DOI https://doi.org/10.5817/CZ.MUNI.P210-8639-2021-18

Possibility of Resolving Individual Labor Disputes in Croatian Law by Arbitration

Trpimir Perkušić
Faculty of Law, University of Split, Croatia

Abstract

Given the specificity of labor relations, there are several ways of resolving disputes that may arise from these relations. Besides the regular procedure before the competent national court, i.e., court proceedings, there is also a possibility of an out-of-court or alternative dispute resolution. The paper analyzes arbitration as one of the alternative ways of resolving individual labor disputes and especially the arbitrability of these labor disputes, given a different points of view between case law and legal doctrine. As the norms that regulate the possibility of resolving individual labor disputes are inconclusive and inconsistent in relation to the general rules on arbitration, they do not explicitly answer the question whether the disputes are arbitrable, nor do they clearly define the preconditions for interpreting the arbitrability of these disputes according to the general rules on arbitration. In this sense, the paper analyzes the answers to these open questions, and offers solutions de *lege ferenda* in terms of arbitrability of individual labor disputes according to Croatian law.

Keywords

Alternative Way of Resolving Disputes; Arbitration; Arbitrability; Labor Disputes; Individual Labor Disputes.

1 Introduction

Labor disputes are specific due to the special characteristics of the employment relationship (and above all because of the protective character of the employment relationship) in which the employment relationships differ from other legal relationships, including those that are based on similar appointed contracts that have a specific performance for their subject.

It is precisely the specific characteristics of the labor relationship and its protective character that are the reasons why the way of resolving labor disputes is specifically regulated. Namely, the Labor Act contains special provisions on the settlement of labor disputes, while such provisions are also contained in the Code of Civil Procedure.[1] However, special provisions governing the possibility of resolving individual labor disputes before arbitration are vague in such a way that they do not explicitly indicate whether all individual labor disputes can be resolved before arbitration or certain individual labor disputes due to the protective nature of employment can be resolved only before state courts. In this sense, different legal understandings are taken up both in case law and in legal doctrine. The answer to these open questions should be seen, both in the context of the specific provisions of the Labor Act relating to the possibility of resolving individual labor disputes through arbitration, as well as in the context of the Arbitration Act, which as a general legal regulation of dispute resolution by arbitration is applied in a subsidiary manner to labor disputes, which is the subject of the analysis of this paper.

2 General Characteristics of Employment

The possibility of arbitration as one of the alternative ways of resolving individual labor disputes should definitely be looked from the point of view of specific characteristics that are recognizable for the employment relationship. Namely, in the legal literature, an employment relationship is defined as a social law relationship between an employer and an employee based on their agreement (explicit or implicit, in written or oral form), on the basis of which the employee personally undertakes to carry out certain work according to the instructions and orders of the employer, who is in turn obliged to provide the employee with the necessary means of work, machinery, material, tools, working conditions and compensation (salary)

1 Civil Procedure Act adopted on 8 October 1991 (Official Gazette No. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 57/11, 148/11, 25/13, 28/13, 89/14, 70/19) regulates the special litigation proceedings in Art. 433–437, while Art. 382 regulates the possibility of submitting a request for revision of the judgment in a dispute over the existence of an employment contract, i.e., termination of employment or in order to determine the existence of an employment relationship.

for the work performed, respecting the standards provided for by the law, collective agreement and work regulations governing their relationship.[2] In the legal system of the Republic of Croatia, with the entry into force of the Labor Act of 1995[3], the notion of employment as a status relationship was abandoned and civil law approach to employment was accepted.[4] The status approach ignored the contractual dimension of the employment relationship,[5] therefore, such an approach required for the employment relationship to be predominantly regulated by legal norms of a coercive legal nature.[6] The law sets a minimum of rights and obligations under which the contracting parties may not go, unless otherwise regulated by a special regulation, while it is up to the parties to the employment contract to agree on more favourable terms than those arising from the law.

An employment relationship is established by an employment contract, unless otherwise provided by special regulations.[7] It follows from the above that the employment contract is not the only basis for employment, but special regulations stipulate that the legal basis for employment in the civil service is a decision on admission to the civil service[8], that is, the decision

2 BILIĆ, A. *Fleksibilnost i deregulacija u radnopravnim odnosima*. Doctoral dissertation. University of Split, Faculty of Law, 2012, p. 10; Similar to see GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, p. 12: *"… Employment relationship is a willingly based relationship in which the employee is obliged to carry out the work personally. In doing so, the employee is subject to the instructions of the employer in his work, and the employer has the right to supervise his work."*

3 Labor Act entered into force on 16 June 1995 (Official Gazette No. 38/95, 54/95, 65/95, 102/98, 17/01, 82/01, 114/03, 123/03, 142/03, 30/04, 68/05 – Decision of the Constitutional Court of the Republic of Croatia, 137/04 – consolidated text) ("Labor Act/95").

4 This approach was maintained in the Labor Act 2009 entered into force on 1 January 2010 (Official Gazette No. 149/09, 61/11, 82/12 and 73/13) ("Labor Act/09") and in the Labor Act 2014 entered into force on 7 August 2014 (Official Gazette No. 93/14, 127/17 and 98/19) ("Labor Act").

5 POTOČNJAK, Ž. Sporovi o novom hrvatskom radnom zakonodavstvu. *Revija za socijalnu politiku*, 1994, Vol. 1, no. 1, pp. 37–52.

6 In the status approach the theory prevailed that while regulating the Labor relations public legal intervention by the State should be prioritised in order to protect workers as a weaker side of the Labor relation. See more POTOČNJAK, Ž. Sporovi o novom hrvatskom radnom zakonodavstvu. *Revija za socijalnu politiku*, 1994, Vol. 1, no. 1, p. 41.

7 Art. 10 Labor Act.

8 Art. 52 para. 1 Civil Servants Act adopted on 24 April 2012 (Text No. 1166) (Official Gazette No. 92/05, 140/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12 – official consolidated text, 38/13, 37/13, 1/15, 138/15, 102/15, 61/17, 70/19, 98/19) ("Civil Servants Act").

on the selection of candidates[9] (special legal regime of employment). The employment contract, in addition to being the basis for establishing an employment relationship (general employment regime), also serves as a source of law that regulates the rights and obligations arising from that relationship. However, its importance as a source of law is significantly diminished as it often refers to collective agreements and labor regulations in its provisions.[10] In this regard, it should be emphasized that the employment relationship and the employment contract are not synonymous. Namely, the concept of employment covers a wider range of rights and obligations than it arises from the employment contract. In addition to the employment contract, the content of the employment relationship may be regulated by international treaties concluded and ratified in accordance with the Constitution of the Republic of Croatia, collective agreement, workers' council agreement with the employer, labor regulations and legal provisions.[11] With regard to legal provisions, the Labor Act and other regulation determine the minimum rights and obligations below which the contracting parties may not go. The employer, the employee and the workers' council, as well as trade unions and employers' associations, may agree on working conditions that are more favourable for the employee than those stipulated by law, while the employer, employers' associations and trade unions may agree on unfavorable working conditions only if expressly provided by law.[12] If an employment law is regulated differently by the stated sources of law, i.e. in case of conflict in application between several labor law sources, in accordance with the principle *in favorem laboratoris*, the most favorable law will be applied to the employee.[13]

9 Art. 52a Civil Servants Act.

10 Similar to see GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, pp. 1–2.

11 Art. 8 Labor Act. See more widely BILIĆ, A. *Fleksibilnost i deregulacija u radnopravnim odnosima*. Doctoral dissertation. University of Split, Faculty of Law, 2012, pp. 10–18; GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, p. 2; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, pp. 345–346.

12 Art. 9 para. 1 and 2 Labor Act.

13 Art. 9 para. 3 Labor Act.

2.1 Essential Elements of the Employment Relationship

There are various legal relations that have labor as a subject, and it is necessary to distinguish such legal relations from employment. Employers sometimes, all in order to avoid coercive protective regulations that protect the worker as a weaker party in the employment relationship (provisions on the protection of workers who are temporarily or permanently incapable of work, on vacations, assumptions in which the employer may cancel employment contract, etc.), conclude other contracts that have labor as a subject. The Labor Act, and in order to combat such behavior, stipulates that if an employer concludes a contract with the employee to carry out a job that, given the nature and type of work and the employer's authority, has the characteristics of the job for which the employment relationship is established, it is considered that the employer has concluded an employment contract with the employee, unless the employer proves otherwise.[14] Precisely according to the essential characteristics of the employment relationship, we will identify its existence, that is, recognize it is an employment relationship. Essential characteristics of the employment relationship are voluntariness, the obligation to perform work personally *(faciendi necessitas)*, subordination to the instructions of the employer (subordination) and payment.[15]

An employment relationship arises only if the parties agree to create such a relationship. The consent, i.e., voluntariness of the parties to that contract is required not only during the establishment, but also for the entire duration of that employment relationship.[16] On the other hand, if the employment relationship is based on an employment contract that would be contrary to the Constitution of the Republic of Croatia, force regulations or morality of the company,[17] i.e., if it is concluded by the use of force against the contracting party, it is null and void.[18]

14 Art. 10 para. 2 Labor Act.

15 See GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, p. 12; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, p. 355.

16 See more GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, pp. 12–13; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, pp. 355–357.

17 Art. 322 para. 1 Civil Obligations Act entered into force on 1 January 2006 (Official Gazette No. 35/05, 41/08, 125/11, 78/15 and 29/18) ("Civil Obligations Act").

18 Art. 279 para. 3 Civil Obligations Act.

According to the Labor Act, as one of the fundamental rights and obligations from the employment relationship, the employee is obliged to personally perform the work, according to the instructions of the employer and pursuant to the nature and type of work.[19] Therefore, an employee cannot transfer the obligations arising from that employment relationship to another person, all because the employer wanted that particular employee for his specific skills and knowledge.

It is precisely the element of subordination of employees with the instructions of the employer that most often separates the employment relationship from other legal grounds that have work for their case. In the employment relationship, the employee is obliged to take over the work according to the instructions of the employer.[20] In legal doctrine, subordination can be divided in economic and legal terms.[21] In economic terms, the dependence of employees on the salary they receive for their work from the employer is highlighted as their only source of income. However, economic subordination is not sufficient for a relationship to be considered an employment relationship, because, as it is pointed out, even an economically independent person has all the rights and obligations arising from employment protection regulations after the employment is established.[22] In legal terms subordination can be professional (the worker is obliged to perform the work according to the instructions of the employer) and/or organizational (the employer is authorized to determine the time and the place of work). Thus, for the existence of the element of subordination as an essential characteristic of labor law, not only the economic dependence of employees is sufficient, but legal subordination is also necessary, while professional and organizational subordination of workers to the employer are not necessary to exist simultaneously (cumulatively).[23]

19 Art. 7 para. 1 Labor Act.

20 Ibid.

21 GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, p. 14; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, pp. 359–364.

22 See STRASSER, R. Abhängiger Arbeitsvertrag oder freier Diensvertrag: Eine Analyse des Kriteriums der persönlichen Abhängigkeit. *Das Recht der Arbeit*, 1992, no. 2, p. 102.

23 GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, pp. 13–18; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, pp. 359–364.

Also, if the element of payment is missing, it is not an employment relationship. Namely, the fundamental obligation of the employer is to pay the employee a salary for the work performed.[24] The importance of this element stems from the fact that salary data are mandatory content of a written employment contract, i.e. written certificate of concluded employment contract,[25] that is, the contract itself must refer to those sources of law that regulate these issues.[26]

2.2 Protective Character of the Employment Relationship

Whether arbitration is permitted in individual labor disputes should certainly be considered from the aspect of the protective character of the employment relationship. The question arises as to whether the parties to the employment relationship are even able to negotiate arbitration to resolve the individual labor dispute, and whether the parties have the opportunity to regulate the composition, procedure and other issues relevant to the work of arbitration. In answering these questions, one should start from the general principles of civil law which base the freedom to regulate legal relations on the elements of the freedom to establish that relationship (the principle of dispositiveness, i.e., the principle of autonomy)[27] as well as on the elements of freedom to determine the content of that relationship.[28] According to the Obligations Act, the contracting parties independently and freely decide whether to establish a legal relationship, i.e., to conclude a contract and ultimately freely regulate the content of such relationship.[29]

24 According to Art. 7 para. 1 Labor Act: *"The employer is obliged in employment to give the worker a job and pay his salary for the work performed, and the worker is obliged according to the instructions given by the employer in accordance with the nature and type of work, to personally perform the work."*

25 Art. 15 para. 1 subpara. 8 Labor Act.

26 Art. 15 para. 2 Labor Act.

27 The freedom to arrange a mandatory relationship is provided for in Art. 2 Civil Obligations Act *("Road users freely regulate mandatory relations and cannot regulate them contrary to the Constitution of the Republic of Croatia, coercive regulations and the morality of society.")*, while the dispositive character is determined by Art. 11 Civil Obligations Act *("Participants may arrange their mandatory relationship differently than is specified by this Act, unless something else derives from or out of the meaning of a particular provision of this Act.")*.

28 BÄHR, P. *Grundzüge des Bürgerlichen Rechts*. München: Vahlens Lernbücher, 2008, pp. 99–125.

29 See GORENC, V. et al. *Komentar zakona o obveznim odnosima*. Zagreb: RRif plus, 2005, pp. 7–8.

Thus, it follows from the principle of dispositiveness in a civil law context that the legal relationship arises, ceases and changes by the will of legal entities.[30] It is clear that the freedom to establish legal relationship may be limited both in terms of entities that are free to establish a particular legal relationship and in respect of which entities are free to regulate the content of that relationship. Given the specificity of the employment relationship, in which the employee is a weaker contracting party, and because of his protection, but also the public interest in exercising his right to work,[31] legal norms of a protective character established restrictions on freedom of employment and the content of that relationship.

With regard to the freedom of employment, any restrictions should be seen in the light of the restrictions imposed on both the employee and the employer. Namely, no restrictions are provided for the employee when choosing an employer with whom he will establish an employment relationship. Thus, the employee has complete autonomy in this regard. However, from the employer's point of view, labor law provides for certain limitations, that is, in certain cases, the autonomy of the employer when choosing a worker with whom he will establish an employment relationship is limited.[32] The Act on Vocational Rehabilitation and Employment of Persons with

30 See KLARIĆ, P. and M. VEDRIŠ. *Građansko pravo*. Zagreb: Narodne novine, 2009, p. 8.

31 Art. 54 para. 1 Constitution of the Republic of Croatia (Official Gazette No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10 and 85/10 and 5/14) ("the Constitution of the Republic of Croatia") guarantees the right to work and freedom of work. In legal doctrine, the right to work is determined as an abstract background right of an individual to require the state to conduct a full employment policy, to protect the ability of every worker to earn a living in the employment relationship he freely established, to organize and run free employment services for all employees, and to organize and conduct professional education. See HEPPLE, B. Security of Employment. In: BLANPAIN, R. (ed.). *Comparative Labor Law and Industrial Relations*. Deventer: Kluwer Law and Taxation Publishers, 1987, p. 475.

32 Among other things, representatives of national minorities have priority under the same conditions in the bodies of local self-government units and regional self-government units under certain assumptions under the same conditions. Art. 22 Constitutional Law on the Rights of National Minorities adopted on 13 December 2002 (Official Gazette No. 155/02, 47/10, 80/10 and 93/11). Also, Art. 67 Collective Agreement of 9 November 2017 for Civil Servants and Employees (Official Gazette No. 112/17, 12/18, 2/19, 119/19 and 66/20) provides that the official and employee, whose work has ceased the need in the state body, are required by that state authority to offer admission to the civil service, i.e., the conclusion of a contract of employment, if within one year the need arises for the performance of the jobs to which the official and employee was assigned at the time when the need for his work ceased.

Disabilities[33] stipulates the obligation of quota employment of persons with disabilities for an employer employing at least twenty workers,[34] while state administration bodies, judicial authorities, state authorities and other state bodies, bodies of local and regional self-government units, and public services, public institutions, extra-budgetary and budgetary funds, legal entities owned or predominantly owned by the Republic of Croatia and units and local and regional self-government, as well as legal entities with public authority, are obliged to give priority to persons with disabilities on equal terms when recruiting.[35] Also, the Law on Croatian Homeland War Veterans and Their Family Members[36] provides for an advantage in the employment of these persons.[37]

As regards the regulation of the content of the labor relations, the protective norms of labor law also provide for restrictions. Thus, the protective norms of labor law, in addition to limiting the contractual autonomy of the parties, in principle set a framework for the regulation of employment relations. Many coercion standards of labor law regulate certain rights and obligations under which contracting parties are not allowed to go.[38] As already noted, the employer, the employee and the workers' council, as well as trade unions and employers' associations, can arrange working conditions that are more favourable for the employee than the conditions standardized by the legal provisions,[39] while the employer, employers' association and trade unions, if permitted by legal provisions, can arrange less favourable

33 Act on Vocational Rehabilitation and Employment of Persons with Disabilities (Official Gazette No. 157/13, 152/14, 39/18 and 32/20) ("Act on Vocational Rehabilitation").

34 Art. 8 Act on Vocational Rehabilitation.

35 Art. 9. Act on Vocational Rehabilitation; See more about the obligation to employ people with disabilities NOVAKOVIĆ, N. Obveza zapošljavanja osoba s invaliditetom i prednosti tih osoba pri zapošljavanju. In: CVITANOVIĆ, I. (ed.). *Aktualnosti u radnim odnosima – 2015*. Zagreb: Novi informator, 2015, pp. 57–73.

36 Law on Croatian Homeland War Veterans and Their Family Members (Official Gazette No. 121/17 and 98/19).

37 Art. 18 para. 1.g subpara. 1 Law on Croatian Homeland War Veterans and Their Family Members, as well as the provisions of Art. 101–104 Law on Croatian Homeland War Veterans and Their Family Members; Regarding the freedom to contract in employment relations, see more in ROŽMAN, K. Neke napomene u vezi slobode ugovaranja u radnim odnosima. *Radno pravo*, 2014, no. 03/14, pp. 16–22.

38 For example, the minimum age of employment (a person under fifteen years of age or a person aged fifteen and over fifteen, and under the age of eighteen who attend compulsory primary education, must not be employed. Art. 19 Labor Act).

39 Art. 9 para. 1 Labor Act.

working conditions by collective agreement than the conditions set by law.[40] Of course, in the case where an employment law is regulated differently in several sources, the most favourable right will apply to the employee.[41]

3 Possibilities of Resolving Individual Labor Disputes

Before specifying how individual labor disputes can be resolved, the question of what is a labor dispute and what types of labor disputes we have should be answered. *"A labor dispute is a state of disagreement on a particular issue or group of issues, on which there is a conflict between employees and employers, or in relation to which employees or employers seek the protection of their rights, or on which employees or employers support other employees or employers in their claims or attitudes."*[42] We divide labor disputes into individual and collective labor disputes. An individual labor dispute is a dispute arising between an employer on the one hand, and an employee or several employees on the other hand, with each employee acting on its own and independently from another employee in the dispute, for the exercise of rights and obligations arising from the employment relationship.[43] On the other hand, a dispute arising between an employer or employers' association and trade unions or trade union associations regarding the regulation of collective employment relationships is a collective labor dispute.[44]

40 Art. 9 para. 2 Labor Act.

41 Art. 9 para. 3 Labor Act. The same was confirmed by case law *"… in competition with contracts of employment and collective agreements, what is more favourable to the worker should be applied, which in this case is a collective agreement."* Judgment of the Supreme Court of the Republic of Croatia of 18 July 2007, Case No. Revr-402/07-2.

42 Resolution Concerning Statistics of Strikes, Lockouts and other Action Due to Labor Disputes adopted by the Fifteenth International Conference of Labor Statisticians. Genova: International Labor Office (Bureau of Statistics). *International Labour Organization* [online]. January 1993, p. 2 [cit. 24. 5. 2021]. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087544.pdf: *"A Labor dispute is a state of disagreement over a particular issue or group of issues overwhich there is conflict between workers and employers, or about which grievance is expressed by workers or employers, or about which workers or employers support other workers or employers in their demands or grievances."*

43 DIKA, M. and Ž. POTOČNJAK. Arbitražno rješavanje radnih sporova. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, pp. 240–243.

44 Ibid.; In view of the subject matter of Labor disputes, we divide them into legal and interest. More on the division of Labor disputes with respect to the subject matter of the dispute can be seen in Ibid.; DIKA, M., Ž. POTOČNJAK and V. GOTOVAC. Radni sporovi. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj.* Zagreb: Pravni fakultet i Organizator, 2007, p. 654; ROZIĆ, I. *Kolektivno radno pravo.* Sarajevo: JP NIO Službeni list BiH, 2013, pp. 121–133; BILIĆ, A. and T. PERKUŠIĆ. Legitimacy of strike – qui, quid, quando et quomodo? *Journal of Law and Social Sciences of the Faculty of Law Josip Juraj Strossmayer University of Osijek*, 2018, Vol. 34, no. 3–4, p. 7.

Regarding the individual labor dispute, the possibility of resolving it by judicial and extrajudicial means is foreseen. The exercise of rights in judicial proceedings in individual labor disputes is specific in relation to other legal disputes. Namely, an employee who considers that his employer has violated any of his or her employment rights may, within a statutory limitation period of fifteen days after the service of the decision infringing his or her right, i.e. since finding out about the violation, require the employer to exercise that infringed right.[45] This address to the employer for the protection of rights constitutes a procedural precondition for initiating court proceedings for the protection of employment rights.[46] If the employer does not comply with the employee's claim within a further period of fifteen days, the employee has the right to request the protection of the infringed right before the competent court within a further statutory limitation period of fifteen days.[47] It should be noted, in particular, that if the law, other regulation, collective bargaining agreement or labor rulebook, foresees the procedure of peaceful resolution of the dispute, the 15-day deadline for filing a complaint with the court will run from the day of completion of that procedure.[48] Those preclusive time limits for obtaining judicial protection do not apply in the case of employees' claims for damages or other monetary claims from employment or to procedures to protect the dignity of the employee.[49] As an option for the out-of-court resolution of the resulting dispute, mediation is envisaged as an alternative to the judicial settlement of the labor dispute, and arbitration, which will be discussed in more detail below.

45 Art. 133 para. 1 Labor Act.

46 The same understanding stems from jurisprudence *"… Namely, the failure of workers to require the exercise of their infringed rights with the employer within the statutory (preclude) period in the application of the provisions of Art. 129 para. 1 and Art. 115 para. 4 Labor Act results in the loss of workers' rights to require the protection of infringed rights before the competent court."* Decision of the Supreme Court of the Republic of Croatia of 15 September 2015, Case No. Revr-1886/14-2.

47 Art. 133 para. 2 Labor Act.

48 Art. 133 para. 4 Labor Act.

49 Art. 133 para. 3 and 5 Labor Act; On the judicial settlement of individual Labor disputes see more in DIKA, M. Sudsko rješavanje radnih sporova. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, pp. 131–155; CRNIĆ, I. Sudska zaštita individualnih prava radnika. In: POTOČNJAK, Ž (ed.). *Novine u radnim odnosima: komentar najznačajnijih promjena u radnim odnosima: redakcijski pročišćeni tekst Zakona o radu: pravilnici: o radu, o postupku i mjerama zaštite dostojanstva radnika.* Zagreb: Organizator, 2003, pp. 151–203.

4 Arbitration as an Alternative Way to Resolve Individual Labor Disputes

An alternative way of resolving labor disputes means various procedures that are generally carried out outside the court, in which a third neutral party participates, and depending on the type of proceedings may have a different impact on the result of the dispute itself.[50] As stated in the legal doctrine, these are faster, cheaper and more efficient, i.e., more effective and flexible procedures, and they are all benefits of using alternative methods in resolving labor disputes in relation to judicial settlement.[51] Arbitration as one of the alternative ways of resolving labor disputes constitutes an elected trial in a dispute before an arbitral tribunal.[52] An arbitral tribunal is a non-state judicial body to which the parties amicably entrust the adoption of a arbitral award (a decision on the merits of a dispute), which according to the parties has the power of a final court judgment as well as an enforcement document (if it is condemnatory), and whose authorisation to stand trial derives from the agreement of the parties, as well as its composition, which may be of one or more persons.[53] There are differing views of state and non-state courts regarding the possibility of arbitral settlement of individual labor disputes, i.e., their arbitrability. The concept of arbitrability primarily implies whether the subject matter of the dispute can be dealt with by arbitration (objective arbitrability), and the ability of the party to bring the dispute before

50 GRADAŠČEVIĆ-SIJERČIĆ, J. Sistem alternativnog rješavanja individualnih radnih sporova u Bosni i Hercegovini. In: BIKIĆ, A. (ed.). *Yearbook of the law Faculty of the University of Sarajevo 2019. Vol. LXII*. Sarajevo: Univerzitet u Sarajevu – Pravni fakultet, 2019, p. 326.

51 See POTOČNJAK, Ž. Foreword. In: UZELAC, A. (ed.). *Mirenje u građanskim, trgovačkim i radnim sporovima: Zakon o mirenju, Pravilnik o načinu izbora miritelja i provođenju postupka mirenja s komentarima*. Zagreb: TIM press, 2004, p. 7; GOTOVAC, V. Alternativne metode rješavanja radnih sprova: mirenje i arbitraža. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova*. Zagreb: Narodne Novine, 2004, pp. 185–224; GRADAŠČEVIĆ-SIERČIĆ, J. Sistem alternativnog rješavanja individualnih radnih sporova u Bosni i Hercegovini. In: BIKIĆ, A. (ed.). *Yearbook of the law Faculty of the University of Sarajevo 2019. Vol. LXII*. Sarajevo: Univerzitet u Sarajevu – Pravni fakultet, 2019, pp. 326–327.

52 TRIVA, S. and M. DIKA. *Građansko parnično procesno pravo*. Zagreb: Narodne novine, 2004, p. 851.

53 Ibid.

arbitration, i.e., contracts arbitration (subjective arbitrability).[54] Regarding the arbitrability of individual labor disputes, or whether the subject matter of the dispute can be decided by arbitration, it should certainly be considered from the point of view of the norms of labor law that represent the protective character of the labor relations.

The possibility of resolving labor disputes through arbitration in the Republic of Croatia was made possible even at the time of the conception of the labor relations as a status relation, and the stated possibility was also maintained in the civilist approach.[55] With the development of labor law regulation, the boundaries of arbitrability of labor disputes were also expanded. However, since the provisions of the Labor Act, regarding individual labor disputes, are only partially regulated by the institute of arbitration, certain ambiguities were created in practice. The question of the application of general arbitration law arises on the grounds that the Labor Act does not explicitly refer to other sources of arbitration law as it does with subsidiary application of mandatory law.[56] Likewise, the Labor Act did not exclude the possibility

54 Similar and more seen in: SIKIRIĆ, H. Law applicable to objective arbitrability. In: UZELAC, A., J. GARAŠIĆ and A. MAGANIĆ (eds.). *Djelotvorna pravna zaštita u pravičnom postupku – izazovi pravosudnih transformacija na jugu Europe, Liber amicorum Mihajlo Dika*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2013, p. 495. Also in legal doctrine (TRIVA, S. and A. UZELAC. *Hrvatsko arbitražno pravo*. Zagreb: Narode novine, 2007, p. 22) the view is expressed that arbitrability implies the following questions: - what disputes can be brought before arbitration (objective limits of arbitrability), - which parties may bring their disputes before arbitration (subjective limits of arbitrability), - whether a particular dispute can only be brought before domestic arbitration or whether arbitration abroad (territorial limit of arbitrability) can also be arranged for that dispute, and – whether a particular dispute can only be brought before institutional arbitration or whether it can also be brought before *ad hoc* arbitration (institutional limits of arbitrability). On the other hand, a position was also expressed (BABIĆ, D.A. Proposal for a new regulation of arbitrability in Croatian law on arbitration. In: UZELAC, A., J. GARAŠIĆ and A. MAGANIĆ (eds.). *Djelotvorna pravna zaštita u pravičnom postupku – izazovi pravosudnih transformacija na jugu Europe, Liber amicorum Mihajlo Dika*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2013, pp. 524–527) that comparative arbitration law generally understands arbitrability only as an admissibility of contracting arbitration with respect to the type of dispute.

55 The possibility of arbitration settlement of Labor disputes in Croatian law was introduced by the Labor Relations Act (Official Gazette No. 19/1990, 28/1990, 14/1991, 19/1992, 26/1993, 29/1994, 38/1995). On the arbitration settlement of Labor disputes through arbitration until the entry into force of the Labor Act, see ROZIĆ, I., A. BILIĆ and T. PERKUŠIĆ. Open issues of objective arbitrability of Labor disputes in Croatian law. *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, 2019, no. 17, pp. 218–222.

56 In these provisions, the Labor Act refers to the subsidiary application of the Civil Obligations Act (Official Gazette No. 53/91, 73/91, 111/93, 3/94, 7/96, 91/96 and 112/99): Art. 8 para. 4, Art. 51 para. 2, Art. 99 para. 3, Art. 106 para. 2, Art. 111 para. 1 Labor Act.

of applying the Arbitration Act,[57] and given the limited number of issues regulated by the Labor Act, it should be concluded that the labor arbitration is subsidiarily subject to the provisions of the Arbitration Act. For this reason, the regulations that standardized labor arbitration will be presented below.

4.1 Arbitration in Individual Labor Disputes Under the Special Legal Regulations of the Labor Act

Regarding individual labor disputes, the Labor Act stipulates that contracting parties may entrust dispute resolution by mutual agreement to arbitration, the composition, procedure and other matters relevant to the work of arbitration may be governed by collective agreement.[58] However, the Labor Act does not define what if these issues are not governed by a collective agreement. Such an undefined and unclear provision leads to the subsidiary application of the provisions of the Arbitration Act, which complements the incomplete provisions of the Labor Act.

Except for individual labor disputes, the Labor Act provides for the possibility of arbitration resolution of the dispute and in the case of dismissal of protected categories of employees, if the workers' council withholds consent to the dismissal of such an employee, and the employer should replace the consent.[59] Also, in the event of a collective labor dispute, the parties may amicably entrust the resolution of the resulting dispute to the arbitration,[60] and arbitration proceedings are provided for determining operations that cannot be terminated during the strike.[61] Given the topic and scope of this paper, only the arbitrability of individual labor disputes will be further analyzed.[62]

---

57 Arbitration Act of 28 September 2001 (Official Gazette No. 88/2001) ("the Arbitration Act").

58 Art. 136 Labor Act.

59 Art. 151 Labor Act.

60 Art. 210–212 Labor Act.

61 Art. 214 Labor Act.

62 On the arbitrability of collective Labor disputes see ROZIĆ, I., A. BILIĆ and T. PERKUŠIĆ. Open issues of objective arbitrability of Labor disputes in Croatian law. *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse,* 2019, no. 17, pp. 234–237.

4.2 Arbitration in Individual Labor Disputes With Subsidiary Application of the General Rules of the Arbitration Act

The Arbitration Act was entered in 2001 and became a general arbitration act regulating arbitration proceedings in the Republic of Croatia. The said Act regulates the domestic arbitration, jurisdiction and conduct of the courts, both in connection with domestic arbitration[63] and in other cases provided in the Arbitration Act, as well as the recognition and enforcement of arbitration awards.[64] According to the Arbitration Act, an arbitration (a selected trial) is a trial before an arbitral tribunal regardless of whether it is organized, or its activities are provided by an arbitral institution[65] or not,[66] while the arbitral tribunal is defined as a non-state court that draws its authorized trial from the agreement of the parties.[67] Regarding arbitrability, i.e., the possibility of presenting the subject of the dispute before arbitration, the Arbitration Act regulates that parties may arrange domestic arbitration to resolve disputes about the rights they are free to dispose of,[68] and that the parties may agree to bring the dispute before an arbitral tribunal regardless of whether its activities are organised by the arbitral institution or not.[69] Thus, in individual labor disputes, the parties may contract the jurisdiction of institutional arbitral bodies (i.e., the organization and action provided by the arbitral institution) or *ad hoc* arbitral tribunals (i.e., organization and action are provided by the parties themselves). Also, if a special law does not stipulate that a dispute can only be settled by a court in the Republic of Croatia, the parties may also arrange arbitration outside the territory of the Republic of Croatia for disputes with an international character.[70] According to general rules of the Arbitration Act, the parties

63 Domestic arbitration is an arbitration whose place is on the territory of the Republic of Croatia (Art. 2 para. 1 subpara. 1 Arbitration Act).

64 Art. 1 Arbitration Act.

65 An arbitral institution is a legal entity or body of a legal person who organizes and ensures the activities of arbitral tribunals (Art. 2 para. 1 subpara. 4 Arbitration Act).

66 Art. 2 para. 1 subpara. 1 Arbitration Act.

67 Art. 2 para. 1 subpara. 3 Arbitration Act.

68 Art. 3 para. 1 Arbitration Act.

69 Art. 3 para. 3 Arbitration Act.

70 A dispute with an international characteristic is a dispute in which at least one of the parties is a natural person resident or habitually resident abroad or a legal person who is basic under foreign law (Art. 2 para. 1 subpara. 6 Arbitration Act); Art. 3 para. 2 Arbitration Act.

to the arbitration agreement subject to arbitration all or certain disputes that have arisen or may arise between them from a particular legal relationship, contractual or out-of-contract, and an arbitration agreement may be entered into in the form of an arbitral clause in some contract or in the form of a special contract.[71] Only an arbitration agreement concluded in writing is valid.[72] Accordingly, in order for a dispute arising from an individual employment relationship to be resolved through arbitration, a written agreement between the parties to that relationship is required. In the context of the parties' ability to conclude an arbitration agreement, the Arbitration Act stipulates that the ability of natural, legal and other persons to conclude an arbitration agreement and to be parties to a dispute before an arbitral tribunal shall be assessed under the law that applies to them.[73] It also stipulates that citizens of the Republic of Croatia and legal entities under Croatian law, including the Republic of Croatia and local self-government units and regional self-government units, may conclude an arbitration agreement as well as be parties to a dispute before an arbitral tribunal.[74] Parties have a disposition to agree on a number of arbitrators, otherwise the Arbitration Act regulates the appointment of three arbitrators.[75] Under the general rules of the Arbitration Act, the arbitral tribunal may decide on its jurisdiction, as well as any objection to the existence or validity of an arbitration agreement. For this reason, an arbitration clause, which is an integral part of a contract, will be considered as an agreement independent from the other provisions of that contract. The decision of the arbitral tribunal on the nullity of the contract does not automatically mean that the arbitration clause is not valid either.[76] In an individual labor dispute, the parties are authorised to independently regulate the rules of arbitration. Where the rules of procedure are not governed by a collective agreement, or when the parties fail to regulate the rules of procedure, under the

71 Art. 6 para. 1 Arbitration Act.

72 The contract is concluded in writing if it is entered in the documents signed by the parties or if it is concluded by exchanging letters, faxes, telegrams, or other means of telecommunicating that provide written proof of the contract, regardless of whether the parties have signed them (Art. 6 para. 2 Arbitration Act).

73 Art. 7 para. 1 Arbitration Act.

74 Art. 7 para. 2 Arbitration Act.

75 Art. 9 Arbitration Act.

76 Art. 15 para. 1 Arbitration Act.

Arbitration Act, the arbitrators are authorized to regulate the rules of procedure by determining or referring to certain rules, laws or other appropriate means.[77] When deciding on the merits of the case, the arbitral tribunal will decide under the legal rules chosen by the parties as applicable.[78] By equity, the arbitral tribunal may decide only with the express consent of the parties.[79] Since the Labor Act provides nothing in terms of an arbitral award, the general rules of the Arbitration Act are subsidiarily applied in individual labor disputes. Unless otherwise specified by agreement of the parties or by collective agreement, the decision shall be taken by a majority vote.[80] In a situation where a majority of votes are not reached, the reasons for each opinion are again discussed, and if a majority of votes are not reached thereafter,[81] the award is adopted by the Chairman of the Panel.[82] If the parties have not explicitly agreed that the award may be challenged before a higher-level arbitral tribunal, the arbitral tribunal's award against the parties shall have the power of a final court judgment.[83] The Arbitration Act also provides for an action to annul the award as a sort of remedy against the award. The competent court will annul the award if the party who filed the action proves one of the reasons prescribed by the Arbitration Act.[84] Furthermore, the court will annul the award if it finds that the subject matter of the dispute is not arbitrable under the laws of the Republic of Croatia, and if the award is contrary to the public policy of the Republic of Croatia.[85] The court decides on the enforcement of a domestic award, unless it finds *ex officio* that there is one of the reasons for the annulment of the award.[86]

77 Art. 18 Arbitration Act.
78 Art. 27 para. 1 Arbitration Act.
79 Art. 27 para. 3 Arbitration Act.
80 Art. 28 para. 1 Arbitration Act.
81 A ruling is a decision of an arbitral tribunal on the essence of a dispute (Art. 2 para. 1 subpara. 8 Arbitration Act).
82 Art. 28 para. 2 Arbitration Act.
83 Art. 31 Arbitration Act.
84 Art. 36 para. 2 subpara. 1 Arbitration Act.
85 Art. 36 para. 2 subpara. 2 Arbitration Act.
86 Art. 39 Arbitration Act.

5 Do Labor Law Standards which Represent the Protective Character of the Employment Relationship allow Arbitration in Individual Labor Disputes?

From the previously stated in this paper it seems that the Labor Act does not explicitly regulate which individual labor disputes can be resolved by arbitration. In this regard, the answer should be sought in the essential characteristics of the individual labor dispute in the context of the provisions of the Arbitration Act, which, as a general legal regulation, also applies in a subsidiary manner to labor disputes.

As mentioned above, the Arbitration Act governs the arbitrability of disputes by provisions under which the parties may arrange domestic arbitration to resolve disputes about rights they are free to dispose of. Also, the parties may agree to bring those disputes before the arbitral tribunal regardless of whether its activities are organized by the arbitral institution or not. Regarding the international disputes, the parties may also arrange arbitration seated outside the territory of the Republic of Croatia, unless a special law stipulates that such a dispute can only be resolved by a court in the Republic of Croatia.[87] On the other hand, in international disputes, the Arbitration Act, in addition to the assumption that these are rights that the parties can freely dispose of, also provides for a restriction that the exclusive jurisdiction of the courts in the Republic of Croatia is not prescribed for the settlement of disputes. The legal doctrine states that the rights the parties are free to dispose of should be broadly interpreted, in such a way that the dispute is arbitrable if the parties can indirectly or directly dispose of the right out-of-proceedings, or in proceedings, whether court or administrative.[88] Although the Arbitration Act regarding domestic arbitration does not explicitly state the court's exclusive jurisdiction as a limitation of arbitrability, as justified in the legal doctrine, such presumption is logical, and disputes for which the law explicitly provides only judicial protection would not be arbitrable.[89]

87 Art. 3 Arbitration Act.

88 See TRIVA, S. and A. UZELAC. *Hrvatsko arbitražno pravo*. Zagreb: Narode novine, 2007, p. 29.

89 DIKA, M. and Ž. POTOČNJAK. Arbitražno rješavanje radnih sporova. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, p. 247.

As regards the possibilities of resolving individual labor disputes through arbitration, legal understandings under both legal doctrine and case law are not in line. Namely, Permanent Arbitration Court at the Croatian Chamber of Commerce as an institutional arbitral body considers, *inter alia*, that the dispute over the admissibility of dismissal is an arbitrable issue,[90] as well as disputes for payment either based on compensation for damages due to an infringement of an obligation under a contract of employment[91] or based on severance pay,[92] and that the above can be referred to in arbitration proceedings. On the other hand, a different position arises from the decisions of the state courts regarding arbitrability of individual labor disputes. Namely, it follows from the state court decisions, primarily the Supreme Court as the highest court in the Republic of Croatia, including the lower courts, that disputes over admissibility of dismissal are not arbitrable on the grounds that the jurisdiction is explicitly prescribed for those kind of disputes, and that the issue of termination of the employment contract

90 By the award of the arbitrator of the Permanent Court of Arbitration at the Croatian Chamber of Commerce of 30 December 2013, Case No. 10. As-P-2011/20, the applicant's request for a finding was rejected *"… that the decision to terminate the employment contract for an indefinite period due to breach of employment obligations / dismissal was conditioned by misconduct of the employee / defendant, which decision was made by the defendant on 19 March 2011 is inadmissible, and that the plaintiff's employment with the defendant has not ceased …".*

91 The Arbitrator's Ruling of the Permanent Court of Appeal at the Croatian Chamber of Commerce of 29 May 2009, Case No. 1000/2010, IS-P-2008/21.

92 The Arbitrator's Ruling of the Permanent Court of Appeal at the Croatian Chamber of Commerce of 3 January 2011, Case No. 1000/2010, IS-P-2009/59.

is strictly regulated.[93] Also, individual labor disputes on the establishment and prohibition of discrimination are not arbitrable, because these are disputes arising from non-contractual relationships.[94] It follows from court decisions that disputes for the payment of salary are not arbitrable,[95] while disputes for damages are arbitrable.[96]

By analysing the provisions governing arbitration in individual labor disputes, as well as the stated understandings of their application in legal doctrine and case law, it should be concluded that those provisions are incomplete and as such inconsistent. Therefore, in order for an individual labor dispute

---

93 According to the legal understanding of the Supreme Court of the Republic of Croatia, it is clear that *"… In order to resolve the dispute in order to establish the inadmissibility of the termination of the contract of employment, jurisdiction is explicitly laid down (argument referred to in Art. 133 Labor Act (Official Gazette No. 93/14) ('Labor Act'), and in addition the issue of termination of the contract of employment is governed by strict regulations (Art. 114-130 Labor Act). It follows, therefore, that the dispute to establish the inadmissibility of the termination of the contract of employment and reinstatement is not arbitrable, and that the arbitration clause referred to in Art. 16. of the cited contract of employment is invalid. Further, it must be concluded that the court has jurisdiction to resolve the dispute in question…"* See Judgment of the Supreme Court of the Republic of Croatia of 4 December 2018, Case No. Gž - 23/2018-2. Lower courts have the same approach: *"… As this legal matter is a Labor status dispute in order to establish the inadmissibility of the decision to terminate employment, and to return to work, this is, as assessed by this court, a dispute for which the law explicitly provides only for judicial protection of rights and on a law governed by strict regulations and which the parties are not free to dispose of (arg. referred to in Art. 124 para. 1 and Art. 133 Labor Act). Concludes, the issue of termination of contracts of employment is governed by strict regulations (Art. 114-123 Labor Act) and the 'right to dismiss' parties are not free to dispose (and it is not a mutual termination of the contract of employment) and the arbitration clause is invalid."* See Decision of the County Court in Split of 21 January 2019, Case No. Gž R-26/19-2.

94 Decision of the Zagreb County Court of 30 October 2018, Case No. Gž R-248/2017-4 *"…Since in the present case the subject of the dispute is the finding that the defendant acted in violation of the mandatory provisions prohibiting discrimination, it is a dispute arising from a relationship of a non-contractual character, which by its nature is not an arbitrable dispute* […] *It must be noted to the court of first instance that, due to the complex nature of the Labor relations, in each particular case it should be carefully assessed whether a particular dispute is arbitrable, and that arbitrable would not be merely Labor disputes arising from a relationship of a non-contractual character. For example, it is stated that in disputes relating to the prohibition of discrimination, a dispute on the payment of salary, dismissal of a contract of employment or other issue from individual Labor relations in which the applicant would argue that discrimination infringed some of his employment rights would be arbitrable. In such a dispute, the arbitral tribunal would determine as a preliminary question whether the mandatory anti-discrimination provision was violated and would decide on the merits of the claim on that basis."*

95 Decision of the County Court in Rijeka of 21 March 2018, Case No. Gž R-95/2017-2 *"… payment of salary is not an arbitrable issue…".*

96 Decision of the Zagreb County Court of 5 January 2017, Case No. Gž R-2421/16 *"… As in the present case it is a dispute for damages, such a dispute is arbitrable."*

to be arbitrable, it must be a matter of rights that the parties can freely dispose of, and the law must not prescribe only jurisdiction to resolve such a dispute. Regarding the rights that the parties are free to dispose of, it follows that those individual labor disputes arising from a non-contractual relationship, as well as those disputes over matters exclusively governed by mandatory provisions, would not be arbitrable. However, one should agree with a reasoning set out in the legal doctrine[97] that even the rights arising from mandatory provisions may also be infringed and should be considered arbitrable as such. Accordingly, cases over a fact whether the undisputed rights governed by mandatory provisions have been violated, should also be considered as arbitrable. Thus, from the analysis of the special regulation of the Labor Act and the general regulation of the Arbitration Act, it should be considered that all individual labor disputes are arbitrable, regardless of whether these disputes arise from contract or not, and when it comes to the right governed by mandatory provisions, if it is disputed in a particular case whether that right has been violated. This conclusion is certainly contributed by the fact that labor relations in the Republic of Croatia are based on a civilist approach, in which the regulation of rights and obligations from the employment is predominantly left to party autonomy. Another condition for contracting arbitration to resolve individual labor disputes is the absence of exclusive jurisdiction of the state court. Namely, the Act in its provisions regulating the judicial protection of employment rights does not prescribe the exclusive jurisdiction of the court to resolve individual labor disputes.[98] On the other hand, the provisions of the Labor Act that regulate the possibility of resolution through arbitration of individual labor disputes determine the general arbitrability of such disputes. Appreciating the norms of employment law which constitute the protective character of the labor relations, it should be concluded that, an employee whose

97 See ROZIĆ, I., A. BILIĆ and T. PERKUŠIĆ. Open issues of objective arbitrability of Labor disputes in Croatian law. *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse,* 2019, no. 17, pp. 230–231; BABIĆ, D. A. Proposal for a new regulation of arbitrability in Croatian law on arbitration. In: UZELAC, A., J. GARAŠIĆ and A. MAGANIĆ (eds.). *Djelotvorna pravna zaštita u pravičnom postupku – izazovi pravosudnih transformacija na jugu Europe, Liber amicorum Mihajlo Dika*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2013, p. 530.

98 Labor Act in the provisions of Art. 133-135 regulates the judicial protection of employment rights.

employment rights have been violated, can independently decide whether to claim his or her rights before the state court or, assuming employer consent, through arbitration.

Studying the case-law mentioned in this paper, it is evident that the parties mostly agree on the possibility of resolving an individual labor dispute through arbitration through the clauses of the employment contract.[99] Indeed, the Labor Act merely states in its provisions that contracting parties may amicably entrust arbitration with the resolution of a labor dispute and that a collective agreement may regulate the composition, procedure and other issues relevant to the work of the arbitration.[100] Therefore, it follows from the above that the possibility of contracting arbitration to resolve an individual labor dispute through an employment contract is allowed. However, it is clear that the employee, as a weaker contracting party, can hardly refuse a clause providing for the possibility of arbitral settlement of the labor dispute precisely because the employer, as the more dominant party to the contract, can condition it by establishing an employment relationship. Having in mind the protective character provided for by labor law standards, the provisions of the Labor Act should be supplemented *de lege ferenda* in such a way that the possibility of contracting arbitration would be permitted by an arbitral agreement only after the dispute from the individual employment relationship arises.

6 Conclusion

Arbitration, as an alternative way of resolving individual labor disputes, is a select trial before an arbitral tribunal. The provisions of the Labor Act as a special legal source governing the arbitrability of individual labor disputes are flawed and incomplete, and although the Labor Act does not explicitly refer to the application of the general rules on arbitration, labor disputes are subsidiarily governed by the rules of the Arbitration Act.

99 It is similar in the United States where arbitration clauses are often an integral part of contracts of employment. See more JAGTENBERG, R. and A. de ROO. Employment Disputes and Arbitration. An Account of Irreconcilability, With Reference to the EU and the USA. *Proceedings of the Faculty of Law in Zagreb*, 2018, Vol. 68, no. 2, pp. 171–192.

100 Art. 136 Labor Act.

Accordingly, disputes on rights that the parties are free to dispose of are arbitrable, as well as disputes for the resolution of which the exclusive jurisdiction of the state court is not envisaged. Following the research carried out in this paper, it is inevitable to conclude that, as regards both conditions, different views arise both in legal doctrine and case law. For this reason and considering the specificities and protective character of the employment relations, the article 136 the Labor Act, which regulates the possibility of arbitral settlement of individual labor disputes, should be supplemented *de lege ferenda* as follows: - that it prescribes the arbitrability of all individual labor disputes, except those for which the jurisdiction of the state court is expressly prescribed by law, – that the possibility of contracting arbitration is admissible only after the particular employment dispute arises, and – that matters not regulated by this law, collective agreement or agreement of the parties are subject to the general rules of arbitration law. These proposals, the provisions of the Labor Act that standardised the possibility of arbitral settlement of disputes in individual labor relations, would be more consistent and clearly defined. Also, the aforementioned proposals strengthen the position of an employee as a weaker party in the employment relationship, and equalize its party disposition when arranging arbitration, therefore indirectly contributing to a more equal position of the employee and the employer in the employment relationship.

Literature

BABIĆ, D.A. Proposal for a new regulation of arbitrability in Croatian law on arbitration. In: UZELAC, A., J. GARAŠIĆ and A. MAGANIĆ (eds.). *Djelotvorna pravna zaštita u pravičnom postupku – izazovi pravosudnih transformacija na jugu Europe, Liber amicorum Mihajlo Dika*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2013, pp. 521–543.

BÄHR, P. *Grundzüge des Bürgerlichen Rechts*. München: Vahlens Lernbücher, 2008, 513 p.

BILIĆ, A. and T. PERKUŠIĆ. Legitimacy of strike – qui, quid, quando et quomodo? *Journal of Law and Social Sciences of the Faculty of Law Josip Juraj Strossmayer University of Osijek*, 2018, Vol. 34, no. 3–4, pp. 109–140. DOI https://doi.org/10.25234/pv/6160

BILIĆ, A. *Fleksibilnost i deregulacija u radnopravnim odnosima*. Doctoral dissertation. University of Split, Faculty of Law, 2012.

CRNIĆ, I. Sudska zaštita individualnih prava radnika. In: POTOČNJAK, Ž. (ed.). *Novine u radnim odnosima: komentar najznačajnijih promjena u radnim odnosima: redakcijski pročišćeni tekst Zakona o radu: pravilnici: o radu, o postupku i mjerama zaštite dostojanstva radnika*. Zagreb: Organizator, 2003, pp. 151–203.

DIKA, M. and Ž. POTOČNJAK. Arbitražno rješavanje radnih sporova. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, pp. 239–269.

DIKA, M. Sudsko rješavanje radnih sporova. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, pp. 131–155.

DIKA, M., Ž. POTOČNJAK and V. GOTOVAC. Radni sporovi. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj.* Zagreb: Pravni fakultet i Organizator, 2007, pp. 649–711.

GORENC, V. et al. *Komentar zakona o obveznim odnosima*. Zagreb: RRif plus, 2005, 1888 p.

GOTOVAC, V. Alternativne metode rješavanja radnih sprova: mirenje i arbitraža. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, pp. 185–227.

GRADAŠČEVIĆ-SIJERČIĆ, J. Sistem alternativnog rješavanja individualnih radnih sporova u Bosni i Hercegovini. In: BIKIĆ, A. (ed.). *Yearbook of the law Faculty of the University of Sarajevo 2019. Vol. LXII*. Sarajevo: Univerzitet u Sarajevu – Pravni fakultet, 2019, pp. 323–346.

GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, pp. 1–46.

HEPPLE, B. Security of Employment. In: BLANPAIN, R. (ed.). *Comparative Labour Law and Industrial Relations.* Deventer: Kluwer Law and Taxation Publishers, 1987, p. 475.

JAGTENBERG, R. and A. de ROO. Employment Disputes and Arbitration. An Account of Irreconcilability, With Reference to the EU and the USA. *Proceedings of the Faculty of Law in Zagreb*, 2018, Vol. 68, no. 2, pp. 171–192.

KLARIĆ, P. and M. VEDRIŠ. *Građansko pravo*. Zagreb: Narodne novine, 2009, 801 p.

NOVAKOVIĆ, N. Obveza zapošljavanja osoba s invaliditetom i prednosti tih osoba pri zapošljavanju. In: CVITANOVIĆ, I. (ed.). *Aktualnosti u radnim odnosima – 2015*. Zagreb: Novi informator, 2015, pp. 57–73.

POTOČNJAK, Ž. Foreword. In: UZELAC, A. (ed.). *Mirenje u građanskim, trgovačkim i radnim sporovima: Zakon o mirenju, Pravilnik o načinu izbora miritelja i provođenju postupka mirenja s komentarima*. Zagreb: TIM press, 2004, 249 p.

POTOČNJAK, Ž. Sporovi o novom hrvatskom radnom zakonodavstvu. *Revija za socijalnu politiku*, 1994, Vol. 1, no. 1, pp. 37–52. DOI https://doi.org/10.3935/rsp.v1i1.616

Resolution Concerning Statistics of Strikes, Lockouts and other Action Due to Labor Disputes adopted by the Fifteenth International Conference of Labor Statisticians. Genova: International Labor Office (Bureau of Statistics) [online]. *International Labour Organization*. January 1993, 10 p. [cit. 24. 5. 2021]. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087544.pdf

ROZIĆ, I., A. BILIĆ and T. PERKUŠIĆ. Open issues of objective arbitrability of Labor disputes in Croatian law. *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse,* 2019, no. 17, pp. 209–242.

ROZIĆ, I. *Kolektivno radno pravo*. Sarajevo: JP NIO Službeni list BiH, 2013, 252 p.

ROŽMAN, K. Neke napomene u vezi slobode ugovaranja u radnim odnosima. *Radno pravo*, 2014, no. 03/14, pp. 16–22.

SIKIRIĆ, H. Law applicable to objective arbitrability. In: UZELAC, A., J. GARAŠIĆ and A. MAGANIĆ (eds.). *Djelotvorna pravna zaštita u pravičnom postupku – izazovi pravosudnih transformacija na jugu Europe, Liber amicorum Mihajlo Dika*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2013, pp. 493–521.

STRASSER, R. Abhängiger Arbeitsvertrag oder freier Diensvertrag: Eine Analyse des Kriteriums der persönlichen Abhängigkeit. *Das Recht der Arbeit*, 1992, no. 2, pp. 93–104.

TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, 700 p.

TRIVA, S. and M. DIKA. *Građansko parnično procesno pravo*. Zagreb: Narodne novine, 2004, 958 p.

TRIVA, S. and A. UZELAC. *Hrvatsko arbitražno pravo*. Zagreb: Narode novine, 2007, 570 p.

Contact – e-mail
trpimir.perkusic@pravst.hr

ORCID
0000-0003-4561-9926