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The Principle of Equal Treatment in Civil Law Procedure. Selected Aspects

This article is an attempt to define the role of the principle of equal treatment in proceedings before courts.

According to the encyclopedic definition, equality is a "fundamental principle of commutative justice"[1]. Its essence is giving everyone the same without discrimination on the grounds of sex, race or social position[2]. Legal language makes a distinction between equality before the law and equality in law. The first expresses the imperative of equal treatment of all individuals by public authorities in the application of law[3]. The second refers to the content of law mandating it to respect to the principle of equality[4]. Modern legal doctrine distinguishes three meanings of equality – descriptive, evaluative and distributive. In the descriptive approach, equality is defined by reference to classes of addressees of law distinguished by a feature deemed essential or relevant. In the evaluative approach, equality is defined by reference to a particular system of values. In the distributive approach, equality demands the same treatment in the allotment of rights and duties, awards and penalties, goods and burdens[5].

In our time the principle of equality gained recognition as one of the fundamental legal rules. It is included in constitutions of democratic states and also in a plethora of acts of the European and international law. The

1 *Nowy Leksykon PWN*, Warsaw 1998, p. 1506.

2 Ibidem.

3 *Wielka encyklopedia prawa*, Warsaw 2005, p. 889.

4 B. Banaszak, *Zasada równości w orzecznictwie Trybunału Konstytucyjnego*, in: L. Garlicki, A. Szmyt (eds.), Sześć lat Konstytucji RP. Doświadczenia i inspiracje, Wydawnictwo Sejmowe, Warsaw 2003, p. 24; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Liber, Warsaw 2002, p. 97.

5 S.I. Benn, *Egalitarianism and the Equal Consideration of Interests*, in: J.R. Pennock, J.W. Chapman (eds.), Equality, New York 1967, pp. 62–65, from: R. Małajny, *Reguła równości wobec prawa w orzecznictwie Trybunału Konstytucyjnego*, in: L. Garlicki, A. Szmyt (eds.), op. cit., p. 179; see also: T. Ereciński, K. Weitz, *Prawda i równość stron w postępowaniu cywilnym a orzecznictwo Trybunału Konstytucyjnego*, a conference paper the Polish Convention of Chairs and Departments of Civil Procedure *Judicial Decisions of the Constitutional Tribunal and the Civil Procedure Code,* Serock 24–27 September 2009, p. 23.

first act of the international law that has comprehensively dealt with the issue of human rights is, undoubtedly, the Universal Declaration of Human Rights of 1948. One should agree with Marek Chmaj that, although that resolution was not binding, it has became a standard for subsequent agreements concluded both within the framework of the United Nations as well as in particular regions of the world[6]. The author further notes, "the wording of the principle of equality and non-discrimination in the universal Declaration of Human Rights has created the basis for magnifying it as a principle of international common law. Its inclusion into the Human Rights International Covenants of 1966 was crucial for incorporating it into the international statutory law"[7]. The principle of equality is also greatly emphasized in the EU law, both primary and secondary. The judicature of the European Court of Justice qualifies it as one of the fundamental principles of the Community law.

However, the principle in question is, first of all, a constitutional principle. The provision of Art. 32 of the Constitution of 1997 stipulates that all are equal before the law and all must be treated equally by public authorities and that any discrimination is prohibited. The principle formulated in that article constitutes a *lex generalis* in relation to other, more specific, constitutional norms regarding equality[8] concerning everybody. Moreover, such a broad definition makes it possible to extend the implementation to any kind of organizations, that is to legal persons and to entities without legal personality[9].

The Tribunal has distinguished two aspects of the said principle, whereby equality is understood as equality before the law and equality under the law[10]. In the first sense, it means equality in the application of law by any public authority to all addressees. As the Tribunal stated, "it has the magnitude of a general principle related to the entire body of rights, liberties

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6 M. Chmaj, *Równość wobec prawa i zakaz dyskryminacji*, in: M. Chmaj (ed.), Konstytucyjne wolności i prawa w Polsce, Vol. I: *Zasady ogólne*, Kantor Wydawniczy Zakamycze, Cracow 2002, p. 121.

7 M. Chmaj, *Równość...*, p. 122, also R. Wieruszewski, *Zasada równości i niedyskryminacji w świetle orzecznictwa Komitetu Praw Człowieka*, Państwo i Prawo 2000, No. 4, p. 40.

8 B. Banaszak, *Konstytucja Rzeczpospolitej Polskiej. Komentarz*, Wydawnictwo C.H. Beck, Warsaw 2009, p. 182; M. Masternak-Kubiak, *Prawo do równego traktowania*, in: B. Banaszek, A. Preisner (eds.), Prawa i wolności obywatelskie w Konstytucji RP, Wydawnictwo C.H. Beck, Warsaw 2002, p. 120; also A. Zołotar, *Zasada równości*, in: M. Zubik (ed.), Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów, Wydawnictwo C.H. Beck, Warsaw 2008, p. XXX.

9 M. Chmaj, op. cit., p. 126. , cf. Also the judgment of the Constitutional Tribunal of 24 February 1999, SK 4/98, OTK 1999, No. 2, item 24, the judgment of the Constitutional Tribunal of 9 March 1988, U 7/87, OTK 1988 item 1; http://orzeczenia.nsa.gov.pl/doc/A30FFBB8B0 (17 Nov. 2009).

10 B. Banaszak, *Zasada...*, p. 24.

and citizens duties. Any restriction thereof, not justified by a desire to achieve greater social equality is impermissible"[11]. So defined, the principle includes equal legal protection of persons subject to state authority[12]. In another meaning – as equality in law – it denotes the requirement to observe the principle of equality in defining the content of legal norms[13]. It is in force in the process of making law, addressed to the legislative body. Legal norms should refrain from any discriminating provisions or grant privileges. Equality under the law demands that the content of legal norms be determined in such a manner as to create the same legal framework for similar addressees of law[14].

The principle of equality expressed in Art. 32 of the Constitution is not absolute. Not necessarily "the same legal provisions would be effective and applicable to everybody and in the same degree"[15]. In legal doctrine there is no equal treatment *in abstracto*, for resignation from differentiation with regard to some criteria amounts to differentiation with regard to other criteria[16]. Therefore, persons are being differentiated with regard to certain relevant features. As the Constitutional Tribunal has noted, "the principle of equality is construed as relative and does not exclude specific allowances or preferences"[17]. It transpires that differentiation between persons in similar situation is permissible; it becomes discriminatory only when there is no such justification. As a consequence, "equal treatment does not necessarily mean actual equality of rights and situations of persons to whom specific legal regulations apply (...)"[18].

The constitutional and procedural law scholars emphasize that the principle of equality is connected with the principle of social justice embedded from Art. 2 of the Constitution. One may recognize that equality is a derivative of justice, which in turn becomes a source of differentiation. The Tribunal held that differentiation between individuals which does not violate

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[11] The judgment of the Constitutional Tribunal of 3 March 1987, P 2/87, OTK 1987, No. 1, item 2, p. 31.

[12] T. Ereciński, K. Weitz, op. cit., p. 24.

[13] L. Garlicki, *Zasada równości i zakaz dyskryminacji w orzecznictwie Trybunału Konstytucyjnego*, in: Obywatel – jego wolności i prawa, materiały konferencyjne z okazji 10-lecia urzędu Rzecznika Praw Obywatelskich, Warsaw 1998, p. 105.

[14] T. Ereciński, K. Weitz, op. cit., p. 24; M. Masternak-Kubiak, op. cit., p. 121.

[15] J. Boć (ed.), *Konstytucja Rzeczpospolitej oraz Komentarz do Konstytucji RP z 1997 roku*, Kolonia Limited, Wrocław 1998, p. 71.

[16] M. Masternak-Kubiak, op. cit, p. 122, cited from: W. Sadurski, *Równość wobec prawa*, Państwo i Prawo 1978, No. 8–9, p. 58.

[17] The judgment of the Constitutional Tribunal of 29 September 1997, K 15/97, OTK 1997, No. 3–4, item 37 and the judgment of the Constitutional Tribunal of 20 October 1998, K 7/98, OTK 1998, No. 6, item 96, after: R. Małajny, *Reguła równości...*, p. 180.

[18] M. Safjan, *Granice ochrony osób słabszych – pomiędzy równością a dyskryminacją pozytywną*, in: A. Janik (ed.), Studia i rozprawy. Księga jubileuszowa dedykowana profesorowi Andrzejowi Całusowi, Oficyna Wydawnicza SGH, Warsaw 2009, p. 98.

the principle of social justice, but rather serves the purpose of its realization, is more likely to be recognized as consistent with the Constitution[19]. A. Góra-Błaszczykowska portrays it accurately when she writes that "the connection between justice and equality in a civil process is very strong and one should admit that the principle of equality of the parties contains a parallel demand to treat the parties justly. Formal equality, which assumes absolutely identical treatment should be distinguished from actual equality whereby parties are treated justly, appropriately to their positions. In a concrete case it could mean that only one of the parties, the one that really needs it, is exempted from the court fees, or gets an attorney free of charge. Equality issue cannot be separated from justice: justice should constitute the criterion of evaluation whether the parties have *de facto* been treated equally"[20].

Equal treatment in a civil process is inseparably linked to the constitutional concept of equality[21]. In the constitutional approach equality becomes a directive for lawmakers; it forbids creating norms inconsistent with the Constitution but allow such that make its provisions more specific. In courts it becomes an interpretation directive which must be taken into consideration in the process of application of law[22]. In the context of a lawsuit it denotes equality of the parties and the right to be heard[23]. Thus, two aspects emerge, since in a lawsuit there are at least two parties having equal rights, including the right of defense[24]. Although the legal situation of a plaintiff and defendant is different, they cannot have different rights[25]. The principle of equality puts them on an equal footing in the proceedings, including in the means of defense. It guarantees that the case is not over until the other party has not taken its position on the merits of the case and used the remedies it is entitled to[26].

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19 The judgment of the Constitutional Tribunal of 27 February 2002, K 47/01, Dz. U. 2002.19.199.

20 A. Góra-Błaszczykowska, *Zasada równości stron w procesie cywilnym*, Wydawnictwo C.H. Beck, Warsaw 2008, p. 27.

21 Ibidem, p. 35.

22 Ibidem, p. 75.

23 W. Broniewicz, *Postępowanie cywilne w zarysie*, Lexis Nexis, Warsaw 2005, p. 57.

24 J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie cywilne*, Lexis Nexis, Warsaw 2009, p. 134.

25 W. Siedlecki, Z. Świeboda, *Postępowanie cywilne. Zarys wykładu*, Lexis Nexis, Warsaw 2004, p. 62.

26 T. Ereciński, K. Weitz, op. cit., p. 27.

1 THE RIGHT TO BE HEARD

In the doctrine of civil procedure the right to be heard is as often reffered to as the "hearing rule" (similarly in the decisions of the Constitutional Tribunal and in the European Human Rights Charter, by the German Constitutional Tribunal and in the works of the majority of foreign authors). The rule has not been expressly proclaimed in the Polish civil procedure, however, according to the *communis opinio*, it can be derived from international law, from the concept of the rule of law, from the principle of dignity and from the right to justice. The right to justice as such has been linked to the hearing rule, therefore it is the right of a party to be in control of the course of a lawsuit – not only by presenting evidence, but also by assuming an active role in the case and responding to the charges of the other party[27]. The party may present its position in any other way, for example orally or in writing. The court must hear each party regarding the circumstances of the case and take their positions into consideration.

The hearing rule also manifests itself in filing applications, pleas, objections, making statements and making comments on the evidence and the right to view the files and the collected evidence[28], in the succession of a former litigant by a new one, taking the place of a plaintiff (for persons who are not, but should be the parties in the proceedings have the right to participate should they meet the legal requirements). A guardian *ad litem* contributes to the above principle too for it provides protection for those unable to take part in the case[29].

However, admitting evidence *ex officio* is a source of controversy. The role of a judge should be limited to an "impartial arbitrator" whereas the parties are solely responsible for submitting evidence. Pursuant to Art. 232 sentence 2 of the Civil Procedure Code, a court may admit evidence not submitted by a party, an under Art. 208 § 1 item 2. A court may demand from a state organizational entity or a local government to present the evidence in its possession, if a party is unable to obtain it by itself. The court

[27] A. Góra-Błaszczykowska, op. cit., pp. 85–86.

[28] Ibidem.

[29] Ibidem, pp. 226 et seq.

should notify the parties on any such actions and if they object, it should stay the hearing upon objection.

The results of the *ex officio* hearing of the evidence should be presented to the parties, who should be able to express their position. In legal theory the court should undertake actions *ex officio* very cautiously and only if it leads to the removal of actual differences between the parties. It is a measure of the last resort, to be applied only when there is no other way of preventing the danger of a wrongful judgment. Otherwise, a court might change its role assuming the role of a quasi-attorney for the party[30]. The Supreme Court has taken a similar stand, stating that "Art. 232 of the Civil Procedure Code permits (...) the court to conduct a hearing of evidence *ex officio* in exceptional situations. Courts should exercise this right by way of exception and the parties should not view this possibility as an obligation of the court to act *ex officio*"[31].

An evaluation whether the principle of equality was satisfied in the course of a hearing, may be made *post factum*, usually by the court of appeal as a result of an appeal brought by a party. A violation of the hearing rule deprives parties of the possibility to defend their rights, which invalidates a hearing. Court should take it into consideration *ex officio*[32].

2. THE PRINCIPLE OF EQUALITY OF LEGAL REMEDIES

The principle of equality of legal remedies is called sometimes the principle of equality of weapons. It guarantees the parties an equal footing, that is, the parties have equal means of attack and defense. The court is obligated to pay the same attention to the submitted evidence, arguments, applications of both parties, save for the evaluation of their relevance. The equality of weapons is a requirement of the due process; each party be given a chance to present its position.

Giving instructions along with the serving of a writ to the party that is not represented by a professional attorney also serves the cause of equality.

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30 Ibidem, p. 258 et seq. Also A. Jakubecki, *A gloss to the judgment of the Supreme Court of 26 January 2006*, II CSK 108/05, OSP 2007, No. 3, item 29.

31 Judgment of the Supreme Court of 20 December 2005, III CK 121/2005, LexPolonica No. 2027817.

32 A. Góra-Błaszczykowska, op. cit., pp. 85–86.

It is connected with the issue of timeliness, since proper serving of a writ of the time limits start running, both statutory and fixed by a court. As regards statutory terms, a court cannot shorten or extend them, yet it can use the procedural mechanism at its disposal such as reinstating of an overrun time-limit, if not by fault of the party. A wrongful decision to restitute a term contradicts the principles of equal treatment and of equality of weapons. For this reason, in examining a restitution plea, the court examines formal requirements, admissibility and justifiability.

As regards court's competence equality of weapons is linked to a specific provision of the Code. Assuming that the plaintiff is in a more convenient position, the lawmakers have established a court's territorial jurisdiction according to the defendant's domicile or place of residence. Exceptions from the rule, provided in Art. 31–42 of the Code do not prejudice the principle of equality of the parties and are justifiable with regard to the principle of direct examination of evidence by a judge[33].

Like in case of the right to be heard, a lack of equality deprives a party of the opportunities to defend its rights which defies the sense of the civil procedure. A party must have the right of defense, however only through actions foreseen in the Code. As A. Góra-Błaszczykowska points out: "if a party takes advantage of the instruments and remedies (...) which are not provided for in a statute, the other party is not automatically authorized to use the same (...) remedies"[34]. The equality of weapons does not necessarily mean that a party would actually undertake such defenses for it may be a task, but not an obligation. If a party willfully gives up defense, it must be prepared to bear adverse legal consequences. It is important to realize that the principle of equality is properly implemented only if it is implemented in full, in both its aspects.

It must be emphasized that the place of the principle of equality among the fundamental principles of law does not *per se* guarantee equality. It is merely a reflection of its formal side. Hence, its materialization is needed by creating the conditions for its implementation in a court room. The proper exercise of rights and legal remedies depends, to a large extent, on the party's capabilities, its being well-informed, knowledge of law, availability of a professional counsel and financial resources. Therefore, the civil

[33] Ibidem, pp. 309 et seq.

[34] Ibidem, p. 92.

procedure contains a number of instruments for effecting a true equality of the parties[35]. The first of them is an exemption from cost of proceedings for those in a disadvantageous financial situation. It may not affect the exercise of rights and remedies. In certain cases the release from costs is possible by operation of the law, in others it depends on the court's decision.

The second instrument granting is legal assistance *ex officio* to a party of modest means[36]. In the case Airey v. Ireland of 9 October 1979[37], the plaintiff wanted to file for separation, but she could not arrange matters herself. She could not afford to retain a professional attorney either. The European Court of Justice found that Art. 6, section 1 of the European Convention, which reads: "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)" has been violated. It stated that not every person and not in every case may receive assistance, and that the member states may determine matters in which assistance would be given in the form of gratuitous legal defense[38].

One should also mention the instructions issued by courts to the parties. They may concern procedural actions of the parties not represented by a professional attorney[39]. Art. 5 of the Civil Procedure Code provides that "in the event of a justifiable need a court may give out necessary instruction to the parties and participants appearing before it without an attorney or without a legal counsel, concerning procedural actions. We can also see it in Art. 212, sentence 2: "in the event of a justifiable need [a court] may give the parties necessary instructions and depending on the circumstances to draw their attention to the purposefulness of appointing an attorney *ad litem*". These provisions have been introduced by the amendment of 2 July 2004, which came into force on 5 February 2005[40]. Until then, the law was silent on instructions, however courts had a duty to instruct the weaker party[41]. The Supreme Court took the view that "where the case was sufficiently explained it should be further evaluated with due regard to the contradictory nature of the process and the principle of disposition,

35 J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, op. cit., p. 135.

36 Ibidem.

37 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R.

38 J. Kołaczyński, A. Krzywonos, *Prawo do sądu*, in: B. Banaszak, A. Preisner (eds.), op. cit., p. 741.

39 J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, op. cit., p. 136.

40 Dz. U. 2004, No. 172, item. 1804

41 T. Pietrzykowski, B. Wojciechowski, *Równość, prawda i sprawiedliwość w procesie cywilnym. Rozważania na tle nowelizacji K.P.C.*, Palestra 2004, No. 9–10, p. 13.

taking into account whether the parties could take full advantage of the procedural rights to prove their assertions"[42]. It might seem that in the current legal framework giving instructions rests within the court's discretionary power although limited by the criterion of a justifiable need. Judicial discretion has been defined broadly. Its scope includes an evaluation of a justifiable need in the case at hand. Even if such a condition has been fulfilled, a judge is free to to decide if to give an instruction at all and about its scope. Only in cases regarding alimonies and tort damage instructions are mandatory[43]. This amendment has been criticized because a "justifiable need" is by nature evaluative and discretionary, which may persuade judges to give up instructions altogether. Some scholars consider, however, that the phrase "the court may" used in Art. 5 of the Civil Procedure Code does not denote discretion, but a duty of the court should other conditions be fulfilled, including the existence of the need to give an instruction[44]. As writes A. Jakubecki, a "justifiable need" is a pleonasm meaning an "existing need'[45]. The amendment was intended to emphasize that instructions issued by courts are not a rule. In giving instructions the court must always act with regard to the principle of equality of the parties. Assistance may not exceed reasonable limits, since if that happened, the court would have acted in favor of one of the parties[46]. So held the Supreme Court by saying that "a judge should not be expected to be particularly active, as a judge is obliged to be when the principle of objective truth is in force. Excessive activity of a judge is undesirable, because the image of the court examining the case in the contradictory procedure suffers from it. Excessive activity of the court may give rise to a suspicion about judge's impartiality, such impartiality being part of the right to a fair trial. It is the parties (and other participants) that have an obligation to be active in order to demonstrate the relevant circumstances and facts on which they base their claims (Art. 6 of the Civil Code). Only in particular procedural circumstances should the court exercise its right (not a duty) to take initiative with regard to evidence (Art. 232 of the Civil Procedure Code)[47].

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42 Ibidem, pp. 11–12.

43 Ibidem, pp. 13–14.

44 A. Jakubecki, *Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego*, in: The fortieth anniversary of the Civil Procedure Code. A convention of the Faculties of Civil Procedure in Zakopane (7–9 October 2005), p. 373.

45 Ibidem.

46 A. Góra-Błaszczykowska, *Zasada...*, p. 177.

47 The judgment of the Supreme Court of 20 December 2005, III CK 121/2005, LexPolonica No. 2027817.

There is a question of how far the interference of a court as an "impartial arbitrator" may go, considering that the submission of evidence is on the parties[48]. According to T. Pietrzykowski and B. Wojciechowski, the need to support the parties not able to handle the case themselves is obvious. However, bearing in mind that the role of the court is that of an "impartial arbitrator", it seems that such assistance should consist in obtaining a much broader access to legal assistance from relevant institutions other than courts and that the role of a court should be limited to indicating the purposefulness of appointing an attorney and the institutions capable of assistance[49].

The instructions may apply only to the proceedings and never to substantive law. Naturally, the court is obliged to explain to a party the content of legal provisions, sometimes very intricate ones; yet, it cannot decide for the party on how to act and the instructions may not take the form of legal advice[50]. One should also consider the possibility of adverse consequences of the instruction for the party. In a judgment of 16 April 1997, II CZ 48/97, the Supreme Court said that if a party has complied with the instructions given to it by the court, then it may not bear adverse procedural consequences as a result of a later different evaluation made by the court[51].

The implementation of the principle of equality is different in non-litigious proceedings, which do not always have a contradictory character. It is evident that like in a lawsuit, the principle of equality is mandatory in non-litigious proceedings too and effected by an appropriate application of law (Art. 13 § 2 of the Civil Procedure Code). It is rooted in the identity of the objectives which both litigious and non-litigious proceedings aim to achieve[52]. However, one cannot borrow the principle of equality from

48 A. Góra-Błaszczykowska, *Zasada...*, p. 177.

49 T. Pietrzykowski, B. Wojciechowski, op. cit., pp. 20 et seq.

50 A. Góra-Błaszczykowska, op. cit., pp. 179 et seq., Also the Judgment of the Supreme Court of 14 October 2004, II UK 30/2004, LexPolonica No. 1852421, in which the Court expresses the opinion that "this provision (Art. 5 KPC – author's note) stipulates that the court should give necessary instructions regarding procedural actions to the parties and participants to the proceedings in the case without an advocate or a legal advisor and to advise them on legal consequences of such actions and on the effects of negligence. The obligation of the court consists in giving of instructions concerning procedural actions necessary for the exercise or defense of the rights of which a party appearing without an advocate may not know. It means that the court should indicate the obligations or possibilities of taking procedural actions defined generally in the procedural provisions and not indicate specific actions that would, in the court's opinion, lie in the interests of the party. The court does not replace a party acting without an attorney, but only informs it on the content of the provisions that regulate that party's procedural rights and obligations at a particular stage of the proceedings. The court does not have an obligation to do it and is not even able to indicate to the party the remedies that the party may exercise in the situation which is known only to that party and which is not known to the court".

51 LexPolonica No. 330118.

52 K. Korzan, *Postępowanie nieprocesowe*, Wydawnictwo C.H. Beck, Warsaw 2004, p. 64.

a contradictory proceeding to be applied in non-litigious proceedings without far-reaching modifications. It is because in non-litigious proceedings there are no opposite parties but, instead, participants in the proceedings. In most cases their attitude is not antagonistic and, moreover, there can be only one single participant. In the non-litigious proceedings the principle of equality is relevant in situations where there are a few participants, and in particular, where their interests are opposing. If there is only one participant, the principle of equality is of negligible value for there is no-one to compare the sole participant's actions with. It may be assumed, however, that in such an event the principle of equality must be implemented in relation to any other participants, although not specified, who could be interested in certain issues. Taking into consideration the principle of equality as factual equality and the creation of the conditions for exercising the granted powers in full, it is fully applicable in non-litigious proceedings[53]. Moreover, pursuant to Art. 510 § 2 of Civil Procedure Code, the court summons *ex officio* the interested parties who are not participants to take part in the proceedings, or appoints a trustee for them if their place of residence is unknown.

A lot of weight is attached to the principle of equality of the parties in arbitration proceedings. The provision of Art. 1183 of Civil Procedure Code contains an absolutely binding principle of equal treatment of the parties: "in the proceedings before the court of arbitration the parties should be treated equally". It is applicable at all stages of such proceedings and according to it each of the parties has the right to be heard and to present its claims and supporting evidence. According to T. Ereciński, the principle is a specific *magna carta* of arbitration proceedings. He holds that the principle of equal treatment goes a bit further than the hearing principle, because it obligates arbitration courts to treat the parties equally in similar situations. The right to be heard arises, apparently, from the principle of equal treatment. Consequently, each of the parties has a guaranteed possibility to present factual and legal circumstances regarding the subject matter of litigation, to adduce evidence, to participate in hearings and to ask the assistance of an attorney before the court as well as to express positions in relation to all assertions and proofs of the opposite party and the actions of arbitrators. The provision of Art.

[53] A. Mączyński, *Ochrona praw jednostki w postępowaniu nieprocesowym*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego 1979, No. 85, pp. 55–56.

1183 of the Code is addressed to arbitration courts themselves. There is little doubt, however, that it also applies to the parties having a broadly defined right to agree to the principles and the manner in which such proceedings are to be conducted. As it has already been mentioned, the prohibition of discrimination applies to the entire proceedings and, primarily, to the hearing of evidence[54]. However, it should not be forgotten that an equal status of the parties also relates to the drafting of the arbitration clause. The provisions of the clause which violate the principle of equality are legally void. The same applies to provisions authorizing only one party to institute actions before the arbitration court or to grant more powers to one of the parties[55].

The refusal to recognize or to perform an arbitral award as well as to reverse a judgment as a result of an appeal are the sanctions for the violation of the principle of equal treatment of the parties in the civil proceedings. It is evident, then, that the court of arbitration must be very careful to avoid the impression that one of the parties is treated better. It may rely on such facts and findings only as to which both the parties have been able to express their opinions, for each of the parties has the right to take a stand on all substantial factual and legal matters arising in the course of the proceedings. Practically, it means that a party is given a time limit to present its claims and evidence and to express its opinion on the assertions, evidence and conclusions of the opposing party. With respect to oral proceedings, this principle demands that the hearing be planned in such a way as to enable both parties to be present during the hearing and to freely express themselves. Thereby, the parties must be notified of the hearing and of the sessions of the court in advance. Since the principle of equal participation in the proceedings is implemented only when both parties have the opportunity to take an active part in them[56]. The right to be heard will not always be realized by way of direct oral presentation of arguments to the arbitrators, as the parties may decide that the proceedings will take documentary form, without initiating a hearing[57]. The right to be heard and its implementation depend on the parties. A willful

54 T. Ereciński, K. Weitz, *Sąd arbitrażowy*, Lexis Nexis, Warsaw 2008, pp. 279–281.

55 R. Golat, *Polubowne rozstrzyganie sporów*, Lexis Nexis, Warsaw 2007, p. 131; T. Strumiłło, *Zasady postępowania arbitrażowego*, Quarterly ADR Arbitraż i mediacja 2009, No. 3(7), p. 65.

56 T. Ereciński, K. Weitz, *Sąd...*, pp. 281–282; T. Strumiłło, op. cit., p. 65.

57 R. Morek, *Mediacja i arbitraż (art. 183¹ – 183¹⁵, 1154–1217 KPC). Komentarz*, Wydawnictwo C.H. Beck, Warsaw 2006, p. 208.

non-appearance and lack of participation in the hearing does not hold up the court in conducting the hearing and issuing an award[58].

A breach of the party's right to be heard does not have to always lead to a reversal of the award of an arbitration court. It is for national courts to verify whether the breach could have an impact on the award of the court of arbitration[59].

The principle of equal treatment is also manifests in Art. 1189 § 3 of the Civil Procedure Code, which provides for a duty to deliver to a party any procedural writs submitted by the other party as well as to deliver to both parties experts" opinions and other written evidence which the court takes into consideration in making a decision.

In sum, equal treatment of the parties is the fundamental principle governing proceedings before civil court. That principle is closely linked to the protection of the rights of individuals, in particular the right of action and the right to a fair process. The guarantee of equal treatment of the parties and participants of the proceedings constitutes only one aspect of the analyzed principle. Another aspect is that the court should aim at implementing that principle to the largest possible degree, in compliance with the principle of justice.

58 T. Ereciński, K. Weitz, *Sąd...*, p. 282; T. Strumiłło, *Zasady...*, p. 66.

59 Ibidem, p. 283.