USING ARBITRATION TO RESOLVE LABOR DISPUTES

The use of arbitration in the resolution of labor disputes is a reality in Brazil and there are already laws that guarantee the use of these procedures in different situations. CAMINTER may use arbitration to resolve labor disputes in other countries, but must first review local laws to determine if there are any prohibitions or limitations on the use of arbitration.

As a result, arbitration, which was accepted by many labor courts around the world only in terms of collective bargaining, is now also accepted in individual claims by employees in several countries.

This change led to large, already consolidated arbitration chambers, such as the International Center for Arbitration and Mediation (CAMINTER), **to open space for labor arbitration and gave rise to several new chambers around the country to deal specifically with the matter, with their own regulations and specifics.**

Like jurisdiction, arbitration is a form of heterocomposition in which a third party is appointed to resolve the dispute between the parties. The difference, however, lies in the fact that, in jurisdiction, the appointment of the third party results from the law, while in arbitration the choice is made by joint indication of the parties.

In addition, the arbitration procedure provides the opting parties with several advantages not seen in a lawsuit, such as being: (i) usually faster; (ii) more specialized (the parties choose one or more arbitrators who are experts in the matters of the demand they intend to discuss, for example, in a discussion involving stock options); and (iii) endowed with secrecy (secrecy may be assigned if the parties so agree).

Arbitration can be concluded in two ways:

A. By arbitration clause: signed based on the will of the parties, which stipulate that, in the event of a conflict between them, they will resort to the arbitration court, and not to the Judiciary. With the existence of the arbitration clause, a negative assumption is created, so that, if one of the parties files a lawsuit having previously agreed an arbitration clause with the other party, the latter may raise the existence of such a negative assumption, the which will lead to the extinction of the process without meritorious resolution, unless it is demonstrated that the will in the agreement of the clause was vitiated, which will imply in its annulment.

B. Arbitration commitment: After the occurrence of the conflict, arbitration is submitted to one or more arbitrators.

Once the arbitration procedure is initiated, it is necessary to observe all the rules of the arbitration itself, the confirmation of the capacity of the participating persons, the object of the arbitration (available property rights), among others.

Among the precautions so that the validity of the labor arbitration concluded is not questioned later, it is also recommended that there is a document in which the employee takes the initiative to institute the arbitration procedure or expresses his express agreement with such measure.

At the end of the arbitration process, the responsible arbitrator renders an arbitration award, which will constitute a judicial enforceable title, being unappealable and may be executed ex officio or executed in the competent court.

Before the Labor Reform, the jurisprudence of the courts did not allow the use of arbitration procedures in individual disputes, invoking, among other arguments, the fact that workers' rights were inalienable and, therefore, incompatible with arbitration. However, when the issue is analyzed from a constitutional point of view, there is no legal prohibition to carry out arbitration in the labor field in individual disputes, even because arbitration is authorized in an infra-constitutional way.

Thus, despite being expressly authorized by law, the use of arbitration in individual disputes, if its procedure is followed correctly and if the peculiarities relating to the Arbitration Law are observed, the arbitration award must have its validity recognized by the Labor Court.

Considering and respecting all the positions that admit or not the arbitration in the individual labor disputes, we are totally in favor of the voluntary application, and by common agreement, of this institute in the individual labor law, which, without a doubt, could make an enormous contribution in the emptying of individual labor claims, especially large ones, of knowledge and information workers, who can bear the procedural expenses/arbitration fees, based on the following grounds:

1. This is a new way of resolving or pacifying conflicts, collective or individual, which should not be ruled out in the Labor Judiciary, on the contrary, it should be privileged, encouraged and made available to the parties that want to use this tool. And that they are able to bear the respective costs/expenses of the arbitration process;

2. In the same way as some scholars understand, that hermeneutics is clear in adding that where the law does not discriminate, it is not up to the interpreter to do so, and we do not find any legal prohibition against the non-use of the arbitration institute in individual labor disputes ;

3. We understand that the institute also does not harm or collide with basic principles of Individual Labor Law, such as Protection and its triple aspect, irrevocability, unavailability, equality, as such principles apply to individual material law and not to procedural or instrumental law work, in which impartiality and the assistance powers of the magistrate must prevail, able to enforce the principle of parity of arms, since he is not a mere stone guest in the process;

4. In this way, arbitration is fully applicable to individual labor disputes, in the same way as the Prior Conciliation Commissions. If any defect arises in the course of the arbitrations, in the same way that it occurs in relation to the Prior Conciliation Commissions, the parties may appeal to the Judiciary to request its nullity;

5. Arbitration generally applies to individual material rights available, subject to the transaction, insofar as the parties seek arbitration only after the termination of the individual employment contract, that is, when the employment contract is dead, it being clear that unavailable labor rights only have shelter in the living employment contract, which has the protective umbrella of Labor Law;

6. When the employment contract is alive, in progress, all individual rights remain, "in full force and effect", which are unavailable and several of them of public order (related to health, medicine, safety and work environment), which no longer occurs when the employment contract is terminated. In this case, the unavailable labor rights, from the moment of termination (death) of the employment contract, are transmuted into "credits", and from there, be the object of a transaction in individual disputes in court, and also of eventual arbitration.
7. It is credible that not every worker will be subject to arbitration, which should be an instrument made available to knowledge and information workers, with inverted or mitigated subordination, who have economic and financial conditions to bear the costs of arbitration , which will not happen with subordinate workers, who depend on the gratuitousness of justice and who are not able to bear the costs of the process, without prejudice to themselves and their family.

Arbitration is an extrajudicial, voluntary and timely alternative procedure between people capable of contracting within the scope of Available Property Rights, without the protection of the Judiciary, when we are faced with an impasse resulting from a contract. The parties elect or accept an arbitrator they trust, subject to the final decision imposed by the Court or Arbitrator, on a definitive basis, since in this modality there is no degree of appeal. With the enactment of this Law in each country and inserted in the contracts, it is mandatory between the parties and the Arbitration Award has the same effectiveness as the Judicial Award, requiring no approval of any nature and there will be no appeal.

There are several reasons for the increasing search for arbitration, as it has many advantages for the parties involved:
Economy, confidentiality and secrecy, choice of headquarters, legislation and language of the procedure, expertise of the chosen arbitrator, flexibility of procedures, celerity in the resolution of the conflict.

1– WHAT ARE AVAILABLE PROPERTY RIGHTS?

These are those rights that the citizen can freely dispose of (Private law) referring to commerce, industry, service provision, rent, condominium, purchase and sale in general, etc. And that do not involve the interest of the Municipality, State or the Union, as these are unavailable.

2- WHAT TIME DOES YOU HAVE TO SOLVE AN ISSUE IN CAMINTER?

In the absence of the parties and the arbitrator having agreed another term, the

demand must end in 180 (one hundred and eighty) days in accordance with the Law.

3 – WHAT IS THE EFFECTIVENESS OF THE ARBITRAL AWARD?

The Arbitration Award has the same effectiveness as the sentence handed down by the Judiciary, and if it is condemnatory, it constitutes an enforceable title.

4 – WHAT TO DO TO ADOPT ARBITRATION?

It is necessary that in the contracts signed between the Parties, they make the provision that, if there is any dispute arising from its execution, it will necessarily be resolved by the Arbitration Court. This provision, called the Arbitration Clause, is mandatory between the contracting parties, so that if any dispute arises in the course of the execution of the contract, it will have to be resolved by the Arbitration Court and they will be obliged to comply with the provisions of the contract, not being able to file a lawsuit.

5 – WHAT IS A COMMITMENT CLAUSE?

Arbitration Clause is a clause contained in contracts involving negotiable Law, where the parties voluntarily establish that future and eventual conflicts arising from said contract will be resolved by CAMINTER (International Arbitration and Mediation Center).

6. WHAT ARE THE ADVANTAGES OF RESOLVING DISPUTES THROUGH ARBITRATION?

a) Speed: the arbitration will resolve the issue within the period set by the parties and, if nothing is provided for in this regard, the law determines that it will be within 6 (six) months;

b) Confidentiality: the arbitration is confidential. Nothing that is dealt with may be disclosed to third parties. The parties and the arbitrators shall maintain confidentiality; differently, therefore, from the judicial process which is public.

c) Expertise: the arbitrator may be an expert in the matter. As a result, expertise may be waived, because the arbitrator has the professional ability to understand and decide the issue.

d) The possibility of being able to follow the Procedure and speak directly with the

Arbitrator.

e) The parties cannot appeal to the judiciary in the event of disagreement with the award.

7. CAN A PARTY REFUSE TO INSTITUTE ARBITRATION WHEN THE AGREEMENT HAS A COMMITMENT CLAUSE?

Not. The arbitration clause agreed upon is mandatory and binding. The matter cannot be taken to the Judiciary.