


## Issues of awards given as a part of social arbitration in a collective dispute. *De lege lata* and *de lege ferenda* remarks

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**Abstract:** Social arbitration as the third method of resolution of collective disputes can be used to resolve a dispute in an amicable manner. Thanks to this method, parties to the collective dispute can end their conflict thanks to the arbitration award with no need to go on strike. The author analyses the legal nature of arbitration awards and presents consequences of the related labour law legislation. The conclusion is as follows: current legal regulations are in need of change, especially when it comes to the execution, amendment and supplementation of an award issues as a part of social arbitration with the involvement of trade unions, employers or their organisations.

## 1. Introduction

Collective labour disputes constitute a material element of the economic system of a state. It remains a valid question whether amicable methods of dispute resolution can be used effectively to avoid using strikes as a last resort. Social arbitration is one such amicable form. To evaluate the importance of this institution and its possible application objectively, one cannot ignore the nature of an arbitration award. However, it has to be explained first what collective disputes are and who they apply to.

While analysing collective disputes, one should note that a collective dispute is a legal concept separate from the concept of an individual employee dispute. The principal difference between an industrial dispute and

an individual dispute is the scope of the subject and object of the dispute. According to art. 2 of the Act of 23 May 1991 on the resolution of collective disputes<sup>1</sup>, parties to the dispute can be employers, their organisations and employees who can only be represented by their trade union. The party to the dispute will therefore not be the individual employee, but the employees represented by an entity acting for the collective interests of the employees. In fact, a trade union is the one who can initiate and carry out a collective dispute. Additionally, pursuant to art. 1 of the said Act, a dispute can relate to working, remuneration or social benefit terms as well as to union rights and freedoms of employees or other groups having the right to form trade unions. It is not permitted to conduct a collective dispute to support individual employee claims if their resolution is possible by way of proceedings before the agency resolving disputes relating to employee claims<sup>2</sup>.

The legislator provided for three amicable methods of collective dispute resolution. The first method is by bargaining. If it is ineffective as understood in art. 10 of the Act one shall proceed to mediation. The lack of an agreement at the stage of the mediation proceedings authorises the trade union to initiate a strike action<sup>3</sup>. However, a trade organisation that does not wish to take advantage of this right can also initiate social arbitration pursuant to art. 16 RCD. The essence of social arbitration is to authoritatively resolve a dispute with the involvement of the social arbitration college in a competent District Court (one employer dispute) or Supreme Court (multi-employer dispute). Such a college can issue an award ending this stage of the collective dispute<sup>4</sup>.

The paper analyses two ways to conclude arbitration proceedings, i.e. conclusion of a collective agreement and issuance of an arbitration award. For this form of dispute resolution to be successful, it is important to actually be able to end the dispute by opting for one of these two variants of conflict resolution. They should give the parties a feeling of a stable settlement of the dispute that is consistent with the applicable laws.

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<sup>1</sup> Act on the resolution of collective disputes of 23 May 1991, Journal of Laws 2020, item 123, hereinafter: “RCD” or “Act”.

<sup>2</sup> Article 4 (1) RCD.

<sup>3</sup> Article 17 (2) and Article 15 RCD.

<sup>4</sup> Article 16 (2) and Article 16 (6) RCD.

The institution of social arbitration must inspire confidence in both parties to the dispute. Both the employee and the employer side should be certain that the award or agreement will be enforced without any problems whatsoever. Only clear and comprehensive regulation of the arbitration will make it possible to resort to arbitration proceedings to end a collective dispute rather than go on a strike. For this reason, the analysis covers the legal nature of an arbitration award in the context of practical problems with applying social arbitration in Polish legal reality.

The aim of this study is to determine whether legal regulations concerning the methods for ending social arbitration are comprehensive and clear or whether they need to be changed, and if yes, to what extent. The analysis uses the dogmatic-legal and legal-comparative methods. The countries under analysis share one common feature: they have all implemented legislation to resolve collective disputes. Research into legal mechanisms in the states concerned leads to the conclusion that these mechanisms are close to one another in terms of their objective: in each state, the legislator strives to ensure that the arbitration proceedings are effective in discouraging non-amicable forms of collective dispute resolution. Legal regulations of the countries in question are influenced by labour law standards adopted by international and European organisations.

## **2. Ways to end social arbitration**

### **2.1. Collective agreements as the second method of collective dispute resolution in arbitration proceedings in addition to arbitration awards**

An award issued by a social arbitration college is not the only way to resolve a dispute at this stage. Just like with bargaining or mediation, parties to arbitration proceedings can enter into agreements resolving the dispute. According to § 9 of the Regulation of the Council of Ministers of 16 August 1991 on the procedure before social arbitration colleges<sup>5</sup> after the opening of a college session encourages the parties to reach an agreement.

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<sup>5</sup> Ordinance of the Council of Ministers of 16th August 1991, Journal of Laws 1991, No. 73, item 324, hereinafter: "PSA".

Such an agreement as the source of the appropriate content of the labour law, determining rights and obligations<sup>6</sup> has the legal nature characteristic for agreements based on RCD<sup>7</sup> resulting from bargaining and mediation<sup>8</sup>. It should determine: parties to the dispute, precise claims of the trade unions and normative collective provisions if they apply to the general situation of the employees. It can also contain individual provisions if they influence the contents of the employment relationship<sup>9</sup>.

According to the Supreme Court, collective agreements are considered contractual provisions applying exclusively to entities covered with their contents. However, they are not treated as generally applicable legal regulations<sup>10</sup>. According to the representative theory, parties to a collective agreement execute it not only on their behalf but also on behalf of members they represent or individuals other than their members. It means that it is possible to make direct demands regarding the fulfilment of duties by individual employees and employers towards each other<sup>11</sup>. Agreements are based on the principle of the freedom of agreements by way of the submission of declarations of will in the course of social arbitration<sup>12</sup>. The doctrine

<sup>6</sup> See Krzysztof Wojciech Baran, "Porozumienia zawierane w sporach zbiorowych jako źródła prawa pracy," *Monitor Prawa Pracy*, no. 9 (2008): 455; Janusz Żołyński, "Postępowanie arbitrażowe jako metoda rozwiązywania sporu zbiorowego," *Monitor Prawa Pracy*, no. 10 (2011): 517.

<sup>7</sup> Grzegorz Goździewicz, "Charakter porozumień zbiorowych w polskim prawie pracy," *Work and Social Security*, no. 3 (1998): 23; Łukasz Pisarczyk, "Pokojoye (ireniczne) metody rozwiązywania sporów zbiorowych," in *System prawa pracy. Zbiorowe prawo pracy*, vol. V, ed. Krzysztof Wojciech Baran (Warszawa: Wolters Kluwer S.A., 2014), 643–644; see Baran, "Porozumienia," 453–54. The labour law doctrine includes doubts regarding the distinction of agreements being specific sources of the labour law, see Ludwik Florek, "Charakter prawny porozumień zbiorowych," in *Prawo pracy. Refleksje i poszukiwania. Księga jubileuszowa Profesora Jerzego Wratnego*, ed. Gertruda Uścińska (Warszawa: IPISS, 2013), 114–17.

<sup>8</sup> Ludwik Florek, *Ustawa i umowa w prawie pracy* (Warszawa: Wolters Kluwer Polska sp. z o.o., 2009), 258.

<sup>9</sup> Pisarczyk, "Pokojoye," 650–52.

<sup>10</sup> Polish Supreme Court, Judgment of 22 February 2008, Ref. No. II BP 36/07, *Journal of Laws* 2009, no. 11–12, item 138.

<sup>11</sup> Waclaw Szubert, *Układy zbiorowe pracy* (Warszawa: Państwowe Wydawnictwo Naukowe, 1960), 10–11.

<sup>12</sup> Compare Paweł Nowik, *Metoda negocjacji układowych w zakresie kształtowania wynagrodzenia za pracę pracowników administracji publicznej. Doświadczenia polskie i europejskie* (Lublin: Wydawnictwo KUL, 2014), 90–1.

notices elements of a civil law agreement contained in such agreements that, however, do not rule out the possibility that above-mentioned acts compiled at the arbitration stage in a collective dispute can be seen as sources of the labour law based on the act<sup>13</sup>. Agreements signed by parties to the dispute in the course of social arbitration entail an automatic change of collective interests of employees the satisfaction of which the trade union demanded into individual subjective rights just like agreements executed at the bargaining and mediation stage<sup>14</sup>.

## 2.2. Arbitration awards – decisions of social arbitration colleges

If an agreement resolving a collective dispute is not reached in the arbitration proceedings an arbitration award will be issued. In practice, one can distinguish substantive decisions considering the demand made by a trade union and dismissing collective claims made with regard to payment, working and social benefit conditions<sup>15</sup>. When a trade union makes a claim regarding union rights and freedoms, a decision can be made to dismiss that claim, i.e. considering the trade union's position ungrounded or to grant the application in whole or in part<sup>16</sup>.

A social arbitration college also issues typically formal awards. These type of awards includes a decision to refuse to hear the arbitration, *de facto* to reject the application to the inadmissibility of social arbitration as understood in RCD regulations, even though no legal basis for such a conclusion

<sup>13</sup> See Pisarczyk, "Pokojoye," 650–51; see also the topic of a collective agreement in Florek, *Ustawa*, 224–27.

<sup>14</sup> Andrzej Marian Świątkowski, "Ustawa o rozwiązywaniu sporów zbiorowych," in *Zbiorowe prawo pracy*, eds. Jerzy Wratny, Krzysztof Walczak (Warszawa: C.H. Beck, 2009), 334.

<sup>15</sup> E.g. according to the information obtained as a part of access to the public information, the award rejecting the related request of the applicant was issued by the social arbitration college at the Regional Court in Piotrków Trybunalski in 2012, Decision of the College for Social Arbitration at the Regional Court in Piotrków Trybunalski, Judgment of 2012, Ref. No. KAS - z 1/12, unreported. Data referring to specific awards under social arbitration that were referred to in the article were collected on the basis of enquiries emailed to all Regional Courts in Poland.

<sup>16</sup> Artur Rycak, "Praktyka arbitrażu społecznego w zbiorowych sporach pracy w Polsce," in *Arbitraż i mediacja w polskim prawie pracy*, ed. Grzegorz Goździewicz (Lublin: Wydawnictwo KUL, 2005), 142.

of arbitration proceedings can be found in PSA or even less in RCD<sup>17</sup>. Additionally, a decision to discontinue proceedings exists in legal transactions<sup>18</sup>.

In the issued award, the social arbitration college also refers the case to a competent social arbitration college for the ruling, e.g. the college at the Supreme Court<sup>19</sup>. Decisions of the social arbitration college at the Supreme Court adopted the rule according to which “employer disputes can be transformed during the proceedings before a social arbitration college into a single multi-employer dispute if parties to these disputes are willing and the subject matter of the dispute applies to workers employed in at least two workplaces”<sup>20</sup>. In the analysed case being the basis for the issue of the above-mentioned award, the college primarily examined its competence to hear the dispute. It was necessary due to the fact that the dispute was conducted as eight separate disputes in the bargaining and mediation phase. Findings made by the college led to the conclusion according to which trade unions representing all workers covered with disputes in the bargaining and mediation phase jointly applied for the submission of

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<sup>17</sup> It has to be stated that both RCD and PSA do not introduce the possibility to reject a request, only to return it due to formal defects not remedied on time, see: Walery Masewicz, *Zatarg zbiorowy pracy* (Poznań: Polski Dom Wydawniczy “Ławica”, 1994), 97–98. Some representatives of the labour law science indicate that the college issues substantive awards considering demands of the trade union in part or in whole or dismissing them in part or in whole, see: Bogusław Cudowski, *Spory zbiorowe w polskim prawie pracy* (Białystok: Temida, 1998), 114. However, if arbitration is not admissible due to the fact that there was no bargaining or mediation carried out or when proceedings before the college demonstrate that the dispute is not a collective dispute the request will have to be rejected for purposive reasons. The postulate that the trade union’s request can be rejected by the issue of an award by the social arbitration college is justified. Checking whether a dispute is a collective dispute lies within the competences of the college, see Rycak, “Praktyka,” 142. The labour law doctrine also contains the view according to which a request can be destroyed due to the inadmissibility of arbitration proceedings due to its return by the court president, see: Walery Masewicz, *Ustawa o związkach zawodowych Ustawa o rozwiązywaniu sporów zbiorowych* (Warszawa: Wydawnictwo Prawnicze PWN, 1998), 180.

<sup>18</sup> E.g. in 2005-2014, the social arbitration college at the Regional Court in Łódź dismissed arbitration proceedings twice: in one case, it was due to the trade union’s loss of its mandate to represent employees, in another case, it was due to the withdrawal of the request for social arbitration.

<sup>19</sup> Rycak, “Praktyka,” 142.

<sup>20</sup> Decision of the College for Social Arbitration at the Supreme Court of January 26, 2006, Ref. No. III KAS 1/05, *Journal of Laws* 2007, no. 3–4, item 59.

the dispute for resolution by the social arbitration college at the Supreme Court as a multi-employer dispute<sup>21</sup>.

### 3. Legal nature of arbitration awards

In light of art. 16 clause 6 RCD, the arbitration award is binding for parties to the dispute unless they agree differently. If both the trade union in its application for social arbitration and the employer responding to that application fail to submit, pursuant to art. 16 clause 6 RCD, an appropriate statement of application for arbitration with the issue of an award non-binding for the parties, the decision of the social arbitration college, in principle, will bind the parties<sup>22</sup>. The employer can express their position on the subject responding to the application of the trade union or in another letter before the date of the commission's session but not later than upon the opening of that session<sup>23</sup>. Contrary to the situation in which both parties express their conclusive consent to the binding nature of the college's decision, a trade union can decide to initiate a protest action in the form of a strike if the award is non-binding. Purposive considerations are in favour of this postulate<sup>24</sup>. The parties can autonomously choose the dispute resolution variant after the mediations end and apply non-amicable resolution methods. An award in arbitration proceedings whose binding power results from the will of the parties ends the proceedings related to the occurrence of a collective dispute with the employer<sup>25</sup>; as a consequence, the collective dispute is resolved<sup>26</sup>. The statement of the binding power<sup>27</sup> shall be contained in

<sup>21</sup> Ibid.

<sup>22</sup> Świątkowski, "Ustawa," 374.

<sup>23</sup> Janusz Żołyński, *Ustawa o rozwiązywaniu sporów zbiorowych. Komentarz. Wzory pism* (Warszawa: Wolters Kluwer Polska sp. z o.o., 2011), 92.

<sup>24</sup> See Grzegorz Goździewicz, "Mediacja i arbitraż w polskim prawie pracy," in *Arbitraż i mediacja w polskim prawie pracy*, ed. Grzegorz Goździewicz (Lublin: Wydawnictwo KUL, 2005), 24.

<sup>25</sup> Zbigniew Hajn, *Zbiorowe prawo pracy. Zarys systemu* (Warszawa: Wolters Kluwer Polska sp. z o.o., 2013), 188.

<sup>26</sup> Bogusław Cudowski, "Rola państwa w rozwiązywaniu sporów zbiorowych," *Państwo i Prawo*, no. 10 (1994): 69.

<sup>27</sup> In turn, the college at the Regional Court in Olsztyn examining the case, granted the trade union's request in full by obliging to introduce the salary agreement of 21 February 2005 in the award not binding the parties, issued on 4 April 2006. Decision of the College for Social

the award itself<sup>28</sup>; however, this situation does not always happen<sup>29</sup>. According to § 11 clause 3 PSA, an arbitration award should also contain the name and content of the college, award issue date, definition of parties, indication of the subject matter of the dispute, the resolution<sup>30</sup> and its justification, the statement whether the award binds the parties and signatures of members of the college<sup>31</sup>.

If the award does not contain any of the above-mentioned elements, it seems that it is not possible to supplement them pursuant to art. 351 § 3 of the Act of 17 November 1964 – Code of Civil Procedure<sup>32</sup> for two reasons. Firstly, provisions of the Code of Civil Procedure do not apply to arbitration proceedings before social arbitration colleges – obviously with some exceptions. Civil procedure was referred to only in one place of the provision regulating the arbitration procedure, however, it only had to do with evidentiary proceedings. In the light of § 8 clause 2 PSA, a college can take evidence in line with the provisions of the Code of Civil Procedure on evidence. Secondly, it is the social arbitration college rather than a public court that issues an award; this is why, in light of the linguistic interpretation of

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Arbitration at the District Court in Olsztyn, Judgment of 2006, Ref. No. Kas-z.1/06, unreported. The above data come from the information obtained by email as an answer to enquiries addressed to Regional Courts. See more Maciej Jarota, “Arbitraż społeczny – fakultatywna czy obligatoryjna metoda rozwiązywania sporów zbiorowych? Przyczynek do dyskusji o wykorzystaniu postępowania arbitrażowego w zbiorowych stosunkach pracy,” *ADR Arbitraż i Mediacja*, no. 2 (2018): 48–49.

<sup>28</sup> Goździewicz, “Mediacja,” 23.

<sup>29</sup> Rycak, “Praktyka,” 145.

<sup>30</sup> In practice, the awards of the social arbitration college sometimes lacks the dispute resolution, which cannot be considered positive at this stage of the dispute. E.g. in the operative part of the award of 7 May 2015 regarding the proceedings requested by the trade union against the employer, the social arbitration college at the Regional Court in Warsaw limited itself to the indication that the parties failed to reach an agreement. Decision of the College for Social Arbitration at the District Court in Warszawa, Judgment of 2015, Ref. No. XXI Kas-z 2/14, unreported. The operative part of the decision did not refer to the dispute resolution while item 5 of the award states that the award is not binding for the parties. See more Maciej Jarota, “Arbitraż społeczny – fakultatywna czy obligatoryjna metoda rozwiązywania sporów zbiorowych? Przyczynek do dyskusji o wykorzystaniu postępowania arbitrażowego w zbiorowych stosunkach pracy,” *ADR Arbitraż i Mediacja*, no. 2 (2018): 48–49.

<sup>31</sup> Świątkowski, “Ustawa,” 374.

<sup>32</sup> Act on the Code of Procedural Civil of 17 November 1964, Journal od Laws 2020, item 1575, as amended, hereinafter: “CPC”.



art. 351 § 3 CPC in connection with art. 351 § 1 CPC, it is not possible to supplement an award issued pursuant to § 11 PSA.

It is worth mentioning that, in the past, according to art. 9 of the Regulation of the President of the Republic of Poland of 27 October 1933 on extraordinary disputes committees for the resolution of collective disputes between employers and employees in the industry and commerce<sup>33</sup>, the legal construct in force in Poland provided that the committee's award had the economically prevailing importance in the work branch covered with the award, the Council of Ministers could issue a regulation if requested by the minister of social care to give binding legal effect to the award in the entire area for which the award was issued or in a part of the area where it attained prevailing importance. Such an award, as understood in the said regulation, would apply directly to all employees and employers. Said legal regulations have overcome the rule of committee awards contained in the pre-WWII Law of Obligations, typical for collective labour agreements (c.l.a.), according to which they are only binding for those parties who have executed them<sup>34</sup>.

To summarize this part of the discussion, a concern may be expressed about the impossibility to supplement an existing award, if necessary. Similarly, the Polish legislation does not provide for rectification of an award should there be an obvious error in the dispute resolution. In the Polish legal reality, there are no legal regulations that would precisely define the manner in which the panel should act if it is necessary to amend the award from the proceedings.

#### 4. Execution of arbitration awards

While analysing the issues of arbitration awards, it is worthwhile to consider whether parties to the employment relationship are entitled to the claim for the execution of an award issued by a social arbitration college on the same terms as those applying to the formulation of demands

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<sup>33</sup> Ordinance of the President of the Republic of Poland 27th October 1933, Journal of Laws 1933, No. 82, item 604.

<sup>34</sup> Marek Włodarczyk, "Historia porozumień normatywnych na szczeblu zakładu pracy w Polsce," in *Studia z prawa pracy. Księga pamiątkowa ku czci Docenta Jerzego Logi*, ed. Zbigniew Góral (Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2007), 210.

referring to the execution of provisions of the collective agreement executed in the course of social arbitration. The view that it is possible for employees and employer to make direct civil law claims based on an arbitration award just as is the case with the collective agreement<sup>35</sup> is debatable<sup>36</sup>.

As soon as demands made by the trade union are transformed into individual rights pursuant to the collective agreement executed at the arbitration stage, individual employees acquire the right to claim the satisfaction of individual rights guaranteed to them. In turn, the issue of an arbitration award not being a source of labour law does not entail the legal transformation of employee interests to be satisfied by the employer on the basis of the decision of the social arbitration college into rights of individuals with an employment relationship. The conclusion of this analysis is that the issue of an award does not result in an automatic transformation of employees' collective interests into their rights<sup>37</sup>. Reference publications present the prevailing view that, to enforce the employer's observance of the arbitration award referring to employee interests, it is only possible for the trade union to exert pressure by organizing a strike or another non-amicable method of resolution of collective disputes even with no renewed procedure for the initiation of a collective dispute<sup>38</sup>.

The Polish model of an amicable resolution of collective disputes does not provide for sanction for the failure to comply with an award issued in the arbitration proceedings<sup>39</sup> even though the failure to comply can be considered a violation of art. 26 clause 1 clause 2 RCD<sup>40</sup>. The enforceability of

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<sup>35</sup> Żołyński, *Ustawa*, 95. In 1960ies, doubts existed regarding the enforceability of collective labour agreements as far as the enforcement of resulting obligations is concerned. Free market economies adopted the inadmissibility of the formulation of individual employee claims against a participant in the collective labour agreement. A particular significance of rights vested in the employee organisation representing employees rather than individual rights was stressed, see Szubert, *Układy*, 229.

<sup>36</sup> See Świątkowski, "Ustawa," 376; see also Pisarczyk, "Pokojoye," 676.

<sup>37</sup> See Świątkowski, "Ustawa," 376; see also a different position: Żołyński, *Ustawa*, 94.

<sup>38</sup> See Pisarczyk, "Pokojoye," 680; Krzysztof Wojciech Baran, *Zbiorowe prawo pracy. Komentarz* (Warszawa: Wolters Kluwer Polska sp. z o.o., 2010), 442; Cudowski, *Spory*, 115; see also a different position: Żołyński, *Ustawa*, 94.

<sup>39</sup> Goździewicz, "Mediacja," 25.

<sup>40</sup> Pisarczyk, "Pokojoye," 680.

arbitration awards is not subject to enforcement proceedings<sup>41</sup>. This fact is demonstrated in the linguistic interpretation of art. 777 CPC, in particular, the lack of an indication of awards issued in the social arbitration mode in its contents and the absence of a legal standard in RCD that would establish the admissibility of enforcement of such awards by way of enforcement proceedings<sup>42</sup>.

Such deficiencies may raise doubts whether a trade union is actually able to effectively enforce pay and work conditions, social benefits, or trade union rights and freedoms established by an arbitration award. Hence, the trade union organisation, unlike the employer, will essentially go for a strike method rather than arbitration proceedings. Mediation failing, the trade union party will count on a strike as a viable method to achieve its demands from a collective dispute stage. The mere fact that an arbitration award will become non-binding if one of the parties submits a relevant declaration hardly encourages the use of the social arbitration method. Since parties to a collective dispute are not bound by the arbitration award, decisions of the social arbitration committee are treated as non-mandatory for the trade union and the employer. On the other hand, the inability to effectively enforce a binding arbitration award means that arbitration proceedings actually lose their sense as a constructive method of resolving a controversy.

## **5. Arbitration awards in selected European states vs. Polish legal realities**

In light of the unique nature of an arbitration award and a limited possibility of its enforcement in Polish labour law, it is worthwhile to analyse the said institution from the perspective of selected examples of European states. Legal regulations of individual European states define the legal nature of arbitration awards in an inconsistent manner. In some European states, arbitrators issue awards. In the Russian Federation, an arbitration award is binding for the parties. They are obliged to execute it in pain of the fine of 2000-4000 roubles. If the employer fails to comply with the award the trade

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<sup>41</sup> Żołyński, *Ustawa*, 93.

<sup>42</sup> Baran, *Zbiorowe*, 442.

union can initiate a protest action in the form of a strike<sup>43</sup>. In France, the arbitrator's decision can be appealed against to the Supreme Court of Arbitration consisting of the equal number of judges from the Council of State and judges from the Court of Cassation<sup>44</sup>.

In light of art. 20 clause 4 of the Latvian Act of 26 September 2002 on employment relationships, compliance with an arbitration award is voluntary in Latvia. If parties compile a written agreement to determine the binding power of the arbitration award that arbitration award shall have legal effects typical for a collective agreement<sup>45</sup>. In Great Britain, an award issued in the course of an optional arbitration is binding if the parties decide during the pending procedure that they would comply with the award irrespective of its contents<sup>46</sup>.

In Slovakia, awards issued by an arbitrator regarding the execution of collective agreements can be appealed against to a District Court that repeals the arbitrator's award if it is in conflict with the legal regulations or with the collective agreement. In the same country, an arbitrator's decision regarding the conclusion of a collective labour agreement is final with no appeal possible, unlike decisions referring to disputes regarding the execution of duties under collective agreements. If a court annuls the arbitrator's award the dispute shall be referred to the same arbitrator for reassessment. The lack of consent to the participation of the same person as the arbitrator results in the nomination of an arbitrator on the request of any of the parties by the Minister of Labour, Social Affairs and Family of the Slovak Republic<sup>47</sup>.

In Spain, art. 21 clause 3 V ASEC provides that a binding arbitration award is enforceable immediately. Each award is submitted to

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<sup>43</sup> Elena Gerasimowa, "The Resolution Of Collective Labour Disputes," in *Labour Law in Russia: Recent Developments and New Challenges*, eds. Vladimir Lebedev and Elena Radevich (Newcastle: Cambridge Scholars Publishing, 2014), 274.

<sup>44</sup> Michel Despax, Jaques Rojot, and Jean Pierre Laborde, *Labour Law in France* (Alphen aan den Rijn: Kluwer Law International, 2011), 347.

<sup>45</sup> In Greece, like in Latvia, the arbitrator's award entails legal effects typical for a collective agreement, see Theodore Konaris, *Labour law in Hellas* (Alphen aan den Rijn: Kluwer Law International, 2002), 239.

<sup>46</sup> Steven Hardy, *Labour Law in Great Britain* (Alphen aan den Rijn: Kluwer Law International, 2002), 44–45.

<sup>47</sup> Helena Barancová and Andrea Olšowská, *Labour Law in Slovak Republic* (Alphen aan den Rijn: Kluwer Law International, 2002), 191.

the SIMA office. After that, the award is forwarded to an appropriate agency for publication if required under the law. The award has the same legal effects as a collective labour agreement<sup>48</sup>.

In Germany, parties to a dispute can appeal from the decision of an arbitration committee to a labour court within 2 weeks of the award announcement. The appeal can be upheld in the event of a law violation. The German labour law doctrine indicates that parties rarely decide to undermine the resolution made at the arbitration stage in collective disputes in this manner<sup>49</sup>. In Denmark, an award issued at the arbitration stage is final even though, if material rules of the procedure influencing the resolution of the case are violated it is possible to consider the award invalid before the labour court<sup>50</sup>.

Polish legal regulations do not assume the two-tiered procedure in arbitration proceedings<sup>51</sup>. As already mentioned, parties in Slovakia and Germany have the possibility to appeal against an arbitration award to a labour court. Analysed legal solutions applied in above-mentioned countries make the appellate review of an arbitration award possible, which is particularly desirable for a discretionary ruling by an arbitration agency in a specific case, in a manner not limited with statutory criteria. The aspect of determination of an entity competent to consider the means of challenge of arbitration awards is also extremely important. The labour court seems to be competent to assess an arbitration award because judges who are labour law practitioners are able to guarantee reliability and independence while analysing arbitration proceedings in a collective dispute.

It should be remembered that, according to the rule set out in art. 262 § 2 item 1 of the Act of 26 June 1974 – Labour Code<sup>52</sup> public courts cannot

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<sup>48</sup> Manuel Alonso Olea and Fermín Rodríguez - Sañudo, *Labour Law in Spain* (Alphen aan de Rijn: Kluwer Law International, 2002), 156.

<sup>49</sup> Manfred Weiss and Marlene Schmidt, *Labour Law in Germany* (Alphen aan den Rijn: Kluwer Law International, 2008), 236.

<sup>50</sup> Ole Hasselbalch, *Labour Law in Denmark* (Alphen aan den Rijn: Kluwer Law International, 2011), 300–01.

<sup>51</sup> Polish Supreme Court, Resolution of 23 May 1986, Ref. No. III PZP 9/86, *Journal of Laws* 1987, no. 4, item 77; Polish Supreme Court, Resolution of 10 December 1986, Ref. No. III PZP 72/86, *Journal of Laws* 1987, no. 4, item 47.

<sup>52</sup> Act on the Labour Code of 26 June 1974, *Journal of Laws* 2020, item 1320.

interfere with disputes regarding the establishment of new payment and working terms or the application of labour law standards to the nomination of college members at the social arbitration stage<sup>53</sup>. The lack of a two-tier system in social arbitration in Poland provokes doubts<sup>54</sup>. In particular, the literature rightly indicates that the delegation of three, by definition, independent members of the college from the employer side and three members from the trade union to form the college is only apparent; in fact, a dispute is resolved by a professional judge. Individuals indicated by the trade union or by the employer do not vote against their principals<sup>55</sup>.

The statement of reasons for the draft collective labour code of 2008 prepared by the Labour Law Codification Commission<sup>56</sup> provides that social

<sup>53</sup> Żołyński, *Ustawa*, 93.

<sup>54</sup> In the previous legal regime applicable in 1980ies, the Public Prosecutor General argued that purposive considerations (the need to amend awards) warrant the application of remedies provided for in civil procedure regulations but the Supreme Court did not share this position in its decision of 10 December 1986, III PZP 72/86, see Polish Supreme Court, Resolution of 23 May 1986, Ref. No. III PZP 72/86, unreported. The labour law doctrine also indicated that, even though the nature of arbitration proceedings is different than the nature of litigation, this circumstance does not entail the right to conclude that it is not possible to appeal against an arbitration award on the basis of autonomous findings of the parties, see Andrzej Marian Świątkowski, "Spory zbiorowe (I)," *Praca i Zabezpieczenie Społeczne*, no. 8 (1987): 13–17.

<sup>55</sup> See Cudowski, *Spory*, 112; Żołyński, *Ustawa*, 93; Żołyński, *Ustawa*, 438.

<sup>56</sup> [http://www.mpips.gov.pl/gfx/mpips/userfiles/File/Departament%20Prawa%20Pracy/kod-eksy%20pracy/ZKP\\_04.08..pdf](http://www.mpips.gov.pl/gfx/mpips/userfiles/File/Departament%20Prawa%20Pracy/kod-eksy%20pracy/ZKP_04.08..pdf), accessed May 9, 2016, hereinafter: CLC. The CLC draft was submitted to the President of the Council of Ministers on 5.12.2006 even though its contents refer to "April 2007", while the draft description found at the website provides the information that the draft originated in April 2008. The Labour Law Codification Commission had been preparing the draft for a few years on the basis of the Ordinance of the Council of Ministers of 20th August 2002 on the establishment of a labour law codification commission, Journal of Laws 2002, No. 139 item 1167, as amended. The Commission initially worked under the leadership of Tadeusz Zieliński. As of 5.12.2003, the Commission consisted of: Michał Seweryński, a professor at the Łódź University (the chairman); Ludwik Florek, a professor at the Warsaw University (deputy chairman); Grzegorz Goździewicz, a professor at the M. Kopernik University in Toruń; Zbigniew Hajn, a professor at the Łódź University, a judge at the Supreme Court; Andrzej Kijowski, a professor at the A. Mickiewicz University in Poznań, a judge of the Supreme Court; Walerian Sanetra, a professor at the Białystok University, President of the Supreme Court; Barbara Wagner, a professor at the Jagiellonian University, judge of the Supreme Court; Jan Wojtyła, a professor at the K. Adamiecki University of Economics in Katowice; Jerzy Wrątny, a professor

arbitration as a resolution method for dispute of the voluntary nature of awards issued by an arbitration commission does not fulfil the role expected by the legislature. In light of this fact, authors of the project observed that it was necessary to reinstate the importance of arbitration by considering that the arbitrator's decision would be binding for the parties and end the collective dispute. Additionally, authors of the draft believe that above-mentioned problems justify the introduction of the rule according to which an arbitration award would be subjected to judicial control when it comes to its legal compliance and interests of the parties, which would strengthen the rule of law and social peace in collective labour agreements. This position of the Labour Law Codification Commission was expressed in the suggestion contained in art. 156 § 2 CLC that assumed that each of the parties to a collective dispute would be able to appeal to a court against an arbitration award within 7 days of its receipt if that award blatantly violates the party's interest or the law<sup>57</sup>. The appeal would be made to a district court in the case of a one employer dispute and to a regional court in the case of a multi-employer dispute – both these courts having jurisdiction in the dispute initiation location. Even though an appeal from an arbitration award is not provided for in the following draft of the collective labour code of 14 March 2018 by the new Labour Law Codification Commission<sup>58</sup>, there is no doubt that the concept worked out in 2006 is worth considering.

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at the Rzeszów University; dr Eugenia Gienieczko, Director of the Labour Law Department in the then Ministry of Labour and Social Policy. In 2005, Teresa Liszcz, a professor of the Maria Curie-Skłodowska University in Lublin, later a judge in the Constitutional Tribunal, joined the Commission.

<sup>57</sup> Art. 158 § 2 of the draft Collective Labour Code from mid 1990ies suggested that each of the parties and the labour inspector could be granted the right to appeal against the arbitrator's award violating the laws, see Cudowski, *Spory*, 115.

<sup>58</sup> The text of the draft collective labour agreement, see <https://www.gov.pl/web/rodzina/bip-teksty-projektu-kodeksu-pracy-i-projektu-kodeksu-zbiorowego-prawa-pracy-opracowane-przez-komisje-kodyfikacyjna-prawa-pracy>, accessed January 23, 2021. The last Labour Law Codification Commission was established pursuant to the Ordinance of the Council of Ministers of 9th August 2016 on the establishment of a labour law codification commission, Journal of Laws 2016, item 1366. The Commission consisted of: Prof. UG dr hab. Marcin Zieleniecki – the Chairman, Prof. dr hab. Arkadiusz Sobczyk, Prof. UJ dr hab. Leszek Mitrus, Prof. UW dr hab. Łukasz Pisarczyk, Prof. UAM dr hab. Michał Skąpski, Prof. UG dr hab. Jakub Stelina, Prof. UW dr hab. Jacek Męcina, Prof. UKSW dr hab. Monika Gładoch, Prof. UAM dr hab. Anna Musiała, Prof. WSH dr hab. Marek Pliszkiewicz,

One has to welcome the rule corresponding, among other things, with the German or French legislation, that is expressed in art. 156 § 2 CLC and guarantees the parties to a dispute the right to appeal against the arbitration award while satisfying conditions provided for in the laws. Considering that the appellate review of arbitration awards is necessary in complicated collective labour relationships, the suggestion presented in CLC is very desirable. However, it would be worthwhile to think about a prolongation of the 7-day deadline for the appeal to 14 days. Such a solution would make a professional preparation of the appeal possible, especially in cases with complicated factual and legal circumstances.

One has to note that satisfying the appeal condition, i.e. blatant violation of an interest of the party, can turn out to be ambiguous. It can be difficult to define the blatant nature of the arbitrator's undesirable resolution if the arbitrator has the freedom of decision with no statutory model imposed in advance. The grounds for an appeal will be evaluated by an independent court. It seems that, even though the court analysing the legal compliance of an award will be limited by the proper application of the principles of interpretation of the law, it will have the margin of decision when it comes to the analysis of the party's interest. Therefore, the court hearing the appeal would have the particular responsibility for the correct determination of facts and an appropriate dispute resolution.

While analysing the issue of an appeal from the arbitrator's award, the participation of a labour inspector at this stage of the dispute is worth considering. In light of the 2006 proposal, the labour inspector would not have the right to appeal<sup>59</sup> even though, in certain situations such as the announcement of a strike, suspension of operations of a plant or its part by the employer for more than 3 months, creation of a major threat to public interest, the labour inspector would be able to initiate a collective dispute pursuant to art. 154 § 2 CLC. According to art. 156 § 1 CLC, the arbitrator would resolve a collective dispute by issuing an award to be delivered

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Prof. UŁ dr hab. Mirosław Włodarczyk, Dr Jakub Szmit, legal counsel Marta Matyjek, attorney at law dr Liwiusz Laska.

<sup>59</sup> The granting of this right to the labour inspector was postulated by Michał Seweryński, see: Michał Seweryński, "Wybrane zagadnienia rozwiązywania sporów zbiorowych w Polsce," in *Arbitraż i mediacja w prawie pracy*, ed. Grzegorz Goździewicz (Lublin: Wydawnictwo KUL, 2005), 52.



to the parties, to an appropriate labour inspector and to the National Labour Dialogue Consultant. Therefore, the labour inspector would receive the arbitrator's award and, in certain cases, would in fact be able to initiate arbitration proceedings according to CLC but would not be able to appeal against the decision issued by way of social arbitration. Such a situation can cause doubts whether the suggested participation of the labour inspector in social arbitration would be sufficient. It seems that the lack of interference from the labour inspector at the stage of the appeal against the arbitrator's decision is justified in the context of the desirable autonomy of the will of parties to the dispute regarding the application of arbitration proceedings. The freedom of trade unions and employers should also cover the making of decisions regarding the undermining of arbitration awards.

## 6. Conclusions

The above considerations allow us to formulate three principal conclusions. Firstly, the Polish legislature should offer an in-depth analysis of institutions lacking in PSA. A reference should be introduced to labour law regulations to state that in cases not regulated in the appropriate regulation on the amendment and supplementation of an arbitration award and the rejection of an arbitration application, CPC provisions shall be applied accordingly. As a consequence, the amendment and supplementation of an arbitration award would be permitted in line with cases specified in art. 350 § 1 CPC and art. 351 § 1 CPC. Such an action would also remove doubts regarding the interpretation of the possibility that the social arbitration college may reject the employee application for procedural reasons.

Secondly, the failure of parties to the dispute to respect binding arbitration awards is also a problematic issue. Legal consequences of the parties' failure to comply with the award issued by an arbitrator within specific time limits has to be set out precisely in the Polish act. The example of Russia is interesting here, where a fine is imposed for non-compliance with the award. Indeed, it would be worth adopting such a sanction in the Polish legal reality – a pecuniary penalty could be imposed by the National Labour Inspectorate (PIP). Additionally, the arbitration award should be included in the catalogue of enforcement titles referred to in art. 777 § 1 of the Code of the Civil Procedure so that it could be efficiently enforced in practice.

It also seems appropriate to adopt the principle that an arbitration award is binding on the parties to a collective dispute and is made immediately enforceable, as is the case, for example, in Spain. Such a legal construct could increase confidence in this method of collective dispute resolution. Legal certainty that the award will be enforced is essential from the perspective of the effectiveness of social arbitration itself.

Thirdly, it is worth considering whether it might be necessary to introduce the possibility of an appeal against an arbitration award in such socially important cases relating to the resolution of collective disputes. It seems that this solution would contribute to an increased importance of social arbitration. Judicial control over the award issued in arbitration proceedings would promote trust among parties to the dispute, which could mean that this method of resolution of collective disputes would be used more frequently. Award correctness verification would also make it possible to eliminate errors that can appear in practice during the case assessment. It would not be unusual if such a possibility is introduced into Polish legislation. In France, Slovakia or Germany, an option to appeal against an arbitration award is guaranteed by law. It seems that, just like in Germany, the Labour Court should be competent to hear appeals. Obviously, it remains an open point whether the case should be examined by the Court of Appeal or the Supreme Court. Given that social arbitration committees competent for in-company disputes operate at District Courts, it would not necessarily be desirable to make the District Court an appellate body. However, if awards are reviewed by the Court of professional judges, there is a reason to believe without any doubt that the process will be carried out with due diligence.

In view of the foregoing, how should we assess the above-described regulations on the settlement of a collective dispute through social arbitration? First of all, do they provide the balance between social partners? It ought to be emphasized that seemingly these regulations affect the legal situation of both employers and trade unions to an equal extent. Nevertheless, the provisions are unclear and the enforcement of an arbitration award uncertain, which makes the trade unions reluctant when it comes to this form of dispute resolution. However, this is a disadvantage for the employer itself as well. Failing successful mediation, the employer must be aware that a strike is forthcoming.

If we interpreted the principle of equal treatment of parties to a collective dispute in its broad sense, we could not unambiguously claim that the rule is complied with, given that only a trade union party is vested with the right to institute arbitration proceedings. Still, the rule is not absolute, and we should share the view that it is permissible that in certain situations the legislator may intentionally differentiate the rights of the subjects of collective labour relations in order to achieve a legal balance in practice<sup>60</sup>. It seems legitimate whenever the legislator differentiates between the legal situation of the trade unions and the employers in this respect. It cannot be presumed that the employer could also submit a motion to initiate social arbitration in a binding manner. This would be an excessive interference in the collective dispute resolution procedure, giving the employer a real opportunity to block the trade union's right to organise a strike for some indefinite period of time. Given the current problems in the application of arbitration proceedings and an illusory, non-binding nature of arbitration awards, this would be a highly dysfunctional step. Pre-arbitration measures, i.e. negotiations and mediations give the parties to a collective dispute the opportunity to reach an agreement before a strike is initiated in the wake of a failed mediation. Postponing the possibility of resorting to a non-amicable action due to pending arbitration initiated by the employer could adversely affect the success of previous dispute resolution methods. The employer would then be basically deprived of any pressure in the event of a dispute, which could mean its lower involvement in the amicable settlement of the dispute during negotiations or mediations.

It is particularly worth noting that the common objective of bargaining, mediation and arbitration is to prevent non-amicable actions, especially strikes. However, arbitration is the last amicable stage of collective disputes in the light of RCD regulations. It does not necessarily mean that it is the most important method of dispute resolution even though, in the Polish legal reality, arbitration is the final tool making reconciliation of the parties possible. In turn, a strike can negatively impact various aspects of daily life, in particular, it can worsen the employer's economic situation. Therefore, so as not to permit an automatic cessation of work by employees

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<sup>60</sup> Paweł Nowik, *Pojęcie równowagi prawnej w zbiorowym prawie pracy* (Lublin: Wydawnictwo KUL, 2016), 90–91.

after unsuccessful mediation, one has to guarantee complete and clear mechanisms of arbitration proceedings. From this perspective, changes in the legal nature of an arbitration award, the possibilities to appeal against it, enforce, supplement or amend it are unavoidable. A comprehensive analysis of the arbitration award institution by the legislature is necessary to strengthen social arbitration as an amicable dispute resolution method.

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