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THE IMPACT OF THE ACT OF SEPTEMBER 10, 2015 AMENDING SOME STATUES IN CONNECTION WITH THE PROMOTION OF ADR ON THE SEPARATE PROCEEDINGS IN CASES WITHIN THE SUBJECT-MATTER AND SCOPE OF LABOUR LAW – SELECTED ISSUES

Introduction

The Act of September 10, 2015 amending some statutes in connection with the promotion of amicable dispute resolution methods¹, which entered into force on January 1, 2016, is aimed at popularizing mediation and other methods of extra-judicial settlement of disputes in civil matters and ultimately the reduction of the caseload of the common courts in these matters². Initiation of the legislative work on this law and its adoption, was the result of a fairly universal conclusion about far from satisfactory use of instruments of extra-judicial resolution of disputes in civil matters, in particular mediation which was introduced to the Code of Civil Procedure³ under the Act of 28 July 2005 amending the Code of Civil Procedure⁴. This observation gave birth to the conviction of the need to improve and adapt the existing regulations, in particular pertaining to the mediation to the current needs, taking advantage of the experience gained throughout the period of almost ten years of the functioning of the institution of mediation. The ADR-promotion Act on the one hand amends certain existing solutions, and on the other hand introduces some new measures aimed at encouraging the parties to mediation and other non-judicial methods of dispute resolution, including, in particular the increase of the legal awareness on the possible use of these institutions, boosting its attractiveness *versus* competing solutions as well as its overall efficacy. It is worth noting that although the main intent of the amendment was to increase the utilization of mediation in business to business relationship, enacted legislation shall apply to all civil proceedings in which a settlement

¹ The Journal of Laws of 2015, item 1595, hereinafter also referred to as „*ADR-promotion Act*”.

² Statement of reasons for the governmental bill of the Act amending the Code of Civil Procedure and some other statutes in connection with the promotion of amicable dispute resolution methods, Druk Sejmowy Sejmu VII kadencji no. 3432, pp. 1–2.

³ The Act of November 17, 1964 Code of Civil Procedure, (the consolidated text: the Journal of Laws of 2014, item 101, as amended), hereinafter referred to as “*CCP*”

⁴ The Journal of Laws of 2005, no. 178, item. 1478. This statute entered into force on October 17, 2005.

is allowed⁵, including in cases examined pursuant to the provisions governing separate proceedings in cases within the subject-matter and scope of labour law⁶.

Labour-related proceedings is a mandatory separate procedure⁷, which means that if the dispute meets the law-specified criteria as to the subject-matter of the proceedings⁸ and the proceeding is conducted between employee⁹ and employer, the article 451 *et seq.* of the CCP¹⁰ shall be applicable. Due to the incompleteness of the statutory regulation of labour-related proceedings, to the extent not expressly governed otherwise, it is the general provisions of the ordinary contentious proceedings, that shall apply, giving due regard to the *lex specialis derogat legi generali* rule.

In the context of the ADR-promotion Act it needs to be emphasized that the labour-related cases are assumed to have high potential for amicable resolution. Having said that, one should also note that the principle of an amicable settlement of labour-related disputes was enclosed in the art. 243 of the Act of June, 26 of 1974 the Labour Code¹¹. Consequently, one may also assume that the solutions introduced by the ADR-promotion Act will have a strong bearing on the labour-related proceedings. At the same time it is worth noting that in the labour-related disputes involving the employee as a claimant, there are some specific institutions, aimed at, among others, informalisation of these proce-

⁵ See Statement of reasons for the governmental bill of the Act amending the Code of Civil Procedure and some other statutes in connection with the promotion of amicable dispute resolution methods, Druk Sejmowy Sejmu VII Kadencji no. 3432, pp. 1–2. It follows from art. 10 of the CCP without any doubt that mediation may be conducted in all and any matters fit for resolution through settlement. In this regard see also: K. W. Baran, *Ugody zawarte przed mediatorem w sprawach z zakresu prawa pracy, Studia z zakresu prawa pracy i polityki społecznej*, 2006, p. 119. The scope of the admissibility of settlement of civil cases is determined both by the rules of substantive law defining the limits of party autonomy in shaping legal relations and procedural regulations. Inadmissibility of the conclusion of a court settlement may therefore result expressly from the provisions of procedural law excluding settlement fitness of certain categories of cases, eg. in matters relating to social security (art. 477¹² CPC), or from the content and nature of the legal relationship to which the subject of the civil case (lack of full autonomy to dispose of certain rights); see *inter alia* M. Jędrzejewska, K. Weitz [in:] *Kodeks postępowania cywilnego. Komentarz. Tom I. Postępowanie rozpoznawcze*, ed. by T. Ereciński, Warszawa 2009, p. 117. The most comprehensive catalog of cases lacking settlement fitness is presented by K. Gajda-Roszczyńska who defines settlement fitness of cases as a specific property of the matter (dispute), determined by the subject matter of the dispute (i.e. procedural claim), which allows the parties to resolve that dispute by means of settlement and thus remove such dispute from the courts adjudicative powers; K. Gajda-Roszczyńska, [in:] *Kodeks postępowania cywilnego. Komentarz do artykułów 1–729 Tom I*, ed. by A. Góra-Błaszczkowska, Warszawa 2013, p. 107.

⁶ Hereinafter also related to as „Labour-related proceedings” or “employment disputes”.

⁷ M. Manowska, *Postępowania odrębne w procesie cywilnym*, Warszawa 2012, p. 17.

⁸ Pursuant to art. 476 § 1 of the CCP cases within the subject-matter and scope of labour law shall mean cases concerning: 1) claims arising out of or in connection with an employment relationship, 1¹) determination of the existence of an employment relationship, if the legal relationship between parties has the features of an employment relationship, contrary to the actual agreement executed between the parties, 2) claims under other legal relationships to which provisions of the labour law apply by virtue of other regulations, 3) damages sought from a work establishment on the basis of provisions regulating compensation for occupational accidents and diseases.

⁹ Within the meaning of art. 476 § 5 point 1 of the CCP.

¹⁰ I.e. provisions contained in the CCP (First par, book one, Title VII, section III).

¹¹ The consolidated text: Journal of Laws of 2014 r., item 1502 as amended, hereinafter referred to as “LC”.

edings in order to strengthen the protection of the employee and allow swift settlement of the matter (e.g. by specifically obliging the President of the court or the judge designated by him to properly prepare the trial)¹². The other institutions worth mentioning here is the preliminary review of the case (art. 467 of the CCP) and the investigation procedure governed by article 468 of the CCP, one of the main objectives of which is to encourage the parties to reach a settlement.

The purpose of this paper is to analyze the impact of some of the major changes introduced by the ADR-promotion Act on the labour-related proceedings, from the stand-point of the degree of harmonization of both regulations, in particular the assessment of the correctness of incorporating the new provisions in existing rules governing employment disputes.

The principle of the amicable settlement of disputes

Article 10 of the CCP expresses the principle of the amicable settlement of all civil cases which in the light of the requirements of substantive and procedural law are allowed to be resolved by way of the settlement. The new wording given to that provision pursuant to the ADR-promotion Act was employed to emphasize the duty of the court to support and pursue the amicable settlement of all civil cases which are fit for amicable resolution. In the context of the purpose of above-mentioned statute, replacing the existing aspirational phrase “the court should in every state of the proceedings seek (...)” to settle the dispute with a firm formula: “*court seeks(...)*” to settle a dispute, leaves no doubt as to imposition of the afore-said legal obligation on the court. Therefore one cannot accept J. Jagieło’s position that supporting and pursuing for amicable settlement of the matter remains “*a duty which the court may take advantage of, but is not obliged to comply with*¹³”. The assumption about the possibility of the existence of such „*discretionary*” duties is indeed a kind of a *contradictio in adiecto*, negating the very essence and the plain meaning of the term “*duty*”. Conclusion on the existence of a firm duty on the side of the court in the abovementioned field is not undermined by the mere fact that in reality the degree and extent of compliance with this requirement, falls largely beyond any appellate review, thus amounting to a kind of „*lex imperfectae*”, i.e. unenforceable norm of law. One could hardly imagine raising an effective appellate plea alleging that the court infringed upon art. 10 of the CCP by neglecting any effort to settle the matter amicably.

Another important modified element in the art. 10 of the CCP is the special emphasis giving in this provision to mediation as not just one of the accepted but the most favoured amicable settlement of disputes mechanism.

¹² See A. Jabłoński [in:] *Kodeks postępowania cywilnego, Postępowanie odrębne w sprawach z zakresu prawa pracy i ubezpieczeń społecznych*, ed. by K. Antonów, A. Jabłoński, Warszawa 2014, p. 176.

¹³ See J. Jagieła [in:] *Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1–366*, ed. by A. Marciniak, K. Piasecki, Warszawa 2016, Legalis, commentary to art. 10, side no. 3. According to this author it is within the sole discretion of the court to decide whether it will take steps aimed at settlement of the case, including urge the parties to mediation or abstain from such activities, even if the parties did not engage in any amicable dispute resolution effort.

These two major general modifications in art. 10 of the CCP find its proper extension and supplement in further regulations adopted under the ADR-promotion Act, namely first: imposing the obligation on a presiding judge to assess purposefulness of the referral of the parties to mediation prior to a first court session designated for a hearing (art. 183⁸ § 5 sentence I of the CCP) and second: duty of a court to instruct the parties at the beginning of a hearing regarding the possibility to settle the dispute amicably, in particular by means of mediation (art. 210 § 2² of the CCP). Thus, the new information provision duty of a court supplements the existing disposition of art. 223 § 1 sentence I of the CCP, according to which the presiding judge should, at the proper time, persuade the parties to reconcile, especially on the first hearing, after the parties have presented their stance.

Aforementioned regulations shall find their particular use in the context of labour-related proceedings. The principle of an amicable settlement of disputes in the field of labor law which is expressed in art. 243 of the LC and the related to “*irenic*” or conciliatory function of labour law¹⁴, shall apply to all forms and stages of individual labour disputes¹⁵. This rule, likewise art. 10 of the CCP is directly aimed at pursuing the amicable settlement to the dispute by employees and employers¹⁶. However, unlike art. 10 and art. 223 § 1 sentence I of the CCP, the art. 243 of the LC, as a rule of substantive law is addressed to the parties to the legal relationship in dispute, as opposed to the norm governing the conduct of a court. In addition, on the basis of the provisions on labour-related proceedings, in the course of investigation procedure according to the art. 468 § 2 point 2 *in fine* of the CCP, the legislator envisaged autonomous rule under which the court should encourage the parties to reconciliation and settlement, thereby realizing the principle of amicable settlement of labour-related disputes. As a result one may therefore argue that amendments adopted pursuant to ADR-promotion Act perfectly fit in the existing regulations, stressing the importance of amicable disputes resolution, especially in labor law matters.

In the context of the particularly prominent role of mediation in the pursuance of amicable settlement of disputes within the framework of the discussed amendment to the CPP, one should note however that as far as the admissibility of mediation in labour-related disputes did not constitute a matter of contention beforehand¹⁷, prior to the adoption of this amendment, it was often emphasized that in labour-related disputes courts referral of the parties to mediation should only take place in exceptional – particularly justified cases¹⁸. The proponents of such stance argued that the previous wording of art. 10 of the CCP and art. 468 § 2 point 2 *in fine* of the CCP indicated a preference for seeking the

¹⁴ K. W. Baran [in:] *Prawo Pracy i Ubezpieczeń Społecznych*, ed. by K. W. Baran, Warszawa 2013, p. 47. This function is based on the action of labour law provisions in a manner conducive to securing the preservation of social peace in labour relationships

¹⁵ K. W. Baran, *Modele polubownego likwidowania sporów z zakresu prawa pracy*, *Praca i Zabezpieczenie Społeczne* 2006, no. 10, p. 15.

¹⁶ *Ibidem*.

¹⁷ K. W. Baran, *Modele polubownego...*, p. 18 et seq., K. W. Baran, *Mediacja w sprawach z zakresu prawa pracy*, *Praca i Zabezpieczenie Społeczne* 2006, no. 3, p. 2.

¹⁸ P. Prusinowski [in:] *Rozstrzygnięcie Indywidualnych sporów ze stosunku pracy*, ed. by Z. Góral, Warszawa 2013, p. 186, K. W. Baran, *Modele* p. 18.

amicable settlement before the court (preferably at the stage of investigation procedure), thus submitting that resorting to mediation should have merely a subsidiary character. In our opinion, in light of the amendment of art. 10 of the CCP, newly adopted art. 183⁸ § 5 of the CCP and the extension of the temporal limits for the admissibility of the referral of the parties to mediation by the court (art. 183⁸ § 1 of the CCP), the aforesaid argument have lost its legal grounds. Conversely to above-mentioned widely-represented stance, mediation – also in labour related matters – should in fact be deemed as amicable dispute resolution mechanism at least equivalent (not inferior) to the settlement negotiations before the court.

A duty to provide information on conciliatory efforts in the statement of claim

Pursuant to the ADR-promotion Act, the art 187 § 1 of the CCP which stipulates the mandatory formal requirements for the statements of claim was supplemented with point 3. According to this newly added provision the statement of claim shall indicate whether the parties attempted mediation or other extrajudicial dispute resolution mechanism, and if such attempts have not been taken, it shall explain the reasons for such failure. This amendment is intended to draw the attention of the parties that each case referred to court proceedings should be preceded by an attempt to seek the amicable resolution of the underlying conflict¹⁹. The second objective of this new obligation imposed on the claimant is to provide the court with relevant information necessary to discharge the obligations stipulated in art. 183⁸ § 5 sentence I of the CCP (the assessment of the purposefulness of referring the parties to mediation) examine the need to designate the information meeting (art. 183⁸ § 4 sentence I of the CCP) or summon the parties to a preliminary hearing in camera (art. 183⁸ § 5 sentence II of the CCP). On the basis of the commented provision, controversies arouse as to the procedural effects of a failure to provide required information in a statement of claim.

According to the first stance, failure to include the necessary information listed in art. 187 § 1 point 3 of the CCP amounts to a breach of formal requirements, demanding its correction under art. 130 of the CCP. The provision of art. 187 § 1 of the CCP defines the required elements for a statement of claim and therefore omission of each of them results in the incompleteness of the lawsuit which prevents further processing of the case²⁰. Adopting this view would mean that the occurrence of the abovementioned breach of formal requirements of lawsuit shall trigger President judge to call the claimant, to correct the statement of claim, under the pain of its return pursuant to art. 130 § 1 and 2 of the CCP. It should be noted however that in the case of labour-related proceedings instituted by the employee, the call under the art. 130 § 1 of the CCP may only take place if the lawsuit cannot be corrected in the course of investigation procedure. Pursuant to art. 467 § 1 of the CCP any labour-related proceedings brought by an employee against

¹⁹ See Statement of reasons for the governmental bill of the Act amending the Code of Civil Procedure and some other statutes in connection with the promotion of amicable dispute resolution methods, Druk Sejmowy Sejmu VII Kadencji no. 3432, pp. 25–26.

²⁰ See I. Kunicki [in:] *Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1–729*, ed. by A. Góral-Błaszczkowska, Warszawa 2015, Legalis, commentary to art. 187, side no. 59.

an employer shall begin with mandatory²¹ preliminary review of the case. Such preliminary review consists in determining whether the pleading commencing the proceedings, i.e. the statement of claim complies with the necessary formal requirements, enabling its further processing as well as taking steps conducive to resolve the dispute at the first hearing. At the same time, pursuant to art. 467 § 3 of the CCP after a preliminary review of the case the presiding judge calls for the correction of formal deficiencies to the statement of claim only if these deficiencies cannot be removed in the course of investigation procedure. In the scholarly literature and case law it is submitted that the formal defects removed in the course of investigation procedure are those that do not require a call to correct them²², and therefore one that does not have a significant impact on the further course of the case are of secondary importance and does not obstruct the proceedings²³. If it is possible to remove those deficiencies in the course of investigation procedure it is not admissible to call the employee to remedy the formal shortcomings of the statement of claim pursuant to art. 130 § 1 of the CCP²⁴. It is therefore the preliminary review of the case when the court determines whether the existing formal deficiencies of the lawsuit are fit for correction during the investigation procedure. It is right to conclude that the formal defects resulting from the failure to comply with requirements set forth under the art. 187 § 1 of the CCP should be remedied in the course of investigation procedure²⁵. Moreover it seems beyond any reasonable doubt that lack of information required pursuant to art. 187 § 1 point 3 of the CCP is particularly fit for correction at the abovementioned stage of proceedings. Furthermore it should also be noted that even before the implementation of the amendment adding provision in question to art. 187 of the CCP, the performance of the court duties under the art. 468 § 2 point 2 of the CCP to encourage conciliation and amicable settlement during the investigation procedure, often consisted in inquiring the parties regarding their off the court attempts to resolve the dispute and in case of lack

²¹ Preliminary review of the case is not carried out in a simplified procedure (art. 505¹⁴ § 1 of the CCP), likewise it do not apply to the cassation in appeal and the proceedings before the Supreme Court, caused by its filing (art. 475¹ of the CCP). Similarly, provisions on the preliminary review are not applicable where a lawsuit was filed by the employer (art. 477⁷ of the CCP); see A. Jabłoński, *op. cit.*, p. 176, M. Manowska, *Postępowania odrębne...*, p. 91.

²² The opposites are deficiencies of significant importance for the further course of the case, eg. lack of a copy of a lawsuit, lack of demands, failure to indicate defendant, the lack of signature on the lawsuit, the lack of document confirming granting the power of attorney; see *inter alia* decision of the Supreme Court dated February 13, 2014, case no. II PZP 1/13, LEX nr 1438647, decision of the Supreme Court dated April 21, 2009, case no. I UZ 7/09, OSNP 2010 no. 23–24, item 299, M. Manowska, [in:] *System prawa pracy. Tom VI Procesowe prawo pracy*, ed. by K.W. Baran, Warszawa 2016, p. 532, J. Gudowski [in:] *Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze*, ed. by T. Ereciński, Warszawa 2012, p. 668, M. Malczyk-Herdzina, *Uprzywilejowanie procesowej pozycji pracownika w świetle przepisów kodeksu postępowania cywilnego o postępowaniu odrębnym w sprawach z zakresu prawa pracy, a konstytucyjna zasada równości wobec prawa (art. 32 ust. 1 Konstytucji RP)*, *Studia z zakresu prawa pracy i polityki społecznej* 2010, p. 308.

²³ J. Gudowski, [in:] *Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze*, ed. by T. Ereciński, Warszawa 2009, p. 551.

²⁴ P. Prusinowski [in:] *Rozstrzygnięcie indywidualnych sporów ze stosunku pracy*, ed. by Z. Góral, P. Prusinowski, Warszawa 2013, p. 114.

²⁵ A. Jabłoński, *op. cit.*, p. 178, P. Telenga [in:] *Komentarz aktualizowany do ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*, ed. by A. Jakubecki, Lex/el.

of any such efforts concerning their current position on the possibility to settle a dispute amicably.

According to a competitive view, although information covered by art. 187 § 1 point 3 of the CCP does indeed constitute a mandatory formal requirement of the statement of claim, the failure to observe this requirement neither mandates calling the claimant to remedy this breach nor subsequent return of the statement of claim by the presiding judge²⁶. This stance is supported by a submission that a mere lack of information concerning the exercise of amicable means of resolving the dispute does not preclude the further processing of the case, which pursuant to art. 130 § 1 of the CCP shall exclude its application. This position has also been expressed in the explanatory note to the bill on the ADR-promotion Act, according to which the discussed solution²⁷ is based on the „soft” means of supporting amicable dispute settlement, i.e. those that encourage the parties to use mediation and other dispute resolutions, without resorting to strict measures of coercive nature²⁸. Lack of information in the statement of claim on the efforts taken to resolve the dispute off the court, may therefore have an impact only on the conduct of the court at later stages, e.g. induce presiding judge to summon the parties to information meeting or a preliminary hearing held in camera in order to obtain relevant information as well as to evaluate the purposefulness of referring the parties to mediation. Nevertheless it still seems that accepting discussed view, in no way changes the impact of petitioners’ non-compliance with the requirements of art 187 § 1 point 3 of the CCP on the course of investigation procedure in labour-related proceedings. As already stated, failure to provide required information in the lawsuit undoubtedly constitutes the breach of formal requirements of the statement of claim which is fit for correcting in the course of investigation procedure and hence still subject to the rule set forth in 468 § 2 point 1 of the CCP governing the goal (and indirectly also the scope) of these investigation procedure.

In the context of this information provisions requirement one should also pay attention to the nature of some labour-related procedures initiated by the employee. In relation to certain employment matters, provisions of the Labour Code stipulate temporal limitation for recourse to the labor courts by introducing time limits for lodging claims (i.e. claim preclusion)²⁹. For instance, an appeal from a notice of termination of employment (constituting a lawsuit seeking declaration of ineffectiveness of the notice of termination or reinstatement in work if the contract has already been terminated or demanding compensatory payment from the employer) shall be submitted to a labour court within 7 days of the day of service of the letter notifying of the termination of the contract of employ-

²⁶ B. Czech [in:] *Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1–366*, ed. by A. Marciniak, K. Piasecki, Warszawa 2016, Legalis, commentary to art. 187, side no. 70.

²⁷ This solution is modeled on the § 253 sect. 3 of the German Code of Civil Procedure (ZPO), introduced by the law on the promotion of mediation and other alternative dispute resolution procedures of July 21, 2012 (*Bundesgesetzblatt I*, p. 1577).

²⁸ See statement of reasons for the governmental bill of the Act amending the Code of Civil Procedure and some other statutes in connection with the promotion of amicable dispute resolution methods, *Druk Sejmowy Sejmu VII kadencji no. 3432*, p. 26.

²⁹ Ł. Pisarczyk [in:] *System prawa pracy. Tom VI Procesowe prawo pracy*, ed. by K. W. Baran, Warszawa 2016, p. 1023.

ment (art. 264 § 1 of the LC). Slightly longer period has been envisaged for a claim for reinstatement in work or for payment of compensation which must be submitted to a labour court within 14 days of the day of service of the notification of termination of the contract of employment without notice or of the day of the expiry of the contract of employment (art. 264 § 2 of the LC). Failure to keep these time limits, being the terms of substantive law, leads to a dismissal of the claim³⁰. Thus, it would be unreasonable to assume that in such a short period of time an employee will take action to conduct mediation with the employer or other out of court settlement of the dispute.

At the same time it should be assumed that in case of resorting to the conciliation commissions appointed pursuant to art. 244 § 3 of the LC, whose aim is to encourage the parties to reach a settlement and facilitate amicable resolution of the dispute³¹, such action should be regarded as an attempt to settle the dispute out of court for the purpose of art. 187 § 1 point 3 of the CCP. However, if the proceeding before the conciliation commissions does not lead to a settlement, and at the request of the employee's case is referred by the conciliation commission to the court on the basis of art. 254 of the LC³², the information required under art. 187 § 1 point 3 of the CCP will not be expressly included in the application, which was addressed to the conciliation commission and in such a situation replaces the lawsuit³³. While transferring the case to court upon the motion by the employee, conciliation commission also provides the court with the case files and other relevant documents³⁴. These documents will unequivocally indicate the petitioners' attempt to settle the case out of court. Therefore such transfer of employee's request along with relevant documents should be deemed to substitute requirements set forth in art. 187 § 1 point 3 of the CCP³⁵. It would be unconscionable to demand information confirming facts that are self-evident to the court at the very commencement of the courts proceedings.

These observations strongly suggest that in the labour-related proceedings new obligation to include information regarding out of court conciliation efforts in the statement of claim imposed on the claimant under the ADR-promotion Act shall bear rather limited practical consequences.

³⁰ Resolution of the Supreme Court dated March 14, 1986, case no. III PZP 8/86, OSNC 1986, no. 12, item 194.

³¹ R. Flejszar, *Ugodowe rozwiązywanie sporów z zakresu prawa pracy*, Studia z zakresu prawa pracy i polityki społecznej 2010, p. 317; K. W. Baran [in:] *System prawa pracy. Tom VI Procesowe prawo pracy*, ed. by K.W. Baran, Warszawa 2016, p. 90.

³² This is a special way to initiate proceedings before the labour court; M. Manowska, *System ...*, p. 527.

³³ Using this way is voluntary for the employee. The employee may also bring an action before the labor court on general conditions. It should be noted that the provisions of the Labour Code does not introduce any formal requirements in respect of the application instituting proceedings before a conciliation commission, and can even be made orally to the protocol (art. 248 § 1 of the LC), similarly as a lawsuit brought to court if the employee is not represented by an advocate or legal counselor (art. 466 of the LC).

³⁴ M. Manowska, *System ...*, p. 527.

³⁵ See also: A. Szlęzak, R. Pałubicki, *Pozasądowe sposoby rozwiązywania sporów pracowniczych. Uwagi ogólne* [in:] *Pozasądowe sposoby rozwiązywania sporów pracowniczych*, ed. by A. Góra-Błaszczkowska, K. Antolak-Szymański, Warszawa 2015, pp. 21–33.

Referring the parties to mediation

According to the new wording of art. 183⁸ § 1 of the CCP the parties may be referred by the court to mediation at any stage of the proceedings – *lege non distinguente* – unlimited number of times³⁶. Withdrawal from the previous limitations³⁷ in this regard deserves approval. At the same time, however, one should pose a question whether in labour-related proceedings referral of the parties to mediation may occur at any stage of proceedings without any additional conditions or reservations.

Generally it would seem admissible to refer parties to mediation after a preliminary review of the case, since the court at the time of that review is expected to take steps to settle the case at the first session. In this case, however, as a rule, the court determines the duration of the mediation for a period of up to three months (art. 183¹⁰ § 1 of the CCP). Meanwhile pursuant to art. 471 of the CCP when proceedings was instituted by the employee³⁸ a hearing session should be scheduled within two weeks of completion of the investigation procedure or, where no such procedure is conducted, from the date of filing a lawsuit, unless some irremovable obstacles occur. Hence, referral of the parties to mediation usually precludes meeting the time-limit specified in art. 471 of the CCP. It would be questionable to consider the court's decision to refer the parties to mediation as the “*irremovable obstacle*” within the meaning of art. 471 of the CCP³⁹. Therefore, regardless of the highlighted in the academia⁴⁰ and jurisprudence⁴¹ purely instructional

³⁶ See: M. Sychowicz [in:] *Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1–366*, ed. by A. Marciniak, K. Piasecki, Warszawa 2016, Legalis, commentary to art. 183⁸, side no. 4. As rightly pointed out by M. Sychowicz the failure of one mediation attempt does not mean that, given the changes in the circumstances and in particular the development of the parties position, a new effort to amicable settlement cannot be completed successfully. It seems, after all, that due to the principle of effectiveness and efficacy of proceedings re-referral of the parties to mediation in must be treated with extreme caution, having due regard to its purpose and in particular, the likelihood of a positive effect of mediation. Unjustified referral of the parties will lead to excessive prolongation of proceedings, which in turn could violate fundamental right to access to justice and fair trial which implies the right to a hearing and the final resolution of a dispute without undue delay (see art. 45 sect. 1 of the Constitution of the Republic of Poland of 2 April 1997, The Journal of Laws of 1997, no. 78, item 483, art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, The Journal of Laws of 1993, no. 61, item 284 and art. 47 of the Charter of Fundamental Rights of the European Union, Official Journal of the EU C of 2010, no. 83, item 401 as well as the Polish Act of 17 June 2004 on a complaint regarding breach of the right to hear the case in preparatory proceedings conducted or supervised by the prosecutor and the judicial proceedings without undue delay, The Journal of Laws of 2004, no. 179, item 1843).

³⁷ Explicit prohibition of re-referring the parties to mediation in the same proceedings has resulted directly from the previous wording of art. 183⁸ § 2 of the CCP.

³⁸ Pursuant to art. 477⁷ of the CCP this regulation shall not apply if the action was instigated by the employee.

³⁹ According to J. Witkowski the following typical events may amount to “irremovable obstacles”: force majeure, a serious illness or a long trip outside the permanent place of residence; J. Witkowski [in:] *Kodeks postępowania cywilnego. Postępowanie odrębne w sprawach z zakresu prawa pracy i ubezpieczeń społecznych*, ed. by K. Antonów, A. Jabłoński, Warszawa 2014, p. 216.

⁴⁰ See *inter alia*: decision of Supreme Court dated January 7, 2013, case no. III SPP 102/12, Legalis no. 710471.

⁴¹ See *inter alia*: K. Gonera [in:] *Kodeks postępowania cywilnego. Komentarz. T. 2*, wyd. 6., ed. by K. Piasecki, Warszawa 2014, p. 297; M. Muliński [in:] *Kodeks postępowania cywilnego. Komentarz do artykułów 1–729 Tom I*, ed. by A. Góra-Błaszczkowska, Warszawa 2013, p. 1106.

nature of the time-limit set forth in art. 471 of the CCP⁴², the lack of consideration of these overlapping regulations at the drafting stage of the ADR-promotion Act supporting ADR results in a conflict of norms stemming from art. 471 of the CCP, and the authority to refer the parties to mediation at any stage of the proceedings vested in courts under art. 183 § 1 of the CCP. At the same time the collision in question cannot be easily removed either by determining the relation between the two provisions in terms of *lex specialis* – *lex generalis* principle or through the use of some classical methods of interpretation. The use of traditional methods of interpretation, especially linguistic, teleological and the systemic methods does not lead to clear results. Therefore it points to a conclusion that the issue in question requires *de lege ferenda* adopting some clear rules resolving aforementioned dilemma. *Legis latae* it seems, after all, that more arguments reason for admitting referring the parties to mediation before commencement of the trial after the completion of the investigation procedure or even directly at the session designated to carry out investigation procedure. In the course of investigation procedure the court may find circumstances indicating that the likelihood of reaching voluntary agreement by the parties would be boosted considerably by involvement of an independent and impartial professional mediator skilled in the facilitating amicable settlement of the dispute as opposed to the court of law vested primarily in adjudicating cases. For the same reasons, sometimes it may prove appropriate to refer the parties to mediation, also at a later stage of labour-related proceedings before the court of first instance, or even on appeal. This solution takes into account the fact that the opportunity for an amicable settlement of the dispute may appear as much as a result of new facts in the course of the proceedings, as an outcome of a change in the parties perception and approach to the case and each other, their original positions, or even subjective forecasts on the further chances of success in an ongoing process, creating a new space for mutually acceptable amicable resolution. One should note however that due to inadmissibility of the settlement in the cassation proceedings as well as the proceedings lodged by the application for a declaration of illegality of a final judgment, mediation is not admissible in these proceedings⁴³.

It is also submitted that, *legis latae*, court is not allowed to refer the parties to mediation in lieu of the investigation procedure after the preliminary review of the case. Conversely, investigation procedure shall be carried out mandatorily if justified by the results of the preliminary review of the case⁴⁴ and semi-mandatorily when the case was

⁴² See however the art. 183¹⁰ § 1 sentence 3 of the CCP which states that the duration of the mediation shall not be included in the total duration of court proceedings

⁴³ See also: M. Sychowicz [in:] *Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1–366*, ed. by A. Marciniak, K. Piasecki, Warszawa 2016, Legalis, commentary to art. 183⁸, side no. 3.

⁴⁴ In the event that the carrying out of investigation procedure is supported by the results of a preliminary review of the case, in our opinion, investigation procedure should be conducted regardless of the potential occurrence of the negative premises set forth in art. 468 § 1 *in fine* of the CCP, *i.e.* the fact that the investigation procedure will not accelerate the proceedings or are obviously impracticable for other reasons. The analysis of art. 468 § 1 of the CCP to the extent that this provision refers to the results of the preliminary review of the case should be made in conjunction with the wording of art. 467 § 3 of the CCP. As it stems from this provision upon preliminary review of the matter presiding judge calls for the removal of formal deficiencies of a pleading only if these deficiencies cannot be removed in the course of investigation procedure. Consequently, if after a preliminary review of the case it turns out that the statement of claim contains deficiencies which may

not subject to conciliation before a conciliation commission⁴⁵. This stems from the fact that investigative procedure may only be omitted when its conduct does not speed up proceedings or is impractical for other reasons.

The information meeting

The ADR-promotion Act introduced a new institution of an information meeting⁴⁶ concerning amicable dispute resolution methods, in particular mediation (art. 183⁸ § 4 of the CCP). The purpose of adopting this solution was to establish additional tool to encourage choice of mediation or another means of out of court amicable settlement by informing outside the trial on the availability and benefits of voluntary dispute resolution methods and consequently persuading the parties to resort to one of these out of court mechanisms⁴⁷. Notably there is no obstacle to invite the parties to participate in the meeting at any stage of the proceedings⁴⁸. At the same time, however, it should be noted that such information meeting cannot be held at the court session scheduled for the investigative procedure for the following reasons.

Art. 468 § 2 of the CCP which stipulates the objectives of investigative procedure includes exhaustive list of those objectives – it does not use phrase “*in particular*” or any equivalent when listing aforesaid goals. In academia it is sometimes argued though that investigation procedure may be conducted to achieve purposes other than those men-

be removed in the course of investigation procedure, the court may not order the claimant to supplement the deficiencies in accordance with art. 130 of the CCP. This stance is clearly supported by the use of words “only” and “cannot be corrected in the course of the investigation procedure”. Therefore, in such circumstances, it should be irrelevant that these activities will not accelerate the proceedings, or prove impractical for other reasons. This view is supported, *inter alia*, by J. Gudowski [in:] *Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze*, ed. by T. Ereciński, Warszawa 2009, p. 553. Conversely A. Jabłoński, *op. cit.*, p. 184, M. Manowska, *Postępowania odrębne ...*, p. 92. The authors supporting the opposite view tend to submit that the phrase “cannot be corrected in the course of the investigation procedure” also includes the instances when “investigation procedure would not expedite the proceedings or is otherwise evidently pointless”.

⁴⁵ Conduct of investigation procedure In this regard has a semi-mandatory character which stems from the very wording of art. 468 § 1 of the CCP which states that the court shall perform an investigation procedure subject to occurrence of certain circumstances. Similarly M. Wujczyk, who indicates that the court cannot refrain from conducting investigation procedure, unless some specified circumstances occur; see M. Wujczyk [in:] *Procesowe prawo pracy*, ed. by K.W. Baran, Warszawa 2013, p. 195, M. Mędrala, *Funkcja ochronna cywilnego postępowania sądowego w sprawach z zakresu prawa pracy*, Warszawa 2011, p. 224. These authors deem however the whole institution of investigation procedure as semi-mandatory. Conversely, treating investigation procedure as purely optional: M. Muliński [in:] *Kodeks postępowania cywilnego. Komentarz do artykułów 1–729 Tom I*, ed. by A. Góra-Błaszczkowska, Warszawa 2013, p. 1091; K. Gonera [in:] *Kodeks postępowania cywilnego. Komentarz. T. 2*, wyd. 6., ed. by K. Piasecki, Warszawa 2014, p. 290.

⁴⁶ See art. 5 sect 1 of the Directive of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters (Official Journal of the EU L. 2008 no. 136, item 3).

⁴⁷ See Statement of reasons for the governmental bill of the Act amending the Code of Civil Procedure and some other statutes in connection with the promotion of amicable dispute resolution methods, Druk Sejmowy Sejmu VII kadencji no. 3432, pp. 2, 26.

⁴⁸ *Ibidem*.

tioned in art. 468 of the CCP⁴⁹, provided that carrying out investigation procedure for reasons other than expressly stipulated in the provision in question cannot be of such a nature which can be achieved only through a hearing in the course of the trial (e.g. taking of evidence)⁵⁰. That view, however, is difficult to accept because of the wording of this provision indicating in an unambiguous manner an intent for exhaustive enumeration. One can reasonably argue that instructing the parties on the amicable dispute resolution methods falls within the scope of inducing the parties to reconciliation and settlement, which belongs to the statutory-fixed purposes of such investigation procedure. Nevertheless this argument does not eliminate material differences between the investigation procedure and information meeting which *legis latae* seem to preclude carrying out both activities jointly.

First of all, the investigation procedure takes place at the public session of the court (art. 148 § 1 of the CCP), which shall be reported in the form of a minutes (art. 157 § 1 of the CCP). Conversely, information meeting is neither a trial nor any other session of the court⁵¹ and as such is documented only by the official note (§ 139 of the Minister of Justice Regulation of December 23, 2015 on the Terms of office of common courts⁵²). Secondly, the court sessions (including investigation procedure in the labour-related proceedings) are conducted by the court (exceptionally by the court's referendary executing the powers of the court vested in them pursuant to art. 47¹ of the CCP and other specific provisions). Meanwhile, according to art. 183⁸ § 4 sentence II of the CCP, the conduct of an information meeting may also be entrusted to the officer of the court, assistant of a judge or permanent mediator. In addition, in accordance with § 136 of the Terms of office the appointment of an information meeting shall not affect the trial or other court sessions, which emphasizes that this meeting must be strictly distinguished from court's sessions including those designated for investigation procedure. In summary, therefore, information meeting does not fall within the scope of information procedure. It must therefore be assumed that it may be held at any stage of the proceedings, both before or after the investigation procedure, safe that in any event it should not be held prior to the preliminary review of the matter, which should take place, *verba legis*, "immediately after initiating proceedings".

⁴⁹ J. Gudowski [in:] *Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze*, ed. by T. Ereciński, Warszawa 2009, p. 553; K. Gonera [in:] *Kodeks postępowania cywilnego. Komentarz. T. 2*, wyd. 6., ed. by K. Piasecki, Warszawa 2014, p. 290; K. Falga-Gieruszyńska [in:] *System prawa pracy. Tom VI Procesowe prawo pracy*, ed. by K.W. Baran, Warszawa 2016, p. 598. Conversely M. Wujczyk, *op. cit.*, p. 196; A. Jabłoński, *op. cit.*, p. 186.

⁵⁰ K. Gonera, *op. cit.*, p. 290.

⁵¹ M. Sychowicz [in:] *Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1–366*, ed. by A. Marciniak, K. Piasecki, Warszawa 2016, Legalis, commentary to art. 183⁸, side no. 13.

⁵² Official Journal of 2015, item. 2316, hereinafter referred to as „*Terms of office*“.

Mandatory appearance of the parties in closed session

In the field of referring the parties to mediation discussed amendment introduced yet another important novelty. As already indicated, before the first session scheduled for a trial, prior to commencement of the examination of the merits of the case, presiding judge shall thoroughly contemplate expedience of referring parties to mediation (art. 183⁸ § 5 sentence I of the CCP). For this purpose, if necessary to hear the parties, presiding judge may summon them to appear in person in closed session (art. 183⁸ § 5 sentence II of the CCP). According to the statement of reasons to the bill of the ADR-promotion Act, adopted solution was envisaged to highlight the judge's obligation to comprehensively evaluate whether the case is suitable for mediation, in particular if the mediation can truly facilitate the parties resolving the dispute amicably⁵³. Such an analysis should be performed primarily at the initial stage of the proceedings before examining the merits of the case. At the closed session the court will be able to make a more thorough assessment of whether the dispute, in the light of relevant circumstances of the case, promises a reasonable chance for an amicable resolution.

Conducting such a session in labour-related proceedings in which investigation procedure was held and both or at least one of the parties appeared shall be deemed as impractical or even pointless due to the fact that in the course of the investigation procedure presiding judge was obliged to seek clarification the positions of the parties and urge them to reach a settlement. As already indicated, the personal appearance of the parties at the court session scheduled pursuant to art. 183⁸ § 5 sentence II of the CCP aims at gathering facts necessary for a judge to evaluate expediency of referring the parties to mediation – same facts which should already be gathered by the court during investigation procedure⁵⁴. As a result investigation procedure can – and in case of its conduct even should – accomplish the purpose and therefore replace discussed closed session. Appointment of additional closed session pursuant to art. 183⁸ § 5 sentence. II of the CCP before or after holding investigation procedure appears to be unacceptable from the point of view of the rule stemming from art. 471 of the CCP, which expresses specific realization of general principle of efficacy and expediency of the proceedings as provided for in art. 6 of the CCP.

From the point of view of the possibility to accomplish the objectives of the closed session referred to in art. 183⁸ § 5 sentence II of the CCP directly within the framework of the investigation procedure one should take into account that costs sanctions

⁵³ See Statement of reasons for the governmental bill of the Act amending the Code of Civil Procedure and some other statutes in connection with the promotion of amicable dispute resolution methods, Druk Sejmowy Sejmu VII kadencji no. 3432, p. 22.

⁵⁴ The authors of the ADR-promotion Act submitted that the practical effectiveness of the courts referrals to mediation performed in closed session without the participation of the parties tends to be much lower comparing to referrals made after personal contact between the judge and parties; see Statement of reasons for the governmental bill of the Act amending the Code of Civil Procedure and some other statutes in connection with the promotion of amicable dispute resolution methods, Druk Sejmowy Sejmu VII kadencji no. 3432, p. 22.

provided for under 183⁸ § 6 of the CCP⁵⁵ in the event of unjustified non-appearance of a party to the session can not apply to investigation procedure. This however does not pose any significant issue due to the fact that in the labour-related proceedings any party failing to appear at the session with mandatory appearance indicated by the court without a due cause may be charged with a fine or refused reimbursement of the costs of the proceedings which amount to a more stringent sanction than one warranted under the art. 183⁸ § 5 sentence II of the CCP.

Conclusions

To summarize the analysis conducted in this paper one is compelled to reiterate that in principle, i.e. in terms of the general direction changes introduced by the ADR-promotion Act to the civil procedure in labour-related matters are consistent with the spirit and function of these separate proceedings, strengthening and exposing the principle of amicable settlement of disputes and emphasizing the usefulness of mediation also in labour-related proceedings. Nevertheless it also requires to be stated that in terms of the degree of harmonization of specific solutions adopted in this Act to the current structure and needs of the labour-related proceedings, new regulations are nowhere near to perfection. *De lege ferenda* more study and thorough considerations, hopefully leading to clear and precise regulation shall be given in particular to properly establish the relationship between the newly adopted institutions of information meeting and the closed sessions envisaged to evaluate the advisability of the parties referral to mediation *versus* the investigation procedure specific to labour-related proceedings. Lack of clear regulation in this regard in the light of partial overlap of objectives and functions of these activities, significantly raises the risk of major discrepancies in the application of these provisions by individual courts, as well as potential conflicts of their possible cumulative use with the principle of efficiency and expediency of proceedings. These considerations firmly justify the call for urgent albeit well-advised legislative intervention in this field.

Summary

The aim of this article is to analyze the impact of some of the major changes introduced to Code of Civil Procedure by the Act of September 10, 2015 amending some statutes in connection with the promotion of amicable dispute resolution methods on the labour-related proceedings, from the stand-point of the degree of harmonization of both regulations, in particular the assessment of the correctness of incorporating the new provisions in existing legal framework governing employment disputes. Discussed regulation is aimed at popularizing mediation and other methods of extrajudicial settlement of disputes in civil matters. It should be noted that the labour-related cases are assumed to have high potential for amicable resolution so one may also assume that the solutions introduced by the ADR promotion Act will have a strong bearing on the labour-related proceedings.

Keywords: amicable dispute resolution methods, labour-related proceedings, mediation

⁵⁵ Pursuant to this provision party failing to appear despite being summoned for compulsory appearance may be ordered to reimburse the costs of the opposite party mandatory appearance.