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ARBITRATION IN INDIVIDUAL LABOR AND EMPLOYMENT CONFLICTS: A CONSTITUTIONAL AND LOGICAL-SYSTEMATIC INTERPRETATION OF CLT ARTICLE 507-A

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Abstract: This study seeks to present a brief analysis of article 507-A, added to the Consolidated Labor Laws (CLT) by Statute 13,467/2017 (Labor Reform Act), which provides the possibility of inserting an arbitration clause into individual employment contracts, as long as the presence of this clause is derived from the initiative of the employee themself or has their express agreement. The main purpose is to interpret this new provision in accordance with the 1988 Brazilian Federal Constitution, the Arbitration Act and the case law.

Keyword : Labor Reform; Arbitration; Individual labor conflicts.

1. Introduction

Article 507-A, added to the Consolidated Labor Laws (CLT) by Statute 13,467/2017 (Labor Reform Act), allows for the possibility of inserting an arbitration clause into individual employment contracts, provided that the presence of this clause is derived from the employee's initiative itself or enjoyed his express agreement, in verbis:

> *Art. 507-A. In individual employment contracts whose remuneration is higher than twice the maximum limit established for the benefits of the General Social Security System, an arbitration clause may be agreed provided that it is on the initiative of the employee or through its express agreement, as per the terms foreseen in Statute 9,307, of September 23rd 1996.*

As it is known, the resolution of a conflict via the arbitral route depends on the existence of an arbitration agreement, which can take two distinct forms: an arbitration clause or a compromissum to arbitration.

The arbitration clause (cláusula compromissória) is a legal agreement by which the parties, previously and in advance, undertake to submit conflicts that may arise at some future moment to dispute resolution through arbitration. It is distinct from the compromissum to arbitration, since the latter stipulates the arbitration route for the resolution of pre-existing disputes.

In the light of the provisions contained in article 114, paragraphs 1 and 2 of the 1988 Brazilian Federal Constitution (CRFB/88), previously, in case law, the prevailing view was that arbitration allowed only to resolve collective labor conflicts. According to this understanding, the statute was, however, incompatible with the resolution of individual labor conflicts, since article 1 of the Statute 9,307/96 (Arbitration Act) establishes that only disputes relating to freely transferable property rights were susceptible to resolution through this mechanism.

In order to justify the alleged incompatibility with the resolution of individual labor and employment conflicts, the majority of the judgments were based on the principle of protection, on the lack of balance between the parties, on the state of subordination, on the economic and legal weakness of the employees and on ideas of unwaivability and unrenouncability that govern labor rights. Sub-section I of Individual Grievances (SDI-I) of the Brazilian Superior Labor Court (TST) had already adopted this line of understanding, in accordance with the judgments transcribed below:

> *"Public-interest civil action. Labor Prosecution Office. Chamber of Arbitration. Imposition of obligation not to do. Abstention from practice of arbitration in the sphere of employment relations. [...] 3. Whether from the perspective of article 114, paragraphs 1 and 2 of the Federal Constitution, or in the light of article 1 of Statute 9,307/1996, the*

doctrine of arbitration does not apply as a way of resolving individual labor conflicts. Even regarding the performances deriving from the employment contract susceptible to settlement or waiver, the expression of the will of the employee, individually considered, must be appreciated with natural reservations, and must be examined by the Labour Court or, at the union level, through the execution of valid collective bargaining. Interpretation of articles 7, item XXVI, and 114, head provision, item I, of the Federal Constitution. 4. As a rule, economic weakness implies that the condition of the employee affects individual free will. Hence the need for state intervention or, by express constitutional authorization, of an entity of the representative class of the professional category, as a means of preventing the perversion of the legal and constitutional precepts that govern Individual Labor Law. Article 9 of the CLT. 5. The principle defense of the employee, one of the pillars of Labor Law, renders unviable any attempt to undertake arbitration, in the forms enshrined by Statute 9,307/1996, in the sphere of the Individual Labor Law. This protection also extends to the post-contractual period, covering the ratification of rescission, the determination of sums deriving therefrom and the possible execution of an agreement with a view to release from the terminated employment contract. The pre-eminence of the determination of the rescisory sums, comprising food, at a time of particular weakness of the ex-employee, frequently subject to insecurity related to unemployment, rightly rules out the possibility of adopting the arbitrational route as a means of resolving individual labor conflicts, in the light of the greater threat to the will of the worker in such a scenario. 6. The mediation of a private legal entity – 'arbitration chamber' – whether in the resolution of conflicts, or in the ratification of agreements involving individual labor rights, is not compatible with the model of state interventionism that orients labor relations in Brazil. [...]" (TST, SDI-I, E-ED-RR nº 25900-67.2008.5.03.0075, Justice-rapporteur João Oreste Dalazen, tried April 16th 2015, DEJT May 22nd 2015).

> *"ARBITRATION. APPLICABILITY TO THE INDIVIDUAL LABOR LAW. RELEASE FROM EMPLOYMENT CONTRACT. 1. Statute 9,307/96, in defining the arbitration court as an extrajudicial measure for the resolution of conflicts, restricted, in article 1, the field of action of the doctrine merely to disputes relating to freely transferable property rights. It so happens that, due to the protective principle which informs the individual labor law, and also due to the lack of balance between the parties, labor rights are unwaivable and unrenouncable. On the other hand, the constitutional convention legislator wished to allow the adoption of arbitration only for collective conflicts, in observance of article 114, paragraphs 1 and 2 of the Federal Constitution. Thus, arbitration is not compatible with the individual labor law. 2. It is important to highlight in this case, that arbitration is questioned as a means of general release from an employment contract. In this regard, the case law of this court considers that it is not valid to use the doctrine of arbitration as a support for the ratification of the rescission of an employment contract. Indeed, the ratification of the rescission of an employment contract can only be made by the union of the sector or by the agency of the Labor Ministry, there being no legal provision that this should be done through an arbitral report. Motions for Clarification heard and denied." (TST, SDI-I, E-ED-RR-79500-61.2006.5.05.0028, Justice-rapporteur João Batista Brito Pereira, DEJT March 30th 2010)*

The case law of the Brazilian Supreme Court has adopted the position that the applicability of arbitration as a means of resolving individual labor and employment conflicts is a matter of infraconstitutional nature, related to the interpretation concerning the Arbitration Act provisions, which ended up considering unviable the filling of extraordinary appeals[1]. This would confer greater importance

1.RE 681,357/BA, Justice-rapporteur Luiz Fux, single judge decision June 27th 2012, DJE June 27th 2012. In the same sense: RE 659,893/PR, Justice-rapporteur Ricardo Lewandowsky, single judge decision, June 17th 2014, DJE June 20th 2014; and ARE 730,630/MT, 2nd Panel, Justice-rapporteur Gilmar Mendes, tried June 24th 2014, unanimous vote, DJE August 18th

on the predominant interpretation of the Superior Labor Court of the matter.

In 2015, Statute 13,129 sought to introduce paragraph 4 on the Arbitration Act, aiming to enable the stipulation of an arbitration clause in employment contracts involving an employee who occupied or would occupy the position or role of statutory administrator or director. The provision foresaw, however, that the arbitration clause would only be effective if the employee took the initiative of instituting the arbitration or if it expressly agreed to its being instituted, verbis:

> *Paragraph 4 Provided that the employee occupies or comes to occupy the position or role of statutory administrator or director, in individual employment contracts an arbitration clause may be agreed, which will only be effective if the employee takes the initiative of instituting the arbitration or if it expressly agrees to its being instituted.*

As what regards to adhesion contracts, article 4, paragraph 2 of the Arbitration Act already foresaw that the effectiveness of the arbitration clause (which is to say, the possibility that the clause would produce effects) is conditional before the fact of the adherent's taking the initiative of instituting the arbitration or expressly agreeing to its being instituted[2].

However, the above transcribed article 4, paragraph 4 (the provision which sought to authorize arbitration as a means of resolving individual labor conflicts) was object to a veto signed by the then Vice-President of Brazil, Michel Temer, who followed the recommendation of the Ministry of Labor and Employment. The express reasons for the veto were the following:

> *The provision would authorize the arbitration clause in an individual employment contract. As such, it would also impose restrictions on its effectiveness in relations involving given employees, depending on their occupation. In this regard, it would end up making an undesirable distinction between employees, in addition to using a term not technically defined in labor legislation. As a result,*

2014.

2. Art. 4, Paragraph 2, Statute 9,307/96. In adhesion contracts, the arbitration clause shall only have effectivenss if the adherent takes the initiative of instituting the arbitration or expressly agrees to its being instituted, provided that this occurs in writing in an annexed document or in bold, with the signature, or analyzed specifically in relation to this clause.

> *it would put at risk the generality of workers who could find themselves subjected to the arbitration proceeding.*

With the upholding of the veto, the interpretation gained further force – which was already predominant in the case law – in the sense of the incompatibility of arbitration with individual labor disputes[3].

However, in introducing article 507-A to the text of the CLT, the Labor Reform put into effect by Statute 13,467/2017 reopened the debate regarding the applicability of arbitration as an extrajudicial means of resolving individual conflicts in the labor sphere.

2. The requirements stipulated by art. 507-A of the CLT

The new article 507-A provisions may be analyzed from different perspectives.

According to the wording used, the stipulation of the arbitration clause is allowed in contracts involving employees that receive monthly remuneration greater than twice the sum of the highest benefit paid by the General Social Security System. In practical terms, the provision for the resolution of conflicts by arbitral means shall be possible for employees with remuneration higher than R$11,291.60 (approximately US$ 2,900 in December 2018), according to the values in force in 2018 (Administrative Rule MF nº 15, published in the Official Gazette of January 17th 2018, whose article 2 establishes the welfare upper limit at R$5,645.80).

Unlike the criterion foresee in CLT's article 444, sole paragraph, article 507-A does not condition the possibility of inserting the arbitration clause on the fact of the employee's possessing a higher educational qualification.

The provision also uses the term "remuneration" (a broader concept than that of "salary", used in the cited article 444, sole paragraph), since remuneration encompasses the complex of payments habitually received by the employee, which covers payments in money or in commodities deriving from the employer or third parties. So, in accordance with the literalness of these legislative innovations, the possibility of adopting arbitration shall encompass a larger number of workers than the contractual freedom enshrined by article 444, sole paragraph.

Regarding the reading of the bill in the Chamber of Deputies,

3. On this subject, see VERÇOSA, Fabiane. Arbitragem para a resolução de conflitos trabalhistas no Direito brasileiro. In: MELO, Leonardo de Campos; BENEDUZI, Renato Resende (Coord.). A reforma da arbitragem. Rio de Janeiro: Forense, 2016, p. 483-502.

in justifying the insertion of the provision which allowed for the use of arbitration in individual conflicts, the Deputy Rapporteur ROGÉRIO MARINHO highlighted that he had taken "care not to indiscriminately allow it to all employees, since it is based on equivalence between the parties"[4]. However, the exclusively economic criterion which the legislator opted to adopt (based only on the requirement of remuneration greater than the twice the benefits ceiling of the General Social Security System - RGPS) does not come close to assuring or minimally guaranteeing equivalence between the parties in the negotiation or during the stipulation of the contractual clauses.

Even if the employee receives remuneration greater than twice the benefits ceiling of the RGPS (approximately US$ 2,900 in December 2018), in the vast majority of cases the state of subordination inherent to the search for employment (and the need for its maintenance as the sole or principal source of subsistence) inevitably relativizes and mitigates autonomy in the stipulation of contractual clauses, including in the possible agreement of an arbitration clause. Which is to say, in most cases, the employee will be in no position to effectively negotiate or interefere in the wording of the contractual clauses. In the expression of Anglo-Saxon origin, the contractual proposal of the employee is analyzed basically on a "take-it-or-leave-it"[5] basis.

Note, however, that article 507-A uses the concept of the arbitration clause and foresaw the possibility of its agreement provided that it was on the initiative of the employee or through its express agreement, as per the terms foreseen in Statute 9,307 of September 23rd 1996.

As previously highlighted, the arbitration clause is a legal agreement where resolution is stipulated through the arbitral route even before the existence of any conflict. The wording of the provision added to the CLT – at that time the object of sanction by the Brazilian President – resembles and is inspired, to some extent, by the previously

4. CHAMBER OF DEPUTIES, Special Commission formed to proffer an opinion on Bill nº 6,787/2016, of the Executive Branch, Report of the Deputy Rogério Marinho. Available at: www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1544961, accessed on April 25th 2018.

5. An expression also used by the veteran U.S. Supreme Court Justice, Ruth Bader Ginsburg, on proferring her dissenting opinion in the cases Epic Systems Corp. vs. Lewis, Ernst & Young LLP vs. Morris and National Labor Relations Board vs. Murphy Oil USA, which concerned the possibility of employers inserting arbitration agreements into employment contracts and waiver on the participation of employees in class actions. In a decision proffered on May 21st 2018, by a majority of 5 votes to 4, the Court accepted the validity of the provision regarding the compulsory use of arbitration, with a waiver on the worker's right to appear as a substitute in class actions. The decision, however, did not cover unionized workers. Decision available at: https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf, accessed on May 25th 2018.

mentioned article 4, paragraph 2 of the Arbitration Act according to which, in adhesion contracts, the arbitration clause shall only be effective if the adherent takes the initiative of instituting arbitration or expressly agrees to its being instituted.

The inspiration to the disciplining of adhesion contracts is not accidental, as we shall see below. In most cases, it does not require much effort to discover that the insertion of the arbitration clause derives from a mere imposition of the employer – even if the text of the clause is highlighted or written in a separate instrument, has the worker's signature highlighted or obeys any other formality.

3. The possibility of arbitrating individual labor and employment conflicts

Despite these aspects, with all due respect to those who adopt a contrary position[6], and notwithstanding the imprecisions in the wording of article 507-A of the CLT, nothing in the foregoing up to the present is sufficient to support the idea – prevalent until then – regarding the absolute incompatibility of arbitration with the proper way of resolving individual labor and employment conflicts, notably concerning disputes where credits are discussed deriving from now extinct employment relations. This is because, once a contract is terminated, the rights potentially violated are converted, in most cases, into credit rights. And these rights are duly inserted in the sphere of the waivability of the parties, whether as freely transferable property rights or as proprietarial consequences of unwaivable rights[7]. Such is this the case that the legal system allows – and the Courts also approve and encourage – the settlement of individual labor and employment conflicts.

As IARA ALVES CORDEIRO PACHECO highlights, unwaivable rights are those which are unrenounceable, unignorable and

6. Those who consider article 507-A of the CLT unconstitutional and claim the inapplicability of arbitration to individual employment contracts include, among others, FELICIANO, Guilherme Guimarães [et al]. Comentários à lei da reforma trabalhista: dogmática, visão crítica e interpretação constitucional. São Paulo: LTr, 2018, p. 123-126; and MILANI, Fabio Rodrigo. A inaplicabilidade da cláusula compromissória aos contratos individuais de trabalho. In: DALLEGRAVE NETO, José Afonso; KAJOTA, Ernani [coord.], Reforma trabalhista ponto a ponto: estudos em homenagem ao professor Luiz Eduardo Gunther. São Paulo: LTr, 2018, p. 186-194.

7. For the applicablity of arbitration to individual labor conflicts, see: SANTOS, Enoque Ribeiro dos. Aplicabilidade da arbitragem nas lides individuais de trabalho. In: MIESSA, Élisson; CORREIA, Henrique [org.]. A reforma trabalhista e seus impactos. Salvador: JusPodivm, 2017, p. 891-905; e BERNARDES, Felipe. Manual de Processo do Trabalho. Salvador: JusPodivm, 2018, p. 121-126.

inviolable in relation to which default cannot be induced and confession does not produce effects[8].

On the other hand, regarding labor and employment disputes, the worker can opt not to sue the other party and there is express provision for the statutory limit applicable for the exercise of the right of the corresponding action (article 7, item XXIX, Brazilian Federal Constitution -CRFB/88).

In addition to this, in a labor suit, the application of the doctrine of confession is settled, although articles 345, item II, and 392 of the Civil Procedure Code (CPC/2015), which textually foresee the nonexistence of confession regarding recognizably waivable rights (in this regard, see Precedents 9 and 74 of the Superior Labor Court - TST)[9].

In the Brazilian legal system, there is, moreover, no express prohibition on the use of arbitration in individual labor and employment disputes. Neither is there any provision that restricts the hearing of these disputes exclusively to the Labor Court. As it is known, if the law does not restrict it, it is not up to the interpreter to do so.

By contrast, article 3, paragraph 1, of the CPC/2015, is express in establishing that arbitration is allowed, in accordance with the law, and CLT's article 507-A hereby expressly enshrines the applicability of the doctrine to individual labor conflicts.

Although much less frequent, one similarly cannot ignore the existence of cases where elements of the economic and legal weakness of the employee are revealed in a highly mitigated or rarified manner, such as in cases involving director employees and high-ranking executives of financial institutions or multi-national companies (so-called C-Levels), with substantial monthly earnings and a high level of expertise and technical knowledge in their field of action. As REINALDO DE FRANCISCO FERNANDES highlights, "the greater the autonomy of the employee, the lesser will be the state intervention, which is to say, autonomy is the direct reason for the unwaivability of the rights of the employment relationship"[10].

MAURO SCHIAVI is also emphatic in maintaining that "for some kind of labor or employment contracts where the worker presents more rarified weakness, such as high-ranking employees, arbitration

8. PACHECO, Iara Alves Cordeiro. Os direitos trabalhistas e a arbitragem. São Paulo: LTr, 2003, p. 122.

9. According to REINALDO DE FRANCISCO FERNANDES, "in addition to the inapplicability of confession, another premise of unwaiverable rights is the nonexistence of limitation on the exercise of the right of action and its precepts." (FERNANDES, Reinaldo de Francisco. O direito do trabalho como direito (in)disponível e a autonomia da vontade nos contratos de trabalho. In: MANNRICH, Nelson; FERNANDES, Reinaldo de Francisco [coord.]. Temas contemporâneos de Direito do Trabalho. São Paulo: LTr, 2016, p. 194).

10. FERNANDES, Reinaldo de Francisco. Op. cit., p. 198.

may be used, provided that the worker's adherence is spontaneous, and it follows the termination of the employment contract"[11].

Arbitration, as it occurs in numerous other countries, can make important contributions to the resolution of individual labor and employment disputes, especially in cases concerning highly specialized subject, when the parties may elect arbitrators who possess a high degree of technical knowledge about a given area of knowledge. The doctrine may also assure confidentiality to the proceeding, which shall benefit the preservation of the intimacy and privacy of those involved, in addition to preventing damages to employees that wish to relocate in the labor market. The swiftness and unappealability of the decisions are also aspects which, in many cases, can offer advantages to the arbitral proceeding as an effective and efficient way of resolving individual labor conflicts.

AMAURI MASCARO NASCIMENTO and SÔNIA MASCARO NASCIMENTO highlight that the use of arbitration as a heteronomous mechanism for resolving conflicts is present in almost every country, although to a greater or lesser extent, "its being difficult to find a country where labor conflicts cannot be decided by these means"[12].

As such, despite being possible to criticize the wording and criteria adopted by article 507-A from different perspectives, we believe that arbitration, in principle, is a valid way of resolving individual labor conflicts which discuss, following the termination of the employment contract, rights located in the sphere of the waivability of the parties (whether waivable rights or the financial consequence of unwaivable rights). We agree with the opinion of the Portuguese jurist MANUEL BARRADAS, for whom "clearly, labor rights, disputes over which are submitted to arbitration after the labor relationship has terminated and which have a merely economic or proprietarial nature, are susceptible to resolution by arbitration"[13].

It thus remains to proceed to the analysis of the best interpretation to be conferred on the terms of the new provision included in the CLT.

4. Employment contracts and adhesion contracts: the requirements of the employee's initiative or its express agreement

In labor matters, clearly, the use of arbitration will require extra care and caution, above all due to the underlying principles inherent to this legal field.

11. SCHIAVI, Mauro. A reforma trabalhista e o processo do trabalho: aspectos processuais da Lei n. 13.467/17, 2. ed. São Paulo: LTr, 2018, p. 80.

12. NASCIMENTO; Amauri Mascaro; NASCIMENTO, Sônia Mascaro. Curso de direito processual do trabalho, 29th ed. São Paulo: Saraiva, 2014, p. 53.

13. BARRADAS, Manuel. Manual de Arbitragem. Coimbra: Almedina, 2010, p. 134.

As previously stated, the exclusively economic criterion which the legislator opted to adopt in article 507-A (whose scientific ground is not clear, based only on the requirement of remuneration higher than twice ceiling of the RGPS) does not come close to minimally assuring or guaranteeing equivalence between the parties in the negotiation or in the stipulation of the contractual clauses, especially regarding the possible inclusion of an arbitration clause, agreed before the effective existence of a conflict.

Even if it involves an employee with remuneration greater than R$11,291.60 (approximately US$ 2,900 according to the exchange rates in force in December 2018), an employment contract does not cease to be, with rare exceptions, a true adhesion contract, without greater freedom or margin for interference of the worker in the stipulation of its clauses. As MAURICIO GODINHO DELGADO and GABRIELA NEVES DELGADO highlight, an employment contract is probably the most important adhesion contract known to the contemporary economic and social system[14].

It is no accident, as has been previously seen in this study, that the wording of article 507-A sought inspiration in the discipline of adhesion contracts (article 4, paragraph 2, of the Arbitration Act), in establishing the possibility of stipulating an arbitration clause provided that this is on the initiative of the employee or through its express approval, as per the terms foreseen in Statute 9,307, of September 23rd 1996.

Note that the provision added to the CLT makes express reference to the discipline of Statute 9,307/96 (Arbitration Act). Moreover, it establishes the requirements of the employee's initiative or its express agreement, without, however, establishing parameters for the fulfilment of these requirements, which could lead to diverse interpretations, and consequenlty, considerable legal uncertainty.

Due to the fact that an employment contract is, as a rule, an adhesion contract, and according to the logical-systematic interpretation – made in reference to the provision of article 4, paragraph 2 of the Arbitration Act –, we believe that the employee's initiative or its express agreement are not mere requirements of validity of the arbitration clause (to be fulfilled at the time of the signing of the legal business), but rather a condition of its efficacy (understood as the capacity of the arbitration

14. DELGADO, Gabriela Neves; DELGADO, Mauricio Godinho. A reforma trabalhista no Brasil: com os comentários à Lei n. 13.467/2017. São Paulo: LTr, 2017, p. 158 and 192. In the same regard, commenting on the lack of real freedom in the agreement of the arbitration accord, ANTONIO UMBERTO DE SOUZA JÚNIOR states that an employment contract is "a true adhesion contract imposed, as a rule, on the worker who, anxious for admission and fearing unemployment, can rarely resist in practice" (SOUZA JÚNIOR, Antonio Umberto de [et al]. Reforma Trabalhista: análise comparativa e crítica da Lei nº 13,467/2017 e da Med. Prov. nº 808/2017, 2nd ed. São Paulo: Rideel, 2018, p. 295).

clause to produce specific effects).

Which is to say, once a conflict of interests has arisen, it will only be possible for the arbitration clause to produce effects (field of efficacy) in two hypotheses: (i) if the initiative for the specific institution of arbitration comes freely from the adhering worker itself; or (ii) if the initiative to institute arbitration comes from the employer, in which case the worker must demonstrate its express agreement to the use of this course to resolve the dispute (agreement must be expressed explicitly and unequivocally before the arbitral judge, since silence, in this case, cannot be interpreted as approval).

In every case, if the worker opts for the judicial route to resolve the dispute, the employers cannot oppose this choice. In other words, according to the interpretation hereby proposed, it is possible to sign an arbitration agreement (arbitration clause or compromissum to arbitration) in the sphere of the individual employment relationship, as foreseen in article 507-A of the CLT. However, this does not prevent the worker from having access to the judicial branch, if it so wishes.

It is noted that article 507-A does not offer any provision regarding which party shall bear the costs of instituting and realizing the arbitral proceeding. Moreover, in accordance with article 13, paragraph 7 of the Arbitration Act, the arbitrator or arbitral court may order the advancing of funds for costs and measures that it considers necessary.

Due to the fact that the costs of the arbitral proceeding are generally considerably higher than those inherent to labor complaints in Brazil, one cannot prevent the worker, if it so wishes, from opting for the judicial route.

This interpretation is consistent with the constitutional principle of access to justice (article 5, item XXXV, CRFB/88), with the guarantee of free and full legal assistance to those that can prove financial insufficiency (article 5, item LXXIV, CRFB/88) and with the principle of protection that orients the Labor Law. It does not prevent, however, the necessary respect for individual freedom and the free will of parties who – in a sincere, valid and spontaneous manner – express the desire to submit a given conflict to resolution through arbitration (which could be an effective, efficient and appropriate way of analyzing the individual dispute).

The interpretation hereby proposed would also avoid numerous discussions about the effective enforceability of the expression of the will of the worker regarding the arbitration agreement. As already highlighted, the signing of individual employment contracts occurs, as a rule, in an environment where there is a lack of freedom for the stipulation of clauses by the worker. In addition to this, the mere observance of a given formality (such as the insertion of a text in bold, the wording of a clause in a separate instrument, or the highlighted

signature of the worker), despite being desirable, is not in itself sufficient to demonstrate free will regarding the sincere and spontaneous choice of the arbitral route, especially in the light of principles of protection and the primacy of reality that orient the Labor Law.

In the sphere of consumer relations, it is highlighted that article 51, item VII, of the Consumer Protection Code (CDC) establishes the nullity of a contractual clause which requires the compulsory use of arbitration[15].

It is opportune and pertinent here to cite the analogy with the Consumer Law, since this is a field where the parties generally negotiate in a situation of legal-economic imbalance and where adhesion contracts are frequent, as occurs in individual labor relations.

The understanding of the Superior Court of Justice (STJ) is no different, which – in interpreting article 51, item VII, of the CDC and article 4, paragraph 2 of the Arbitration Act – has repeatedly conditioned the effectiveness of the arbitration clause on the fact that (i) the adherent itself (consumer) takes the initiative of instituting the arbitration; or (ii) the consumer, at the time of the institution of the arbitration, clearly and explicitly expresses its agreement to the use of this means of resolving the conflict.

The STJ, thus, understands that it is possible to insert an arbitration clause in an adhesion contract derived from a consumer relationship, as foreseen in article 4, paragraph 2 of Statute 9,307/96. However, the effectiveness of the clause (understood as its capacity to produce effects) is conditional on the fulfilment of one of the previously mentioned conditions (initiative of the consumer to institute arbitration or demonstration of its express agreement). In all cases, in the light of the prohibition on clauses that require the compulsory use of arbitration (art. 51, VII, CDC), one cannot prevent the consumer from having access to the judicial branch, if it so desires (article 5, item XXXV, CRFB/88).

It is noted that, according to the STJ, the initiative for the specific institution of arbitration must come freely from the consumer (adherent) itself or, if such initiative comes from the supplier, the adherent must demonstrate its express agreement to the use of this means to resolve the dispute (agreement must be expressed in an explicit, emphatic manner without defects before the arbitrator, since silence, for the STJ, cannot be interpreted as approval).

FELIPE BERNARDES notes that the text of article 507-A of the CLT – though it foresees in an atechnical manner the possibility of an arbitration clause "on the initiative of the employee" – is very similar to the wording used by the STJ in their decisions, and goes as

15 Art. 51. Contractual clauses are null, by force of law, regarding the provision of products and services, which: VII – order the compulsory use of arbitration.

far as to say that the new public sector provision sought inspiration in the case law of the cited Superior Court[16].

Indeed, considering the similarity of the requirements regarding the initiative of the adherent party (offeree) regarding the institution of arbitration or the manifestation of its express agreement (art. 507-A of the CLT and art. 4, paragraph 2 of the Arbitration Act), and considering the similar characteristics between the contracts involving employment relations and those regarding consumer relations (generally marked by the legal vulnerability of one of the parties), the analysis of the case law already developed in the sphere of the STJ acquires great importance and can serve as a valuable interpretative reference for the labor area.

In this regard, to confirm the interpretative criteria described above, I shall proceed to transcribe some important judgments made by the STJ regarding the existence of arbitration clauses in adhesion contracts and in consumer relations:

> *"[...] 6. Thus, the institution of arbitration by the consumer binds the supplier, but the opposite is not true, since the filing of arbitration by the offeror depends on the express ratification of the vulnerable offeree, its not being sufficient to accept the clause made at the time of the signing of the adhesion contract. As a result, any form of abuse is avoided, inasmuch as the consumer holds, should he so wish, the power of freeing himself from the arbitral route to resolve a possible dispute with the service provider or supplier. The refusal of the consumer does not require any motivation. His filing of an action in the courts will amount to a tacit refusal (or renunciation) of the arbitration clause.7. Thus an arbitral clause is possible in an adhesion consumer contract when it is clear that it is not imposed by the supplier or the vulnerability of the consumer, and when the initiative for its institution occurs from the consumer or, in the case of the initiative of the supplier, it expressly agrees with or ratifies the institution, removing any possibility of abuse.8. In this hypothesis, the records reveal an adhesion consumer contract where an arbitration clause was stipulated. Despite its initial manifestation, the mere filing of this action by the consumer is sufficient to demonstrate its disinterest in adopting arbitration –*

16 BERNARDES, Felipe. Op. cit., p. 125.

there would be no posterior enforceable ratification of the clause [...]" (STJ, 4th Panel, Special Appeal nº 1,189,050/SP, Justice-rapporteur Luis Felipe Salomão, tried March 1st 2016, unanimous vote, DJE March 14th 2016).

"[...] 5. Article 51, item VII, of the CDC limits itself to prohibiting the prior and compulsory adoption of arbitratrion at the time of the signing of the contract, but does not prevent, subsequently, in the light or a potential dispute, there being consensus between the parties (particularly regarding the acquiescence of the consumer), the institution of the arbitral proceeding. 6. In the hypothesis under judgment, the attitude of the appellant (consumer) in filing the principle action before the state court, evidences, though implicitly, its disagreement with submitting to the arbitral proceeding, preventing, thus, as per the terms of article 51, item VII, of the CDC, the prevalence of the clause that imposes its use, given that it would have occurred compulsorily." (STJ, 3rd Panel, Special Appeal nº 1,628,819/MG, Justice-rapporteur Nancy Andrighi, tried February 27th 2018, unanimous vote, DJE March 15th 2018).

"[...] It can be seen on pages 13-35 (e-STJ) that the contract attached to the records is an adhesion contract. As such, the understanding of the lower court is in accord with the case law of this court, in the sense that one can only contemplate the effectiveness of the arbitration clause foreseen in an adhesion contract if the consumer takes the initiative of instituting the arbitral proceeding, or if it subsequently ratifies its institution, at the time of the specific dispute, confirming the intention of the previous decision. [...]" (STJ, Special Appeal nº 1,649,252/GO, Justice-rapporteur Marco Aurélio Belizze, single judge decision, February 10th 2017, DJE March 8th 2017).

"1. With the promulgation of the Arbitration Law, three regulations with different degrees of specificity come to harmoniously coexist: (i) the general rule, which obliges observance of arbitration when

agreed by the parties, with derogation of state jurisdiction; (ii) the specific rule, containted in article 4, paragraph 2, of Statute 9,307/96 and applicable to generic adhesion contracts, which restricts the efficacy of the arbitration clause; and (iii) the even more specific rule, contained in article 51, item VII, of the CDC, which applies to contracts deriving from consumer relations, whether adhesion contracts or not, imposing the nullity of any clause that determines the compulsory use of arbitration, even if the requirements of article 4, paragraph 2, of Statute 9,307/96 are satisfied. 2. Article 51, item VII, of the CDC limits itself to prohibiting the prior and compulsory adoption of arbitration, at the time of the signing of the contract, but does not bar, in the light of a potential dispute, there subsequently being consensus between the parties (in particular, the acquiescence of the consumer), an arbitral proceeding's be instituted. (...)" (STJ, 3rd Panel, Special Appeal nº 1,169,841/RJ, Justice-rapporteur Nancy Andrighi, tried November 6th 2012, unanimous vote, DJE November 14th 2012)

5. Necessity of effective existence of a conflict of interests and of a doubtful legal relationship

The use of arbitration in the resolution of individual employment conflicts will also certainly be the object of broad discussion in the legal literature and in the decisions of the Brazilian courts. As HOMERO BATISTA affirms, "there will be great judicial controversy in this regard, bearing in mind that, in analogous cases, the Labor Courts did not accept this alternative way of resolving conflicts, believing that labor credits are located in the context of unwaivable rights, a subject immune to arbitration as determined by Statute 9,307/1996"[17].

However, in adopting current jurists' opinion, which allows, in principle, for arbitration to be used in the resolution of such conflicts – notably those relating to already extinct labor relations where only freely transferable property rights or proprietary consequences of unwaivable rights are discussed –, it becomes necessary to establish an interpretation that systematically analyzes and harmonizes the content of article 507-A of the CLT with the terms of the Arbitration

17 SILVA, Homero Batista Mateus da. Comentários à reforma trabalhista. São Paulo: Editora Revista dos Tribunais, 2017, p. 70.

Act (particularly its article 4, paragraph 2), with the constitutional principle of access to justice (article 5, item XXXV, CRFB/88), with the guarantee of free and full legal assistance to those who can prove financial insufficiency (article 5, item LXXIV, CRFB/88), and with the underlying principles inherent to the Labor Law.

In the light of the revocation of article 477, paragraph 1 of the CLT by the Labor Reform Act[18], it is also important to highlight that the doctrine of arbitration and the arbitration courts cannot serve, in any case, to enable the perpetration of frauds. The choice of the arbitral route obviously presupposes the effective existence of a conflict of interests, which may obtain an appropriate, swift and effective solution through this mechanism.

The search for arbitration with the simple purpose of awarding severance pay and obtaining general release regarding the terminated contract – in order to avoid and hamper prevent any subsequent discussion of labor rights – is a practice that clearly suffers nullity, and, as such, must be suppressed.

The enthusiastic authors of arbitration themselves had already recognized the impossibility of using the institution for the simple discharge of severance pay. See, in this regard, the opinion of the jurist ANA LÚCIA PEREIRA:

> *"[...] submitting severance pay to arbitration is to render clear and unequivocal the duress and defect of the consent, given that the employee has no alternative. He is not being given any alternative to choosing, or not choosing, arbitration, since if we consider severance pay as being an alimentary sum, indispensable to his survival until he receives a new salary, the employee will not have the option of saying that he doesn't agree to the arbitration. So, arbitration must effectively be used as a choice so that the employee can claim its pendencies, in the same way that it would if it were appealing to the Labour Court, having already also received its severance payment, FGTS (Workers Severance Guarantee Fund) withdrawal bills and its unemployment compensation. [...]"*[19]

18. Article 477, paragraph 1, of the CLT, provided that a request for dismissal or receipt of release from the termination of an employment contract, signed by an employee who has performed over one year of service for the company, shall only be valid when done with the assistance of the respective union of the professional class or with the authority of the Labor Ministry.

19. PEREIRA, Ana Lúcia. Considerações sobre a utilização da arbitragem nos contratos

It is worth recalling that, in the recent past, Statute 9,958/2000 introduced to the CLT articles 625-A to 625-H, providing the possibility of the resolution of extrajudicial labor disputes through so-called "Prior Conciliation Commissions" ("Comissões de Conciliação Prévia" - CCPs), to which was assigned jurisdiction to seek conciliation regarding individual labor conflicts. According to the wording of article 625-E, sole paragraph of the CLT, the conciliation term drafted before the CCP shall have general discharging efficacy, except regarding expressly reserved sums.

However, it was not uncommon to use the doctrine in a distorted manner, as an instrument for fraudulent practises, where agreements were duly ratfiied when there were not even disputes, let alone mutual concessions. As such, in practice, the CCPs were often used as a simple means of seeking to obtain the desired general discharging effectiveness.

In view of this situation, it was not unusual for case law to determine the invalidity of agreements signed before CCPs, as can be verified from the judgments transcribed below:

> *"PAYMENT OF TERMINATION SUMS BEFORE THE PRIOR CONCILIATION COMMISSION. PERVERSION OF THE DOCTRINE. FRAUD EVIDENCED. NULLITY OF THE AGREEMENT. The purpose of the prior conciliation commissions, instituted by companies and unions, is to seek to conciliate individual labor conflicts, in the strict terms contained in article 625-A of the CLT. Effectively, they cannot function as a ratifying instance of termination. Once fraud is characterized, the nullity of the agreement must be declared. Ordinary appeal denied." (Regional Labor Court – TRT–6th Region, 3rd Panel, RO nº 0001891-29.2015.5.06.0102, Judge-rapporteur Ana Catarina Cisneiros Barbosa de Araujo, tried June 5th 2017, publication June 8th 2017)".*

> *"ACCORD BEFORE THE PRIOR CONCILIATION COMMISSION. INVALIDITY. INDISPENSABILITY OF THE EXISTENCE OF FUNDS OF DUBIOUS OR CONTROVERSIAL STATUS. IMPOSSIBILITY OF USE OF PRIOR CONCILIATION COMMISSION MERELY FOR THE PAYMENT OF RESCISSORY FUNDS. The Prior Conciliation*

individuais de trabalho. Revista de Arbitragem e Mediação, São Paulo, v. 23, Oct-Dec. 2009, p. 104.

> *Commission constitutes a means of resolving labor disputes, which possesses effectiveness to terminate obligations, but, for this purpose, the agreement signed must be valid, which is not the case here. The agreement constitutes the resolution of the conflict between the parties, through the mutual concession of the litigants. Thus, for the transaction to be characterized, it is necessary that the matter discussed is controversial. Acording to Dorval Lacerda, cited by Arnaldo Süssekind, a transaction 'is a legal act whereby the parties, making reciprocal concessions, terminate litigious or doubtful obligations' (A renúncia no direito do Trabalho, 1943, págs. 91, 179 e 180, apud Instituições de Direito do Trabalho, 20th edition, São Paulo, Editora LTr, 2002, p. 207). Thus, the doubt or controversy regarding the intention of the party constitutes a requirement indispensable to the validity of the transaction." (Regional Labor Court – TRT-2nd Region, 4th Panel, RO nº 0002520-43.2011.5.02.0073, Judge-rapporteur Ivani Contini Bramante, tried Dec. 9th 2014, publication January 9th 2015).*

In regulating the law, the Ministry of Labor and Employment issued Administrative Ruling nº 329/2002, which established the following understanding:

> *Art. 11. The conciliation must restrict itself to conciliating rights or controversial payments. Sole pargraph. The portion owed by way of FGTS (Workers Severance Guarantee Fund) cannot be the object of the settlement, inlcuding the fine of 40% on all the deposits due during the validity of the employment contract, as per the terms of Statute 8,036, of May 11th 1990.*

Thus, in accordance with case law, and in keeping with the interpretation conferred by the judicial branch itself, an agreement signed before the CCP shall only be valid where, in fact, there was an effective settlement (which presupposes the existence of reciprocal concessions), and not only a waiver of rights or the submission of one party to the other. Obviously, it is still important that there be a litigious relationship and an effective controversy regarding the sums due; the

doctrine cannot serve as a mere means for obtaining general release regarding the extinct contract and, thus, as an obstacle to access to justice.

The analysis of these past experiences proves relevant, in order to avoid the repetition – through new doctrines incorporated into the CLT, as is the case with arbitration – of the same errors of the past, which could generate declarations of nullity and consequent nonuse.

As verified in the experience of the CCPs, the function of arbitration chambers as mere ratifying agents of the termination of employment contracts – without there effectively being a questionable legal relationship, and through the insertion of clauses of general release – constitutes complete and absolute distortion, as well as fraud and flagrant nullity.

If the employer uses this doctrine with such a (deviation from) purpose, potential decisions proffered or agreements signed on an arbitral basis may potentially have their validity challenged before the judicial branch.

6. Conclusion

Once an employment contract is terminated, the rights potentially infringed are transformed, in most cases, into credit rights, with a clear economic bias. And such rights are duly inserted into the sphere of the waivability of the parties, either as freely transferable property rights or as financial consequences of unwaivable rights. The conflicts of interest relating to such rights are, in principle, resolvable through the institution of arbitration.

Regarding the provisions contained in the new article 507-A of the CLT, we understand that, in addition to the fact that the arbitration clause is only possible in contracts involving employees that receive remuneration greater than twice the benefits ceiling of the RGPS, the production of the effects of the clause shall depend on the initiative of the worker to institute the arbitration or to express its clear, express and unequivocal agreement.

In the same sense as the interpretation adopted by the STJ in relation to article 4, paragraph 2 of the Arbitration Act, and article 51, item VII of the CDC, we believe that, following the effective emergence of the conflict, the initiative for the specific institution of the arbitration must freely come from the adherent itself (in this case, the worker) or, if the initiative for the institution of the arbitration comes from the employer or receiver of services, the worker must provide its express agreement with the use of this means for resolving the dispute (the agreement must be explicity and emphatically expressed without defects before the arbitral court, since silence, according to the STJ,

cannot be interpreted as approval).

In other words, the employee's initiative or the communication of its express agreement (requirements established in article 507-A of the CLT) are not mere requirements of validity of the arbitration clause (to be fulfilled on the signing of the legal agreement), but rather a condition of its effectiveness (understood as the capacity of the arbitration clause to produce specific effects) and must be fulfilled following the effective emergence of the conflict.

Either way, if the worker opts for the judicial route to resolve the dispute, the employer cannot oppose such a choice.

This interpretation has proven to be consistent with the constitutional principle of access to justice (article 5, item XXXV, CRFB/88), with the guarantee of free and full legal assistance to those who can prove economic insufficiency (article 5, item LXXIV, CRFB/88), with the principle of protection that orients the Labor Law and with the case law of the STJ regarding arbitration in consumer relations (a field also marked by the legal vulnerability of one of the parties). This, however, does not prevent the necessary respect for individual freedom and the free will of the parties – in a valid, sincere and spontaneous manner – to express the desire to submit a given conflict to resolution by the route of arbitration, which can be an effective, efficient and appropriate way to analyze the individual dispute following the termination of the employment contract.

In the light of the revocation of article 477, paragraph 1 of the CLT by the Labor Reform Act, the doctrine of arbitration and the arbitral chambers cannot enable, in any case, the perpetration of frauds. The choice of the arbitral course clearly presupposes the effective existence of a conflict of interests and of a doubtful legal relationship, where transferable rights or financial consequences of non-transferable rights are discussed.

The search for arbitration by employers, with the simple aim of paying termination sums and obtaining a general release regarding the extinct contract – in order to avoid rendering unviable any subsequent discussion, as a simple mechanism for preventing the filing of labor actions – is a practice that possesses clear nullity and, as such, must be opposed. In simple terms, arbitral chambers cannot serve as ratifying agents of contractual rescissions, payments of rescissory sums or a means to restrict access to justice, under penalty of the complete perversion of the doctrine.

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