

The challenges of establishing arbitration as a means to resolve employment disputes

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Topics

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When the article 507-A was added to the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho), many wondered what Brazil's Labor Courts would have to say about the possibility of including an arbitration clause in employment agreements.

The Employment Reform deals with the possibility quite succinctly, imposing only two requirements for the use of arbitration in employment relations: (i) the employee's monthly salary must be at least two times the limit established for benefits under the public social security and pension plan; and (ii) the employment agreement must contain an arbitration clause within the meaning of Law 9.307/1996 (the Arbitration Law).

In the five years since the Employment Reform, the issue of arbitration in employment relations has made its way to the Labor Courts, with the courts being called on both to validate arbitration agreements and to uphold awards made in employment arbitrations.

The first question the Labor Courts address in such cases is whether the requirements under article 507-A CLT have been met: they will determine whether the employee was paid more than two times the limit under the public pension plan and whether the employment agreement effectively contained an arbitration clause. The Labor Courts have taken a firm position that if these two requirements are not met, the dispute between the parties is not subject to arbitral jurisdiction.

Another point that the Labor Courts will generally examine in determining whether an arbitration clause is valid is the nature of the rights at issue in the dispute between the parties. Under article 1 of the Arbitration Law, only disputes involving disposable (i.e. alienable) economic rights may be submitted to arbitration, and it is natural that this question will arise frequently in the Labor Courts since not all employment rights fall within the category of disposable economic rights.

Another issue frequently examined by the Labor Courts is whether the arbitration clause in employment agreements must be “full” – in other words, whether it contains all the elements needed to commence the arbitration immediately – in order to be valid. This issue arises because article 5 of the Arbitration Law provides that “where the parties have referred in the arbitration clause to the rules of an institutional arbitral body or specialized entity, the arbitration will be commenced and processed in accordance with those rules although the parties may establish in the arbitration clause itself or in another document an agreed form for commencing the arbitration.” In other words, there is some question as to whether the arbitration clause must state, at a minimum, how the arbitration proceeding will be initiated –

and generally clauses will refer to the rules of one of Brazil's many arbitration chambers.

If the Labor Courts determine that the arbitration tribunal or arbitrator chosen by the parties does not have jurisdiction for any of the reasons discussed above, they will find that any submission agreement the parties may have made is void, along with any arbitral award or settlement made in the course of arbitration, which will also invalidate any release given by the employee in the course of arbitration. Employees are then free to bring their claims before the Labor Courts.

Five years after the Employment Reform, the use of arbitration to resolve employment disputes is far from settled, and employers should be attentive to both the requirements under article 507-A CLT and the decisions of the Labor Courts when including arbitration clauses in employment agreements.

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