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# BRIEF REFLECTIONS ON THE PRACTICE OF LABOR ARBITRATION IN EL SALVADOR

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## I. COMPULSORY ARBITRATION AS AN OBSTACLE TO THE RIGHT TO STRIKE

The strike itself is not an objective to be pursued in an economic collective labor dispute. The purposes of a collective labor dispute are set forth in Article 469 of the Labor Code of El Salvador (the "L.C."). The strike is a mere stage in a collective dispute in which the workers press for the recognition of economic benefits. Moreover, the right to strike is not absolute, because it is regulated by statute. The immediate effect of the pressure a strike exerts is on the employer's economic situation, usually forcing him to concede benefits in order to end the dispute. In the context of a collective labor dispute involving an entity which provides services essential to the community, a strike not only affects the economic situation of the employer, but seriously impacts the welfare of the entire population. The impact, damage or economic harm in such a case goes beyond that felt by the employer, thus departing from the legitimate role performed by a strike in a collective labor dispute. Compulsory arbitration avoids this pathological degeneration of the right to strike to the detriment of the public interest. This, in turn, is the justification for compulsory arbitration. In this author's view, however, compulsory arbitration should not limit the right to strike, which deserves the protection of the law.

## II. THE ROLE OF VOLUNTARY ARBITRATION IN THE SETTLEMENT OF COLLECTIVE LABOR DISPUTES OF AN ECONOMIC NATURE

Although employers, workers, and labor unions share the responsibility of settling a collective labor dispute of an economic nature, it is necessary to identify at the outset what is the goal sought by each of the protagonists in the conflict. Is the goal to

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peacefully resolve a labor conflict? If so, then all the procedural mechanisms preceding arbitration, *i.e.*, direct negotiations and conciliation, should not be regarded as mere formalities in a prolonged war of attrition. If, on the one hand, the parties reach an agreement during the process of direct negotiations or during the conciliation proceedings, the solution would have been sought and reached by the parties themselves. Resort to arbitration, on the other hand, even voluntary arbitration, is an implicit recognition that both employers and workers are unable to reach an agreement by themselves.

### III. ADVANTAGES OF COMPULSORY ARBITRATION IN PUBLIC SECTOR LABOR DISPUTES

Under Salvadoran law, the executive branch has the exclusive power to determine whether a given economic collective dispute should be subject to compulsory arbitration. The composition of the tribunal is also left to the discretion of the executive branch (L.C. Article 515). Despite their decentralization from the executive branch and their own legal personality, state agencies in charge of rendering important public services maintain a close economic and bureaucratic relationship with the central government. Their primary goal is not to reach a fair settlement of labor disputes, but to ensure that public services vital to the population are effective and continuous.

Not surprisingly, employees are concerned about the mandatory nature of arbitration proceedings as well as employees' lack of input into the composition of the arbitral tribunal. At the end of the conciliation proceedings, labor unions which represent workers from the public sector have only two options: 1) to pursue voluntary arbitration, in which the workers have the opportunity to appoint at least one of the three arbitrators that are to become members of the panel, or 2) to pursue compulsory arbitration, in which they have no say in the appointment of the arbitral panel members who are appointed by the government.

Given these options, state agencies naturally prefer to reject the labor union's offer of voluntary arbitration, for this would allow the labor union to appoint at least one of the arbitrators. State agencies reject voluntary arbitration because the dispute will then have to be settled by compulsory arbitration, where all the arbitrators are appointed by the government (L.C. Articles 498(2), 515).

#### IV. THE CONSTITUTIONAL OBLIGATION TO PROMOTE CONCILIATION

Article 49(2) of the Salvadoran Constitution creates an obligation on the government to promote arbitration. This same provision creates an obligation to promote conciliation. Unfortunately, however, conciliation proceedings are not well regulated in El Salvador. Salvadoran law fails to specify the qualifications of those who serve as conciliators. Lack of trust in those in charge of an amicable settlement is a major factor in the ineffectiveness of conciliation proceedings in El Salvador.

According to L.C. Article 509, the arbitral tribunal must seek to a reconciliation among the parties. The arbitrators must also verify that conciliation efforts have been exhausted before proceeding with arbitration. Because this is rarely done, most disputes which are referred to arbitration do not have the opportunity to be settled by conciliation.

#### V. ENFORCEMENT OF ARBITRAL AWARDS

Failure to voluntarily honor an arbitral award is a rare event in El Salvador. Although this fact should promote the use of arbitration, the complexity of many disputes brought before the arbitrators should be taken into account. Collective disputes of an economic nature generally arise in occupational enterprises with a great number of workers and in specific areas of the economy (e.g., fishing and construction industry).

#### VI. ADVANTAGES OF DIRECT NEGOTIATIONS OVER ARBITRATION

Face to face negotiation serves an educational purpose because the parties themselves become the interpreters and guarantors of their agreements. Through the practice of direct negotiations, the parties become skillful conciliators. The habit of resorting to arbitration to settle labor disputes is a comfortable alternative for those who have no interest in providing their own solution. In the long run, avoiding direct negotiations has negative effects on the harmonious relationships between workers and employers. A labor agreement arrived at through direct negotiations provides a fairer and more stable balance of the interests of labor and capital than an arrangement which has been reached through arbitration.

## VII. IMPROVEMENT OF ARBITRATION MECHANISMS IN EL SALVADOR

Efforts to improve arbitration in El Salvador should focus on economic collective labor disputes and deal with all the various stages of the arbitration proceedings. Unfortunately, the draft of the L.C. of El Salvador merely improved the mechanisms for compulsory arbitration by granting the Supreme Court of Justice the power to appoint the members of the arbitral panel. Before a dispute may be submitted to compulsory arbitration, the executive branch must first classify the dispute as eligible for such arbitration.

## VIII. THE ROLE OF THE STATE IN MECHANISMS OF LABOR DISPUTE RESOLUTION

The active participation by the State in settling economic collective labor disputes is common to all of Latin America. Western European legal systems do not share this feature, because the initiative and most of the responsibility for dispute resolution rest with the employers and workers.

Moreover, in El Salvador, the State pays the arbitrators, who are viewed as performing a public service. In this author's opinion, the parties themselves should bear the costs of arbitration, which would operate as a small economic sanction for their lack of cooperation in reaching an agreement by themselves.

## IX. ARBITRATION AS AN ALTERNATIVE TO THE STRIKE IN THE PUBLIC SECTOR

It is difficult to predict whether arbitration could either avoid or decrease the number of collective disputes arising in the public sector in El Salvador. Relationships between employers and employees gradually deteriorate as a result of the large economic differences. Forceful measures are taken every day, and there is a wide gap between the law and reality. Every day, factories are seized and business managers are kidnapped. Although these events would have surprised Salvadorans many years ago, many labor union leaders currently consider these measures as the only means of forcing employers to sit at the bargaining table. There is little concern on the part of the union leaders for the criminal and ethical consequences of these actions.

The rule of law must be implemented with determination in order to curb these violent means of resolving labor disputes and halt these conflicts from becoming increasingly radical. Many commentators suggest that arbitration should be forced on the parties by operation of law soon after a strike has begun. However, they consider it inappropriate to grant the executive branch the power to determine whether or not a certain dispute should be submitted to compulsory arbitration. A system of automatic arbitration, or arbitration by operation of law, has been used in other countries in order to avoid the irreparable harm caused by the suspension of public services.

#### X. THE ESTABLISHMENT OF PERMANENT ARBITRATION AND CONCILIATION BOARDS IN EL SALVADOR

Article 49(2) of the Constitution of El Salvador suggests the establishment of permanent arbitration and conciliation boards, relying perhaps on the experience of other countries where these boards have operated with relative success. For example, conciliation and arbitration boards successfully operated in Mexico for many years. However, Mexico follows a different pattern of economic development than El Salvador. It is not, therefore, altogether clear whether the example of Mexico should be followed in El Salvador, for the success of these permanent boards largely depends on their independence from the central government and the degree of authority granted to the conciliators. Permanent boards cannot be established in El Salvador by a stroke of the legislator's pen. The input of both labor unions and employers should be sought because it will provide trust and credibility to the boards, especially regarding the advantages of and procedures for establishing such permanent conciliation and arbitration boards in El Salvador.

#### XI. COMPULSORY ARBITRATION IN THE PUBLIC SECTOR

Even though the labor relationship between civil servants and the State may be distinguished from labor relationships in the private sector, labor conflicts arise within the public sector as often as in the private sector. It is therefore worth considering the possibility of establishing arbitration as a mechanism to settle disputes involving public services.

One of the problems to be encountered is how to ensure the

impartiality of the arbitrators who are aware of the budgetary constraints of the public administration which is reluctant to grant benefits and wage increases to its employees. Arbitration in the public sector should be compulsory and the arbitral award should be enforced in the same way as a collective bargaining agreement. In this author's view, arbitration in the public sector should be governed by the rules contemplated for judicial summary proceedings, with the possibility of a strike foreclosed. Article 221 of the Constitution of El Salvador demonstrates this suggestion because it prohibits a strike and the suspension of work in occupations where services essential to the community are at stake.

## XII. THE LABOR UNIONS' VIEWPOINT ON LABOR ARBITRATION

It is not easy to generalize as to the viewpoint of Salvadoran labor unions regarding arbitration. The most radical labor unions will not accept any restrictions on the right to strike. They consider arbitration, or any other mechanism of dispute resolution, as an obstacle to the right to strike. Some labor union leaders believe that direct negotiations and conciliation proceedings pose too many obstacles to the right to strike. Further, many labor union leaders regard the strike as the only possible framework for resolving labor conflicts. Workers do not favorably regard either compulsory or voluntary arbitration. Some labor unions also consider voluntary arbitration as an obstacle to the strike, even though the labor force has the opportunity to be represented on the arbitration panel.

No matter the ideological leaning of a particular labor union, most, if not all, Salvadoran labor unions look upon arbitration with wary eyes. In their view, the strike offers the optimal means to obtain the benefits claimed from the employer. Without analyzing the cultural factors which have influenced this perception, it must be recognized that under this view arbitration cannot be regarded as an instrument capable of harmonizing the interests of employers and workers. Arbitration can only operate successfully if the parties are genuinely committed to settling their differences within a peaceful social and political climate. Unfortunately, this climate does not presently exist in El Salvador.