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Arbitration in employment disputes – de lege ferenda comments 15 years after arbitration clauses in employment relations were introduced in the civil procedure

Abstract

The purpose of this paper is to analyse the existing model of employment arbitration in Poland in force since 2005. According to Article 1164 of the Code of Civil Procedure, arbitration clauses in employment disputes can only be established once a dispute has already arisen. In reality, this post-dispute voluntary regulation has no practical value and employment arbitration is an instrument used extremely rarely in Poland.

On the basis of examination of applicable laws, the author shows that in given factual and legal circumstances a reasonable employee and a reasonable employer shall seldom have a cause to simultaneously agree to arbitrate an already existing dispute. By applying the comparative method at the same time, the paper examines possible criteria of distinguishing categories of disputes, agreements, persons and other conditions that would permit a valid arbitration clause in employment agreements.

In conclusion, the author demonstrates that, firstly, the existing voluntary post-dispute employment arbitration model in Poland is a fictitious one and requires reform and, secondly, that both a full elimination of arbitration clauses in employment agreements and a full arbitration clause for all future disputes are too blunt a tool not taking into account the real

needs and requirements of today's employees and employers. The author calls for a more nuanced regulation of employment arbitration in Poland.

Keywords: employment dispute, arbitration clause, employment arbitration

Introduction

Arbitration clauses in labour law matters may only be introduced after a dispute has arisen. This rule, introduced in Article 1164 of the Code of Civil Procedure, precludes the imposition of arbitration clauses in employment agreements and in other agreements establishing an employment relationship.¹ It is the purpose of such regulation to protect a weaker party to an employment relationship by affording it the right to co-decide in matters related to referring a dispute to arbitration proceedings only after a dispute has arisen and claims have been determined.² This purpose is a consequence of the assumption that an employment agreement is often in the nature of an adhesion contract, where an employee is unable to make decisions concerning individual contractual solutions and may only accept the agreement in its entirety.³

In Poland, it has only been possible to submit an employment dispute to arbitration since 2005. Up until then this mode of dispute resolution was not available to employees and employers. The literature has pointed out that the instrument provided for in Article 1164 of the Code of Civil Procedure is a dead letter,⁴ only to be used on very rare occasions.⁵ In the Court of Arbitration at the Confederation of Lewiatan, a dispute in the field of labour law has never been considered, while

1 Bąba, M., *Zapis na sąd polubowny w sporach z zakresu prawa pracy*, "ADR. Arbitraż i Mediacja" 2009, No. 4(8), pp. 5-13; Golat, R., *Specyfika polubownego rozstrzygnięcia sporów w stosunkach pracowniczych*, "Służba Pracownicza" 2006, No. 9, pp. 9-14.

2 Flejszar, R., *Ugodowe rozwiązywanie sporów z zakresu prawa pracy*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2010, No. 1, pp. 315-328.

3 Skąpski, M., *Ochronna funkcja prawa pracy w gospodarce rynkowej*, Kraków 2006, pp. 106-161.

4 Szlęzak, A. and Pałubicki, R., *Pozasądowe sposoby rozwiązywania sporów pracowniczych. Uwagi ogólne*, in: Góra-Błaszczkowska, A. and Antolak-Szymański, K. (eds.), *Pozasądowe sposoby rozwiązywania sporów pracowniczych*, Warszawa 2015, p. 25. The statistics referred to by the authors specify that the number of employment disputes in Poland resolved by arbitration clause is limited to several per year.

5 Flaga-Gieruszyńska, K., *Sądownictwo polubowne w sprawach z zakresu prawa pracy*, in: Góra-Błaszczkowska, A. and Antolak-Szymański, K. (eds.), *Pozasądowe sposoby rozwiązywania sporów pracowniczych*, Warszawa 2015, pp. 73-82.

the Court of Arbitration at the Polish Chamber of Commerce refuses to provide any statistics.⁶

As a result, in light of only marginal use of arbitration clauses in Poland in labour law matters, it seems that precluding the option to refer disputes arising in connection with employment agreement to arbitration is not really a solution, and at best it is a solution that is not sufficiently nuanced in currently evolving economic and technological conditions. Some authors emphasise the need of legislative changes in the field of employment arbitration.⁷ Suggestions that have been presented include making arbitration operate more efficiently by establishing specialised courts devoted to such disputes⁸ or singling out employment agreements executed by management board members of companies as fit for employment arbitration.⁹ However, what is lacking in literature from the field of labour law and civil proceedings is a critical analysis of the rule adopted in the Code of Civil Procedure, stating that only already existing disputes in connection with employment agreements may be the object of arbitration clauses.

In respect of arbitration in employment matters, it seems that a division of solutions concerning arbitration in employment agreements into mandatory pre-dispute clauses and voluntary post-dispute clauses¹⁰ is of vital importance. In this paper, the model that is in force in Poland is referred to as voluntary. However, this voluntary nature means that both parties are permitted to make a decision to refer a dispute to arbitration only after such dispute has arisen. A mandatory model, in turn, is one where both parties make such a decision prior to the dispute having arisen – “mandatory” in this case does not mean that arbitration as such is mandatory.

Proponents of the voluntary model are of the opinion that all benefits and characteristics of arbitration still apply after the dispute has arisen. There is no point, therefore, in tying our hands by arbitration and precluding common courts from resolving a dispute before such dispute has even come to be. However, this reasoning seems faulty, as it completely disregards actually existing legal, economic and social conditions in which employees and employers operate. Further, it seems correct and justified to propose that after a dispute has arisen rational parties to an

6 Electronic correspondence with registries of both aforementioned courts in February 2020.

7 A. Węgrzyn, *Sądownictwo polubowne w sporach z zakresu prawa pracy*, “Studia z Zakresu Prawa Pracy i Polityki Społecznej” 2007, No. 1, pp. 399-410.

8 Flaga-Gieruszyńska, K., op. cit., p. 77.

9 Szlęzak, A. and Pałubicki, R., op. cit., p. 26.

10 Estreicher, S., *Saturns for rickshaws: the stakes in the debate over predispute employment arbitration agreements*, “Ohio State Journal on Dispute Resolution” 2001, Vol. 16, No. 3, pp. 559-570; Eisenberg, T. and Hill, E., *Arbitration and litigation of employment claims: an empirical comparison*, “Dispute Resolution Journal” 2003/2004, Vol. 58, No. 4, pp. 44-55.

employment relationship only rarely will decide to refer such conflict to an arbitration court since at any point either party will be more interested in either common courts or arbitration courts. The consent of both parties is needed for an arbitration clause to take effect. The current regulation, however, imposes certain restrictions concerning the time when an arbitration clause with respect to employee and employer claims may be introduced.¹¹

This paper presents a critical analysis of the post-dispute model that is in force in Poland and revisits the conditions that should be fulfilled in order to introduce pre-dispute clauses as well. This evaluation has been conducted accounting for the prevailing conviction in labour law studies about benefits to be incurred by reducing tensions in the work environment thanks to entities from outside the common court system.¹² This paper shows possible criteria for identification of specific categories of disputes, agreements, entities and other conditions, whereby an arbitration clause would be permitted in an employment agreement.

Defects of the voluntary model

The applicable post-dispute model for labour law conflicts does not offer employees and employers a real option to refer the dispute to arbitration – it is only nominal and on the surface. After the dispute has arisen, i.e. after claims of the parties have been specified and their positions have become known, the legislator assumes that those parties will reach an arrangement regarding the forum which will be tasked with resolving the conflict. Meanwhile, for both the employee and the employer – and often and especially for lawyers who represent them in the event a dispute arises – the strategic decision on whether to introduce an arbitration clause will depend mainly, if not exclusively, on whether this will increase their chances of obtaining a favourable outcome in a particular case in specific factual and legal circumstances. Assuming both parties act rationally, most frequently only one party will arrive at the conclusion that such a clause is beneficial to it. Only in extraordinary situations will this conclusion be reached by both the employee and the employer. This is the main reason why the voluntary post-dispute arbitration clause model is so unpopular.

Firstly, the parties and their professional advisers in particular will scrutinise each and every advantage and disadvantage of arbitration in terms of already specified claims – for example, whether experts competent for a given dispute or persons

11 Mędrala, M., *Zapis na sąd polubowny w sprawach z zakresu prawa pracy*, “Studia z Zakresu Prawa Pracy i Polityki Społecznej” 2007, No. 1, pp. 411-419.

12 Baran, K.W. (ed.), *System prawa pracy. Tom I. Część ogólna*, Warszawa 2017, pp. 1207-1210.

familiar with the industry make rulings in a given court or whether a no-jury trial has any significance, whether a trial conducted in camera will be beneficial for one of the parties, whether a ruling will be appealable, whether full proceedings on evidence will be conducted or whether the proceedings will be speedier than in common courts. Only the sum of answers to each and every of those questions will allow each party to decide if arbitration will be a good solution in specific circumstances – and only for this party, not for anyone else. It is difficult to imagine a dispute in which both parties and often their lawyers would, as a result of the respective conducted analysis, make the same decision as regards the arbitration clause. What is a benefit of proceedings before arbitration courts for one party will be a drawback and risk for the other. For instance, long duration of proceedings before common courts could be deemed an asset for a party that intends to ‘exhaust’ its opponent and delay an unfavourable ruling. On the other hand, the openness of proceedings could be seen as an advantage for an employee who wants the affairs of a business to be examined in public, but may also be beneficial for an employer who would like a given person’s salary to be known to the media. For this reason, while it is possible for both parties to be interested in referring a dispute to arbitration, only on very rare occasions will both of them be willing to have a specific conflict resolved before such a forum.

Secondly, at the moment when a dispute has come into being, relations between parties are already affected by negative emotions and a certain tension. Also then for psychological reasons it is difficult to expect conflicted parties to come to an arrangement in any matter and forget about their clash in order to reach an agreement on a neutral or fresh ground in an additional matter.

Thirdly, parties and in particular the lawyers representing them are not willing to take any steps that the other party may interpret as weakness. Meanwhile, considering the aforementioned circumstances, consent to arbitration may be regarded by one party as admission of vulnerabilities with which the proposed legal and factual narration is afflicted.

In other words, if both parties are competent, only in extraordinary situations will they make a simultaneous decision to refer an existing dispute to arbitration. On the other hand, a rational risk and benefit analysis related to arbitration as well as relationship dynamics between the parties upon executing an employment agreement are a different matter altogether. At such point, the parties are unable to specify any particular dispute that might arise between them in specific legal and factual circumstances. They are thus incapable of determining whether the common court or the arbitration court is in general more beneficial to them. If for any reason both parties are willing to be bound by an arbitration clause, this joint willingness will most likely disappear at the very moment a conflict is established,

since in the assessment of one party proceeding to resolve the issue by way of conventional courts might be more worthwhile. In other words, the benefits that the parties collectively see according to a mandatory model (i.e. in being bound by an arbitration clause when executing an employment agreement) are missing in the voluntary model, since one of the parties is unlikely to consider them as such.

In the voluntary system provided for in Article 1164 of the Code of Civil Procedure the parties have to bear all the problems related to dispute resolution by common courts plus all negative aspects of arbitration. For this reason, it is not surprising that in the Polish reality employees and employers vote against arbitration clauses. After the dispute has arisen, none of the parties, thinking it has a better chance in common courts, will agree to any other solution. Imagine poker players who are encouraged to swap their position after cards have been dealt – they will never agree to it at the same time. However, before card dealing no one should have any problem whatsoever with this.

One of the consequences of precluding arbitration clauses from being included in employment agreements are long waiting times before cases are heard before labour courts, whereas a substantial number of such cases could be efficiently resolved in arbitration. Of course, there are several arguments against the inclusion of arbitration clauses in employment agreements, but analysis thereof leads to an opposite conclusion.

Firstly, supporters of the voluntary model can maintain that arbitration proceedings are not open and therefore some rulings on labour law matters would not be part of the public domain. However, this objection against arbitration proceedings may pertain to all types of conflicts resolved by arbitration courts. The private nature of arbitration proceedings may be a value in itself – even of elementary importance – for the parties. If we agree that it is a value of this sort – it will remain a value both when the dispute has already arisen and at the stage of executing an employment agreement. All those benefits to arbitration proceedings that exist the moment the fact of a conflict has been established, likewise existed at the stage of executing an employment agreement. The argument concerning openness may also be reversed – openness of proceedings is sometimes used in labour law disputes for the promotion of dubious or risky suits so as to force, by means of public exposure of the case, the other party to specific concessions. The issue of openness or lack thereof is not a matter of advantages or disadvantages of employment arbitration, but constitutes a generally acceptable characteristic of arbitration proceedings which is of various importance for various parties, irrespective of whether it is assessed in light of an already existing dispute or a conflict that might come to be in the future.

Secondly, proponents of the voluntary model may state that in labour law cases arbitration is of limited use due to evidentiary restrictions often applicable before

such courts (such as written witness statements). As with lack of openness, this objection against arbitration proceedings may concern all types of cases resolved by arbitration courts. Meanwhile, limited and speedy proceedings on evidence may be deemed a benefit for each party to a conflict, and if we consider such streamlined rules of proceedings on evidence as a general advantage of arbitration, our assessment will not differ regardless the time it is made. Otherwise, we would be forced to admit that limited proceedings on evidence of this sort may never be permitted in labour law matters at all, even if an arbitration clause was to be introduced after a dispute has arisen.

Thirdly, supporters of the voluntary model may claim that arbiters in arbitration courts will, as a rule, favour employers (due to the economic nature of arbitration as such). Such criticism may also boil down to the assessment that conventional labour courts with jurors would be more forgiving towards employees or that in such courts employees may expect higher compensation. Such attitude may also be manifested in an accusation that if a given enterprise is a frequent client of a given arbitration court it will enjoy a privileged position.¹³ These arguments contain contradictory prejudices that are not supported by any statistical research but are rather based on “hunches” and legal measures. If they are indeed a reflection of particular methods of dispute resolution, they are not favourable to any one model, but rather speak against both of them. Considering moreover that arbitration in labour law matters in Poland is used only marginally, attributing favouritism towards employers to those courts seems out of touch with reality – arguments of this type state first of all that common courts should not favour employees at the expense of employers, and secondly that some labour law cases should be actually submitted to arbitration.

Finally, proponents of the voluntary model may purport that an employment agreement, being an adhesion contract, is not negotiated by an employee and therefore it should not feature an arbitration clause as sometimes the employee may even be unaware of the consequences of such contractual provision. However, when executing an employment agreement, an employee (managerial staff or high-level specialists notwithstanding) usually has little influence on any particular contractual provision, and despite this, for some reason, the legislator decided against specifying in detail what solutions should be included in an employment agreement and afforded the parties certain freedom in their arrangements regarding

¹³ Bingham, L., *Employment arbitration: the repeat player effect*, “Employee Rights and Employment Policy Journal” 1997, No. 1, pp. 189-199. The author notes that perhaps the privilege concerns not employers whose disputes found their way into arbitration courts but professional representatives using a given forum.

the employment relationship. It is commonplace and accepted that an employee executes an employment agreement as an adhesion contract of sorts – and for this reason this is not an argument against such arbitration clause to be a part of the agreement. Either this practice should be permitted in full or we should oppose it altogether. The voluntary model is characterised by a dual personality of sorts – on one hand it assumes that an employee upon executing an employment agreement may be unaware of what he is signing and on the other hand it presumes that when a dispute arises the employee will most certainly make a rational decision regarding the type of court.

It is impossible to criticise arbitration for lack of openness, limited proceedings on evidence or favouring employers and other characteristics and at the same time support referrals to arbitration courts by parties to an employment relationship after a dispute has arisen.

Recapitulating – if we agree that arbitration in Poland has any benefits, those benefits will exist both when a dispute has arisen and at an earlier date, when an employment agreement is being executed. Taking into account the aforementioned arguments proving that rational parties will only on rare occasions and only in extraordinary circumstances refer a dispute that has already been established to arbitration, one cannot as a result logically proclaim advantages of arbitration and simultaneously declare that such advantages are non-existent when an employment agreement is being executed.

Therefore, it is worth considering in relation to what kind of disputes, entities and agreements and under what conditions arbitration clause could be included in employment agreements at the moment they are executed.

Conditions for the mandatory model

In light of the comments presented above and the only marginal use of post-dispute arbitration clauses in Poland, it seems justified to consider the conditions the fulfilment of which would allow parties to an employment relationship to submit a dispute to arbitration as soon as such relationship has been established.

Firstly, such clauses could be used in employment agreements executed with management board members or more broadly with company officials by defining such persons similarly to Article 128 §2(2) and Article 1514 § 1 of the Labour Code as ‘employees managing the workplace on behalf of the employer’ and ‘directors of separate organisational units’. In all those cases, an employee is not a weaker party to an employment relationship and therefore the need of enhanced protection is not as valid as in the case of ordinary employees. Most commonly, employment

agreements with such persons are not in the nature of adhesion contracts. In this context, it is worth remembering about different negotiating positions afforded to promoted intra-corporate managers on one hand and to managers brought from outside on the other hand, but this division is impossible to be reflected in provisions of law. As a rule, one can notice a correlation that the longer a given employee works with a given employer, the more willing he will be to be bound by an arbitration clause¹⁴ (this most likely indicates that parties bound by a long-term contract would seek more creative ways to resolve a dispute). Further, conflicts between such persons and employers often resemble economic disputes, involving experts in the field of management and evaluations of enterprises. One should also not forget that arbiters may be better prepared to tackle such quasi-corporate or quasi-economic disputes than labour judges and jurors.

Research results from the United States point to certain interesting correlations in this scope.¹⁵ Namely, referrals to arbitration can be most often found in three situations involving the management staff (it is worth remembering that in the United States as many as nearly 60% of employment agreements contain arbitration clauses),¹⁶ in particular in employment agreements with management staff, where a part of the compensation depends on long-term business results of the managed enterprise. In those situations, employees usually want to ensure that the dispute is submitted to experts in the field of management and remuneration and to complicated mathematical models, that information about their salary is kept confidential and most of all that the high salary does not put them at a disadvantage in the eyes of common court judges (moreover, some employees may be anxious that the industry they work in, e.g. e-gaming tech start-ups, will be met in common courts with scepticism or lack of understanding). Further, arbitration clauses can be found in employment agreements executed mainly in industries susceptible to volatile economic changes, such as mergers, acquisitions or bankruptcies. In those circumstances, employees usually want to have the dispute resolved quickly. Finally, referral to arbitration is also frequently added to employment agreements in low-income industries where employees are often more interested in lower costs

14 Schmitz, A., *Untangling the privacy paradox in arbitration*, "University of Kansas Law Review" 2006, Vol. 54, pp. 1215-1217.

15 Schwab, S. and Thomas, R., *An empirical analysis of CEO employment contracts: what do top executives bargain for?*, "Washington and Lee Law Review" 2006, Vol. 63, pp. 236-240; Thomas, R. et al., *Arbitration clauses in CEO employment contracts: an empirical and theoretical analysis*, "Vanderbilt Law Review" 2008, Vol. 63, No. 4, pp. 960-974.

16 Colvin, A., *The growing use of mandatory arbitration. Access to the courts is now barred for more than 60 million American workers*, 27.09.2017, Economic Policy Institute, <https://www.epi.org/files/pdf/135056.pdf> (accessed 31.01.2019).

of proceedings (in Poland, however, the cost argument works the other way), and by granting consent to arbitration clauses they wish to emphasise their loyalty and willingness to compromise.

In the United States, we can also see another correlation. Namely, the bigger the share of a given employer in gross product of a given state, the bigger the willingness of management staff to avoid state courts in disputes with this employer.¹⁷ In other words, managers fear bias of judges (referred to as hometown bias) in the event of a dispute with an employer who has a big impact on the local economy. This might be a valuable guideline for employees of Polish State Treasury companies or municipal companies.

Secondly, an arbitration clause in labour law matters could be permitted upon employment agreement execution by correlating it with a certain threshold number, such as salary per year or month or claim value in a given case. These numbers are usually dependent on the position, nature of employee's duties and qualifications and may thus be treated as an indication of whether in a specific situation a given employee must be subject to protection by national labour courts or can be afforded the leeway to decide for himself. Research shows that the higher the employee's salary, the more interested he is in having the dispute resolved by arbitration courts.¹⁸

Thirdly, it is easy to imagine a model in which, at the stage of executing an employment agreement, an arbitration clause would be permissible in every matter save for cases involving equal treatment in employment. This way, ordinary disputes related to termination of employment and payment of items of salary could be subjected to arbitration, while conflicts concerning rights and freedoms protected by the Constitution would have to always be considered by common courts. Also disputes regarding the protection of business secrets or non-competition could enjoy a different treatment.

Fourthly, considering the aforementioned research showing the correlation between an employee's willingness to resort to arbitration and the volatility of a given industry, one possible criterion is the character of the conducted business activity. For example, arbitration clauses in labour law disputes could find their way to agreements executed by employees working for companies listed on the New-Connect stock exchange operated by *Gięlda Papierów Wartościowych w Warszawie* (Warsaw Stock Exchange) in the case of new-tech and intangible assets companies.

Finally, referring to the aforementioned analyses presenting a correlation between career length with a given employer and employee's willingness to be bound by an

17 Sherwyn, D. et al., *Assessing the case for employment arbitration: a new path for empirical research*, "Stanford Law Review" 2005, Vol. 57, No. 4, pp. 1557-1590.

18 Thomas, R. et al., *op. cit.*, p. 983.

arbitration clause, it might be a good idea to specify in an employment agreement that only disputes that arise after the lapse of certain time that such an agreement has been in force will be referred to arbitration. On the one hand, this would allow conflicted, albeit familiar parties to look to arbitration courts for more creative solutions than those available in labour courts, and on the other hand to show a tendency to some kind of mutual loyalty and willingness to compromise, which will have an impact on how comfortable both parties will be to perform the agreement.

Conclusions

The option to refer labour law disputes of parties in an employment relationship to arbitration courts that was introduced in Poland in 2005 has proven to be a fiction. The analysis we have conducted above shows that in specific actual and legal circumstances a rational employee and a rational employer will only rarely find reasons to agree to refer an already existing dispute to an arbitration court.

As a result, it seems that an amendment to Article 1164 of the Code of Civil Procedure is desirable in order to permit more extensive and genuine application of arbitration clauses by parties to an employment agreement. Both complete elimination of arbitration clauses, as it is today, as well as the opposite situation – full submission of all future labour law disputes to arbitration courts do not take into consideration the actual needs and expectations of the parties to an employment relationship.

The statutory regulation of arbitration clauses in labour law disputes should be more nuanced and should respect the willingness of certain groups of employees and employers to be bound by arbitration clauses in specific employment agreements. This will allow parties to an employment relationship to have the provisions concerning arbitration clauses formulated in a flexible manner at the stage of negotiating an employment agreement and to refer particular types of cases to common courts and other conflicts to arbitration courts.

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