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EMPLOYMENT DISPUTES AND ARBITRATION AN ACCOUNT OF IRRECONCILABILITY, WITH REFERENCE TO THE EU AND THE USA

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This paper concerns employment disputes, a domain where dispute resolution out of court (private justice) has a long tradition, not only in collective labour disputes between trade unions and employers' associations but also in individual employment disputes. However, in Europe individual employment disputes arbitration is almost never used. By contrast, in the United States arbitration clauses are often written into standardized employment contracts since the early 1990s, in particular in the financial services industry. After an overview of the development of employment relations on both sides of the Atlantic, in this paper converging tendencies are highlighted. It is argued that an increasing popularity of both in-company and court-referred mediation programmes can be observed. Empirical data corroborate such finding.

Key words: employment disputes, arbitration, arbitrability, mediation, EU, USA

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I. INTRODUCTION

The focus of this paper is on employment disputes, a domain where dispute resolution out of court (private justice) has a long tradition.[1] This applies equally to collective labour disputes between trade unions and employers' associations and to individual employment disputes. Among the methods used in collective disputes, arbitration has always been less prominent than negotiation-based approaches. In individual employment disputes, arbitration is almost never used, at least in Europe. In the United States, by contrast, arbitration clauses are often written into standardized employment contracts, and this method has been extensively used since the early 1990s, in the financial services industry particularly. This arbitration practice, however, is heavily criticized, and major empirical research has been undertaken in the wake of the fierce debates.

In this paper, an effort is made to explain the remarkable differences between the USA and Europe with regard to the resolution of individual employment disputes. To this end, the development paths of employment relations on both sides of the Atlantic are summarized, and the case law regarding the voluntary or mandatory character of arbitration is compared. As a next step, converging tendencies are highlighted. These tendencies largely emanate from the universal drive to increase productive efficiency for industry, but also for the judiciary. It is argued that the outcome will be: an increasing popularity of both in-company and court-referred mediation programmes. Empirical data corroborate the finding that mediation has come to overshadow arbitration.

II. CHARACTERISTICS OF EMPLOYMENT DISPUTES

1. Europe

The employment relationship, and the very phenomenon of labour law, is grounded in the process of industrialization that unfolded during the 19th and 20th centuries. Industrial mass production necessitated the employment of large numbers of people to perform designated tasks at the instruction of a skilled master or supervisor: their employer. For most of the past two centuries, the prevailing idea was that the employer creates jobs, creates opportunities for people to make a living. In so doing, the industrial entrepreneur's role as an employer was perceived as key to the growth of a nation's national income and prestige.

[1] An early systematic inventory on the use of ADR methods was already published by the International Labour Organization in 1933: *Conciliation and Arbitration in Industrial Disputes, Studies and Reports*, ILO, Geneva, 1933.

During most of the 19th century, individual workers hiring themselves out to factories faced an extreme power imbalance, a problem that could only be addressed through collectivization. Initially, trade unions were prohibited; only individual disputes were recognized, and many statutory schemes (like the early *Conseil de Prud'Hommes* in France) arranged for the major input of the employer as the decision-maker. As a result of that, evidence introduced by the worker was often statutorily excluded, as borne out by the old *Code Civil* provision: *Le Maître est cru sur son affirmation.*[2]

From the late 19th century onwards, the constructive role of trade unions became recognized across Europe, if only as a tool to contain social unrest, against the backdrop of the rise of communism. Governments started to support collective bargaining and to facilitate informal dispute resolution schemes between both sides of industry. Informal modes of dispute resolution such as conciliation and mediation were thought best suited to instil negotiation qualities in the emerging 'social partners' while respecting their autonomy – a highly sensitive issue.

Collective disputes thus came to be recognized in addition to individual disputes. Collective disputes do not concern only rights arising under collectively bargained agreements (CBAs) in force, but also mere economic interests, where negotiations over future terms of employment in envisaged CBAs have ended in a stalemate. Recourse to such informal dispute resolution mechanisms – mostly conciliation/mediation, occasionally arbitration – tended (and still tends) to be voluntary. Only during World War I and World War II were *mandatory* arbitration regimes put in place by most European governments. The rationale underlying these mandatory schemes was to prevent strikes from paralyzing the vital war industry.[3] After 1945, the European integration process took off, and one of the milestones that marked this process was the European Social Charter, adopted in 1961. The Charter provided that the Council of Europe Member States should support the social partners (industry and the unions) by making conciliation and *voluntary* arbitration mechanisms available to them.[4]

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[2] Meaning: the Master's word will be conclusive. Jagtenberg, R.; de Roo, A., *Arbeid en ICMS: opbrengsten, weerstanden en intenties*, Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement TMD, *vol.* 13, no. 3, 2009, pp. 43 – 66.

[3] de Roo, A.; Jagtenberg, R., *Settling Labour Disputes in Europe*, Kluwer Law Int'l, Deventer/Boston, 1994.

[4] Art. 6 ss. 3, European Social Charter (European Treaty Series no. 163, 1961); it should be noted, though, that isolated cases of mandatory arbitration do occur in collective disputes. An interesting example is Norway, where in the event of major strikes affecting large strata of society, 'special occasion' statutes have been enacted

Thus, to some extent one could say that governments treat the social partners as 'Masters of their own household': the social edifice.

As to individual employment disputes, it is important to recall that socialism, as one of the main orientations in European politics, resulted in the enactment of various statutes aimed at protecting the worker against hazardous conditions in the workplace and – later – against unfair dismissals and discrimination on the shop floor. Henceforth, rights for individual employees could emanate from collectively bargained agreements and/or from statutory rights. Obviously, the latter are to be vindicated in the courts of law. But the courts of law will also apply and construe CBA provisions governing an individual employment contract under review. Most European countries have specialized labour courts and have involved the social partners in these, for example as lay assessors. Prior to adjudication, conciliation tends to be offered as an option to the litigants, either *integrated in* the courts (as in Germany and France with the *Arbeitsgerichte* and the *Conseils de Prud'hommes*) or *annexed to* these courts (as in the UK, with ACAS – the Advisory Conciliation and Arbitration Service – tied into the Employment Tribunal System).

Since in most countries the social partners are represented in the labour court system, it will not come as a surprise that it is not very common for CBAs to provide for arbitration as a complete alternative to the courts. Occasionally, one may come across (quasi-)arbitration schemes that individual workers who are members of a signatory union should resort to in the event of a dispute over a particular provision in the CBA. But such dispute resolution schemes governing individual union members have in recent times become even less relevant, as unionization levels have started to decline everywhere in Europe, except in Scandinavia. De-unionization may be understandable as personal wealth and individual statutory protection have significantly increased. In the new millennium, however, the pressure to maintain competitive cost levels that ensue from economic globalization has led employer associations to question the very legitimacy of CBAs *and* the 'rigidity' of statutory protection of workers and their social security entitlements. Reference is thereby often made to the USA as a model worth following.

to bring such disputes under the jurisdiction of the National Wages Board. For further information see the official government website: https://www.regjeringen.no/no/aktuelt/compulsory-arbitration (10 April 2018).

2. USA

The development of labour law and dispute resolution in the United States has been different from what occurred in Europe, at least in some respects.[5] American culture has always embraced the free market philosophy. Socialism never was a major political movement, and as a consequence protective legislation in the USA never became as elaborate as in Europe. The 'at will' principle in dismissal cases and the comparatively scant social insurance infrastructure bear witness to this 'purist' starting point. Neither unions nor employers' associations were systematically integrated 'as social partners' in the enforcement of labour law although, similar to the experience in Europe, unions were gradually recognized as actors that could play a constructive role in developing stable labour relations and industrial peace. In 1947, the Federal Mediation and Conciliation Service (FMCS) was established to support both sides by offering conciliation, and also voluntary arbitration services, in collective disputes.

But for individual worker claims, rather than having uniform statutory standards, much was left to the bargaining power of specific unions active in specific areas, an approach wholly in line with free market philosophy. In this context it is almost self-evident that for unionized individual workers, CBAs have increasingly provided for a two-tier mechanism of dispute resolution, that is, 'grievance mediation', and should this fail, 'grievance arbitration'. Lacking comprehensive legislation, the doorsteps of the courts are not necessarily the natural way to go.

As a consequence, where in Europe it is not uncommon for the courts to consider CBA rights while dealing with statutory rights, in the USA it is not uncommon for arbitrators to consider statutory rights (where these exist) while dealing with rights arising under a CBA.

The more prominent role for arbitration in the unionized segments of the American labour market has, however, proliferated in the non-unionized sector, notably in the financial services sector. Here, arbitration clauses can increasingly be found in individual contracts, but the terms of these contracts are not genuinely negotiated. Rather, they follow a set model imposed by the employer; these are *contracts of adhesion*. For a candidate aspiring to a job position under such conditions with an employer, it is often simply a case of 'Take it or leave the building.'

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[5] Blanpain, R. (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer Law International, The Hague/London/Boston, 2001.

One could say that a referral to arbitration emanating from a clause in an adhesion contract comes effectively down to mandatory arbitration. It is with particular reference to such cases that a lively debate started in the USA in 1991 and has continued ever since.

III. THE MANDATORY EMPLOYMENT ARBITRATION DEBATE IN THE USA

1. The *Gilmer* case as a turning point

During the post-World War II period, the U.S. Supreme Court had initially set a course of delimiting the scope of employment arbitration. Notably in its 1974 decision in *Alexander v Gardner-Denver,* the Supreme Court held that no mandatory arbitration was allowed in respect of individual employees claiming statutory rights (*casu quo* under the 1964 Civil Rights Act).[6]

But in the 1980s the atmosphere changed. The ADR movement took off then, and Supreme Court Chief Justice Warren Burger and Justice William Rehnquist openly praised ADR against the backdrop of high litigation rates and overburdened courts. Then, in 1991, came *Gilmer v Interstate/Johnson-Lane,* where the Supreme Court held a stockbroker employee to be bound – through a standard clause in his employment contract – to arbitrate a *statutory* age discrimination claim.[7] The *Gilmer* case spawned a debate that could easily fill a library. And that debate intensified when a similar judicial pro-arbitration attitude was taken in respect of individual consumer claims. It should be said that some lower courts attempted to narrow the applicability of *Gilmer.*[8] The Supreme Court, however, stuck to its guns.[9]

The main arguments put forward by the *critics* of *Gilmer* and by its *defenders* can be summarized as follows. The *critics* say that mandatory arbitration eliminates a claimant's right to present claims to a judge or jury and prevents them from setting public precedents. Critics also suspect that many arbitration clauses provide for limited discovery, eliminate remedies available in court and/

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6 *Alexander v Gardner-Denver,* 415 U.S. 36 (1974).

7 *Gilmer v Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).

8 *Cole v Burns International Security Services* 105 F.3d 1465 (D.C. Cir. 1997); *Prudential Insurance Corporation of America v Lai* 42 F.3d 1299 (9th Cir. 1994). *Cole* addressed the issue of impartiality, *Prudential* the issue of voluntariness.

9 *Circuit City Stores Inc. v Adams, 532 U.S. 105 (2001).* The gist of *Circuit City:* no 'little guy' exception in adhesion contracts.

or impose non-neutral arbitrators. Lisa Bingham warned of repeat-player effects, notably where an arbitrator handles many cases for the same employer – the employer who would most likely pay the arbitrator.[10] It was feared that mandatory arbitration would become the standard procedure. The headline of one influential article read: 'The U.S. Supreme Court allows birds of prey to sup on workers and consumers'.[11]

The *defenders* of mandated arbitration say: this saves companies a lot of money; and the benefits companies accrue this way will be passed along to customers or employees in the form of lower prices or higher salaries. So, mandatory arbitration is beneficial to the public at large.

2. Empirical data on use and outcomes of arbitration

These fierce debates necessitated some solid empirical work, the bigger part of which was undertaken at Cornell University. First, there is the 2011 work by Alex Colvin: *An Empirical Study of Employment Arbitration*.[12]

Colvin analysed nearly 4,000 arbitrations administered by the American Arbitration Association and found that:

- the employee win rate was lower in arbitration than in litigation;
- in cases won, the amounts awarded in arbitration were substantially lower than in litigation;
- the positive news was that the disposition time in arbitration was substantially shorter than in litigation;
- arbitration fees ($6,500 on average) were nearly always fully paid by the employer.

As to the repeat-player effect, Colvin found strong evidence of a repeat-employer effect, in two ways:

1. Employee win rates *and* award amounts were significantly lower where an employer had been involved in multiple arbitration cases.

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[10] Bingham, L. B., *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, McGeorge Law Review, *vol.* 29, 1997-1998, pp. 223 – 259.

[11] Carrington, P.; Haagen, P., *Contract and Jurisdiction*, Supreme Court Review, 1996, p. 331.

[12] Colvin, A. J. S., *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, Journal of Empirical Legal Studies, *vol.* 8, no. 1, 2011, pp. 1 – 23.

2. A significant repeat employer-arbitrator pairing effect was confirmed: lower win rates and smaller damage awards were found where the same arbitrator was involved in more than one case with the same employer.

In 2014, another well-known researcher at Cornell, David Lipsky, tried to integrate Colvin's findings into a larger longitudinal assessment of the use of arbitration.[13] This was possible as Cornell had carried out surveys of Fortune 1000 corporations on the use of ADR in 1997 and then again in 2011.

From the data collected it became clear that most large employers now prefer mediation: in 2011, 70% of employers rarely or never used *arbitration*, as contrasted to only 14% of employers who rarely or never used *mediation*.

The main reason put forward for this outcome was that arbitration had become as costly and complex as litigation.

IV. THE ABSENCE OF AN EMPLOYMENT ARBITRATION DEBATE IN THE EU

In the EU today, the main distinction made in employment dispute resolution is between collective and individual disputes, witness also the two distinct Eurofound (European Foundation for the Improvement of Living and Working Conditions) surveys that correspond to this main division.[14] In collective disputes, there is a role for voluntary arbitration in conformity with the European Social Charter, although even in such disputes negotiation-based approaches are much more frequently used. The rationale for this preference for direct negotiation or conciliation is obvious: unlike arbitration, these methods respect the autonomy of the social partners. If an agreed solution were absolutely impossible while pressure was building up to terminate the dispute, it would be preferable to let a state court decide, first because a court constitutes a genuine outsider, and second because a court *as an outsider* would likely prefer to decide along procedural criteria – creating new room to manoeuvre – rather than deciding itself on the substance of the matter at stake.[15]

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[13] Lipsky, D. B.; Lamare, J. R.; Maffie, M., *Mandatory Employment Arbitration; Dispelling the Myths*, Alternatives (a CPR series), *vol.* 32, no. 9, 2014, pp. 133 – 146.

[14] Welz, C.; Eisner, M., *Collective Dispute Resolution in an Enlarged European Union*, Eurofound, Dublin/Brussels, 2006; Purcell, J., *Individual Disputes at the Workplace: Alternative Dispute Resolution*, Eurofound, Dublin/Brussels, 2010. Both reports have been followed by thematic updates.

[15] The exceptional mandatory arbitration system in Norway was scrutinized by the ECtHR in a 2002 testcase submitted by the Offshore Workers' Trade Union (OFS). In the particular case at hand, the ECtHR saw no infringement of Art. 11 ECHR,

In individual employment disputes, which are almost always about statutory rights, adjudication – possibly preceded by conciliation/mediation through the labour courts – is the paramount mode of dispute resolution in Europe. Can *statutory rights* claims by individual workers be submitted at all to *arbitration,* as happened in the *Gilmer* case?

Over the last fifty years the EU countries have adopted different views on this. Under French law, for example, such arbitration is simply prohibited. The Supreme Court (*Cour de Cassation*) has consistently taken the view that statutory employment rights concern public policy, and thus lack arbitrability.[16]

In other countries, such as the UK and the Netherlands, arbitration agreed to *voluntarily* may be allowed, but under certain restrictions. In the UK, this depends on the amount in controversy; in the Netherlands, only disputes regarding contractual rights may be submitted to arbitration, and these mostly concern senior managers who have negotiated their financial entitlements in case of (premature) termination of employment, but the decision to terminate employment in and of itself lacks arbitrability and must be submitted to the courts. Thus, in the Netherlands parallel avenues may have to be pursued in such cases.[17]

In practice, even where such voluntary arbitration is possible, it is rarely used. This appears, for example, from the 2010 Eurofound survey *Individual disputes at the Workplace: ADR.*[18] Anecdotal evidence from employment lawyers suggests that the legal complexities have made such arbitration too risky.

If the road to *voluntary* arbitration is already strewn with obstacles, what is the status of *mandatory* arbitration then, that is, those cases where an arbitration clause has already been included in an *adhesion* contract?

In a 1962 decision, the then European *Commission* of Human Rights considered that such a clause had been signed voluntarily as the individual employee concerned 'could have refused the employment'.[19] And in a 1999 judgment, the ECtHR held that the German courts had not violated two ESA employees'

though this would not amount to a generic approval of the arbitration system. Appl. No. 38190/97, ECtHR decision of 27 June 2002.

[16] See for example *Cour de Cassation* 30 novembre 2011, Arrêt no. 2512 (pourvoi 11-12.905 et 906).

[17] van Slooten, J. M., *Arbitrage in ontslagzaken tegen bestuurders*, TRA, *vol.* 10, 2011, pp. 15 – 18.

[18] Purcell, *op. cit*. in n. 14.

[19] Decision of the Commission of 5 March 1962, *X. v. the Federal Republic of Germany*, Appl. No. 1197/61.

right of access to court contained in Art. 6 ECHR, by granting the ESA as an international organization immunity from jurisdiction as an arbitration-like mechanism within ESA had been available to the complainants, while in addition they could have sued the firms that had hired them out in a court of law.[20] So both these cases – the only ECHR cases found on arbitration in the domain of employment law – seem to condone arbitration, although the first case is rather old now, and in the latter case arbitration was held acceptable as in addition resort to the courts had been an option through a different litigation track.

The lack of court cases on mandatory employment arbitration – to the extent this is indicative of a non-existing controversial practice – also explains the absence of a debate on this subject in the EU. This is despite the few scattered attempts by commercial law firms to alert their corporate readership to potential benefits involved in arbitration.

V. HOW TO EXPLAIN THE EU-USA DIVIDE?

1. The nature of arbitration and/or the nature of employment relations?

First, potential endogenous explanations, that is to say, the factors within the systems of arbitration and employment relations in the USA and the EU, will be reviewed, starting with arbitration.

Arguably, the most succinct definition of arbitration is: *private adjudication*. Indeed, the parties themselves agree to submit existing or future legal disputes to a privately appointed neutral third party, who will decide their case. That decision – the arbitral award – is, moreover, legally binding *and* basically as enforceable as a court judgment. The grounds for vacating an arbitral award, or for opposing its enforcement, are extremely restricted.[21] An arbitral award is thus as final as a court judgment – or even *more* final, as most court verdicts can still be appealed.

In this sense, genuine arbitration constitutes a genuine *alternative* to court litigation. In negotiation and in mediation – methods at the *other extreme* of the ADR range – there is no decision imposed upon disputants. The jointly negotiated solution constitutes a new contract that can be the object of in-court litigation.

[20] Case of *Waite and Kennedy v. Germany*, Appl. No. 26083/94, ECtHR judgment of 18 February 1999.

[21] Reference is made to Art. V of the 1958 New York Convention on recognition and enforcement of foreign arbitral awards, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf (10 April 2018).

These idiosyncrasies of arbitration, and of negotiation-based methods, respectively, may be instrumental in understanding why employers (industry) at first sight might be charmed by arbitration: its finality. In Europe, it is exactly this finality aspect at the 'exit' side that requires voluntariness at the 'entry' side, when committing oneself to such private adjudication.[22]

At the basis of any genuine arbitration lies the parties' *Agreement to arbitrate*. In this sense, arbitration would seem to be a *voluntary* process. There are two kinds of such agreements: arbitration clauses, incorporated in other legal documents, mostly contracts, whereby the contracting parties agree beforehand to refer any disputes that may arise in the future to arbitration; and *ad hoc* agreements, where parties already involved in a dispute decide on the spot to go for arbitration. The American cases discussed related to arbitration clauses, which were, however, not truly negotiated. These cases were about large corporations using standardized employment contracts incorporating an arbitration clause in small print. An individual candidate for a job seeking desperately to be hired can do little else than accept such standard terms. In several European jurisdictions, such a practice would likely be prohibited by law, if only for lack of arbitrability of statutory employment claims.

Thus the legal framework for arbitration already differs between the EU and the USA: not so much in regard to the *finality* of arbitration, but in regard to the amount of *compulsion* that is allowed in referring individual parties to arbitration.

For completeness' sake, mention should be made of an intermediate range of ADR methods that lie between genuine arbitration and mediation. There are ADR methods where indeed a neutral third party *takes a decision*, but not a binding decision. This is the case where ADR schemes cater to the neutral third party issuing 'recommendations', or where agencies hand down an 'opinion'.[23]

Most confusing, however, are those ADR schemes that lead to a binding decision, but a binding decision that is not enforceable as an arbitral award. Such schemes may be referred to as 'quasi-arbitration'. This category encompasses a wide variety of legal phenomena.

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[22] de Roo, A.; Jagtenberg, R., *Mediation and the Concepts of Accountability, Accessibility and Efficiency*, in: Van Rhee, C. H.; Uzelac, A. (eds.), *Access to Justice and the Judiciary*, Intersentia, Antwerp/Oxford, 2009.

[23] A notorious example of the last category is the Human Rights Board (*College voor de Rechten van de Mens*) in the Netherlands: despite the fundamental nature of the law that constitutes its working domain, the Commission can only hand down non-binding opinions.

Thus, in the continental legal family the principle of party autonomy and freedom of contract has resulted in a court-honoured (and occasionally even codified) practice of parties to a contract agreeing that a neutral third party will settle a controversy over the contracting parties' proper rights and obligations. The neutral third party will take a decision that legally binds the contracting parties, but that decision itself is technically a contract again, superimposed on the original contract, and as such not directly enforceable. The *tierce decision obligatoire* (France, Belgium) and the *bindend advies* (the Netherlands) fall within this sub-category. In the common law family, an institution that comes close is the *expert determination*. Here, contracting parties will empower a neutral third party to decide controversies of a technical, factual nature and, mostly, the disputing parties will agree beforehand to be bound by the determination reached. Again, such determination is by itself not directly enforceable.

The strangest animal in the 'quasi-arbitration' category is perhaps 'court-annexed arbitration' as used by various federal and state courts in the USA. Courts making use of such schemes will mandatorily refer claims – mostly: *small monetary claims* – to an arbitrator who is paid out of court funds.[24] Arbitral awards thus rendered are enforceable, but only if both parties resign themselves to the award. Within specified time limits each party may, however, file for a trial *de novo* with the court that referred them initially.

Such court-referred arbitration schemes remain exceptional. A more frequently encountered phenomenon is that a court will decline jurisdiction because at an earlier stage the parties had contractually agreed to submit a dispute between them to arbitration. As indicated previously, at such occasions European courts will likely scrutinize the voluntary acceptance of such contractual clauses first.

The notion of *arbitrability* constitutes a bridge from the nature of arbitration to the nature of employment relations in the EU and the USA, respectively. The variety of areas where arbitration is presently used obviously relates to arbitrability: For which problems does the law in any given country allow arbitration to be used in the first place?[25]

As appears from, for example, the Cole Report that was recently prepared for the European Parliament, the precise delineation of issues that may lend

[24] See *inter alia*: Meierhofer, B., *Court-Annexed Arbitration in Ten District Courts*, Federal Judicial Center, Washington DC, 1990.

[25] E.g. Fortier, L. Y., *Arbitrability of Disputes*, in: Aksen, G.; Böckstiegel, G. *et al.* (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution*, ICC publishing, Paris, 2005.

themselves to arbitration differs from country to country.[26] One recurring criterion is that arbitrations may only concern rights that the parties can freely dispose of. This observation does not take us much further, though. Such rights mainly concern status, while employment disputes mainly concern monetary claims.

It may be more helpful to organize the best known arbitration practice areas using Marc Gallanter's distinction between 'One Shotters' and 'Repeat Players'. Then the following pattern emerges in Europe:[27]

Repeat Player against Repeat Player

commercial disputes (business-to-business);

arbitrated e.g. through providers such as the ICC (International Chamber of Commerce) or on an *ad hoc* basis;

investment disputes (business-to-government);

arbitrated e.g. through the ICSID, the International Centre for the Settlement of Investment Disputes; the recently abandoned TTIP-ISDS scheme (Investor-State Dispute Settlement mechanism within the envisaged Transatlantic Trade and Investment Partnership) also fell within this category;

inter-state disputes (government-to-government)

e.g. through the Permanent Court of Arbitration or on an *ad hoc* basis.

What these areas (where arbitration thrives) have in common, is that the relations are (mostly) between equals: commerce, investment and inter-state. Interestingly, the Permanent Court, seated in The Hague near the International Court of Justice, was initially set up to entertain *inter-state* disputes, but now advertises energetically to attract *commercial* disputes as well.[28]

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[26] Cole, T. *et al.*, *Legal Instruments and Practice of Arbitration in the EU – Study for the JURI Committee*, European Parliament, policy dept. Citizen's Rights and Constitutional Affairs, Brussels, 2015 (PE 509.988, 315 pages), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf (10 April 2018).

[27] Galanter, M., *Why the 'haves' come out ahead*, Law & Society Review, *vol.* 9, 1974, pp. 95 – 160.

[28] See the Court's website: https://pca-cpa.org (10 April 2018).

Much less known and less used is arbitration in the following areas:[29]

Repeat Player against One Shotters

individual employment disputes (employer versus individual employee)

if used at all: mostly between executives and a company on the basis of a negotiated arrangement; rarely on the basis of a collectively bargained agreement, and in that case exclusively in respect of CBA rights conferred on union members.

individual consumer disputes (manufacturer/supplier versus individual end-user)

hardly used; quasi-arbitration is, however, practised in various jurisdictions by bipartite or tripartite complaint-handling bodies.

The abovementioned relationships are characterized by a power imbalance owing to unequal access to financial and documentary resources, and unequal opportunities to shift expenses on to others. In Europe, this power imbalance has been conducive to two developments: first, intervention by the legislator through the introduction of protective legislation on a large scale; and second, individual workers and consumers organizing themselves into collectives, such as trade unions or consumer associations. As a consequence, workers may opt for litigation to assert their statutory rights individually in court. Or they may entrust the protection of their interests to unions, negotiating and disputing *collectively*. Such collective disputes may then fall within the Repeat Player category:

Repeat Player against Repeat Player (continued)

Collective employment disputes (employer versus trade union)

The handling of such disputes has been institutionalized in many jurisdictions, often through statutory-based ADR bodies; here voluntary arbitration plays a modest role, only secondary to conciliation/mediation.

Collective consumer disputes

Such disputes are mostly pursued in court, e.g. through class actions. Occasionally, collective settlements are negotiated, pursuant to, or in lieu of, litigation.

[29] In family disputes, in the category 'One shotter against One shotter', arbitration is hardly used, although there might be scope for its deployment. Coenraad, L., *Arbitrage in Scheidingszaken*, in: Meijer, G. J. *et al.* (eds.), *Piet Sanders: Een Honderdjarige Vernieuwer*, Boom Juridisch, Den Haag, 2012, pp. 247 – 260.

What can be observed here is that where one shotters have really organized themselves into collectives they prefer to maximize control over process and outcome, which translates into a preferred use of negotiation-based methods. This preference for negotiation, or mediation at the most, may in turn be attributed to the social partner status of employers and unions, where autonomy has to be carefully safeguarded at all times.

Where individual workers turn to the courts – a practice increasingly resorted to as unionization levels drop – they too will be increasingly confronting conciliation/mediation attempts, according to schemes that may be either internal, court-integrated (as in France and Germany) or external, court-referred (as in the UK, but also in the Netherlands and developing in Germany).

As noted earlier, protective legislation and institutionalized social partner structures play a much less important role in the USA. Where unions are strong, they will devise autonomous dispute resolution avenues, including arbitration, in direct consultation with the key employers. Arbitration has thus become more accepted in the USA. Conversely, where there is hardly any unionization, employers will not shy away from incorporating their own arbitration schemes in standardized employment contracts.

In sum: the distinct development paths of employment relations in the USA and the EU have thus left their mark on the use or non-use of arbitration (next to differences in the framework for arbitration itself).

2. Other explanatory factors: efficiency, industry's political clout and judicial preferences

Are there yet other factors that could explain the remarkable contrast between the USA and Europe with regard to the law on employment arbitration, notably factors outside the law itself? Explanations furnished in the USA for the favourable stance of industry, and part of the judiciary, on arbitration can be summarized as follows.

Industry desires to decrease legal costs and liabilities. Moreover, industry desires to keep disputes private, protecting their reputation, and to have the possibility to secure an arbitrator's sympathy as a 'valued client'.

One would expect, though, that this drive for productive efficiency, protection of reputation and securing a neutral third party's sympathy are *universal* considerations, equally applicable in the EU. A possibly relevant intermediate factor that could explain the US-EU difference might be: *political culture*. US companies potentially have more political clout due to the system of campaign contribu-

tions, combined with the fact that a company's shareholders are regarded as its primary stakeholders.[30] In the EU, in contrast, unions and employers together are regarded as social partners and a company's employees are stakeholders potentially equal to shareholders.

And how to explain the stance taken by the *judiciary*? Senior American judges, as we saw, are quite outspoken in their favour of arbitration compared to their European brethren.

Here a possible explanation lies in a phenomenon that seems to be more widespread in the USA than in the EU, that is: the practice for quite a number of judges to pursue careers after retirement as arbitrators. The ADR provider JAMS (Judicial Arbitration and Mediation) is even built on this practice. This may particularly explain strong *pro-arbitration* views among some judges.

In Europe, judges are also increasingly speaking out, but then it will be against or in favour of the *negotiation-based* ADR varieties, such as mediation. GEMME, the European Association of Judges for Mediation, constitutes a good example.[31]

3. Convergence between the EU and the USA?

The role of industry and the role of the judiciary may necessitate some qualifications to be made in respect of the foregoing observations. The gap between the two Western continents may not be as wide as it seems; the continents may even be drawing closer together. At least four different reasons for this can be identified.

First, it has been argued that the pro-arbitration mood among companies in the USA has (or had?) a temporary character. This mood developed as a result of a 'perfect storm' (Corbin) caused by rising litigation levels and the U.S. Supreme Court's 1991 *reversal* (in *Gilmer*) of its earlier rejection of mandatory employment arbitration (as in Europe). Yet, already in 2009 a bill titled the Arbitration Fairness Act (AFA) was introduced in the U.S. Congress that would render any mandatory pre-dispute arbitration clause void and unenforceable, as in the ECtHR's *Suda* case. The AFA initiative stalled when Republicans gained the majority, it was then tabled, and currently the situation is unclear due to the unsettled political climate.

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[30] van Biezen, I.; ten Napel, H-M., *Regulating Political Parties: European Democracies in Comparative Perspective*, LUP Academic, Leiden, 2014.

[31] *Groupement européen des magistrats pour la médiation*; www.gemme.eu (10 April 2018). The website of JAMS is: https://www.jamsadr.com (10 April 2018).

Second, a related issue is the increased complexity of arbitrations involving legal aspects emanating from different sources (CBAs, statute law) and the complexity this engenders. This complexity is bound to make arbitrations more expensive, particularly as more time will be needed for the arbitrators to make awards 'litigation-proof'.

If one prefers to solve problems behind closed doors, it might be better to resort to methods that are not focused on the application of complex legal norms, but simply on reconciling future interests.

This takes us to a third common development, which appears notably from Lipsky's data: arbitration has clearly been over taken by mediation. The Eurofound survey too suggests mediation is more popular than arbitration. As Lipsky explained, the adversarial nature of arbitration is also inconsistent with the values of teamwork and employee engagement that seem to have won the day across the globe. Large employers increasingly take a strategic view of conflicts by having Integrated Conflict Management Systems (ICMS) in place. Such systems encompass protocols as to how management and workers should act in the face of disputes. As a rule, multi-step approaches are envisaged: communication always comes first, then in-house mediation, and arbitration or litigation only as a last resort. Importantly, these systems also provide for training and development of conflict handling competences amongst all staff; this is a rational investment, as conflicts that linger on or escalate will entail huge direct and indirect costs for a company.

A somewhat cynical interpretation might be that through ICMS disputes can be nipped in the bud.

The second and third reasons in particular will amount to a converging pressure across the Atlantic emanating from the business community, or rather, from the employers' side. A switch to mediation or ICMS is, after all, bound to enhance productive efficiency.[32] This pressure, however, also comes from within the judiciary, and this is the fourth reason to be discussed.

On both sides of the Atlantic, judges must work more 'efficiently' to handle more and more cases with the same (or reduced) level of staff. We have argued elsewhere that this phenomenon (*Verdict Industries Inc.*) will lead judges to behave

[32] An important qualification needs to be made with regard to the notion of efficiency. A fundamental preliminary issue here is: Exactly whose costs are considered; and to whom do the yields accrue? See Landsman, S., *ADR and the Cost of Compulsion*, Stanford Law Review, *vol.* 57, 2005, pp. 1593 ff.

strategically.[33] That is: they will minimize reasoning, forgo time-consuming interlocutories and/or try to refer perceived 'bulk complainants' to external ADR. From court statistics one must infer that a noticeable category of such bulk complainants is constituted by employees litigating individual employment disputes.

Where we write 'external ADR', this must logically be *mediation*. It cannot be arbitration, since a judge cannot take the initiative himself/herself to refer parties to a competing private system for producing enforceable awards. For judges too, it may be efficient to refer employment cases to external mediation, as from their point of view it will minimize their costs in terms of time to be invested in handling cases against an optimum level of output. A decision to refer litigants to external mediation still counts as output, while in the time thus saved other cases waiting on the docket can be finalized. If this reasoning holds true, then the frequency of court-integrated conciliation/mediation (where judges themselves invest time in forging amicable solutions) will be increasingly substituted by external mediation schemes.

VI. CONCLUDING REMARKS

We see that individual employment arbitration mandated through adhesion contracts is hardly ever used (if not prohibited) in Europe but allowed and even advocated in the USA. The diverging development paths of employment relations, resulting in different roles for statutory protection and court enforcement, have likely co-determined the acceptance of arbitration, or the lack thereof. Further factors that continue to play a role today are the political clout of industry (or instead: 'the social partners') and the preferences of senior judges. It may be difficult to measure the exact individual impact of all these factors. This is all the more so as we are looking at a highly dynamic area of society.

It is noteworthy that on both sides of the Atlantic converging pressures are mounting too: both the Cornell and the Eurofound surveys found that, all in all, negotiation-based strategies such as mediation have become much more popular than arbitration as a means to settle employment disputes. This common development may be explained by (1) the increasing complexities of the law that hamper arbitration but not mediation, (2) the fact that confidentiality is equally protected in mediations, while mediation fits in better with the

[33] Jagtenberg, R.; de Roo, A., *From Traditional Judicial Styles to Verdict Industries Inc.*, in: Huls, N. J.; Bomhoff, J.; Adams, M. (eds.), *The Legitimacy of Highest Courts' Rulings*, Cambridge University Press, The Hague/Cambridge, 2008, pp. 301 – 322.

tendency to promote teamwork, and (3) the fact that overburdened judges can initiate referrals to mediation but not to arbitration.

In concluding this paper, it is tempting to dwell for a moment on the future of employment relations: Are such relationships themselves bound to disappear?

This takes us to 'A further inconvenient truth', to borrow from Al Gore's comment about global warming: the explosive growth of the world population (from 2 to 9 billion in one century) also means a steady increase in the supply of human labour. But this increase in supply combines with the explosive growth of rationalization of production, currently through robotization, resulting in a rapid *decrease in demand* for labour.[34] Companies, notably multinationals, do not *create* work anymore, but *relocate* work, or in the workplace substitute humans with androids.

We are already witnessing mass economic migrations of people desperately in search of x billion jobs.

And all of this is currently unfolding within an atmosphere of anti-free trade, protectionism and nationalism.

But to end on a positive note, some economists have calculated that by taxing automated production a universal basic income can be financed for every citizen. Is it a coincidence that the international expert group in this area (the Basic Income Earth Network) uses the French acronym BIEN?[35] One thing is certain, if societies based on such a system are ever to materialize, the story of labour law and employment dispute resolution will have to be completely rewritten.

BIBLIOGRAPHY

Bingham, L. B., *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, McGeorge Law Review, *vol.* 29, 1997-1998, pp. 223-259.

Brynjolfsson, E.; McAfee, A., *The Second Machine Age*, Norton & Co., New York, 2014.

Carrington, P.; Haagen, P., *Contract and Jurisdiction*, Supreme Court Review, 1996, pp. 331-402.

Coenraad, L., *Arbitrage in Scheidingszaken*, in: Meijer, G. J. *et al.* (eds.), *Piet Sanders, Een Honderdjarige Vernieuwer*, Boom Juridisch, Den Haag, 2012, pp. 247-260.

[34] Brynjolfsson, E.; McAfee, A., *The Second Machine Age*, Norton & Co., New York, 2014.

[35] www.basicincome.org (10 April 2018).

Cole, T. *et al.*, *Legal Instruments and Practice of Arbitration in the EU – Study for the JURI Committee*, European Parliament, policy dept. Citizen's Rights and Constitutional Affairs, Brussels, 2015 (PE 509.988, 315 pages), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf, (10 April 2018).

Colvin, A. J. S., *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, Journal of Empirical Legal Studies, *vol.* 8, no. 1, 2011, pp. 1-23.

Conciliation and Arbitration in Industrial Disputes, Studies and Reports, ILO, Geneva, 1933.

de Roo, A.; Jagtenberg, R., *Mediation and the Concepts of Accountability, Accessibility and Efficiency*, in: Van Rhee, C. H.; Uzelac, A. (eds.), *Access to Justice and the Judiciary*, Intersentia, Antwerp/Oxford, 2009, pp. 149-169.

de Roo, A.; Jagtenberg, R., *Settling Labour Disputes in Europe*, Kluwer Law Int'l, Deventer/Boston, 1994.

European Social Charter 1961, European Treaty Series no. 163.

Fortier, L. Y., *Arbitrability of Disputes*, in: Aksen, G.; Böckstiegel, G., *et al.* (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution*, ICC publishing, Paris, 2005, pp. 269-284.

Galanter, M., *Why the 'haves' come out ahead*, Law & Society Review, *vol.* 9, 1974, pp. 95-160.

Groupement européen des magistrats pour la mediation, www.gemme.eu (10 April 2018).

https://pca-cpa.org (10 April 2018).

https://www.regjeringen.no/no/aktuelt/compulsory-arbitration (10 April 2018).

Jagtenberg, R.; de Roo, A., *Arbeid en ICMS: opbrengsten, weerstanden en intenties*, Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement TMD, *vol.* 13, no. 3, 2009, pp. 43-66.

Jagtenberg, R.; de Roo, A., *From Traditional Judicial Styles to Verdict Industries Inc.*, in: Huls, N. J.; Bomhoff, J.; Adams, M. (eds.), *The Legitimacy of Highest Courts' Rulings*, Cambridge University Press, The Hague/Cambridge, 2008, pp. 301-322.

JAMS, https://www.jamsadr.com (10 April 2018).

Landsman, S., *ADR and the Cost of Compulsion*, Stanford Law Review, *vol.* 57, 2005, pp. 1593-1630.

Lipsky, D. B.; Lamare, J. R.; Maffie, M., *Mandatory Employment Arbitration; Dispelling the Myths*, Alternatives (a CPR series), *vol.* 32, no. 9, 2014, pp. 133-146.

Meierhofer, B., *Court-Annexed Arbitration in Ten District Courts*, Federal Judicial Center, Washington DC, 1990.

New York Convention on recognition and enforcement of foreign arbitral awards, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf, (10 April 2018).

Prudential Insurance Corporation of America v Lai 42 F.3d 1299 (9th Cir. 1994).

Purcell, J., *Individual Disputes at the Workplace: Alternative Dispute Resolution*, Eurofound, Dublin/Brussels, 2010.

van Biezen, I.; ten Napel, H-M., *Regulating Political Parties: European Democracies in Comparative Perspective*, LUP Academic, Leiden, 2014.

van Slooten, J. M., *Arbitrage in ontslagzaken tegen bestuurders*, TRA, *vol.* 10, 2011., pp. 15-18.

Welz, C.; Eisner, M., *Collective Dispute Resolution in an Enlarged European Union*, Eurofound, Dublin/Brussels, 2006.

www.basicincome.org, (10 April 2018).

CASE LAW

Alexander v Gardner-Denver, 415 U.S. 36 (1974).

Cole v Burns International Security Services 105 F.3d 1465 (D.C. Cir. 1997).

Cour de Cassation 30 novembre 2011, Arrêt no. 2512 (pourvoi 11-12.905 et 906).

Circuit City Stores Inc. v Adams, 532 U.S. 105 (2001).

Gilmer v Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

X. v. Federal Republic of Germany, European Commission of Human Rights, 5 March 1962, Appl. No. 1197/61.

Waite and Kennedy v. Germany, ECtHR judgment of 18 February 1999, Appl. No. 26083/94.

http://hudoc.echr.coe.int/eng?i=001-101481 (10 April 2018).

Sažetak

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RADNI SPOROVI I ARBITRAŽA. OSVRT O (NE)POMIRLJIVIM STAJALIŠTIMA U EUROPSKOJ UNIJI I SJEDINJENIM AMERIČKIM DRŽAVAMA

U radnim sporovima izvansudsko rješavanje sporova ima dugu tradiciju, i to ne samo u kolektivnim radnim sporovima nego i u individualnima. Ipak, među metodama izvansudskog rješavanja radnih sporova arbitraža je slabije zastupljena. U individualnim radnim sporovima u Europi gotovo bi se moglo reći da je ni nema. U Sjedinjenim Američkim Državama, međutim, od 1990-ih arbitražne su klauzule uobičajeni dijelovi ugovora o radu, osobito u financijskom sektoru. Kritike takva pristupa popraćene su brojnim empirijskim istraživanjima. Iako postoje bitne razlike među načinima rješavanja individualnih radnih sporova u Sjedinjenim Američkim Državama i Europi, u radu se ipak uočava postupno smanjivanje razlika među njima. Autori smatraju da će arbitražu kao način rješavanja individualnih radnih sporova naposljetku posve istisnuti medijacija pred sudom ili unutar samih kompanija. I empirijska istraživanja navode na takav zaključak.

Ključne riječi: radni sporovi, arbitraža, arbitrabilnost, medijacija, EU, SAD

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