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ALTERNATIVE DISPUTE RESOLUTION: FROM ROMAN LAW TO CONTEMPORARY REGULATIONS

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TABLE OF CONTENTS

INTRODUCTION

In a sight of the increasing recognition of Alternative Dispute Resolution, the 6th edition of Polish-Spanish Conference on the European Legal Tradition, held last year in Warsaw, concentrated on this issue. Tangible effect of that conference appears to be a present publication. Discussed in the book problems concentrate mostly on arbitration, mediation and settlement, presenting not only contemporary regulations, but also its historical inclinations. References to Roman law invariably remain a common denominator of introduced matters.

The authors of the description come from several Polish and Spanish universities. Hence, at the publication, you can find information featured on the experiences of these two countries. Comparative perspective is a quite essential element of the book, whereas europeanization and globalization of the disputes. Beyond question is also the fact that Alternative Dispute Resolution can evolve into a strong competitor of litigation. It seems to be an effective possibility to create a proper space for feuding parties.

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Editors

PART I

Chapter 1
Qualifications for Becoming an Arbitrator of the Arbitration Courts in Roman Law and in Selected Contemporary Legal Systems

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Abstract: The possibility of an amicable settlement of disputes has already existed in ancient Rome. The origins date back to the classical period, but full development occurred during post-classical period. An important point of this process was the selection of an arbitrator. In this case, criteria for arbitrators differed from qualifications required from a judge in the normal proceeding. An arbitrator does not have to be a lawyer. Mostly it is a person of high professional standing. A candidate therefore should have extensive knowledge in a given field as well as about the subject of dispute settlement. The essence of this study is to present and compare the main criteria required from arbitrators earlier and today. Reflection on the qualifications of an arbitrator are conducted in comparison with existing solutions in Polish law and in practice.

Keywords: arbitration, arbitrator, arbitrator subjective qualifications, dispute resolution, amicable settlement.

Introductory issues

The current dynamic economic development, in conjunction with technological and social development, leads to a significant increase in the number of civil law conflicts. They need to be resolved by the common courts of law. At the same time more and more often these disputes are resolved, among others, by courts of arbitration. The ability to resolve civil disputes out of court existed in the ancient world, especially in Roman law.[1]

The issue of resolving disputes before an arbitration court in Roman law had already been the subject of many studies. The most important of these may

[1] Despite the similarities between the modern arbitration proceeding and in Roman law, we cannot forget about existing differences e.g. that a statement did not enjoy the force of *res judicata* at that time.

include studies by I. Milotic,[2] J.L. Linares Pineda,[3] J. Cremades,[4] M. Talamanca.[5] In the Polish legal literature M. Żołnierczuk[6] dealt with the arbitration. In contemporary Romance studies R. Wojciechowski deals with amicable settlements, he is the author of several studies on the subject.[7] In the cited publications we can noticed a lack of broader study of present characteristics of a candidate for arbitrator.

An important element of settlements of disputes before the arbitration court was and still is the selection of a suitable candidate to serve as an arbitrator so on the national and international levels.[8] This issue can be approached from different sides, how to choose an arbitrator, the scope of his competence, possible ways to resolve the dispute. The most important for us is the issue of the candidate's qualifications as an arbitrator according to Roman law while comparing with modern solutions. In addition, how the lack of these skills can affect the performance of an arbitrator's obligations assumed on the settlement of the dispute? These issues will be researched from the perspective of legal and historical research, using the comparative method of legal and dogmatic.

The qualifications of arbitrator's candidate in Roman law

Basic information about the candidate's qualifications for an arbitrator in Roman law come from preserved fragments of prudentes in title 8, book 4: *De receptis: qui ut arbitrium receperint sententia dicant*. In addition, further information on this topic can be found in the Code of Justinian under the title *De receptis* (C 5.55 (56)). References to the amicable settlement of disputes can also be found in literary sources,[9] which, however, are not useful from the point of view of this study.

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[2] *Arbitration-Selected Issue: Arbitral Resolution of Disputes by Good Man (Bonus Vir) in Roman Law and European Legal Tradition,* 15-2008 Croat. Arbit. Yearb 169-299.

[3] See *"Compromissum" y" receptum arbitrii": Aspectos negociables del arbitraje privado romano en relación con el moderno*" in *Derecho romano de obligaciones. Homenaje al profesor José Luis Murga Gener*. 709-720 (1994).

[4] See *La acción contra el árbitro que no dicta sentencia* in 3 *Estudios J. Iglesias* 1187-1204 (1988).

[5] See *Ricerche in temat di <compromissum>* (1958).

[6] See *Rzymskie sądownictwo polubowne (okres przedklasyczny i klasyczny)* (1978).

[7] See R. Wojciechowski, *Wybrane zagadnienia arbitrażu w doktrynie prawnej XII i XIII wieku,* 7-2007 Studia Prawnoustrojowe 319-325; Id., *Arbiter w prawie rzymskim* in *Postępowanie polubowne w dziejach: Materiały IX Konferencji historyków państwa i prawa, Przemyśl 7-10 July 2005* 17-25 (2006).

[8] See P. Nowaczyk, *Arbiter XXI wieku – wyzwania i oczekiwania (w poszukiwaniu arbitra idealnego)*, 5-2008 Biuletyn Arbitrażowy 7-8.

[9] Cic. *Pro Rosc*. 4,10-13; Seneca, *de benef*. 3,7,5.

According to R. Ulias modern rules about the arbitrators' qualifications in generally applicable laws are not developed.[10] In a national system such arbitrator's qualities were formulated in art. 1170, 1173, 1174 of the Code of Civil Procedure. The basic requirement for arbitrators is possession of full legal capacity to act, regardless of their nationality (art. 1170 § 1 of the Code of Civil Procedure). Provisions of the Code of Civil Procedure do not prohibit the appointment for an arbitrator a person convicted by a criminal judgement and even deprived of civil rights. In the literature, there is a debate over whether people convicted by a final judgment of the court, at least those convicted of economic crimes, should not be excluded from exercising such an important social function.[11]

A state judge cannot be an arbitrator, unless he is retired (art. 1170 § 2 of the Code of Civil Procedure). Provisions contained in art. 1173 of the Code of Civil Procedure are the rationale for this decision. According to the legislator, the parties determine an arbitrator's qualifications. The court approving the parties' choice of indicated candidate for an arbitrator must satisfy itself that it is impartial and independent person. According to A. Krysiak and M. Wierzbowski impartiality and neutrality mean the interests of the parties.[12] An arbitrator is not obliged to have relevant knowledge. When choosing an arbitrator accent is put more on experience supported by knowledge. In practice, arbitrators are often prominent experts in a given range.

Further detailed solutions can be found in the legislation of individual courts or arbitration courts, domestic and foreign. Used regulation, among others, is contained in art. 11 of the Rules of Arbitration of the International Chamber of Commerce from 2012, or in § 15 of the Rules of the Arbitration Court of Arbitration at the Polish Chamber of Commerce in Warsaw. At each court of arbitration there is a list of arbitrators from which a suitable candidate can be chosen. However, this list is not binding and the parties can still choose someone else. In practice, however, particularly international list of arbitrators has a habitual nature.

Modern lack of clearly specified candidates' qualities for arbitrators does not mean, however, that people are selected accidentally. In practice, serving as an arbitrator entrusted to persons of high standing, experience, and above all knowledge. Often these are people with degrees and academic titles. Their selection, often at very high remuneration, increases the probability of winning.

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[10] See R. Uliasz, *Kwalifikacje podmiotowe arbitrów i mediatorów*, 4-28(2914) Arbitraż i Mediacja, 75.

[11] See ibid. 76-75.

[12] See A. Krysiak & M. Wierzbowski, *Bezstronność i niezależność jako kluczowe cechy każdego arbitra* in *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy krajowej Izbie Gospodarczej w Warszawie* 361-362 (2010). See M. Romanowski, *Znaczenie niezależności i bezstronności arbitra w postępowaniu arbitrażowym w świetle konstytucyjnego prawa do sądu* in *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie* 376-384 (2010).

Freedom of expressing arbitrator's will regarding to resolution to the dispute – receptum arbitrii

In Roman law, a potential arbitrator was free to assume the obligations to resolve the dispute and, consequently, free to decide about the dispute settlement process. Thus, an arbitrator could not be the person who would be in any way coerced into accepting this obligation.

Ulp. 13 *ad ed.* D. 4.8.1: *Tametsi neminem praetor cogat arbitrium recipere, quoniam haec res libera et soluta est et extra necessitatem iurisdictionis posita, attamen ubi semel quis in se receperit arbitrium, ad curam et sollicitudinem suam hanc rem pertinere praetor putat: … .*

The above mentioned Ulpian's text contains one of the fundamental principles of arbitration – *Tametsi neminem praetor cogat arbitrium recipere* […].

The Praetor and, consequently, parties could not compel anyone to undertake an arbitration, which, according to Cascione had to express their will as well as obliging parties to the agreement.[13] Such a conclusion is of use in the text of phrase *arbitrium recipere*. The verb *recipio – ere* meant, among others, acceptance of the undertaking, however, did not have a civil nature. The basis for the creation of a *quasi*-obligations of the parties and an arbitrator was *stipulatio compromissi*, which, however, did not bear any procedural objections, such as *pacti* or *doli*. In the Constitution 529, Justinian suggested that the basis for the obligation settlement of the dispute was the pledge made by an arbitrator.[14] It was a regular basis to bring an action for the fulfillment of the commitments adopted by an arbitrator.[15]

To make such legal action, a party's expressing a statement of acceptance of the liability free will was necessary. Hence, Ulpian says that – *haec res libera et soluta est*. The principle of arbitrator's freedom as to the commitment to resolve dispute is expressed also in art. 1171 of the Code of Civil Procedure.

Guaranteed freedom in deciding regarding to acceptation of an appointment to an arbitrator extended also to the process of making decisions during the proceedings. The Praetor was the organ authorized to make a possible application of administrative coercive measures (fines), but only to those who accepted such an obligation and then refused to fill it. The Praetor in this case served a similar function to the present Minister of Justice, who serves the oversight function of justice. With this difference, that the Minister has no supervisory powers over the courts of arbitration.

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[13] See C. Cascione, *Consensus. Problemi di origine, tutela processuale. Prospettive sistematiche* 23-24 (2003).

[14] C. 2,55,4.

[15] See M. Talamanca, *Istituzioni di diritto Romano* 569 (1990).

Freedom in arbitrator's decisions, which is mentioned in the previously cited Ulpian's text, has already been expressed in the praetorian edict *De receptis*,[16] which read as follows:

Qui arbitrium pecunia compromissa receperit, eum sententiam dicere cogam.[17]

Use of the phrase ... *compromissa receperit* ... indicates that Ulpian only reminded solution included in the praetorian edict. This classic formula written in the praetor's edict was in force until the Justinian's time.

The situation changed when a person appointed by the parties agreed to undertake the functions resolving the dispute (arbitration).

Ulp. 13 *ad ed.* (D. 4.8.3): *Tractemus de personis arbitrantium. Et quidem arbitrum cuiuscumque dignitatis coget officio quod susceperit perfungi, etiam si sit consularis: nisi forte sit in aliquo magistratu positus vel potestate, consul forte vel praetor, quoniam in hoc imperium non habet*.

In case of consent to undertake an arbitration, the Praetor could compel an arbitrator to perform a duty of the office. The rank of an arbitrator was not significant. The Praetor could compel an arbitrator no matter what his rank was, to perform the duties of the office which he has undertaken, even though he was of consular rank, unless he hold some magisterial position, or was invested with other authority. This may mean that in practice there were cases of refusal to perform a unwisely adopted liability relying on performing function.

The exception to this rule was the follow-up agreement to take office of consul or praetor. In accordance with the principle of hierarchy of public offices in the Republican Rome, the Praetor could not give any commands to anyone who possesses higher or equal authority (*magistratus*). By virtue of subordination or parity, the Praetor could not give any commands neither to consul nor to praetor.[18]

Paul. 13 *ad ed*. (D. 4,8,4): *Nam magistratus superiore aut pari imperio nullo modo possunt cogi: nec interest ante an in ipso magistratu arbitrium susceperint. Inferiores possunt cogi*.

In accordance with the foregoing, only inferior officials could be subjected to compulsion. It was irrelevant whether they accepted the office of arbitrator during the term of their magistracy or previously.

Praetorian compulsion (cognition) did not, however, have absolute character. The Praetor while deciding was able to take into account the specific situation of an arbitrator.

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[16] See O. Lenel, *Edictum perpetuum* 130-131 (1985).

[17] The content of the edict preserved in Ulpian's part 13 *ad ed.* (D. 4,8,2): *Ait praetor: "Qui arbitrium pecunia compromissa receperit"*.

[18] See J. Zabłocki & A. Tarwacka, *Publiczne prawo rzymskie* 74ff. (2011); A.F. De Bujan, *Derecho publico Romano* 131-132 (2010); B. Sitek & P. Krajewski (red.), *Rzymskie prawo publiczne* 30-36 (2006).

Ulp. 13 *ad ed.* (D. 4,8,15): *Licet autem praetor destricte edicat sententiam se arbitrum dicere coacturum, attamen interdum rationem eius habere debet et excusationem recipere causa cognita: ut puta si fuerit infamatus a litigatoribus, aut si inimicitiae capitales inter eum et litigatores aut alterum ex litigatoribus intercesserint, aut si aetas aut valetudo quae postea contigit id ei munus remittat, aut occupatio negotiorum propriorum vel profectio urguens aut munus aliquod rei publicae: et ita Labeo.*

The issue about resolving a dilemma by the Praetor of whether an arbitrator should be compelled to make an award, was not clear. According to Ulpian, the Praetor in the process of decision-making should pay attention to his reasons and accept his excuses – *attamen interdum rationem eius habere debet*, arguments that release him from discharge of his duty. In this regard, the Praetor had a fairly wide discretionary powers, i.e. he could decide at his own discretion, take into account the arguments of an arbitrator – et *excusationem recipere cognita causa*.

What reasons could release an arbitrator from the fulfillment of the commitments? Ulpian in the above-quoted part provides several causes. The first is when an arbitrator is defamed by the litigants – *si fuerit infamatus a litigatoribus*. In this case, it was probably about the accusation of an arbitrator by the litigants for lack of knowledge, ability or just disapproval.

The second reason justifying relief from the obligation could be hostility between an arbitrator and litigants or one of them. In this case it was difficult to talk about an arbitrator's objectivity, hence, it was a sufficient reason to consider an arbitrator's request to release him from the obligation. Another reason for the release could be age or sickness. In this case, Ulpian refers to the regulation common for judges, where the age and sickness could justify the refusal to accept this option or exemption from its performance.[19] In case of sickness, it was possible to postpone judgment until an arbitrator's recovery. According to Paulus the Praetor can force an arbitrator to settle the issue of postponement due to illness or similar events – *Sed in causa causa valetudinis similibusve cognita differre cogitur*.[20]

In the end, there may be some other reasons for which an arbitrator could step down from adopted function. Ulpian gives such reasons: an arbitrator is occupied with his own affairs, or there is urgent necessity for him making a journey; some public office requires an arbitrator's attention. This can be such cases as performing the function of a judge in a civil procedure or a criminal one, and the deadline to deliver judgment cannot be deferred.[21]

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[19] Accordin to Lex Irnitana c. 86 a judge was able to serve his function. See B. Sitek, *Lex Coloniae Genetivae Iuliae seu Ursonensis i Lex Irnitana. Ustawy municypalne antycznego Rzymu. Tekst, tłumaczenie i komentarz* 191 (2008).

[20] Paul. 13 *ad ed.* (D. 8,4,16 pr.).

[21] Paul. 13 *ad ed*. (D. 8,4,14,1): *Arbiter iudicii sui nomine, quod publicum aut privatum habet, excusatus esse debet a compromisso, utique si dies compromissi proferri non potest:… .*

Reasons for excluding the possibility of performing arbitrator's function

The first of the reasons for exclusion from the possibility of an arbitrator was a lack of legal status of a free man – *status libertatis*. At present, this problem does not really matter because of the fact that all people are free.

Ulp. 13 *ad ed.* (D. 4,8,7, pr.): *Pedius libro nono et Pomponius libro trigensimo tertio scribunt parvi referre, ingenuus quis an libertinus sit, integrae famae quis sit arbiter an ignominiosus. In servum Labeo compromitti non posse libro undecimo scribit: et est verum.*

In the cited part there are the opinions of two Roman lawyers. The first Quintus Pedius, who lived in the first century BC (he died in 43 BC), and the other Sextus Pomponius who lived in the second century AD. Specifying the timeout of life of both lawyers is not accidental.

It shows that the issue of the legal status of a candidate for an arbitrator was then widely discussed in doctrine. Probably there had to be some disagreement as to whether a free man could be appointed an arbitrator. The opinions of these two lawyers prevailed and were considered correct. In the end, an arbitrator could be person who was born free as well as a freedman – *ingenuus quis an libertinus sit*.

Another issue raised in this part is the question whether it is possible to entrust a function of an arbitrator to a slave. Ulpian cited the Labeo's opinion who says that a slave cannot act as an arbitrator – *In servum Labeo compromitti non posse libro undecimo scribit: et est verum*. As added at the end, this opinion is correct, which means that also in this issue there had to be many different opinions. According to T. Giaro, finally in the second century of legal doctrine it was considered that the arguments presented by Labeon were the most appropriate.[22]

This point of view was also confirmed in the following Ulpian's section, where we can find the outcome of the Juliana Salvius, a lawyer who lived in the second century AD.

Ulp. 13 *ad ed.* (D. 4,8,7,1): *Unde Iulianus ait, si in Titium et servum compromissum sit, nec Titium cogendum sententiam dicere, quia cum alio receperit: quamvis servi, inquit, arbiterium nullum sit. Quid tamen si dixerit sententiam Titius? Poena non committitur, quia non, ut receperit, dixit sententiam*.

In the text of the main legal issue was the resolution of a dispute about whether the Praetor may compel an arbitrator to rule when he was appointed together with a slave. According to Julian, if arbitration is referred to Titius and a slave he cannot be forced to give an award, because he undertook the arbitration with another. The decision is maintained even in the face of the fact that the setting of a slave an arbitrator was invalid. Establishment of a slave an arbitrator was legally ineffective activity – ... *quamvis servi, inquit, arbiterium nullum sit*.

[22] See T. Giaro, *Römische Rechtswahrheiten. Ein Gedenkenexperiment* 410 (2007).

One might even consider the question whether in this case is if the slave was established with the knowledge of parties or he concealed his legal status? But this is an issue that can be the subject of a separate study.

Although the slave does not have the legal capacity to settle disputes, and could not be an arbitrator established validly, however, such action was admissible in view of his imminent release.

Ulp. 13 *ad ed.* (D. 4,8,9 pr.): *Sed si in servum compromittatur et liber sententiam dixerit, puto, si liber factus fecerit consentientibus partibus, valere*.

Although the slave did not have the legal capacity to settle disputes and could not be established an arbitrator validly, however, such action was admissible in view of his imminent release. In the above-described by Ulpian case, the parties deciding to appoint a slave had to be aware of the fact that it will be soon liberated. In this way, the very act of liberation was a form of improving actions by the parties to appoint an arbitrator slave. This, however, after the liberation had to once again impress the accentuation of choice (*consensus*), or submit a statement of intent, accepting the undertaking. Under Roman law, only a free man was able to make such a statement.

In the previously cited Ulpian's text – Ulp. 13 *ad ed.* (D. 4,8,7, pr.) – another very important issue was raised, which in the days of ancient Rome concerned rather important issue, namely, candidacy's for an arbitrator's good or bad faith. In Roman law, an unfamed person, that is not enjoying a good reputation, was excluded from holding public office, and also continued to experience numerous constraints in the field of private law. Such person cannot serve as a judge. In the light of the provisions of Polish law and international law, good or bad reputation does not matter if the parties decide so.

Hence, in Roman law, good or bad reputation of someone to act as an arbitrator did not matter – *integrae famae quis sit arbiter an ignominiosus*. Such a solution was probably caused by the fact that the decision to appoint an arbitrator was taken by the parties themselves. If parties agreed to the establishment of an arbitrator people as an actor, gladiator whether a person convicted to infamy, it did not have further legal significance.[23]

Assess of the immoral deeds of the already established an arbitrator was a different issue.

Ulp. 13 *ad ed.* (D. 4,8,9,3): *Sunt et alii, qui non coguntur sententiam dicere, ut puta si sordes aut turpitudo arbitri manifesta sit*.

In the Ulpian's text there were used two key words – *sordes* and *turpitudo* that require some elaboration. The first one is bribery, while the other disgraceful professions or living an immoral life. If these acts were committed after the establishment of an arbitrator, then the Praetor did not compel that person to give an award.

[23] These people were counted among the group of covered by infamy. Iul. 1 *ad ed.* (D. 3,2,1). See B. Sitek, *Infamia w ustawodawstwie cesarzy rzymskich* 48 (2003).