

Asociación de Magistrados y Funcionarios de la Justicia Nacional
Lavalle 1334 1er. piso – (1048) Ciudad de Buenos Aires – República Argentina
Tel / Fax: (011) 4372-0398 / 0654 / 2043 – E-mail: presidencia@asocmagistra.org.ar

INTERNATIONAL ASSOCIATION OF JUDGES/UNION INTERNATIONALE DES MAGISTRATS
2006 MEETING.

**Report from the representatives of the ARGENTINE REPUBLIC for the
questionnaire of the 4th Study Commission¹**

**DO WE NEED SPECIAL LABOUR COURT PROCEDURES AND
ALTERNATIVE DISPUTES METHODS?**

Conflict, in its confrontation form, cannot be a permanent situation, since it is incompatible with the normal development of labour relationships, and workers could neither have the purpose of hindering in a definite manner the functioning of the productive system, nor could allow themselves to do such a thing, due to their economic dependence on their jobs.

Negotiation – broadly speaking– is a procedure which includes all means through which confrontation may be overcome.

Bearing this in mind, in the Argentine Republic, more than fifty years ago, when it was decided to submit all conflicts arising from work to the scope of courts specialized on that matter, law-decree 32347/44, later ratified by law 12948, established that the National Justice on Labour matters would be exercised by a Conciliation Committee, an Arbitration Committee and the judges of the courts created by said law-decree (according with Section 1).

In addition to the conciliatory function, the Committee performed other activities inherent to a judicial court, since it received the complaint, summoned a hearing for parties to attend to and, eventually, answer the complaint, oppose exceptions and offer evidence. Only upon expiration of the term set for the offering of evidence, the proceedings were to be elevated to the appointed trial judge. It was a system closely connected with judicial jurisdiction, which served as a stage of the process.

With the sanction of the Law of Organization and Procedure of National Justice on Criminal Matters [Ley de Organización y Procedimiento de la Justicia Nacional del Trabajo] (No. 18345 published in the Official Gazette [Boletín Oficial] on November 24th, 1960) the stage at the Conciliation Committee was suppressed and – in a way – replaced by the conciliation attempt which was required before recurring to the intervening court (section 68 OL).

This situation subsisted until the publication in the Official Gazette (5/3/96) of law 24635 and the entering into effect (9/1/97) of the so called compulsory stage of labour conciliation, which is still the current legal framework, which - in addition to other specific regulations still in force – shall constitute the content of the relevant answer for this case in accordance with the specific questions made, and to the eventual ends of processing the information required.

I.1 Under the system of law 24635 the conciliation attempt constitutes a necessary step before trial, and in fact it is a requirement for the admission of the complaint, as

¹ Report prepared by Luis M. GARCÍA, Judge and María Florencia HEGGLIN, Public Defendant, upon request of the Asociación de Magistrados y Funcionarios de la Justicia Nacional (Argentina) [Association of Judges and Officers of the National Judiciary].

established by subsection 7 of section 65 of the LO (as revised by executive order 106/98) which sets as a requirement for the complaint “evidence of having previously attended and exhausted the conciliation stage”

Law 24557 of Workers’ Compensation Insurance [Riesgos del Trabajo] came a step before law 24635 in establishing an administrative stage of compulsory conciliation for actions arising from risks of which the employer was aware before the new regime entered in force.

This prior stage in matters of labour accidents has not been eliminated by law 24635, and both procedures were harmonized by resolution 561/97 of the MTSS [Labour Ministry].

However, section 4 of the regulatory executive order 1169/97 (as revised by executive order 1347/99 section 2) establishes that the provisions of law 24635 and its regulation shall not be applied to transactional, conciliatory or releasing agreements entered into spontaneously and directly by the parties, without any of them having recurred to the Compulsory Labour Conciliation Service, when said agreements were ratified by the parties at the Labour Ministry [Ministerio de Trabajo y Seguridad Social]. At the time of said ratification the acting official shall verify that the worker expressed his consent in a free manner and that he understands the effects of said agreements. Under such circumstances, the Labour Ministry may issue the justified resolution mentioned in section 15 of the LCT once the requirements established thereby are verified.

The worker shall be assisted by an attorney or union representative at the moment of ratifying the spontaneous agreement.

In order to enter into a spontaneous agreement, there can be no claim submitted to the SECLO on the same subject matter. The employer, or the person entering into the agreement with the worker, shall deposit a fee of 40 Argentine pesos for each worker which is a party to the agreement in the account of the MTYSS, which shall be opened to that effect at the Banco de la Nación Argentina [Argentine National Bank]. Evidence of the deposit shall be submitted to the MTSS upon presentation of the agreement, and shall constitute a requirement for continuing the proceeding.

I.1.a

In the law 24635 system, the attempt of conciliation shall be compulsory. In that regard, section 1 of law 24635 established that “individual and collective claims of the National Justice on Labour matters shall be compulsorily solved, prior to any judicial claim”, at an administrative organism of the Servicio de Conciliación Laboral Obligatoria (SECLO) created by section 4 of said law.

It may be noticed that what is compulsory is not the resolution of the conflict – as it is improperly suggested by the mentioned section – but the fulfilment of the administrative stage of conciliation, which essential for any claim made before the National Justice on Labour matters, except: a) the filing of amparo [relief] actions or cautionary measures, as well as actions which require via sumaria o sumarísima [procedures which are faster than ordinary procedures, due to shorter terms] (such as the ones of sections 47;52 and 62 of law 23551); b) preliminary measures and anticipated evidence; c) when the individual or collective claim had been included in a procedure of productive reorganization, crisis-prevention or compulsory conciliation of law 14786; d) law suits against employers who are under reorganization or in bankruptcy; e) law suits against the National, provincial and municipal State; and f) actions filed by minors, which require the intervention of the Ministerio Público [Public Ministry].

I.1.b

In the event of breach of the approved conciliatory agreement, it may be enforced at the National First Instance Courts on Labour matters by the procedure of sentence execution of sections 132 to 136 of law 18345. In this case, the judge, assessing the employer's conduct, shall impose a fine in favour of the worker of up to 30% of the conciliated amount. (see section 26 Law 24635)

Had the case been voluntarily referred to arbitration (procedure regulated in chapter IX of law 24635), the pertaining awards may be appealed -within 5 days of notification- to the Court of Appeals on Labour matters, and shall be enforced at the national First Instance courts on Labour matters. The principles established in section 736 and following sections of the ACCP [Argentine Code of Civil Procedure] shall be applied in order to determine the arbitration procedure, terms and other circumstances not expressly provided for in the special law.

On the other hand, in accordance with section 80 LO, at the moment of producing the oral evidence the judge shall attempt to obtain a conciliatory agreement from the parties. Notwithstanding the abovementioned measure – which is mandatory for the judge – he may attempt other conciliatory measures during the labour procedure.

I.1.c

The law does not set a duration term for the proceeding at the SECLO, but it is obvious that it shall respect the principle that justice must be expeditious [principio de celeridad], which is a distinctive note of the labour discipline, and may not exceed the term at the end of which the rights claimed at trial would be statute-barred, in accordance with the provisions of section 257 LCT and case-law set in Plenario [Judgement passed by all the Rooms of a Court of Appeals in order to harmonize contradicting judgements] 312 issued in the case “Martínez c/ YPF SA”, which shall be discussed in point I.1.e below.

I.1.d

The Judicial Secretary of the Ministry of Justice has retained the power to “determine the basic fee for the conciliator” (section 2 law 24635)

The procedure shall be free of charge for the worker and his successors. Title VI of law 24635 provides for the creation of a Funding Fund in the scope of the Ministry of Justice.

The conciliator shall receive a basic fee to be determined by the Ministry of Justice for his performance in each conflict, regardless of the amount claimed.

This fee shall be increased in the proportion set by the regulation should the procedure end with the approval of a conciliatory agreement or the issuance of an award in case the parties instruct the conciliator to act as arbitrator.

In the cases of conciliation, the employer shall deposit the conciliator's fees in the Funding Fund within 5 running days as from notification of the approval of the

agreement or, in the case of arbitration, within 3 running days as from the moment the award is consented or executed.

Should the employer fail to comply, the Fund shall issue the pertaining certificate.

The Funding Fund of this regime shall be in charge of paying the conciliator the basic fee mentioned in paragraph 1 of section 12 when the procedure ends with no conciliatory agreement or designation of the conciliator as arbitrator. Should the employer be eventually sentenced to pay the judicial costs, he shall reimburse the basic fee received from the Fund. If the employer is sentenced, said sentence may order an extra charge on such fee within the limits set by the regulation, should the judge consider that the employer's abusive behaviour led to the frustration of conciliation attempt.

Section 22 of the regulatory executive order sets the amount of 25 Argentine pesos as the conciliator's basic fee for his performance in each of the conflicts in which he has to intervene.

Should the procedure end with a conciliatory agreement or arbitration award, said fee shall amount to 250 Argentine pesos, which shall be paid by the employer or the person to whom the claim was made. In the cases of a claim filed by several plaintiffs, failing the conciliation attempt in connection with all the plaintiffs, the conciliator shall receive -as sole remuneration- the basic fee. However, if a positive result is achieved regarding only one of the plaintiffs, the fee payable to the conciliator shall be of 250 Argentine pesos, which shall increase by 25% for each additional plaintiff with whom said result is achieved. The employer or the person to whom the claim was made may, at his sole discretion, pay the fees for successful conciliation directly to the conciliator, who shall issue the pertaining documentation, thus releasing the employer from any further obligation in connection therewith. Within the term of 10 running days, the conciliator shall inform the Funding Fund that he has received his fees directly from the employer, should the latter decide to fulfil his obligation in said manner.

The conciliator shall have executive action against whoever is obliged to pay his fees. To that end, a copy of the conciliation minute and the certification of the agreement approval issued by the SECLO shall constitute executive title.

In order to obtain a copy of the resolution which approves the agreement, the person bound to pay shall prove at the SECLO that he fulfilled his obligation to pay the conciliator's fees. Any payment to be made in compliance with the conciliatory agreement of section 21 of the law 24635 shall be personally received by the worker, under penalty of nullity.

I.1.e

Through Plenario 312 issued on 6.6.06 in the case "Martínez Alberto versus YPF SA", the National Court of Appeals on Labour matters established as legal doctrine that -in accordance with section 7 of law 24635- a six-month term suspending the prescription for the claim at the SECLO shall be added to the term of section 257 LCT, regardless of the circumstance that the administrative proceedings were shorter or took more time.

I.2

In order for the claim to be successful, there are alternatives for the cases in which conciliation fails, admitting that the parties may request the SECLO to reopen the procedure provided no legal action has been initiated.

If at court the employer is sentenced after conciliation failed, the sentence may impose an additional charge of 3 to 10 times the amount of the basic fee destined to the

Funding Fund, when the judge considers that the employer's abusive behaviour led to the failure of the conciliatory attempt.

Within the next 5 working days as from the date on which the sentence imposing the additional charge mentioned in the previous paragraph turns definite, the Court Secretary shall notify the Funding Fund, and attach evidence of said notification to the file. Failure to serve such notice within the established term shall constitute serious negligence.

I.3

Unpaid remunerations as of the maturity date shall be paid with the accessories which compensate for the lack of availability of a credit of alimony nature.

I.4

The procedural regulations for mediation are not applicable to labour conflicts, since their scope is civil and commercial matters; said procedure is governed by law 24573.

The discussion of said regulations is alien to the issue under analysis in point I of this questionnaire, which is limited to Labour matters, and also to the general question stated in the section and subject matter of the Study Commission which makes said questionnaire.

COLLECTIVE ACTIONS

II.1.

The collective forms of conflict resolution are a) self-composition, b) conciliation and arbitration.

When the CN in section art 14 bis makes reference to conciliation and arbitration as methods for solving labour conflicts, it includes not only those initiated by administrative organisms unconnected with the parties (and thus originally alien) but also those which appear spontaneously – or which are agreed upon by – from the parties themselves.

Law 14786 has laid down rules aimed at sorting out conflicts of interests by means of a stage of compulsory conciliation and another one of voluntary arbitration.

The rules governing the conciliatory attempt may also be applied to the cases of collective conflicts at law as a prior voluntary stage to the intervention pertaining to the comisiones paritarias [joint committees] mentioned in section 14 of law 14250.

In turn, section 7 of law 23546 establishes that law 14786 shall be applied to the differences arising during negotiations. Notwithstanding the abovementioned, the parties may agree to submit themselves to a mediation, conciliation and arbitration service which shall be performed at the Ministry of Labour.

II.2

The parties to these procedures may be a plurality of workers with a collective interest or a union of workers, on behalf of the worker, and an employer, a group of employers or a professional association of employers, on behalf of the employer.

If the conflict arises while pursuing the execution or modification of a collective labour agreement, the right to recur to conciliation or arbitration pertains only to the workers' unions with legal standing.

II.3

If a conflict cannot be solved among the parties (in accordance with section 2 law 14786), any of them shall, before taking any direct action, inform said circumstance to the administrative authority in order to proceed to the stage of compulsory conciliation. The Ministry may intervene on its own initiative, if it deems it convenient due to the nature of the conflict.

Should the suggested solution not be admitted, a report shall be made public containing an indication of the causes of the conflict, a summary of the negotiations, the suggested conciliation formula and the party who brought it forward, accepted it or rejected it; the parties shall be invited to submit the matter to arbitration.

If the offer is accepted, the parties shall sign a commitment indicating a) the arbitrator's name, b) the points under debate, c) whether the parties shall offer evidence or not, and eventually the term for the production thereof, d) the term in which the arbitrator shall issue the award.

II.4

The arbitration award has the same effects of the collective agreements mentioned in law 14250.

II.5

The conciliatory agreements provided for in law 14786 and the arbitration awards shall be binding not only for the parties who sign them but also for all active workers and employers.

II.6

In order for a union to demand the fulfillment of its affiliates' rights, it shall need the individual power of attorney of those who it pretends to represent.

II.7

In this last case judicial costs shall be borne in accordance with the general provisions on the matter (section 38 LO and section 68 and following sections ACCP)

APPENDIX

Usual abbreviations and reference legislation

L.O Ley de Organización y Procedimiento de la Justicia Nacional del Trabajo [Law of Organization and Procedure of the National Justice on Labour Matters] (No. 18345 published in the Official Gazzette on September 24th 1969, as amended by executive order 106/98)

Asociación de Magistrados y Funcionarios de la Justicia Nacional
Lavalle 1334 1er. piso – (1048) Ciudad de Buenos Aires – República Argentina
Tel / Fax: (011) 4372-0398 / 0654 / 2043 – E-mail: presidencia@asocmagistra.org.ar

LCT Ley de contrato de trabajo [Labour Contract Law] (law 20744 and subsequent amendments which, together with supplementary legislation, constitute the RCT, that is to say, the Régimen de Contrato de Trabajo [Labour Contract Regime])

LAS Ley de Asociaciones Sindicales [Law of Union Associations] No. 23551

LRT Ley de Riesgos del Trabajo [Worker's Compensation Insurance Law] No. 24557

SECLO Servicio de Conciliación Laboral Obligatorio [Compulsory Labour Conciliation Service] (established by law 24635 of Conciliación Laboral Obligatoria [Compulsory Labour Conciliation])

LAW 14786 Conciliación Obligatoria [Compulsory Conciliation] (within the scope of Collective Law)