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ARTIFICIAL INTELLIGENCE AND CASE CATEGORIES IN CIVIL PROCEEDINGS

Abstract

Under the Polish Constitution, administration of justice cannot be performed by someone (something) other than a human being. Therefore, the introduction of AI into civil proceedings may not take place in violation of the right to a court. This does not mean, however, that one should not consider possibly allowing AI to adjudicate civil cases and thus replace the judge, but it should rather apply to simple, uncomplicated and repetitive cases. Certainly, AI would not be affected by external factors, except for one – the introduction of appropriate assumptions into the algorithm. It must be remembered that AI is not human, so if it were to act as a judge, it would have to ‘learn to think’, be able to react to non-standard behaviour of witnesses and parties, analyse their behaviour, etc. It is worth considering piloting the introduction of AI at first instance in certain categories of cases, especially those that do not require extensive evidentiary proceedings based on evidence other than documents. Examples of such cases are ‘franking’ cases involving loans linked to a foreign currency. This would provide an opportunity to verify in practice the use of AI in justice for activities other than technical, opinion and adjudication support.

KEYWORDS

artificial intelligence, judge, ‘franc’ case, right to a court

SŁOWA KLUCZOWE

sztuczna inteligencja, sędzia, „sprawa frankowa”, prawo do sądu

I. INTRODUCTION

The application of AI in civil proceedings must meet two conditions: it must not diminish the rights of citizens in the context of the right to a court (Article 45 of the Polish Constitution and Article 6 ECHR)¹ and should result in a reduction of the length of court proceedings, which is a problem not only in Poland but also in other countries.² Indeed, the long duration of court proceedings undermines confidence in the justice system. Moreover, the introduction of AI should not be an end in itself but should bring tangible benefits, exactly such as accelerating of judicial proceedings without diminishing the rights of citizens.

New technological tools, which in this area are referred to as LegalTech (Legal Technology),³ in the provision of legal aid and justice are being introduced in various legal systems, although often not yet on a large scale. In Poland, such most popular tools are: software for the management of law firms, time recording software for lawyers, legal information systems, software for the creation of contracts and pleadings, as well as software supporting debt collection processes. These tools are, therefore, used primarily by law firms and not by the courts.

As far as the judiciary is concerned, a distinction should be made between the tools that improve the work of the court as an institution and the tools that improve the recognition of cases.⁴ The former tools are known to Polish legis-

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended and supplemented by protocols (Official Journal of the Republic of Poland 1993, No 61, item 284, as amended).

² See Joanna Klimczak, *Szybkość postępowań sądowych w Polsce i w innych państwach Europy* (Warsaw 2020) 7ff.

³ See, e.g., Laura Kontiainen, *Legal Tech Con 2018 – How will AI shape the future of law* in Riika Koulou, Laura Kontiainen (ed), *How will AI shape the future of law*, Helsinki 2019, 17ff; Dariusz Szostek, in Dariusz Szostek (ed), *Prawo nowych technologii. LegalTech. Czyli jak bezpiecznie korzystać z narzędzi informatycznych organizacji, w tym w kancelarii oraz dziale prawnym* (Warsaw 2021) 3.

⁴ It has been pointed out in the doctrine that the applications of AI in the judiciary should be distinguished from the process of automating proceedings – see Arkadiusz Bieliński, *Potencjalne*

lation in relation to civil proceedings, the latter are basically not used in Poland. Therefore, it can be hypothesised that the use of AI in the judiciary in Poland is basically non-existent, and this is not peculiar to Poland alone but to European legislation in general. However, it seems that in certain categories of cases, the use of AI would be beneficial, leaving aside, of course, aspects of a constitutional nature.

The application of tools streamlining the work of courts as institutions is primarily aimed at improving the exchange of pleadings so that the work of court clerks doesn't have to be involved and the circulation of letters between the court and the parties (their attorneys) is faster. In fact, this mainly concerns cases where the parties are represented by professional attorneys (attorneys-at-law, advocates, etc.),⁵ with regard to, for example, the possibility of filing pleadings via an ICT system, the problem is the computerisation of the courts, which causes the deadline for the introduction of such a solution to be postponed. Moreover, implementation of some solutions has been forced by the Covid-19 epidemic, e.g. remote hearings.

II. AI IN VARIOUS ROLES IN COURT

1. GENERAL ASPECTS

As indicated, the introduction of AI into civil proceedings would have to solve the problem of protracted proceedings without adversely affecting the substantive adjudication of cases and depleting the rights of the parties (litigants). The key question is whether AI would need to be applied to the substantive adjudication of cases or only to ancillary issues in the administration of justice. Indeed, the scope of the potential use of AI in the judiciary is not analogous to that of other legal professions, since it is not about providing legal assistance to citizens but about adjudicating cases and issuing judgments on behalf of the Republic of Poland in procedural proceedings and decisions on the merits in non-procedural proceedings. It is, therefore, about resolving human disputes, i.e., a judgment must be given in a particular case which is in accordance with the law and at the same time corresponds to the sense of social justice.

obszary zastosowania sztucznej inteligencji w postępowaniu cywilnym – czy obecnie ma to rację bytu i czy jesteśmy na takie rozwiązania gotowi? in Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, Dariusz Szostek (eds), *Sztuczna inteligencja, blockchain, cyberbezpieczeństwo oraz dane osobowe* (Warsaw 2019) 62–64.

⁵ See further Tomasz Szanciło, Beata Stępień-Załucka, *Sędzia robotem a robot sędzią w postępowaniu cywilnym w ujęciu konstytucyjnym i procesowym* (Prawo i Wiąż 2023) No 4, 230-231.

Therefore, in procedural terms, three possibilities must be kept in mind: 1) AI as an assistant judge; 2) AI as a court registrar; 3) AI as a judge. These are different roles performed by specific individuals in the administration of justice, with obviously different roles and powers. If AI were to perform the role of a judge, the question of the appeal procedure appears to be extremely important, and this applies both to ordinary appeals and extraordinary appeals. Indeed, it is possible to imagine (at this point only theoretically) a situation in which the court would be composed of robots in both instances, as well as in the Supreme Court. The question is whether such a solution is possible and, if so, whether it is advisable and necessary. In other words, is it conceivable that the case will be decided from start to finish without the involvement of the human factor, and would such a hearing of the case be acceptable not only from a substantive point of view but also socially acceptable.

2. THE ROLE OF A JUDGE IN THE ADMINISTRATION OF JUSTICE

The administration of justice in the Republic of Poland is exercised by the Supreme Court, common courts, administrative courts and military courts, with judicial proceedings being at least two-instance (Articles 175(1) and 176(1) of the Polish Constitution).

A judge performs tasks in the field of justice and legal protection, other than the administration of justice (Article 2 § 1 and 2a of the Act of 27 July 2001 – Law on the system of common courts⁶), except that in district courts (i.e. the lowest level courts) these tasks are also performed by court assessors,⁷ with the exclusion of certain categories of decisions and cases, with the latter exclusion being relevant to civil cases, relating to cases heard in the family and juvenile division (Article 2 § 1a and 2a u.s.p.).⁸ Judges, in the exercise of their office, are

⁶ Consolidated text Official Journal of the Republic of Poland 2023, item 217, as amended; hereinafter: u.s.p.

⁷ Before the expiry of 36 months of performing the duties of a judge, a judicial assessor may submit to the president of the competent regional court a request for appointment to the position of a judge of a district court; the assessment of the qualifications of the judicial assessor is carried out by a visiting judge appointed by way of a draw of lots by the president of the competent appellate court, and then the college of the district court assesses the candidature of the assessor for the vacant position of a judge of a district court (Article 106xa § 1–5 u.s.p.). The application for the appointment of an assessor to the position of a judge is presented to the President of the Republic of Poland by the National Council of the Judiciary.

⁸ Pursuant to Article 2 § 1a(3) u.s.p., court assessors are not allowed to resolve cases in the area of family and guardianship law, cases concerning demoralisation and criminal acts of minors, treatment of persons addicted to alcohol and narcotic and psychotropic drugs, as well as cases belonging to the guardianship court under separate acts, with the exception of cases for permission to perform an act exceeding the scope of ordinary management of the property of a child or a person

independent and subject only to the Constitution and laws.⁹ Judges shall be provided with working conditions and remuneration commensurate with the dignity of their office and the scope of their duties. A judge may not belong to a political party nor a trade union, nor engage in public activities incompatible with the principles of independence of the courts and independence of judges (Articles 178(1)-(3) of the Constitution of the Republic of Poland). Judges are irremovable, and a judge's removal from office, suspension from office, transfer to another seat or to another position against his or her will may take place only by virtue of a court decision and only in cases specified by law. A judge may not, without the prior consent of the court, be held criminally responsible or deprived of liberty. A judge may also not be detained or arrested, except in the case of being apprehended in the commission of an offence, if his or her detention is necessary to ensure the proper course of proceedings; the president of the locally competent court shall be immediately notified of the detention and may order the immediate release of the detainee (Articles 180(1)-(2) and 181 of the Constitution of the Republic of Poland).

As can be seen, the constitutional guarantees of judges' independence and autonomy from external factors are extensive. This is obvious, as the role of judges (assessors) in the administration of justice is the most important one; it is they who decide how it is exercised, what the content of judgments is, and how specific cases with which civil law subjects apply to the courts are decided. It is the manner in which the judges (assessors) handle the case, including the time taken to conclude them, and the procedural decisions (in particular judgments) they issue that determine the public's perception of the justice system. In other words, it is a combination of two aspects: the completion of the case within a reasonable time and the issuance of a correct and just decision on the merits (judgment or order on the merits). They should be guided solely by the law, their own convictions, principles of logical thinking, life experience, etc., in making their judgements, and, therefore, should not be exposed to any factors that could influence the content of their judgements.

3. AI AS A JUDGE

It is relatively easy to imagine the use of AI in the role of an assistant judge, whose tasks (in general) include taking actions that allow the judge to make a substantive ruling on the case, possibly concluding it in a different way. In practice, this comes down to the assistant judge drafting orders aimed at preparing court cases for hearing, collecting the necessary literature and case law, as well as

under guardianship in the form of simple acceptance or rejection of an inheritance, resolved in the course of proceedings for the statement of inheritance acquisition.

⁹ With regard to court assessors, this principle is expressed in Article 106j(1) u.s.p.

drafting judgments and their justifications. The use of AI could particularly concern the preparation of a case for the judge to decide, i.e. the collection of relevant literature and case law (primarily available on the internet and in legal information systems) and the analysis of evidence. AI would certainly be able to determine much more quickly, for example, whether there are rulings on a particular matter or even a line of case law that should be taken into account when deciding a case,¹⁰ reviewing available studies in this respect, etc. Correctly framing the task in this way would make it possible to limit the results to those desirable from the point of view of the substantive decision.

Similarly, AI would be useful in performing the tasks of a court registrar. Court registrars perform a very important range of tasks in the courts, but apart from (at least to some extent) the substantive adjudication of the case as a result of the issuance of an order for payment, all their other activities are ancillary and incidental to the proceedings aimed at resolving the case (issuing a judgment or order on the merits). It does not require the court registrar to perform thought processes in the context of resolving the entire case. The introduction of AI in this matter would, therefore, not affect the essence of the right to a court, while at the same time, it could significantly improve the performance of these activities. The biggest doubt when it comes to the application of AI in the administration of justice concerns its replacement of judges. This concerns the issuing of decisions on the merits. Of course, it is technically possible for a robot to make such rulings, as evidenced by the experience of other countries.¹¹ There are no such solutions in Poland, and no attempts have even been made to apply them, with the exception of assisting judges with tools such as access to legal information systems, without which (given the wealth of case law and doctrine) it is difficult to imagine the work of a judge. As indicated above, this includes streamlining the proceedings as such and assisting the judge in concluding (especially on the merits of) the case but not about replacing him or her with AI. Even leaving aside the constitutional concerns, the question is whether AI is capable of replacing the human mind, given the various nuances that differentiate cases which appear to be analogous. It is precisely these nuances, small differences, that may affect the content of the adjudication. For it must not be forgotten that AI is merely a certain algorithm.

¹⁰ See Maria Dymitruk, *Sztuczna inteligencja w wymiarze sprawiedliwości?* in Luigi Lai, Marek Świerczyński (eds), *Prawo sztucznej inteligencji* (Warsaw 2020) 275ff.

¹¹ See further, e.g., Mariusz Załucki, *Nowe technologie a sprawność i przyszłość sądownictwa w Polsce* (Przegląd Sądowy 2021) No 11–12, 11–15.

4. POTENTIAL USE OF AI IN DIFFERENT CATEGORIES OF CIVIL CASES

In general, with a view to the rights and obligations of the parties to a civil law relationship, and thus the type of legal protection sought, three types of actions are traditionally distinguished:

- (1) for the award of a benefit, the content of which is the demand to oblige the defendant to a specific behaviour: to give (*dare*), to do (*facere*), not to do (*non facere*), to stop (*omittere*) or to put up with (*pati*);
- (2) to establish the existence or non-existence of a legal relationship or right;
- (3) for shaping a legal relationship or a right.

The most common action is an action for an order, in particular, for the payment of a specific sum of money. However, it may also consist in a demand for non-pecuniary performance, e.g. for the delivery of an item of property, for an order or prohibition of a specific behaviour. In all cases, however, the demand must be clearly formulated and capable of being performed,¹² as, in principle, judgments in this type of case are enforceable. An action for the surrender of an object should, therefore, be specified by individualising the object – in the case of movable property, identifying marks should be given if possible (e.g. in the case of a car, a machine), while in the case of immovable property, not only the number of the land register which is kept for it (possibly a collection of documents) should be given, but also the town in which it is located, the precinct, the address, the registration number, the surface area, etc.

If an order for payment was to be issued (usually in the case of an action for payment, exceptionally for the delivery of variable items), AI could be applied (there is an appeal against such an order, which is heard by the court that issued the order for payment). An order for payment is issued on the basis of the allegations and evidence presented by the plaintiff if they are not in doubt and the action is not manifestly unfounded. The AI's analysis of the documents should give a proper assessment. After an appeal has been lodged against the order for payment, further evidence may come to light, including personal evidence (testimony of witnesses, parties) or expert witness evidence. It will, thus, be necessary to ask the right questions. Before the evidence can be analysed, it must be collected in accordance with the provisions of the Code of Civil Procedure. Therefore, if AI was to replace a human being, it would have to be able to carry out evidentiary proceedings. Of course, it is possible to introduce algorithms that comply with the code in this matter.

A different type of case is conducted in proceedings where no order for payment is issued and a copy of the statement of claim is served on the defendant,

¹² On the concept of 'benefit', see the resolution of 7 judges of the Supreme Court of Poland of 2 October 1997, III CZP 27/97, OSNC 1998, No 1, item 1; Piotr Osowy, *Powództwo o zasądzenie świadczenia w sądowym postępowaniu cywilnym* (Państwo i Prawo 2002) No 6, 51ff.

who can file for defence. This also applies to an action for benefits, such as an action to compel the defendant to behave in a certain way. For example, in cases for the protection of infringed or lost possession of a road, it is necessary to define the limits of the protection granted with an indication of how the lost possession is to be restored. It is not sufficient to declare the substance of the dispute in general terms by using the formula ‘restores the infringed possession’, but it is necessary to specify what it should consist in, depending on the nature of the infringement.¹³ In actions for determination of a right or legal relationship (Article 189 of the Code of Civil Procedure), it is necessary to specify very precisely the right or legal relationship which the action is supposed to concern, as well as to indicate whether this is a question of determining the existence or non-existence of a specific right or legal relationship. This is because a claim of this type may be both positive (establishing the existence) and negative (establishing the non-existence), e.g. establishing the non-existence of a legal relationship due to the invalidity of a contract (in short: an action for a declaration of the invalidity of a contract). In actions for the modification of a right or legal relationship, on the other hand, the plaintiff should precisely specify the demand for the modification of the indicated right or legal relationship, i.e. the establishment,¹⁴ dissolution,¹⁵ or the transformation of it.¹⁶ Thus, not only the legal relationship or right should be precisely indicated but also the direction of its modification, as this is the primary purpose of this type of action.¹⁷

The claimant is obliged not only to formulate the demand precisely (the *petitum* of the statement of claim; the applicant – the *petitum* of the application), but also to cite the facts justifying the demand and, therefore, relevant to the petition (*causa petendi*). The facts stated by the claimant to justify the demand make it possible to determine the legal basis on which the claimant’s claim is based and the defendant’s liability regime, and thus to delimit the framework of the dispute and the court’s cognition. Indeed, the circumstances indicated constitute the factual basis justifying the application of an abstract legal norm, and the process of

¹³ The judgment of the Supreme Court of Poland of 24 January 1985, III CRN 297/84.

¹⁴ For example: for an obligation to make a declaration of intent – when the preliminary agreement meets the requirements on which the validity of the final agreement depends, in particular, the requirements as to form, the entitled party may enforce the conclusion of the final agreement (Article 390 § 2 in connection with Article 64 of the Civil Code); for the establishment of paternity (Article 84 of the Family and Guardianship Code).

¹⁵ For example: dissolution of marriage by divorce (Article 56 of the Family and Guardianship Code), dissolution of a limited liability company (Article 271 of the Commercial Companies Code).

¹⁶ For example: a claim for a reduction in the claimant’s benefit or an increase in the benefit due to the claimant, or the invalidity of the contract in the case of exploitation (Article 388 of the Civil Code); a claim for the valorisation (change in the amount or manner of fulfilment) of a monetary benefit in the event of a significant change in the purchasing power of money after the obligation has arisen (Article 358¹ § 3 of the Civil Code).

¹⁷ See further Kazimierz Korzan, *Orzeczenie konstytucyjne w postępowaniu cywilnym* (Warsaw 1972) 19.

application of the law by the court consists in comparing the established state of facts with the state of facts stated in the hypothesis of a specific legal norm, i.e. in subsuming the facts of the case under a specific legal provision. The state of facts indicated by the plaintiff and subsequently established by the court, therefore, determines the application of the legal norm and is extremely important in determining the scope of the case being submitted to the court's judgment.¹⁸ There is no basis for calling on the claimant (in the context of a formal review) to supplement the facts when the claimant has set out in the application the facts which make it possible to sufficiently determine the basis of its claim.¹⁹ The determination (indication) of the facts to form the basis of the claim is the sole responsibility of the claimant, and neither the defendant nor the court may adjust these facts, especially in a direction that brings adverse procedural consequences for the claimant.²⁰ An award of a sum of money which, although within the quantum limits of the claim, is based on a different factual basis constitutes an award in excess of the claim. In other words, a judgment upholding a claim on a factual basis on which the plaintiff neither in the statement of the claim nor in the proceedings before the court of first instance based the claim constitutes an award in excess of the demand. Indeed, the court may not grant the claim on a factual basis other than that indicated in the application.²¹ Pursuant to Article 321 § 1 of the Code of Civil Procedure, the court may not adjudicate as to the subject matter which was not covered by the demand, nor may it adjudicate in excess of the demand.

As regards, however, the legal basis of the claim, i.e. – in a nutshell – quotation of numbers of provisions (their content) which, in the plaintiff's opinion, are applicable to the action formulated by the plaintiff, it is uniformly accepted in the doctrine and judicature that it is not required to indicate the legal basis in the statement of claim or in further pleadings (as well as opinions of jurisprudence or representatives of science), and the quoted legal basis is not binding upon the court. This is the result of the applicable rules: *da mihi factum dabo tibi ius* ('state the facts, you get legal protection'), *iura novit curia* ('the court knows the law'). If it follows from the facts stated in the application that the claim is justified in whole or in part, it should be accepted to that extent, even if the claimant does not indicate the legal basis or if the legal basis indicated by him turned out to be incorrect.²² Moreover, the plaintiff's establishment of a factual basis for the claim,

¹⁸ See the judgment of the Supreme Court of Poland of 11 December 2009, V CSK 180/09.

¹⁹ See, e.g. the decision of the Supreme Court of Poland of 14 December 2001, V CKN 1713/00; decision of the Court of Appeal in Katowice of 10 September 2012, V ACz 667/12.

²⁰ See the decision of the Supreme Court of Poland of 19 December 2000, V CKN 1790/00.

²¹ See, e.g. judgments of the Supreme Court of Poland: of 29 October 1993, I CRN 156/93; of 18 March 2005, II CK 556/04, OSNC 2006, No 2, item 38.

²² See, e.g. judgments of the Supreme Court of Poland: of 23 February 1999, I CKN 252/98, OSNC 1999, No 9, item 152; of 6 December 2006, IV CSK 269/06; Andrzej Struzik, *Da mihi factum dabo tibi ius* in Jacek Gudowski, Karol Weitz (eds), *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, Vol I (Warsaw 2011) 599ff.

which may be qualified according to different legal grounds, justifies the court's consideration of each of them when hearing the case, and the application of one of them, even if different from that stated by the plaintiff, doesn't justify the allegation of a violation of Article 321 § 1 of the Civil Procedure Code.²³

However, the indication by the claimant of the substantive law provisions intended to constitute the legal basis for the judgment, although not required, is not irrelevant to the course and outcome of the case, since it also indirectly determines the facts justifying the claimant's demand for judgment.²⁴ It may be the case that the plaintiff, in choosing a legal basis, not only sets out the boundaries of the facts relevant to the outcome of the case, but also sets out the boundaries of the defendant's defence, since the defendant undertakes that defence to the extent that it arises not only from the facts but also from the provision referred to; the defendant is not obliged to structure his defence in such a way as to rebut all the possible objections that may arise from all possible grounds for judgment.²⁵ This orientation cannot, however, imply that the court is formally bound by the stated legal basis of the claim, in particular, where the facts may support a different, adequate legal basis.²⁶

In summary, the claimant in the statement of claim should indicate what he is claiming (*petitum*) and why (*causa petendi*), i.e. on what grounds he has a designated claim and seeks protection. He is not obliged to state the law, but he must specify whether this is a contract, tort, damage, etc., without necessarily using strictly legal language. AI is able to analyse documents as well as apply the law if the right algorithms are used. The biggest concern is the handling of personal evidence and the evaluation of testimony, including taking into account the testifying persons' behaviour, facial expressions, etc., and on this basis assessing the veracity of the testimony given. It should not be forgotten that AI is an algorithm that is adapted to schematic behaviour. Therefore, if AI was to play the role of a judge, it would have to 'learn to think', be able to react to non-standard behaviour of witnesses and parties, and analyse such behaviour, etc.

²³ See the judgment of the Supreme Court of Poland of 25 June 2015, V CSK 528/14, OSNC-Additional Collection (OSNC-ZD) 2016, No D, item 73.

²⁴ See, e.g. judgments of the Supreme Court of Poland: of 23 February 1999, I CKN 252/98, OSNC 1999, No 9, item 152; of 11 December 2009, V CSK 180/09; of 11 March 2011, II CSK 402/10, OSNC-ZD 2012, No A, item 16; Karol Weitz, *Związanie sądu granicami żądania w procesie cywilnym* in Jacek Gudowski, Karol Weitz (eds), *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, Vol I (Warsaw 2011) 695–697.

²⁵ See, e.g. the judgment of the Court of Appeal in Szczecin of 17 April 2015, I ACa 573/14; the judgment of the Court of Appeal in Warsaw of 12 September 2017, I ACa 519/15.

²⁶ See the judgment of the Supreme Court of Poland of 30 September 2016, I CSK 644/15; Tadeusz Żyznowski, *Uwagi o obligatoryjnych składnikach pozwu i obowiązkach stron sąąd wynikających* (Rzecznik Patentowy 2006) No 1–2, 5ff.

5. 'FRANC' CASES

It seems that the cases in which AI could be used on a wider scale, also as a judge, could be the so-called 'franking' cases, concerning loans linked to a foreign currency – indexed and denominated. Such contracts contain prohibited contractual provisions, or the so-called abusive clauses, regulated by Articles 385¹-385³ of the Civil Code and Article 3 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.²⁷ The definition of such a provision is contained in Article 385¹ § 1 of the Civil Code, according to which it constitutes a provision of a contract concluded with a consumer that has not been individually negotiated, if it shapes his or her rights and obligations in a manner contrary to good practice, grossly infringing his or her interests, with the proviso that this does not apply to provisions defining the main benefits of the parties, including the price or remuneration, if they have been formulated in an unambiguous manner. It is, therefore, possible to distinguish four prerequisites, the cumulative fulfilment of which determines whether a given term of a standard agreement may be deemed abusive:

(1) the provision has not been individually negotiated with the consumer, and, therefore, has not been subject to negotiation;

(2) the rights and obligations of the consumer shaped in this way are contrary to good practice;

(3) the rights and obligations thus formed grossly infringe the interests of the consumer;

(4) the provision of the agreement does not relate to the unambiguously formulated main benefits of the parties, including the price or remuneration.

The agreements in question contain provisions setting out the rules for converting the amount of the loan granted into the domestic currency at the time of the disbursement of the loan, the instalments to be paid in foreign currency (indexation clause), as well as the provisions related to exchange rate fluctuations (exchange rate risk clause). The former were found to be abusive, as they allow the bank to freely shape the foreign currency exchange rate, based on the bank's exchange rate tables. The amount of the bank's benefit and the amount of the consumer's benefit depend on the bank's free decision. Both the conversion of the amount of the loan into the domestic currency at the time of its disbursement and the reverse conversion at the time of the maturity of individual repayment instalments serve to determine the amount of the consumer's benefit. Such provisions, which empower the bank to unilaterally fix exchange rates, are non-transparent and leave room for arbitrary action by the bank. They thus burden the borrower with unpredictable risks and violate the equality of the parties. Moreover, the vague and unverifiable determination of the determination of exchange rates con-

²⁷ OJ EU L 95, 29; hereinafter: Directive 93/13.

stitutes an additional, hidden remuneration for the bank, which may be of considerable importance for the counterparty, the amount of which is freely determined by the bank.²⁸

The exchange rate risk clause relates to a change (in this case of the amount of the benefit) due to fluctuations in the exchange rate of one currency against another. This may result in a worsening of the financial situation of one party and an improvement of the financial situation of the other party. However, the source of the risk is primarily the inability to accurately predict the direction of fluctuations in the currency exchange rate (increase or decrease in value) and the magnitude of these fluctuations. The borrower must be clearly informed that by signing a loan agreement linked to a foreign currency, he bears a certain exchange rate risk which, from an economic point of view, may prove difficult for him to bear in the event of a fall in the value of the currency in which he is paid in relation to the foreign currency in which the loan was granted. To this end, the trader must outline the possible exchange rate fluctuations and risks involved in taking out a loan in foreign currency.²⁹ Article 4(2) of Directive 93/13 must, therefore, be interpreted as meaning that the requirement, which states that the terms of the contract must be expressed in plain and intelligible language, obliges financial institutions to provide borrowers with sufficient information to enable them to make informed and prudent decisions. This requirement implies that the condition relating to exchange rate risk must be understood by the consumer both formally and grammatically, as well as with regard to its concrete scope so that a reasonably well-informed and sufficiently attentive and prudent average consumer is able not only to become aware of the possibility of a decrease in the value of the domestic currency in relation to the foreign currency in which the loan was denominated (or indexed), but also to assess the – potentially significant – economic consequences of such a condition on his financial obligations.³⁰ If, therefore, the consumer has not been duly informed of the exchange rate risk, i.e. the possibility of a fall in the value of the domestic currency against the foreign currency, so that he can assess the economic consequences of such a condition for his financial obligations in the event of fluctuations in the exchange rate, this means that, within the meaning of Article 4(2) of Directive 93/13, the terms of the contract have not been expressed in plain and intelligible language.³¹ In practice,

²⁸ See, e.g. the judgments of the Supreme Court: of 22 January 2016, I CSK 1049/14, OSNC 2016, No 11, item 134; of 4 April 2019, III CSK 159/17, OSP 2019, No 12, item 115; of 7 November 2019, IV CSK 13/19; of 2 June 2021, I CSKP 55/21; of 27 July 2021, V CSKP 49/21.

²⁹ The judgment of the CJEU of 20 September 2018, C-51/17, OTP Bank and OTP Factoring, para 75; similarly, the judgment of the CJEU of 20 September 2017, C-186/16, Andriuciu and others, para 50.

³⁰ The judgment of the CJEU of 20 September 2018, C-51/17, para 78.

³¹ The judgments of the Supreme Court of 3 February 2022, II CSKP 415/22.

this risk was almost entirely passed on to the consumer.³² Undoubtedly, therefore, the contractual provisions shaped in this way fulfilled the prerequisites for declaring them abusive as outlined above. CJEU case law also emphasises that there is a significant contractual imbalance to the detriment of the consumer if unlimited exchange rate risk is imposed on the consumer.³³

In this type of case, borrowers are (usually) seeking to establish the invalidity of the loan agreement and payment of a certain amount due to this invalidity. Such cases are primarily based on documents and, in addition (but not always), the borrowers are questioned on the circumstances surrounding the conclusion of the contract, particularly, whether they had been informed of the exchange rate risk. In fact, the problem concerns the analysis of contractual provisions that are standard (they can be sorted into several groups). The cases are repetitive, so in the vast majority, AI would be a sufficient tool to resolve them.

III. SUMMARY

The electronic (online) court Ultima Ratio at the Association of Notaries of Poland has already appeared in arbitration in Poland, using AI to a greater or lesser extent.³⁴ However, as far as the ordinary judiciary is concerned, there are no such solutions. Indeed, the first doubt concerns constitutional standards, as it is not possible under the Polish Constitution for the administration of justice to be carried out by someone (something) other than a human being. On the other hand, it is possible as regards technical acts,³⁵ opinions and supporting the judicial process; this issue does not require constitutional amendments, legislative changes would suffice. The situation is different with regard to AI's ability to administer justice, as this would require an amendment to the Polish Constitution.

The possible acceleration of court proceedings must not take place at the expense of the citizens' right to a fair trial. It seems that, even if the use of AI to

³² See further Tomasz Szanciłło, *Ustalenie nieważności umowy o kredyt frankowy a niedozwolony mechanizm klauzul przeliczeniowych i ryzyko kursowe* in Anna Hrycaj, Tomasz Szanciłło (eds), *Upadłość i restrukturyzacja kredytobiorcy lub banku przy umowach o kredyt frankowy* (Warsaw 2024) 75–76.

³³ See the judgment of the CJEU of 10 June 2021, C-776/19 – C-782/19, BNP Paribas Personal Finance SA and BNP Paribas Personal Finance SA i Procureur de la République, para 103.

³⁴ See also Kinga Flaga-Gieruszyńska, *Zastosowanie sztucznej inteligencji w pozasądowym rozwiązywaniu sporów cywilnych* (Studia Prawnicze KUL 2019) No 3, 9ff.

³⁵ See Ewa Aleksandra Płocha, *O pojęciu sztucznej inteligencji i możliwościach jej zastosowania w postępowaniu cywilnym* (Prawo w Działaniu 2020) No 44, 286–287, who emphasizes the legitimacy of using AI as a tool to support work of translators, and in some cases even replace them.

adjudicate cases is allowed, the last word should still belong to a human being and, therefore, the remedy should lie with a ‘human’ court. As it is pointed out, while the very possibility of using AI to support court proceedings should be assessed positively, moderation must be exercised and human participation must be ensured, even if only at the final stage of the proceedings, which would provide a kind of safety buffer and guarantee that the right to a court and to have a case heard and treated as an individual problem is fairly realised.³⁶

Possible admission of AI to adjudicate cases should rather concern simple, uncomplicated cases,³⁷ as well as repetitive ones. Particular reference is made to the European order for payment procedure and the EPU.³⁸ As far as the other categories of cases mentioned above are concerned, the application of AI should not be widespread, if at all possible. And even if the standardisation of cases for AI was applied, the legal system cannot be subject to constant change. If the legal system is clear and consistent, it is easier to carry out operations using AI, which are mainly mathematical and logical operations.³⁹

Moreover, the widespread use of AI to resolve cases may lead to a deadlock in the law, in the sense that it is the ‘human factor’ that allows it to develop. The judgements made by AI could be standard and identical and the law would become rigid, without providing the necessary flexibility.⁴⁰ Standardisation is not always desirable.

Although the European Ethical Charter on the use of artificial intelligence in and around judicial systems was adopted in Strasbourg on 3-4 December 2018,⁴¹ which sets out fundamental principles in this area (including respect for fundamental rights and the operation of AI under user control), introducing AI to adjudication (rather than just advice) in civil cases will not be easy. No special solutions for the judiciary are provided for in the annex to the Resolution of the Council of Ministers No 196 of 28 December 2020 ‘Policy for the Development

³⁶ Berenika Kaczmarek-Templin, *Sztuczna inteligencja (AI) i perspektywy jej wykorzystania w postępowaniu przed sądem cywilnym* (Studia Prawnicze. Rozprawy i Materiały 2022) No 2, 74–75.

³⁷ See, e.g. Mariusz Załucki, *Wykorzystanie sztucznej inteligencji do rozstrzygania praw spadkowych* in Luigi Lai, Marek Świerczyński (eds), *Prawo sztucznej inteligencji* (Warsaw 2020) 145ff; Maria Dymitruk, *Sztuczna inteligencja...*, 275ff; Aleksander Chłopecki, *Sztuczna inteligencja – szkice prawnicze i futurologiczne*, Warsaw 2021, 61ff.

³⁸ See Arkadiusz Bieliński, *Potencjalne obszary...*, 63–64; Anna Kościółek, *Wykorzystanie sztucznej inteligencji w sądowym postępowaniu cywilnym – zagadnienia wybrane* in Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, Dariusz Szostek (eds), *Sztuczna inteligencja, blockchain, cyberbezpieczeństwo oraz dane osobowe* (Warsaw 2019) 69–71.

³⁹ Łukasz Goździaszek, *Perspektywy wykorzystania sztucznej inteligencji w postępowaniu sądowym*, Przegląd Sądowy 2015, No 10, 47, 55.

⁴⁰ See Beata Stępień-Załucka, *Sędziowski stan spoczynku. Studium konstytucyjnoprawne* (Warsaw 2019) 65.

⁴¹ <<https://rm.coe.int/ethical-charteren-for-publication-4-december-2018/16808f699c>> accessed 1 October 2023.

of Artificial Intelligence in Poland from 2020'.⁴² On the other hand, the doctrine postulates that the medium-term goal for the development of the judiciary was the complete digitalization of court records, including sending documents to and from the courts only in electronic form.⁴³

This issue needs to be approached very carefully. Certainly, AI would not be exposed to external factors, with the exception of the introduction of appropriate assumptions to the algorithm. Pilot introduction of AI at first instance appears to be worth considering in some categories of cases, particularly those that do not require extensive non-document evidence-based proceedings. The 'franc' cases are an example of such cases.

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⁴² <<https://www.gov.pl/attachment/fc404068-7a75-4404-8167-a66fb73c067f>> accessed 1 October 2023.

⁴³ Michał Kotalczyk, *Sztuczna inteligencja w służbie polskiego sądu – propozycje rozwiązań*, Iustitia 2021, No 21, 62–64.

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