Chapter 2.

SOCIAL ARBITRAGE AS A METHOD OF COLLECTIVE DISPUTE RESOLUTION IN POLAND

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1. Arbitration (from the French word *arbitrage* – court of arbitration) is one of the ways of resolving disputed issues, in this case by a collective or one–person entity whose decisions may be issued with legal validity[2].

Social arbitration is an institution of the Polish collective labour law, whose inclusion in this paper has been motivated by the specificity of how this institution is structured in the applicable regulations. Its special nature, which distinguishes it from negotiation and mediation, results, among other things, from the presence of an arbitrator who is a professional judge, the ability to proceed in the seat of a court with elements of civil procedure and the issuance of a ruling that ends a collective dispute. Given the above distinctness as well as the controversies emerging on its basis, it seems that social arbitration should be included in the considerations relating to judicial culture as a culture of conciliation or litigation.

2. Apart from bargaining, mediation and strikes, social arbitration is another method of resolving a collective dispute under the Polish labour law. The parties' rights and obligations are structured differently within each of these methods. Consequently, the scope of use of a certain method of resolving a collective dispute is determined by numerous factors. First of all, it is to a certain degree imposed by the applicable provisions included in the Act of 23 May 1991 on Collective Dispute

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2 E. Sobol, *Mały słownik języka polskiego,* Warszawa 1993, p. 19.

Resolution[3]. They point to negotiations and mediation as compulsory methods with which to solve any collective dispute. Bargaining or, to put it differently, negotiations are the most basic form of creating dialogue between conflicting parties. They do not require the presence of intermediaries, they are not especially resource intensive, and the time of bargaining is decided by the parties themselves. The positive effect of bargaining is entered in an agreement having special legal validity. This agreement achieves the status of an autonomous source of labour law, which implies the possibility of lodging a claim with an employment tribunal for enforcement of its provisions. The second of the compulsory methods of collective dispute resolution, i.e. mediation, has been fashioned in a slightly more formalized way and it requires the parties to allocate more resources. In this case, it is necessary to appoint a mediator, to establish the terms of payment in connection with the remuneration to which he/she is entitled and with the reimbursement of travel and accommodation costs, as well as the terms of incurring the costs of possible expert opinions. These matters should generally be addressed by the parties of a collective dispute, however, in the process of selecting a mediator they might be assisted by the minister responsible for labour affairs. Successful mediation proceedings, as in the case of bargaining, are brought to an end by signature of an agreement with similar legal validity to the one described above.

Another factor influencing the use of a particular method of resolving a collective dispute is the intensity of a conflict between parties and associated inability to reach a compromise. In this case, the parties make use of a final and radical measure, namely going on strike. The radical nature of a strike is surely determined by an aspect of employees collectively refraining from performing work, whereas its finality results from the legal obligation to precede its announcement by bargaining and mediation. Therefore, the final character of a strike consists in the fact that it is announced when there is no other way out of a situation.

Social arbitration is located somewhat far from the mainstream of the above methods of collective dispute resolution. It is not in the

3 Act of 23 May 1991 on Collective Dispute Resolution (Journal of Laws 1991, No. 55, item 236, as amended), hereinafter referred to as the cdr.

pool of obligatory forms, and what is more, it is not a final method. It constitutes a voluntary method of dispute resolution because the decision on adopting it as a course of action is made exclusively by an entity representing employees. Neither is it a final method, since after a ruling declared by the parties as non–binding a strike may be announced.

3. The subject matter of this publication, while being concerned with the issues of judicial culture, creates the need to determine the legal status of boards of social arbitration formed for the purpose of resolution of collective disputes under Polish labour law. Since the Polish regulation causes many doubts, the mentioned problem has been rather widely discussed in the literature[4]. It is certain that the discussed social arbitration is not a homogeneous institution. This is shown, for example, in the composition of an arbitration board, where, apart from the six members appointed by the parties (three each), there is also a professional judge[5]. He/she is nominated by the president of a court to act as the president of an arbitration board. Another element possibly causing doubts with regard to the legal status of social arbitration is the location of these boards. In the case of a dispute concerning a single work establishment, they are supposed to act as part of a regional court which also includes a labour and social security court, whereas in the case of disputes concerning several work establishments they are supposed to act as part of the Supreme Court[6]. In addition, it should be noted that proceedings before boards of social arbitration include elements of court proceedings in civil matters. For in accordance with Regulation of 16 August 1991[7] governing proceedings before boards of social arbitration, they may apply the provisions of the ccp. for the purpose of the taking of evidence. The above entitlement may also cause problems with unambiguous assessment of the nature of boards of social arbitration. The above–mentioned features of this institution have once led to the development of starkly opposing views expressed by representatives of

4 See K.W. Baran, *Z problematyki charakteru prawnego orzecznictwa kolegiów arbitrażu społecznego,* Praca i Zabezpieczenie Społeczne 1994, No. 2, p. 15 et seq.; B. Cudowski, *Spory zbiorowe w polskim prawie pracy,* Białystok 1998, p. 110 et seq.

5 Article 16 section 3 cdr.

6 Article 16 section 2 cdr.

7 § 8 of the Regulation of the Council of Ministers of 16 August 1991 on the proceedings before a social arbitration board (Journal of Laws 1991, No. 73, item 324).

the doctrine, starting from a position granting these boards the status of particular types of courts, and ending with an opinion rejecting the possibility to acknowledge them as agencies of legal protection[8]. Despite the fact that the position denying boards of social arbitration the status of judicial authorities is currently prevalent in the literature, the legal provisions referred to above clearly link this institution to the existing judicial culture.

One thing that must not, however, be overlooked are some contrasts determining the distinct nature of this institution. In particular, attention should be paid to the collective character and even composition of this entity, which influences the manner in which a ruling is issued. It is not in fact issued by a single person but instead it is passed by majority vote of the members of the board with the participation of the so–called social factor[9]. Moreover, the ruling becomes special in its nature in connection with its invalidity, if the parties so decide still before submitting the dispute to be resolved by this board. On the other hand, it should be noted that the legislature has not provided for another method in which such a ruling may be amended or repealed. One thing missing from the applicable regulation is in particular the avenue of appeal, which leads to the conclusion of the doctrine about the inadmissibility of filing an appeal against a ruling of a board of social arbitration[10].

It must be concluded that in the Polish regulation concerning labour law, arbitration refers to both the method of conciliation and of litigation as methods of dispute resolution. On the one hand, there is an authoritative element in the form of a ruling issued by a competent authority, while on the other hand, the binding nature of the decision issued depends on the will of the parties to the conflict. Looking at the presented regulation in its entirety, it can be reported that what we are dealing with is mutual interpenetration of elements of social arbitration and judicial elements [11].

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8 These views are presented by B. Cudowski, *op. cit.,* p. 110–111.
9 Article 16 section 6 cdr.
10 B. Cudowski, *op. cit.,* p. 113.
11 G. Goździewicz, *Mediation and arbitration in the Polish labor law,* [in:] G. Goździewicz (ed.), *Arbitration and mediation in labor law. American and Polish Experience,* Lublin 2005, p. 41.

4. Practice shows that in the Polish reality of the conflicts that are collective in their nature, the institution of social arbitration is rarely used and inefficient[12]. In my opinion, this situation does not mean that the institution of social arbitration has become obsolete or that it should be removed from the existing legal regulation. This is, for instance, demonstrated by the presence of this method of collective dispute resolution on an international ground, and also within individual EU Member States.

It should be noted that the issues concerning the models of systems of collective labour dispute resolution have not previously been of interest to the EU, which has been reflected in the omission of these issues in the existing legislative instruments[13]. It is also today that the Treaty on the Functioning of the EU[14] expressly states that the European Union shall not support or complement the efforts of the Member States with regard to the right to strike or the right to impose lock–outs[15]. In this way, the European Union makes it clear, at least this is how it seems, that the above–mentioned issues belong among the matters regulated under the internal policies of the Member States. However, on the other hand, it must be noted that ratification of the Charter of Fundamental Rights by the EU can bring about some changes in this regard[16], because Article 28 of the cfr. has been given binding force. From its provisions, it follows that workers and employers, or their respective organizations, have, in accordance with the EU law and with national legislations and practices, the right to negotiate and conclude collective labour agreements at the appropriate levels and to take, in cases of conflicts of interests, collective action, including strike action to defend their

12 Results of research on the use of the institution of social arbitration in the collective labour disputes have been presented by A. Rycak, *Social arbitration in collective labor disputes in Poland,* [in:] G. Goździewicz (ed.), *op. cit.,* p. 147 et seq.

13 As an interesting exception one can point to Directive of the European Parliament and of the Council No. 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L No. 18, p. 1). In Article 3, the Directive refers to the collective agreements and arbitral awards declared universally applicable, by obliging the Member States to guarantee that posted workers are covered by the application of the provisions contained therein as regards specific conditions of employment.

14 A consolidated version of the Treaty on the Functioning of the European Union of 30 March 2010 (OJ C 83, p. 1), hereinafter referred to as the t.f.e.u.

15 Article 153 section 5 t.f.e.u.

16 The EU Charter of Fundamental Rights (OJ C 2007, No. 303, p. 1), hereinafter referred to as the cfr.

interests. In the literature, it is rightly assumed that the quoted article "consummates the achievements of European labour law doctrine as regards (including but not limited to) the following: the principles of bargaining […], the concept and subject of collective labour disputes, models of systems of their resolution, basic principles of strike and lockout"[17]. There is no doubt that the right to bargain is a fundamental social right. It is also included in the European Social Charter of 18 February 1961[18], whose provisions are explicitly described by the t.f.e.u. in Article 153 as "fundamental social rights". Within the framework of the right to bargain, Article 6 of the e.s.c. explicitly mentions voluntary arbitration for the labour dispute resolution as a mechanism that can ensure the effective exercise of the right to collective bargaining. These issues are also presented in Recommendation 92 of 1951 issued by the ILO with regard to voluntary conciliation and arbitration[19].

From the foregoing considerations it is clear that the EU law, for instance the provisions of Directive 96/71 concerning the posting of workers in the framework of the provision of services, accepts the legal arrangements in force in the Member States on ways of settlement of collective disputes, including arbitration. It does not impose any solutions on the Member States in this respect. Furthermore, on the international ground, the existence of institutions of arbitration in collective conflicts is recognized as most desirable.

The significance of the mentioned institution is also evident in other Member States. An example among the Member States is constituted by France. Arbitration is mentioned in France as a way to resolve a collective dispute, in addition to conciliation, mediation and judicial mediation[20].

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17 M. Matey–Tyrowicz, *Podstawowe prawa społeczne w dziedzinie pracy jako „mega–źródła" prawa pracy,* [in:] M. Matey–Tyrowicz, T. Zieliński (eds.), *Prawo pracy RP w obliczu przemian,* Warszawa 2006, p. 94. As a side note, it is worth mentioning that in connection with the provisions of the Treaty, the Author draws attention to the fulfillment by the EU of its obligation to ensure the application of Article 28 of the cfr. by creating the appropriate legal standards.

18 The European Social Charter of 18 February 1961 (Journal of Laws 1999, No. 8, item 67), hereinafter referred to as e.s.c.

19 Ministry of Labour and Social Policy. Department of Dialogue and Social Partnership, *Międzynarodowa Organizacja Pracy. 90 lat istnienia,* Warszawa 2009, p. 29.

20 A. Machowska, [in:] A. Machowska, K. Wojtyczka (eds.), *Prawo francuskie,* Kraków 2005, p. 330.

Unlike in Poland, arbitration is governed by the Labour Code[21]. It is clear from these provisions that it is a procedure requiring consensus among the social partners, which, however, do not always see the need to involve a third party in the dispute. In the literature a position is being formulated that this is one of the reasons for the lack of popularity of this institution in France[22]. An arbitrator is a person appointed in order to resolve a particular case. This determines the occasional nature of acting in this capacity. A list of potential arbitrators may be placed in conventions or collective agreements, if they provide for such a method of settling a collective dispute[23]. Equally important is the fact that both an arbitrator and arbitration procedure may also be established in a general agreement between parties, even when these matters are not governed by conventions[24]. An arbitrator is expected to issue a ruling alongside with a substantiation. In resolving a dispute, an arbitrator should first and foremost pay attention to its subject since it determines the sources based upon which a decision will be made. If a dispute relates to the interpretation and enforcement of legal provisions (acts, ordinances), the collective conventions or applicable agreements, the arbitrator shall issue a ruling on the basis of the law. It is particularly interesting that in matters not determined by law but being the subject of a dispute (such as remuneration), an arbitrator makes his/her decision on the basis of equity principles. This also applies to situations where labour disputes are connected with bargaining with view to a revision of the clauses of collective conventions[25]. In the case of French arbitration, an arbitrator's ruling is not final. The parties may exercise their right to appeal to the Supreme Court of Arbitration (*Cour supériere d'arbitrage*), operating within the Council of State (*Conseil d'État*), including the following judges: Vice–President of the Council of State, four (active or honorary) counselors of the Council of State, and four (active or honorary) members of common courts of law[26]. When the Supreme Court of Arbitration decides in favour of cancellation, in whole or in part, of the arbitration award, it

21 Article 2524–1–2524–11 of *Code du travail* (Ord. nº2007–329 du 12 mars 2007), hereinafter referred to as the ct.
22 A. Mazeaud, *Droit du travail,* Paris 2004, p. 250.
23 Article L 2524–1 ct.
24 Article L 2524–2 ct.
25 Article L 2524–4 ct.
26 A. Machowska, [in:] A. Machowska, K. Wojtyczka (eds.), *op. cit.,* p. 330.

refers the case to the parties which appoint a new arbitrator, if they have been unable to reach an agreement.

5. Appreciation of the institution of social arbitration, which has been in fact planned as an alternative to a strike, requires amendment of the existing regulation. Accordingly, in the literature there have been attempts at presentation of proposed modifications aiming to make arbitration more attractive to the parties so that they would want to use it. It has been correctly postulated that, above all, a mandatory element in the social arbitration procedure must be introduced. As a side note, it must be added that the need for such an amendment is recognized not only in Poland, but, as mentioned earlier, also in France where it is acknowledged that one of the reasons for the low popularity of arbitration is its wholly–voluntary nature. In the Polish regulation, mandatory arbitration would be applicable to the following three situations: (1) in the event of existent statutory restriction on the right to a strike and of an unfavorable completion of mediation, (2) when a strike or lock–out fails to end a collective dispute within 3 months, while any further continuation of the dispute would jeopardize national security or significantly violate the public interest, (3) when a ruling legally binding for the parties is issued[27].

The need for changes in the social arbitration procedure has also been spotted by the Labour Law Codification Commission while preparing an amendment to the existing provisions in the Draft Code of Collective Labour Law[28]. It also includes some postulates of the doctrine with regard to compulsory arbitration in the event of a lengthy strike or suspended operations of a work establishment (or its part) by the employer[29] and to a binding decision[30].

The moment of submitting a collective dispute for resolution by a board of social arbitration has been defined in a different way than the currently–applicable one, as the parties may agree about doing so at any stage of the dispute. This applies even to a strike, with the exception

27 M. Seweryński, *Problemy legislacyjne zbiorowego prawa pracy,* [in:] M. Matey–Tyrowicz, T. Zieliński (eds.), *op.cit.,* p. 425–426.
28 Collective Labour Code (Draft) from April 2007, hereinafter referred to as the clcd.
29 Article 154 § 1 clcd.
30 Article 156 § 1 clcd.

that in such a case the strike must be suspended immediately. In view of the generally voluntary nature of arbitration, it has been accepted that the initiation of arbitration procedure does not preclude the conclusion of an agreement. The only condition, as assumed in the proposed amendment, is that the parties should reach an agreement before the arbitrator's decision is issued. At that time, the arbitration procedure is cancelled. In this way, the draft introduces flexibility in the use of the institution of social arbitration by the parties which is much greater than ever before. It should be noted that the proposed changes resemble the regulation of labour arbitration found in the American system. In particular, they are based on a similar principle, according to which the parties must be able to shape the arbitration according to their own needs[31]. The introduction of flexibility in arbitration procedure in the United States is perceived as a key factor in the success of this institution and its popularity among the parties of the employment relationship[32].

The provision about the right of the both parties to make a decision on submitting the dispute to the arbitration procedure is clearly a positive development, and also postulated in the doctrine. In addition to this general principle, the project also provides for an exception concerning the employees without the right to a strike. The proposed provision assumes that a resolution of the dispute under arbitration may only be determined by the employee party which has the same right if the earlier mediation proceedings have not led to a successful outcome[33].

The description of an arbitrator resolving the dispute is another significant change included in the draft. Above all, he/she would replace the present boards of social arbitration. The procedure of appointing an arbitrator has been designed in a similar manner to the one applicable in the case of a mediator. Essentially, the choice of an arbitrator in the draft amendment is left to the parties, except the case of mandatory arbitration, where an arbitrator is appointed by the National Consultant of Labour

31 S. Das, *The Structure of Labor Arbitration in the United States,* [in:] G. Goździewicz (ed.), *op. cit.,* p. 263.

32 T.W. Jennings, *The Advantages and Disadvantages of Labor Arbitration on the Private and Public Employment Sector within the United States from the Prospective of a Union Advocate,* [in:] G. Goździewicz (ed.), *op. cit.,* p. 228.

33 Article 153 clcd.

Dialogue[34]. To facilitate the selection of an arbitrator the draft provides for the parties to be able to designate an appropriate person either from a list prepared by the National Consultant of Labour Dialogue, trade unions and employers organizations, or someone who is not on the list. This rule also resembles the U.S. arbitration system and provides the parties with the thing which is commonly called "pure justice"[35] in that country. It is not only guaranteed by the fact of selection of an arbitrator by the parties, but also by his/her competences and attitude. For the parties to feel comfortable, the requirements to be met by the arbitrators are very important. For this reason, a solution consisting in defining the requirements to be met by an arbitrator shall be adopted. He/she should be a person with the capacity to perform acts in law, enjoying full civil rights, with knowledge of employment problems, with impeccable reputation and at least five years' experience in the legal profession or the degree doctor of legal sciences[36]. However, it must be noted that the draft provides for the obligation to comply with the above criteria only in respect of arbitrators on the list. It seems that clear–cut criteria should also be defined in the case of a mediator who is not on the list. The popularity of the American arbitration is also influenced by the fact that an arbitrator must be impartial[37]. The Polish draft also explicitly states that an arbitrator should act in fairness[38], which must be seen as a positive thing. Similar to a mediator, he/she is also obliged not to divulge information obtained in the workplace during the proceedings.

The costs of the arbitration procedure include remuneration of the arbitrator and refund of incurred expenses. In addition, an arbitrator has the right to unpaid time off work for the duration of the arbitration[39] and the legal protection enjoyed by government officials during the proceedings.

A ruling issued by an arbitrator is presented in the draft in a different manner than in the current legal state. The difference consists

34 Article 154 § 2 clcd.
35 T.W. Jennings, [in:] G. Goździewicz (ed.), *op. cit.,* p. 231.
36 Article 158 clcd.
37 S. Das, [in:] G. Goździewicz (ed.), *op. cit.,* p. 261.
38 Article 155 § 1 clcd.
39 Article 157 clcd.

not only in the fact that it is binding, as previously mentioned. It is also important that an appeal against the ruling to a court within seven days of its receipt has been expressly allowed[40]. Currently, it is difficult to unambiguously assess the proposed solution. It seems that it may lead to a prolonged arbitration procedure and increase its costs. However, we can only state at this point that in the American arbitration the control of an arbitrator's rulings is very limited and applies actually to arbitral awards made in the state sector[41]. It is assumed that arbitral awards are binding and final, arguing that the parties themselves have decided to submit the dispute to arbitration[42].

40 Article 156 § 2 clcd.

41 R.M. Goldberg, *Judicial Review of Arbitration Awards,* [in:] G. Goździewicz (ed.), *op. cit.,* p. 241–243.

42 Ch.F. Szymanski, *The Development of Labor Arbitration in the United States,* [in:] G. Goździewicz (ed.), *op. cit.,* p. 174.