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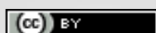
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Arbitration of individual labor disputes in Brazil and Japan: a comparative analysis

Arbitragem de conflitos trabalhistas individuais no Brasil e no Japão: uma análise comparativa

Arbitraje de disputas laborales individuales en Brasil y Japón: un análisis comparativo

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ABSTRACT

The way labor rights disputes are solved in Japan and Brazil in the last two decades has changed. New laws and interpretation have been challenging the way labor arbitration functions. In 2004, Japan passed the judicial labor tribunal system; in 2017, Brazil enacted the use of private arbitration under individual contracts, in addition to the provision in the 1988 Brazilian Federal Constitution allowing for the use of arbitration for collective contracts. There are common themes and comparative contrasts in the uses of arbitration in each country. They may use governmental and/or private structures to house dispute settlement processes of individual and/or collective labor disputes. However, there also are some differences, with Japan keeping the processes largely under governmental regulation and institutions, whereas Brazil provides legal authority to privatize much of the labor and employment law dispute resolution processes. The use of arbitration to settle labor rights disputes in Brazil and Japan, while having different approaches, have similar themes. Understanding their functionalities may present an opportunity for both countries to choose the best practices regarding these different dispute resolution structures. This Article compares the arbitration models in labor disputes in Japan and Brazil, providing guidance for possible improvements of the current systems.

KEYWORDS: Labor Arbitration; Alternative Dispute Resolution, Comparative Law

RESUMO

A forma pela qual as disputas trabalhistas são resolvidas no Japão e no Brasil nas últimas duas décadas mudou. Novas leis e interpretações têm desafiado o funcionamento da arbitragem trabalhista. Em 2004, o Japão aprovou o sistema do tribunal judicial do trabalho; em 2017, o Brasil promulgou o uso da arbitragem privada sob contratos individuais, além da disposição na Constituição Federal de 1988 que permite o uso da arbitragem para contratos coletivos. Há temas comuns e contrastes comparativos nos usos da arbitragem em cada país. Podem-se utilizar estruturas governamentais e/ou privadas para abrigar processos de solução de controvérsias de conflitos trabalhistas individuais e/ou coletivos. No entanto, também há algumas diferenças, com o Japão mantendo os processos amplamente sob a regulamentação e sob as instituições governamentais, enquanto o Brasil fornece autoridade legal para privatizar grande parte dos processos de resolução de disputas trabalhistas. O uso da arbitragem para resolver disputas de direitos trabalhistas no Brasil e no Japão, embora com abordagens diferentes, possui temas semelhantes. A compreensão de suas funcionalidades pode representar uma oportunidade para ambos os países escolherem as melhores práticas em relação a essas diferentes estruturas de resolução de disputas. Este artigo compara os modelos de arbitragem em disputas trabalhistas no Japão e no Brasil, fornecendo orientação para possíveis melhorias dos sistemas atuais.

PALAVRAS-CHAVE: Arbitragem Trabalhista; Resolução Alternativa de Disputas; Direito Comparado

RESUMEN

La forma en que se resuelven los conflictos laborales en Japón y Brasil en las últimas dos décadas ha cambiado. Nuevas leyes e interpretaciones han desafiado el funcionamiento del arbitraje laboral. En 2004, Japón aprobó el sistema de tribunales laborales; en 2017, Brasil promulgó el uso del arbitraje privado bajo contratos individuales, además de la disposición de la Constitución Federal de 1988 que permite el uso del arbitraje para los convenios colectivos. Hay temas comunes y contrastes comparativos en el uso del arbitraje en cada país. Las estructuras gubernamentales y/o privadas pueden ser utilizadas para albergar procesos de resolución de conflictos laborales individuales y/o colectivos. Sin embargo, también hay algunas diferencias, ya que Japón mantiene los procesos en gran medida bajo regulación e instituciones gubernamentales, mientras que Brasil proporciona autoridad legal para privatizar gran parte de los procesos de resolución de disputas laborales. El uso del arbitraje para resolver disputas sobre derechos laborales en Brasil y Japón, aunque con diferentes enfoques, tiene temas similares. La comprensión de sus funcionalidades puede representar una oportunidad para que ambos países elijan las mejores prácticas en relación con estas diferentes estructuras de solución de controversias. En este artículo se comparan los modelos de arbitraje en los conflictos laborales en Japón y Brasil, y se ofrece orientación para posibles mejoras de los sistemas actuales.

PALABRAS CLAVES: Arbitraje Laboral; Resolución Alternativa de Conflictos; Derecho Comparado

INTRODUCTION

Dispute resolution mechanisms are created and evolve according to the characteristics of a given society. Where society is organized under the rule of law,¹ the creation and administration of dispute resolution mechanisms is primarily a function of the State,² particularly of its Judiciary branch, which acts both as a buffer between the rulers and ruled, and as the umpire and enforcer of legal rules in private relations (ANDREOTTI, 2017, p. 17) However, other dispute resolution mechanisms may be created to cater to specific needs which are not covered by the Judiciary, be it due to its costs, inefficiencies or other reasons that are important enough to lead interested parties in thinking about alternatives. This has

¹ Law is “[t]he regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the legal system” (GARNER, 2009). The rule of law, however, is a term that is disputed. O’Donnell asserts that “its minimal (and historically original) meaning is that whatever law exists is written down and publicly promulgated by an appropriate authority before the events meant to be regulated by it, and is fairly applied by relevant state institutions including the judiciary” (O’DONNELL, 2004, p. 32-46).

² According to Weber, “[a] compulsory political organization with continuous operations will be called a ‘state’ insofar as its administrative staff successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order” (WEBER, 1978, p. 54).



been the recent case for arbitration³ regarding labor relations, which has come under discussion in different countries. However, either from a policy perspective as well as a legal one, relevant questions of whether arbitration is desired or even permitted for labor disputes need to be addressed.

Labor relations, absent the organization of workers, are marked by the difference in power between the employer and the employee. To this extent, the use of arbitral mechanisms to solve individual labor disputes may favor employers if there is no participation in their design by labor representatives. Understanding the creation of a given system can bring relevant insights as to whether it will be effective to enforce rights, or whether it will be a means of protecting the interests of one of the sides of the disputes.

On the legal aspect, arbitration is used for disputes where the subject matter is arbitrable, which is defined according to the law of each legal system, usually considering matters of public rights, interests of third-parties or related to governmental authority (BORN, 2009, p. 768). Therefore, the legality of using arbitration for labor relations has to be assessed according to the law of each country where it will be used.

The objective of this article is to analyze the ongoing developments of labor arbitration in Brazil and Japan, comparing the cultural characteristics of labor disputes in each country and their possible effects on the design of this dispute resolution system.

This article is divided in five parts: after this introduction (1), we first analyze the relationship between dispute resolution, arbitration and labor law, and how the use of arbitration for labor relations may present some complicated issues (2). The third part of the article discusses the latest Brazilian developments for labor arbitration, considering the questions raised in section one (3), while the fourth part does the same for Japan (4). Finally, we conclude (5).

³ Arbitration is “a private mechanism of dispute resolution, where a third-party, chosen by the parties of the dispute, imposes a decision, which will have to be observed by the parties” (Translated by the Authors.) (CARMONA, 2009, p. 31)



1. DISPUTE RESOLUTION, ARBITRATION AND LABOR LAW

Disputes are resolved according to the parties' interests, rights or power (SMITH; MARTINEZ, 2009, p. 126). Interest based dispute resolution is based on negotiation and mediation mechanisms, and when the parties are able to reach an agreement they usually are satisfied with it (SMITH; MARTINEZ, 2009, p. 126). However, if they are not able to negotiate a solution, the parties may resort to the legal system, where their claims will be based on their rights, applied by a neutral third-party, or on power, which may lead to extreme consequences such as violence (SMITH; MARTINEZ, 2009, p. 126). A functioning dispute resolution system is desired to the extent that it diminishes the use of power as a means of dispute resolution, and also allows for the parties that rely on it to better plan their economic activities (ANDREOTTI, 2017, p. 17-22)

In this context, the design of dispute resolution mechanisms based on rights should strive to achieve certain goals, such as finality, obedience to its decisions, guidance to future players, efficiency regarding its costs and the results achieved, availability, which is a matter of access to justice, neutrality, fairness and conflict reduction (GETMAN, 1979, p. 918). As a function of the legal system, rights based dispute resolution mechanisms are responsible to solve disputes and decide a given issue when parties are not able to reach an agreement. In case of noncompliance with a decision, a dispute resolution mechanism may also need mechanisms to enforce a previously given decision.

The adequacy of a dispute resolution system to achieve the aforementioned goals is, however, dependent on the parties' interests and the incentives that are available to them. For example, to reduce conflicts the system must be effective, to the extent that a possible defendant knows that in case of a right violation he will likely be sued, convicted and will be obliged to pay. On the other hand, a decision to sue depends on the costs that the claimant will have to bear, such as legal fees to file a lawsuit and the amount to be paid for lawyer representation, as well as the likelihood of prevailing on his claim.



Each set of relations have their peculiarities that need to be considered so a dispute resolution system that addresses disputes arising out of them can be effective.

Labor relations are qualified by the inequality between the actors and the misalignment of their interests. Inequality is characterized to the extent that the employer is the owner of the means of production, while the employee only has his time, strength and abilities to sell. The strength of the worker *vis a vis* the employer is a function of the supply and demand labor curve. A higher rate of unemployment means the employer has a stronger position in relation to workers, regarding the negotiation of wage and work conditions. Within this context, the struggle between capital and labor is evident: while the employer would prefer to pay as little as possible for the employee's labor, the employee would prefer to earn as much as possible for the work performed.

In capitalist societies this is a well-known struggle. For example, in 1895 Oliver Wendell Holmes Jr. explained that “[one of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful.” (SHULMAN, 1955, p. 1954-1955).

Left to purely private organization, labor relations can become dehumanizing. It is well established that during the industrial revolution extenuating hours and child labor was an integral part of the way in which society was structured to produce goods (VOTH, 2003, p. 221-226).

The state has a role to appease these problems, either directly, with legislation imposing labor rules, or indirectly, serving as a forum to enforce what has been agreed upon between the parties, either individually or collectively. However, the state can be even a degree further on its guaranteeing role, only to function as an enforcer of rules that enable alternative dispute resolution mechanisms, serving only as the backstop when everything else has failed.

Within this context, arbitration can be used as the dispute resolution forum, as long as there is legislation in place that allows the subject matter to be arbitrable. Public policy



considerations are relevant regarding which type of disputes are arbitrable. Gary Born explains that

The types of disputes which are non-arbitrable nonetheless almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by “private” arbitration should not be given effect. (BORN, 2009, p. 768)

The decision of a society to allow for individual labor arbitration should consider all these questions, including the extent of protection the law gives to workers, how the arbitration system will be designed and how will this shift the current labor relations in a country.

Allowing for arbitration without calibrating these concerns in individual labor arbitrations may create some serious issues for workers. For example, allowing for mandatory arbitral clauses that restrict the worker to a dispute resolution system that is organized by employers’ organizations may create a fairness problem. For example, labor arbitration in the US with repeat player employers, employees fare worse in arbitration when compared non-repeat players. (BINGHAM, 1999). In addition, arbitration can be costly for employees, which could bar their access to justice.

However, individual labor arbitration may have an important role in society. The lower the power imbalance between employer and employee, the more appropriate it is to allow for the parties to decide the best system to resolve their disputes. In addition, ineffective justice systems may create an opportunity for structuring alternative dispute resolution systems, benefiting both employers and employees. In 2016 the Labor Justice in Brazil was in crisis due to the increase in lawsuits and the budget restrictions that were imposed, which led to lengthy judgments, which was a bad situation for both parties, but especially to the workers that had the right to be paid.

The next sections will analyze individual labor arbitration in Brazil and in Japan.



2. LABOR ARBITRATION IN BRAZIL

Brazil is known to have a litigation culture. This is acknowledged even by the current Brazilian Supreme Court President, José Antônio Toffoli⁴. With more than 1 million active lawyers in Brazil⁵, its labor trial courts received 1.742.507 new lawsuits in 2018⁶. With this amount of litigation, it becomes necessary for dispute resolution systems to be efficient, which is not always the case with Brazilian Courts, allowing for the development of alternative dispute resolution systems.

In 1996, Law 9.307/96 (Arbitration Law) was enacted, with the objective of modernizing arbitration in Brazil. Some important issues were dealt with, such as arbitration's independence from the judiciary and the use of arbitral clauses to preclude a party from resorting to the judiciary to solve disputes.

However, the 1988 Constitution has a norm stating that “the law will not exclude from the Judiciary the appreciation of a harm or threat to a right”⁷ (art. 5, XXXV), which led to a discussion of whether arbitration clauses were constitutional. This issue was swiftly solved by the Brazilian Constitutional Court in 1997, with the decision in the SE 5206 AgR/EP:

[...] 3. Arbitration Law (L. 9.307/96): constitutionality, in theory, of arbitration; incidental discussion of the constitutionality of various topics of the new law, especially regarding the compatibility, or not, between the arbitral clause's judicial execution for the solution of future conflicts and the constitutional guarantee of the universality of the Judiciary (CF, art. 5º, XXXV).

⁴ OTTA, L. “No Brasil, existe a cultura do litígio”. *Jornal Estadão*, 23/09/17. Available at <https://economia.estadao.com.br/noticias/geral,no-brasil-existe-a-cultura-do-litigio,55902>, accessed on 08/09/2019.

⁵ PEDROZO, J.; ABRÃO, C. **Um a cada 190 habitantes: por que o Brasil tem tanto advogado**. *Gazeta do Povo*, 11/08/2019. Available at <https://www.gazetadopovo.com.br/justica/numero-advogados-brasil-oab/>, accessed on 08/09/2019.

⁶ TST. **Recebidos e Julgados na Justiça do Trabalho em 2018**. Available at www.tst.jus.br/documents/18640430/23408293/Ano+de+2018.pdf/266a7b60-6210-27c1-cf56-153258f89ccb, accessed on 08/09/2019.

⁷ Translation by the authors.



Constitutionality declared by the full court, considering the Tribunal, by majority of votes, that the consent of the parties expressed by the arbitral clause, when the contract was entered into, and the legal permission given by the judge to substitute the will of the unwilling party to sign the arbitration agreement does not violate art. 5, XXXV of the Constitution.

Regarding labor disputes, the Constitution also has a provision that expressly states that arbitration can be used for collective conflicts,⁸ which led to discussions and judicial decisions that it could not be used for individual labor disputes, due to the inherent power unbalance regarding employer and employee and the non-disposable character of labor rights (FERNANDES, 2018, p. 1-2). It is important to note, however, that some commentators have the understanding that the decisions from the Superior Labor Court would only preclude mandatory arbitration based on an arbitral clause, but would allow for arbitration after the conflict had arisen and the parties engaged in an arbitration procedure (PEREIRA JR.; SERRA, 2018, p. 50).

These were decisions made by the Brazilian Labor Court, which has the competence to deal with work related matters⁹, but does not have the final word on whether a given legal norm is constitutional.

In 2015 the Brazilian Arbitration Law was amended (Law 13.129/15). One of the norms that was within the Law Project 406/2013 was to expressly allow for arbitration clauses in individual labor contracts, as long as the employee was a manager or a statutory director. In addition, for arbitration to be valid, it had to be initiated by the employee or with his express agreement. This provision was vetoed by the Brazilian President at the time, with the argument that there would be an unequal difference among workers.¹⁰

⁸ CF, art. 114, §§1º and 2º.

⁹ CF, art. 114, I.

¹⁰ “O dispositivo autorizaria a previsão de cláusula de compromisso em contrato individual de trabalho. Para tal, realizaria, ainda, restrições de sua eficácia nas relações envolvendo determinados empregados, a depender de sua ocupação. Dessa forma, acabaria por realizar uma distinção indesejada entre empregados, além de recorrer a termo não definido tecnicamente na legislação trabalhista. Com isso, colocaria em risco a generalidade de trabalhadores que poderiam se ver submetidos ao processo arbitral.” BRASIL. Message n. 162, from May 26, 2015.



Despite this veto arbitration continued to be considered and discussed as an alternative for labor disputes. The labor reform was seen as an opportunity to create legislation that would expressly allow for individual labor arbitration, inserting article 507-A in the Consolidation of Brazilian Labor Laws (CLT), which states:

Art. 507-A In individual labor contracts where the remuneration is above twice the limit established for the General Social Security System benefits, an arbitration clause may be agreed, as long as by the initiative of the employee or with his express agreement, according to Law n. 9.307, of September 23, 1996.¹¹

At the time this article is being written, the remuneration limit for the payment of the General Social Security System benefits is of R\$ 5.839,45, which means that whenever remuneration is over R\$ 11.678,90¹², arbitration can be used. According to Nexo Jornal, this income is more than what is earned by 98% of the Brazilian population.¹³

There is a common trend both with the norm that was vetoed and the one that was approved. Both differentiate who will be able to resort to arbitration, excluding most employees from its provision. Within labor legislation, which is protective of employees due to the power imbalance existent in labor relations, these provisions were thought to allow for the use of alternative dispute resolution methods only when employer and employee are on more equal footing, be it due to the characteristics of the employee's role within the company or due to his salary.

The latest decisions from the Superior Labor Tribunal are still confirming the impossibility of individual labor arbitration, but they analyze labor contracts that started

¹¹ Translation by the authors.

¹² Approximately: US\$ 2874,00 -September of 2019

¹³ Available at <https://www.nexojournal.com.br/interativo/2016/01/11/O-seu-sal%C3%A1rio-diante-da-realidade-brasileira>. Accessed on 08/09/2019.



before the reform¹⁴. However, the discussion seems to be of a constitutional nature¹⁵, which will require a decision from the Brazilian Constitutional Court for the matter to be settled.

Brazilian commentators have been writing about the advantages of individual labor arbitration, such as costs, speed and confidentiality (DALLEGRAVE NETO; GARCIA, 2018, pp. 26-42) and the preconditions for the legal possibilities of arbitrating individual labor claims PEREIRA JR.; SERRA, 2018, p. 43-56).

The main issue is whether the legal labor regime can be differentiated according to the type of employee, be it regarding his function or remuneration. This type of differentiation already exists regarding other legal issues¹⁶, and has been widened by the labor reform. For example, art. 444, single paragraph allows for those who have a college degree and a salary that is twice the limit established for the General Social Security System benefits to negotiate work conditions that, for other workers, can only be collectively negotiated.

Despite the strong resistance of the Superior Labor Tribunal regarding the use of arbitration for individual labor disputes, the legal question to be answered is whether art. 507-A of the CLT is compatible with the Brazilian Constitution. While this is not clearly established, arbitration still not is a safe dispute resolution system, either for the employers as for the employees.

3. LABOR ARBITRATION IN JAPAN

Japan is known to have a labor culture that prioritizes long-term contracts and seniority-based wages (YAMAKAWA, 2016, p. 171), where workers have an important role even within the corporate governance of companies (ARAKI, 2000, p. 101-102).

¹⁴ For example, RR-837-92.2012.5.09.0411, 6ª T., j. 04/09/2019 and Ag-ED-ED-AIRR-1606-98.2011.5.02.0001, 1ª T., j. 26/06/2019.

¹⁵ For example, in RR-1421-62.2012.5.09.0411, 6ª T., j. 28/08/2019, the Tribunal states that “the constitutional legislator only allowed the adoption of arbitration for collective conflicts, as described by §§1º and 2º of art. 114 of the Federal Constitution, foreseeing, still, the necessity to observe the ‘minimal legal dispositions to protect work’” (Translated by the Authors).

¹⁶ Such as time control for managers.



This organization of labor relations has the benefit of lessening the disputes between employers and employees, due to the importance that is given to the worker in the company and because the worker would rather not create conflicts due to the fact that their relation is expected to be long and there usually are prospects of better conditions in the future (YAMAKAWA, 2016, p. 171).

Araki (2000, p. 114) explains that the stability in Japanese labor relations is the result of three factors: enterprise-level unionism, joint labor-management consultation practices and internal management promotion practices¹⁷.

The Enterprise unionism, developed historically in Japan, allows for an efficient mechanism for reconciling the interests of employers and employees, with a pragmatic approach regarding workers' demands vis-a-vis the company's competitiveness (ARAKI, 2000, p. 115). Also the with the joint practices it is common for Japanese companies to have formal consultation channels between labor and management. After WWII, labor relations were very adversarial with many confrontations. The joint consultation procedures arose, voluntarily, out of this situation, with the Productivity Increase Movement, where its three basic principles were to increase productivity with the help of employees, by using the joint consultation procedures, which in turn would enhance employment security, with a commitment to use other measures instead of layoffs, and the increase in productivity would also be equally distributed among managers, employees and customers (ARAKI, 2000, p. 116-117). And last the internal practices, as describe by Araki's article, the Japanese boards were composed of nearly half of directors with employee-functions, with a considerable part of these directors having a past of union leadership ("28.2% of top management was not only union members, but also leaders of an enterprise union") (2000, p. 117-118). This type of internal promotion

¹⁷ When Araki's article was published (2005), Japanese boards were composed of nearly half of directors with employee-functions, with a considerable part of these directors having a past of union leadership ("28.2% of top management was not only union members, but also leaders of an enterprise union") (2000, p. 117-118). This type of internal promotion demonstrates to other workers that their career path can be promising and creates a direct communication channel between labor and management.



demonstrates to other workers that their career path can be promising and creates a direct communication channel between labor and management.

However, Japanese labor relations are changing. The most obvious problems with the classical Japanese labor relations structure is that it has created a highly discriminatory labor structure, where mostly males employed directly from school will be able to hold lifetime positions, and that due to large presence of enterprise unions, as mentioned before, where the organization of workers were mostly targeted to those who were eligible for lifetime employment, reinforcing the discriminatory structure and leaving part-time workers unprotected (HANAMI, 2004, p. 10-12). With the decline of Unionization and the increase of part-time work (HANAMI, 2004, p. 9-12), where workers do not have the same strong incentives as lifetime employees to refrain from initiating a dispute, conflicts have been growing.

Yamakawa suggests that changes in employer's behavior and the labor market, such as diminishing union density and the use of joint consultation, a change in the long term employment practices and the consequent worker fidelity and the diminishing role of middle management as conflict buffers, are some of the causes for the increasing labor disputes in Japan (YAMAKAWA, 2016, p. 193-195). This change in labor relations led to the need to create different disputes resolution mechanisms to deal with this fact.

In 2001, with the Individual Labor-Related Disputes Act, the "System for Promoting Resolution of Individual Labor Disputes" was created, with conciliation mechanisms by the dispute adjustment commissions and administrative guidance by the directors of prefectural labor bureaus (YAMAKAWA, 2016, p. 268). Within the Judiciary system, in 2004 Japan created a new Labor Tribunal system, at the District Court Level, to deal with the increasing number of disputes. This is a system structured as a mediation/adjudication procedure where tribunal panel composed of three members (a professional judge, a lay-member from management and a lay-member from labor) may render binding awards in case mediation fails (YAMAKAWA, 2016, p. 171-174). Contrary to arbitration procedures, the binding effect of the



award does not stand if an objection is filed and the case then goes to ordinary court (YAMAKAWA, 2016, p. 171-174).

Despite the current developments and the increase in individual dispute resolution in labor relations in Japan, arbitration has not been a mechanism that has been resorted to. Arbitration clauses are not common in collective bargaining agreements, and arbitration clauses between an individual and his employer are void according to the Japanese Arbitration Act. (YAMAKAWA, 2016, p. 170).¹⁸

The closest experience to individual labor arbitration in Japan is baseball salary arbitration. It is a system created by the owners of baseball teams (corporate conglomerates), where players who are dissatisfied with the terms of their contract for the upcoming season may present a request for salary arbitration (SNYDER, 2009, p. 85). However, as Japanese players' contracts are renewable yearly contracts, this is a mechanism to define contractual terms for the next season, which characterizes it more as a negotiating procedure, a privilege for the player, which does not even have to be granted, than proper litigation based on rights (SNYDER, 2009, p. 85).

The procedure is also highly biased in favor of the baseball teams. The panel that will decide the player's request is made by constituted by the Nippon Professional Baseball (NPB) Commissioner and the two league presidents, who are chosen and paid by the Japanese club owners (SNYDER, 2009, p. 87). It is not surprising that this is a system that has not been used extensively, with only six cases until 2008 (SNYDER, 2009, p. 89).

The outlook for individual labor arbitration in Japan does not seem promising. Japanese labor culture is oriented to conflict avoidance, with long-term contracts and a sense of stability and cooperation in labor relations. Despite the changes that are looming in this culture, Japan has a variety of labor dispute resolution mechanisms, both at the administrative

¹⁸ "Article 4. (Exception Relating to Arbitration Agreements Concerning Individual Labor-related Disputes) For the time being until otherwise enacted, any arbitration agreements concluded following the enforcement of this Law, the subject of which constitutes individual labor-related disputes (which means individual labor-related disputes as described in article 1 of the Law on Promoting the Resolution of Individual Labor Disputes [Law No.112 of 2001]) that may arise in the future, shall be null and void. Available at <http://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf>. Accessed on 03/09/2019.



and judiciary levels, which does not leave much space for the development of alternative private dispute resolution mechanisms. In addition, arbitration law as it is does not allow for arbitration of individual labor disputes in Japan.

CONCLUSION

Brazil and Japan differ substantially when it comes to labor litigation culture. While in Brazil, with more than a million lawyers, litigation culture is strong across the board, including labor disputes, Japanese culture is more inclined to conflict avoidance, especially due to the characteristics of the labor relations in the country, with long-term work relationships and expected growth within the ranks of the company along time. This also translates in the dispute resolution mechanisms that are available, including the development of labor arbitration.

Despite these differences, both legal systems are strongly protective of workers. As arbitration is seen as a private dispute resolution mechanism with no oversight of the state, it is not well accepted as a suitable mechanism for labor disputes.

While in Japan individual labor arbitration is outright prohibited, in Brazil there has been some attempts to allow its use, both with the Arbitration Law reform, where the provision for individual labor arbitration was vetoed, as well as with the Labor Law reform, which included a provision that allowed for individual labor arbitration depending on the remuneration of the employee. However, Brazilian courts may resist the use of arbitration for individual labor disputes. Until Brazilian courts do not decide whether arbitration clauses in individual labor contracts are valid, it will be dangerous to rely on this dispute resolution mechanism.

The question to be answered is whether the use of arbitration will harm employees, considering the power difference in this relationship. In most cases this could be true, especially when labor representatives do not participate in the design of the dispute resolution system. Outright prohibition of arbitration for individual labor disputes, however,



does not seem to be the best option, as there may be positive aspects for its use in specific circumstances, such as with highly specialized workers or top managers.

Arbitration could play an important role in the dispute resolution mechanisms available for individual labor disputes, but for the market to develop it is first necessary for this mechanism to be allowed, which still is not in Japan, and legally safe, which depends on how courts will interpret its use in Brazil. However, if allowed, courts could control those situations where the use of arbitration was unconscionable, still protecting those weaker employees without harming the development of alternative dispute resolution mechanisms.

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