10-1-1989

Costa Rican Labor Arbitration

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I. INTRODUCTION

Title VI of the Code of Civil Procedure of Costa Rica (the "C.P.C."), enacted by Law No. 50 on January 25, 1983 governs arbitration in Costa Rica. It contains chapters on general provisions, *de jure* arbitration, and the *amiable composition.* Article 395 of the C.P.C. provides that "[a]ll disputes among individuals or legal entities may be submitted to arbitration, be it *de jure* arbitration or *amiable composition,* even if there is a pending judicial dispute. . . . All other disputes between individuals regarding technical matters may also be submitted to arbitration."

The C.P.C. regulates, in detail, *de jure* arbitration (Articles 405 through 417), as well as the *amiable composition* (Articles 418 through 424). The C.P.C. provides that the parties or the courts may appoint arbitrators; *de jure* arbitrators appointed by the parties must meet the legal requirements to be judges or mayors, depending on the amount in dispute; and if the parties fail to appoint an arbitrator, the competent court shall appoint a person with no connection to the parties (Article 396). Article 398 requires that an arbitral submission be executed either in a notarial public deed or in a private writing signed by the parties. Further, Article 399 states:

> The arbitral submission shall not be subject to the payment of taxes; the submission must be authorized by the signature of a lawyer; it shall list all the issues on which the parties agree, as well as those on which they disagree, stating the reason for the disagreement. The submission shall also indicate the relief sought by the parties and the terms of the reference submitted to arbitration.

The Labor Code of Costa Rica (the "L.C.") specifically outlines five different mechanisms for the settlement of collective labor disputes. These mechanisms are: direct negotiations, conciliation, arbitration, special proceedings for settling disputes involving

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public services, and compulsory arbitration for collective disputes of an economic nature involving public services.

II. Arbitration as a Method of Labor Dispute Resolution

Arbitration has been used in Costa Rica only as a means for settling collective labor disputes of an economic nature, especially in the public sector. Two cases of administrative arbitration have been reported in Costa Rica involving the settlement of collective labor disputes. In both cases, after the intervention of the court, the parties agreed to arbitration.

One of the cases involved a dispute between the National Bank of Costa Rica and its employees. The labor union representing the employees, *Sindicato de Empleados del Banco Nacional de Costa Rica* (SEBANA), the bank, and officers from the executive branch of the government signed an arbitral submission granting jurisdiction to the Supreme Court to serve as an arbitral tribunal.[1] The Supreme Court rendered the award on June 14, 1984, which ordered compliance with the agreement between the parties, as it appeared in clause fifty-nine of the second amendment to the fifth collective bargaining agreement signed between the Costa Rican National Bank and SEBANA. The executive branch, through the Office of Management and Budget, shall insure that the wages to which the bank employees are entitled correspond to what has been agreed upon in the aforementioned agreement.

The second case involved a labor dispute between the government and the teachers' labor union, the *Asociación Nacional de Educadores* (ANDE), which was settled through the mediation efforts of the Archbishop of San José.

III. Arbitration as a Private Method of Dispute Resolution

If administered independently of the judiciary and the labor department, arbitration may provide an efficient and quick mechanism for the settlement of labor disputes. More significantly, private arbitration can provide a neutral forum not subject to the political influences exerted at times upon the Ministry of Labor. The intervention of the Ministry of Labor is not desirable in the inter-

1. Law No. 6933 of November 22, 1983 formalized this arbitral submission. 105:228 *La Gaceta* 4 (Dec. 1, 1983) (Costa Rica).

pretation of the collective bargaining agreement. A sounder policy is to establish arbitrators specializing in each specific area involved in a dispute.

Labor disputes should be resolved outside the establishments or enterprises where the conflicts arise, under the guidance of an impartial institution to which the parties should confer jurisdiction for deciding the dispute. This institution must be different from what is known in Costa Rica as "labor relations boards," which are only concerned with disciplinary proceedings. The main purpose of arbitral tribunals is the resolution of labor disputes dealing with the interpretation and application of collective bargaining agreements. The arbitration panel should be formed with representatives of both workers and employers or, alternatively, by persons who are completely independent from the parties and possess skills related to the specific issue in dispute.

Arbitration may be voluntary or compulsory. Voluntary arbitration operates in the private sector and compulsory arbitration in the public sector. It is this author's contention that compulsory arbitration should be extended to the interpretation and application of collective bargaining agreements.

In Latin America, including Costa Rica, the role of state enterprises in the economy is increasing in importance. A number of studies have been made on the suitability of various dispute resolution mechanisms in the public sector. Regional organizations such as the Economic Commission for Latin America (CEPAL), the Institute for Latin American Integration (INTAL), and the Latin American Center of Administration and Development (CLAD) have published studies on the structure, function, type and role of public enterprises in national development. The International Labor Organization has recommended the adoption of compulsory arbitration as a last resort for settling labor disputes. Compulsory arbitration implies a limitation on the right to strike, and is, therefore, at times difficult to reconcile with labor freedoms. However, the law limits the right to strike in the public sector. Arbitration may serve as the most effective mechanism for establishing reasonable limits on the right to strike.

The importance of arbitration as a method of dispute resolution cannot be overemphasized because under Costa Rican law conciliation has been reduced to a useless formality. Once conciliation proceedings are exhausted without success, the next step is arbitration. Most legal commentators agree that all the evidence

submitted and produced during the conciliation proceedings should also be used during the arbitration. However, this suggestion is of little use if the parties choose, as they often do, to forego the conciliation stage and submit the dispute to arbitration.

IV. Voluntary Arbitration

Many labor unions and employers think that measures such as the strike and lockout are the most effective means to exert pressure on and obtain concessions from the other party. However, the interruption of production seriously affects the community at large. Regardless of which party finally prevails, the harm caused is considerable. After a strike, a sentiment often remains that it would have been better to reach a settlement, even if not a fully satisfactory one, than to strike.

In order to avoid the interruption of work, unions and employers may agree that disputes that have not been resolved through direct negotiations or conciliation be referred to arbitration. Arbitration differs from conciliation and mediation in several ways. In conciliation and mediation proceedings, the parties seek an arrangement outside the adversary process. In contrast, in arbitration, the parties offer arguments to persuade the arbitrator, furnish all evidence pertinent to the issues, and agree to abide by the decision of the arbitrator.

Most labor codes regulate voluntary arbitration but for differing reasons, it has been rarely practiced in Latin America. In the first place, the workers are generally reluctant to even suggest the inclusion of an arbitral clause into a collective bargaining agreement because they feel that agreeing to arbitration amounts to a waiver of the right to strike. In the second place, during the course of the labor dispute, the parties are reluctant to suggest arbitration for it may be taken as a sign of weakness. In this author's opinion, voluntary arbitration does not necessarily imply a waiver of the right to strike, nor should a proposal to arbitrate be considered a sign of weakness by the party who offers it as an alternative means of dispute resolution. On the contrary, it is this author's contention that once the advantages of arbitration become widely known and as employers and labor union leaders become familiar with the mechanics of arbitration, prejudice against arbitration will gradually disappear. Employers and labor unions should realize that they assume equal risks by referring a dispute to arbitration be-

cause they are given equal opportunities to present their cases.

Latin American countries have favored the establishment of permanent panels of arbitrators, such as conciliation and arbitration boards. There are, however, important exceptions. Argentina, for example, relies heavily on the conciliatory and arbitral functions of the Ministry of Labor. Chile has chosen a system of arbitration with a sole arbitrator. Peru relies on its executive branch for the settlement of collective labor disputes.

There are different ways of forming an arbitral tribunal. The distinction between systems with sole arbitrators and those with panels of arbitrators has never been significant in Latin America because at the time the labor codes were enacted, the idea of arbitration for resolving labor disputes of a legal nature was not in vogue. The labor codes were drafted based on the assumption that courts should settle labor disputes of a legal nature. It is clear from the codes that arbitration was contemplated as a method for resolving only labor conflicts of an economic nature. This is the case in Costa Rica, as shown in Article 525 of the L.C. Normally, the use of a sole arbitrator is more practical and expeditious in cases where the collective labor dispute is a legal one, while a panel of arbitrators is preferable for settling economic labor disputes. In Costa Rica, however, the twelve arbitration cases that have been reported were decided by arbitral tribunals composed of many members. In most Latin American countries, conciliation and arbitration boards have been established as *ad hoc* tribunals. This has also been the case in Costa Rica, where the arbitral tribunals have been established for each particular case.

The appointment of arbitrators may be made by the administrative or judicial authorities, by the parties themselves or pursuant to a list of candidates previously compiled for that purpose. To qualify as an arbitrator, one must meet requirements for nationality, age, good behavior, and full enjoyment of their civil rights. Almost all countries require that the arbitrators be literate. In some countries, specific rules determine when the appointee should decline to serve as an arbitrator and on what grounds the appointee may be challenged to serve as an arbitrator.

In most countries, there is a set of rules to be followed in the conduct of the arbitral proceedings. In some legal systems, however, very few procedural aspects are regulated and the arbitral tribunal is empowered to establish its own procedure. The most appropriate system for Costa Rica is one that regulates in detail the

procedural steps to be followed in arbitration. This system would be ideal for private arbitration, without intervention of judicial or administrative authorities. As to judicial arbitration, the rules of procedure are specifically embodied in the L.C.

Furthermore, in some countries, the arbitral award must distinguish between issues of a socio-economic nature and others that deal with the legal aspects of the dispute. In other legal systems, it is clearly established that the arbitral tribunal must render the award in accordance with the arbitrators' discretion without being subject to any rules regarding the evaluation of the evidence. As stated above, the arbitration system in Costa Rica is judicial in nature, with detailed rules set forth in the L.C.

In the L.C. the arbitral award may be challenged by a request for revision (*recurso de revisión*) (Article 933), a request for clarification (*recurso de clarificacíon*) (Article 491) and the so-called request for consultation (*recurso de consulta*) (Article 526). These requests must be brought before the Superior Labor Tribunal (*Tribunal Superior de Trabajo*). A writ of error on constitutional grounds (*recurso de inconstitucionalidad*) is available only in *de jure* arbitration, inasmuch as the application of a statute alleged to be unconstitutional may be crucial to the outcome of the dispute. The writ of error cannot be brought against an award rendered by the *amiables compositeurs* because such award is not subject to the rules of law.

Arbitration is effective only if the award is final and binding on the parties. It is reasonable to assume that if the parties have willingly accepted an arbitral clause in a collective bargaining agreement, the parties will not object to the arbitrators' decision. In any case, the possibility of alleging an abuse of authority or manifest incompetence of the arbitrators is always available to the parties.

V. Costs of Arbitration

The costs of arbitration, including payment of the arbitrators' fees, should be borne equally by the parties or each party should bear the costs of the arbitrator that each party respectively appointed. If the arbitrators are officers of the court or the administration, the payment of their fees should be borne by the State.