countries.¹⁹ As a result, one may legitimately conclude that the suitability of the resolution of disputes in these contexts by arbitration or other ADR methods will be one of the hot topics to come. This, coupled with the many question marks on the compatibility of western legal institutions, rules and principles with Islamic legal systems (i.e., compatibility of substantive laws),²⁰ amounts to a genuine challenge.

actually the demand is significantly bigger than what is being offered on the market. The article predicted that the issuance of Sharia-compliant bonds (sukuk) will reach \$100 billion by the end of year 2012. One of the new tendencies is that "[t]he demand comes [not only] from Islamic financial institutions [but also from] fund managers and high net worth individuals;" to a great extent due to the euro-zone crisis and because sukuk are backed by real assets. See Ashar Nazim (Ernst & Young), *Surge in Sukuk Demand Outpaces the Issuance*, FTfm 5th of November 2012 issue, at 20.

¹⁸ See, e.g., the article by Robin Wigglesworth, *By the Book* in the 26th May 2014 issue of the Financial Times (page 5) stating that "London wants to be a global centre in the fast-growing industry [of Islamic finance] despite fierce competition and debate over value and ideology". The article mentioned also the plans of the UK government of 2013 "to become the first western country to issue an Islamic bond, or sukuk – a security structured to adhere to the Muslim prohibition of interest".

¹⁹ For example, Intel engaged in such cooperation with an Islamic bank "to offer consumers Pakistan's first large-scale hire-purchase scheme for personal computers". See Matthew Green and Robin Kwong, *Intel Plan to Offer Islamic Loans in Pakistan*, the Financial Times, 19th of October 2011 issue, page 19.

²⁰ For example, when the Dubai's state-owned property firm Nakheel Development Ltd. issued in 2006 \$3.52 billion of bonds, trusts were set up for the benefit of the bondholders. This proved to be problematic, among others, because 'trusts' are foreign to Dubai's laws. Moreover, Dubai has neither "track record of adjudicating complex international transactions", nor would its courts be willing to enforce judgments of English courts. See, e.g., Alessandro Pasetti and Jacob Plith, *the Disturbing Fine Print on those Nakheel Bonds*, the Wall Street Journal, 14 December 2009 issue, at 7.

2.3.2. ARBITRATION OF TRUST DISPUTES

Trust, not long ago thought to be an exclusive attribute of common law systems only, is spreading in European civil law systems as well. This claim is valid notwithstanding that none of the European variants is an exact replica of any of the common law concepts. Suffice to mention the German-Swiss '*Treuhand*,' the French '*fiducie*,' or the transplants in Central and Eastern Europe (CEE); be it the Romanian kin of the French *fiducie*, the Lithuanian or the latest Hungarian versions.²¹ Moreover, Book X of the soft-law instrument – the Draft Common Frame of Reference (DCFR) – authored by an elite group of European scholars and bearing the features of a typical civil code also “recommends” to Europeans introduction of trust.

In other words, trust is already very much present and used in quite a number of European civil law countries, though its real rise is to be expected later. This legitimizes putting on the table, at this early stage already, the question of the arbitrability of the concomitant disputes and the suitability of other ADR forms for the resolution of trust-related disputes. As European civil laws offer little (if any) guidance in this respect, the experiences of the leading Anglo-Saxon system ought to be consulted. Both the UK and the US have not only a rich repository of such cases, but even a certain amount of experience with statutory regulation²² of these

²¹ The patterns radically differ: while Lithuania placed the trust in the book on property (Book Four: Things or Property Law, Chapter VI: Right of Trust, sections: 4.106-4.110), for the new Hungarian Civil Code from 2013 trust is primarily an obligation and a contract (Book VI: Obligations, Part Three: Specific contract types, Title XVI: agency-type contracts, Chapter XLIII: Trust contract, Sections: 6:310 – 6:330).

²² The statutory approaches differ radically. For example, while the English law uses broad language and allows for arbitration of “any debt, account, claim, or thing whatever related to ... the trust”, [the Trustee Act 1925 as amended by Trustee Act, 2000 (U.K.)], some US States have opted rather for a detailed list (e.g., Washington and Idaho). See S.I. Strong, *Arbitration of Trust Disputes: Two Bodes of Law Collide*, 45 Vanderbilt J. of Transnat'l L. 1157 (October, 2012), at 1191-92.

specific legal issues. What should be clear is that presuming that trust-disputes are arbitrable without any constraints is mistaken.

The hurdle is that understanding trust itself, and especially what the prerequisites for its efficient functioning are, presents *per se* a huge challenge for comparatists from civil law systems. Yet most of the above ADR-related queries could not been answered without fully comprehending what trust is about and what follows for arbitration especially from the *multiparty, fiduciary as well as long term nature of trust*. The challenge clearly transgresses the obvious as it is a no-brainer that engaging arbitrators having particular expertise in trust law is a necessity or that special considerations apply to the arbitrability of cases when the beneficiaries of a trust are unborn, unascertained, or legally incompetent persons.²³

On the one hand, as the US experience shows, while the arbitration of external disputes (i.e., the trustee's disputes with third parties) does not seem to present specific issues, that is hardly so as far as the internal trust-relations of the settler, trustee and the beneficiary (or beneficiaries) are concerned. Indeed, the US Uniform Trust Code (UTC) speaks of 'the material purpose of the trust' and imposes restrictions on the arbitration of these.²⁴

On the other hand, due to the long-term nature of trusts, judicial instructions (decisions on preliminary points of law) play a key role in the life of trusts because they give "*the parties, typically the trustee, early*

²³ See Strong *Id.* at 1184.

²⁴ Section 111(c) of the Uniform Trust Code (as amended in 2010) – adopted by twenty-four US States in whole in part – states that "*interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust [yet such agreements are] valid only to the extent that [they do] not violate a material purpose of the trust and include terms [...] terms and conditions that could be properly approved by the court under this [Code] or other applicable law*". Strong, *Id.*, at 1188-89.

resort to authoritative judicial guidance [in] situations of uncertainty or dispute."²⁵ The unsettled issue is whether these could be entrusted to arbitrators, or rather (as it is in England) if courts would keep the prerogative of deciding preliminary points of law yet "*without robbing the arbitral tribunal of its jurisdiction over the merits of the dispute[?]*"²⁶ Or, whether the arbitrators would have powers to pass a series of awards over the lifetime of the trust "*to amend or correct a prior award in a subsequent [one]*".²⁷

In brief, there are many open questions on the relations of trusts and ADR.

2.3.3. ARBITRATION OF FRANCHISE DISPUTES

The position of franchise (i.e., business format franchise) is to a great extent similar to that of trusts: they are successful transplants originating in the US that have in the meantime become nominated in quite a number of European countries and they also display some specific features. Because of the latter, special considerations apply to the question of arbitrability of franchise disputes or their resolution by other ADR methods. In two important respects, nonetheless, franchise is different from trusts: they have reached Continental Europe (and CEE) a decade or two before trusts, and the legal treatment of franchise differs more radically even among common law systems. Most importantly, while in the UK there is no statutory law on franchise but general contract, it is tort law coupled with industrial standards that governs the field (the

²⁵ See Strong *Id.*, at 1203-04 quoting John H. Langbein, *the Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625-671 (1995), at 662.

²⁶ *Id.* at 1205 referring to the English Arbitration Act 1996, c. 23, §45 allowing courts to address a preliminary point of law.

²⁷ *Roehl v. Ritchie*, 54 Cal. Rptr. 3d 185, 190 (Ct.App.1 2007) mentioned by Strong, *Id.* at 1207.

so-called ‘light-touch’ regulatory approach), on the other side of the Atlantic both federal and state-level regulations exist to curb the abuses of franchisors in addition to contract, tort, and criminal law.²⁸

The concrete reason why it is important to cast a glance on the US, or more precisely the law of the State of California, is that there arbitration of franchise disputes has become statutorily restricted. The main reason lies with the inherently asymmetric nature of franchise contracts: in most of the cases the strategically stronger franchise is in the position to impose the term and conditions of transactions and is in the position to exert overwhelming control. One way of achieving that is through imposing arbitration of all franchise disputes, which becomes a problem essentially in two situations: *first*, when the designated arbitral body is also controlled by the franchisor, and *second*, when the arbitral body is not under the influence of the franchisor, yet the place of the arbitration and all the other concomitant costs are so prohibitive that they prevent the weaker party (franchisee) from participating. In Europe, the related reported cases (court and arbitral) are extremely limited, which should not lead to the conclusion that scholars should bypass the topic. Suffices to mention a recent German court case from 2011 to justify the point.²⁹

²⁸ See, for example, Tibor Tajti, sub-chapter D2 on franchise in: *Systemic and Topical Mapping of the Relationship of the Draft Common Frame of Reference and Arbitration* (Kazimieras Simonavičius University, Vilnius, Lithuania, 2013), at 63 through 95.

²⁹ See *Subsidiary Company of Franchiser v. Franchisee*, Higher Regional Court of Thuringia, 1 Sch 01/08, 13 January 2011. In the case, the enforcement of the arbitral award of the International Center for Dispute Resolution (ICDR) – an affiliate of the American Arbitration Association – was denied because “the arbitration clause in the franchise contract, which provided mandatorily for a New York venue for the arbitration hearing, created a gross disparity to the disadvantage of the franchisee, a small German entrepreneur, and was therefore invalid under the Liechtenstein law, which applied to the arbitration agreement by an implied choice”. See Albert Jan van den Berg (ed.), *Yearbook of Commercial Arbitration 2012 – volume XXXVII 37* (Kluwer Law International 2012), pp. 220-222.

2.4. THE SUITABILITY, INTERESTS AND PREFERENCES OF VARIOUS INDUSTRIES

2.4.1. SHIFTING ADR MODES AS TOOLS FOR RESOLVING LABOR DISPUTES

An excerpt from a long-forgotten American article might readily point not just to the heart of what the ADR dynamism entails and would also reveal the price the misunderstanding of the nature of ADR, or of its varying constituent forms, might entail to the economy and society as a whole:

*“The annual loss from strikes and lockouts in the United States [in 1917] equals the fire loss, which is about \$250,000,000. All are agreed that this waste of the national strength should be stopped, by government settlement if possible. But beyond this point there is the greatest diversity of opinion and misunderstanding of the facts. The general popular belief is that arbitration is the main feature of our present plan of settlement, and that since arbitration has failed (!) we must work out a new method. Few understand that the chief and most successful part of our system is “mediation,” or, as it is sometimes called, “conciliation.”*³⁰

The lesson for the modern times, in which ADR plays an equally fundamental role in resolving labor disputes – not only in the US but in Europe as well – is that neither arbitration nor mediation must be perceived as having any inherently privileged position in this domain either.

³⁰ Quoted from James T. Young, *Government Arbitration and Mediation*, p. 268, in: *Annals of the American Academy of Political and Social Science*, vol. 69, *The Present Labor Situation. Compulsory Investigation and Arbitration* (Jan., 1917), pp. 268-279 (available through JSTOR).

2.4.2. WHAT FITS THE SPECIFICITIES OF CONSTRUCTION INDUSTRY?

The narrative on the relationship of industries and ADR on the national level is different compared to the international scene though the two may overlap to a certain extent and thus the timing, dimensions as well as the reasons of the shifts in attitude may display similarities. Yet, as empirical evidence is often lacking, it is hard to formulate firm positions on industrial preferences, especially in many parts of Central and Eastern Europe where ADR is still veiled with a significant amount of ignorance. In more developed systems, however, clearly discernible trends could be detected and thus one should, indeed, reckon with the stance of identifiable industries. For example, the US construction industry is spoken of as the pioneer in embracing mediation as a dispute resolution mechanism somewhere in the 1970s, albeit with some assistance from the American Arbitration Association. The construction industry served later as the spring-board from which mediation began spreading to other industries and other types of commercial disputes.³¹

Besides the construction industry or problems that have arisen in relation to the arbitration of franchise-disputes, arbitration has become the norm in other industries as well. This has become the rule also in case of broker-customer disputes on the capital markets³² and

³¹ Michael F. Hoellering, *Comments on the Growing Inter-Action of Arbitration and Mediation*, in: Albert Jan van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture*, ICCA Congress Series 1996 Seoul (Kluwer Law Int'l, 1998), pp. 121-124, at 121.

³² As a renowned US textbook describes: "The practical impact of [the leading cases of *McMahon* and *Rodriguez*] is to create a world in which arbitration of broker-customer disputes is the norm, not the exception". See Richard W. Jennings, Harold Marsh, Jr., John C. Coffee, Jr., and Joel Seligman, *Securities Regulation* (Foundation Press, New York, 8th ed., 1998), at 1412.

the disputes concerning self-help repossession;³³ at least in the US.

Admittedly, US patterns may but need not be replicated in Europe or in other parts of the world. However, they may serve as a good starting point for analysis and planning for the future. Hence, it should not be illogical to raise the simple but important question of what reasons might justify the conclusion that the direction of developments will be any different in Europe. At least, it would make sense to add a qualification to textbooks on arbitration pointing to the pitfalls ignorance of problems faced by others earlier might generate. At the moment, this does not seem the case in Europe. For example, publications on franchise generally have only recently begun to appear to Europe and there are less than a handful papers that would at least mention the potential problems with arbitration of franchise disputes. There is a simple practical method to test whether this is the right approach: ask those individuals who dared to become franchisees, invested all their life savings and have obtained substantial amounts of credit, then went bankrupt and were left with the option to start arbitration against the multinational-franchisor on the home-ground of the latter to effectuate their loosely defined rights.

2.4.3. INTERNATIONAL ARBITRATION AS A WEAPON IN THE HANDS OF MULTATIONALS

As a recent, still unfolding and increasingly discussed example of recoil from ADR one ought to point to two groups of problems negatively affecting the image of 'big ticket' international arbitration involving governments. While the falling popularity of ICSID investment arbitra-

³³ See section 3.2.2.1. *et seq* in: Tibor Tajti, *Systemic and Topical Mapping of the Relationship of the Draft Common Frame of Reference and Arbitration* (Kazimieras Simonavičius University, Vilnius, Lithuania, 2013), at 106 *et seq*.

tion (investor-state) has been given a substantial degree of attention for more than a decade or so,³⁴ the topic of exploitation of arbitration by multinationals “to threaten governments and influence trade negotiations” is reaching the headlines only these days. A recent article in the *Financial Times* spoke of a “surge in the [arbitral] cases [that have] morphed from a legitimate way for foreign investors [...] into a way for them to threaten, or influence, government regulations and even policy”, a phenomenon referred to by some as a ‘very toxic issue.’³⁵ One of the possible consequences is already visible: inclination of states to terminate, or let expire,³⁶ the bilateral investment treaties that used to cherish arbitration as the optimal dispute resolution model. While it is hard to foretell whether the trend will accelerate or what the other concrete repercussions will be, both have obviously tarnished the earlier impeccable reputation of arbitration.

³⁴ As it is commonly known, the International Center for the Settlement of Investment Disputes (ICSID) was established by the Washington Convention of 1965 – i.e., the Convention on the Settlement of Investment Disputes between States and Nationals of other States – which stepped into force on 14 October 1966. While the 2nd edition of the worldwide venerable textbook of Redfern and Hunter from 1991 (i.e., about 23 years ago) legitimately spoke of the “outstanding success [of ICSID that was] owed in part to the sponsorship of the Convention by the World Bank”, today one should be moderate in forming an opinion. Quoted from Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2nd ed., 1991), pp. 47-49.

³⁵ See Shawn Donnan, *Toxic Talks*, in: *Financial Times*, 7 October 2014 issue, p. 11. According to the article, the expression ‘a very toxic issue’ was used by the Swedish Cecilia Malström, the candidate for The EU’s next trade commissioner related to the EU-US trade talks and the plan to include ‘investor-state dispute settlement’ (ISDS) in the agreement.

³⁶ According to the *Financial Times* article, Indonesia and South Africa have opted for such steps.

3. CLOSING REMARKS OR WHY IS THE 'OF COURSE' ARGUMENT INSUFFICIENT?

The reader, having reached the end of this paper, might be tempted to counter the claims by the 'of course argument'; to wit, it should be self-explanatory that ADR and its constituent forms are all dynamic, they do change, evolve – sometimes coupled with backlash – and nothing should be taken as eternal truth. More reasons could be put forward to show that such a presumption is insufficient. Most importantly, no profession or industry likes to air its problems, and as Michael W. Reisman put it in 1989 (a remark that was but hidden in one of the footnotes of his article and only had to do with international arbitration) “*much of what occurs in contemporary international arbitration is not available in the literature but is transmitted, like the folklore of many professions, orally.*”³⁷ This article hoped to lift the veil from one such ADR-related phenomenon not by gathering some word-of-mouth anecdotes, but by juxtaposing evidences from areas normally thought to be remote; not against but for the benefit of ADR, both internationally and locally, as “[*taking*] *fright and reserve tracks*”³⁸ is in the interest of neither national governments, nor businesses – let alone consumers.

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³⁷ Quoted from Michael W. Reisman, *the Breakdown of the Control Mechanism in ICSID Arbitration*, Duke L. J. vol. 1989, No. 4, pp. 740-807 (Sept. 1989), at 739.

³⁸ See Jan Paulsson, *Arbitration without Privity*, 10 ICSID Rev. – For. Inv. L.J. 232 (1995), at 257.

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SANTRAUKA

Alternatyvaus ginčų sprendimo būdo dinaminė samprata

Sunku būtų surasti žmogų, kuris gali ginčyti, kad leidiniuose anglų (ar kokia kita) kalba per pastaruosius kelis dešimtmečius alternatyvaus ginčų sprendimas yra minimas vis dažniau. Tą visų pirma galima pasakyti apie tarptautinį komercinį arbitražą, nors tarpininkavimas gali būti ne tik tarptautinis, bet ir vidaus. Tačiau vidinio alternatyvaus ginčų sprendimo atvejų pasitaiko vis daugiau. Nepaisant to, kad alternatyvaus ginčų sprendimo klausimais parašyta nemažai knygų, arbitrai ar tarpininkai jaučia mokslinių leidinių stygių. Šiame straipsnyje ne tik skiriama daug dėmesio esamai padėčiai aprašyti, bet ir pateikiamos alternatyvaus ginčų sprendimo panaudojimo formos.

Šis straipsnis skirtas parodyti, kaip alternatyvaus ginčų sprendimo XXI amžiuje suvokimas iš statinio virto dinaminiu. Straipsniu siekiama pabrėžti dinamiškumą ir nuolat kintančius alternatyvaus ginčų sprendimo kontūrus tiek viduje, tiek išorėje. Šiame straipsnyje ši tema jokiais būdais nėra išnagrinėta išsamiai ir visapusiškai, o tik siekiama apibūdinti iškeltas alternatyvaus ginčų sprendimo būdų prielaidas, pateikiant galbūt kiek eklektišką tarptautinių ir istorinių pavyzdžių.

Šiame straipsnyje išdėstomi pagrindiniai postulatai, kuriuos galima klasifikuoti į keturias grupes: pirma, teisėkūros (tiek teisės aktų, tiek teismų praktikos) poveikis; antra, įvairių AGS formų santykis, ypatingą dėmesį skiriant arbitražui ir tarpininkavimui (nuo konkurencijos iki taikaus bendradarbiavimo ir atvirkščiai); trečia, iššūkiai, susiję su AGS plėtra, kuriai įtakos turi materialinės teisės pokyčiai; ir, pagaliau, įvairių pramonės šakų specifinių poreikių, interesų ir pageidavimų poveikis AGS.