Alternative Forms of Settlement of Labor Disputes (or Non-Judicialization of Conflicts)

Upon the enactment of Law No. 13.467 / 2017 (“Labor Reform”), two new institutes were created: the **Annual Discharge Term**, through which employees and employers may, annually, formalize the term of discharge/release of the obligations to give and to do, inherent to the employment agreement, with the acquaintance and participation of the professional union and the **Ratification of the Out-of-Court Agreement**, which allows employees and employers to settle an agreement on allowances inherent to the employment agreement, before the Conciliation Section of the Labor Court.

Both institutes were introduced aiming at privileging the principle of autonomy and also making prevail the terms negotiated by the parties over the legislation.

In this sense, it was also introduced, along with the Labor Reform, an article that authorizes the inclusion of an arbitration clause in employment agreements **(i)** in which remuneration exceeds twice the maximum established for the benefits of the Social Security System* and **(ii)** provided that the initiative to submit to arbitration is made by the employee himself or by his express consent.

Arbitration is a more incisive way of conflicts resolution, relying the situation to be defined by an exempted arbitrator, expert in the matter discussed, who decides the controversy without any interference of the parties. His decision has the force of a court ruling and is definitive, since it does not admit any appeal against it.

Currently, only employees who receive a compensation of over BRL 11,291.60* may recourse to arbitration.

However, there are still concerns about the use of the Arbitration Chamber to resolve conflicts involving individual labor rights.

This is because, article 1, of Law No. 9.307/1996, provides that only disposable rights may be submitted to arbitration.

As individual labor rights provided by law are, in essence, indisposable and so cannot be waived, in theory they are not subject to be negotiated outside the Court’s procedural context.

By the Labor Reform, it is questionable whether the individual labor right can be freely negotiated, since the law, when amended the wording of the Labor Code, promulgated in 1943, exalted the principles of autonomy and “prevalence of the negotiated over the legislated”, treating differently the employees who receive higher remunerations.

From what can be observed, little by little, the arbitration is being introduced in the labor scenario, as an alternative way to achieve the intended protection, outside Labor Courts.

It is clear that, apart from the legal question, the greatest challenge that currently exists is the reluctance of society and the Judiciary itself to submit cases to be sorted out by arbitration as a legitimate form of conflict resolution.

It is rooted in Brazilian culture the **dependence of the State for the solution of conflicts**, especially the labor conflicts, since the consolidated understanding of the Courts, before the recent amendment of the Labor Code, brought by Law No. 13.467/2018, was for the annulment of the arbitration award or

annulment of any out-of-court agreement involving individual labor rights, as a safeguard to economic hypo sufficiency, inherent to the status of employee and that could interfere with individual free will.

Thus, it was justified the need for state intervention or, by express constitutional authorization, at least, of the entity representative of the professional category, as a mean of avoiding distortion of legal and constitutional precepts.

The objective of the legislator, when implementing said law, was to increase the autonomy of both parties, employer and employee, as well as soften the collective conception that the employee is hypo sufficient and cannot negotiate his/her own rights directly with the employer.

The above question is well mirrored by the Judiciary. According to a statistic carried out by the Superior Labor Court itself, only in 2017, 2,648,463 (two million, six hundred and forty-eight thousand, four hundred and sixty-three) cases were filed, out of that 37.7% [1] were settled.

It should also be noted that, in the past, an attempt was made to establish a form of settling out-of-court agreements in labor matters, through the Quasi-judicial Labor Committees, established by the Labor Code.

Referred Committees were established between companies and unions, by the jointly appointment of members, with the attribution of trying to reconcile individual labor conflicts.

However, as a result of several frauds identified in the composition of the Committees, the Judiciary began to annul the agreements settled therein, returning to the “square one” regarding out-of-court agreements to solve conflicts.

“Out-of-court agreement signed before the Quasi-judicial Labor Committee, with the purpose of satisfying relevant allowances related to the end of the employment relationship for significantly lower amounts than those due under the law, affronts rights and guiding principles of employment relations. Impossibility of validation, under penalty of this Specialized Justice teaches and encourages bad employers to interpret irregularly the intention of the legislator when creating the Committees, causing manifest losses to the employee, hypo sufficient in the employment relationship.” (Case Law 01657.2006.024.02.00-7)

From a strictly legal point, provided that the requirements listed above are fulfilled, resulting from the literal reading of article 507-A, of the Labor Code, all disputes inherent to the employment agreement may be settled through arbitration.
And there are many advantages that arise to the parties that submit cases to arbitration, among them:

1. Flexibility of choice as to the form and type of arbitration. In that sense, since there is no violation of good customs and public order, based on the principle of autonomy of the will, the parties involved may agree on the rules of arbitration;

2. Choice of referee. The arbitrator’s choice shall be made by the parties, that may appoint more than one arbitrator;

3. Referees may be experts in the subject;

4. Celerity. After the delivery of the arbitration award, a second merit analysis will not be accepted, reducing the reasonable duration of the process;

5. Confidentiality. Unlike the judicial process, the parties may request confidentiality during the process

of arbitration, which will be enacted immediately, without going through a value judgement;

6. Principles of contradictory and broad defense. The arbitration does not prevent the participation of the parties, guaranteeing the contradictory and broad defense;

7. Economy. An arbitration procedure may be economically more advantageous for the parties.
In this sense, the option for the arbitration process shows that the parties have chosen this alternative means of conflict resolution, aiming at maintaining a relationship between them.

On the other hand, in spite of the above mentioned advantages, there are also aspects that can reduce the efficiency and effectiveness of the arbitration procedure:

1. Lack of coercive power. In case of non-compliance of the arbitration award, the parties must resort to the Judiciary to enforce said decision;

2. Risk of annulment. The arbitration procedure may be annulled in the procedural scope, when irregular;

3. Suspicion of the referee. Once the arbitrator is chosen by the parties, there is a risk of choosing a partial arbitrator;

4. Economy. Depending on the case, the arbitration process may be more expensive than a judicial proceeding.
It is worth mentioning that, in order to reduce the processing time of the judicial lawsuit, a goal was created in the Labor Court as a whole, so that the time for processing the cases was reduced. [2]

This is because, in average, the duration of labor proceedings is 5 years, while, in arbitration, the resolution of conflicts takes from 8 to 18 months.

Based on the cultural background mentioned above and the quite recent introduction of arbitration in the labor sphere, there is much instability and legal insecurity to be confident enough while submitting dispute resolutions arising out of the employment agreements to the arbitration chambers.

Finally, there is the figure of mediation, which aims, through a mediator, to “recover” the dialogue between the parties, fomenting negotiations until, spontaneously, they reach an agreement in a friendly way.

It happens that mediation (Law No. 13.140/2015) is not applied to the labor proceeding, as it is a mechanism that resembles the conciliation in the way it is already adopted by Labor Courts, being available to the parties at any time during the due course of the lawsuit, according to article 764, of Brazilian Labor Code: *“The individual or collective lawsuits submitted to the Labor Courts’ ruling will always be subject to conciliation.”*

The single paragraph of article 42, of the aforementioned law, stipulates that, in the labor sphere, mediation in labor relations shall be regulated by a proper law, which, to date, has not occurred.

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[1] http://www.tst.jus.br/web/estatistica

[2] For the year of 2017, the target was 200 days for Lower Courts, 200 to 300 days for Regional Courts and 410 days for the Superior Court.