Führer, Lukáš

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"... compromittimus tanquam in arbitros et arbitratores nostros et amicabiles compositores": On Some Aspects of Arbitration Practice in Bohemia and Moravia in Ecclesiastical Disputes of the 13th Century Through the Lens of Compromise and Arbitration Charters

Lukáš Führer / lukas.fuhrer@phil.muni.cz /
https://orcid.org/0000-0002-6486-7987

Department of Auxiliary Historical Sciences and Archive Studies, Faculty of Arts,
Masaryk University, Brno, Czech Republic

Abstract

One of the common ways in which the Church (either individuals or institutions) settled its disputes in the Czech lands in the 13th century was through arbitration. This form of extrajudicial settlement is documented by various types of charters in which different stages of the arbitration proceedings are recorded. This probe will focus on two questions: 1) What types of charters were produced in connection with arbitration in the 13th century and how do they look from a formal point of view? 2) What is the content of these charters and how does the content testify to the practice of arbitration in the Czech lands in the 13th century?

Keywords

arbitration – 13th century – diplomatics – canon law – formularies – arbitration charters – compromissum – ecclesiastical disputes

Charters document more than 200 disputes in Bohemia and Moravia in the 13th century in which the Church (either institutions or persons) was at least one of the disputants. Some of these were related to property matters, while some were of an ecclesiastical nature, especially the *causae spiritualibus annexae*. Although the Church had the option of settling its disputes before an ecclesiastical court according to canon law or, in certain cases, before a secular court according to land customs, during the 13th century there was a marked tendency for it to settle its disputes through arbitration.[1]

However, this was in no way contrary to canon law. The canonists of the time were quite unanimous in interpreting that arbitration could be conducted on all matters except for criminal matters, marriage and *causae liberales* (as stated, for instance, by Tancredus: *sequitur, de quibus causis potest iri ad arbitros. Et dicendum est, quod de omnibus, exceptis criminibus et liberalibus et matrimonialibus*[2]). Arbitration had its roots in Roman law, but it was also incorporated into canon law. Several provisions concerning arbitration are included in Pope Gregory IX's *Liber Extra Decretum Gratiani*.[3] However, the issue of arbitration was also dealt with by a number of canonists and notaries in the 12th and especially the 13th century, and its principles are thus captured in their formularies and procedural law manuals.[4] The canonists of the time thus dealt with a range of issues related to the procedural, substantive and theoretical aspects of arbitration, with discussions on its forms. Consequently, two methods of arbitration were gradually defined around this time:

a) The first was that the arbitration proceeded *secundum iuris ordinem*, i.e., in accordance with the law and governed by procedural rules. In this case, the arbitral judge was to be referred to as the *arbiter* and his award as the *arbitrium*.
b) The second was that the proceedings were conducted *per viam aequitatis* and the arbitral judge, referred to as the *arbitrator* or *amicabilis compositor,* had the task of establishing justice (*iustitia*) between the parties; therefore, the *arbitrator* was not bound by procedural rules.[5]

In the first half of the 13th century, several early documents were issued by local, i.e. Bohemian and Moravian, issuers in disputes settled by arbitral judges. From the 1240s onwards, the term *arbiter* begins to emerge in local charters,[6] together with another

1 Cf. Roebuck (2013), p. 282: "[...] *teachings* [of the Christian church, note by the author] *instructed all Christians to avoid litigation, though they were usually ignored whenever litigation seemed expedient. But ecclesiastical courts often adjourned a case and tried to assist in a settlement.*" See also p. 289.

2 Tancredus de Bologna, *Ordo iudiciarius*, P. 1, Tit. 3 (*De arbitris*), § 3, in: Bergmann (1842), p. 104. In general, see Wojciechowski (2010), pp. 98–100; Litewski (1999), p. 578. A specific list of disputes in the Austrian lands settled via arbitration is given by Hageneder (1967), pp. 199–200.

3 In particular, X 1.43: *De arbitris*, in: Friedberg II (1959), coll. 230–238.

4 On the development, see Wojciechowski (2010), pp. 29–62.

5 On this topic, see Wojciechowski (2010), pp. 62–89.

6 For example, CDB IV/1, pp. 78–79, no. 16 (1247): *tandem in arbitros convenimus*; CDB IV/1, pp. 339–340, no. 187 (1250): *compromittimus in venerabiles viros et dominos* [...] *tamquam in arbitros nostros super causis*; CDB IV/1, pp. 446–449, no. 263 (1253): *de communi consesnu et unamini voluntate in nos tamquam in arbitros* [...] *compromittere.*

designation of arbitral judges as *boni, honorabiles, discreti viri,* or *persona amicabilis*.[7] From the 1270s onwards, the broadest designation of arbitral judges as *arbitri seu amicabiles compositores* or *arbitri seu arbitratores seu amicabiles compositores* appears sporadically, a term which became predominant in the diplomatic sources from the late 1280s onwards.[8] This brief overview shows that the writings produced in the course of arbitration in the 13th century may reflect not only the theory and practice, but also recent discussions of this extrajudicial manner of settling disputes. The gradual change in terminology in the diplomatic sources went hand in hand with the development of the charters that were issued in the course of arbitration proceedings during the 13th century. Until the end of the 1240s, the surviving charters of Bohemian and Moravian origin were mostly issued by one or both parties as evidence of an arbitration award, and in one case as a confirmation of it. These are charters whose main purpose was to accept, publish or confirm the arbitrator's award in writing, and therefore they contain very little information about the arbitration proceedings. Moreover, there are very few of these documents in existence. From around the middle of the 13th century, the number of surviving charters relating to arbitration in ecclesiastical matters increased significantly. Certainly, this can be partly attributed to the general trend in the Czech lands, where there was a marked increase in the issuing of charters in general at that time. However, the increasing number of writings relating to arbitrations is also associated with the fact that from around the middle of the 13th century, more types of charters issued during arbitrations began to appear. At first, these included the arbitration charter, which was the document issued directly by the arbitral judges containing their award, and a little later, the *compromissum*, which was the written agreement of the parties to settle the dispute through the arbitrators. In addition to these charters, which initiated and terminated the arbitration proceedings, other documents that were produced during the arbitration have been preserved in rare cases.

The very existence of these new types of charters suggests that it was around the middle of the 13th century when certain procedural steps during arbitration began to be fixed in writing in the Czech lands. Their content allows us to follow arbitration practice much better than is possible for the period prior to this time, and thus to ask the question of how these arbitrations were conducted and to what extent they respected the principles codified in the above-mentioned legal sources (i.e., constitutions such as *Decretals*, or the works of the canonists of the time). However, these questions can only be answered with detailed knowledge of each individual case of arbitration and with a clearer idea of when

7 For example, CDB V/1, pp. 201–202, no. 122 (1257): *tandem ambe partes pro bono pacis et concordie in nos tamquam in personam amicabilem concorditer convenerunt*; CDB V/1, pp. 569–570, no. 384 (1263): *arbitrantibus nobilibus viris et discretis* [...], *quos ad hoc ex utraque parte concorditer elegeramus*; CDB V/2, pp. 92–93, no. 535 (1267): *concordavimus per honorabiles viros*; CDB V/2, pp. 179–180, no. 589 (1269): *tandem inter eos mediantibus bonis et honestis viris* [...], *talis ordinatio, conventio et compositio amicabilis intervenit*.

8 For example, CDB V/2, pp. 450–451, no. 777 (1275): *arbitri seu amicabiles compositores*; CDB V/2, pp. 459–461, no. 784 (1275); *Dedimus eciam eisdem potestatem, ut omnia et singula, que inter nos tamquam arbitri seu amicabiles compositores ordinarent* [...]; CDB V/2, pp. 463–464, no. 787 (1275): *dantes nichilominus eisdem arbitratoribus seu arbitris vel amicabilibus compositoribus potestatem*; CDB VI/1, pp. 104–106, no. 58 (1279): *electus arbiter, arbitrator sive amicabilis compositor partibus ab eisdem*; KLL I, p. 329, no. 838 (1295): *tamquam in arbitros, arbitratores, laudatores, compositores, diffinitores compromiserunt*.

and how the form of dispute resolution under study began to be applied, what its development was, and how the principles of reconciliation were used in the domestic legal environment. Only a further comprehensive study of the subject can provide an answer to these questions. This study will therefore outline only some of these issues in relation to arbitration over a specified period of time. The questions to be investigated are:

1) What types of documents were produced in connection with arbitration in the 13th century and what do they look like from a formal point of view?
2) What is the content of these documents, how do they refer to arbitration and to what extent does their content testify to the some chosen aspects of arbitration practice in the Bohemia and Moravia in the 13th century?

1. Sources

As indicated above, various types of documents relating to arbitrations have been preserved from the 13th century. This section will review the various types of documents produced at different stages of the arbitration procedure, focusing in particular on the formal aspects of compromise and arbitration charters.

1.1 Compromise Charters – *Compromissa*

Similar to the judicial *libellus*, a document that determined the fundamental procedural and substantive framework for the proceedings before the (ecclesiastical) court, the compromise charter (also referred to as a *compromissum* after its usual dispositional verb) marked the beginning of the arbitration. Its main purpose was to designate the arbitral judge or judges and provide other necessary provisions concerning the subject matter of the dispute and the manner of its resolution.

Compromise charters from Bohemia and Moravia have been documented since 1250, and thus far eleven exemplars have been found in full-text, which have survived either as originals or as transumpts. Part of the text of another three *compromissa* were apparently incorporated into arbitration charters. A final and not preserved *compromissum* is explicitly mentioned in an arbitration charter from 1279, according to which it should have had the same wording as the *compromissum* of the counterparty inserted in the document. An overview of the *compromissa* whose texts have survived either in whole or in part is provided in the following list:

Number	Date	Parties to the dispute	Form of preservation	Edition
C 1a	[1250]	Provost of the Vyšehrad Chapter vs. Custodian and Vyšehrad Chapter	Insert in the arbitration charter	CDB IV/1, pp. 338–339, no. 186
C 1b	[1250]	As above	As above	As above

Number	Date	Parties to the dispute	Form of preservation	Edition
C 2	1250, VIII. 2. Prague	Commander of the German Knights in Bohemia vs. Master of St Francis Hospital in Prague	Original	CDB IV/1, pp. 339–340, no. 187
C 3	[before 1253, II. 15.]	Provost of the Vyšehrad Chapter vs. Dean of the Vyšehrad chapter	The text is partially preserved in the arbitration charter of 1253, II. 15.	CDB IV/1, pp. 446–449, no. 263
C 4	[before 1254, VIII. 22.]	Dean of the Vyšehrad Chapter vs. Custodian of the Vyšehrad Chapter	The text is partially preserved in the arbitration charter from 1254, VIII. 22, Vyšehrad	CDB V/1, pp. 74–75, no. 35
C 5	1275, VI. 25. –	Dolní Kounice Monastery vs. Oslavany Monastery	Original	CDB V/2, pp. 459–461, no. 784
C 6	1275, VIII. 21. Brno	Kadold of Miroslav vs. Oslavany Monastery	Original	CDB V/2, pp. 463–464, no. 787
C 7	1277, V. 31. –	Hradisko Monastery vs. Velehrad Monastery	Original	CDB V/2, pp. 550–551, no. 840
C 8a	1279, IV. 1. Vyšehrad	Provost of the Vyšehrad Chapter vs. Dean of the Vyšehrad Chapter	Insert in the arbitration charter from 1279, XII. 23.	CDB VI/1, pp. 75–76, no. 34
C 8b	[1279, IV. 1. Vyšehrad]	As above	Mentioned in the arbitration charter from 1279, XII. 23.	Mentioned in CDB VI/1, no. 81
C 9	1280s –	Vyšehrad Chapter	Original	CDB VI/1, pp. 163–165, no. 115
C 10	1281, IX. 16. Prague	Provost of the Vyšehrad Chapter vs. Vyšehrad Chapter	Original	CDB VI/1, pp. 212–213, no. 162
C 11	1282, VI. 1. Vyšehrad	Gotfried, Provost of the Prague Chapter and Custodian of Vyšehrad and Vyšehrad Chapter vs. Provost of the Vyšehrad Chapter	Two originals	CDB VI/1, pp. 273–275, no. 220
C 12	[before 1284, I. 21.]	Monastery Louka vs. Alšík of Melren	The text is partially preserved in the arbitration charter from 1284, I. 21.	KLL I, pp. 27–28, no. 34
C 13	1285, VII. 29. Brno	Frederick of Šumburk vs. Bruno, Bishop of Olomouc	Original	KLL I, p. 63, no. 139

With one exception, all the *compromissa* available in full-text have the typical form of a sealed charter of that time.[9] However, some differences in their external and internal features are evident. Compromise charters in disputes of the Vyšehrad Chapter are most often issued separately by each of the counterparties and are always authenticated only by the seal of the respective issuer (chapter, provost or dean). By contrast, the other *compromissa* were usually issued jointly by both parties and are authenticated not only by their respective seals but also by other means, such as by witnesses and/or by seals of other persons or institutions. The reason for this difference is probably that all the disputes of the Vyšehrad Chapter are specific to the chapter, as they frequently concerned its internal affairs, and the arbitral judges were always appointed from the ranks of its members. The other *compromissa* have the character of "public charters", as various institutions and persons acted as parties to the dispute, and persons from different backgrounds were elected as arbitrators. In these cases, it is frequently possible to associate at least some of the witnesses or seals with the institution from which the arbitral judges were elected.

For the stylization of individual compromise charters, the role of the diplomatic environment was naturally significant, with their wording also dependent on other factors, namely the existing or expected course of negotiations on the matter in dispute. Notwithstanding these circumstances, all the extant *compromissa* have common and even typical content in general terms. This is due to the fact that these charters were intended to define the matter of the dispute and, with it, the manner of its resolution, since the elected arbitral judges were not allowed to exceed their competence in any particular case (as will be discussed further, see, especially, section 2.3). For this reason, public notaries and experts in canon law offered formularies of these *compromissa* in their works, from which the typical clauses that these documents were to contain could be derived, including:[10]

a) Identifying the disputing parties.
b) Appointing the arbitrators.
c) Determining the subject matter of the dispute.
d) Binding the disputing parties to comply with the arbitral award.
e) The authority of arbitrators to take various actions.
f) Fixing a contractual penalty in the event of non-compliance with the award.
g) A waiver of the rights by the parties that would allow them to contest the arbitral award.

Some of these clauses are contained in all the surviving *compromissa*. These include the designation of the arbiter or arbiters, a more or less detailed specification of the subject matter of the dispute, and a designation of the scope of the arbiters' powers, which will be discussed further (in sections 2.2 and 2.3). With one exception, these *compromissa*

9 The exception is the first two surviving *comprosmissa* relating to the dispute of the Vyšehrad chapter over the election of the custodian (= C 1a, b), which are inserted in the arbitration charter of the arbitrator – the Vyšehrad provost. Both documents lack the typical formulae, such as *corroboratio* and date, and therefore it is not possible to say with certainty whether they were, or at least should have been, sealed.

10 For the thorough analysis of the formularies, see Wojciechowski (2010), pp.100–108 (on pp. 107–108 a list of the clauses).

also contain a promise to abide by the arbitral judgment, and in most cases this promise was accompanied by an oath or was made under the penalty of a fine. A waiver of the rights is traceable only in three compromise charters, which were from the late 1280s and issued in the disputes of the Vyšehrad Chapter.

While it is evident from this brief overview that the content of the *compromissa* adhere to the clauses of the formularies drawn up by Italian notaries and canonists, in several compromise charters of Bohemian and Moravian origin we even observe reflections on the terminology and phraseology introduced by them. This is already evident in the *compromissum* of the Commander of the Teutonic Order and the Master of the St Francis Hospital in Prague from 1250. Similar passages can be found, for instance, in a formulary drafted by the Italian notary and representative of the Bolognese law school Salatiele in his work *Ars notariae*, the first version of which was compiled in the early 1240s, the second, revised version was published in 1254.

Salatiele, *Ars notariae*[11]	CDB IV/1, pp. 339–340, no. 187 (= C 2)
Labeo ex una parte et Gillius ex altera **compromisserunt in** dominum Accursium **tanquam in arbitrum** electum concorditer et nominatum ab eisdem **super lite** et de lite seu discordia **que vertebatur** et erat **inter eos in hunc modum**, petebat, etc., qui per stipulationem promisserunt sibi invicem dicto arbitro stare, parere et non contravenire omni laudo et arbitrio eius quod laudaverit vel fuerit arbitratus, cum scriptura vel sine semel aut pluries **presentibus partibus et absentibus** dum tamen citatis et **diebus feriatis vel non feriatis** ubicumque et quandocumque et quomodocumque **sedendo aut stando** [...].	[...] **compromittimus in** venerabiles viros et dominos [...] **tamquam in arbitros** nostros **super causis**, **que vertuntur inter nos** super decimis [...] et super omnibus easdem causas contingentibus **sub tali forma**, quod iidem sine strepitu iudicii partes audiant summatim, testes recipiant et cognitis causarum meritis seu eciam visis locis, de quibus agitur, si necesse fuerit, pronunciare valeant **stando vel sedendo**, **die feriato et non feriato, partibus presentibus vel absentibus** [...].

While only certain specific formulations and phrases are reflected in the 1250 charter, the 1281 *compromissum* of Peter, the provost of Vyšehrad, issued in the dispute with his chapter, adopts almost verbatim longer passages that are known, for example, from the formulary published in the work *Ars notaria* by another Bolognese lawyer and notary Rolandinus de Passeggeri in 1255 or 1256.

11 Cited according to Wojciechowski (2010), p. 100.

Rolandinus Passeggeri, *Ars notariae*[12]	CDB VI/1, pp. 212–213, no. 162 (= C 10)
De lite et super lite [...] ipse Antonius ex una parte et do. Cor. ex altera **compromisserunt** communiter et concorditer in Phi. **tanquam in arbitrum et arbitratorem, amicabilem compositorem**, dispensatorem, et bonum virum. **Promittentes** per se et eorum haeredes adinvicem, scilicet una pars alteri vicissim solemnibus stipu. Hincinde intervenientibus, et ipsae partes dicto **arbitro et arbitratori** pro se et suis haeredibus stipu. **stare, parere, obedire et non contravenire aliqua ratione vel causa de iure vel de facto omni laudo, arbitrio, dicto, diffinitioni, et pronunciationi** eius, **quae vel quas** inter eos super praedictis, aut aliquo **eorum** vel praedictorum **ocassione fecerit, dixerit, pronunciaverit, diffiniverit, aut arbitratus fuerit cum scriptura vel sine, semel vel plures diebus feriatis et non feriatis, sedendo et stando, quandocunque et qualitercunque et ubicunque** cum iuris cognitione [...]	[...] quod huiusmodi causa vel res veniret in actum vel effectui mandaretur, in providos et discretos viros [...] confratres et concanonicos nostros, sine dolo, fraude, ac omni captione pure ac fideliter **compromittimus tanquam in arbitros et arbitratores nostros et amicabiles compositores**, ut ipsi arbitrentur, componant, sentencient, et diffiniant inter nos et dictum capitulum super prefatis articulis, iuxta quod eis videbitur expedire **Promittentes** tenore presencium prefatis dominis Welizalo, Bartolomeo, Dominico et magistro Laurencio **arbitris vel arbitratoribus stare**, **parere et obedire et non contraire vel contrafacere de iure vel facto aliqua racione vel causa omni arbitrio, dicto, sentencie, vel diffinicioni**, **quod vel quam** iidem proferent super articulis pretaxatis, **et eorum occasione dixerint, fecerint, pronunciaverint, aut arbitrati fuerint, cum scriptura vel sine scriptura, diebus feriatis vel non feriatis, sedendo vel stando, ubicunque, quandocunque, et qualitercunque** [...]

In addition to these, the *compromissum* of the Vyšehrad Chapter from 1282, based on Peter's charter, also partly reflects the formulary,[13] and the specific phrases are also detectable in three *compromissa* whose texts have not been preserved in full, two of which date from the 1250s and one from the 1280s.[14] This important phenomenon of the reception of foreign formularies in the local environment therefore deserves much more detailed research.

It should be emphasised here that most of the cases in which traces of the typical phraseology of the formularies can be clearly found can be associated with the Vyšehrad Chapter.[15] There is only one documented case of a more extensive use of phraseology in a *compromissum* that is not associated with the Vyšehrad Chapter. This was a dispute

12 Cited according to Wojciechowski (2010), pp. 101–102.

13 CDB VI/1, pp. 273–275, no. 220 (= C 11).

14 CDB IV/1, pp. 446–449, no. 263 (= C 3); CDB V/1, pp. 74–75, no. 35 (= C 4); KLL I, pp. 27–28, no. 34 (= C 12).

15 Besides the disputes over the internal matters of the Vyšehrad Chapter, there is an arbitration which took place between the Knights of the Teutonic Order and the Hospital of St Francis in Prague, but some of the arbitrators were members of the Vyšehrad Chapter, in addition to the Olomouc canon John (= C 2). According to the formal analysis of the charter (see CDB IV/1, pp. 339–340, no. 187), the scribe probably came from the environment of the Knights with the red star. Nevertheless, given that the charter was issued in Prague, the judges were members of the Vyšehrad Chapter, and the charter includes other members of the chapter as sealers and witnesses, it is possible, if not probable, that the charter was drawn up in the chapter.

between Alšík of Melren and the Louka monastery over the tithes from the vineyards in certain villages, which was settled by Archdeacon Ulrich of Znojmo as arbitrator. Here, however, we can link the issuing of the charter to another environment which, like the Vyšehrad Chapter in Bohemia, was a centre of legal knowledge in Moravia and from which the arbitrators in various disputes between Moravian ecclesiastical institutions very often came: the chapter in Olomouc. Not only was Archdeacon Ulrich a member of the Olomouc Chapter by virtue of his title, but although the negotiations took place in Znojmo, the head of the chancery of Bishop Theodoric of Olomouc, the notary Henry of Tuřany, was also present and drew up the charter.

Thus, if the very existence of compromise charters together with the knowledge of their content indicates a general awareness of the formal aspects of arbitration at the time, the reception of the phraseology of foreign formularies and manuals for the drafting of local *compromissa* suggests a more thorough knowledge of the procedural mechanisms of arbitration discussed by recent scholars. This seem to have been concentrated in two main centres: Prague (or Vyšehrad Chapter) in Bohemia, and the Olomouc Chapter in Moravia.

1.2 *Receptum* and Other Documents Arising in the Course of Arbitration

Once the *compromissum* had been drawn up by the parties to the dispute, it was necessary for the elected persons to accept the role of the arbitral judges, thereby committing themselves to adjudicate in the dispute. Acceptance of the *compromissum* could be made in writing, in the form of a document known as a *receptum*. Although the acceptance of a *compromissum* is evidenced in Bohemian and Moravian diplomatic sources by the fact that the elected arbitrators eventually settled the dispute, and some charters explicitly refer to the acceptance of a *compromissum*,[16] no actual written *receptum* has yet been found. However, the existence of a formulary preserved in the collection of formularies of Bishop Tobias of Prague suggests that this type of writing may have already existed in the period under study.[17]

In addition to the receptum, the course of arbitration, like court proceedings, may in some cases have been conducted in writing. This is evidenced by one document related to the dispute over the patronage of the church in Troskotovice in 1275. The parties issued a joint *compromissum*, by which they entrusted their dispute to the three arbitral judges.[18] Two

16 In one of the first surviving arbitration charters from 1250, the arbitrator – Engelbert, the dean of Vyšehrad, explicitly states that he accepted the *compromissa* of the disputing parties: *compromissionem venerabilis domini magistri Dyonisii prepositi ex una parte et domini Bartholomei custodis et capituli Wissegradensis ex altera super iure utriusque partis, quod dicebant se habere tum in collacione custodie, quam electione custodis Wissegradensis, in nos ad ultimum recepimus ipsorum precibus inclinati* (CDB IV/1, pp. 338–339, no. 186). Similarly, for example, CDB IV/1, pp. 446–449, no. 263 (= C 3): *Nos igitur propter multas pias causas iam dictum arbitrium prefata pena valatum acceptamus.*

17 FTB, p. 14, no. 16: [...] *nos W.* [...] *Pragensis et magister Io. Saccensis ecclesiarum prepositi* [...], *cupientes odiosam litium discordiam amputare, compacientes etiam laboribus et expensis, labores huiusmodi ad sopiendum lites predictarum personarum recepimus spontanea voluntate*.

18 CDB V/2, pp. 463–464, no. 787 (= C 6).

days later, these newly elected judges de facto accepted the agreement by their charter, in which they set the date and place of the hearing and, in accordance with the provisions of the *compromissum*, also determined a contractual penalty in the event that one of the parties failed to appear at the hearing.[19] Another example that the arbitration could be conducted in writing is the two charters issued in 1293 in a dispute over the parish boundaries of the Brno churches of St Peter and St James. In this case, both parties undertook in writing to submit to the arbitrator's judgement.[20]

1.3 Arbitration Charters

The arbitral award concluding the arbitration may have a written form that we can refer to as an arbitration charter (in the sources sometimes *arbitrium*, which is also a term for the arbitration or the arbitral award itself). There are around twice as many surviving arbitration charters from the period in question as there are *compromissa*. Unlike the latter, the arbitration charters were documents with permanent legal validity, which provided the disputing party with proof of the arbitral award.

The surviving arbitration charter issued by domestic arbitral judges are commonly encountered from 1240 onwards. Again, these are documents that take the typical form of sealed charter. This is not surprising, since they are similar to judicial charters, which were issued quite frequently at that time by ordinary or delegated judges as the conclusion of court disputes. The composition and wording of arbitration charters are naturally partly dependent on the diplomatic environment in which they were created,[21] but, like *compromissa*, they also contain regularly recurring phrases or wording regardless of their place of creation. This is because, like *compromissa*, arbitration charters had to be drafted in such a way that they did not mislead and could not be challenged from a formal point of view.

For this reason, the composition of these charters was discussed by the canonists of the time, and their formularies were included in their works. Thus William Durand, in his manual *Speculum iudiciale,* eloquently states: *Ut autem compromissum et arbitrium recte concipiantur, ut nihil de premissis possit eis opponi, utriusque formas hic duximus inserendas*.[22] He then offers the following wording of the formulary, from which we extract the opening clause: *In nomine Domini amen. Nos Caius et Martinus, concorditer electi arbitri, arbitratores etc. in forma compromissi, a Tito ex parte una et Seio ex parte altera, super lite et*

19 CDB V/2, pp. 465–466, no. 788.

20 KLL I, pp. 286–287, nos. 736 and 737.

21 As an example *pars pro toto* could serve a pair of charters issued in the same dispute between the Johannites (or the parish priest in Přibice) and the monastery in Dolní Kounice, one of which was issued in 1284 (KLL I, pp. 31–32, no. 47) and the other in 1293 (KLL I, pp. 298–299, no. 762). The wording of the later document is clearly based on the text of the earlier one. It should also be noted that in both cases, the charter was issued in two copies for each of the parties to the dispute, which can also be observed as a particularity of the given environment.

22 Wiliam Durand, *Speculum iudiciale*, Lib. 1, Part. 1 (rubr. *De Arbitro et arbitratore*), rubr. *De forma compromissi et arbitrii*.

controversia etc., ex praemissis vel non etc., prout in forma compromissi plenius continetur, lite coram nobis legitime contestata, visis, auditis, intellectis et examinatis partium iuribus deliberatione praehabita diligenti, pro bono pacis et concordie ex vigore compromissi praedicti, Christi nomine invocato ordinamus, laudamus, arbitramur, diffinimus, dicimus atque praecipimus, quod [...]. A similarly constructed, if somewhat simpler, formulary is offered, for example, by another canonist active in the 13th century, Gratia de Arezzo, in his *Summa de iudicario ordine*: *Nos M., D. et S., arbitri electi et assumati a P. ex una parte et a G. ex altera, super lite et controversia, que vertebatur inter eos super decem, quae petebat P. ex causa depositi et super aliis omnibus questionibus* [...] *laudamus, diffinimus, praecipimus et arbitramur, quod* [...].[23]

Since we already know that the wording of Bohemian and Moravian compromise charters in some cases reflects the phraseology of the Italian formularies, it is not surprising that we also find traces of them in the arbitration charters. As this phenomenon deserves more detailed examination, it is worth referring to the arbitration charter of Master Velislav, who in 1279 arbitrated a dispute between the provost of the Vyšehrad Chapter and Půta of Rýzmberk.[24] It states: *Ego Welizlaus, terre notarius et canonicus ecclesie Wissegradensis, in causa, lite, seu questione, que vertebatur inter honorabiles viros capitulum dicte ecclesie Wissegradensis ex una parte et nobilem virum dominum Potonem dictum de Rysenberch ex altera super dimidietate ville Kyrchs, electus arbiter, arbitrator sive amicabilis compositor partibus ab eisdem invocato Dei nomine laudo et dico arbitrando et arbitrium diffiniendo, quod* [...]. Similarly, other arbitration charters of the period also contain traces of the mentioned formularies.

Despite the fact that this phenomenon has not yet been sufficiently researched, it can already be concluded that the majority of arbitration charters issued in Bohemia and Moravia – regardless of where they were created – contain all, or at least a large part, of the clauses introduced by the formularies:[25]

a) *Intitulatio* with the names of the issuers – arbitral judges.[26]
b) Identification of the parties to the dispute, together with a designation of the subject matter of the dispute.[27]

23 Gratia de Arezzo, *Summa de iudicario ordine*, P. 3, Tit. 1 (*De arbitris*), § 5, in: Bergmann (1842), p. 383.

24 CDB VI/1, pp. 104–105, no. 58.

25 The following summary of the clauses of Bohemian and Moravian arbitration charters corresponds in principle to the clauses provided by the formularies, as given (together with a detailed analysis of them) in Wojciechowski (2010), pp. 187–195.

26 It is not very often that issuers are referred to as arbitral judges at this point, see, e.g., CDB IV/1, pp. 446–449, no. 263 (= C 3): *Tobyas et Cuno, Dei gracia Pragensis et Bolezlaviensis ecclesiarum prepositi, et frater Iohannes, ordinis Predicatorum lector in Praga, arbitri a partibus electi*; CDB VI/1, pp. 104–105, no. 58: *Ego Welizlaus, terre notarius et canonicus ecclesie Wissegradensis, in causa* [...] *inter* [...], *electus arbiter arbitrator sive amicabilis compositor partibus ab eisdem.*

27 For example, CDB IV/1, pp. 338–339, no. 186 (= C 1): *quod compromissionem* [party] *ex una parte et* [party] *ex altera super* [subject matter]; CDB V/1, pp. 74–75, no. 35 (= C 4): *quod super controversia, que vertebatur inter* [party] *ex una parte et* [party] *ex altera super* [subject matter]; CDB V/1, pp. 201–202, no. 122: *Cum inter* [party] *ex una parte et* [party] *super* [subject matter] *coram nobis questio verteretur*; CDB V/1, pp. 216–217, no. 135: *cum causa, que vertebatur inter* [party] *ex una parte et* [party] *ex altera super* [subject matter] *coram venerabili patre domino B., Olomucensi episcopo, esset aliquamdiu agitata*; CDB V/2, pp. 188–189, no. 596: *quod cum inter* [party] *et* [party] *quaestio verteretur et jam dudum agitata fuisset super* [subject matter].

c) Disclosure of the fact that the dispute has been settled by arbitration (some of the arbitration charters then apparently also incorporate some of the compromise clauses, for example, on the obligation to accept the arbitral award or on penalties).[28]
d) A brief description of the procedure used.[29]
e) The operative part of the judgement containing the substantive ruling on the claim.[30]
f) A reminder to the parties regarding the contractual penalty for failure to comply with the provisions of the award (which is rare in the cases examined here).

The fact that most arbitration charters, regardless of the diplomatic environment in which they originated, were drawn up with the knowledge of what information and clauses they should contain, along with similar findings in connection with the *compromissa*, shows that from around the middle of the 13th century the principles of arbitration based on canon law and contemporary interpretations by foreign scholars influenced local extrajudicial procedures for the settlement of ecclesiastical disputes.

1.4 Charters Issued after the Arbitrators' Award

As mentioned above, compromise charters regularly contained a provision whereby the parties to the dispute agreed to accept the arbitrators' award. This acceptance of the award could also be in writing. This is shown by the charter of Bishop Bruno of Olomouc and his chapter in the dispute with the abbot of the Břevnov monastery in 1255, in which the bishop expressly accepts and agrees with the arbitrators' verdict (*Quam ordinacionem nos de concordi et unanimi voluntate acceptantes et ratam habentes* [...]).[31] In

28 For example, CDB V/1, pp. 74–75, no. 35 (= C 4): *in nos est conpromissum utriusque tamquam in arbitros et ipsum firmatum est conpromissum*; CDB V/1, pp. 201–202, no. 122: *tandem ambe partes pro bono pacis et concordie in nos tamquam in personam amicabilem concorditer convenerunt, promittentes in manus nostras fide prestita ratum habere, quicquid super hiis statuere curaremus*; CDB V/1, pp. 216–217, no. 135: *tandem in nos tamquam in arbitros ex utraque parte supradicta causa committebatur de consensu venerabilis patris nostri Olomucensis episcopi terminanda, adiecta pena decem marcarum persolvendarum domino episcopo et nobis arbitris tantumdem a parte nostro arbitrio contradicente vel non servante*; KLL I, pp. 27–28, no. 34 (= C 12): *in nos extitit tamquam in arbitrum seu arbitratorem, sive amicabilem compositorem ab utraque parte voluntarie compromissum.*

29 For example, CDB IV/1, pp. 94–95, no. 21: *Auditis itaque proposicionibus et allegacionibus utriusque partis et habita discussione non modica super eis unanimiter concordavimus*; CDB V/1, pp. 74–75, no. 35 (= C 4): *Nos igitur dictis parcium diligenter auditis et intellecta facti recitacione per principales personas ac lite coram nobis plenissime contestata*; CDB V/1, pp. 201–202, no. 122: *Cognitis igitur iuribus utriusque partis sic habito consilio*; KLL I, pp. 27–28, no. 34 (= C 12): *Nos igitur in domo fratrum minorum in Znoym ad partem sedentes, cum predictis tanquam sapientibus et consiliariis habita diligenti examinatione et tractatu cause predicte, requisito consilio et habita voluntate predictorum sapientum.*

30 For example, CDB IV/1, pp. 338–339, no. 186 (= C 1): *Secundum formam compromissionis nobis traditam ab eisdem per diffinitivam sententiam pronunciamus*; CDB IV/1, pp. 446–449, no. 263 (= C 3): *ex arbitraria potestate ordinamus, laudamus et in scriptis diffinitive sentenciando pronunciamus*; CDB V/1, pp. 74–75, no. 35 (= C 4): *ita diffinimus, pronunciamus et arbitramur*; CDB V/1, pp. 216–217, no. 135: *Nos itaque arbitrio in nos suscepto taliter decrevimus esse statuendum;* CDB VI/1, pp. 104–106, no. 58: *invocato Dei nomine laudo et dico arbitrando et arbitrium diffiniendo.*

31 CDB V/1, pp. 109–112, no. 55. Another similar case is a charter jointly issued by the Prague bishop Tobias and the abbot of the Hradisko monastery in 1280 in their dispute over the boundaries of some villages, in

addition, a number of documents have also survived which are in the nature of a written proclamation by one or both of the parties to the dispute of the pronouncement of the judgement or its actual execution. The other group of documents, issued after the dispute had been settled, are the confirmations of the arbitration verdict by the competent authority, most often the bishop or the pope.

Although these documents certainly deserve a more thorough analysis with regard to the overall course of the disputes in the period under consideration, it has to be the subject of future research. In the following text, the second question of this study, related to aspects of arbitral procedure that emerge from the arbitration and compromise charters, the form and content of which was presented above, will be discussed.

2. Arbitration Practice

This section will focus on several aspects of arbitration that can be identified in the extant charters (especially in *compromissa* and arbitration charters). It will trace how the arbitrations were initiated, how the arbitral judges were selected, and what powers they had. Finally, it will consider what forms of arbitration were actually practised in the environment of Bohemia and Moravia.

2.1 Initiation and Grounds for Arbitration

In the 1280s, there was a dispute between Alšík of Melren and the monastery in Louka over the tithes from the vineyards in Havraníky, for which several documents have been preserved. They include an arbitration charter issued in 1284 by Ulrich, Archdeacon of Znojmo and a confirmation charter of Bishop Theodoric of Olomouc from 1289, which confirmed Ulrich's ruling.[32] According to the arbitration charter, both parties entrusted their dispute to Ulrich *tamquam in arbitrum seu arbitratorem sive amicabilem compositorem*, from which we might infer that the parties agreed to settle their dispute directly by arbitration. However, Bishop Theodoric's confirmation gives a different account of how the dispute was initiated: Ulrich was first appointed by the bishop as a delegated judge (*iudex delegatus*), and only then was the dispute settled *per compositionem et concordiam*. Therefore, if Theodoric's confirmation had not survived, the fact that the action was first brought before the bishop's court and that the arbitration was agreed upon only in the course of this procedure would not have come to light.

This example highlights the limits to our understanding of how arbitrations were initiated, as charters may not contain sufficient detail to determine this. Moreover, in many cases, there is only one surviving document from which to reconstruct the course of the arbitration. Many solitary sources refer only very briefly and unspecifically to

which they state: *Quas metas et fines, prout superius sunt expresse, nos predicti episcopus et abbas ratas habentes et gratas ipsas acceptamus et tenore presencium confirmamus* (CDB VI/1, pp. 143–145, no. 90).

32 KLL I, pp. 27–28, no. 34 (= C 12) and p. 176, no. 444.

the commencement of the dispute, since their purpose was not to describe the course of the arbitral proceedings but to record in writing the arbitrators' award or other matters relating to the dispute. Despite these limitations, it can be assumed, at least in some cases, that the intention to settle the dispute out of court by arbitration was indeed paramount. This is evidenced in a charter issued by Bishop Bruno of Olomouc in 1255 in his dispute with the abbot of Břevnov monastery regarding the installation and deposition of parish priests in the church of Rajhrad.[33] Although the abbot was convinced of his rights, he proposed to the bishop that they settle the dispute by arbitration, as he did not want to go to court.[34] After consulting with his chapter, the bishop accepted this proposal. However, most documents relating to the arbitrations simply state that the arbitrators had been selected, without giving further details. Thus, it is often only stated that the parties agreed to settle their dispute by arbitration and with certain selected arbitrators, or that their dispute was settled in this way.[35] Some documents state that the disputes had been going on for a long time, but there is no indication of whether the parties had attempted to resolve them by any other means,[36] or there is no indication of exactly how the long-running dispute was handled prior to the arbitration.[37]

However, the dispute over the tithes from the vineyards in Havraníky revealed a different way in which arbitration took place. One of the parties filed a lawsuit in court, and it was only during the court hearing that it was agreed to settle the dispute by arbitration. These cases, involving both secular and ecclesiastical litigation, appear to be relatively

33 CDB V/1, pp. 109–112, no. 55.

34 Ibidem: [...] *nolens* (the abbot) *subire iudicium contenciosum nobiscum* (with Bishop Bruno) *et canonicis nostris petebat humiliter et devote, ut aliquibus viris discretis ipsam causam delegaremus per conpositionem amicabilem terminandam.*

35 For example, CDB IV/1, pp. 339–340, no. 187 (= C 2): *quod nos* [...] *compromittimus in venerabiles viros* [...] *tamquam in arbitros nostros*; CDB V/1, pp. 74–76, no. 35 (= C 4): *quod super controversia* [...] *in nos est conpromissum utriusque tamquam in arbitros et ipsum firmatum est conpromissum*; CDB V/1, pp. 569–570, no. 384: *arbitrantibus nobilibus viris et discretis* [...], *quos ad hoc ex utraque parte concorditer elegeramus*; CDB V/2, pp. 92–93, no. 535: *in causa* [...] *concordavimus per honorabiles viros sub hac forma*; CDB V/2, pp. 184–185, no. 593: *quod controversia* [...] *hoc modo in firmam amiciciam est redacta*; CDB V/2, pp. 420–421, no. 755: *quod super lite, viris providis et discretis mediantibus et partibus in arbitrium ipsorum consencientibus* [...], *firma concordia ad composicionem amicabilem per memoratos arbitros convenissent*; CDB V/2, pp. 550–551, no. 840: *quod controversiam et litem* [...] *committentes ex utraque parte in arbitrium viris honorabilibus et discretis* etc.

36 For example, CDB IV/1, pp. 94–96, no. 21: *Durante quadam discordia* [...], *tandem placuit eisdem in nos arbitros convenire*; CDB IV/1, pp. 240–241, no. 143: *quod questio* [...] *iam dudum ventilata in hunc modum per amicabiles arbitros* [...] *finaliter est decisa*; CDB V/2, pp. 179–180, no. 589: *quod, cum multo tempore* [...] *controversia perdurasset, tandem inter eos mediantibus bonis et honestis viris* [...], *nostro* (the Bishop John III of Prague) *ad hec accedente consensu talis ordinatio, conventio et compositio amicabilis intervenit*. CDB V/2, pp. 188–189, no. 596: *quod cum* [...] *quaestio verteretur et jam dudum agitata fuisset* [...], *tandem ad parcendum laboribus et expensis placuit eis nobis* (the Bishop Bruno of Olomouc) *tanquam arbitris committere totum factum*; CDB V/2, pp. 483–484, no. 797: *quod controversia, que inter nos longo tempore agitabatur* [...] *arbitrantibus probis viris et discretis*; CDB V/2, pp. 617–618, no. 880: *quod, cum discordia sive controversia* [...] *aliquamdiu verteretur, talis inter ipsos de consensu et mandato nostro* (the Bishop Bruno of Olomouc) *compromissio intervenit, quod ex utraque parte in arbitrium quatuor proborum virorum fuit legitime compromissum* etc.

37 CDB V/2, pp. 56–58, no. 511 (1267): [...] *quod cum inter nos* (Peter, the provost of Vyšehrad chapter) *ex parte una et Sifridum dictum de Misna, civem Lutomiricensem, ex altera super quibusdam agris* [...] *questio verteretur, super ea fuisset diucius et diversis modis hinc inde disceptatum, tamdem per arbitros communiter electos eadem decertatio exstitit diffinita.*

common. The focus here is on those disputes that were brought before an ecclesiastical court, but which, in principle, also appeared to function in the same or similar way as an action brought before a secular court.[38] In accordance with the judicial practice of the time, some of these disputes were brought before the local ecclesiastical court (that is, before the court of the bishop or of judges delegated by him), while others were brought before the curial court and were subsequently judged by judges delegated by the Pope.

The latter possibility appears much earlier in Czech lands, in the first half of the 13th century. One of the earliest documented disputes, which was probably settled by arbitration after the court proceedings were opened, took place in 1226 between Louka monastery and Adam, the parish priest of the Church of St Michael in Znojmo, which was over the parish rights of the Church of St Nicholas in the same town.[39] The complaint of the abbot of Louka was settled by three foreign judges delegated by the Curia. In the first phase of the proceedings, the judges excommunicated the parish priest for failing to appear in court. After a year, a new hearing was held, during which the parish priest was absolved from excommunication on the basis of his oath, so that an agreement could finally be reached between the two parties. The initiative for this came from the delegated judges and the provost of the Church of St Hippolyte in Znojmo, Wikbert, who was the notary of the Czech king Přemysl Otakar I and was apparently commissioned by him to manage the reconciliation with the abbot. At their suggestion (*Ad peticionem quoque nostram et domini Wigberti, qui ex parte regis venerat, ut concordiam inter eos procuraret* [...]), the abbot of the Louka monastery eventually agreed to settle the dispute by agreement. That this agreement (called *concordia* in their charter) was probably based on arbitration with the delegated judges as arbiters, is revealed by the later confirmation of Pope Gregory IX from 1231, according to which Gregory confirmed the agreement (here *compositio*) mediated between the disputing parties by the "amicable judges" (*mediantibus predcitis iudicis amicabilis*).[40]

The course of this dispute shows that it was eventually the judges delegated by the Curia who invited the abbot to settle the dispute amicably. A similar case is documented in 1247 in a dispute between the Kladruby monastery and the parish priest in Kladruby. There are two surviving documents relating to the dispute, which allow us to follow and reconstruct its course in more detail.[41] The dispute concerned properties in the village of Dobrá, which the abbot claimed had been unjustly acquired by the parish priest of Kladruby. The abbot therefore lodged a complaint with the Curia, which followed the usual procedure for the resolution of similar disputes: by written mandate, Pope Innocent IV

38 For example, CDB IV/1, pp. 78–79, no. 16: [...] *ego G., Teplensis electus, ad citacionem cuiusdam militis pro quadam hereditate nomine Nelseov in Chladrun coram rege et baronibus litigaturi convenimus; super quo plurimum disceptantes, tandem in arbitros convenimus.*

39 CDB II, pp. 279–280, no. 285. On the course of the dispute, see Führer (2021), pp. 133–134.

40 CDB III/1, p. 3, no. 4.

41 Mandate *Ea, que de bonis* (see below) of Pope Innocent IV of 6 February 1247 (CDB IV/1, pp. 193–194, no. 101) and the arbitration charter of Abbot of Niederalteich, Hermann, of 8 October 1247 (CDB IV/1, pp. 213–215, no. 119).

appointed Hermann, Abbot of the Niederalteich monastery, as judge of the dispute.[42] The trial began following the standard court procedure.[43] As the monastery was represented by a procurator, the judge first asked him to present his power of attorney – the *procuratorium*.[44] After examining it, the judge could then invite the plaintiff to present his claim, which the parish priest, who defended himself, was obliged to respond. The plaintiff's procurator stated that the parish priest held the possessions illegally (*proposuit* [...] *possessiones* [...] *illicite detinere*), which the parish priest denied, saying that he had bought them from the monastery as a lifetime possession (*e contrario dixit se illas possessiones non illicite, sed precario et titulo personalis condictionis ab ecclesia comparasse per vite suae tempora possidendas*). Although the denial of the action created the conditions for further judicial proceedings (i.e., it could lead to a *litiscontestatio*[45] and subsequent positional and evidentiary proceedings followed by a rendering of a judgement), the judge offered both parties a different solution. "Preferring conciliation to litigation", he first attempted to bring the parties to an agreement (*nos autem pacem litibus praeferentes, partes primo concordare attemptavimus*). The fact that this agreement was formally to take the form of arbitration is evidenced by the following provisions of Hermann's charter. The abbot set a contractual penalty and both parties agreed to submit to the award of the judge,[46] which are typical procedural elements of arbitration. While both parties agreed to this suggestion, the question of whether this procedure could be invoked at all remained. As mentioned above, the abbot of Kladruby was represented by a procurator and his powers in court were limited by his *procuratorium*, which the procurator was not allowed to exceed. After it was established that the *procuratorium* took into account the possibility of settling the dispute by reconciliation,[47] the judge-arbitrator thus initiated arbitration and delivered his judgment.

The amicable settlement of the open court litigation was essentially in accordance with the canonical procedure. Indeed, according to the *Liber extra*, in cases where it

42 In this case, it was not a general mandate of delegation, but a special mandate *Ea, que de bonis*, by which the Curia ordered the delegated judges to return the misappropriated property of ecclesiastical institutions. This was usually an alienation of property without the consent of the whole chapter or convent, which was therefore probably the crux of the dispute in this case. On the mandates *Ea, que de bonis,* see, e.g., Krofta (1904), p. 151; Führer (2021a), p. 115; Herde (1970/I), pp. 473–477. The other mandate *Ea, que de bonis* will be discussed here in section 3.2. See also note 55.

43 For the usual course of court proceedings in Bohemia and Moravia in the 13th century, see Führer, Lukáš: *Settling Disputes, Spreading Canon Law: Trials Concerning Parish Rights, Patronages and Tithes in the Dioceses of Prague and Olomouc in the Thirteenth Century*, which is now being peer-reviewed.

44 Cf. X 1.38.1: *Non auditor quis tanquam alterius procurator, nisi habeat mandatum legitime factum* (Friedberg II [1959], coll. 211–212). On this, see Nörr (2012), p. 30.

45 On the *litiscontestatio*, see Nörr (2012), pp. 109–112.

46 [...] *poenas ad hoc invenimus, et ipsae a nobis inducente nostro arbitrio praecise negotium submiserunt, promittentes fide data se ratum qualecunque nostrum arbitrium habituras.*

47 The extant *procuratorium* indeed states, inter alia, that the procurator is entitled *ad paciscendum*. For similar example, see CDB V/1, pp. 201–202, no. 122, where it is stated that the procurators of the disputing parties had a mandate to accept the arbitrator's award (*Quam ordinationem soror Herburgis et Gotfridus, procurator sororum, habens super hoc speciale mandatum, et frater Ricquinus, pro ipso hospitali mandatum habens simile, ratam habuerunt et spontanee acceptarunt*).

was possible and the subject matter of the dispute allowed it, the judge could invite the disputants to a reconciliation: *Iudex potest et debet se interponere pro transactione inter partes facienda, praeterquam in casibus, in quibus iura hoc non admittunt, ut super matrimonio*.[48] While some older canonists specifically in the 12th century rejected the possibility of a judge being appointed an arbitrator, others, especially in the 13th century, interpreted this possibility as being in accordance with canon law[49] (for example, Tancredus: *secundum canonum tam ordinarius quam delegatus arbiter esse potest*[50]).

In practice, the correctness of the procedure of the judges delegated by the Pope, who invited the parties to reconciliate, is in the above-mentioned dispute over the parochial rights of the Znojmo church demonstrated by the following developments. In 1231 the Louka monastery had the verdict confirmed by Pope Gregory IX.[51] Although his charter is based on the formulary for the confirmation of judgments with the typical arenga *Ea, que iudicio*,[52] so that it should be borne in mind that its provisions depend on the *stilus curiae*, its wording shows that the Pope respected the way in which the dispute was settled. As already mentioned, the *narratio* of the papal charter indicates that Louka monastery asked the Pope to confirm the *compositio* mediated between the parties by the "amicable judges".[53] Gregory IX then confirmed this *compositio* on the basis of the finding provided by the delegated judges' charter that the agreement was made *sine pravitate, provide et sponte* and was accepted and observed by both parties.

From the point of view of the Papal Curia, the settlement of the dispute by means of a *compositio* was therefore acceptable. This is also clear from the provisions of the general mandates of delegation (delegation rescripts), some of whose clauses were regularly drafted on the basis of the formulary of this type of mandate. Although the mandate for the judges to resolve the complaint of the abbot of Louka has not survived, it can be assumed that it was also drafted using the usual clauses. In essence, the judges were instructed to summon the parties to a hearing and to establish justice, which they could then enforce by means of coercion (i.e., excommunication).[54] Therefore, judges do not have to resolve the dispute a priori through the courts, which is in compliance with the *Decretal* mentioned above allowing the judges to settle disputes by agreement. The same applies to the mandates *Ea, que de bonis*, one of which was given to the Abbot of

48 X 1.36.11, in: Friedberg II (1959), coll. 210; see, e.g., Ott (1877), p. 74.

49 See Litewski (1999), p. 582.

50 Tancredus de Bologna, *Ordo iudiciarius*, P. 1, Tit. 3 (*De arbitris*), § 2, in: Bergmann (1842), p. 104.

51 CDB III/1, p. 3, no. 4.

52 On the *Ea, que iudicio* charters, see note 128.

53 The *narratio* is certainly based on the *suplica* of the procurator *ad impetrandum*, who was authorized to secure the issuance of the papal confirmation.

54 Cf., e.g., CDB II, p. 112, no. 123: *mandamus, quatinus partibus convocatis, et auditis hinc inde propositis, quod iustum fuerit, appellatione postposita, statuatis; facientes quod decreveritis, per censuram ecclesiasticam firmiter observari*, or CDB V/1, pp. 54–55, no 18: *mandamus, quatinus partibus convocatis audias causam et appellatione remota debito fine decidas, faciens, quod decreveris, per censuram ecclesiasticam firmiter observari.* In addition to this clause, the delegation rescripts usually contain the so called *Testes autem* clause, which allows witnesses to be compelled to testify, and then the *Quod si non omnes* clause, which provides for the possibility that not all the delegated judges have to be present at the trial (for this, see section 2.3 and note 128).

Niederalteich to resolve the complaint of the Abbot of Kladruby. They did not specify how the dispute was to be resolved, the Pope merely ordering the judge to ensure the lawful restitution of the illegally alienated property.[55] In both cases, the possibility of settling the dispute through arbitration was therefore not excluded.

In both cases, the local disputes were heard by foreign delegated judges. Some time later, however, the sources reveal agreements on the amicable settlement of disputes in the course of court proceedings conducted by local judges, thus illustrating the implementation of this principle in Bohemia and Moravia. In 1275, in a dispute between the monastery of Vizovice and the Brno Minorites, three judges were delegated by the Pope: the dean of Olomouc Alexius, the provost Albert and Bishop Bruno of Olomouc, who sub-delegated his mandate to the Olomouc canon, John of Homburg.[56] In their charter, the above-mentioned principle resulting from the *Liber extra* is recorded in the following words: "It is among the duties of a judge to bring discordant parties to reconciliation" (*Ad officium iudicum proprie pertinet, ut partes discordantes ad concordiam revocent*).

However, the actual appointment of the arbitral judges in this case differs from the disputes referred to above. The delegated judges did not become arbitrators, but, with the approval of them, the parties chose other persons to settle their dispute. There are several other similar cases from the period in question, including those in which the trial was initiated before a local episcopal court, either directly before the bishop or before judges delegated by him. One such case – a dispute over the patronage right of the church in Troskotovice – is documented by a compromise charter, the *narratio* of which thoroughly captures the course of the proceedings and allows us to look at the whole process in more detail.[57] After the judges delegated by the Bishop of Olomouc failed to reach a verdict due to various postponements and adjournments, both parties agreed to settle the dispute by arbitration. For this they sought the consent of the Bishop of Olomouc, whereupon each party chose one arbitrator and set their powers, which will be discussed later (in section 2.3). More important at this point is the justification for their actions. The *compromissum* shows the apparent dissatisfaction of the parties with the prolongation of the court proceedings, which involved considerable costs for both parties: *Sane, quia nobis visum fuit, quod per iudiciorum strepitum nonnumquam partes gravarentur laboribus et expensis, in* [names of arbitrators] *compromisimus*.

The long duration of the litigation, coupled with the prolongation of the court proceedings and the associated expenses, which increased the parties' court costs, seems

55 Innocent IV, in his mandate, ordered the abbot of Niederalteich: *mandamus, quatenus ea, quae de bonis ejusdem monasterii alienata inveneris illicite vel distracta, ad jus et proprietatem ipsius studeas legitime revocare, contradictores per censuram ecclesiasticam appellatione postposita compescendo.* Other mandates *Ea, que de bonis* are formulated in the same way, see, e.g., CDB V/1, pp. 122–123, no. 61: *mandamus, quatinus ea, que de bonis ecclesie ipsius loci ad dictum hospitale spectantis alienata inveneris illicite vel distracta, ad ius et proprietatem ipsius ecclesie studeas legitime revocare, contradictores* etc., or CDB V/1, p. 282, no. 176: *mandamus, quatinus ea, que de bonis ipsius hospitalis alienata inveneris illicite vel distracta, ad ius et proprietatem eiusdem hospitalis legitime revocare procures; contradictores* etc.

56 CDB V/2, pp. 450–451, no. 777.

57 CDB V/2, pp. 459–461, no. 784 (= C 5).

to be one of the most common reasons why disputants agreed to arbitrate.[58] Indeed, even the aforementioned charter of delegated judges from 1275 emphasises that conciliation (here clearly arbitration) relieves the parties of costs and fees (*per quam partes releventur a laboribus et expensis*). For the same reasons, in 1269 an arbitration took place in a dispute between Knights Templar in Čejkovice and the monastery in Žďár nad Sázavou, which was initially heard by Bishop Bruno of Olomouc and his official, Master Heidenreich. From Bruno's charter of 25th September 1269, it is evident that during the proceedings there were several postponements in connection with the appointment of a new procurator, the pronouncement of an interlocutory judgment and the hearing of an appeal.[59] The outcome of these proceedings is not known as we do not have the necessary documents. However, on the 25th of October of the same year, the bishop issued a charter closing the whole case.[60] It reveals that, because of the delays in the courts, the parties agreed to settle the dispute by arbitration, with the bishop as arbitrator. One of the reasons given in Bruno's arbitration charter is to save court costs: *quod cum inter venerabilem virum dominum abbatem de Sar et conventum ejus et fratres domus militiae de Templo quaestio verteretur et jam dudum agitata fuisset super jure parochiali et decimis in Michelsdorf, tandem ad parcendum laboribus et expensis placuit eis nobis* (i.e., bishop Bruno) *tanquam arbitris committere totum factum*.

In 1258, a dispute between Nová Říše monastery and Ludmila[61] and her son Marquard of Červený Hrádek over the patronage of the church in Stará Říše was also settled by arbitration.[62] In the *narratio* of the arbitration charter of the four arbitral judges, it is recorded that as the dispute had been pending before the Bishop of Olomouc for a long time, both parties, with the consent of the bishop, finally entrusted it to the arbitrators (*quod, cum causa* [...] *coram venerabili patre domino B., Olomucensi episcopo, esset aliquamdiu agitata, tandem in nos tamquam in arbitros ex utraque parte supradicta causa committebatur de consensu venerabilis patris nostri Olomucensis episcopi terminanda*). Thus, behind the words *cum causa* [...] *esset aliquamdiu agitata* we can again sense the dissatisfaction of the disputants with the duration of the process. Court delays and high costs also resulted in arbitration at one stage in the complicated dispute between the Herburgy monastery in Brno and the monastery in Zábrdovice over the village of Diváky, as is explicitly stated in the 1287 charter of Bishop Theodoric of Olomouc: *quod cum lis et causa et questio verteretur inter* [...] *Theodericum, abbatem Zaberdowicensem* [...] *et sororem Katherinam priorissam et conventum Celle sancte Marie in Brvnna* [...] *et coram diversis iudicibus utraque pars fuisset gravata multis laboribus, sumptibus et expensis lite nondum finita, volentes ambe partes ad concordiam pervenire et vitare dampna plurima et expensas, pro bono pacis et quietis, quia non*

58 Although the arbitrator may have requested a fee in some cases, unlike in court fees were not usually imposed on the parties in arbitration. For this, see Wojciechowski (2010), pp. 123–124 and 149. For the Austrian countries, the same reasons for resolving disputes by arbitration are given by Hageneder (1967), pp. 197–198.

59 CDB V/2, pp. 186–187, no. 594.

60 CDB V/2, pp. 188–189, no. 596.

61 Regarding women as parties in arbitration, see Wojciechowski (2010), p. 93–94.

62 CDB V/1, pp. 216–217, no. 135.

decet servos Dei litigare, talem concordiam, conposicionem et transactionem de assensu eciam et voluntate nostra fecerunt.

Apart from the reasons of initiating the arbitration during the court proceedings, often caused by prolongation and expenses, it is apparent from presented sources that various manners of commencement of the arbitration were employed. Another examples, showing this diversity, can be provided.

In 1293, a dispute over certain tithes between the monastery in Tišnov and Peter, the parish priest in Čejč, was judged by Theodoric, the abbot of Zábrdovice.[63] From his charter it is apparent that the Cistercian nuns lodged a complaint against the parish priest with the Bishop Theodoric of Olomouc, who entrusted the abbot with his mandate to investigate and conclude the dispute. The delegated judge thus summoned both parties to a hearing, at which Peter proposed that the dispute be settled by conciliation (*Petivit autem dictus dominus Petrus concordiam, quia vellet cum adversa parte amicabiliter concordare*). The hearing was therefore postponed until the following day, when the parish priest was eventually forced to withdraw from the dispute and accept the monastery's terms on the basis of a forged document (which had apparently been produced shortly before the dispute by the Cistercian nuns of Tišnov). Despite the outcome of the dispute, to the displeasure of the parish priest, the initiative for a conciliatory solution came from the defendant at the beginning of the trial, and the delegated judge was in favour of this procedure. The reason for this was, besides the aforementioned principle that a judge could encourage the parties to reconcile, namely the fact that the abbot Theodoric, as a delegated judge, was allowed to do so on account of his mandate from the bishop.[64] Theodoric's mandate of delegation has the typical *stilus curiae* of papal delegation rescripts, which – as was already mentioned – essentially instruct the delegated judges to summon both parties for a hearing and to resolve the dispute according to the principles of canon law, with the possibility of using coercive means in the form of excommunication to enforce the judgement.[65] Thus, in this case the judge, Abbot Theodoric, was not instructed a priori to settle the dispute via court proceedings, and he could have resorted to other options.

However, there is also a bishops' delegation mandate from the Czech lands with a different wording that had much more specific instructions for resolving the dispute. In 1293, there was a dispute between the parish priests of the churches of St Peter and St James in Brno, and their patrons, the monasteries of Tišnov and Oslavany, over the boundaries of the two parishes.[66] The beginning of the dispute is documented by a mandate from Bishop Theodoric, once again to the abbot of Zábrdovice, which partly follows the *stilus curiae*, but the particular mandate clause is worded differently. This time the Bishop of Olomouc directly ordered the delegated judge to settle the dispute by arbitration (*per amicabilem compositionem et concordiam*), but with the provision that if the dispute

63 KLL I, p. 274, no. 701.

64 KLL I, p. 271, no. 690.

65 On the delegative rescripts, see Führer (2021). See also Hruboň (2021), esp. pp. 215–216.

66 KLL I, pp. 275–276, nos. 705–707. On the dispute in detail, see Razim (2022), pp. 86–100.

could not be terminated by amicable agreement, the delegated judge/arbitrator have the mandate to determine the boundaries (in consultation with wise counsellors), that is, to settle the dispute judicially.[67] Whether in this case was the arbitration requested directly by the plaintiff or initiated by the bishop, is not known, but at least the provision for the case that the judge will not be able to settle the dispute by arbitration, seems to be given by the authority of the bishop.

The possibility that the judge (bishop) could even order the parties to arbitrate, is documented by another dispute, this time between the parish priest of the Church of All Saints in Brno and the Nathan Iudeus over the church dowry.[68] In the charter of Bishop Bruno of 1278, in which he confirmed the verdict of the four arbitrators, it is expressly stated that the arbitrators were appointed with his consent and explicitly by his order: *talis inter ipsos de consensu et mandato nostro compromissio intervenit, quod ex utraque parte in arbitrium quatuor proborum virorum fuit legitime compromissum*.

A similar way of initiating arbitration is documented in the dispute between the monastery in Vizovice and the Brno minorities from 1275.[69] It was stated earlier that this dispute was settled by judges delegated by the Pope. They set a date for the hearing, at which, however, they gave an interlocutory judgment, according to which the parties fixed a date on which the arbitrators would appear to settle the dispute by amicable agreement. However, as with the aforementioned case, they then stipulated that if the dispute could not be settled via arbitration, the parties would submit to the law.

The examples above show that there is considerable diversity in the manner and reasons for resorting to arbitration. The parties may, of course, choose arbitration as the first means of resolving their dispute, usually to avoid complicated court proceedings or court fees. However, if one of the parties has filed a lawsuit in court, judges may suggest arbitration to the parties after the court proceedings have begun, or may even order that the dispute be settled by arbitration. The initiative to initiate arbitration during the court proceedings could also come from one of the parties to the dispute, or both parties could agree to arbitration with the judge's consent, often because of delays in court proceedings and the consequent increase in court costs. The question is, in which stage of the trial the parties could agree with the judge to arbitrate. A dispute between the Hospital of St Francis in Prague and the parish priest of the Church of St Valentine and his parishioners over the rights of patronage of this church in 1268 show that the parties agreed on this solution before the *litiscontestatio* had been made (*cum consensu utriusque partis lite nondum contestata pro bono pacis et concordie amicabilis compositio taliter intercessit*).[70] On the other hand, the aforementioned charter from 1269, issued by Bishop Bruno of Olomouc as a judge in the dispute between the Knights Templar in Čejkovice and the monastery in Žďár, explicitly states that the litigation was brought to the evidentiary stage of the trial, which means that a *litiscontestatio* had to be made. However, due to

67 See also Razim (2022), p. 89.

68 CDB V/2, pp. 617–618, no. 880.

69 CDB V/2, p. 450, no. 777.

70 CDB V/2, pp. 144–146, no. 568.

various delays, both parties agreed that their dispute would be settled by arbitration with the bishop as arbitrator.[71] Thus, it seems that although the *litiscontestatio* represented an agreement between the parties on the subject matter of the dispute, which according to procedural law was subsequently to be resolved by the court, in practice the possibility of eventually agreeing to arbitration with the judge's consent remained open even at this stage of the court proceedings.[72] In any case, an ordinary or delegated judge might act as arbitral judge, or the parties could agree (usually with the judge's consent) to appoint other persons.

The previous examples have shown that arbitrations could be initiated in a variety of ways and that the way in which they were initiated depended on many circumstances. The last example shows that the initiation of arbitration could be influenced by the interests of other persons and could even be in conflict with canon law.

In 1256, a dispute between the Cistercian monastery in Tišnov and Albert, the parish priest of Church of St Peter in Brno, over the patronage of the church was brought before the court of Bishop Bruno of Olomouc. After the case was heard, the Cistercians appealed to the Curia on the grounds that the court was biased. The dispute was heard then by the papal auditor, where the defendant Albert was excommunicated for not standing (i.e., *propter contumaciam*) and the patronage of the church was awarded to the Cistercians.[73] By his mandate, Pope Alexander IV ordered the abbot of the Scottish Benedictines in Vienna to ensure the execution of the sentence.[74] At this point, however, the Czech King Přemysl Otakar II intervened in the dispute. According to two of his charters of 1258, with the consent of Bishop Bruno, he ordered (*duximus statuendos*) that the disputants submit to the arbitrators' verdict (*quod partibus coram ipsis constitutis sine strepitu iudicii de iusticia congnoscerent utriusque et moderato earum proposito ipsas iuste et rationabiliter concordarent*).[75]

The appointed arbitrators were Habernus, a Minorite, Gerhard, a Viennese parish priest, and the abbot of the Scottish Benedictines, to whom the mandate of Alexander IV had been addressed earlier. With the consent of both parties, the arbitrators came up with a different resolution to the judgment of the papal court: although the Cistercians were still granted the right of patronage, the parish priest Albert was allowed to continue in office until his death. It should be noted that there is no mention in either of the king's charters of an appeal by the Cistercians to the Curia or of a judgement by the papal auditor. In spite of everything, the Cistercians agreed to this method of settling the

71 CDB V/2, pp. 185–187, no. 594 and pp. 188–189, no. 596.

72 See Roebuck (2013), pp. 289–290. Cf. Storti 2018, pp. 43–44, who states: "*This was the very purpose of positiones: while it was absolutely necessary to appeal to a judge in order not to lose a right or claim, once this had been done, there was still time up until the litis contestatio to decide whether or not to go to trial*". By „*positiones*", she meant „*interrogations*" by the judge before the *litiscontestatio* in order to obtain information „*on the subject or nature of the dispute that was relevant in order to ascertain the true facts and the true nature of the legal relationship between the parties*".

73 CDB V/1, pp. 150–152, no. 82; for the course of this dispute, see Führer (2021), pp. 140–141 and 143–144.

74 CDB V/1, pp. 185–186, no. 110.

75 CDB V/1, pp. 263–266, nos. 165 and 166.

dispute, even though the earlier judgement of the papal auditor was more favourable to them and the judgement of the arbitrators could have been considered de jure unlawful. Indeed, according to the provisions of Pope Gregory IX's *Decretals*, the arbitrator was not allowed to alter the judge's judgment in any way unless the Pope gave his permission (*Arbiter post rem iudicatam super discordiis novis assumptus, non potest per suum arbitrium sententiam immutare, etiamsi de componendo inter partes mandatum acceperit a Papa*).[76] It seems that it was more important for the Cistercian nuns to settle the dispute locally than to rely on the mechanisms of the curial judiciary.

2.2 Selection of Arbitrators and the Method of Appointment

Although almost any male clerical or secular person could be elected to the role of arbitral judge (e.g., Tancredus: *possunt arbitri omnes, qui non prohibentur*[77]), Pope Gregory IX's *Decretals* forbade the entrustment of disputes in spiritual matters to lay persons: *De rebus spiritualibus in laicum compromitti non potest*[78] (see also, e.g., Tancredus: *prohibetur laicus arbiter esse in causa spirituali*[79]). There is, however, an exception from another *Decretal*, whereby in ecclesiastical disputes a layman may be appointed as arbitrator by a judge, but in that case a cleric would have to be appointed as an additional arbitrator,[80] which was also reflected by canonists (e.g. Durand: *Item prohibetur laicus esse arbiter in spiritualibus* [...], *sed simul cum clerico esse poterit*[81]). Tancredus therefore concludes that a layman could be appointed as arbitrator by the order of a judge: *potest tamen laicus de rebus ecclesiasticis arbitrari, dummodo in eum auctoritate superioris fuerit compromissum*,[82] Durand also writes: *Item etiam laicus potest esse arbiter in re spirituali autoritate iudicis delegati.*[83]

In the known arbitrations of the 13th century in Bohemia and Moravia, in most cases, clergymen were appointed as arbitrators in the disputes in question. Only a minority of the disputes were arbitrated by lay persons (either alone or together with clergy); most of the cases, nevertheless, concerned property matters, especially disputes over boundaries and over the possession or use of estates.[84] These property disputes, even though they

76 X 1.43.11, in: Friedberg II (1959), coll. 236–237.

77 Tancredus de Bologna, *Ordo iudiciarius*, P. 1, Tit. 3 (*De arbitris*), § 2, in: Bergmann (1842), p. 103. Among these exceptions were generally reckoned *mulier*, *minor viginti annis, servus*, *surdus et mutus*, or *infamus*. On this, see in detail Wojciechowski (2010), pp. 132–138, briefly Litewski (1999), p. 581.

78 X 1.43.8, in: Friedberg II (1959), coll. 235.

79 Tancredus de Bologna, *Ordo iudiciarius*, P. 1, Tit. 3 (*De arbitris*), § 2, in: Bergmann (1842), p. 104.

80 X 1.43.9, in: Friedberg II (1959), coll. 235–236.

81 William Durand, *Speculum iudiciale*, Lib. 1, Part. 1 (rubr. *De Arbitro et arbitratore*), § 2 (rubr. *Arbiter quis possit esse*).

82 Tancredus de Bologna, *Ordo iudiciarius*, P. 3, Tit. 3 (*De arbitris*), ref. I, II to § 2, in: Bergmann (1842), p. 104.

83 William Durand, *Speculum iudiciale*, Lib. 1, Part. 1 (rubr. *De Arbitro et arbitratore*), § 2 (rubr. *Arbiter quis possit esse*). For this topic, see also Wojciechowski (2010), pp. 139–141.

84 A similar situation regarding the appointment of lay arbitrators in cases concerning mainly property matters and between church institutions can be observed in the Austrian countries at this time, see Hageneder (1967), pp. 200–203.

related to the estates of ecclesiastical institutions, were apparently not viewed as *causae in spiritualibus*, and thus, in theory, might not have been covered by the provisions of Gregory's *Decretals*. This is also evidenced by the judicial practice of that time, in which the ecclesiastical institutions also filed their complaints in these property matters with the secular courts – most often directly with the court of the king or *iudicium terrae*. Nevertheless, there are several instances in the preserved evidence of arbitrations in which the appointment of lay persons was questionable or problematic and may even have had certain consequences.

In 1269 the Velehrad monastery entered into a dispute with the Opava burgher Hermann over certain properties.[85] Although the dispute was initially to be settled by the Moravian sub-chamberlain as judge (on the authority of the Bohemian king), the abbot and the burgher, on the advice of certain unnamed persons, finally agreed to arbitration, with only laymen as arbitrators. There are several known similar instances in which a dispute over property was brought before a secular court and subsequently arbitrated. This case, however, is specific. It was based on the fact that the previous abbot of Velehrad had sold estates to Hermann without the consent of the convent, which was contrary to canon law. The *Decretals* of Gregory IX stipulated that ecclesiastical property could not be alienated without the consent of the chapter,[86] and this principle was already an integral part of the papal protection privileges for Cistercian monasteries, which, notably, the Cistercians of Velehrad secured from the Curia three times in the 13th century.[87] Disputes over such improperly alienated properties were thus often settled by the Curia. This is evidenced by the fact that the formulary of the papal *Audientia litterarum contradictarum*, which resolved such disputes, contained a stereotyped formulary named after the incipit of the disposition *Ea, que de bonis*, by which the pope ordered the delegated judges to ensure the return of such misappropriated ecclesiastical properties.[88]

Several such mandates left the papal *Audientia* at the request of Bohemian and Moravian monasteries in the 13th century. One of them, as previously mentioned, was issued for the abbot of Niederalteich, Hermann, who was ordered by Pope Innocent IV to ensure the return of the property of Kladruby monastery. Unlike the monastery in Kladruby, which took the more usual route, the abbot of Velehrad decided to appeal to the local court, even though it was unlikely that the judge delegated by the king or the subsequent secular arbitrators would take into account the canonical-legal core of the dispute, which turned out to be the case. In the spirit of *aequitas*, the arbitrators decided that the burgher should pay certain dues to the monastery for part of the estates he had acquired and that he should keep part and hold them freely. We can only speculate as to

85 CDB V/2, pp. 182–184, no. 592.

86 X 3.10.1: *Non tenet alienatio rei ecclesiasticae absque approbatione capituli*, in: Friedberg II (1959), coll. 501–502.

87 Cf., e.g., CDB II, pp. 68–72, no. 76: *Illud districtius inhibentes, ne terras seu quodlibet beneficium ecclesie vestre collatum liceat alicui personaliter dari seu alio modo alienari absque consensu totius capituli vel maioris aut sanioris partis ipsius.* On protection privileges for Moravian monasteries, see Hruboň (2017), pp. 117–152, or Führer (2021a), pp. 105–108 (overview of protection charters on pp. 122–124).

88 On the mandates *Ea, que de bonis*, see note 42.

the reason that led the abbot of Velehrad to present a dispute before a secular court and then before secular arbitrators. It is likely that the financial costs of litigation before the Curia played a role, but it could also have been the desire to settle the dispute locally, as was the case in the dispute between the Cistercians of Tišnov and the parish priest of the Church of St Peter in Brno.

Returning to the selection of arbitrators, in the above-mentioned dispute, the abbot of Velehrad first filed a lawsuit in court and then agreed with the other party on secular arbitrators, who finally resolved the dispute by an amicable settlement. Some time before May 1261, the Old Brno Johannites chose a similar procedure in their dispute with the Oslavany monastery over certain tithes and parish rights in Králové Pole. The dispute was initiated before the court of the Bishop of Olomouc,[89] but both parties subsequently agreed on arbitrators from among the burghers of Brno. However, according to the Johannites, the arbitrators chosen by both parties exceeded the scope of the powers granted to them in the *compromissum* (*qui formam compromissi huiusmodi excedentes*), the manner of which is not known, and settled the dispute to their disadvantage. The aggrieved party therefore appealed to Pope Alexander IV, asking him to annul the *arbitrium*. Although, as shall be seen later, failure to comply with the powers laid down in the *comporomissum* was a serious procedural error which in itself could probably have been grounds for complaint, the Johannites argued differently: they claimed that their dispute could not be entrusted to lay arbitrators (*super rebus huiusmodi in eosdem laicos non potuerit compromitti*).

It is thus apparent that the Johannites only raised the procedural defects of the arbitration procedure in the form of an appeal to the Curia once the arbitrators had ruled against them. This proves not only the utilitarian behaviour of the Johannites, who would certainly not have protested if the arbitrators had acted in their interests (after all, they had been appointed with their consent), but also their good knowledge of canon law at the time. Indeed, the arguments of the Johannite procurator at the Curia were convincing enough for the Pope to annul the *arbitrium* (*dictus predecessor* [i.e., Alexander IV] *arbitrium ipsum mandaret nuntiari nullum*) and order that the dispute be reheard and resolved by delegated judges. Moreover, the wording of the argument – *super rebus huiusmodi in eosdem laicos non potuerit compromitti* – is mutatis mutandis the wording of the above mentioned *Decretal* of Gregory IX: *De rebus spiritualibus in laicum compromitti non potest*.[90] The question is whether it was already the Johannites, who intended to use this formulation in their supplica, or whether it is the *stilus curiae* of the subsequent mandate of Alexander IV.[91] In the former case, it would be an interesting proof not only of the use of the principle of the *Decretal* itself, but also of the use of its wording for argumentation.

89 CDB V/1, pp. 446–448, no. 300 and pp. 577–580, no. 390. The above date derives from the charter of Pope Urban IV (no. 300), which shows that all these steps up to the filing of the appeal were taken during the pontificate of his predecessor, Pope Alexander IV, who died on 25th May 1261. On the course of the dispute in detail, see Führer (2021), pp. 138–139.

90 X 1.43.8, in: Friedberg II (1959), coll. 235.

91 The mandate of Alexander IV has not survived, but its wording was apparently used in the later mandate

The issue of lay arbitrators was also dealt with by three arbitral judges from the Vyšehrad Chapter, who were elected by its provost or dean and the canons, in an extensive dispute over, inter alia, certain customs in the chapter.[92] In one of the many clauses of their arbitration charter, the arbitrators ordered that neither party should in any way alter the prescribed customs of the chapter, "notwithstanding worthless provisions without any validity" (*non obstantibus constitucionibus frivolis nullam firmitatem habentibus*), which had previously been enacted against canonical principles (*illicita ordinacione et contra canonicas sanctiones*) by Brother Nicholas and Brother Peter of the Minorite Order, together with George, chamberlain of Queen Kunhuta. The arbitrators justified their order on the grounds that George was a layman who was not entitled to decide on spiritual matters ([...] *cum layco de rebus spiritualibus nichil disponere liceat*). The formulation of the justification echoes the words of canonists of the time who interpreted one of the general principles codified in the *Decretum Gratiani*: *De rebus ecclesiasticis disponendis laicis nulla facultas relinquitur*[93] (e.g., Raymond de Peñafort [†1275] in his unfinished collection *Summa iuris*: *Imperator enim vel aliquis laicus nichil potest disponere de rebus vel personis ecclesiasticis*).[94] It was this principle which later seems to have been the basis of the above-mentioned *Decretal* of Gregory IX, and which was again used as the grounds for the annulment of the previous ruling.

The cases of problematic or questionable appointment of arbitrators presented above are exceptions, since most arbitration-related charters do not indicate any complications in the selection of the arbitral judges. Where no one intervened in the selection of arbitrators other than the representatives of the disputing parties, either each party chose its own arbitrators,[95] or the disputing parties agreed on the arbitrators jointly,[96] with the latter procedure much more common in the period in question.[97] However, there are

of Urban IV, who, after the judges delegated by Alexander IV had failed to resolve the dispute, delegated another judges. See note 89.

92 CDB VI/1, pp. 131–136, no. 81.

93 *Decretum Gratiani* D. 96, c. 1.

94 Raymond de Peñafort, *Summa iuris*, 1.11 (cited according to Watt [1964], p. 187, note 24).

95 For example, CDB V/2, pp. 182–183, no. 592: *eligentes nobilem virum dominum Cvnonem, camerarium Olomucensem, et dominum Zaschit in partem nostram et supradictus Hermannus dominum Milotam et Mracotam milites in suam partem, per quos in arbitrando taliter est processum*; similarly, CDB V/2, pp. 459–461, no. 784: KLL I, p. 71, no. 170.

96 For example, CDB V/1, no. 35 (= C 4): *in nos est conpromissum utriusque tamquam in arbitros*; CDB V/1, pp. 216–217, no. 135: *tandem in nos tamquam in arbitros ex utraque parte supradicta causa committebatur de consensu venerabilis patris nostri Olomucensis episcopi terminanda*; CDB V/1, pp. 446–448, no. 300: *tandem ab eodem rectore ac dicto fratre fuit super hiis in Fractonem dictum Alium de Brunna et quosdam alios laicos certa pena interposita concorditer compromissum*; CDB V/1, pp. 569–570, no. 384: *arbitrantibus nobilibus viris et discretis* [...], *quos ad hoc ex utraque parte concorditer elegeramus*; CDB V/2, pp. 56–58, no. 511: *tamdem per arbitros communiter electos eadem decertatio exstitit diffinita* CDB V/2, pp. 483–484, no. 797: *arbitrantibus probis viris et discretis* [...], *quos ad hoc ex utraque parte elegeramus.* CDB V/2, no. 812: *electi arbitri unanimi assensu parcium ymmo precibus studiosis ad componendum in ipsa causa, prout dictaret equitas, inter ipsos taliter, et ut visum est nobis, satis eque decrevimus componendum.*

97 Cf. Hageneder (1967), pp. 209–210, who has shown that the situation in Upper and Lower Austria was similar until the end of the 13th century.

also several documented cases where a third party intervened in the selection of the arbitrator.

This happened, for example, in a dispute of the Vyšehrad Chapter in 1253, which was eventually entrusted to three arbitrators – the Prague provost Tobias, the provost Kuno of Stará Boleslav and the Dominican lector brother John.[98] In their arbitration charter we read that the parties were prepared to entrust the dispute to them under a fixed penalty (*in nos tamquam in arbitros sub pena ducentarum marcarum compromittere parati fuistis*). The common request of the parties (*tandem cum instancia supp*[l]*icastis ad nos concorditer accedentes*) was, however, supported by the intervention of the Czech king, who asked the appointed persons in writing to accept the role of arbitrators (*intervenientibus nichilominus ad hoc precibus domini nostri serenissimi W., Boemorum regis, per suas patentes litteras, ut propter bonum pacis ac concordie acceptare arbitrium huiusmodi curaremus*). This procedure may point to the fact that the acceptance (*receptum*) of the role of arbitrator, unlike that of a judge, was not an obligation but an act of goodwill. If, however, the arbitrators accepted their task, they were obliged to put an end to the dispute (Gualterus de Constantiis: *Et nota, quod arbitrium primo voluntarium est, sed postquam susceptum fuerit, tenetur arbiter arbitrari*).[99]

2.3 Determination of the Subject Matter and the Powers and Obligations of the Arbitrators

When analysing the form of the compromise charters, it was mentioned that the content of these documents was not only related to the appointment of the arbitrators, but also the definition of the subject matter of the dispute and the determination of the scope of the arbitrators' powers. The arbitrators were not allowed to exceed the powers defined for them, as it was codified in one *Decretal* of Gregory IX: *Arbiter non habet potestatem iudicandi ultra comprehensa in compromisso*.[100] As mentioned earlier, this principle was pertinent in the dispute between the Johannites and the monastery of Oslavany in the 1260s, in which one of the grounds for the appeal to the Curia was the fact that, according to the Johannites, the arbitrators *formam compromissi huiusmodi excedentes*.[101]

The practical application of this principle can also be encountered in another case under review. In 1254, there was a dispute between the dean of the Vyšehrad Chapter and its custodian over the daily and ordinary offerings and those received by the Vyšehrad church on the basis of papal indulgences.[102] The dispute was arbitrated by the provost of Vyšehrad, Dionysius, who specified in his arbitration charter which offerings would belong to the custodian and which to the chapter. However, at the end of this charter

98 CDB IV/1, pp. 446–449, no. 263 (= C 3).

99 Gualterus de Constantiis, *Tractaturi de iudiciis*, 1.21.4; see Wojciechowski (2010), pp. 142–144; Litewski (1999), p. 582.

100 X 1.43.6, in: Friedberg II (1959), coll. 234–235. See also Wojciechowski (2010), pp. 124–125, 177.

101 CDB V/1, pp. 446–447, no. 300 (see also section 2.2).

102 CDB V/1, pp. 74–75, no. 35 (= C 4).

he added that he could not arbitrate on other offerings, as no *compromissum* had been reached on them (*Super reliquiis vero in medio ecclesie ponendis et oblacionibus, que fiunt ad illas, nichil penitus arbitramur, quia super hiis in nos non fuit conpromissum*). Thus, the arbitrator refused to arbitrate on a matter that had not been imposed on him by the agreement of the parties.

The compromise charter therefore formed the framework of the arbitration by defining both the subject matter of the dispute and the scope of the arbitrators' powers. This is illustrated by one of the earliest surviving *compromissa* from 1250, issued by Ludvík, Commander of the Teutonic order in Bohemia, and Konrad, Master of the St Francis Hospital in Prague.[103] The two parties first agreed on the arbitrators (*compromittimus in venerabilos viros* [...] *tamquam in arbitros nostros*) and defined the subject of the dispute – tithes from two villages. The charter then set out how the arbitration was to be formally conducted. The arbitrators were to hear both parties together *sine strepitu iudicii*, to receive witnesses, to acquaint themselves with the substance of the dispute, and, if necessary, to personally inspect the places at issue in the dispute. The parties then stipulated the manner in which the arbitrators could deliver their verdict: *pronunciare valeant stando vel sedendo*, *die feriato vel non feriato, presentibus vel absentibus*. As already stated, this clause was taken from the forms of compromise of the Italian canonists. In addition to these, a clause was added stating that if one or more arbitrators were unable to attend the hearing, the remaining arbitrators would, with the consent of the representatives of the parties, select another arbitrator to make up the number of arbitral judges. The above-mentioned clauses are also included to varying extents in the remaining known compromise charters of the period in question, although their specific provisions may differ, which may then further our knowledge of the arbitral practice at that time.

It was noted above that in the dispute between the members of the Vyšehrad Chapter in 1254, the arbitrator – the dean of Vyšehrad – decided only on the subject of the dispute, which was determined by the compromise charter.[104] The definition of the subject of the dispute thus constituted an important part of the *compromissa* and needed to be formulated in such a way that the arbitrators could actually settle the dispute in the manner demanded by the disputants.[105] For this reason, Commander Ludvík and the Master of the St Francis Hospital included in their *compromissum* a rather broadly worded definition of the subject of the dispute – while specifying the localities whose tithes were disputed, they also stipulated that the arbitrators could decide on all other matters related to the dispute (*et super omnibus easdem causas contigentibus*).[106]

103 CDB IV/1, pp. 339–340, no. 187 (= C 2).

104 CDB V/1, pp. 74–75, no. 35 (= C 4).

105 On the definition of the subject matter of the dispute, see Wojciechowski (2010), pp. 97–98.

106 Cf., for example, the formulary in: Gratia de Arezzo, *Summa de iudicarii ordine,* P. 3, Tit. 2 *(De arbitris),* § 2: *super causa, que vertitur inter eos super decem, quae dictus P. petebat a dicto G.* [...] *et super omnibus aliis circumstantiis, que vertuntur vel verti sperantur inter eos occasione dictae pecuniae vel alterius rei,* in: Bergmann (1842), pp. 381–382. Similarly, for example, CDB IV/1, pp. 446–449, no. 263 (= C 3): *arbitrium* [...] *acceptamus tam super premissis omnibus et eorum accessoriis, seu quecumque possent ex eis sequi vel ob illa* or CDB VI/1, pp. 163–164: *dantes eisdem plenam potestatem et liberam facultatem tractandi* [...] *omnesque alias necessitates ipsius ecclesie in statum debitum demandandi, prout eis secundum Deum et iusticiam videbitur expedire.*

However, in some of the compromise charters the subject matter of the dispute is set out very specifically without further generalising additions, which was also sufficient. This is well illustrated by the dispute between the provost of Vyšehrad and the Vyšehrad Chapter over certain rights, for which both *compromissa* issued by the parties for the arbitrator and the arbitrator's arbitration charter are preserved.[107] In both *compromisa* of the same wording it is stated that the arbitrator was to determine, *utrum antecessores mei et ego* (i.e., the provost of Vyšehrad), respectively *nos* (i.e., the Vyšehrad Chapter) *ius aliquod in collacione custodie Wissegradensis habeamus vel non.* The dean of Vyšehrad then arbitrated according to the agreement (*secundum formam compromissionis nobis traditam*): *Capitulum habere ius eligendi custodem Wissegradensem, magistro Dyonisio, preposito Wissegradensi, super collacione, quam dicebat habere se idem prepositus in custodia Wissegradensi, perpetuum silencium imponentes.*

A similar procedure can be observed in one of disputes between the provost of Vyšehrad and the chapter in the 1270s and 1280s.[108] By their compromise charters, both parties entrusted the dispute to three members of the chapter and gave them full authority to decide on the disputed issues, including explicit emphasis on the correction of certain earlier illegal ordinances (*dantes eis plenam et liberam potestatem super decisione predictarum questionum et causarum ac super bono statu ipsius ecclesie procurando ordinandi, diffiniendi, providendi, ac statuendi, necnon rationabiliter corrigendi ea, si que priori vice in predicta ecclesia Wissegradensi per ordinacionem inprovidam et iuri contrariams sunt statuta*). The arbitrators could then confirm this decision by any means they deemed appropriate (*suas ordinacionem, diffinicionem, provisionem, statutum, et correctionem confirmandi et roborandi, secundum quod ipsis videbitur expedire*), and they could also pronounce their ruling whenever and in whatever place they chose to do so. Upon accepting the *compromissum*, the arbitrators convened a hearing at which they heard and examined the arguments presented by the disputants. After examining the various documentary evidence and receiving the confessions (*confessionbius*) of both parties, they settled the dispute by virtue of their authority (*arbitraria postestate nobis concessa*). First, in accordance with the authority conferred on them by the *compromissum*, their voluminous arbitration charter annulled the previous orders of the three arbitrators (as stated in 2.2). In accordance with the *compromissum*, the arbitrators also concluded by stipulating that the provost and the chapter should have their *arbitrium* confirmed by the Papal Curia within a certain period of time.

In both cases, the arbitrators ruled on all the matters required of them by the compromise charters, and therefore their jurisdiction ended and the arbitration was duly terminated[109] (for example, Tancredus: *Finitur arbitri iurisdictio, si de omnibus, de quibus in*

107 CDB IV/1, pp. 338–340, no. 186 (C 1a, b).

108 CDB VI/1, pp. 75–76, no. 34 (= C 8a), and pp. 131–136, no. 81 (= C 8b). On the content of the dispute, see also Krejčíková (1982), pp. 144–146, where, however, the author misinterprets some of the procedural steps in the settlement of the dispute.

109 See also Wojciechowski (2010), pp. 150, 157–158.

eo compromissum est, sententiaverit[110] or Durand: *Finitur arbitrium, si de omnibus, de quibus compromissum fuit, sit pronunciatum*[111]).

However, the course of the dispute between the Vyšehrad Chapter, as recorded in the above-mentioned document, provides insight not only into the question of the definition of the subject matter, but also into other procedural steps of the arbitration. Indeed, the *compromissa* also determined how the arbitrators should or may proceed. Thus, in this instance, it is provided, inter alia, that the arbitrators may deliver their award whenever they wish and at a place of their choosing (*et pronunciandi eandem ordinacionem, quandocumque voluerint, et in loco, quemcumque ad hoc duxerint eligendum*). Again, this is a clause that was clearly inspired by the formularies of notaries and canonists,[112] who, by broadly defining the manner in which the arbitration was to be announced, sought to avoid potential problems associated with the conduct and termination of the arbitration. In fact, according to the canonists of the time, the authority of the arbitrators would be extinguished even if they did not decide within the given time limit (Tancredus: *finitur etiam* [arbitri iurisdictio] *elapso die in compromissso apposito*[113] or Durand: *Item finitur per lapsum diei in compromissio appositae*[114]).

Since the principles of arbitration were reflected in the local environment, it is no longer surprising that most of the known compromise charters contain similar clauses anticipating possible complications in the settlement, some of which were taken more or less verbatim from formularies. Thus, we read in our *compromissa* that the arbitrators may arbitrate formally or informally (*stadno vel sedendo*),[115] on any day, including holidays (*die feriato vel non feriato*), in writing or otherwise (*in scriptis vel sine scriptis*), in the presence or absence of the parties (*partibus presentibus et absentibus*).[116] The clause *die feriato vel non* thus again focuses on the date of the pronouncement of the judgement, since

110 Tancredus de Bologna, *Ordo iudiciarius*, P. 1, Tit. 3 (*De arbitris*), § 5, in: Bergmann (1842), p. 107.

111 William Durand, *Speculum iudiciale*, Lib. 1, Part. 1 (rubr. *De Arbitro et arbitratore*), rubr. *Arbitrium qualiter finitur.*

112 Cf., for instance, Gratia de Arezzo, *Summa de iudicarii ordine*, P. 1, Tit. 2 (*De arbitris*), § 2: *Dantes eis licenciam et liberam potestatem laudandi inter eos et arbitrandi et diffiniendi, quotienscumque et quandocumque voluerit,* in: Bergmann (1842), p. 382.

113 Tancredus de Bologna, *Ordo iudiciarius*, P. 1, Tit. 3 (*De arbitris*), § 5, in: Bergmann (1842), p. 107. On this further, see Wojciechowski (2010), p. 145 and on prorogation pp. 146–148.

114 William Durand, *Speculum iudiciale*, Lib. 1, Part. 1 (rubr. *De Arbitro et arbitratore*), rubr. *Arbitrium qualiter finitur.*

115 For this clause, see below (section 2.4).

116 For example, CDB IV/1, pp. 339–340, no. 187 (= C 2): *pronunciare valeant stando vel sedendo, die feriato et non feriato, partibus presentibus vel absentibus*; CDB IV/1, pp. 446–449, no. 263 (= C 3): *quod pronunciare possimus* [...] *coniunctim et divisim, in totum seu pro parte, diebus feriatis seu non feriatis, stando, sedendo, in scriptis et sine scriptis, presentibus partibus et absentibus*; CDB V/1, pp. 74–76, no. 35 (= C 4): *arbitrari seu pronunciare tam diebus feriatis quam non feriatis, stando vel sedendo, in scriptis et sine scriptis, partibus presentibus et absentibus*; CDB VI/1, pp. 212–213, no. 162 (= C 10): *dixerint, fecerint, pronunciaverint, aut arbitrati fuerint cum scriptura vel sine scriptura, diebus feriatis vel non feriatis, sedendo vel stando, ubicunque, quandocunque, et qualitercunque*; KLL I, pp. 27–28, n. 43 (= C 12): *determinatum et decisum foret in causa predicta, sive stando sive sedendo, presentibus sive absentibus partibus, in scriptis sive sine scriptis.*

it was generally not supposed to be pronounced on a holiday.[117] The *partibus presentibus et absentibus* clause is intended to ensure that the arbitrators can conclude the dispute even if one of the parties does not appear. If this were the case, the arbitrator would not be able to pronounce his judgment according to the interpretation of the canonists (e.g. Durand: *Item arbiter non pronunciat altera parte absente*). However, this obstacle could be removed by including the said clause in the *compromissum*[118] (e.g., Tancredus: *item non potest sententiare arbiter altera parte absente, nisi hoc actum sit in compromisso*[119]; or Placentius: *Non enim arbiter nisi utroque presente iudicare potest, nisi specialiter expressum sit, ut vel utroque, vel uno absente, sententia promatur*[120]). Finally, according to some canonists, the judgement of the arbitrator, like that of an ordinary or delegated judge, had to be given in writing.[121] For this reason, the clause *in scriptis vel non* also became a common provision of the *compromissa*, allowing arbitrators to pronounce their settlement orally.

Another possible complication was the situation in which the arbitrator did not attend the hearing, either because of his death or for some other reason.[122] This was also provided for in the clauses of the local compromise charters. In the *compromissum* of the Commander of the Teutonic Order and the Master of the Hospital of St Francis in Prague of 1250, it was mentioned that the disputants added a clause according to which in the absence of one or more of the appointed arbitrators, the remaining arbitrators were to elect other persons in their place with the consent of the parties (*Et si aliquem vel aliquos de predictis contigerit non adesse, residui de consensu parcium eligant alium vel alios loco ipsius vel ipsorum*).[123] A similar clause contain *compromissum* from 1285 issued by Frederick of Šumburk in his dispute with Bishop Theodoric of Olomouc over the construction of Boršov Castle, with the difference that the new arbitrators were to be chosen by the parties (*Quod si predicti omnes vel singuli haberi in eodem termino non poterunt, alii pro eis ab alterutra vel utraque partium eliguntur*).[124] In addition, under the terms of the *compromissum*, the arbitrators were not allowed to disperse until a decision had been reached on the issue in dispute (*curia ipsius non recedere, donec predicta inter nos dissensio terminetur*). And, if an even number of arbitrators failed to agree, the final word was to be given to the King of Bohemia.

In both cases, the *compromissa* stipulated that all arbitrators needed to be present to decide. However, there was a possibility for not all of the chosen arbitrators to attend the

117 Wojciechowski (2010), pp. 160–161.

118 On the issue, see Wojciechowski (2010), pp. 163–165.

119 Tancredus de Bologna, *Ordo iudiciarius*, P. 1, Tit. 3 (*De arbitris*), § 4, in: Bergmann (1842), p. 106.

120 Cited according to Wojciechowski (2010), p. 164.

121 See Wojciechowski (2010), pp. 196–198.

122 See, for example, Tancredus de Bologna, *Ordo iudiciarius*, P. 1, Tit. 3 (*De arbitris*), § 5: *item mortuo arbitro vel litigatorum aliquo* [...] *item iurisditem finitur iurisdictio arbitri cum causae cognitione, si excusaverit se arbiter coram praetore, quod potest facere pro multis causis*, in: Bergmann (1842), p. 107. See also Wojciechowski (2010), pp. 162–163.

123 CDB IV/1, pp. 339–340, no. 187 (= C 2).

124 KLL I, p. 63, no. 139 (= C 13).

arbitration where this was agreed in the *compromissum*.[125] This was also reflected in the formularies of Italian canonists, from which the provision that arbitrators can arbitrate *coniunctim vel divisim, in totum seu pro parte* was used in the *compromissum* between the provost and the Vyšehrad Chapter in 1253.[126] The compromise charter of the representative of Kadold of Miroslav and the provost of the Oslavany monastery in their dispute over the patronage of the church in Troskotovice in 1275 dealt with this issue in a similar way, but its provision is based on a different source.[127] Both parties stipulated that three or even two of the four appointed arbitrators could settle their dispute (*ut, si in termino ad arbitrium seu amicabilem compositionem promulgandam, quem nobis assignabunt, omnes interesse non poterunt, eorum tres vel duo idem negotium nichilominus exequantur*). This is an analogy to the stereotypical clause *Quod si non omnes* of papal mandates of delegation, which ensured that the judgment of the delegated judges could be rendered even in the absence of one of them.[128]

In addition to the method of arbitration, the *compromissum* could also determine the details of the organisation of the arbitral tribunal and the commencement of the proceedings. The fixing of the date and place[129] of the arbitration may therefore have been part of the *compromissum*. However, among our surviving *compromissa* only the compromise charter of Frederick of Šumburk from 1285 contains this. Frederick stipulated that the elected arbitrators were to meet on the feast of St Cunigunde at the court of the Czech King Wenceslas II, wherever he might be at that time in his kingdom (*quod pars utraque in presentia domini nostri, domini et heredis regni Boemie et marchionatus Moravie, ubicunque in terris suis fuerit constitutus, in die sancte Kunegundis proximo instanti debeat comparere*).[130] Another way of setting the place and time of the arbitration is shown by the compromise charter issued in the dispute over the patronage of the church in Troskotovice, which stipulates that the date of the hearing is to be set by the arbitrators.[131] In this case, we have the unique charter of the arbitrators, issued two days later, in which they actually set the date of the hearing for the Wednesday after the feast of St. Giles and, in accordance with their authority defined by the compromise charter, they also set a fine for the case in which one of the parties failed to appear.[132]

The compromise charter in the dispute over the patronage rights in Troskotovice, this time between the monasteries of Oslavany and Dolní Kounice, does not specify exactly when and where the arbitrators were to meet, but it does state in detail how the arbitra-

125 See Wojciechowski (2010), pp. 131–132.

126 CDB IV/1, pp. 446–449, no 263 (= C 3).

127 CDB V/2, pp. 463–464, no. 787 (= C 6).

128 For example, CDB IV/1, p. 125, no. 41: *Quod si non omnes hiis exequendis potueritis interesse, duo vestrum ea nichilominus exequantur.* On the clause and the charters *Ea, que iudicio*, see Herde (1970/I), pp. 425–434; for the formularies, see Herde (1970/II), pp. 470–471; for Moravia, see Führer (2021), pp. 144–145. See also note 54 in section 2.1.

129 On the place, see Wojciechowski (2010), pp. 158–160.

130 KLL I, p. 63, no. 139 (= C 13).

131 CDB V/2, pp. 463–464, no. 787 (= C 6).

132 CDB V/2, pp. 465–466, no. 788.

tion was to be initiated.[133] Each party selected one arbitrator, who was to receive the relevant documents on the possession of the patronage rights of the opposing party. After studying these documents, the arbitrators were to meet in one place, where they were to deliver their judgment *secundum fidem* and under oath, taken in the presence of the provost Albert of Olomouc.[134] Similarly worded definitions of the arbitration procedure are contained in other compromise charters. It was mentioned earlier that the *compromissum* of 1250, which provided that the arbitrators were to summon the disputants, hear the witnesses, acquaint themselves with the substance of the dispute and, if necessary, personally inspect the places whose tithes were in dispute.[135] The fact that the arbitrators could actually do this is proven by a charter from 1280 issued directly by the disputants Tobias, Bishop of Prague, and the abbot of Hradisko in a dispute over the boundaries between several villages of the Prague bishopric on the one hand and the Hradisko monastery on the other.[136] The document shows that the bishop and the abbot, together with several members of their chapter or convent, and with the elected arbitrators, went directly to the place in question, where, with the help of sworn villagers, they redefined the boundaries between the estates.

2.4 Method of Arbitration – *Arbiter* or *Amicabilis Compositor*?

It is not possible to determine in great detail what the proceedings before the arbitrators were like during the period under consideration. Unlike court proceedings, which have been documented for the 13th century in at least three surviving judicial acta and some other documents, the purpose of which was to record in detail the course of the entire court hearing or some of its phases,[137] there are no similar documents that record arbitration proceedings. Either they have not survived, or, in most cases, the proceedings do not appear to have been conducted in writing. Therefore, in order to analyse the course of arbitration, it is necessary to refer to sources that were not intended to record the proceedings directly. These include, on the one hand, the *comprosmissa*, which usually set out in various ways how the arbitration was to be conducted, and, on the other hand, the arbitration charters, which may sporadically, but usually not in great detail, record the course of the hearing before the arbitral judgment was pronounced.

As previously mentioned, although in addition to defining the powers of the arbitrators the *compromissum* provided for the manner in which the arbitration was to be initiated, its progress depended on the arbitrators chosen, unless the *compromissum* provided otherwise.[138] Gratia de Arezzo, for example, summed this up succinctly as follows:

133 CDB V/2, pp. 459–460, no. 784 (= C 5).

134 This is one of the few proofs of the oath taken by the arbitrators, and apparently of their impartiality.

135 CDB IV/1, pp. 339–340, no. 187 (= C 2).

136 CDB VI/1, pp. 143–145, no. 90. Cf. note 31.

137 On this, see Führer, L.: *Settling Disputes,* see note 43.

138 See Wojciechowski (2010), p. 158.

Facto namque compromisso possunt arbitri procedere, si volunt, secundum iuris ordinem, vel aliter, si volunt.[139] This principle is also reflected in his formulary: *dantes eis licenciam et liberam potestatem laudandi inter eos et arbitrandi et diffiniendi quotienscunque et quandocunque, ordine iuris servato vel non* [...].[140] Much more comprehensive in this respect is the formulary of William Durand, who proposed a series of phrases to express the different ways of conducting arbitration and rendering judgement: *dantes ei et concedentes plenam potestatem* [...] *de plano et sine strepitu et figura iudicii examinare* [...], *pronunciare, diffinire, laudare, arbitrari* [...] *ordine iuris servato vel non servato*, [...] *sedendo vel stando* [...].[141] All of these clauses determine a very wide range of possibilities for conducting the hearing and pronouncing the judgment, either formally (*stando*) or informally (*sedendo, de plano et sine strepitu et figura iudicii*), and according to the rule of law (*ordine iuris servato*) or not.[142]

Also for this reason, the typical phrase *arbiter seu arbitrator seu compositor amicabilis*, has permeated the forms of compromise charters. According to this, the selected arbitral judges were allowed to arbitrate using both methods of arbitration.[143] The *arbiter*, as stated in the introduction, was to act according to the rule of law (*secundum ordinem iuris*), the *arbitrator*, or *compositor amicabilis*, according to justice (*secundum iusticiam*, *per viam aequitatis*).[144] However, it should be emphasised that – as mentioned at the beginning of this study – the designation of arbitral judges was introduced into Bohemian and Moravian charters only gradually (i.e., until the 1270s none of the charters contained the mentioned phrase, and arbitral judges were typically referred to only as *arbitri* or *probi et honorabiles viri*, but usually only separately). Therefore, if this terminology is only gradually introduced into local charters, it cannot be assumed *a priori* that the use of the term *arbiter* means that the arbitral judge had to proceed *sedundum ordinem iuris* and *vice versa*. This raises the question of the extent to which the theory of the two types of arbitration, distinguished by the different designations of the arbitral judges, was reflected in local practice.

Thus, the designation of the arbitral judges does not necessarily indicate how the arbitration was to be conducted; moreover, if the formula *arbiter seu arbitrator* was used in the *compromissum*, the arbitral judge could theoretically proceed in any form of arbitration. Nevertheless, there are several instances documented in our sources that indicate how the arbitration actually took place.

One of the few surviving sources that records the course of the arbitration in greater detail is the arbitration charter of three arbitrators from 1253 issued in a dispute between the Vyšehrad Chapter and its provost.[145] The extensive *narratio*-formula reveals that the arbitrators (called *arbitri*) first accepted the *compromissum* on the understand-

139 Gratia de Arezzo, *Summa de iudicario ordine*, P. 3, Tit. 1 (*De arbitris*), § 3, in: Bergmann (1842), p. 382.

140 Gratia de Arezzo, *Summa de iudicario ordine*, P. 3, Tit. 1 (*De arbitris*), § 2, in: Bergmann (1842), p. 382.

141 William Durand, *Speculum iudiciale*, Lib. 1, Part. 1 (rubr. *De Arbitro et arbitratore*), rubr. *De forma compromissi et arbitrii.*

142 For the formal and informal proceedings, see Wojciechowski (2010), pp. 101, 121 (*sine strepitu iudicii)*.

143 Wojciechowski (2010), pp. 171–172.

144 On the substance of these phrases, see Wojciechowski (2010), pp. 80–82.

145 CDB IV/1, pp. 446–449, no. 263 (= C 3).

ing that they could pronounce their verdict *coniunctim et divisim, in totum seu pro parte, diebus feriatis seu non feriatis, stando, sedendo, in scriptis et sine scriptis, presentibus partibus et absentibus.* Thereupon the arbitrators opened the proceedings, at which the canons presented their claim, which, in their view, arose both from the older privilege and from the existing custom (*consuetudine probata*). However, to this the provost replied: *narrata, ut narratur, vera non esse et petita fieri non debere*. Thus, by denying the petition, a *litiscontestatio* was made, as the document expressly states (*ad que* [i.e., to the action] *vos, domine preposite, litem contestando respondistis*). The arbitrators thus commenced the second stage of the trial, at which they heard and examined the evidence of both parties (*visis et auditis rationibus et allegacionibus utriusque partis*), which included the documentary evidence (*privilegia*), and the *confessiones* of the provost.

The course of the arbitrators' deliberations, as described in the document, indicates that the arbitrators in this case acted *secundum ordinem iuris*. This is evidenced by the procedural steps typical of court proceedings. The hearing is referred to as an *iudicium*, in which the claim (*petitio*) was submitted by the plaintiff and denied by the defendant. This constituted a *litiscontestatio*, i.e., a formal agreement on the subject matter of the dispute.[146] The *litiscontestatio* concluded the preparatory stage (*preparatoria iudicii*) and the judges could proceed to the next stage of the proceedings. In accordance with the canonical procedure, the parties in this stage were supposed to present their positions (*positiones*), i.e., brief statements outlining the facts to which the opposing party was obliged to respond. The opposing party could either confess the position[147] (which the defendant apparently did, as is indicated by his *confessiones* in the charter), or express a negative statement, which was followed by the presentation of evidence (as was done by the Vyšehrad Chapter by the mentioned privilege).[148]

A similar course of arbitration is documented in another dispute of the Vyšehrad Chapter from 1254, although it is not described in such detail. The chapter again agreed on arbitrators (again referred to as *arbitri*) who were to ascertain the truth regarding the defined disputed issue *sine strepitu iudicii*. Although the course of the proceedings is then recorded much more briefly in the charter (*Nos igitur dictis parcium diligenter auditis et intellecta facti recitacione per principales personas ac lite coram nobis plenissime contestata ita diffinimus, pronunciamus et arbitramur*), the mention of the *litiscontestatio* might again suggest that the arbitrators acted *secundum iuris ordinem*.

On the basis of these cases, it can therefore be concluded that the arbitration hearing could have been conducted under the order of law during the period under consideration. On the other hand, there are also documented arbitrations that indicate a relatively opposite approach to the arbitration. For example, there was a dispute between Prague

146 For *litiscontestatio*, see esp. X 2.5 and X 1.6.54, § 3–4; also X 2.6.1–5, in: Friedberg II (1959), coll. 93–94, 257–265 and Tancredus de Bologna, *Ordo iudiciarius*, P. 3, Tit. 1, in: Bergmann (1842), pp. 196–201; see also Nörr (2012), pp. 109–112.

147 For *confessa in iure* after the *litiscontestatio*, see Tancredus de Bologna, *Ordo iudiciarius*, P. 3, Tit. 4, in: Bergmann (1842), pp. 211–215. See also Nörr (2012), pp. 116–122.

148 See X 2.22.10 in: Friedberg II (1959), coll. 350–352, or Tancredus de Bologna, *Ordo iudiciarius*, P. 3, Tit. 3, § 5, in: Bergmann (1842), p. 210.

burghers and the Břevnov monastery over certain properties, for which there is a preserved arbitration charter issued jointly by the five arbitrators chosen by the parties.[149] According to the wording of the charter, the arbitrators could in theory choose any form of arbitration (they are referred to as *arbitri, arbitratores seu compositores amicabiles*), but at the same time a simplified and informal form of negotiation (*simpliciter et de plano*) is emphasised. The arbitrators then gave their judgment on the basis of their consideration of various circumstances and to the benefit of both parties, in particular, to calm the dispute (*nos* [...] *consideratis diversis circumstanciis materie predicte propter utriusque partis pacis commodum et precipue ad sopiendam litis occasionem inter ipsas, prout nostre videbatur consciencie expedire*). The dispute was therefore resolved in such a way that the monastery would pay the burghers a certain sum, who, upon receipt of the sum, were to surrender the disputed goods to the abbot and the convent.

This reveals that, according to the arbitration charter, the arbitrators were to arbitrate informally (*simpliciter et de plano*), which is again a phrase used in formularies of *compromissa* and was probably already anchored in the unpreserved compromise charter of the two disputants. Similarly, this unpreserved *compromissum* could also have contained the provision to bring peace between the two parties, as the wording of the arbitrators' charter suggests. And finally, the unpreserved written agreement may have included the provision that the arbitral judges then decide in favour of both parties. This was not uncommon, as similar statements about peace and equity are to be found in other arbitration charters. For instance, in 1276 there was a dispute between the Hradisko monastery and Bohuslaus of Lubojaty over a chapel, which was arbitrated by two members of the Olomouc Chapter.[150] In their arbitration charter we read: *nos* [...] *electi arbitri unanimi assensu parcium ymmo precibus studiosis ad componendum in ipsa causa, prout dictaret equitas, inter ipsos taliter, et ut visum est nobis, satis eque decrevimus componendum.* That the provision to settle the dispute to the benefit of both parties could be a part of the *compromissum* is shown by a compromise charter in the dispute between Hradisko and Velehrad monasteries over certain boundaries. In their charter, both issuers stipulated that the arbitral judges, again members of the Olomouc Chapter along with several lay persons, were obliged to ascertain the rights of both parties, to arbitrate the dispute according justice with regard to the utility of both parties (*qui viso iure utriusque partis et causam dictam et omnes circumstancias diligencius examinantes, secundum Deum et iusticiam arbitrati, communem utilitatem utriusque ecclesie perpendendo*).[151]

The wording and provisions of the documents presented above rather suggest that the arbitrators were required to choose the path of justice.[152] In the case of the dispute between the Prague burghers and the Břevnov monastery, this possibility is more than likely also because the arbitrators in this dispute were chosen from among the Prague burghers, who cannot be assumed to have had much knowledge of procedural law. In

149 KLL I, p. 121, no. 315.

150 CDB V/2, pp. 503–504, no. 812.

151 CDB V/2, pp. 550–551, no. 840 (= C 7).

152 See also Wojciechowski (2010), pp. 118–120.

contrast to the aforementioned dispute of the Vyšehrad Chapter of 1253, where the form of arbitration can be discerned from a comprehensive account of the proceedings recorded in the charter, in the case of the examples presented below, the fact that the arbitrators did not adhere to procedural law can be inferred solely on the basis of the terminology employed and the broader context. The question, therefore, is to what extent these terms (*secundum iustitiam*; *prout dictaret equitas*) indicate the form of arbitration. Additionally, it is pertinent to ascertain whether arbitrations at this time were conducted strictly either *secundum ordinem iuris* or *per viam aequitatis*, or whether these proceedings were more variable. However, these are questions for further study.

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In conclusion, several important observations can be summarised from this study. Although the institution of arbitration is known to have existed in Bohemia and Moravia earlier, it is only from around the middle of the 13th century that the typical documents for initiating and concluding arbitration – the compromise and arbitration charters – begin to appear. Most contain the necessary passages as formulated by experts in law of that time, while some reflect or even adopt the typical phraseology captured by their formularies. This suggests that the institution of arbitration entered the Czech lands on the basis of canon law, which was becoming increasingly widespread at the time. Moreover, in some cases – especially in the case of the Vyšehrad Chapter in Prague and the Olomouc Chapter – this reception was also based on the knowledge of current discussions on arbitration by foreign lawyers, as the local notaries were able to draw up the compromise and arbitration charters on the basis of their recent formularies. It is therefore a question for future research as to which collections were involved and how the awareness of these discussions spread within the Czech lands.

At the same time, the written diplomatic sources testify to the fact that the practice of arbitration respected the principles of canon law of the time at various stages of the negotiations (i.e., the initiation of arbitration, the compromise of the parties, the proposal of the method of negotiation, the granting of powers to the arbitrators, and even the actual course of the arbitral proceedings). During the 13th century, arbitration was a popular method of settling disputes in the Church. It will therefore be necessary in the future to systematically trace the development of this method of settling disputes in order to understand ecclesiastical justice in the period under consideration.

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"...compromittimus tanquam in arbitros et arbitratores nostros et amicabiles compositores". K některým aspektům arbitrážní praxe v Čechách a na Moravě v církevních sporech 13. století optikou kompromisních a arbitrážních listin

Z českých zemí se z průběhu 13. století dochovaly v listinách zmínky i podrobné informace o více než 200 sporech, v nichž byla církev, ať už instituce nebo církevní osoby, alespoň jednou ze stran sporu. Některé z těchto sporů se týkaly majetkových záležitostí, některé záležitostí církevního charakteru, zejména tzv. *causae spiritualibus annexae*. Ačkoli církev měla podle kanonického práva možnost řešit své spory před církevním soudem, nebo podle zemských zvyklostí v určitých případech i před soudem světským, ve 13. století pozorujeme výraznou tendenci řešit spory prostřednictvím arbitráže.

Vzhledem k tomu, že církevní arbitráže byly v českých zemích ve 13. století vcelku rozšířeny, vystává otázka, jak probíhaly a do jaké míry respektovaly zásady kodifikované v právních pramenech (zejména *Liber extra decretum Gratiani* papeže Řehoře IX.) nebo v procesně-právních příručkách zahraničních právních znalců. Na tyto otázky však bude možno odpovědět až s podrobnou znalostí každého jednotlivého případu rozhodčího řízení a s jasnější představou o tom, kdy a jak se zkoumaná forma řešení sporů začala uplatňovat, jaký byl její vývoj a jak byly její teoretické principy implementovány do domácího právního prostředí. Na tyto otázky může dát odpověď pouze další komplexní studium tématu. Tato studie se proto zaměřuje pouze na některé dílčí otázky, totiž a) jaké typy písemností vznikaly během arbitráží a jak vypadaly z formálního hlediska, a b) jaký byl obsah těchto písemností, a jak tento obsah svědčí o některých vybraných aspektech arbitrážní praxe v českých zemích 13. století.

Ačkoliv víme, že se arbitráže uplatňovaly v Čechách a na Moravě i dříve, teprve zhruba od poloviny 13. století se začínají objevovat typické písemnosti pro zahájení a ukončení rozhodčího řízení

– kompromisní a arbitrážní listiny. Většina z nich obsahuje nezbytné údaje tak, jak je formulovali tehdejší právní znalci, některé z nich dokonce reflektují či přímo přejímají typickou frazeologii navrhovanou v jejich formulářích. Navíc v některých prostředích – zejména v případě vyšehradské a olomoucké kapituly – je patrná i znalost aktuálních diskusí o arbitráži zahraničních právníků, neboť místní notáři byli schopni zkomponovat kompromisní a arbitrážní listiny na základě zahraničních formulářů.

Písemné prameny (kompromisní a arbitrážní listiny, ale i další typy písemností vznikající během arbitráže) též svědčí o tom, že arbitrážní praxe respektovala v různých fázích jednání, konkrétně při zahájení rozhodčího řízení, dohodě stran o uzavření sporu arbitráží, při udělení pravomocí rozhodcům, a dokonce i během průběhu rozhodčího řízení, principy kanonického práva. Během 13. století byla arbitráž oblíbeným způsobem řešení sporů v církvi. Pro pochopení církevního soudnictví ve vymezeném období bude proto nutné v budoucnu systematicky sledovat vývoj i tohoto způsobu řešení sporů.