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The Law and Practice of Labor Arbitration in Argentina

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I. INTRODUCTION

Labor law in Argentina has been fashioned in accordance with the country's historical and cultural framework. These laws have been shaped by the changing political climate and made seemingly without any rational purpose. Legislation evolved out of the economic context in which labor disputes occur, originally enacted for the purpose of guaranteeing certain rights to workers as individuals and neglecting the advent of organized labor. The regulation of labor unions is a legislative morass shaped according to the political situation of the country.

The legislature, more than the judiciary and organized labor, has been the main protagonist in the labor law. An active labor movement, highly dependent on the State for labor benefits, has continuously called for legislation. Labor unions have played prominent political, social, and economic roles in Argentina. These roles result from the high number of unionized workers, the concomitant political power of labor unions, the unions' complex organization, and the unions' potential for causing social turmoil.

In Argentina, congressional legislation has granted most benefits to workers. However, the executive branch has often usurped the legislative role as a result of numerous coups d'état, which form Argentina's background of political instability. The suspension of the collective bargaining process in 1975, not reestablished until January 1988, only served to increase the active role of the State. Although technological changes have rendered many collective bargaining agreements obsolete, these agreements continue to provide the most significant framework for labor negotiations.

During the past few decades there has been a noticeable trend toward the deregulation of collective labor relationships in which the parties to these relationships act with increased autonomy. The

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transition from legislative regulation towards a system of self-governance is a phenomenon shaping modern industrial relationships. The trend toward deregulation started in industrialized countries, but this trend in theory and in practice has gradually impacted developing countries.

This noted change has greatly influenced the approach of labor unions towards labor conflicts. The traditional confrontational attitude of labor unions towards management is a cultural and social phenomenon, not necessarily an economic and legal necessity. The aggressive approach of labor unions toward the government and employers has gradually decreased and a new approach, in which workers are regarded as consumers, has begun to take place. In light of this new perspective, a more innovative approach to analyzing labor conflicts, and their most serious consequence, the strike, must be taken. The trend has resulted in a period of transition from a labor culture centered on conflict toward one centered on compromise. This change has also influenced methods of dispute resolution, which are now characterized by compromise and reasonable demands by workers.

Traditional definitions of "collective labor disputes" are no longer satisfactory inasmuch as they are based on a formalistic view of labor law and ignore the existence of a "living law." This "living law" is comprised of rules established by labor unions, employers, and organizations of employers, which coexist with the "formal law" enacted by the legislature. The complexity of this system of self-regulation is proportional to the industrial development and prevailing cultural standards which vary from country to country and from era to era. Just like any other conflict regulated by law, labor disputes originate with the need to satisfy material claims. Most labor disputes commence with the filing of a petition seeking modification or alteration of a pre-existing status, or requesting remuneration or indemnification. The claim may be accepted by the employer or it may be rejected by the assertion of a counterclaim. In the latter case, the dispute becomes less formal and is likely to trigger "measures of force" (*medidas de fuerza*). Thus, the dispute may continue for a prolonged period of time during which the different methods of dispute resolution may come into play.

In Argentine labor law, individual labor disputes and minor collective labor disputes are settled through informal mechanisms. The informality of these methods of dispute resolution has re-

sulted in a scarcity of legal research on the subject. Although the informal practices for dispute resolution developed by labor unions and employers are not a new phenomenon, their form is defined only enough to provide fair and effective solutions to labor conflicts. Between March 1976 and November 1983, informal mechanisms of dispute resolution increased in importance because the military government suppressed the activities of labor unions. Law No. 14.250 of 1953,[1] which permitted the collective bargaining process to operate freely, was suspended in 1976 by Law No. 21.307.[2] The suspension of the collective bargaining process and the active role assumed by the executive branch in fixing salaries made the operation of informal mechanisms of dispute resolution extremely difficult.

Even after the formation of the constitutional government in 1983, the executive branch continued to have a prominent role in the determination of salaries, which prior to 1976, had been fixed through free negotiations. Finally, the constitutional government enacted Law No. 23.546 of 1988,[3] which reestablished in Argentina the collective bargaining process after almost thirteen years of interruption. This enactment has been widely perceived as one of the most auspicious developments in Argentine labor law.

At the present time, Law No. 14.250,[4] as amended by Laws 23.545,[5] 23.544,[6] and 23.543, provides the legal framework for the collective bargaining process now extended to employees in the public sector. As a result of Argentina's ratification of Convention No. 154 of the International Labor Organization (I.L.O.),[7] a bill was sent to Congress establishing the collective bargaining process for the public sector, including employees of the legislative and judicial branches of government. The broad scope of this collective bargaining process is unprecedented in Argentina.

Individual labor disputes and collective labor disputes are addressed through two completely different processes. Individual labor disputes in Argentina are settled at three different levels. The first is through direct negotiations between the enterprise and the

1. Ley 14.250, XIII-A A.D.L.A. 195 (Oct. 20, 1953).
2. Ley 21.307, art. 7 XXXVI-B A.D.L.A. 1089, at 1090 (May 7, 1976).
3. Ley 23.546, No. 2 at 5, Bol. Inf. 2/88 A.D.L.A. (Jan. 11, 1988).
4. Ley 14.250, *supra* note 1.
5. Ley 23.545, No. 2, at 4 Bol. Inf. 2/88 A.D.L.A. (Jan. 11, 1988).
6. Ley 23.544, No. 2, at 1 Bol. Inf. 2/88 A.D.L.A. (Jan. 11, 1988).
7. Convention Concerning the Promotion of Collective Bargaining, June 19, 1981, International Labor Organization (I.L.O.) No. 154.

employees. If these negotiations fail, it is customary for the labor union to report the individual dispute to the Ministry of Labor. The Ministry of Labor assumes an active role in a proceeding which is a mixture of conciliation and mediation, seeking an arrangement to end the dispute. If both attempts at reaching a settlement fail, or if none of the two previous methods are pursued by the worker, the Ministry may resort to the courts of law.

Collective labor disputes of a legal nature (*conflictos colectivos de derecho*) seek the interpretation of a collective bargaining agreement already in force. The "collective labor disputes of an economic nature" (*conflictos colectivos económicos o de intereses*) seek to modify the rules embodied in a collective bargaining agreement, to substitute for it totally or partially by another agreement or to convert it into a collective bargaining agreement. Collective labor disputes are not dealt with at the three different levels indicated for individual labor disputes, but rather according to three different procedures, with different laws regulating each procedure. This diversity of laws and procedures results in confusion and the eventual ineffectiveness of collective methods of dispute resolution.

Law No. 14.250[8] and Law No. 23.546[9] presently regulate the collective bargaining process. These statutes respectively provide for "negotiating committees" (*comisiones negociadoras*) and for "bipartisan committees" (*comisiones paritarias*) in which the parties are represented. The negotiating committees are empowered to conclude or renew collective bargaining agreements, whereas the bipartisan committee is set up to interpret the agreements at the request of the parties or the labor administration. The decisions rendered by the bipartisan committees have the same normative force as collective bargaining agreements executed or modified by the negotiating committees.

Law No. 14.786 of 1959[10] regulates mandatory conciliation and voluntary arbitration for collective labor disputes of an economic nature. This statute also establishes conciliation proceedings for collective disputes of a legal nature as a preliminary and optional proceeding before the intervention of the bipartisan commissions. Conciliation proceedings do not preclude the use of other methods of dispute resolution. Experience has shown that a multiplicity of

8. Ley 14.250, *supra* note 1.
9. Ley 23.546, *supra* note 3.
10. Ley 14.786, XVIII-A A.D.L.A. 319 (Jan. 9, 1959).

procedures is not conducive to the quick settlement of collective labor conflicts. Finally, Law No. 16.936 of 1966[11] provides that the Ministry of Labor may intervene in the settlement of legal or economic labor disputes through mandatory arbitration.

The procedures established in these statutes are inconsistent and contradictory. The informal procedures that may be freely pursued by the parties cannot be reconciled with those imposed by the law. Voluntary conciliation and arbitration are incompatible with compulsory conciliation. Furthermore, the rules provided in Laws 14.250[12] and 14.786[13] are superfluous; labor disputes of a legal nature are generally settled outside the framework provided by law because the parties prefer to bypass these procedures and request the assistance of the courts of law.

II. Conciliation

In individual labor disputes, conciliation is meant to operate at the request, invitation or suggestion of a court. In practice, however, the judge becomes an active participant in the deliberations and in the arrangement which the parties eventually reach. Individual labor disputes may also be brought before the Ministry of Labor, whose intervention as a mediator promotes the conciliation of the parties. The arrangement resulting from the conciliation proceedings is valid only if a court declares that the terms of the agreement fairly protect the interests of both parties.

Labor legislation also provides for conciliation proceedings in collective labor disputes, especially if those disputes are economic. The parties may choose to pursue an informal conciliation procedure not regulated by law, in which they negotiate directly without being subject to the rules of law. Only in such a situation does the conciliation of collective labor disputes of an economic nature correspond to the theoretical model provided by law. If the parties cannot deal with each other at arms length, then the Ministry of Labor conducts the conciliation process.

The conciliation process, as used in the context of collective labor disputes, is replete with ambiguities. Conciliation is viewed as a method of dispute resolution, as a function undertaken by the

11. Ley 16.936, XXVI-B A.D.L.A. 791 (Aug. 31, 1966).
12. Ley 14.250, *supra* note 1.
13. Ley 14.786, *supra* note 10.

labor administration and performed by the public officer who acts as a conciliator, and as a decision reached by the active involvement of the parties. In contrast, in arbitration a third party settles the dispute, achieving the goal through coercive methods.

The general perception in Argentina, is that the government must provide for all aspects concerning the economic organization of the country. Conciliation of collective labor disputes, particularly economic ones, is therefore left in the hands of skilled officers of the Ministry of Labor. Although theoretically conciliation seeks to "cool," and, if possible, "freeze" the dispute, in practice, conciliation proceedings are adversary processes which result in a "winner-takes-all" outcome.

The Ministry of Labor is not limited to promoting agreement between the parties, instead it assumes an active role in the negotiations. An officer of the labor administration usually makes proposals to the parties and attempts to persuade them regarding the fairness of such proposals. Thus, the "conciliatory" role of the Ministry of Labor is particularly complex, for it involves the drafting of the amicable settlement, taking measures aimed at furnishing the parties with the information that they need, and supervising the activities of the parties. The multiple tasks performed by the labor administration demonstrate how conciliation is more important than simply mediating the dispute.

Law No. 14.786[14] provides the mechanics of conciliation for economic or legal labor disputes and authorizes the Ministry of Labor to participate in collective economic disputes. This statute confers on the labor department the power to regulate and direct the activities of the parties, as well as to take measures and make decisions on its own motion in light of the particular facts of each case. No strike can begin and no measure of force may be used without first exhausting this conciliatory stage. Thus, the parties to a collective labor dispute of an economic nature must first report the conflict to the Ministry of Labor. As of that time, the parties become engaged in a conciliatory process. During that period, workers are prohibited from working in any form. In practice, however, the steps required by law are not observed. In collective labor disputes, particularly those in which wage increases are sought, the conflict usually continues for a considerable time without the employees ever reporting the dispute to the Ministry of Labor.

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14. *Id.*

The Ministry of Labor is authorized to summon the parties to appear at a hearing, conduct fact-finding on claims and counterclaims raised by the parties, request the opinion of governmental agencies and private institutions, and secure any evidence that is relevant and conducive to a fair settlement of the dispute. If the parties fail to reach an agreement, the labor administration must take the initiative and submit a conciliation proposal to the parties. These proceedings cannot be extended for more than twenty days.

The law generally refers to measures of force or "measures of direct action" (*medidos de acción directa*) as those measures altering the working conditions which existed before the conflict arose. If measures of force are resorted to during the conciliation stage, the Ministry of Labor may issue an injunction and order the parties to reestablish the situation that existed before the dispute arose. If the parties insist on using measures of force, the employer is subject to fines and the employees may be sanctioned by not receiving wages as long as they persist in taking measures of force.

The conciliation proceedings terminate at the end of twenty days. If, at that point, the parties refuse to submit the dispute to arbitration, they are left to their own bargaining positions. They may carry out the measures of force that they deem most appropriate. If the parties are unable to reach an amicable settlement, they may resort to the procedure provided in Law No. 14.250[15] and request the bipartisan commission to construe the terms of the collective bargaining agreement.

III. Arbitration Laws

The codes of civil and commercial procedure adopted by each province provide for arbitration as a method of dispute resolution available to the parties before litigation has commenced or during the pendency of a suit. The codes of procedure also provide for an informal type of arbitration, the *amiable composition* or equitable arbitration (*arbitraje de equidad*). The *amiables compositeurs* are not subject to the rules of law and render their judgment according to their knowledge and understanding. The procedural law in labor matters which is in force in the federal district governs arbitral proceedings in individual labor disputes, whereas Laws No.

15. Ley 14.250, *supra* note 1.

14.786[16] and 16.936[17] create complex procedures of voluntary and compulsory arbitration in economic or legal collective labor disputes.

Arbitration, regardless of its form, is rarely resorted to in countries whose legal culture relies heavily on the State to settle disputes. The arbitration system provided for in the Code of Civil Procedure is not used by lawyers and those subject to the industrial relationships. Similarly, the informal or equitable arbitration, or *amiable composition*, is discussed in the writings of legal commentators but rarely used in practice.

IV. Arbitration of Individual Labor Disputes

Law No. 18.345 of 1969,[18] as amended, intends to govern labor procedure for individual labor disputes in the federal district. However, in practice, this statute provides for a set of rules which are ill-suited for its purpose. These rules provide for a conciliation hearing at the outset of the arbitral proceedings. If the parties are unable to reach an amicable settlement, the court must recommend to the parties that they refer the case to arbitration.

Only the judge or the clerk of the court may serve as arbitrator. Once the deed of submission has been executed, the arbitral proceedings are conducted in accordance with the rules for the *amiable composition*. The arbitral award may be set aside only if rendered after the prescribed period has expired or if the award decides issues which were not submitted to arbitration. The arbitral procedure set forth in Law No. 18.345[19] has not become a part of the daily practice of judges or lawyers. In other words, while arbitration is part of the Argentine *corpus juris*, it is not frequently used in the every day practice of law.

V. Voluntary Arbitration of Collective Labor Disputes

Law No. 14.786[20] provides that if the parties fail to reach an amicable settlement during the conciliation proceedings described above, the officer of the Ministry of Labor, acting as mediator,

16. Ley 14.786, *supra* note 10.
17. Ley 16.936, *supra* note 11.
18. Ley 18.345, XXIX-C A.D.L.A. 2664 (Sept. 12,1969).
19. *Id.*
20. Ley 14.786, *supra* note 10.

must invite the parties to refer an economic collective labor dispute to arbitration. Thus, voluntary arbitration is triggered only after the failure of the conciliation proceedings. Voluntary arbitration is only available for economic collective labor disputes and cannot be used to settle legal conflicts. In contrast, compulsory arbitration, regulated by Law No. 16.936,[21] applies to both types of collective labor disputes.

If the proposal to submit the case to arbitration is accepted, the parties must enter into a submission agreement (*compromiso arbitral*). The submission must identify the parties, the issues to be submitted to arbitration, the evidence to be produced and the period within which it must be produced, as well as the time limit for the rendering of the award. The failure to include this information renders the submission null and void.

Voluntary arbitration proceedings under Law No. 14.786 are of a contractual nature—the parties provide for their own rules of procedure and agree on the appointment of arbitrators of their choice. In the few cases of voluntary arbitration of collective labor disputes that are known in Argentina, the arbitrators have always been officers of the Ministry of Labor. Thus, it is generally accepted that the arbitrators must be members of the Ministry of Labor. This attitude reflects not only a lack of experience with arbitration, but also a legal culture that emphasizes the participation of the State in the settlement of disputes.

The arbitral submission becomes effective as of the date the arbitrators accept their appointment. At that time, the arbitrators have jurisdiction to conduct the proceedings and to render the award. The arbitrators may carry out a fact-finding process and order the production of evidence on their own motion. The time limit to render the award is automatically postponed if the arbitrators decide that additional evidence must be produced. The arbitral award must comply with the same requirements as a judgment rendered by a court. The award must identify the parties, reproduce the terms of the submission to arbitrate, and must be supported by reasons. The award must be rendered within ten working days after the execution of the arbitral submission. This period may be postponed if the arbitral tribunal requests the production of evidence and such evidence requires a longer period to procure. The arbitral award shall remain in force for a period of at least six

21. Ley 16.936, *supra* note 11.

months.

The award may be set aside if rendered after the time limit has expired or if the arbitration decides issues not submitted to arbitration. The effects of the arbitral award are the same as the effects of a collective bargaining agreement and are extended to all workers and employers similarly situated. In order to be valid, the award must be confirmed by the Ministry of Labor.

VI. Compulsory Arbitration of Collective Labor Disputes

Law No. 16.936 of 1966,[22] as amended by Law No. 20.638 of 1974,[23] introduced compulsory arbitration in Argentina; however, legal commentators agree that forcing arbitration on the parties is not compatible with the constitutional guarantee of due process. Law No. 16.936 authorizes the Ministry of Labor to settle all economic or legal collective labor disputes. The decision of the Ministry of Labor that a specific dispute must be subject to arbitration is final. That is, the law unconstitutionally provides that this administrative decision is not subject to judicial review.

A collective labor dispute which is subject to compulsory arbitration does not allow for the possibility of measures of force. Thus, the law provides that within the twenty-four hours of the administrative ruling by which the case must be referred to arbitration, the parties must cease taking any measure of force. The parties are notified of this ruling in person or by telegram.

If any party refuses to give up measures of force, sanctions may be imposed. Employers may be fined in proportion to the number of workers involved in the dispute. Furthermore, workers may also consider themselves discharged without cause and entitled to compensation. If the employees fail to comply with the administrative ruling ordering the cessation of a strike, the employer may discharge them without cause. The Ministry of Labor may order the parties to reestablish the working conditions that existed before the conflict, but there are no provisions for sanctions in case the parties decide not to comply with the order.

As soon as the labor administration decides that a collective dispute should be submitted to compulsory arbitration, the arbitral proceedings must commence with the appointment of an of-

22. *Id.*

23. Ley 20.638, XXXIV-A A.D.L.A. 136 (Jan. 21, 1974).

ficer of the Ministry of Labor to serve as arbitrator. The law also provides that the parties may appoint any person familiar with the economic and legal issues. However, in the few cases of compulsory arbitration which have taken place, the parties have chosen an officer of the labor administration to serve as arbitrator. Within five working days, the arbitrator must summon the parties to submit evidence which may consist of documents, reports, and expert opinions. The arbitrator must determine the terms of reference which dictate the scope of the arbitral award. The arbitrator may propose, on his or her own motion, that relevant evidence be submitted by the parties. The admissibility of the evidence is left to the discretion of the arbitrator.

The award must be rendered within ten working days, but this period may be extended if the arbitrator orders that additional evidence be produced. The award may be set aside on the grounds that it was rendered beyond the time limit authorized in the submission or if it decided issues not submitted to arbitration. In the federal district, an application for setting aside an arbitral award must be filed with the National Court of Appeals on Labor Matters. In the rest of the country, the application must be filed with the federal circuit courts of appeals. If the award is set aside, a new arbitrator shall be appointed and the arbitral proceedings must commence *de novo*. This legal framework irrationally encourages prolonging a dispute for at least two months or more.

The effects of the award vary, depending on whether it deals with economic or legal labor disputes. Arbitral awards deciding economic disputes have the same effects as collective bargaining agreements and remain in force for at least one year. Arbitral awards deciding issues of law may be reviewed at any time by the courts.

VIII. Conclusion

Compulsory arbitration of collective labor disputes has rarely been used in Argentina. In those few instances where it has taken place, it has been during *de facto* governments, thus reflecting the impact of the political climate on the practice of labor dispute

resolution. Although compulsory arbitration has never been resorted to during periods of constitutional government, such as the one in place since 1983, perhaps it is time to put arbitration to better and more frequent use.