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LABOR ARBITRATION IN COSTA RICA

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I. INTRODUCTION

Experience has shown that the best settlement is one reached by the parties themselves. No adjudication system can provide a better solution than a settlement obtained by the parties by mutual agreement and through direct negotiations.

Arbitration is one mechanism for the settlement of labor disputes in Costa Rica. Article 43 of the Constitution of Costa Rica, in the Chapter on "Rights and Individual Guarantees," acknowledges the right to submit disputes to arbitration. Article 43 states that "[e]very person has the right to settle disputes of an economic nature by arbitration, even if the dispute is pending before the courts."

Arbitration has the advantage of providing a quick and informal proceeding. Arbitral proceedings, however, must be conducted with regard for the principle of due process. The parties must not only determine the issues in dispute submitted to arbitration; they are also required to furnish the arbitrators with all the information necessary to decide the dispute. The principle of good faith is overriding under the terms of Article 19 of the Labor Code of Costa Rica (the "L.C."), which states that "[t]he contract of labor binds the parties according to its terms as well as to what is implied from good faith, equity, usages, customs, and the law."

Costa Rican law provides for judicial arbitration as a means for settling labor disputes. However, in the area of labor, arbitration may only be used to settle disputes of an economic-social nature (*conflictos colectivos de carácter económico-social*). Thus, Costa Rican law does not provide for voluntary arbitration, administrative arbitration, or arbitration of individual or collective disputes of a legal nature (*arbitraje individual o colectivo de carácter jurídico*).

The broad acceptance of arbitration is set forth in Article 445

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of the L.C. which provides:

To the extent that the letter and general principles of this Title are not violated, the rules of the Code of Civil Procedure shall apply to fill gaps. In case there is a gap in the rules of procedure in this Title, labor courts shall apply the rules of the Code of Civil Procedure by analogy, or work out those rules which are most suitable to facts of the case in order to facilitate a prompt decision which can fairly decide the dispute.

Accordingly, labor courts are vested with the authority to devise new rules of arbitration, either by applying by analogy the rules set forth in Articles 395 through 424 of the Code of Civil Procedure (the "C.C.P.") or by adapting those rules to the informality and flexibility needed in the area of labor law.

II. VOLUNTARY ARBITRATION

Due to lack of information, contracting parties rarely include arbitral clauses in collective bargaining agreements. The most commonly used methods for resolving disputes in Costa Rica are conciliation and mediation. These proceedings take place before the boards of labor relations (*juntas de relaciones laborales*). The boards are composed of representatives from labor and management and, occasionally, include a representative from the Ministry of Labor who has no decision-making power. Arbitration in administrative matters is used even less frequently as a means of dispute resolution. At times, administrative arbitration has been conducted by the Ministry of Labor, represented by an officer who serves as a sole arbitrator. This arbitration proceeding is generally used when a worker has been fired and a labor union alleges that the worker has been persecuted because of membership in the union. Administrative arbitration may also be used during strike periods when the parties decide to terminate the strike on the condition that fired workers be reinstated.

Judicial arbitration has been used, except in rare instances, only for the settlement of labor conflicts of an economic-social nature, such as the dispute between the National Bank of Costa Rica and the bank employees' union (*Sindicato de Empleados del Banco Nacional de Costa Rica*).

Costa Rica lacks an arbitral institution capable of furnishing professional arbitrators and conducting the arbitral proceedings. The Supreme Court of Costa Rica compiles a list of official arbitra-

tors, but such list is compiled for civil and commercial arbitration proceedings. The Supreme Court of Costa Rica compiles a list of arbitrators who represent the interest of management and labor for each labor court. However, this list is used exclusively in labor disputes of an economic-social nature.

The absence of an arbitral institution, such as the American Arbitration Association, is felt in Costa Rica. This institution was created in the United States in 1926 and has fostered the use of arbitration for the settlement of labor disputes. Perhaps voluntary arbitration would prosper in Costa Rica given a similar arbitral institution. Unfortunately, the Costa Rican Office of the Ministry of Labor has not yet gained the prestige that would encourage its intervention in labor-management disputes, as is the case of the Federal Mediation and Conciliation Service in the United States.

Voluntary arbitration allows for a simple and flexible proceeding. The parties make their own rules, appoint the arbitrators, pay the arbitrators' fees, define the issues in dispute, and agree to honor the award.

Voluntary arbitration in matters of collective conflicts of an economic-social nature is regulated in Section II, Chapter III, within the Title of the L.C. devoted to "Procedural Labor Law." Articles 512, 517, and 518 of the L.C. provide for conciliation, mediation, and arbitration as different methods for resolving labor disputes. The parties may resort to the courts only after exhausting those mechanisms.

Under Costa Rican law, arbitration is considered a means of settling complaints of a coalition of workers who are not organized as labor unions but share the same disputes with management. This type of arbitration is generally regarded as a substitute for the strike, which is a constitutionally recognized instrument of pressure. Article 61 of the Costa Rican Constitution states that "[t]he Constitution recognizes the right of management to lockout and the right of workers to strike, except in cases where public services are involved pursuant to the regulation made by the law, which shall not authorize any act of coercion or violence."

III. COMPULSORY ARBITRATION

Compulsory arbitration is frequently used in Costa Rica for resolving disputes in which the national economy and the welfare of the citizens are at stake. Article 56(d) of the L.C. refers the par-

ties to arbitration under the following circumstances: "Thirty days after the labor union files a petition with the employer for the execution of a collective bargaining agreement, if the parties fail to agree on its clauses, any of them may request that the points in disagreement be settled by the labor courts." Still, although arbitration is rarely used for settling matters regarding the content of a collective bargaining agreement, it is frequently used to construe the clauses of such agreements.

Article 61 of the Costa Rican Constitution prohibits strikes by employees who perform public services. The notion of "public services" is broadly defined in Article 369 of the L.C. to include services furnished by workers employed by the State or its instrumentalities, harvesters of agricultural products, and workers employed in public transportation, including railways, maritime, and air transportation companies. Also included within the category of "public services" are those services which may not be suspended without seriously affecting the public economy, such as those rendered in clinics, hospitals, and other institutions providing sanitation and electricity.

If conciliation and mediation procedures fail, public service workers must resort to arbitration as the only means of settling economic-social disputes with the government. It is not surprising to find that these kinds of arbitration proceedings have proliferated in Costa Rica, because the notion of public service, as outlined above, is very broad.

The economic crisis affecting all Latin American countries since the early 1970s, first as a result of the rise of oil prices and later as a consequence of the monetary and financial crisis resulting from the foreign debt, has limited the capacity of the State, the main employer in the country, to grant economic and social benefits to its employees. Therefore, civil servants must resort to arbitration as the only means to obtain an improvement in their working conditions.

Article 368 of the L.C., in accordance with Article 61 of the Constitution, provides that "[a] strike in the public sector shall not be permitted. All disputes between labor and management, as well as all those disputes in which the right to strike is prohibited, shall be submitted to arbitration, which shall be conducted by the labor courts."

Many legal scholars are in favor of compulsory arbitration.

The well-known legal scholar Guillermo Cabanellas states that "[a]rbitration is, actually, the last recourse that the public entities have in order to settle a collective labor dispute and therefore avoid the parties' direct action." Likewise, Professor R. Nápoli states that "[i]f conciliation is not successful, two alternatives remain to put an end to the conflict: either the parties take direct action or they resort to arbitration. Under the former method, the right of the strongest is imposed, while under the latter, a fair outcome may be established."¹

Those who are opposed to binding arbitration trace the origins of compulsory arbitration to the Italian fascist regime of 1926, which was later adopted by Generalissimo Francisco Franco in Spain and similar regimes in Portugal and Brazil. The 1943 Labor Code of Costa Rica seems to have followed this path, although the Labor Code's *exposé des motifs* fails to mention the source from which compulsory arbitration was adopted. The Mexican Federal Arbitration Law of August 18, 1931 also influenced the adoption of compulsory arbitration in Costa Rica.

IV. ARBITRAL PROCEEDINGS

Arbitral proceedings, voluntary or compulsory, are governed by Articles 519 through 530 of the L.C. The judge of the labor court where the case arose presides over the arbitral tribunal. The tribunal is composed of one arbitrator representing management and one arbitrator representing the employees. The arbitrators are appointed from a list compiled for this purpose by the Supreme Court.

In voluntary arbitration, the parties must define the issues in dispute for arbitration. In compulsory arbitration, the arbitral tribunal shall indicate the issues in dispute in accordance with the statements submitted by the parties. If there is a strike or a lock-out, the arbitral tribunal cannot commence the proceedings until such strike or lockout has terminated. The arbitral tribunal has ample powers for taking evidence submitted by the parties and scheduling hearings before rendering the award.

The arbitral award must deal separately with the social-economic issues and the points of law. The rulings of the arbitrators on economic-social issues must remain in effect for at least six

1. Nápoli, *Conciliación y Arbitraje*, in III ENCICLOPEDIA JURÍDICA OMEBA 592 (1955).

months. The rulings on points of law shall become *res judicata*. The arbitral award is subject to the principle *rebus sic stantibus*, that is, it binds the parties as long as the economic conditions prevailing at the time it was rendered are not subject to significant variations.

With regard to the claims involving economic and social issues, the arbitral tribunal may, pursuant to Article 525 of the L.C., "freely decide according to equitable principles (*en conciencia*), denying or granting, totally or partially, what has been requested by the parties, and also granting concessions which may be different from those requested by the parties."

Thus, the L.C. does not provide any rule of law by which the arbitrators are bound in rendering the award. Legal scholars usually refer to the following sources, which the arbitrators must take into account in rendering the award:

a) previous arbitral awards (according to the French Superior Court on Arbitration *Corte Superior de Arbitraje Francesa*), "the fairness of a solution is determined in contrast to the solution provided in other arbitral awards");

b) collective bargaining agreements (according to the English National Court of Arbitration (*Tribunal Nacional de Arbitraje Ingles*) established in 1940, "the principles of an arbitral award should be the same as those inspiring collective bargaining agreements");

c) applying by analogy the working conditions in effect in the area of trade and in the particular region where the conflict arose (this is what in France is known as "usages observed in the trade," or "conditions of employment of the particular trade," or the salaries "paid to workers who perform similar services in the same city or district," this author recalls that the Industrial Disputes Order promulgated in England in 1951, which replaced a similar order issued on July 18, 1940, requires arbitrators to follow the terms and conditions established for workers in sectors of the economy, according to collective bargaining agreements, arbitral awards, or state regulations and this order remained in force and was confirmed by the Terms and Conditions of Employment Act of 1949);

d) the needs of workers and economic capability of the enterprise (wages are fixed according to the cost of living and the financial situation of the employer); and

e) criteria which promote harmony in labor-management rela-

tions (according to the French law enacted on December 31, 1931, an arbitral award must seek a solution within "climate of collaboration," or, as stated by the Italian law of April 3, 1926, the arbitrators must take into account "the overriding interest of economic production").

Arbitration tribunals in Costa Rica usually follow the foregoing standards, although they do not always expressly refer to the sources from which the awards derive. For example, several years ago, a governmental regulation provided that civil servants with professional education would be full-time workers, to the exclusion of any other job, and increased their wages. Arbitral tribunals in Costa Rica have extended this benefit to professionals who are not civil servants, such as bank employees, on the ground that equal remuneration and benefits should be provided to workers with similar employment.

V. MEANS OF RECOURSE AGAINST ARBITRAL AWARDS

According to Article 526 of the L.C., the arbitral award "shall be certified for consultation with the Superior Labor Tribunal (*Tribunal Superior de Trabajo*)." As a matter of practice, the parties are allowed to appeal the arbitral award before such tribunal. It is disputed by legal commentators whether arbitral awards should be subject to such a free and unrestricted appeal. It is said, and in this author's view rightfully so, that if a full appeal is allowed, the Superior Tribunal rather than the arbitral tribunal will actually render the award, because the appellate jurisdiction of the Superior Labor Tribunal is broad enough so as to substitute its judgment for that of the arbitrators. It is preferable to limit a challenge against the award to certain specific grounds. For example, in France, a writ of cassation may be brought against an arbitral award only for lack of fairness or absence of reasons supporting the decision, or on grounds of violation of the law and applicable legal doctrine.

VI. CONCLUSION

Labor arbitration is rarely used in Costa Rica on a voluntary basis. However, parties have resorted to voluntary arbitration in order to settle disputes arising from the firing of labor union leaders. In those exceptional cases, the Ministry of Labor has served as sole arbitrator.

Compulsory arbitration has been used with greater frequency than voluntary arbitration, for the former is the only available means of redress for civil servants who are not allowed to strike. The use of compulsory arbitration has increased during the economic crisis affecting Costa Rica and as a result of government regulations impeding the free negotiation of collective bargaining agreements.

If the advantages of arbitration were to become more widely known, parties would more likely substitute arbitration for judicial proceedings which are very slow. It is this author's belief that at a time when Central American countries are considering a revival of the Central American Common Market, pursuant to the Peace Plan Accord, Esquipulas II, signed in Guatemala City in 1987,² the reform and harmonization of the law of arbitration in Central America should be seriously considered. Until Central America achieves economic justice, it is unlikely that peace and democracy will prevail in the region.

2. 26 I.L.M. 1164 (1987).