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LABOR ARBITRATION IN EL SALVADOR

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I. INTRODUCTION

In El Salvador, arbitration may be used to resolve civil, commercial, labor, and public international law disputes. With respect to labor disputes, arbitration is only used to resolve disputes of a collective nature involving economic interests. The Labor Code of El Salvador addresses arbitration in its chapter dealing with conflicts of an economic nature.

Labor arbitration in Salvadoran law is generally regulated by the Labor Code. Specifically, Book IV (Chapters III, IV, and V) of the Labor Code regulates arbitral proceedings. The binding force of an arbitral award is provided for in Article 512.¹ Arbitrators are considered public officers² who serve in an independent capacity.³ Accordingly, arbitration under Salvadoran law may be defined as a proceeding of an administrative nature in which private individuals, exercising a public function, settle labor disputes of an economic nature by virtue of a voluntary submission or by operation of law. When viewed in light of the regulations set out in Article 509,⁴ an arbitral award has the same force as a collective bargaining agreement.

II. BACKGROUND OF LABOR ARBITRATION IN EL SALVADOR

Labor arbitration is said to have originated in New Zealand, which promulgated its first arbitration law in 1894. The New Zealand statute was amended thereafter in 1913 and 1954.⁵ Spain adopted an arbitration system to regulate strikes and lockouts, en-

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1. Código de Trabajo [Cod. Trab.] art. 512 (El Sal.).

2. *Id.* art. 514.

3. *Id.* art. 507.

4. *See id.* art. 509.

5. Conciliation and Arbitration Act of 1954, 6 R.S. 447 (N.Z. 1957) (amending Labour Disputes Investigation Act of 1913, 6 R.S. 839 and Industrial Conciliation and Arbitration Act of 1908).

acting its first law on arbitration on November 27, 1931.⁶ In France, commercial guilds and labor unions worked out a draft on labor arbitration. Parliament promulgated a governmental bill, backed by President Blum, on December 31, 1936. Under the French legislation, collective labor disputes were mandatorily submitted to conciliation and arbitration before any strike or lockout could take place.⁷ The French system established in 1936 strongly influenced the drafting of labor legislation in Latin America. The different methods of dispute resolution adopted in El Salvador seek a peaceful solution to labor conflicts through voluntary arbitration, except in cases in which a strike may affect essential services (*servicios públicos*).

Although Labor courts exclusively handle individual labor disputes, the settlement of collective labor disputes calls for a more complex procedure. This is because the interests at stake in collective labor disputes are not centered on the application of pre-existing rules of law, but rather on the determination of working conditions and labor benefits.

III. VOLUNTARY ARBITRATION

The decision to submit a dispute to arbitration may come from the parties themselves or it may be established by operation of law. Thus, there is a system of voluntary arbitration co-existing with compulsory arbitration. In addition, Salvadoran law distinguishes between conventional arbitration and voluntary arbitration. Whereas the parties agree upon conventional arbitration for resolution of disputes which will arise in the future, parties agree upon voluntary arbitration after the dispute has arisen. The Labor Code of El Salvador has adopted this dual classification of arbitration.⁸

The conduct of arbitral proceedings in voluntary arbitration is governed by Articles 500 through 514 of the Labor Code. Labor arbitration commences when one party files a statement of intent to submit a dispute for arbitration. The parties must submit this

6. Jurados Mixtos del Trabajo Industrial y Rural, de la Producción Rústica y de la Producción y las Industrias Agrarias Ley de 27 noviembre, Gaceta [Gac.], Nov. 28, 1931 (Spain).

7. Recours Obligatoire à de Procédure de Conciliation et d'Arbitrage dans tout Différend du Travail Industriel Loi de 31 decembre, J.O. (1936), B.L.D. (Jan. 16, 1937) (Fr.).

8. See Cod. Trab. art. 500(1),(2).

statement to the General Director of Labor (*Director General del Trabajo*) twenty-four hours after the parties are notified that conciliation proceedings have been exhausted. The General Director of Labor then transmits this statement of intent to the other party, who must respond within twenty-four hours with its acceptance and submission to arbitration.⁹

It is not necessary to execute a public deed of submission in labor arbitration, as is required in civil and commercial matters. The agreement to submit a dispute to arbitration does not require any formality.¹⁰ Salvadoran law provides for the availability of voluntary arbitration in three circumstances: when the parties willingly submit to arbitration; when the contract or collective bargaining agreement includes an arbitration clause; and, any time that the dispute involves the rendering of a public service essential to the community.¹¹

IV. COMPULSORY ARBITRATION

In collective labor disputes, the submission to arbitration is established by operation of law. The economic, social, and political nature of collective labor disputes justifies the obligation to submit the dispute to arbitration. Collective labor disputes are likely to affect not only the parties to the dispute, but also consumers and the community at large. Legal commentators harshly criticized compulsory arbitration as a violation of the constitutional right to strike. However, this criticism is not justified in El Salvador, where compulsory arbitration takes place only under certain circumstances and in accordance with the law. Article 515 of the Labor Code,¹² calls for the use of compulsory arbitration only when the economic conditions in the country or in the enterprise involved in the dispute require the revision of a collective bargaining agreement, provided such agreement has been in force for at least one year. The government has no reason to extend the use and scope of compulsory arbitration because each dispute is based on its own individual facts and merits. Whether a particular collective labor dispute must be submitted to compulsory arbitration is determined on a case by case basis by the Department of Labor and

9. Cod. Trab. arts. 497, 498.

10. See *id.* arts. 498, 500.

11. *Id.* art. 500(1)-(3).

12. *Id.* art. 515.

Social Welfare (*Ramo de Trabajo y Previsión Social*).¹³

V. ARBITRATION BY OPERATION OF LAW

Arbitration by operation of law occurs when a collective dispute is referred to arbitration without a previous determination by the Department of Labor. The Revolutionary Council, which governed Venezuela at the time, promulgated Decree No. 101 of December 22, 1945 and established arbitration by operation of law. This decree provided for compulsory conciliation and arbitration proceedings of collective disputes on the ground that strikes and lockouts jeopardize national security. Arbitration by operation of law should be used only under the most extraordinary circumstances since compulsory arbitration may impinge on the constitutional right to strike. In Salvadoran law, in contrast, while arbitration is compulsory, it does not arise by operation of law. Article 515 of the Labor Code¹⁴ requires compulsory arbitration to be preceded by an administrative determination that a specific dispute should be referred to arbitration.

VI. EFFECTS OF THE ARBITRAL AWARD

No sanctions will be imposed when the party to whom arbitration was offered objects to arbitration or fails to answer an offer to arbitrate within twenty-four hours of being notified by the General Director of Labor. Furthermore, the dispute may continue indefinitely, unless the parties themselves end the conflict.¹⁵

However, if a party refuses to honor an arbitration award, the courts will enforce the award. The effects of an arbitral award are the same as the effects of a collective bargaining agreement. According to the Labor Code, the terms of collective agreements are binding on the parties.¹⁶ The arbitral award may be enforced pursuant to Articles 422 and 458 of the Labor Code.¹⁷

13. *Id.*

14. *Id.*

15. *Id.* arts. 498, 499.

16. *See id.* arts. 286, 294.

17. *Id.* arts. 422, 458.

VII. APPOINTMENT OF ARBITRATORS

Salvadoran law provides for two different methods of appointing arbitrators, depending on whether the arbitration is voluntary or compulsory. In voluntary arbitration, the appointment must be made within twenty-four hours after the submission of the dispute to arbitration. Each party shall appoint one arbitrator and notify the General Director of Labor of his or her selections. If any of the parties fails to appoint his or her arbitrator within the time provided by law or in the submission, the General Director of Labor shall make the appointment on his or her behalf. Within twenty-four hours of their appointment time, the General Director of Labor summons the arbitrators to take the oath of office and choose a third arbitrator. If the appointed arbitrators fail to agree on the appointment of the third arbitrator, the General Director of Labor must make that appointment within twenty-four hours.

As stated previously, the Department of Labor and Social Welfare make the determination that a dispute is subject to compulsory arbitration. When such a determination is made, an arbitral tribunal is required. The three members of the arbitral tribunal must meet the requirements of Article 502 of the Labor Code. Members of the tribunal are subject to challenge as provided by Article 503 of the Labor Code.¹⁸ The arbitral tribunal may request the assistance of the General Director of Labor and the Ministry of Economy.

VIII. QUALIFICATIONS OF ARBITRATORS

The Labor Code of El Salvador provides for requirements and qualifications which arbitrators must meet. The requirements are designed to ensure impartiality. Although the Labor Code fails to distinguish between the requirements and the qualifications of arbitrators, the absence of either disqualifies a person from serving as an arbitrator.¹⁹ To meet the Labor Code's requirements for serving as an arbitrator one must be: a Salvadoran citizen, at least twenty-five years old, able to read and write, and able to enjoy full civil and political rights. The following persons are disqualified from serving as arbitrators: those persons convicted of a criminal offense; those who have represented any of the parties in previous

18. *Id.* art. 503.

19. *See id.* arts. 502, 505.

proceedings conducted for the purpose of reaching a settlement; those connected as employer, employee, partner or advisor of any of the parties; those who are relatives of the parties; and those who have a conflict of interest arising from a relation with any party involved in the dispute.

Although arbitrators in general may abstain from intervention under some circumstances, the Labor Code of El Salvador does not provide any grounds for abstention. Since the Labor Code is silent, some may argue that as a result of the cross-reference made in Article 602 of the Labor Code, the provisions of the Code of Civil Procedure should be applied. However, it is this author's belief that the possibility of abstention should be excluded from labor arbitration.

IX. CHALLENGE OF ARBITRATORS

Proceedings to challenge an arbitrator's appointment in voluntary arbitration are governed by Article 504 of the Labor Code.²⁰ Moreover, Article 504 also applies to compulsory arbitration though the last paragraph of Article 515, which states that the procedure in voluntary arbitration proceedings applies to compulsory arbitration.

Article 504 of the Labor Code provides that in voluntary arbitration a challenge must be made within forty-eight hours of the appointment of the arbitral tribunal. By analogy, in compulsory arbitration, the challenge must be made within forty-eight hours of the decision to form the arbitral tribunal. A motion challenging an arbitrator must be brought before the General Director of Labor, who is required to resolve the challenge within forty-eight hours.²¹ The decision of the General Director of Labor is final.

X. THE ARBITRAL AWARD

The arbitral award has the following features: it may be set aside if rendered beyond the period indicated in the submission; it terminates the collective labor dispute; it has the same effect as a collective bargaining agreement; and it remains in force three years after its registration.

20. *Id.* art. 504.

21. *Id.*

XI. MEANS OF RECOURSE AGAINST THE AWARD

Article 511 of the Labor Code provides that an arbitral award is final after parties receive notification.²² However, insofar as an arbitral tribunal is an administrative and not a judicial tribunal, only recourses to administrative and not judicial bodies are prohibited. Therefore, an arbitral award is subject to a contentious-administrative recourse, which is a judicial challenge seeking review of the legality of an administrative act. Article 3 of the Contentious-Administrative Act provides that a contentious-administrative recourse lies against an act issued by the public administration, on the ground that such an act is in conflict with the law.

Although arbitral awards may be challenged, the challenges are limited to errors of law, *i.e.*, "violation of a prohibitive law or the failure to comply with a mandatory law." A challenge results in a stay of execution of the award under Article 16 of the Contentious-Administrative Act. If the challenge is accepted, the award must be held illegal and thereafter overturned.

Certain legal commentators question whether the administration may refuse to register an arbitral award, thus exercising some kind of supervision or review of the award. However, Salvadoran law does not grant the recording officer the authority to refuse the registration of an award. On the contrary, the Labor Code provides that the award "shall be registered automatically in the pertinent office."²³

22. *Id.* art. 511.

23. *Id.* art. 512.