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"WHAT ARE THE LEGAL IMPLICATIONS OF MEDIATION AND ARBITRATION IN BRAZILIAN LABOR COURTS?"

by

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Abstract

The following dissertation explores the legal implications of mediation and arbitration in Brazilian labor courts. It uses a mixed methodology from different sources, such as government data, surveys and literature. The surveys with lawyers had the purpose of highlighting that, although there is a specific law about alternatives for dispute resolution in Brazil, they are not easily implemented and/or haven't been used, as they should have been in comparison with Ireland. Alternatives for dispute resolution come with many benefits that facilitate the process of solving an issue before having to go to court. This should mean that money is saved and, in some cases, the power is with the parts about the decision and there is less formality, secrecy, the judicial system is relieved, and so on.

Introduction

According to the Google dictionary, conflict is "a serious disagreement or argument, typically a protracted one". The Cambridge dictionary says "an active disagreement between people with opposing opinions or principles". So, it could be between two people, a group, or in a larger dimension, such as between countries. The conflict can be born through different ways: politics, status competition, divergence of gender or ethnic hatred, beyond the Marxist theory class of structure. Georg Simmel says that conflict, contrary to what we think, obliges us to recognize each other, rather than putting an end to relationships and interactions.[1] Conflict was illustrated by Constatino (1997) as being like water; if there is too much, it can be as destructive as a flood, and, conversely, if there isn't enough, it limits growth, as in a drought.

So, we can see here that conflict is everywhere. and there is potential to make things change (behaviour, thoughts, positions, so on), not always in a bad way. Conflict is in the essence of the human being.

As already explained above, conflict is everywhere, meaning that it must also be present in a work environment. What were the eight most common causes of conflict indentified in a study that investigated conflict at work between 2000 and 2002? Given below are the most common causes of conflict at work, according to psychologists Art Bell and Brett Hart:

Conflicting Resources: In the work environment, it is important to have access to all kinds of resources to perform the job competently. This means that the resource (e.g. manpower, meeting space, equipment, etc) should be adequate to fulfil the role.

[1] Editora Unesco, published 12/05/2006 (http://editoraunesp.com.br/blog/confira-o-conceito-de-conflito-de-acordo-com-giddens-e-sutton)

Lack of these resources can cause stress and generate conflict between colleagues and / or between the employee and the company. One way to resolve the issue, in addition to providing employees with resources when and where possible, is to teach them how to optimize time and share resources. If this measure does not work, the idea is to talk to the staff together and try to understand what the problem is, how to solve it and what the importance is of resources for the development of their work.

1- *Conflicting Resources*: In the work environment it is important to have access to all kinds of resources to perform the job competently. This means that the resource can be, adequate equipment, more manpower, meeting space, etc.

   The lack of these resources can cause stress and generate conflict between colleagues and / or between the employee and the company. One way to resolve the issue, in addition to promoting employee resources when possible, is to teach them how to optimize time and share resources. If this measure does not work, the idea is to talk to both together and try to understand what the problem is, how to solve it and what is the importance of resources for the development of their work.

2- *Conflicting Styles*: We all have our style according to our personality, experience, and personal needs, which ends up generating a conflict. What we can consider to minimise conflict and prevent it from occurring is checking the characteristics of the employees and, only after that, forming a team. It is important to understand that many times the order of the factors does not change the product, but for the conflict not to act, the parties involved must be as flexible as possible. It is also recommended to encourage employees to take the Myers-Briggs personality test, which may enable one to accept the style of the other.

3- *Conflicting Perceptions*: Here, the key point is to share information with the team, be it good or bad. Once again, we all look at the world through our lens. Lack of information on the part of

some can generate gossip and disputes for territory in the work environment. Office policies can also be a source of conflict. So the advice is to train the team equally (avoid territorial fights) and talk openly with everyone.

4- *Conflicting Pressures*: In a company, jobs are often interconnected; that is, you need a specific person to perform a task so that you can perform yours. Problems occurs when that same person you depend on to start your job is already doing a job for a third party and, added to that, you have a deadline to do your job. In this case, what can be done is to extend the deadlines to relieve the pressure of urgency.

5- *Conflicting Goals*: We can say that in this case, the important thing is to make it clear and well defined to the team or employee what the priority is; for example, if they are asked to perform a certain job, but it must be performed with agility, depth and quality in the analysis (the requests conflict with each other). This conflict resembles the conflict mentioned above, excluding only the urgency.

6- *Conflicting Roles:* When we perform a task or responsibility that is different from the usual ones, or when we think that a certain task should be done by someone else, we are talking about territory and struggle for power. Here again, it is clarity, information, conversation, and definition that can resolve the conflict. Explaining to someone why they were chosen to perform that role and having a team that has established each other's roles clearly can help to ease the pressure.

7- *Different Personal Values:* When the employee is asked to do something that goes against their values, they find themselves in a conflicting situation, since refusing can lead to serious problems such as losing their job or breaking the boss's confidence in them. Make sure you don't put your employee in a situation that will hurt their ethics.

8- *Unpredictable Policies*: A sudden change in rules and policies at work without prior

communication can generate conflicts and resistance from employees. Communication and explanation of why it has changed, what has changed, and how it will be from now on will determine that the adoption of the new measures by employees. Additionally, and after the actual change, be the first to endeavor to comply with it fairly and consistently.[2]

After analyzing each possible cause of conflict, it can be concluded that lack of communication, different perceptions and priorities, power struggles and lack of clarity around the boundaries of expectations are the main causes and the best strategy to correct them are on-boarding, clarity, communication, team building and managing pressure.[3]

It is important to emphasize that knowing how to deal with conflict can bring benefits: Let's see what they are.

1. *Earlier Problem Identification:* Identifying the cause and taking the necessary measures quickly can prevent the conflict from growing and bringing about a much bigger problem in the future. Do not underestimate trivial conflicts; if not properly cared for they can become a fully-fledged conflict.
2. *Better Problem-Solving:* Healthy discussions and a plurality of perspectives can be excellent for finding solutions, but can also generate friction since it is difficult to get everyone to accept an idea, particularly if it doesn't come from the more dominant team. Knowing how to engage team members and use this discussion constructively can be positive for the company. And employees who work on these skills can become a highlight in the organization.

[2] Why it's important and how to do it. Equipped - The Managing Conflict Issue – A free Magazine from Fortress Learning – p. 6 to 9

[3] Why it's important and how to do it. Equipped - The Managing Conflict Issue – A free Magazine from Fortress Learning – p. 6 to 9

3. *Healthy Relationships, Morale, and Commitment:* Avoiding, denying, running away from, hiding from, or neglecting an existing conflict can end a relationship. It is important to create a safe environment where parties can speak and be heard, and that employees recognize that their concerns and issues are taken seriously by their colleagues and management. This creates a strengthened relationship and, for this reason, everyone benefits from the result.
4. *Improved Productivity:* To have a team focused on the work and its functions, instead of work-related tensions, it is necessary to spend time and energy from the beginning preparing the person and team to recognize and manage the different types of conflict.
5. *Personal Growth and Insight*: Conflict can be the path to self-discovery and learning and helps us to know our co-workers too, since we know what kind of reaction they have or may have in a given situation, making us act with better caution or ability to deal with future situations.[4]

[4] 5 Benefits of Workplace Conflict - Kari Boyle, Queen's IRC Facilitator- Publication date: December 2017 – Queens University IRC - https://irc.queensu.ca/articles/5-benefits-workplace-conflict

Aims and Objectives

The aim and objective of this dissertation is to study what the legal implications of mediation and arbitration in Brazilian labor courts are. Despite all the benefits that ADR has brought to society in comparison to action being taken in court, sometimes it is not enough or easy to implement in other countries, such as Brazil.

Throughout this study, we can see the history of a country where social inequality is a reality and all labor legislation was created to protect the employee and control the balance between the labor parties, employee and employer.

So, it will be done that all society has their concerns and unfamiliarity with any points of alternatives for dispute resolution. Also, when we talk about concerns and/or unfamiliarity, we are not only talking about a person with a poor education; it is also possible to find lawyers uncomfortable with the new alternatives that the law nº 13.467/2017 brought in.

Finally, we are going to see that the requirements stipulated in the existing in law make it hard for the law to be implemented.

Research methodology and Methods

Methodology is the science which studies all the different techniques which are used in the process of gaining knowledge. This means “studying a range of methods and identifying if there are limitations or not in their applications” (Costa, 2001, p.4).

The researcher pursues the method from the very beginning of the journey, formulating a problem until a response proves the end of the research. So, we say that it is a set of systematized steps that are utilised in the search for “truth”.

Notice that truth is validated by science once and in an absolute sense it will never reach up. “ After thousands of experiments which have produced consistent outcomes as a scientific theory, just one opposite result can overturn a scientific theory” (Cruz; Ribeiro, 2003, p. 33).

“The science looks to capture and analyze the reality, and the method makes the researcher step up his goals” (Demo, 1985, p.20).

The responsibilities of the method are the transparency and the objectivity of the research. This means that the method translates the way the researcher gets their result, making it possible for other researchers to follow the same steps.

However, the method cannot involve a confusing process. It is important to have a broad approach, and the process is “the scientific application of methodological plan and the special execution of the action” (Cruz; Ribeiro2003, p. 33).

Here are the four operational practices that consecrate the scientific method:

1) Creation of the problem: the curiosity that makes you enthusiastic to research it
2) Indication of the response: It is a priori response to the problem mentioned.
3) Data Collection: data research which will bring the response and confirm the hypothesis.
4) Response analysis: check-up of the viability of the hypothesis found.

However, beyond using the operational practices, it is necessary to choose a specific scientific method responsible for ensuring different ways to get the response needed.

The method of the approach is responsible for the reasoning used in the development of the research, which means “the general procedures that guide the development of fundamental steps in the scientific research” (Andrade, 2001, p. 130-131).

In this dissertation, the inductive approach is used. This method is responsible for generation, but it does not occur via priori response. This means that the induction starts general phenomenon through the experiments and observations, finding a relation between the two phenomena to generate them.

Chapter 1 – The basis of Brazilian labor law

1.1 Introduction

Before entering into each of the legal implications of mediation and arbitration in the labour law in Brazil, it is necessary to understand first the motivations that lead such implications to exist, starting with the historical and implicit principles, and moving on to the understanding of some concepts, the assumptions for such procedures to be valid and effective, the benefits and possible advantages of their use, counterpoints for its application in specific cases, and the legal definitions. Lastly, after having such concerns on the subject, one can understand not only what the implications on labour law are, but also what the reasons are for these implications and the exhaustion of the subject to which it is proposed to address.

1.2 Historical aspects

For each and every analysis involving labour law and its respective purposes, it is indispensable to mention the fundamental characteristic by which it was created. This is paramount in the understanding of its peculiarities, as well as guiding the understanding of how its norms are elaborated and applied in relation to certain circumstances.

There is no way to disassociate the main characteristic of labour law from its principle of greater relevance, since this is the real motivation for the creation of this specific area of Brazilian law. The principle of worker protection's main objective is the protection of the effectiveness of labour standards throughout the National Territory, and its essential purpose is the improvement of workers' social conditions, thus untangling the economic inequalities between employee and employer.

It is clear that social inequality is not a new subject, but the consequences of any of its aspects are updated as society evolves. Therefore, it should be mentioned that, despite being perceived as more of a political than theoretical matter, what is intended is to unravel the importance of conjecturing this scenario thoroughly in order to understand the reasons why some legal institutes tend to work or not in a certain country, state, city or municipality, starting with historical bias, until one can understand the technical aspects and equally indispensable to the subject.

Most issues that resemble the current circumstances of people are directly linked to what has been experienced over time for generations and, as it could not be different, these issues always have repercussions on the evolution of the rights and obligations of the people who live in them. In addition, there are some patterns and/or traditions that are repeatedly practised by people without even noticing why they are taking certain attitudes. However, in this legal system, most laws have a rational motivation, whether linked to moral postures, religion or even tradition, but makes sense to those people in an attempt to seek justice, despite being a subjective concept.

When it comes to labour law in Brazil, it is inherent to the subject to have a full understanding of the evolution of the law based on historical events and consequent unfolding of world-known episodes such as colonization, the enslavement of indigenous people and afro-descendants and, consequently, the less economically favoured. This is the reason why, where working relationships are concerned, the freedom of people is much appreciated in a broad sense, which justifies the protectionist principle mentioned here. One thing leads to another, as is illustrated by the words of the illustrious humanist Américo Plá Rodriguez in his teachings related to the main reason of this principle, and is necessary for the management of the effective rights of workers:

> "Historically, the labour law has arisen as a consequence of freedom of the contract between people with unequal power and economic capacity has led to different forms of exploitation, including the most abusive and unequal ones. The legislator could no longer maintain the fiction of equality existing between the parties

> to the employment contract and leaned towards compensation for this economic unfavourable inequality to the worker with a favourable legal protection. Labour law responds fundamentally to the purpose of levelling inequalities."[5]

It is perceived, therefore, that the attempt for substantial equality, that is, to treat equally the equal and unequal, in proportion to the present inequalities, is already a historical pursuit for which legislators have been seeking both in material law and in procedural law. Professor José Augusto Rodrigues Pinto still mentions this as an ideal (or fertile) field in an attempt for the effective right to assert itself:

> The Procedural Law of Labour, in whose womb individuals are confronted with each other who are unequal by their economic and, consequently, social condition, is a fertile field for its application, because above all, the Labour Process has the obligation to prevail the rule that "all are equal before the law".[6]

1.3 Principles

It is clearly noticed that procedural law, due to being the instrument of material law, has a direct relationship with all principles that involve the labour law, which, like any legal area, covers principles that doctrinally may have some variations in relation to their denomination. However, for this subject, it is appropriate to describe three of the most common subtopics of this same principle by doctrine. Additionally, there may be more consequences, but to guide the scope of understanding related to mediation and arbitration, these three end up becoming the most relevant.

The first is the principle *"in dubio, pro operário"*, also known by respected doctrines in the academy as *"in dubio pro misero"*, which concerns the possible controversies in the law and that, if there is any dichotomy regarding the application of norms related to the right of the employee, then its resolution should tend to be the most favourable to them; that is, from the possible interpretations that could have

[5]RODRIGUEZ, Américo Plá. *Princípios de Direito do Trabalho*. 3 ed. São Pulo: LTr, 2000. P.85.
[6]RODRIGUES PINTO, José Augusto. *Processo Trabalhista de Conhecimento*, São Paulo: Editora LTr, 5ª ed., 2000, p. 51.

influenced the judgment before an established norm, the magistrate should choose the most favourable to the worker.

The second is based on the same idea. However, the application of the most favourable norm for the worker is directed in cases where there are two applicable laws to the specific case, even if it is a deprecated norm. In terms of the hierarchy of laws, it is lower than that of the applied or even posterior, being, of course, both in force.

The third differs from the above, because, although referring to one situation prevailing over another, it brings the specific idea of the application of the most beneficial condition to the worker at the time of the standard use, and it can be understood that the advantages already acquired by workers (in norms present in the national legal system or in those provided in employment contracts or Collective Agreements and Collective Labour Agreements) cannot be subtracted , unless there is already provision in law for any exception.

Although the protection of the worker is remarkable for historical and principled reasons, it can never be forgotten that it is always the duty of the magistrate not to confuse the principles with injustice in pursuit of balance between parties, since the impartiality of the court is an indispensable requirement for the maintenance of justice, as mentioned by Arion Sayão Romita:

> It is not a duty of the law - of any of the branches of law - to protect any of the subjects of every social relationship. The duty of the law is to regulate the relationship in pursuit of the ideal of justice. If, in order to achieve practical action to the ideal of justice, it is necessary to take the adoption of any provision to balance the poles of the relationship, it is rightfully granted to the party in an unfavourable position some guarantee, advantage or benefit capable of fulfilling that requirement.[7]

Considering the above, it must be realized that, in many situations of work justice day-by-day, the application of its principles may not be as simple as it seemed from the beginning. However, for disputes that are brought to the public institution called the Judiciary Power, there is a general

[7]ROMITA, Arion Sayão. *O Princípio da Proteção em Xeque*. LTr- São Paulo: 2003, p. 23.

expectation from all parties that the magistrate will be completely impartial and fair in the fulfilment of his/her duties, performed after an approval of the presentation of evidence and titles that have public appreciation, not only in the strict sense, but also as to the feeling of the citizen who bails out the official courts to request what he/she understands by its right, as well as by the other party that has the expectation of not being wronged by a biased court. Therefore, as one of the greatest historical remnants of the use of a public power to judge cases of whatever nature after long periods of slavery, when considering labour and injustices committed by those who were not officially of the Colonizing Court, which was until then called Metropolis, and the apparent sense that the court really valued justice, despite there being some implicit interests, which was not remarkable to the Colony[8], is the credulity rooted in the Brazilian society throughout all times in which the state holds the status of supreme agent of impartiality.

As meaningful as the principle of protection is to the subject, it is notorious that there are other principles that support mediation and arbitration, which Celso Antônio Bandeira de Melo has defined as:

> Nuclear commandment of a system, true foundation. Fundamental disposition that influences different norms, giving them the spirit and being used as a criterion for their exact comprehension and intelligence, by defining the logic and rationality of normative systems in which gives it the strength and provides harmonic meaning to it.[9]

However, this will be explained here in a more superficial way, so that it can be conjectured.

The Principle of Good Faith, as in all branches of law, should also always be present in any and all labour law demands, whether litigious or not, since it is essential for the maintenance of justice and, therefore, should also be taken into account in every aspect involving the addressed subject.

Another principle that deserves attention is the principle of Confidentiality, which does not strictly

[8]Lilia Moritz Schwarcz; João Spacca de Oliveira. D. João Carioca - A *corte portuguesa chega ao brasil (1808-1821)*. EDITORA COMPANHIA DAS LETRAS. 2007, São Paulo.
[9]MELO, Celso Antônio Bandeira. *Curso de Direito Administrativo*. 7. Ed. São Paulo: Malheiros, 1997.

affect the parties, but all those involved in the modality of conflict resolution elected, according to Article 30 of Law No. 13,140 of June 26th, 2015:

> *Art. 30.*Any and all information relating to the mediation procedure will be confidential in relation to third parties and may not be disclosed even in arbitration or judicial proceedings unless the parties expressly decide differently or when its disclosure is required by law or necessary for compliance with an agreement obtained by mediation. § 1 - The duty of confidentiality applies to the mediator, the parties, their officers, lawyers, technical advisors and other persons of their trust who have, directly or indirectly, participated in the mediation procedure, reaching: I - statement, opinion, suggestion, promise or proposal formulated by one party to the other in the search for understanding for the conflict; II - recognition of fact by either party in the course of the mediation procedure; III - expression of acceptance of a proposal for an agreement presented by the mediator; 25 IV - document prepared solely for the purposes of the mediation procedure. § 2 The evidence presented in disagreement with the provisions of this article shall not be accepted in arbitration or judicial proceedings. § 3 The information relating to the occurrence of a crime of public action is not sheltered by the confidentiality rule. § 4 The rule of confidentiality does not rule out the duty of persons discriminated against in the caput to provide information to the tax administration after the end of mediation, applying to its employees the obligation to maintain confidentiality of the information shared pursuant to Article 198 of Law No. 5,172 of October 25th, 1966 - National Tax Code.[10]

Consequently, for being provided by law such obligation of parties, if disrespected its main consequences may be the legal sanction of damage repair through compensation, as stated in the diploma itself referred herein.

Another principle takes into account the autonomy of the will which, briefly, is based on the freedom in exercise of obligations and legal business guaranteed by the Federal Constitution of Brazil in its fifth article and, therefore, such procedures must be in accordance with the will of the parties, respecting the limits imposed by the fourth Magna Letter. Additionally, Silvio Rodrigues states:

> The Principle of Autonomy of the Will consists of the prerogative conferred on individuals to create

[10]Available: <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13140.htm>Acess - 28.10.2020

> relationships in the orbit of the law, provided they are under the rules imposed by the law and that their ends match.[11]

For the last principle to be mentioned here, we have the Principle of Qualification of the Conciliator, mediator, or judging body, with which, as it could not be different, it is possible to equate the performance of a judge, who must always act impartially and be able to perform his/her function under specific requirements for the function.

In the words of Mary of Narazeth Serpa:

> The third interventor who, through appropriate techniques related to negotiation, directs the parties towards a solution of mutual value. His intervention is neutral and somewhat limited, because his authority is focused on the process itself, and not on the substance of the dispute. [12]

If the latter is not respected, it may cause the nullity of the acts committed, as well as the decisions arising from them.

[11]RODRIGUES, Silvio. Dos Contratos e das declarações unilaterais de vontade. São Paulo: Saraiva, 2007.
[12]SERPA, Maria de Nazareth. *Mediação, processo judicioso e resolução de conflitos*. Belo Horizonte: Faculdade de Direito. UFMG, 1997, p. 162.

Chapter 2 - Mediation

2.1 Fundamental concepts

In addition to adopting a measure or procedure, it is necessary to know what each of them is about. For Brazilian law, it is so important that the concepts of some of the institutes are brought into the law itself that regulates it. However, in some other cases, it is necessary to look for support in doctrines, or, in very rare cases, from other sources of law in such a way that it can be easily understood.

In the present study, more than conceptualizing mediation and arbitration as alternative solutions for resolving conflicts of interest, it is important to understand what the subject is about n addition to specifically looking into each one.

First, it is imperative to mention that conflict exists within what the law calls ‘lawsuits’, which, in its most classical conception described by Carnelutti in 1936 as "the conflict of interests qualified by a resisted claim". It is a concept that is covered by all the doctrines in all areas of law, since conflict, besides being inherent to humanity, is the main motivation for the creation of norms and already translates a primordial concept to the understanding of this, that is, the lawsuit.

To stress the aforementioned classical definition, it is possible to use the words of the brilliant proceduralist of the civil area, Humberto Theodoro Jr. Labour law may well use his words to abstract the concept of the two main elements of this macro concept, which are "interest" and "claim":

> [...]. Carnelluti explains what is of interest to "the favourable position for the satisfaction of a need assumed by one of the parties" and claim, "the requirement of a part of subordination of an interest unrelated to an interest of its own interest".[13]

With the main points, understood as the concepts first brought to the fore, it is necessary to distinguish

[13]THEODORO JUNIOR. Humberto. Curso de direito processual civil. 37 ed. Rio de Janeiro: Forense, 2001. p.31.

the methods of conflict resolution into two important methods also to be conceptualized so that, later, one can arrive at the definition of what a mediation is and, then, what arbitration consists of, conceptually, both under the aegis of Labour Law, although some doctrines mention some other means. The classification adopted here for the formation of reasoning is basically divided into self-composition and heterocomposition, in which the first consists of the solution of a conflict established between the parties themselves, even though the doctrine differs in relation to the need for the presence of a third party or not, for example to only mediate the negotiations or give suggestions, such as mediation. However, the intention here is only to understand the concept and not the doctrinal discussion, whose relevant peculiarities will be addressed when appropriate. In the second mentioned modality, we have the presence of a third party imposing on the parties its decision after the analysis of the arguments presented, or, in other words, it is the exercise of the coercion of an agent whose obligation is to resolve the conflict, which is the modality in which both judicial conflicts and cases in which arbitration is chosen.

There is also a third division called self-protection, in which one party imposes its decision on the other, but it will not be deeply detailed due to being used only in exceptional cases recently. However, it is appropriate here to make a brief mention of it, although there is a minority of scholars who argue that mediation is a form of self-protection, as can be seen from the excerpt below:

> Mediation has the proposal of a third party, but the parties are not obliged to accept. Thus, although there is an understanding that mediation is a form of heterocomposition, it is actually a modality of self-composition, because, with the agreement of the parties involved, the mediator only suggests the ways to resolve the conflict, bringing the parties closer to reaching the solution of the controversy, without imposing any decision.[14]

But, focusing on the understanding of the main elements of the present study, we have the concept of

[14]GARCIA, Gustavo Filipe Barbosa. Curso de Direito do Trabalho. – 7ª. ed. rev. e atual. – Rio de Janeiro: Forense, 2013, p. 857.

mediation, which, for Amauri Mascaro Neto, is:

> Conflict composition technique characterized by the participation of a third party, supraparties, the mediator, whose function is to listen to the parties and formulate proposals.[15]

Or, according to Law No. 13,140 of June 26, 2015, "Mediation is considered the technical activity carried out by an impartial third party without decision-making power, which, if/when chosen or accepted by the parties, assists them and encourages them to identify or develop consensual solutions to the controversy".[16]

Whatsoever, it is a self-composition (or self-protection, depending on the doctrinal current that is intended to be adopted), that nevertheless is assisted by a third party, whose role is to create dialogue and propose solutions with the purpose of reaching a common agreement for all parties, considering the proposals suggested in order to end the conflict, even if they have to resign part of what they believe to be due. The third party may be part of the judiciary or not, although the first hypothesis is more common.

A relevant aspect of mediation is its differentiation from conciliation, as Rogério Neiva explains:

> [...] thus, the difference between conciliation and mediation is given by the criterion related to the level of action of the neutral third party who acts to seek self-composition. By making proposals, we are facing conciliation. If it does not make proposals and only seeks to stimulate dialogue, it is mediation.[17]

In Brazil, for issues related to labour law, mediation tends to be exercised by the Ministry of Labour and Employment through labour delegates or inspectors.

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[15]NASCIMENTO, Amauri Mascaro. *Curso de direito processual do trabalho* 19. ed. São Paulo: Saraiva,1999.
[16]Disponível em<http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13140.htm> Acesso em 29.10.2020.
[17]NEIVA, Rogério. *Direito e Processo do Trabalho Aplicados à Administração Pública e Fazenda Pública*. 2ª Edição. Editora Método, 2015.

Chapter 3 - Arbitration

3.1 Concepts

Moving on to the concept of arbitration, according to Professor Carlos Alberto Carmona, it consists of the following:

> Alternative means of resolving disputes through the intervention of one or more persons who receive their powers from a private convention, deciding with support in it, without state intervention, and the decision is intended to assume the same effectiveness of the judicial sentence – it is made available to whoever it is, to resolve conflicts relating to property rights about which the litigants may have. It is a private dispute settlement mechanism, whereby a third party, chosen by the litigants, imposes its decision, which must be complied with by the parties.[18]

As described, it is an alternative means for conflict resolution which attempts to assist the Judiciary Power to settle disputes in which it is necessary for a judging court to intervene but which, due to high demand, takes an extensive time to process, analyse, and decide. It often becomes ineffective from the point of view of the so-called parties who need a decision that has the same binding for the fulfilment of what has been decided, provided that it complies with the assumptions required by the specific law, as will be discussed below.

Regarding this subject, it is also necessary to objectively approach the concept of an arbitration agreement, which is the most usual modality for fulfilling two purposes. It includes the reciprocal commitment made between the parties, submitting to the arbitral court, and the waiver agreement to state jurisdiction by submitting to decisions issued by arbitrators. Additionally, it covers the concept of arbitral sentence, which is the written document that puts an end to the arbitration procedure related

[18]CARMONA, Carlos Alberto. *Arbitragem e processo: um comentário à Lei nº 9.307/96*. 3ª ed., São Paulo: Atlas, 2009, pg. 31.

to the determined demand and which, according to Art. 26, inc. III of the law that regulates the subject (Law No. 9,307/1996.), the arbitrator, or the arbitrators, "shall resolve the matters submitted to them and shall set the time limit for compliance with the decision, if applicable", and in accordance with Art. 27 of the same law shall decide "on the liability of the parties to the costs and expenses of arbitration, as well as on money arising from litigation in bad faith, if applicable, in compliance with the provisions of the arbitration agreement, if any."

3.2 Assumptions

In order to be able to come to a conclusion that a possible dispute has its solution obtained through an arbitration decision, it must then fulfil requirements, or assumptions, determined by the Law that regulates the subject - Law no. 9,307/1996 - which, in its first article, already makes it mandatory for the parties involved to be capable people - over 18, with discernment and who can express their will (and can also be a Legal Entity) - and restricts their use when it determines that they can use arbitration to settle disputes related to available property rights - relating to goods that can be freely sold or traded because they are untangled. That is, right from the start it is already possible to come across some of the main requirements for their respective use.

Another implicit requirement contained in the first article in the determination of the Law, is that, when the legal text uses the verb "might", it expresses the idea that arbitration is not compulsory, but it is a free choice of the parties and at their discretion.

In the labour sphere, which is the object of this study, arbitration is a relatively new subject, considering that, in 2017, there was a reform in the Labour Laws which brought with it the permission for this method to be used in the resolution of conflicts involving work - Law no. 13.467 of July 13th, 2017 - provided that “at the initiative of the employee or upon his/her express agreement”, under the

terms of the Arbitration Law. Therefore, this is a specific assumption for this area of law. Even in 1990, Georgenor de Sousa Franco Filho predicted that this would be an alternative to think about, according to his words below:

> Through the arbitration solution of labour disputes it will be possible to find the desired peaceful coexistence between the factors of production, since capital and labour in common agreement then assign private third party, independent and exempt, to the pursuit of remedies for healing your disagreements. It is a valid way to obtain the divergences composition between economic and professional categories, and to improve the distribution of wealth. It is not a utopian mechanism. On the contrary, with its good implementation and accurate knowledge of its techniques it could be the formula that is sought for the perfect understanding between the social partners.[19]

One of the great dilemmas faced by legal professionals in this area in Brazil, even after some legislative developments, includes constitutional provision (§ 2 of article 114 of the Constitution) and infraconstitutional legislation, as in Law nº 7.783 / 1989 - Law of Strike, which provides in its article 3 regarding the power to start a strike after collective bargaining has been frustrated or the impossibility of appeals has been verified through arbitration; and, in its article 7, it provides that the stoppages can be governed by arbitration award. In the words of Joel Dias Figueira Júnior:

> (...) it is not enough just to provide constitutional normative and implicit principles access to justice; it is necessary to have mechanisms that generate the realization of subjective rights whose realization is verified through instruments that enable the achievement of the objectives pursued quickly by the author, that is, within a reasonable period of time and compatible with the complexity of the litigation, providing the beneficiary of the measure with the concrete satisfaction of the scope pursued.[20]

Furthermore, the fact that the country still lacks experience in this area, which intrinsically ends up being a requirement for achieving the intended results in a demand without having nullities in the

[19]FRANCO FILHO, Georgenor de Sousa. *A arbitragem e os conflitos coletivos de trabalho no Brasil*. São Paulo: Ltr, 1990.

[20]FIGUEIRA JÚNIOR, Joel Dias. *Arbitragem, Jurisdição e Execução*. 2ª Ed. São Paulo: Revista dos Tribunais, 1999, p. 137.

procedure as a whole, is one of the major obstacles to its effective and comprehensive use, in addition to other legal, instrumental, procedural and theoretical implications.

Chapter 4- Advantages and Disadvantages in ADR

4.1 Advantages in Mediation

Upon its creation, both mediation and arbitration were certainly obtained as features of an alternative form of conflict resolution to the judiciary, considering the various aspects of the legal provision, both because of legal requirements, the volume of the account and complexity of the work. Thus, it becomes undeniable that both have distinct advantages. However, like any other method of resolution, they also have disadvantages which are weighed up when choosing whether or not to use them.

With regard to mediation, as already mentioned, if it is a private mediation, it does not involve the Judiciary, which, in other words, means that there will be no judicialisation of the conflict. This, in itself, already makes the process faster and, if the issue of the conflict deals with available rights, it may already turn into a possible judicialisation of the issue in the case of non-compliance with the obligations imposed, which are already in the execution phase, this way noting that the speed for the respective resolution occurred at a certain moment.

Another positive aspect of private mediation is its ability to direct interference in the decision of the parties if they are in agreement, which does not occur in lawsuits involving the judiciary.

In addition to the points mentioned above, it is also possible to list as some advantages of the mediation method the following: predictability of costs that the demand will cause, since the parties have discretion in the choice of budgets to hire a private mediation, privacy on the issue involved in the lawsuit, because, unlike with a case being heard by the Judiciary (except for cases that are processed in secret of justice), there is no need for the acts performed to be public; the power of regret if the parties decide to close the case at any time, or, eventually, decide to change the method of reaching a plausible solution for both sides; parties are free to establish the presence of a lawyer or not by one, or by both,

parties. This can be evoked at any time, even if there is already a judicial demand. This will not have the effect of ending the case, but it can shorten its duration.

With regard to judicial mediation, this method ends up being the one more used among the alternative means of conflict resolution. It also has advantages in relation to the speed in resolving the dispute if it is fruitful. However, in judicial mediation the advantages of privacy and non-judicialisation, and the benefits arising from them, end up being left out.

4.2 Advantages in arbitration

Now, with regard to arbitration, the speed of processing a case is also one of the most advantageous elements since the impossibility of appeal to the judiciary reduces the duration of the litigation. However, this method is also characterized by informality, flexibility, confidentiality, freedom in relation to the hiring or not of lawyers and the choice of who will be the judge of the conflict, regardless of the location or the competence of the judging body being able, if convenient, to appoint someone that has has complete control over the current issue depending on their choice methods. According to the words of Professor Carmona:

> Direct methods guarantee effective participation of litigants in the acceptance or exclusion of certain names; indirect methods are limited to allowing the choice of who will make the appointment of the arbitrators, granting the parties, however, to establish in advance a spectrum of the qualities they expect to find in the arbitrator to be chosen, making restrictions as to the professional qualification, domain of languages, nationality, place of residence.[21]

It is pertinent to mention that, even if the arbitrators are elected by the parties, impartiality must always be maintained throughout the arbitration procedure so that it is considered legally valid.

[21]CARMONA, Carlos Alberto. op. cit. p. 252

4.3 General disadvantages

To address the unfavourable points regarding the use of alternative methods of conflict resolution, due to the fact that its elements are very convergent, the points will be dealt with comprehensively. The main methods will be covered extensively, including mediation and, later, the arbitration will be dealt with in a particular way, due to there being a specific law that brings limitation since this method of conflict resolution can only deal with available rights, which can also be considered as a significant restriction on its choice. Among other points that will be addressed as a specific subject is the labour rights area, in which there are several unavailable rights, but which can be listed with one of the exceptions as an example of the amounts derived from contractual terminations, although there is a divergence of understandings regarding the nature of this amount.

Therefore, it is essential that the parties know exactly what choices they are making to resolve their disputes. Apparently, alternative means of resolving conflicts always seem to be the best way out, taking into account that they may be faster, apparently at first, more economical and / or even simpler, less bureaucratic and even more civilized, so to speak. However, the very critical points of this option are that they do not follow the traditional way of putting the dispute into the hands of the state so that it can resolve it and, this way, the judicial machine continues to be fuelled by the problems that society takes to it. In this way, it gets the jurisdictional response to which the function is assigned but, in addition to this, the main reason that causes suspicion of litigation in this kind of solution is the lack of control of the procedures and decisions by a widely notable body, such as the state. In other words, the great disadvantage of these methods is the inability of litigants to perceive the transparency of the decision, which takes away some of the credibility of the procedure.

Another point that also deserves be mentioned is in relation to what could once have been considered as an advantage after having an unfavourable decision to what was intended in which there is no higher

level to appeal. It later it ends up becoming a disadvantage to those whose pretensions are not fulfilled by the judgment. Therefore, the uniqueness of the judging body can be interpreted in two different ways: advantage or disadvantage, depending on the perspective in which the tutelage is analysed.

Another point that can be considered unfavourable to those using alternative methods is the possibility that the selection of the mediator, or the arbitrator, although the most apt person for that is always the one looked for, is done by a technically unfit person to decide issues that may arise in the course of analysis of the facts and possible evidence involved in the litigation. In the judiciary, although the judge does not have an expertise in the subject, he has the help of justice staff, usually through medical or technical expertise, depending on the subject, which assist in their decisions even if technical knowledge of a particular subject is required. Thus, the fear of the parties that the selected arbitrator is not qualified enough for a fair and unambiguous judgement is also a point of great relevance, consistent with the resistance of the parties in choosing to resolve a conflict through an alternative method other than the Judiciary.

You can also frame the unfavourable points to the use of these methods with: the disinformation of Brazilian society with regard to the procedures; the difficulty in correctly choosing the medium that best serves both parties; the litigant's fear of following a third party recommendation and ending up being deceived for some reason; and, the party's difficulty in demonstrating that it complies with the requirements required for a particular means of resolution, in addition to possible resistance by law enforcement officials (lawyers and / or magistrates) who are more conservative and inclined to not even mention the possibility of resolving a conflict over a dispute through alternative methods.

4.4 Disadvantages of arbitration

The specific disadvantages of arbitration can be considered the greatest impediment to its use for a

significant proportion of the population, although, depending on the litigation, arbitration is apparently sometimes more economical. However, costs are often quite high, because, in addition to possible costs, fees are also due to the arbitrators, while for a judicial solution access is guaranteed to everyone regardless of their financial condition, and all costs can be exempted if the litigants' situation is proven to be insufficient.

The lack of coercive power in conflicts resolved by alternative means is also a reality since, in the specific case of arbitration, despite the arbitration award being an enforceable title, it will be necessary for the other party to resort to the Judiciary to give effect to the decision, taking the risk that, although it is not possible to analyse the merit of the arbitration award, it may be annulled by the Judiciary if the rules and principles established by Law No. 9,307 / 96 - Arbitration Law, in its articles 32 and 33.

Chapter 5 – Mediation and Arbitration in Ireland

5.1 Mediation

Mediation is a form of assistance to the parties, facilitating communication between them, in an equal, confidential, and impartial way so that they can decide for themselves the best solution to the problem that brought them there. This is one of the alternative forms of conflict resolution.

According to the Mediation Act 2007 - Part 2, it can be described as follows.

Mediation can take place at any time. as long as the parties decide to mediate, it can take place before going to court, during litigation, and even if you have an appeal pending judgment. Since mediation is always a voluntary act, the parties can leave mediation at any time.

The parties can be accompanied by an individual and a legal advisor. The right to independent advice is guaranteed at any time during the mediation.

The mediator usually has a single pre-meeting, which all parties involved in. In this meeting, the mediator explains the main points about the mediation and the ground rules: it is voluntary, communication is facilitated through active listening and giving time to all parties to speak, the mediator is impartial, the exceptions of confidentiality, when it is possible to have a break and also that any decision reached and agreed is binding and enforceable.

Following the instructions of the Commercial Court, cases can be postponed to mediation at the request of one of the parties in a dispute, or the presiding judge can order a case to be postponed for mediation to occur (adherence to the request is voluntary, but the parties must be rationally analysed so as not to suffer future consequences). It is important to note that the county court judge or county clerk in a case progression hearing may postpone certain civil proceedings for a period not exceeding 28 days to allow the parties to use mediation, conciliation, and arbitration or any other proceeding dispute settlement to

determine the process issue.

The Commission agrees that the best strategy for good business and dispute management is to contain an ADR clause before the problem arises. The fact that there is an ADR clause does not detract from the nature of the procedure's volatility since it was present when the parties agreed to place it in the contract. However, it must be well written to be efficient. That's mean the parties should ensure that they incorporate contract-specific matters to reflect their own needs.

The Workplace Relations Act 2015, which was enacted on 1st October 2015, made major changes to primary employment and industrial relations legislation going to WRC, where the process is simplified and accessible, so passing on the functions that the Labour Relations Commission (LRC) was previously responsible for, including the Rights Commissioner Service, the Equality Tribunal, the Employment Appeals Tribunal (EAT) and the National Employment Rights Authority (NERA).

The main function of the WRC is to facilitate the improvement of workplace relations, provide information to the public, promote and encourage compliance with the relevant laws, and so on.

It is particularly suited to disputes involving individuals or small groups of workers who find themselves dealing with situations which may involve the following: interpersonal differences, conflicts, difficulties in working together, breakdown in a working relationship, issues arising from a grievance and disciplinary procedure (particularly before a matter becomes a disciplinary issue).

5.2 Arbitration

As Manfield has noted: the definition of an ‘arbitration’ merely provides clarification that arbitration includes both an international commercial arbitration and a domestic arbitration, which is an arbitration other than an international arbitration commercial. [22]

Arbitration is, perhaps, best defined as an extra-judicial legal mechanism for resolving disputes by referring them to a neutral party for a binding decision or ‘award’.[23] In other words, arbitration is an alternative dispute resolution that occurs when in a process agreed between parties in which the dispute is submitted to one or more arbitrators who issue an award, in an activated way, allowing parties to resolve their problems without having to take them to the Court. It is important to say that the third person is an arbitrator, who enforces the decision as being final and binding upon the parties.[24] Furthermore, these agreements have an extrajudicial mechanism with the purpose of allowing the parties and individuals who have signed contracts to have the result of regulating their commercial and contractual relations. It is emphasized that not every object of the main contract, and also the wording of their contractual provisions, will have clauses that despite trying to bind the parties to an obligation to submit to an arbitration dispute may not be effective, thus not forming a procedure or constitute 'an agreement' within the meaning of the Arbitration act 2010, which usually occurs in so-called valuation-type agreements. Here, the discussion is about the function performed; that is, if this function is performed by a natural arbitrator, whether it is necessary to hire a specialist or whether it is necessary to hire a specialist to analyze the technical issue in the substantive contract. The Arbitration Act 2010 has provisions and protection that apply only in 'an agreement', and one of the parties can verify in the

[22] Mansfield, Arbitration Act 2010 and Model law: A Commentary (Dublin: Clarus press, 2010), p.11.
[23] Dowling- Hussey, Arran and Dunne, Derek, Arbitration Law, second edition, p. 1 and 2.
[24] Dowling- Hussey, Arran and Dunne, Derek, Arbitration Law, second edition, p. 2.

courts if the dispute resolution procedure used in the dispute actually followed the parameters mentioned in the Act 2010.

There is interest in knowing which mechanism will be followed in the dispute resolution of a contract, analyzing what is foreseen in the agreement, the will of the parties and the objectives of the clauses. With this, we may have an arbitration or another ADR. It is important to say that the nomenclature used in the clause (arbitration/arbitrator) is not enough to determine which procedure will be followed, once the most value is in the substance in the contract, not the form of the agreement. Afterwards, deciding which dispute resolution mechanism will be used in a contract, and constituting the court, first, it will examine the actual wording of the clause.

The court will always examine the wording and the object of the contract in its entirety if there is ambiguity in the wording of the clause and it is not possible to determine only by it whether it is a dispute resolution constituted 'an arbitration agreement'.[25]

The characteristics that distinguish arbitration from other ADRs will be used whenever it is not possible to resolve the issue of whether a specific dispute resolution mechanism to be used is or is not an arbitration agreement analyzing the actual wording of the clause, or by reference to the object or effects of the main contract. In *Arenson v Areson*, the then House of Lords[26] summarized the essential indicia of arbitration as follows:

> "(a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present

[25] Dowling- Hussey, Arran and Dunne, Derek, Arbitration Law, second edition, p. 2 and 3.
[26] The judicial functions of the House of Lords were assumed by the Supreme Court of the United Kingdom on October 1, 2009, as per the terms of the UK Constitutional Reform Act 2005.

evidence and/or submissions in support of their respective claims in the dispute, and (d) the parties have agreed to accept his decision."[27]

Considered perhaps the most sophisticated form of exposure and analysis of the differences between arbitration of the other conflict resolution is the decision of *Walkinshaw v* Diniz[28]. Thomas J.'s decision has adopted the features of arbitration, as set out in *Mustill and Boyd*:[29]

(a) The court handling the procedural agreement process ensures that the parties are bound by the decision in the procedural agreement.

(b) The procedural agreement must contemplate that the process will be carried out between those persons whose substantive rights are determined by the tribunal.

(c) The jurisdiction of the tribunal to carry out the process and to decide the rights of the parties must derive from the consent of the parties, from an order of the court or from a statue, the terms of which make it clear that process is to be arbitration.

(d) The tribunal must be chosen either by the parties or by a method to which they have consented.

(e) The procedural agreement must contemplate that the tribunal will determine the rights of the parties impartially, with the tribunal owing an equal obligation of fairness towards both sides.

(f) The agreement of the parties to refer their disputes to the decisions of the tribunal must be intended to be enforceable in law.

(g) The procedural agreement must contemplate a process whereby the tribunal will decide a dispute which is already formulated at the time when the tribunal is appointed.

5.2.1 Advantages and disadvantages

[27] [1977] A.C.405 at 428, per Lord Wheatley.
[28] [2000] 2 All E.R. (Comm) 237.
[29] Mustill and Boyd, Commercial Arbitration, 2nd edn (London: Butterworths, 1989).

The advantage of arbitration

One of the biggest advantages is the freedom that the parties have to choose the arbitral tribunal. The outcome depends on the powers that a person or persons have to make decisions. Contracts with great complexity usually have an arbitration clause, so, in case of dispute resolution, the parties can appoint an expert on that particular subject. With this, there are several other advantages, such as that the decisions made by one or more specialists in the disputed issue can better reflect the expectations of the parties involved and the commercial sector and, in cases where there is more than one issue, time will also be optimized. Another point is agility. Once an expert has mastered the subject, he/she will not need more time to study and understand the mechanism involved in that dispute. As a result, it is possible to observe flexibility, since it is unlikely that an arbitrator will need to reschedule due to such an overloaded agenda or for system reasons that prevent that commitment from occurring. Finally, it can be said that in this case, the parties have great time control when choosing arbitration and its procedures.

Also, the parties are not required to follow a certain law. This means that they can choose which law to apply in their agreement, what procedures will be adopted and also define the power that the arbitrator will have. As such, the parties to the agreement can control the procedures in many ways as model law has several varieties that as arbitration can be conducted. Thus, if the parties are unable to reach an agreement, the arbitral tribunal can decide the appropriate form for the procedure. Additionally, on the flexibility of arbitration, it allows the parties, either in the arbitration agreement or at a later time, to decide the location of the arbitration, which may be a neutral, friendly or even more convenient place for them. An important detail is that the seat may also be chosen by the parties and does not necessarily have to be in the same place as the arbitration, but the choice of seat is important because it will determine the rules to be followed and once chosen, the parties place the proceeding within a

framework of the country mandatory national laws applicable to arbitration. The parties that have chosen a different seat of arbitration to where they live or do business need to ensure that they avoid complications related to conflicting laws. The language used for arbitration may also be decided by the parties, according to convenience. In arbitration, freedom also extends to the formality and simplicity of pre-arbitration hearing procedures. As for costs, arbitration has attractive values when compared, for example, to litigation. And finally, depending on the nature of the dispute, if the parties are interested in agility, they may find an arbitrator available to deal with the case immediately, without further ado.

The vast majority of arbitration is carried out privately. However, there is nothing to prevent it from occurring in a public manner, if both parties agree to this. It should be noted that arbitrations on a statutory basis are made in a public manner, maintaining the confidentiality of the procedures, as well as of all those involved. Here the advantage is clear; when it comes to maintaining dispute resolution procedures in particular, since the risk is less than damage to property and commercial relational disputes, avoiding the disclosure or propagation of important or sensitive data. Regarding the question of who is responsible for confidentiality, it is clear when analysing the fact that the parties have agreed to a particular arbitration that the obligation of confidentiality lies with the parties and extends to the arbitrator, in terms of all documents and information received in the course of the arbitration.

Confidentiality obligations in arbitration are qualified, but we will now see what are the exceptions set out in it:

One of the parties to the arbitration may waive the obligation of confidentiality or consent to the benefit of the other party that has brought an action. Otherwise, this would be a breach of the obligation when one of the parties needs documents used in the arbitration to defend against third parties or a legal cause is fundamental. The court should check whether the disclosure is necessary or not. Under a court order, the documents obtained may be disclosed if the arbitration itself is the subject of legal proceedings. In cases of legal interest or the public interest, it may be disclosed.

Another advantage is the fact that the arbitration is binding on the result, and the arbitration award may be challenged by model law. This brings legal certainty.[30]

The disadvantage of arbitration

The success of the arbitration depends on the willingness of the parties to cooperate for the arbitration process to flow. If the parties disagree on one or more important aspects, significant obstacles can be created as one of the parties appeals to the court to oversee the arbitration or the judgement itself. For instance, if the parties do not reach an agreement on which arbitrator will be appointed to handle the dispute, according to Model Law the qualified court may make the appointment, which will cause a delay in dispute resolution.

Difficulties in arbitration can be aggravated due to the lack of sufficient mechanisms in the Arbitration Act 2010, which makes arbitration enforceable if the parties are delaying or recalcitrant, since it does not give the arbitrator the power to impose sanctions or obligations. However, this deficiency can be overcome if the parties in the arbitration agreement duly provide for certain provisions. Another issue is the enforceability of the arbitration, in which it is necessary to provoke the high court by one of the parties to enforce an arbitration award provided for in Section 23. Another flaw in the arbitration mechanism is that the Arbitration Act 2010 cannot compel the involvement of third parties that are not private or that are parties to the arbitration agreements in an arbitration process. This is a common occurrence since not all parties involved in a dispute resolution that has been referred for arbitration or all parties that are interested in the outcome of the dispute are part of an arbitration agreement. According to the Model Law and Arbitration Act 2010, it is not possible to compel a party to a dispute

[30] Dowling- Hussey, Arran and Dunne, Derek, Arbitration Law, second edition, p. 21 to 26.

that is not a party to an arbitration agreement to become involved in the arbitration process. As for the grounds for annulment of an arbitration award, according to the Arbitration Act 2010, the High court is a very limited as it is not possible to successfully challenge an arbitral award that is erroneous on the merits (whether in its finding or interpretation of the facts underlying the arbitrator's award or in its interpretation or application of the law). Indeed, it is clear and has always been held that an arbitration award cannot be challenged merely on the basis that it is wrong on the merits. An arbitration award that is incorrect on the merits will be set aside only where one or more of the grounds on which an arbitral award may be challenged as set out Model Law is made out.[31]

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[31] Dowling- Hussey, Arran and Dunne, Derek, Arbitration Law, second edition, p. 27 to 29.

Chapter 6 – Mediation and arbitration in the Brazilian Labor Law and its implications in Brazil

6.1 Legal positions

Brazilians, rooted in the culture of a paternalistic state, are inclined to seek the judiciary whenever there is a conflict or dispute, and the vast majority of the middle, lower-middle and lower-class population does not even know the existence of the possibility of alternative methods for conflict resolution, even though access to information is free.

This is a truth which hinders the implementation of broad mechanisms of judgement and, consequently, its legal regulation with a possible basis for legislative creation resulting from what in the Brazilian law is called “traditions” and which according to the General Theory of Law is officially considered as a source of Law with a strong incentive to deepen studies and rules of repeated conduct and consequent creation of rules to be later applied by the Judiciary in its judgments. For this reason, while analysing the current legislative part, it is already possible to encounter significant resistance to the expansion of the subject and its respective application.

As a consequence of what was mentioned above, despite the other motivations already mentioned and discussed in this study, the expected results after the selection of mediation or arbitration, specifically in the Labour Court, may be frustrated precisely because of the implications which will be analysed here.

What is already called by some law professionals as the "New Labour Code", due to the changes introduced by Law no. 13,467/2017, brought significant changes and advances to the use of methods that can be considered as more appropriate for the resolution of conflicts, in a way encouraging dialogue and social responsibility in order to reach a rational decision whenever possible, to their own interests, which ended up giving a certain legal guarantee for the mediation and arbitration procedures

and their consequent signed agreements, as can be seen from the legislative text now transcribed:

> Art. 484-A. The employment contract may be terminated by agreement between the employee and the employer.
>
> Art. 507-A. In individual employment contracts whose remuneration is more than twice the maximum limit established for the benefits of the General Social Security Regime, an arbitration clause may be agreed, provided that at the initiative of the employee or upon his express agreement, under the terms provided for in Law No. 9,307 of September 23rd, 1996.[32]

In the quest to expand the use of arbitration within the labour field, there are scholars that support the arguments, as for example in relation to the possibility of acting with integrity by the judge, referred to as an arbitrator, as shown below:

> (…) is a highly specialized legal technician (...) a professional with a great vision of the public interest (...) does not imply financial cost for the parties (...) will bring the institution closer to society (...) has the confidence of society (...)will not occur problems seen today in some prior conciliation commissions, instituted by the unions, relating to general and unrestricted discharge of labour contracts, in flagrant prejudice to workers.[33]

However, despite an expansion of the possibilities for judicial ratification of agreements obtained by alternative methods brought by the Labour Reform and the mitigation of the concerns regarding the possibility of imbalance in the negotiations due to the employee's under-sufficiency in relation to the employer, or derived from any other issues, due to the presence of lawyers or representative unions. This is because these acts are still subject to review by the Labour Court, based on the strong paternalistic motivation of the State to defend the working class, the full admission of these means and the consequent invalidation of all parallel work, instead of relieving the judiciary, would only change its scope of work, thus deviating the purpose for which these institutes were created.

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[32]Disponível em <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13467.htm> Acesso em 29.10.2020

[33]Brito, Rildo Albuquerque Mousinho de. Mediação e Arbitragem de Conflitos Trabalhistas no Brasil e no Canadá. São Paulo: Ltr, 2010 p.59.

Another point that must be taken into account when talking about labour justice is that not all conflicts involve only one worker. Conflicts can also be collective and, therefore, mediation and arbitration rules, in theory, should also cover these situations, which Maurício Godinho Delgado defines as:

> Collective labour conflicts, those that reach specific communities of workers and employers or service providers, either within the restricted scope of the establishment or company, or in a broader scope involving a category or even a broader working community.[34]

However, it is necessary to clarify that, although the use of arbitration is admitted, another implication of its use is the validity related to the representation of this class in the opportunity of the defence or the request for a right of an entire class represented, although in this case there is already a certain parity between the litigants given the strength of a group of workers who almost entirely end up being represented by trade unions or class bodies, taking also into account the express constitutional provision (art. 114, § 1º, CF). In this sense, Minister Lélio Bentes Corrêa expressed his opinion during the Annual Meeting of Labour Justice in 2013:

> Arbitration is valid for the collective labour disputes, not on the individual level. In dealing with collective conflicts, in which workers are represented by unions (by properly organized associations), it is possible to elect an arbitrator to decide on claims that are above the law. With regard to individual rights established by law, especially those constitutionally enshrined, there is no room for interference by a private individual. In this case, it is necessary for the State to be present by the Labour Court, by the Labour Judge, to settle the conflict and grant the necessary protection to the worker's rights.[35]

By the doctrine:

> The decree no. 1.572/1995 established rules on mediation for collective bargaining of a labour nature. The aforementioned decree mentions that the mediator will be freely chosen by the interested parties, or the parties may request the Ministry of Labour to designate a mediator, who may be a person registered with the body, provided that the parties agree on the payment of fees to that professional, or even a staff member, appointed

[34]DELGADO, Mauricio Godinho. *Curso de direito do trabalho*. 7ª Ed. São Paulo: LTr, 2008, p. 1293.
[35]Disponível em <https://online.unisc.br/acadnet/anais/index.php/sidspp/article/viewFile/18849/1192612110> Acesso em 30.10.2020

> by the regional labour delegate, without imposing any burden on the parties.[36]

And as a reinforcement to the understanding of this, the words of Sérgio Pinto Martins are helpful and illuminating, stating that the International Labour Organization itself, in addition to accepting cases, recommends arbitration as a method of resolving conflicts in collective bargaining:

> The ILO advocates the collective bargaining system, through the Convention No. 154 of 19/06/1981, which was ratified by Brazil. Article 6 of the said rule prescribes that do not violate the provisions of the said agreement the labour relations systems in which collective bargaining takes place according to the mechanisms or institutions of conciliation or arbitration, or both at once, that the parties participate voluntarily in collective bargaining.[37]

Regarding individual disputes, even though there is a slight expectation of tendencies towards their acceptance through new legislative reforms or changes in social behaviours, the main divergence of understandings is related to the availability or not of the rights brought in by the Consolidation of the Labour Laws itself and the other rules that regulate the employment relationship. If these rights are considered unavailable, the Law of Arbitration, in its first article, would already remove the procedure for resolving this type of conflict. We also have the assumption of the parties' inequality as to the power of choice of the judging body and the lack of knowledge of the procedures by which the respective demand will be resolved, which could give rise to recurring nullities before the Labour Court. Regarding another concept:

> Individual disagreement is the judicial process through which the State reconciles or decides the disputes between employees and employers, singularly considered, arising from the employment relationship and, by law, other controversies arising from the employment relationship.[38]

Thus, due to questions that the attempt to use different means for conflicts arising from labour relations, Brazilian jurisprudence in the labour field ends up recognizing as null the arbitration clauses

[36]SARAIVA, Renato. *Direito do Trabalho – Concursos público*. São Paulo: JusPODIVM. 18ª ed.
[37]MARTINS, *Sergio Pinto. Direito do trabalho.* 22. ed. São Paulo: Atlas, 2006.
[38]NASCIMENTO, Amauri Mascaro. *Curso de direito processual do trabalho.* 22ª Ed. São Paulo: Saraiva, 2006, p. 357.

and sentences, mostly, when related to the aforementioned agreements, thus curbing the incentive to the applicability of these institutes in these cases, according to the understanding that, despite having been made before the labour reform, it still persists:

> It cannot be said, in the abstract, that it is not possible to carry out arbitration in relation to labour rights, not least because this would clash head-on with the Brazilian legal order and with the international norms that deal with the subject. The question is whether, in the concrete case, the referee act properly. (…). Also, judges cannot fear possible loss of power with the development of arbitration, since it constitutes an important instrument for pacifying conflicts that works in parallel with the judiciary.[39]

In the same sense, this is reinforced by scholars:

> "The Labour doctrine has shown great resistance to the application of arbitration to conflicts between employee and employer, as they are the worker's individual rights. The Law no. 9,307 art. 25, provides that if in the course of the arbitration a dispute arises over an unavailable right, the arbitrator must refer the parties to the Judiciary as a preliminary question "[40]

Therefore, it remains clear that, although Labour Reform has extended the possibility of applying alternative methods. It is still a very recent subject and there is widespread resistance from the Judiciary in their practicability when it comes to Labour Justice in Brazil, especially with regard to individual disputes, even though recent data obtained from the Labour Court points out overwhelming numbers of active cases, which, according to the Association of Magistrates of Brazil, could be an effective solution if the alternative methods of conflict resolution were used less carefully in the Labour Court.

Staying on the subject of statistics, despite the data released by the Superior Labour Court (*TST*) that revealed that there was a 39.3% reduction in new labour claims being made in the country between the first five months of 2016 - prior to the labour reform - and the same 2018 period. It is believed that, if

[39]Brito, Rildo Albuquerque Mousinho de. *Mediação e Arbitragem de Conflitos Trabalhistas no Brasil e no Canadá*. São Paulo: Ltr, 2010p. 71

[40]JORGE NETO, Francisco Ferreira e CAVALCANTE, Jouberto Pessoa. *Direito processual do trabalho*. 7ª. Ed. São Paulo: Atlas, 2015, p. 1447

the points regarding alternative methods were more effective these numbers would reduce even more.[41] As for the use of arbitration and mediation in Brazil, as there are conflicts that are resolved in an unofficial way and they may be inaccurate or biased, but in view of all the explanations now exposed, the tendency is to face an almost insignificant number when comparing them with the number of conflicts protected by the Judiciary.

6.2 Data collection by the Brazilian government

132 years since the abolition of slavery in Brazil, situations analogous to slave labor are still being recorded. Today, the Public Labor Ministry (PLM) has 1,700 procedures for investigating this practice and for recruiting and trafficking workers in progress. According to data from the Radar of the Sub-Secretariat for Labor Inspection (SLI) of the Special Secretariat for Social Security and Labor of the Ministry of Economy, in 111 of the 267 establishments inspected in 2019, the existence of this practice was characterized by 1,054 people rescued in situations of this type. The survey also points out that, last year, the number of complaints increased, totalling 1,213 across the country, while in 2018 there were 1,127.

The rural environment continues to concentrate the largest number of recorded incidents, with 87% of the cases: production of charcoal (121); coffee cultivation (106); rearing of beef cattle (95); retail trade (79); and corn cultivation (67). Urban slave labor also claimed 120 victims, mostly in the making of clothing (35). There were also recorded incidents of slavery in civil construction (18), domestic services (14), road construction (12) and mobile services (11).

Also, according to the balance sheet, it has been noted that a large number of Venezuelan immigrants have crossed the border into Brazil into a situation of extreme vulnerability. In three operations carried

[41]Fonte: Disponível em: https://www.brasildefato.com.br/ Acesso em: 29.10.2020.

out in the state of Roraima, 16 workers were rescued, including three Venezuelans; and 94 had their employment contracts formalized during inspections.

The data was presented during the National Meeting for the Eradication of Slave Labor: Strengthening Contributory Partnerships.

The survey shows that between 2003 and 2018, about 45 thousand workers were rescued and freed from slavery-like work in Brazil. According to data from the Digital Slave Labor Observatory, this means an average of at least eight workers were rescued each day. During this period, most of the victims were male and between 18 and 24 years old. The profile of the cases also proves that illiteracy or low education make the individual more vulnerable to this type of exploitation: 31% were illiterate and 39% had not even completed their 5th year of education.

“The absence of the State is what generates a large part of these situations of vulnerability. It is not by chance that it is in municipalities with a low HDI [human development index], with little state infrastructure and with little offer of public services, that these workers are found being exploited and/or trafficked ”, said the head of the Inspection Division for the Eradication of Slave Labor (Detrae), Matheus Alves Viana. According to him, today the challenges are very big, especially because explorers have developed a counterintelligence and know how to hide. “Success comes when the State is present and is strong. No institution of any Power can do anything in isolation ", pointed out Viana.

The release of updated data for 2019 marked the National Day to Combat Slave Labor, which is remembered on January 28. The date pays homage to the labor tax auditors who died on January 28, 2004 when they went for an inspection on farms in the region of Unaí (estate of Minas Gerais), an episode known as the Unaí Slaughter. Those involved in the killings were convicted, but 16 years later

they are still appealing the sentence in a bid for freedom.[42]

[42] Posted on 28/01/2020 - 12:15 By Karine Melo - Reporter of Agência Brasil – Brasília https://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2020-01/brasil-teve-mais-de-mil-pessoas-resgatadas-do-trabalho-escravo-em#:~:text=O%20levantamento%20mostra%20que%20entre,trabalhadores%20resgatados%20a%20cada%20dia.

Chapter 7 – Surveys

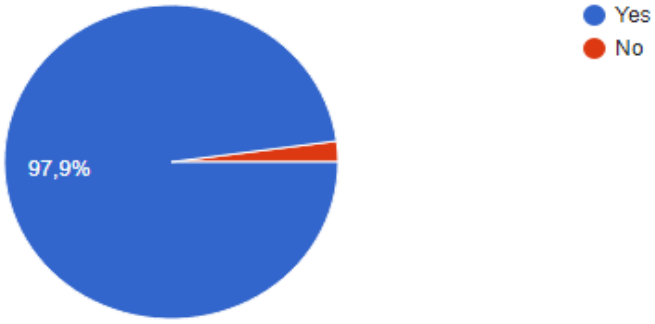
7.1 In point of the view the lawyers – mediation and arbitration

WHAT ARE THE LEGAL IMPLICATIONS OF MEDIATION AND ARBITRATION IN BRAZILIAN LABOR COURTS?

You are being asked to participate in a research study on mediation and arbitration's legal implications in the Brazilian labor court as a lawyer.
In this study, you will be asked to tell us about your experience, knowledge, concerns, and benefits of alternative dispute resolution in labor law in Brazil as a lawyer.
The study typically takes 2 minutes.
This research is voluntary, confidential, and anonymous. That means you will not be identified as an individual or a group. The only intention regarding the use of the data for use in my dissertation.
Thank you

1) Have you ever heard about the law nº 13.467/2017, which makes it possible to use arbitration to resolve individual labor disputes?

47 respostas

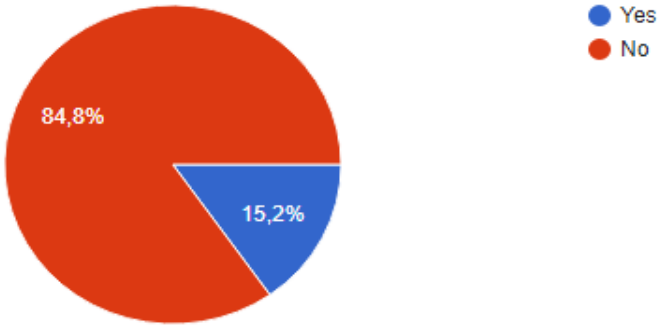


2) What was your source of information regarding mediation and arbitration?

46 respostas

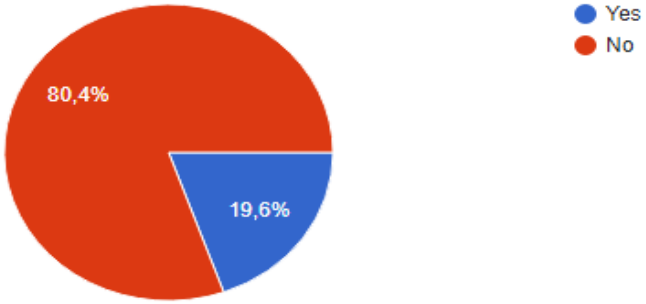
3) In your opinion, does the law nº 13.467/2017 reach the majority of population workers in Brazil?

46 respostas



4) According to your experience, does the law nº 13.467/2017 relieve the judicial system that has been overwhelmed for years?

46 respostas

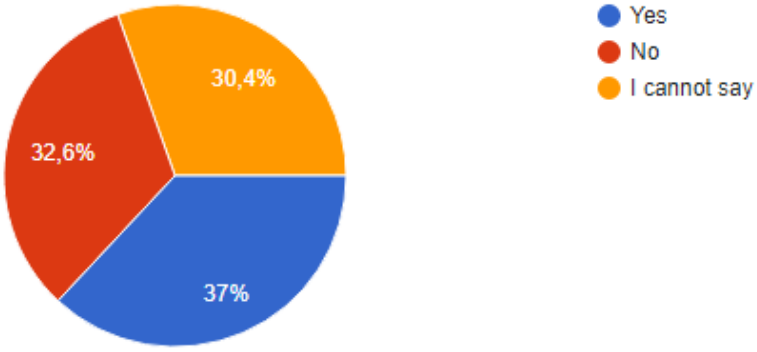


5) If your answer to the previous question was no, what is, in your view, the main problem with these alternatives of dispute resolution in labor law not frequently used?

41 respostas

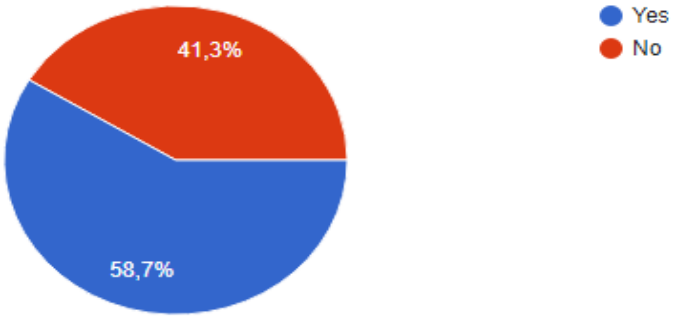
6) Do you think the law nº 13.467/2017 is discriminatory in any of its established requisitions?

46 respostas



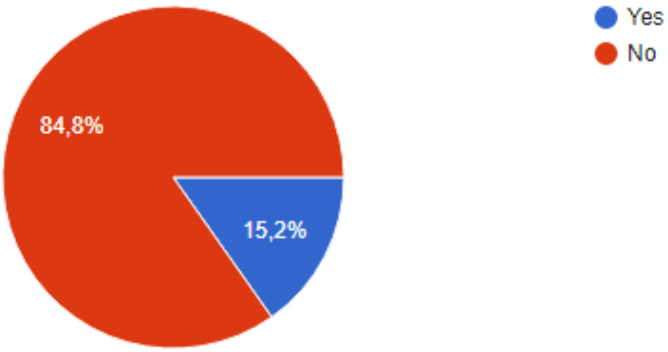
7) Do you think the Brazilian government should incentivize mediation or arbitration as an alternative to the Court process in labor disputes (independent of the salary or position the parties involved in)?

46 respostas



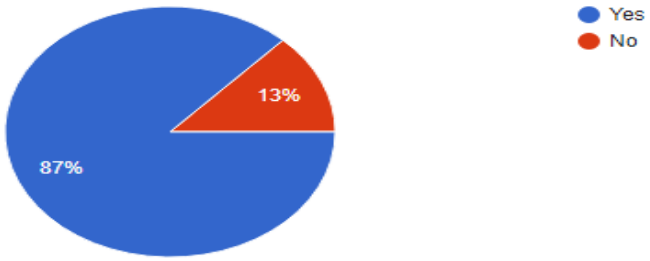
8) Do you believe the workplace parties can use mediation or arbitration by themselves, considering the low level of education that the majority of the Brazilian population has?

46 respostas



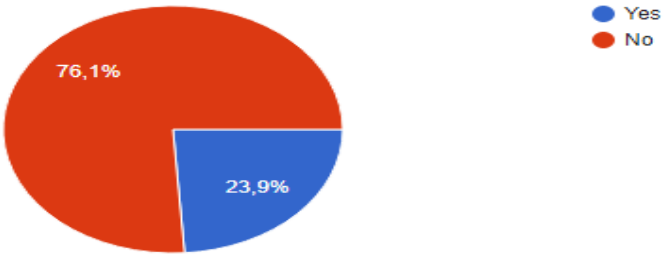
9) Do you think it is hard to implement the new law nº 13.467/2017 (alternative dispute resolution) considering the country's history of labor and slavery still being found nowadays in farms and big cities and the inferior education majority of Brazilian people have?

46 respostas



10) If you get a new client, would you consider using mediation or arbitration to solve his workplace/labor problems?

46 respostas

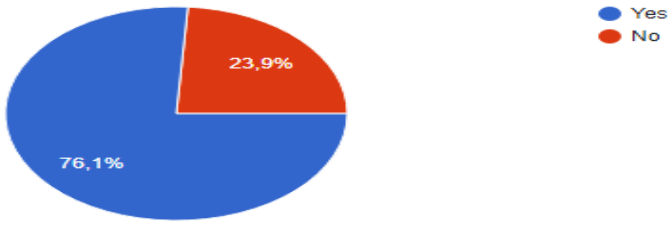


11) If your answer to the previous question was no, could you tell us why not?

43 respostas

12) Are there in law nº 13.467/2017 any points conflicting with the Brazilian constitution that make you afraid of or disagree?

46 respostas

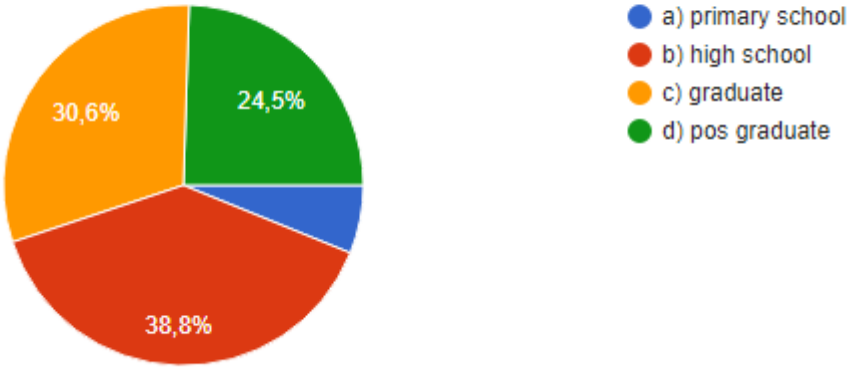


WHAT ARE THE LEGAL IMPLICATIONS OF MEDIATION AND ARBITRATION IN BRAZILIAN LABOR COURTS?

You are being asked to participate in a research study on mediation and arbitration's legal implications in the Brazilian labor court as an employee.
In this study, you will be asked to tell us about your experience, knowledge, concerns, and benefits of alternative dispute resolution in labor law in Brazil as an employee.
The study typically takes 2 minutes.
This research is voluntary, confidential, and anonymous. That means you will not be identified as an individual or a group. The only intention regarding the use of the data for use in my dissertation.
Thank you

1- What level of education do you have?

49 respostas

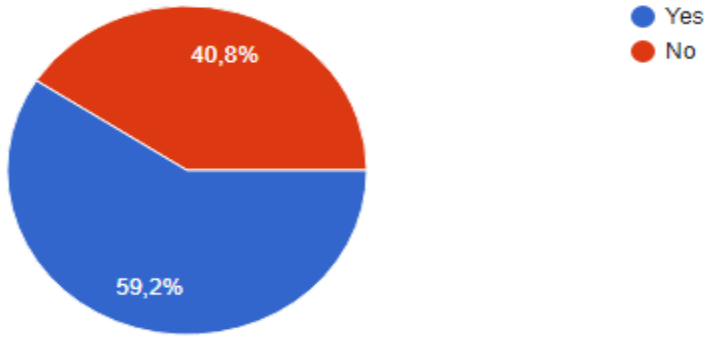


2- How much do you earn per month as an employee?

49 respostas

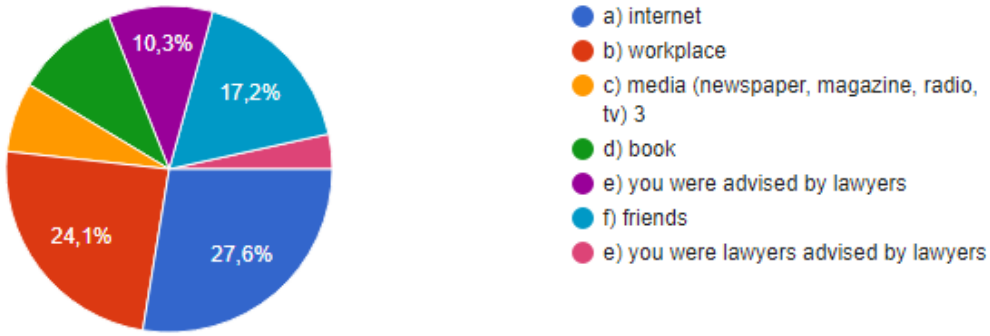
3- Have you ever heard about mediation or arbitration in labor law?

49 respostas



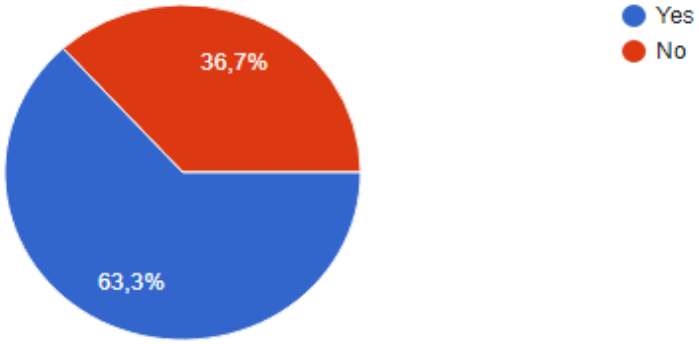
4- If your answer to the previous question was yes, tell us where did you hear it?

29 respostas



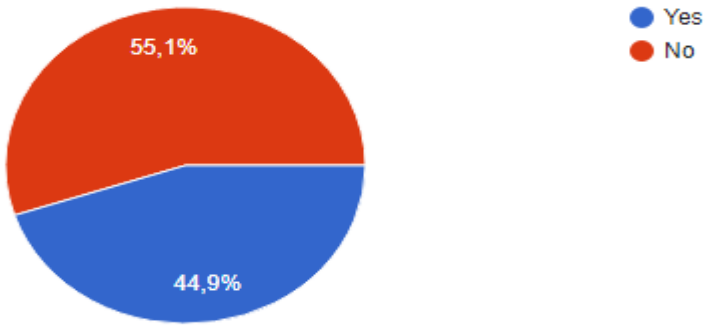
5) Do you know what mediation in labor law is?

49 respostas



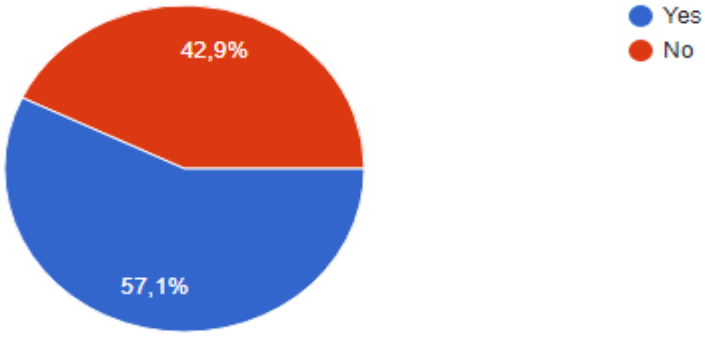
6) Do you know what arbitration in labor law is?

49 respostas



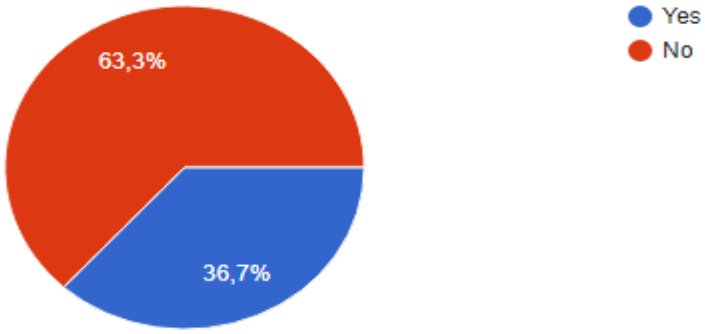
7) Have you ever had a dispute in the workplace?

49 respostas



Do you think you can discuss your labor rights with your boss in a conflict?

49 respostas

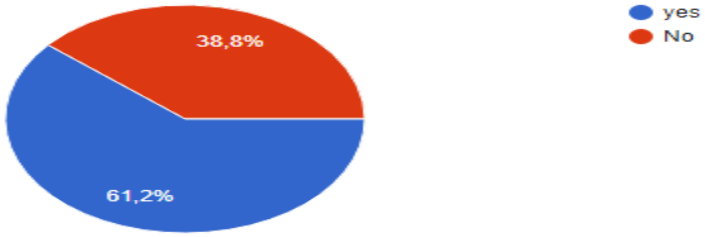


9) If you need to solve a labor dispute, would you look for:

49 respostas

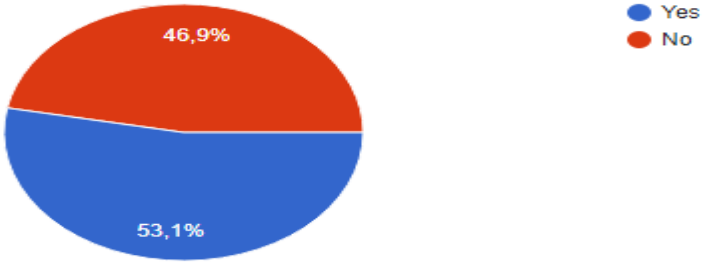
10) Would you trust a mediator to help you communicate with other parties of the labor dispute which the objective is to get a deal?

49 respostas



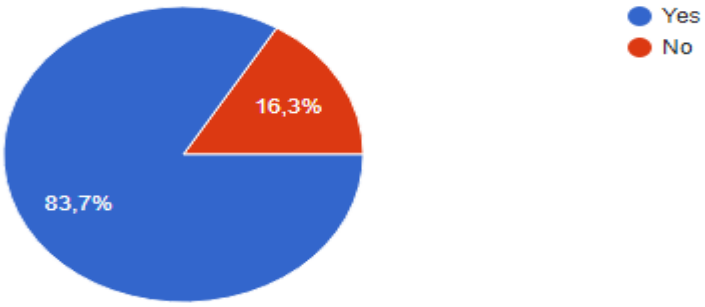
11) Would you trust in an arbitrator deciding your labor conflict?

49 respostas



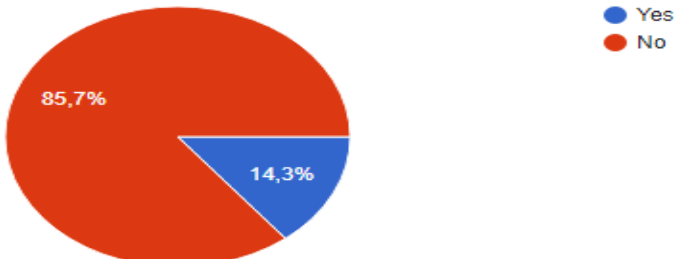
12) Do you trust in a labor judge deciding your labor dispute?

49 respostas



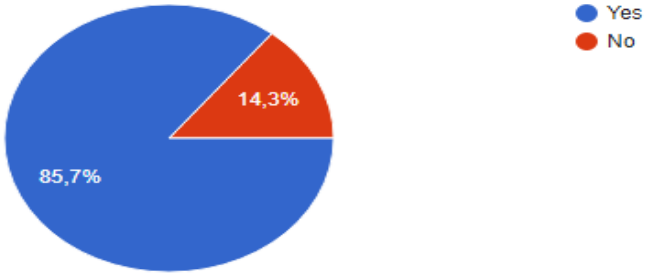
13) When you are hired, do you have the opportunity to discuss the contract clauses? For example, if you have any problem, you can decide where the labor conflict will be discussed: in the arbitration, labor court, or mediation.

49 respostas

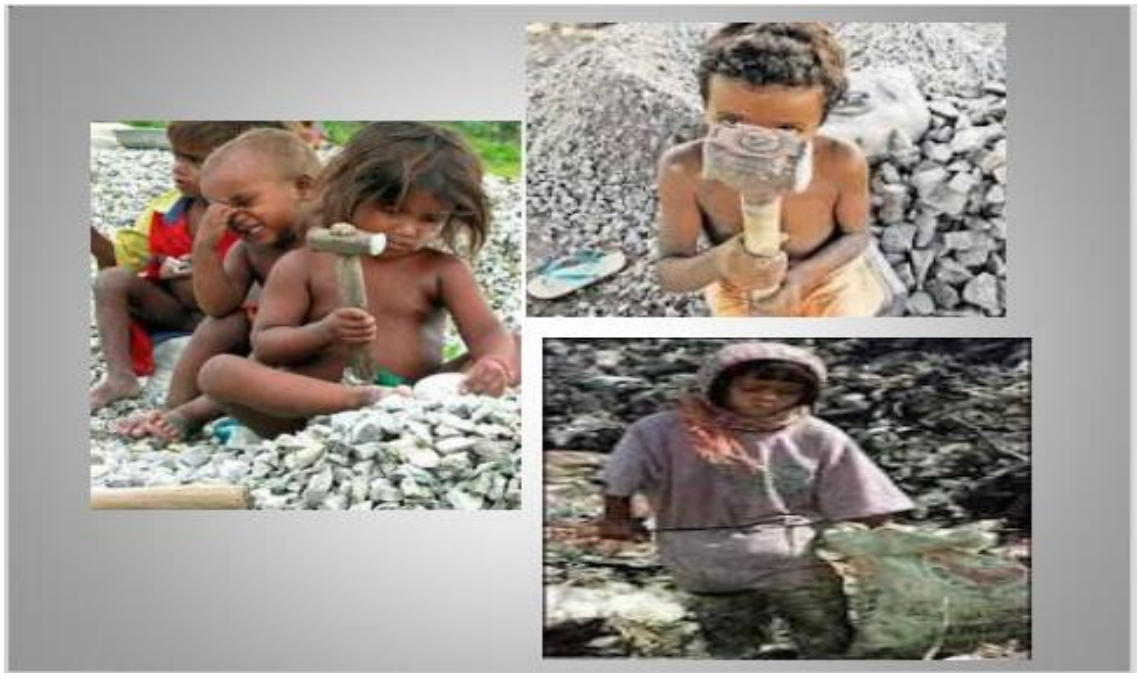


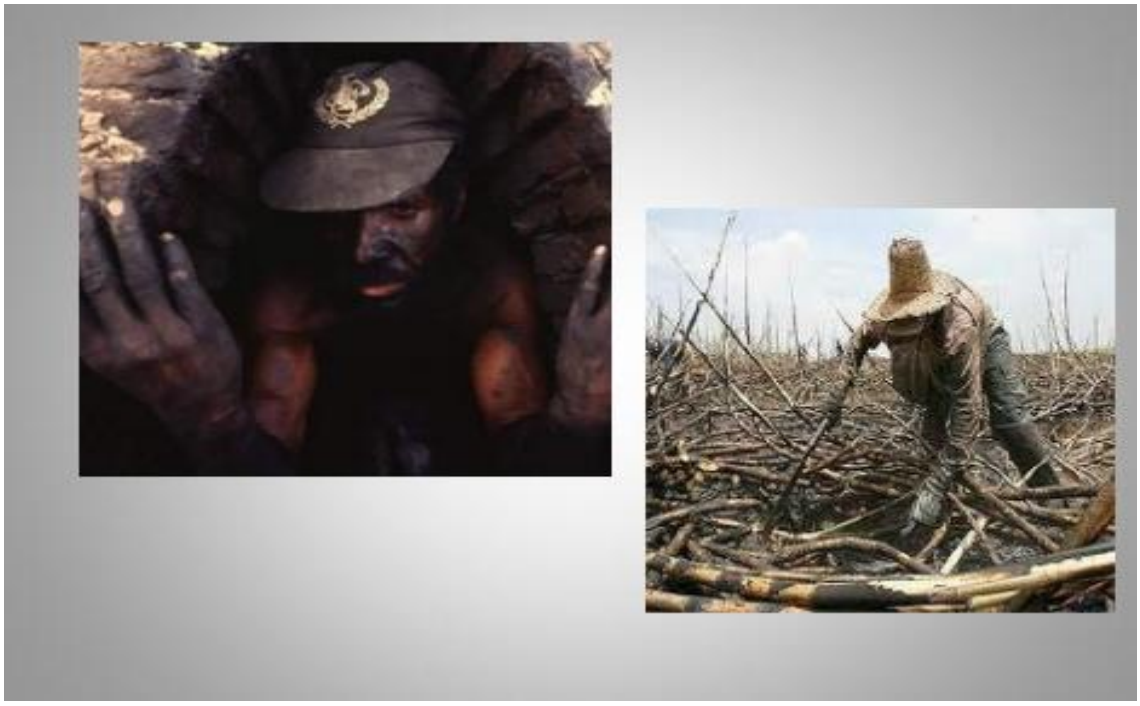
14) In your point of view, if you sue your previous employer, would you be more difficult to get a new job?

49 respostas



Data collection by the Brazilian government





Conclusion

Faced with so many conflicts, the sheer size of the Brazilian population and the lack of quantity and structure of the judiciary, it would be salutary to implement more comprehensive means or alternative methods of conflict resolution that do not involve the state agency. It would also help to attempt to remedy the many issues in Brazilian society and its economic problems, although the main problem of the judiciary's situation is linked to the delay in the judicial provision, which is sometimes caused by the parties themselves in order to gain time to try to evade the obligations due by judicial decisions, thus not allowing the State to exercise its peace-making function more quickly.

Despite the idea that alternative methods can better meet the claims of litigants and even more effectively and quickly, the motivations, including historical ones, that favour or disfavour the application of mediation and arbitration in labour demands have been exposed in this study, the advantages and disadvantages in using them, and, the possibilities of application in conflicts of a labour nature, considering that this is not a pacified subject, neither in doctrine nor in jurisprudence.

One can also note that for collective labour conflicts, based on art. 114 of the Federal Constitution, the use of arbitration is fully possible. However, with regard to the application of the referred method to individual labour conflicts, there is great resistance. This is reflected in the amount of use of the method in relation to the usual demands through the Judiciary.

Having made these considerations, it is possible to conclude that alternative methods utilised in the attempt to resolve conflicts are useful as instruments of the desired social pacification. However, no matter how noble the attempts are for the quickest resolution to end a dispute, it is not possible to be achieved in any way. Therefore, the respective means must be subjected to the implicit principles and legal analyses surrounding them in order to safeguard the free and conscious will of the parties, without defects, irregularities, nullities, or eventual favouritism of one of the parties involved to the detriment

of the right of the other party for such a method to be considered valid, safe, effective and that seeks justice to the fullest (although this is subjective), and also which is not subject to annulment by the Judiciary in the future.

Reflections

Doing this dissertation, I felt like I was in a labyrinth from which I would never find the exit. It required an enormous of time which I didn't have, and required focus and persistence.

Although mediation is part of my work as a lawyer in Brazil and I feel it is an interesting topic to research, attempting to clarify some of the issues my country faces with our legislation without making this study something of a historical or social research made my life more challenging. It is hard to talk about what is happening now without explaining how and why we have reached this point.

Being opposite to mediation and being a lawyer specialized in labor law, I had to learn about arbitration because law nº 13.467/2017 has brought in a new way to arbitrate in the labor area and I could see the difference in the process between Brazil and Ireland.

Another factor that influenced this dissertation was that, in Brazil, one thing is what we see in the laws, and another thing is what happens in practice. This mainly relates to labor law, so that is why it was necessary for my surveys to prove the theory:

Lawyers said

84.8 % The law nº 13.467/2017 does not reach the majority of the Brazilian population.

84% The parties involved in a labor conflict are not able to discuss their labor rights by themselves.

39% The main problem with the law nº 13.467/2017 is that it is not frequently used because of its requirements. For example, an employee must earn (R$ 11,000.00 – 1,641.79 euros) and it should be the employee's decision about the arbitration clause in the labor contract.

44% Don't think mediation or arbitration would be of benefit to their clients.

Employees said

38.8% earn around 298.51 euros per month and 53.1% would trust an arbitrator deciding their labor conflict. However, only 4.1% earn R$ 11,000.00 – 1,641.79 euros per month, one of the legal

requirements to go to arbitration.

85.7% don’t have the opportunity to discuss the clauses in their labor contracts.

85.7% believe they would have trouble getting a new job if they had sued their previous employer.

Overall, it was a good time to update, review and learn more about the alternatives in dispute resolution.

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