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DISSERTATION

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ARBITRATION IN THE GIG ECONOMY: SAFEGUARDING ACCESS TO JUSTICE TO THE WEAKER PARTY TO A WORK CONTRACT

PREFACE

The idea for this dissertation originated from the experiences and insights that I have gained while working in the field of labour law in both private and public sectors. The research seeks to respond to the growing concerns within the legal community about the notable legal uncertainties and lack of comprehensive analysis regarding the use of arbitration as an ADR mechanism to enhance access to justice in the gig economy. The goal of this dissertation, therefore, is to analyse the current state of the laws and suggest potential future developments in this area.

This work would not have been completed without the invaluable support and contributions received from family, friends, colleagues, and institutions.

I am deeply grateful to God and my beloved family for giving me the necessary strength to embark on this journey. A special note of gratitude goes to Dr Antonio Mirra, whose work and commitment to justice have been a constant source of inspiration in my personal and professional life. My heartfelt thanks also go to Ben and Nina Berrecloth for their unwavering support and affection.

I would also like to express my deepest gratitude to my friends, who have always supported me despite the distance and challenges of life. I am sincerely thankful to my colleagues, especially Dr Leopoldo Figueiredo, for his always bright insights on the subject and his professionalism.

Last but certainly not least, I would like to extend my thanks to the team of professors and staff at the University of Essex. I am particularly grateful to my supervisor, Dr Andrea Fejõs, for her guidance throughout the development of this dissertation, and to Dr Niall O'Connor for the valuable discussions on the topic.

'It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to litigation – for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity' [1]

[1] Aristotle, *Rhetoric* (c 350B.C.E., W. Rhys Robert tr, Dover Publications 2004) Book I:13.

ABSTRACT

This dissertation explores the controversial expansion of arbitration beyond the so-called commercial circle to resolve individual workplace disputes within the rapidly evolving gig economy. Using the Brazilian practice as an example to guide the analysis, while also drawing lessons from other jurisdictions, this study investigates whether arbitration can serve as an effective alternative dispute resolution mechanism (ADR) for enhancing access to justice in this new labour landscape. While acknowledging that a more liberal, efficiency-driven approach may be justified in an increasingly dynamic and flexible labour market, the thesis argues that the significant power imbalances and legal uncertainties faced by gig workers demand the adoption of some minimum additional protective features in arbitration. A fine balance needs to be struck here between the opposing principles of party autonomy and the protection of the worker to fully realize the potential of arbitration as an ADR mechanism that can enhance access to justice, avoiding falling either into the mistake of an excessive formalization or lawless arbitral practice.

Keywords: Labour arbitration. Access to justice. Gig economy.

LIST OF ACRONYMS AND ABBREVIATIONS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
AgR	Agravo Regimenta
AMCHAM Brazil	Centre of Arbitration and Mediation of the American Chamber of Commerce for Brazil
art/arts	article/articles
BC	Before Christ
CF/88	Constituição da República Federativa do Brasil de 1988 [Brazilian Constitution]
CBAr	Comitê Brasileiro de Arbitragem
ch/chs	chapter/chapters
CLT	Consolidação das Leis do Trabalho [Brazilian Consolidated Labour Laws]
CNJ	Conselho Nacional de Justiça [National Council of Justice]
CPC	Código de Processo Civil [Brazilian Code of Civil Procedure]
DEJT	Diário Eletrônico da Justiça do Trabalho [Brazilian Official Gazetter]
edn	edition
ed/eds	editor/editors
et al	et alia [and others]
EU	European Union
EUR	Euros
FAA	US Federal Arbitration Act

GBP	British Pound
IBA	International Bar Association
ICC	International Chamber of Commerce
ILO	International Labour Organization
LCIA	London Court of International Arbitration
MNC	Multinational Corporations
MPT	Ministério Público do Trabalho
n/nn	footnote/footnotes (internal to the work)
no/nos	number/numbers
ODR	Online Dispute Resolution
OECD	Organization for Economic Co-Operation and Development
para/paras	paragraph/paragraps
PMDB	Brazilian Democratic Movement [Partido do Movimento Democrático Brasileiro]
PSDB	Brazilian Social Democracy Party [Partido da Social Democracia Brasileira]
PT	Workers'Party [Partido dos Trabalhadores]
RGPS	Regime Geral da Previdência Social [Brazilian General Social Security Regime]
RE	Recurso extraordinário [Extraordinary Appeal]
RR	Recurso de Revista [Review Appeal]
s/ss	section/sections
STF	Supremo Tribunal Federal [Brazilian Supreme Court]
STJ	Superior Tribunal de Justiça [Brazilian Superior Court]
SbDI-1	Subseção 1 Especializada em Dissídios Individuais do Tribunal Superior do Trabalho [Specialized Subsection of the Superior Labour Tribunal for Individual Disputes]

tr/trs	translator/translators
TRT	Tribunal Regional do Trabalho [Employment Appeal Tribunal]
TST	Tribunal Superior do Trabalho [Superior Labour Tribunal]
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKSC	The Supreme Court of the United Kingdom
UN	United Nations
UNCITRAL	Arbitration Rules of the United Nations Commission on International Trade Law
US	United States
USP	Universidade de São Paulo
vol/vols	volume/volumes

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R (Unison) v Lord Chancellor [2017] UKSC 51

Uber BV v Aslam [2021] UKSC 5

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TABLE OF LEGISLATION

I – Table of Statutes

- Brazil

- Other Countries

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III – International Instruments, UN Documents and Arbitration Rules

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American Arbitration Association, 'A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship' <http://www.adr.org/protocol.html> accessed 22 May 2024

American Chamber of Commerce for Brazil, 'Regulamento de Arbitragem para Disputas Trabalhistas' (2021) < https://www.amcham.com.br/index/centro-de-arbitragem-e-mediacao> accessed 27 July 2024

Câmera de Mediação e Arbitragem Especializada, 'Regulamento do Processo de Arbitragem Trabalhista' (2023) < https://www.camesbrasil.com.br/wp-content/uploads/2023/08/4.-Regulamento-arbitragem-trabalhista-maio-2023.pdf> accessed 05 August 2024

Center for International Legal Cooperation, 'The Hague Rules on Business and Human Rights Arbitration' (2019) < https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf> accessed on 17 August 2024

International Accord, 'International Labour Arbitration and Conciliation Rules' (2021) <https://internationalaccord.org/wp-content/uploads/2023/02/2021JU_1.pdf> accessed on 17 August 2024

ILO Constitution 1919

ILO Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia) (10 May 1944)

ILO Recommendation nº 198, 'Employment Relationships Recommendation (Recommendation Concerning the Employment Relationship)' 95th Conference Session Geneva (15 June 2006)

UNCITRAL Model Law on International Commercial Arbitration 1985

UNCITRAL, 'Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration' (1981) UN Doc A/CN9/207

UN Universal Declaration of Human Rights 1948

UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

UN General Assembly, 'Transforming our World: The 2030 Agenda for Sustainable Development` (2015) UN Doc A/RES/70/1

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UN Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc A/HRC/17/31

TABLE OF CONTENTS

INTRODUCTION

In recent years, the innovative use of technology and communication has enabled the emergence of a new business model, the platform 'gig economy', which offers workers greater flexibility and freedom. However, this economic transformation has also brought significant challenges, particularly regarding the increasing obstacles gig workers face when accessing justice.[2]

With the introduction of non-traditional forms of work, coupled with an increasing commodification of human labour, a scenario of great legal uncertainty was created, making it considerably more difficult for gig workers to recognize and pursue their rights. In this way, along with the proliferation of the practice of inserting arbitration clauses in gig work contracts,[3] it has become of paramount importance to critically assess the use of arbitration in the gig economy, with a focus on the issue of access to justice.

The key research question of this dissertation is, therefore, whether arbitration can serve as an ADR mechanism capable of contributing to greater access to justice in resolving individual workplace disputes in the gig economy and whether special rules are needed to make this possible.

The central claim of this thesis is that arbitration can serve as a tool to amplify gig workers' access to justice, provided that additional safeguards are in place to alleviate the inherent power imbalances between the parties, which are aggravated by the legal uncertainties surrounding gig workers.

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[2] Mark Ratilla and others, 'Revisiting the Gig Economy: Emergence, Challenges and Covid-19 Implications' in Mark Ratilla and others (eds), *Sustainability in the Gig Economy* (Springer 2022), 325.
[3] Jean R Sternlight, 'Creeping Mandatory Arbitration: Is it Just?' (2005) 57 (5) Stanford Law Review, 1631.

In an ever-more dynamic economy, where the idea of privatized justice gains more strength under the efficiency rhetoric and where new forms of worker control create an illusion of autonomy, care must be taken to avoid hasty policies that ignore the peculiar challenges gig workers face and the fact that these workers also demand some sort of legal protection.

However, what has been observed so far is that the rapid expansion of the use of arbitration beyond the so-called commercial circle was not accompanied by a comprehensive study of the distinctive challenges brought by the gig economy. Indeed, although there are countless studies on commercial arbitration, the literature on individual labour arbitration is varied and widespread. The existing legal understanding regarding the issue of access to justice in the gig economy often relies on sparse knowledge or studies pertaining to other areas of law, where distinct principles apply.[4]

Therefore, the present dissertation seeks to fill this gap and enrich the incipient literature on arbitration in the gig economy. In a still underexplored field, this thesis introduces the reader to the idea of developing a subtype of arbitration that can incorporate additional features designed to protect workers' access to justice. The goal here is to contribute to the creation of a fair and effective arbitration mechanism capable of appropriately resolving individual workplace disputes in the gig economy.

The methodology used to guide the research process here is the 'normative methodology', which implies a prescriptive approach to law. This strategy, therefore, allows us to move beyond merely describing the law as it currently stands, to understanding how the law ought to be to fully achieve its intended purpose.

As for the method chosen to guide this research, the 'desk research method' was deemed to be the most appropriate technique since it allows the collection and analysis of a wide array of

[4] Adrienne E Eaton and Jeffrey H Keefe, *Employment Dispute Resolution and Worker Rights in the Changing Workplace* (Industrial Relations Research Association 1999), 32.

data available on the subject, crucial to the process of systematising, clarifying and rectifying the law on a particular topic. Among the different sources of information used, case law gains relevance for enabling the evaluation of the effectiveness of the law and for helping to identify gaps in the existing legislation, something crucial when studying an area of law that is evolving and where legislative guidance is still sparse.

To properly address the research question, the paper will be structured as follows. In the first part, the dissertation will offer an overview of how the gig economy has disrupted the world of work and clarify some basic concepts to prevent the adoption of false premises that could compromise the validity of the entire study. Section I, therefore, will explain the phenomenon of the 'gig economy' and highlight the key challenges gig workers face when seeking their rights. Section II, in turn, will define the concept of 'access to justice' in the context of adopting an ADR mechanism to resolve individual workplace disputes, as well as introduce the key characteristics that qualify a private adjudication system as 'arbitration' and examine how these features can either promote or obstruct access to justice.

The second part of the dissertation will analyse the primary barriers limiting the promotion of access to justice when arbitrating an individual workplace dispute in the gig economy. To start, Section I will address the tension that exists between the opposing principles governing arbitration and labour law and how this affects the pursuit of an adjudication system accessible to all. Section II, in turn, will focus on the study of the Brazilian practice – a country that has embraced an intermediate approach to the arbitrability of individual labour disputes. By analysing the Brazilian experience, drawing lessons from other jurisdictions, this work hopes to bridge the gap between the abstract theoretical knowledge given and the real-world challenges. It also hopes to bring the necessary diversity to the development of the literature on the subject, often dominated by the liberal North American or paternalistic European perspectives.

The third part of the dissertation will advance the practical discussion by outlining key measures that can be taken to safeguard the right of access to justice for the weaker party in arbitrating an individual labour dispute within the gig economy. Therefore, Section I will explore potential strategies for creating a private adjudication system accessible to all, and Section II will propose additional procedural features that are necessary to ensure a fair and efficient arbitral process.

Finally, the conclusion will reaffirm the thesis that arbitration can serve as an effective ADR mechanism to amplify gig workers' access to justice, provided that additional safeguards are implemented to alleviate the inherent power imbalances between the parties, which are aggravated by the legal uncertainties surrounding gig workers.

PART I – A TRANSFORMING WORKPLACE AND JUSTICE

I – The Rise of the Platform Gig Economy and the Disruption of Labour Law

After the digital revolution, which has been occurring since the middle of the last century, the world is now being transformed by a Fourth Industrial Revolution, where technological innovation is disrupting almost every industry at a speed and depth with no historical precedent.[5] In the world of work, the emergence of a new business model, the platform gig economy, was made possible by the widespread adoption of mobile internet and smartphones.[6]

The recent COVID-19 pandemic, in turn, has made this scenario even more challenging by triggering an unparalleled acceleration in the adoption of technology to manage and mediate the workforce.[7] Furthermore, with the unexpected economic crisis caused by the pandemic,[8] many blue and white-collar workers had to turn to gig work for additional or even primary income to cope with the cost-of-living crisis.[9]

However, before delving into the implications of the rapid rise of this new business model, it is crucial to first clarify what the platform-based 'gig economy' means. Although there is no consensus on the definition of 'gig economy', also known as 'sharing economy' or 'crowdsourcing economy', the term is usually used to describe this new phenomenon where the exchange of labour for money between individuals or companies is facilitated by an

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[5] World Economic Forum, 'The Fourth Industrial Revolution: What it Means, How to Respond' <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> accessed 30 May 2024.

[6] Christophe Degryse, '(Re)Inventing the Collective Dimension in a 'Virtualised' Labour Market' in Immanuel Ness et al (eds), *The Routledge Handbook of the Gig Economy* (Routledge 2023).

[7] Uma Rani and Nora Gobel, 'Job Instability, Precarity, Informality, and Inequality: Labour in the Gig Economy` in Immanuel Ness et al (eds), *The Routledge Handbook of the Gig Economy* (Routledge 2023).

[8] World Bank Group, 'World Development Report 2022: The Economic Impacts of the COVID-19' <https://www.worldbank.org/en/publication/wdr2022/brief/chapter-1-introduction-the-economic-impacts-of-the-covid-19-crisis> accessed 22 June 2024.

[9] SAFERjobs Community Interest Company, 'Post-Pandemic Economic Growth: UK Labour Markets – Call for Evidence'<https://committees.parliament.uk/writtenevidence/109894/pdf/#:~:text=The%20size%20of%20the%20gig,Continued%20growth%20is%20expected> accessed 22 June 2024.

internet-based platform, such as the famous Uber platform, that connects passengers with drivers for ride-hailing services.[10]

This new business model presents a major challenge to the existing labour laws established to protect workers,[11] since it appears to be built on the idea that labour is a commodity to be bought and sold in the market. An idea that gains traction with the expansion of non-standard forms of work that eliminate traditional forms of control, and which so far has allowed gig companies around the world to avoid the obligations imposed by employment law, in a phenomenon called by some as 'the escape from employment law'.[12]

Although the debate over the misclassification of employees in the modern gig economy is not the central focus of this study, it is crucial to highlight here that the emergence of the contemporary gig worker has disrupted the classic binary employment classification system used in many countries, such as the US and Brazil. In these systems, where workers are labelled as either employees or independent contractors, the modern gig worker does not seem to fit into either category.[13]

Across the world, there is still an ongoing debate over the legal classification of modern gig workers. In this context, however, it is worth highlighting the landmark decision of the UK Supreme Court of the United Kingdom (UKSC) in 2021, which ruled that Uber drivers are not self-employed nor employees under contracts of employment but rather 'workers' who are entitled to certain employment rights.[14] This decision not only represents a groundbreaking

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[10] Mark Graham and Mohammad A Anwar, 'Two Models for a Fairer Sharing Economy' in Davidson NM and others (eds), *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge University Press 2018).

[11] ILO Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia) (10 May 1944), I, a.

[12] Adrián Todolí-Signes, 'The Gig Economy: Employee, Self-employed or the Need for a Special Employment Regulation?' (2017) 23 (2) Transfer (Brussels, Belgium), 193.

[13] Jennifer Pinsof, 'A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy' (2016) 22(2) Michigan Telecommunications and Technology Law Review, 342; Adrián Todolí-Signes, 'The Gig Economy: Employee, Self-employed or the Need for a Special Employment Regulation?' (2017) 23 (2) Transfer (Brussels, Belgium), 193.

[14] *Uber BV v Aslam* [2021] UKSC 5.

milestone on the issue but also serves as an indicator of how other countries might approach and decide on this matter in the near future.

In Brazil, a jurisdiction that welcomes the use of arbitration and which will serve as a practical example for the analysis of the barriers to access to justice in this new landscape, there is still no consolidated national case law on the subject. To date, the chambers of the Brazilian Superior Labour Tribunal (TST) have issued divergent decisions about the employment status of gig workers,[15] and the Brazilian Supreme Court (STF) has yet to rule on the matter.[16]

This scenario only seems to confirm that the speed at which technology is transforming the workplace has made it extremely challenging for lawmakers and courts to keep pace with these changes. Furthermore, in instances where some governments have enacted new laws, gig companies have responded by adjusting their operating models accordingly to circumvent the full application of the law. In this ongoing 'cat and mouse game,' the legal status of gig workers remains quite unclear.[17]

For the purposes of this study, however, it is sufficient to acknowledge the two main features of gig work that are universally recognized by courts and scholars,[18] and that will serve as a starting point for our analysis. The first one is the vulnerability of gig workers, who are subject to new forms of control that can undermine their bargaining power. The second one is the legal uncertainty surrounding gig workers, who find themselves in a legislative vacuum that can make it harder for them to pursue their rights.

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[15] Interlocutory Appeal in Review Appeal (Agravo de Instrumento em Recurso de Revista) AIRR-1001160-73.2018.5.02.0473, Fifth Chamber of the Superior Labour Tribunal (TST), Reporting Justice Breno Medeiros, decided on 03 August 2021, published on the Brazilian official gazette (DEJT) on 20 August 2021; Review Appeal (Recurso de Revista) RR-100353-02.2017.5.01.0066, Third Chamber of the Superior Labour Tribunal (TST), Reporting Justice Mauricio Godinho Delgado, decided on 05 April 2022, published on the Brazilian official gazette (DEJT) on 10 April 2022.

[16] Extraordinary Appeal (Recurso Extraordinário) RE 1446336, Supreme Court (STF).

[17] Cristine Ro, 'Why Gig Work is so Hard to Regulate' BBC (London, 9 March 2022) < https://www.bbc.com/worklife/article/20220308-why-gig-work-is-so-hard-to-regulate> accessed 18 July 2024.

[18] Zach Meyers, 'Driving Uncertainty: Labour Rights in the Gig Economy' (2021) < https://www.cer.eu/insights/driving-uncertainty-labour-rights-gig-economy> accessed 21 August 2024.

Amid the legal uncertainties arising from the rapid growth of the gig economy, one thing is clear: the relationship between gig workers and gig companies cannot be compared to that between traders, where parties are on equal footing.[19] Therefore, building on this premise, this dissertation will seek to identify the key challenges gig workers face when arbitrating individual workplace disputes and assess whether arbitration, in its current form, can serve as an effective adjudication mechanism for improving access to justice in this evolving context

II – Arbitration as a Potential Tool to Improve Access to Justice in Labour Disputes

In modern history, the use of arbitration has primarily been associated with the resolution of international commercial disputes. It is only in recent times that arbitration has begun to rapidly expand beyond the so-called commercial circle to finally reach areas such as labour law.[20]

According to recent reports, private businesses, particularly gig companies, are increasingly requiring or encouraging the use of arbitration to resolve workplace disputes.[21] Furthermore, the use of arbitration is expected to increase rapidly and steadily in the forthcoming years, despite growing concerns surrounding its fairness.[22]

However, as arbitration expands into the labour field, the controversy over its appropriateness to resolve individual workplace disputes also grows. To better understand the role of arbitration in this new context, it is worth taking a brief look back at the history of arbitration to realize that, long before laws were established or courts were organised, people

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[19] ILO Recommendation nº 198, 'Employment Relationships Recommendation (Recommendation Concerning the Employment Relationship)' 95th Conference Session Geneva (15 June 2006).
[20] Jay E Grenig, 'Evolution of the Role of Alternative Dispute Resolution in Resolving Employment Disputes' (2015) 71 (2) Dispute Resolution Journal, 99.
[21] American Association for Justice, 'Forced Arbitration by Corporations Surges to Unprecedent Levels' (2023) <file:///M:/pc/downloads/Forced%20Arbitration%20by%20Corporations%20Surges%201223%20final.pdf> accessed 29 June 2024; Business & Human Rights Resource Centre, *The Future of Work: Litigating Labour Relationships in the Gig Economy* (2019) Corporate Legal Accountability Annual Briefing, 22.
[22] Global Commission on the Future of Work, 'Work for a Brighter Future' (ILO 2019).

had resorted to arbitration for the resolution of all kinds of controversy, not just commercial disputes.[23]

To illustrate this, we recall one of the best-known arbitrators in history, King Solomon, who reigned in the tenth century BC. In one of his most renowned cases, two women claimed to be the mother of a living infant and accused the other of being the mother of the deceased one. King Solomon's wise judgment ultimately identified the true mother and returned the living baby to her.[24]

Therefore, throughout history, arbitration has not been limited to the resolution of international commercial disputes. Instead, it is considered a spontaneous product of historically diverse social groups, functioning as a consensual dispute resolution mechanism sitting outside the court system. [25]

The emergence of arbitration as the preferred method for settling international commercial disputes over the last century is usually linked to the perception that arbitration was a less costly and more equitable alternative to the slow and expensive civil litigation process.[26]

Similarly, in the world of work, the acceptance of arbitration as an alternative mechanism to resolve workplace disputes is also driven by the belief that arbitration can be a form of justice enhancement, providing an efficient mechanism to settle disputes and better access to justice.[27]

In an ever-more dynamic, complex and flexible labour market that flourishes in a free society, it only seems reasonable that parties are entitled to have more freedom to organize their

[23] Frank D Emerson, 'History of Arbitration Practice and Law' (1970) 19 Cleveland State Law Review, 155.
[24] Kings, 3, 16-28.
[25] Earl S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) University of Pennsylvania Law Review, 132.
[26] Imre S Szalai, 'Exploring the Federal Arbitration Act Through the Lens of History' (2016) Journal of Dispute Resolution, 115.
[27] Lola A Ojelabi and Mary A Noone, 'Jurisdictional Perspectives on Alternative Dispute Resolution and Access to Justice: Introduction' (2020) 16 International Journal of Law in Context, 103.

private matters in ways they deem most effective, provided they do not offend public policies or mandatory laws.[28]

'Access to justice', in this context of the adoption of Alternative Dispute Resolution (ADR) mechanisms, serves then to encompass two basic purposes of the system: first, a system of adjudication accessible to all (a 'day in court'); and second, a system with a procedure that can secure a fair process (a 'fair day in court').[29]

Therefore, 'access to justice' involves not only having physical or digital access to a system of adjudication but also having an efficient process that delivers fair outcomes to all parties, with fairness including both substantive components (equitable outcomes based on legal rights) and procedural components (opportunity to be heard).[30]

The adoption of ADR processes to improve access to justice aligns with what Mauro Cappelletti and Bryant Garth identified as the third and final wave to achieve 'effective access to justice', known as the 'access-to-justice approach' or procedural wave. According to this approach, there is a need to create real alternatives to ordinary courts and conventional litigation procedures since, in certain areas or kinds of controversies, the traditional contentious litigation in court might not be the most effective way to ensure the protection of rights. [31]

Now, in a world where 5.1 billion people, two-thirds of the world's population, still lack meaningful access to justice,[32] it is no surprise that arbitration has emerged as an alternative for those seeking justice rather than as a replacement for the existing public justice system.

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[28] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013), 2.
[29] UN Development Programme, 'Programming for Justice: Access for All – A Practitioner's Guide to Human Rights – Based Approach to Access to Justice' <https://www.undp.org/sites/g/files/zskgke326/files/migration/asia_pacific_rbap/RBAP-DG-2005-Programming-for-Justice.pdf > accessed 01 June 2024.
[30] Nancy A Welsh, 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories' (2004) 54 Journal of Legal Education, 49.
[31] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buff L Rev, 181.
[32] Task Force on Justice, 'Justice for All – Final Report' (New York: Center on International Cooperation, 2019) <https://www.justice.sdg16.plus/> accessed 01 June 2024.

But to analyse arbitration's potential as an ADR mechanism in this new economy, it is essential to first clarify its concept and main characteristics. Only after these initial clarifications can we assess the need and possibility of adapting the arbitral system to address the specific challenges that exist when arbitrating an individual workplace dispute in the gig economy.

While arbitration lacks a universal definition, three core procedural characteristics must be found, which otherwise would not render the process to be defined as 'arbitration'. These essential features are the following: (i) the need for an arbitration agreement, to record the *consent* of the parties to submit an *arbitrable* dispute to arbitration; (ii) a reference to a *neutral* decision-maker, a sole arbitrator or an arbitral tribunal that is independent and impartial; and (iii) a *binding* award by the third party (the arbitrator or arbitral tribunal), where the parties accept to carry out the outcomes of the arbitral proceedings without delay.[33]

Thus, in short, arbitration can be defined as an ADR mechanism in which the parties to a dispute agree to refer the disagreement to a neutral third party chosen by them and to accept in advance the arbitral decision as final and binding.[34] This notion of what constitutes arbitration is not subject to the discretion of the parties, but it depends on the applicable law to ensure that the fundamental notions of justice are upheld.

However, beyond the core procedural characteristics just mentioned above, additional procedural features can differ significantly depending on the industry in which the dispute arises and the forum that administers the process. These variations, as we will see in the next chapters, are designed to enhance the efficiency and substantive fairness of the process.[35]

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[33] Andrew Tweeddale and Keren Tweeddale*, Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007), Ch1.
[34] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (7th edn Oxford University Press 2022), Ch 1.
[35] Jill I Gross, 'Arbitration Archetypes for Enhancing Access to Justice' (2020) 88 Fordham Law Review, 2319.

This explains why in the case of individual labour disputes in the gig economy, where significant power imbalances still exist between gig workers and gig companies,[36] there are growing concerns about the practice of simply applying existing procedural rules designed for commercial arbitration to labour disputes.

Therefore, having clarified the meaning of 'access to justice' in the context of the adoption of an ADR mechanism and the fundamental concept of 'arbitration', this dissertation will now focus on identifying and analysing the primary barriers that hinder the implementation of arbitration as an effective ADR mechanism. Only after a critical examination of these challenges, will it be possible to discuss the need for developing a specialized form of arbitration tailored to the new reality of the gig economy, ensuring that arbitration does not become merely a form of 'second-class justice' or 'poor justice to the poor.' [37]

[36] See n 23 Part I, I

[37] Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement` (1993) 56 (3) Modern Law Review, 282.

PART II – CHALLENGES IN ACCESSING JUSTICE WHEN ARBITRATING AN INDIVIDUAL LABOUR DISPUTE IN THE GIG ECONOMY

I – The Weak Party in an Individual Labour Arbitration

1) The Tension Between the Principle of Party Autonomy and the Principle of the Protection of the Worker

The widespread acceptance and global success of arbitration as the preferred mechanism for resolving international commercial disputes is largely due to the principle of party autonomy.[38] This foundational principle of modern arbitration, which upholds the parties' individual freedom to organize their private matters, aligns with the liberal ideals that are highly valued in the dynamic world of international commerce.[39]

According to the principle of party autonomy, the parties involved in a dispute have considerable autonomy to shape the dispute resolution mechanism in ways that best suit their facts and circumstances. This autonomy, therefore, allows parties to decide key aspects of the arbitration, such as the selection of arbitrators, the choice of the applicable law, and the rules that will govern the arbitral proceedings.[40]

On the other hand, in the field of labour relations, a more paternalistic approach prevails, with the principle of the protection of the worker being universally recognized. According to this foundational principle of labour law, workers, being the more vulnerable party in a working

[38] Julian DM Lew, *Comparative International Commercial Arbitration* (Kluwer 2003), V.
[39] Edward Brunet, 'The Core Values of Arbitration' in Edward Brunet et al (eds), *International Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006), 3; UNCITRAL, Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, UN Doc A/CN9/207 (UN 1981), para 17.
[40] Valentina Vadi, 'Analogies in International Investment Law and Arbitration' in *British Yearbook of International Law* (Oxford University Press 2016), 222.

relationship, are entitled to some special protections to mitigate the inherent power imbalance that exists in work contracts, without which they would be left at risk of exploitation. [41]

Therefore, as arbitration expands to the labour field, the primary challenge is to address the tension that exists between the opposing principles governing arbitration and labour law. Indeed, since the arbitral principle defends the freedom of the parties to shape the arbitral procedure, this may conflict with the labour principle that preaches the need to uphold minimum standards for workers.

As previously noted,[42] workers often face challenges that prevent them from being on equal footing with their employers when arbitrating a workplace dispute, such as weak bargaining power or lack of financial means to implement their choices in practice. In situations like these, where parties suffer from inherent weaknesses, the idea of self-governance supported by the principle of party autonomy becomes an area of concern, as the stronger party might simply try to exploit such weakness and, consequently, undermine the weak party's fundamental right to access justice. [43]

To solve this conflict, it is important to remember that the principle of party autonomy is not absolute. Like with other legal principles, this foundational principle of arbitration is not rigidly applied without considering other relevant factors, such as the need to protect different stakeholders. This explains why parties cannot make agreements that are 'incompatible with the proper law of the contract or the mandatory procedural rules of the place where the arbitration is agreed to be conducted or any overriding public policy'.[44]

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[41] ILO Constitution, preamble; Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia), art 1 (a); Universal Declaration of Human Rights, arts 4 and 23 to 25.
[42] See n 23 Part I, I
[43] Immanuel Kant, *Groundwork of the Metaphysics of Morals: A German-English Edition* (Cambridge University Press), IV-446.
[44] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007), Ch 8.

In this way, having provided the necessary clarifications on the foundational principles that are at stake when arbitrating an individual workplace dispute, this study will now analyse how these competing principles can be balanced to ensure arbitration can play its role as an effective ADR mechanism in the context of the gig economy.

2) Limitations to Party Autonomy in Individual Labour Arbitration

Since the principle of party autonomy is not absolute, it can be limited to protect the parties and the public at large. And in the case of labour disputes, it can be said that the aim of protecting the interests of the weak party, which does not always possess the necessary capacity or voluntariness to make choices in its interest, sometimes overlaps with the aim of protecting the interests of the public at large, which requires parties to observe matters of fundamental law reflecting the basic values of a just society.[45]

Overall, however, states tend to adopt different approaches to deal with the weaknesses of the parties in arbitration. And, when it comes to labour issues, these policies can range from a more 'paternalistic' approach, where interference with a person's freedom of action is welcomed to protect the weaker party, to a more 'liberal' approach, which favours minimal interference and defends individual freedom of action.[46]

To implement these policies aimed at protecting the weak party in arbitration, a wide range of instruments can be used. However, despite this variety, it can be said that these tools generally revolve around the fulfilment of the two basic purposes of an adjudication system designed to improve access to justice.[47]

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[45] Franco Ferrari and Friedrich Rosenfeld, 'Limitations to Party Autonomy in International Arbitration' in Stefan M Kroll et al (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023), 61.
[46] Gerald Dworkin, 'Paternalism' (1972) 56 The Monist, 65.
[47] Friedrich Rosenfeld, 'Weak Parties in International Arbitration' in Stefan M Kroll et al (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023), 1751

Regarding the first fundamental purpose of an adjudication system, that is, an adjudication system accessible to all, the following instruments are typically used to regulate the weak party's access to arbitration: (i) the laws on capacity (subjective arbitrability), to restrict access to arbitration to individuals who cannot exercise their own free will; (ii) the laws on arbitrability (objective arbitrability), to define which subject matters are capable of being resolved through arbitration; and (iii) the laws governing the formation and validity of arbitration agreements, to safeguard the actual consent of the parties to submit a dispute to arbitration and to protect the weak party. [48]

Regarding the second fundamental purpose of an adjudication system, that is, an adjudication system with a procedure that can secure a fair process, there are numerous instruments designed to regulate arbitration proceedings to promote efficiency while delivering fair outcomes. These instruments, which cover various aspects of arbitration, from procedural rules to the conduct of arbitrators and parties, depend on the normative framework that governs arbitration, which includes arbitration laws, arbitration rules, party agreements, and the discretion of arbitrators.[49]

In the context of protecting the weak party, the debate over the laws on arbitrability (objective arbitrability) gains prominence, as these laws are among the primary tools used by governments to ensure that the weak party retains the right to a 'day in court'. As regards the instruments used to secure a fair process, this study advocates the need for additional procedural guarantees to address the unique challenges that arise when arbitrating individual labour disputes in the gig economy.

To provide a concrete analysis of the main challenges to the implementation of arbitration and how many of these key instruments have been used to overcome such barriers, bridging

[48] Friedrich Rosenfeld (n 47) Ch 57
[49] Ibid

the gap between the abstract theoretical knowledge given and the real-world challenges, the next Section will delve into the analysis of the Brazilian practice, a country that has recently recognized the arbitrability of individual labour disputes.

The study of the Brazilian practice is particularly relevant, not only because of the size of its economy, the 8th largest economy in the world in 2024,[50] but especially because of its unique approach to labour arbitration. In Brazil, the traditionally protective 'paternalistic' labour law doctrine intersects with a more 'neoliberal' approach to arbitration. Therefore, by introducing a Brazilian outlook on this subject, whose literature is primarily dominated by the more 'liberal' North American or 'paternalistic' European perspectives, this study aims to enrich the necessary diversity required for advancing the studies on this topic.

II – The Brazilian Practice

1) From a Paternalistic to a Neoliberal Approach

Although Brazil is known for having established a more firmly protective labour law doctrine than other jurisdictions[51] and for its paternalistic policies dating back to the 1930s,[52] in the past few years, the country's labour market policies have been shaped by the competing 'state-interventionist' and 'neoliberal' approaches. These conflicting approaches have even become a key aspect of political competition in the country, particularly between the Workers' Party (PT) and the conservative parties like PMDB or PSDB.[53]

[50] International Monetary Fund, 'GDP Chart' (2024) <https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD> accessed 05 July 2024.
[51] Sergio Gamonal and César FR Marzán, 'Protection', in *Principled Labor Law: U.S. Labor Law through a Latin American Method* (Oxford Academic 2019).
[52] Rodrigues J Honório, *Conciliação e Reforma no Brasil* (2nd edn Nova Fronteira 1982), 97.
[53] Colette S Vogeler, 'Yet Another Paradigm Change? Narratives and Competing Policy Paradigms in Brazilian Labour Market Policies' (2016) 38 (3) Policy and Society, 430.

That is why only after President Dilma Rousseff of the Workers' Party was impeached in 2016, the conservative government in power managed to push for a major reform of the existing labour laws, which resulted in the enactment of Law nº 13.467/2017.[54] This labour reform, which introduced significant changes to the paternalistic legal framework that had been in place since 1943, brought greater flexibility and respect for the party's freedom to contract, with the hope of aligning labour laws with societal and economic changes.[55]

Among other changes, such as the prevalence of negotiated agreements over legislation,[56] the labour reform defined the arbitrability of labour disputes,[57] officially expanding the use of arbitration in the employment field. Before this reform, only arbitrations between employers and unions, known as 'labour arbitrations', were expressly accepted, but not arbitrations between employers and individual employees, known as 'employment arbitrations'.[58]

Despite the initial resistance from Brazilian labour courts, individual labour arbitration seems to have been well accepted in the labour market. In fact, only a few years after the labour reform, a survey carried out in the year 2023 showed that the use of arbitration to resolve individual labour disputes has grown significantly, making it the third most used subtype of arbitration in the country, behind only the arbitration of corporate disputes and civil construction and energy contracts.[59] However, despite arbitration's rising popularity under the rhetoric of efficiency, a few questions remain unanswered about its appropriateness for resolving individual labour disputes and its capacity to ensure workers' access to justice. These issues, though, will be examined in detail in the next chapters.

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[54] Reforma Trabalhista 2017 [2017 Labour Reform] (Lei nº 13.467, de 13 de julho de 2017)
[55] Consolidação das Leis do Trabalho [CLT] [Consolidated Labour Laws] (Decreto-Lei nº 5.452, de 1º de maio de 1943).
[56] Ibid, Art 611-A.
[57] Ibid, Art 507-A.
[58] Theodore J St Antoine, 'Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?' (2017) 32 (1) Ohio State Journal on Dispute Resolution, 1; CF, Art 114.
[59] Selma F Lemes, 'Arbitragem em Números' (2023) <https://www.conjur.com.br/wp-content/uploads/2024/01/Arbitragem-em-Numeros-2023-VF.pdf>accessed 05 July 2024.

2) The Arbitrability of Individual Labour Disputes

Regarding the laws on arbitrability, the study of Brazilian practice highlights the different valid approaches that governments can adopt to address the power imbalances between parties in arbitration and the specific challenges that exist in determining which disputes can be resolved through arbitration in the context of the gig economy.

Initially, the answer to the arbitrability of labour disputes was found in the Brazilian Arbitration Law (1996 Arbitration Act), which sets out the legal framework for arbitration in Brazil. According to this law, only persons capable of contracting (subjective arbitrability) may resort to arbitration, and only if the dispute relates to disposable patrimonial rights (objective arbitrability).[60]

Here, the first practical problem arises. This is because, although patrimonial rights are understood to be rights that can be subject to a monetary quantification, there is no consensus among Brazilian legal scholars on what can be considered 'non-disposable rights'.[61]

In the case of labour rights, Brazilian scholars and courts hold differing and opposing views on the exact nature of labour law. [62] On one side, some assert that labour rights are non-disposable, meaning they cannot be subject to arbitration under any circumstances due to the employee's state of subjection to the employer. [63] On the other side, some argue that labour rights are relatively disposable, meaning that some of these rights can be subject to arbitration,

[60] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 1.
[61] Antônio José de Mattos Neto, 'Direitos Patrimoniais Disponíveis e Indisponíveis à Luz da Lei de Arbitragem' (2002) 106 Revista de Processo, 221.
[62] Arion S Romita, 'Inderrogabilidade da Norma e Indisponibilidade de Direitos em Face da Negociação Coletiva: Limites Impostos pelos Direitos Fundamentais' (2017) 79 Revista Magister de Direito do Trabalho, 34.
[63] Mauricio Godinho Delgado, *Curso de Direito do Trabalho* (18 edn, LTr 2019), 1741.

as the availability of the rights depends more on what is relevant to the community in general than to the individual itself. [64]

Thus, given the lack of consensus, coupled with the absence of an express statutory provision on the arbitrability of individual labour disputes, an intense debate emerged in national courts on the subject. This debate, however, resulted in a set of opposing decisions that further intensified the legal uncertainty around the issue.[65]

For some Chambers of the Superior Labour Tribunal (TST), [66] the silence of the law was eloquent, with the omission linked to its prohibition and not to oblivion, as the Constitution does not allow a restrictive or expansionist interpretation of its provisions. Therefore, since the Constitution only mentions the possibility of arbitration between employers and unions, these Chambers supported the idea that arbitration is limited to collective labour agreements.[67]

For other Chambers of the TST, [68] however, the absence of an express law allowed the conclusion, according to the principle of legality provided for in the Brazilian Constitution,[69] that what is not prohibited is permitted. Therefore, if the terms of the Arbitration Act are respected, the dispute is arbitrable.[70]

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[64] Carlos Alberto Carmona (n 54), 44.
[65] Carlos Alberto Carmona, *Arbitragem e Processo: Um Comentário à Lei nº 9.307/96* (3rd edn Atlas 2009), 39.
[66] Review Appeal (Recurso de Revista) RR-225300-85.2003.5.05.0009, Sixth Chamber of the Superior Labour Tribunal (TST), Reporting Justice Aloysio Correa da Veiga, decided on 12 May 2009, published on the Brazilian official gazette (DEJT) on 15 May 2009; Review Appeal (Recurso de Revista) RR-51085-09.2005.5.10.0014, Eight Chamber of the Superior Labour Tribunal (TST), Reporting Justice Maria Cristina Irigoyen Peduzzi, decided on 24 March 2010, published on the Brazilian official gazette (DEJT) on 30 March 2010.
[67] Constituição da República Federativa do Brasil de 1988 [CF] [1988 Brazilian Constitution], Art 114, §1ª.
[68] Interlecutory Appeal in Review Appeal (Agravo de Instrumento em Recurso de Revista) AIRR-147500-16.2000.5.02.0193, Seventh Chamber of the Superior Labour Tribunal (TST), Reporting Justice Pedro Paulo Teixeira Manus, decided on 14 October 2008, published on the Brazilian official gazette (DEJT) on 17 October 2008.
[69] CF (n55), Art 5 II.
[70] Carlos Alberto Carmona (n 54), 44.

Amidst this conflict, in April 2015, the Specialized Subsection of the Superior Labour Tribunal for Individual Disputes (SbDI-1) set a strong precedent in the judgment of a class action deciding against the use of arbitration to resolve individual labour disputes.

According to this Tribunal, given the principle of protection of the worker and the 'state-interventionist' approach adopted in the country, individual labour rights should be considered non-disposable rights before, during and after the employment contract is over, meaning that they cannot be submitted to arbitration.[71]

Therefore, the Tribunal's decision explicitly rejected the theory that labour rights can be relatively disposable to support the idea that these rights are non-disposable. While the Tribunal's main argument for rejecting the arbitrability of labour disputes centers on the nature of labour rights, the decision is fundamentally based on the matter of the violation of the constitutional right of access to justice (Article 5, XXXV, of the Brazilian Federal Constitution)[72].

However, more than ten years before this Tribunal decision, the Supreme Federal Court (STF) addressed the issue of the constitutionality of the Arbitration Act and ruled that the resolution of disputes through arbitration does not violate the parties' right of access to justice.[73]

The labour courts' attempt to revisit a matter already resolved by the country's highest court indicates a movement of resistance to arbitration for the resolution of individual employment disputes. While aimed at protecting workers, it can, however, inadvertently undermine the parties' right to access justice due to the increased legal uncertainty it creates.

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[71] Request for Clarification in Review Appeal (Embargos de Declaração em Recurso de Revista) E-ED-RR-25900-67.2008.5.02.0075, Subsection I Specialized in Individual Disputes of the Superior Labour Tribunal (SbDI-I-TST), Reporting Justice João Oreste Dalazen, decided on 15 April 2015, published on the Brazilian official gazette (DEJT) on 22 May 2015.

[72] Ibid, 19.

[73] Procedural Appeal in a Foreign Sentence (Agravo Regimental na Sentença Estrangeira) SE-AgR 5.206-7, Supreme Court (STF), Justice Rapporteur Sepúlveda Pertence, published on the Brazilian official gazette (DEJT) on 30 April 2002.

To overcome this resistance movement from labour courts and seize the opportunity presented by a period of intense political and economic crisis following years of labour leadership, the Brazilian legislative enacted the Brazilian Federal Law nº 13.467/2017 (Labour Reform). Among other 'neoliberal' changes, this law introduced a new provision to the Consolidation of Labour Laws (CLT) to expressly allow the use of arbitration to resolve individual labour disputes.[74]

According to article 507-A of the CLT: 'in individual employment contracts whose remuneration is higher than twice the maximum limit established for the benefits of the General Social Security Regime, an arbitration clause may be agreed upon, provided it is at the employee's initiative or with his/her express consent, under the terms provided for in Law nº 9.307, of September 23, 1996`.

The Brazilian legislator sought to move away from the objective arbitrability criteria established in civil law (disposable patrimonial rights), which many consider too difficult to define in practice. As a result, the criterion now used to determine the arbitrability of a labour dispute is based on one of the contract elements, namely, the value of the established remuneration. [75]

The monetary criterion used here reflects the theory that classifies labour rights as irrevocable. Therefore, the obstacle to arbitration resides in the fact that employees, due to their economic inferiority (hypo-sufficiency), may struggle to express their genuine consent and, consequently, have their ability to take part in arbitration hindered. [76]

[74] Consolidação das Leis do Trabalho [CLT] [Consolidated Labour Laws] (Decreto-Lei nº 5.452, de 1º de maio de 1943), Art 507-A.
[75] Manuel Gonçalves, Sofia Vale e Lino Diamvutu, *Lei da Arbitragem Voluntária Comentada* (Luanda 2014), 39.
[76] Américo Plá Rodrigues, *Princípios do Direito do Trabalho* (3rd edn São Paulo LTr, 2015), 142.

To overcome this issue, the new rule establishes that if an employee's monthly remuneration[77] — which includes their salary and all benefits usually received — exceeds twice the maximum limit established for the benefits of the General Social Security Regime (RGPS), which in 2024[78] amounts to over R$ 15.572,04 (GBP 2,159.75), the employee may express their consent to arbitrate a future workplace dispute.

Unlike the paternalistic approach adopted by the German law,[79] which rejects the arbitrability of individual labour disputes, and the liberal approach taken by the US law,[80] which welcomes the arbitrability of individual labour disputes irrespective of the weakness of the individual employee, the new Brazilian law takes a middle ground, similar to that adopted by the Belgian law,[81] where employment disputes are arbitrable if they concern higher-ranking employees whose income exceeds a certain threshold.

Although all these approaches to objective arbitrability are valid, the main differences between them stem from the varying policies pursued by their respective governments and the degree of accuracy or risks in pursuing these policies.[82]

In the Brazilian case, the approach adopted by the legislator is clearly in line with the neoliberal policy promoted by the government then in power. However, by adopting the premise that higher remuneration implies greater negotiating capacity, the legislator seems to prioritize legal certainty over the perfect adaptation of the law to reality. Although greater legal certainty can improve access to justice, the remuneration criterion is heavily criticized for its

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[77] CLT (n 66), Art 457.
[78] Portaria Interministerial MPS/MF nº 2, 11 January 2024, Art 2 < https://www.in.gov.br/en/web/dou/-/portaria-interministerial-mps/mf-n-2-de-11-de-janeiro-de-2024-537035232> accessed 22 July 2024.
[79] German Code of Civil Procedure, s 1030.
[80] *Gilmer* v *Interstate/Johnson Lane Corp* [13 May 1991] US Supreme Court, 500 U.S. 20, 33.
[81] 1978 Loi relative aux contrats de travail, Art 69; Income threshold updated from EUR 32,200 before tax to EUR 66,441 before tax < https://www.ejustice.just.fgov.be/eli/loi/1978/07/03/1978070303/justel#LNK0015> accessed 22 July 2024.
[82] Stefan M Kroll et al, *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023), 57.2.2.

low degree of accuracy,[83] since the value established does not appear to reflect the party's negotiating capacity, which also depends on many other factors.[84]

This much-criticized aspect of the law may explain the resistance within labour courts to accept the arbitrability of individual labour disputes, [85] even years after the STF declared the constitutionality of the arbitration law and after the Labour Reform. This resistance, however, creates a scenario of even greater legal uncertainty that can seriously affect workers' right to access justice.[86]

The second key observation to be made here regards the new wording of Article 507-A of the CLT, which only addresses situations where an employee consents to have future disagreements submitted to arbitration (arbitration clause). This is because the silence of the legislator here may lead to the understanding that the remuneration threshold would not apply to situations where consent is given once the contract is over (submission agreement) and where the dispute involves non-standard forms of work.[87]

As for the hypotheses relating to the submission agreement, it is worth noting that a significant number of labour tribunals hold the view that once the employment relationship is over, the employee is no longer considered vulnerable, making the dispute arbitrable.[88]

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[83] Fabiane Verçosa, 'A*rbitragem para a Resolução de Dissídios Individuais Trabalhistas em Tempos de Reforma da CLT e de Conjecturas sobre a Extinção da Justiça do Trabalho: O Direito Trabalhista na encruzilhada'* (2019) 61 (7) Revista Brasileira de Arbitragem 7, 23.
[84] Estevão Mallet, 'Arbitragem em Litígios Trabalhistas Individuais' (2018) 6 Ano 4 RJLB, 858.
[85] Review Appeal (Recurso de Revista) RR 11289-92.2013.5.01.0042, Fifth Chambe of the Superior Labour Tribunal (TST), Reporting Justice Breno Medeiros, decided on 06 February 2019, published on the Brazilian official gazette (DEJT) on 11 February 2019.
[86] Consultor Jurídico, 'Reforma deu Segurança à Arbitragem Trabalhista, mas há Críticas sobre seu alcance' (2024) <https://www.conjur.com.br/2024-jan-19/reforma-deu-seguranca-a-arbitragem-trabalhista-mas-ha-criticas-sobre-seu-alcance/> accessed 23 July 2024.
[87] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 4.
[88] Request for Clarification in Review Appeal (Embargos de Declaração em Recurso de Revista) E-ED-RR-25900-67.2008.5.02.0075, Subsection I Specialized in Individual Disputes of the Superior Labour Tribunal (SbDI-I-TST), Reporting Justice João Oreste Dalazen, decided on 15 April 2015, published on the Brazilian official gazette (DEJT) on 22 May 2015.

However, when it comes to gig workers, the silence of the legislator does not appear to be linked to the acceptance of the idea that these workers are no longer considered vulnerable, but rather to the difficulty faced by the legislator in keeping up with the rapid technological changes that are reshaping the world of work.[89]

Thus, since the remuneration criterion adopted by the legislator to define objective arbitrability lies in the asymmetry inherent to the working relationship, it would only make sense for this new criterion to also cover gig workers. However, the silence of the law, combined with the ongoing debate over the legal classification of modern gig workers, has effectively allowed the unrestricted use of arbitration to resolve individual workplace disputes in the gig economy, raising concerns about the increased risks faced by the economically disadvantaged workers, who may not be able to give proper consent.

On the other hand, a complete prohibition of the use of arbitration in the gig economy does not seem advisable, given the demands for more freedom and flexibility to organize private matters in the new economy and the predominance of small-dollar claims.[90] Indeed, the low value of the claims in gig disputes could hinder the workers' capacity to take the case to court, and in these cases, arbitration could indeed be the only viable mechanism for such workers. [91]

Finally, it is worth noting here that the remuneration criterion does not seem to be in line with the reality of the gig economy, where workers often work simultaneously for multiple platforms. A hypothetical example illustrating this issue would be a highly qualified computer engineer providing similar services on two different platforms. On one platform, his income might qualify him for arbitration, while on another platform it would not, creating an inconsistency in how disputes are handled.

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[89] See n 22 Part I, Section I

[90] Charlotte Garden, 'Disrupting Work Law: Arbitration in the Gig Economy' (2018) The University of Chicago Legal Forum, 205.

[91] Theodore J St Antoine, 'Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?' (2017) 32 (1) Ohio State Journal on Dispute Resolution, 18.

In conclusion, this brief analysis highlights that the absence of clear and specific legislation addressing the objective arbitrability of individual workplace disputes within the gig economy poses a significant risk to gig workers' access to justice. These workers need not only adequate protection but also the necessary legal certainty to seek their rights, as there can be no adequate 'access' to justice where parties cannot even understand the system.

3) The Costs of Arbitrating a Workplace Dispute

One of the main challenges to using arbitration to resolve individual workplace disputes in the gig economy — often referred to by some scholars as the 'Achilles hell' of arbitration — is the financial barrier imposed by arbitration costs. Indeed, since parties in arbitration are required to advance the costs, and there are no clear guidelines or limits for assessing these costs, the weak party in a dispute may be discouraged from pursuing their rights.[92]

Unlike national courts, arbitration is privately funded and does not have the competitive advantage of being subsidized by the State.[93] Therefore, the costs of arbitration — including the fees and expenses of the tribunal, costs of legal representation, and other litigation fees, such as expert witnesses — are attributable to the arbitrator, arbitral institution, or the parties involved[94].

That is why when an arbitration involves employees or gig workers, it is crucial to address the challenges faced by the party in a position of economic vulnerability. If workers are not

[92] Carolina da Rocha Morandi, 'Access to Justice in Labour and Employment Arbitration in Light of the Brazilian and USA Experiences' in Leonardo de Oliveira and Sara Hourani, *Access to Justice in Arbitration: Concept, Context and Practice* (1st edn, Kluwer Law International 2020), 140.
[93] João Ilhão Moreira, 'The Limits to Voluntary Arbitration in Establishing a Fair, Independent and Accessible Dispute Resolution Mechanism Outside Large Contractual Disputes' in Leonardo de Oliveira and Sara Hourani, *Access to Justice in Arbitration: Concept, Context and Practice* (1st edn, Kluwer Law International 2020), 79.
[94] Anke C. Sessler, 'Costs in Arbitration' 5th PreMoot Conference: The Discovery of Arbitration, CISG and Wine (Hanover February 2016), 5.

capable of meeting the arbitration costs at the beginning of the dispute, this can deter them from pursuing their rights in the arbitral tribunal as well as in the state court.

In Brazil, the labour courts have not yet addressed what happens when one of the parties, bound by an arbitration agreement, does not possess the necessary resources to bear the arbitration costs. However, if courts continue to follow their protective and interventionist approach, they are likely to refuse to enforce the arbitration clauses in situations like this, based on the denial of access to justice.[95]

To shed light on the possible alternatives that might be taken to overcome this challenge, it is worth noting here the solution brought by the Italian legislator. Under Italian law, if one of the parties is not capable of meeting the arbitration costs, either the other party can opt to pay for the arbitration, or the poor party will no longer be bound by the arbitration agreement with respect to the dispute that gave rise to the arbitration proceedings.[96]

Another issue that raises concern is the method used to assess costs in arbitration. Simply applying the rules designed for commercial arbitration, where parties are on equal footing and have significant autonomy, can undoubtedly be detrimental in disputes involving a weak party. This is because the lack of clear and specific rules to deal with the allocation of costs can cause the financially disadvantaged party to hesitate in seeking justice if it fears that it might have to bear most of the costs. Furthermore, this uncertainty can also create undue pressure that forces the weak party to settle the claim.

In Brazil, there is no specific rule to address the financial barriers to the weak party in arbitration. The only provision concerning the methods used to assess costs in arbitration is the

[95] Carolina da Rocha Morandi, 'Access to Justice in Labour and Employment Arbitration in Light of the Brazilian and USA Experiences' in Leonardo de Oliveira and Sara Hourani, *Access to Justice in Arbitration: Concept, Context and Practice* (1st edn, Kluwer Law International 2020), 141.
[96] Codice di Precedura Civile [1940 Italian Code of Civil Procedure] (Royal Decree 28 October 1940), Art 816, n 7.

general rule established in the 1996 Arbitration Act, which does not impose limits on private autonomy.[97]

In the landmark class action case that ruled against the use of arbitration to resolve individual employment disputes in Brazil, the Tribunal pointed out that one of the main irregularities identified in the case was the numerous fees charged for arbitrating the workplace dispute. According to the Tribunal, the absence of clear methods or limits for assessing these costs contributed to abusive practices in cost assessment.[98]

Similarly, in other jurisdictions, courts also highlighted the problems that can arise from the lack of clear methods for assessing arbitration costs. A good example can be taken from the North American jurisdiction, where the Circuit Court held that an arbitration agreement was unenforceable because it was silent on costs. According to the court, this lack of clarity could expose the weaker party to 'steep' arbitral costs and, in effect, limit her/his access to justice.[99]

In this scenario of great uncertainty and risk, arbitral institutions can play an important role in addressing the financial barriers to arbitration. For instance, some arbitral institutions adopt the special rules of the United Nations Commission on International Trade Law (UNCITRAL) to tackle the financial challenges in arbitration.[100] Under the UNCITRAL Rules, while the unsuccessful party is, in principle, responsible for bearing the costs of arbitration, the arbitral Tribunal is also granted the discretion to apportion costs in a manner that reasonably reflects the circumstances of the case.[101]

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[97] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 27.
[98] Request for Clarification in Review Appeal (Embargos de Declaração em Recurso de Revista) E-ED-RR-25900-67.2008.5.02.0075, Subsection I Specialized in Individual Disputes of the Superior Labour Tribunal (SbDI-I-TST), Reporting Justice João Oreste Dalazen, decided on 15 April 2015, published on the Brazilian official gazette (DEJT) on 22 May 2015 ; Se n ****** Part II, item II, 2.
[99] *Green Tree Financial Corporation v Randolph*, 531 US 79 (2000).
[100] Isabelle G, 'Arbitration of Human and Labor Rights: The Bangladesh Experience' (2019) 52 ILP, 254.
[101] United Nations Commission on International Trade Law (UNCITRAL) UNCITRAL Arbitration Rules, General Assembly Resolution 31/98, Art 40.

Finally, it is important to address the concerns surrounding the rising costs of arbitration, which can potentially undermine its popularity and perceived legitimacy. While this has become a significant issue in the commercial field — where the amounts at stake are much higher, and representation costs can reach up to 94 percent of total expenses — this does not appear to be necessarily the case in the labour field.[102]

To challenge the belief that arbitration is always more expensive and to prove that this is a myth in the labour field, some Brazilian scholars and researchers have demonstrated that costs in labour disputes can be higher in courts than in arbitral courts. This is particularly true when considering the interest rates of 1% a month applied in Brazilian labour courts, where cases typically take an average of twenty-seven months from the filing of a lawsuit until the judgment is rendered.[103]

Furthermore, it is worth noting that Brazil's recent 'neoliberal' labour reform has made private justice more competitive in terms of dispute costs. Indeed, following the labour reform, the possibility of receiving free legal aid in courts was significantly reduced, currently covering only workers with a monthly salary of up to R$3.114,40 (£ 429.15). Additionally, litigation costs have increased, with reciprocal losing party fees, payment of costs proportional to the value of the case, and expert fees for the losing party.[104]

In summary, this brief analysis indicates that the financial barrier to the implementation of arbitration as an effective ADR mechanism for individual workplace disputes does not simply stem from arbitration being more costly than public justice. Instead, the issue seems to lie in the lack of special legal provisions that can provide greater clarity and certainty regarding

[102] Alphen AD Rijn, *Time and money: Pervasive problems in international arbitration* (Kluwer Law International 2006).
[103] Carolina da Rocha Morandi, 'Access to Justice in Labour and Employment Arbitration in Light of the Brazilian and USA Experiences' in Leonardo de Oliveira and Sara Hourani, *Access to Justice in Arbitration: Concept, Context and Practice* (1st edn, Kluwer Law International 2020), 138.
[104] CLT, Art 790, §3º, Art 790-B and Art 791-A (ADIN 5766 STF).

arbitration costs while also offering some minimum protections to safeguard the weak party's access to justice.

4) The Arbitral Procedural Framework

Regarding the development of an adjudication system with a procedure that can secure a fair process, the study of the Brazilian practice underscores the importance of developing a regulatory framework designed to address the specific challenges of arbitrating an individual workplace dispute in the gig economy.

Although the Brazilian labour reform provided for the arbitrability of individual labour disputes, it did not introduce any special procedural rules to ensure a fair process when arbitrating this kind of dispute. Instead, the legislator chose to simply apply the existing rules used for commercial arbitration to individual labour arbitration.[105]

According to the general rule contained in the Brazilian Arbitration Law, parties are granted significant freedom to establish procedural rules in the arbitration agreement, including here the possibility of adopting rules already established by an arbitral institution.[106] This freedom, however, is not without limits. It must adhere to the principles of adversarial proceedings, equality of the parties, impartiality of the arbitrator, and the arbitrator's free conviction.[107]

Despite these limitations on private autonomy, meant to safeguard access to justice, the legislator left many important aspects of arbitration undefined, opting to rely on private initiative to shape them. While this approach may be effective in commercial arbitration, for which these rules were initially designed, it may not always be suitable for arbitrating individual workplace disputes, where there is no optimal equilibrium between the parties to the dispute. In fact, the adoption of the same progressive ethos present in commercial disputes,

[105] Reforma Trabalhista 2017 [2017 Labour Reform] (Lei nº 13.467, de 13 de julho de 2017).
[106] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 21.
[107] Ibid, Art 21, para 2º.

which values self-regulation and flexibility, can create a fertile ground for challenging the legitimacy of individual labour arbitration.[108]

It is important to remember here that, while Brazilian arbitration law,[109] inspired by the Model Law,[110] arose in the realm of commercial law and is based on the principle of the autonomy of the will, the Brazilian individual labour law, inspired by the Encyclical 'Rerum Novarum',[111] is based on the principle of the protection of the worker from exploitation.[112]

Thus, in a scenario where existing procedural rules for commercial arbitration are directly applied to individual labour arbitration without any reservations, concerns are likely to arise regarding the fairness of the process and the need for special minimum procedural requirements.

One issue that raises significant concern is the selection of the arbitrator. Under Brazilian Arbitration law, the general rule is that parties can choose any capable person whom they trust.[113] However, since the arbitrator can act as a judge of fact and law and since national labour laws should be applied in labour disputes, selecting an arbitrator who lacks legal expertise in a dispute where there is a power imbalance between the parties could further exacerbate the risk of unfair outcomes. [114]

It is worth noting here that, although the Brazilian Arbitration law allows arbitration to be decided based on either law or equitable grounds,[115] the prevailing legal doctrine holds that

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[108] Franco Ferrari and Friedrich Rosenfeld, 'Limitations to Party Autonomy in International Arbitration' in Stefan M Kroll et al (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023), 47.
[109] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996).
[110] UNCITRAL Model Law on International Commercial Arbitration (1985).
[111] Pope Leo XIII, 'Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labour' (1981) <https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html> accessed on 27 July 2024.
[112] Ives Gandra Filho, 'Reflexões com Vistas à Modernização da Legislação Trabalhista por Ocasião dos 75 anos da Justiça do Trabalho no Brasil' (2017) Caderno de Pesquisas Trabalhistas, 11.
[113] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 13.
[114] Ibid, Art 18.
[115] Ibid, Art 2, caput.

there is no room for equity in individual labour arbitration.[116] This is because the Labour Reform's omission on the matter does not allow a conclusion that deviates from the fundamental principles of labour protection and the imperativeness of labour standards.[117]

Therefore, since observing substantive labour laws is mandatory, it only makes sense that arbitrators should be technically qualified to resolve workplace disputes.[118] To achieve this, some scholars have proposed that the government's public body responsible for monitoring compliance with labour legislation should also ensure that arbitrators have the necessary level of legal knowledge.[119]

Another issue that raises significant concern is the lack of transparency in arbitration. Since the Labour Reform does not address this issue, the provisions of the Brazilian Arbitration Law apply here, giving the parties broad autonomy to decide on the confidentiality of the dispute.[120]

However, this broad autonomy given to the parties to decide the matter can lead to extremely low levels of transparency, with the establishment of rules of strict confidentiality that can prevent the publicity of any act of the process and any information regarding it.

While this strict confidentiality may not be problematic in commercial disputes, it presents significant risks in the arbitration of workplace disputes, where there is an inherent power imbalance between the parties. Indeed, it can aggravate the disparity of arms in the arbitration process by restricting the dissemination of knowledge, and it can also hinder the evolution of the law in its various forms by limiting the broad debate on the laws with the prohibition of the publication of decisions and awards.[121]

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[116] Estevão Mallet, 'Arbitragem em Litígios Trabalhistas Individuais' (2018) 6 Ano 4 RJLB, 884.
[117] Consolidação das Leis do Trabalho [CLT] [1943 Consolidated Labour Laws] (Decreto-Lei nº 5.452, de 1º de maio de 1943), art 9.
[118] Richard Wilson Jamberg, 'A Arbitragem como Forma Alternativa de Solução dos Conflitos Individuais Trabalhista' <https://www.trt2.jus.br/html/tribunal/MAGISTRATURA/artigos/artigo_arbitragem.pdf> accessed 7 August 2024.
[119] Ministério Público do Trabalho (MPT) < https://mpt.mp.br/> accessed 07 August 2024.
[120] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 22.
[121] Ana OA Haddad, *A Transparência do Processo Arbitral* (Thesis USP 2020).

In the context of the gig economy, this risk of legal stagnation can be even more concerning, given the fact that state regulation of digital platforms and platform workers is still inchoate.[122] As a growing number of gig companies encourage the use of arbitration to resolve workplace disputes, with strict rules of confidentiality, there are fewer guiding cases, binding precedents, or other influential judgments that can help develop laws related to worker rights in the gig economy.[123]

To address this issue, one potential option for governments would be to enact special rules for the confidential publication of an arbitration award in a workplace dispute.

The confidential publication technique, already in use in countries like the United States, consists of publishing only the essential information needed to understand the controversy and the decision while keeping confidential or sensitive data private. This technique, therefore, would enable the development of the law and ensure minimum protection for the worker without disclosing any confidential or sensitive information that could negatively impact the image of the parties involved.[124]

Amid this ongoing debate over the need for greater transparency in the arbitration of individual workplace disputes, some also advocate for greater transparency regarding the list of arbitrators available at the arbitral institution, as well as the arbitrators' previous experience handling cases with the current employer or similar employers. Supporters of this idea believe

[122] See (n 21) Part I, Section I.

[123] International Labour Organisation, 'World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work 2021'<https://www.ilo.org/publications/flagship-reports/role-digital-labour-platforms-transforming-world-work#:~:text=Social%20Outlook%202021-,The%20role%20of%20digital%20labour%20platforms%20in%20transforming%20the%20world,and%20society%20as%20a%20whole.> accessed 30 May 2024.

[124] California Code of Civil Procedure, §1281.96 (Example of Law regulating transparency); Camera Arbitrale di Milano, 'Guidelines for the Anonymous Publication of Arbitral Awards' < https://www.camera-arbitrale.it/Documenti/guidelines-anonymous-publication-arbitral-awards.pdf> accessed 7 August 2024 (Example of Arbitral Institution guideline on the anonymous publication of arbitral awards); International Labour Arbitration and Conciliation Rules 2021, art 35.

that this would enable parties to make informed decisions when selecting arbitrators, thereby strengthening the right to access justice.[125]

While the Brazilian legislator does not present any specific procedural rule to solve these issues, it is possible to observe an increasing number of arbitral institutions in the country issuing tailored rules to adapt their arbitration proceedings to the specific needs of labour disputes.[126] Although the primary goal of these institutions is to overcome the resistance of national labour courts to arbitrating individual labour disputes, these rules undeniably contribute to greater access to justice.

In summary, the analysis of the Brazilian practice shows that the recent expansion of the use of arbitration for resolving individual workplace disputes often involves applying existing arbitral procedural rules that were originally designed for commercial disputes. However, given the unique characteristics and principles of labour relations, it is necessary to establish some minimum special procedural requirements to safeguard the weak party's right to a fair process. Nonetheless, what is currently observed is a notable lack of tailored rules or systematic analysis on the matter, with existing knowledge or studies largely pertaining to other areas of law governed by different principles.[127]

[125] Theodore J St Antoine, 'Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?' (2017) 32 (1) Ohio State Journal on Dispute Resolution, 12.
[126] American Chamber of Commerce for Brazil (AMCHAM Brazil), 'Regulamento de Arbitragem para Disputas Trabalhistas' (2021) < https://www.amcham.com.br/index/centro-de-arbitragem-e-mediacao> accessed on 27 July 2024; Câmara de Mediação e Arbitragem Empresarial (CAMARB), 'Labour Arbitration Rules' < https://camarb.com.br/en/arbitration/labor-arbitration-rules/> accessed on 27 July 2024.
[127] See (n 22) Part I, Section I.

PART III – SAFEGUARDING ACCESS TO JUSTICE WHEN ARBITRATING AN INDIVIDUAL LABOUR DISPUTE IN THE GIG ECONOMY

I – Enhancing Awareness and Cooperation for an Accessible Justice

The analysis of the Brazilian practice, combined with insights drawn from other jurisdictions, highlights some key challenges in implementing arbitration as an effective Alternative Dispute Resolution (ADR) mechanism for resolving individual workplace disputes in the gig economy.

In analysing the first fundamental aspect of access to justice, which is the expansion of access to justice for all,[128] two key challenges come to light in the context of arbitration in the gig economy: (i) the objective arbitrability of individual labour disputes (legal barrier) and (ii) the costs of arbitrating a workplace dispute (financial barrier).

Regarding the legal barrier, while the restriction of the subject matters that can be arbitrable depends on the policy adopted by governments, the rapid and drastic changes in the economic landscape, particularly with the emergence of new forms of work, have led to an increasing legal uncertainty around the issue of the arbitrability of individual workplace disputes in the gig economy.[129]

While there is nothing problematic in the different approaches adopted by States regarding the arbitrability of labour disputes, given their distinct political, social, and economic contexts, the laws on this issue must be clear.[130] Gaps and ambiguities in the legislation concerning

[128] See (n 24) Part I, Section II.
[129] See (n 41) Part II, Section II, Chapter 2.
[130] Franco Ferrari and Friedrich Rosenfeld, 'Limitations to Party Autonomy in International Arbitration' in Stefan M Kroll et al (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023), 47.

objective arbitrability, especially amidst a radical paradigm shift, can create a scenario of substantial legal uncertainty that can severely undermine the weak party's access to justice.[131]

When legislating on the matter, lawmakers must also acknowledge that being overly liberal in expanding the use of arbitration to additional fields can create a fertile ground for greater judicial intervention and stronger resistance movements to the legitimacy of arbitration for resolving disputes involving a weak party.[132]

When it comes to judicial intervention, although the Judiciary can play an important role in determining the meaning and scope of the law, something crucial during times of constant changes and uncertainties, it must be careful not to invade the sphere of action of the Legislative power. Indeed, while 'legal activism' may have the noble goal of protecting the rights of the weak, it must be careful not to cause the opposite effect by inadvertently increasing legal uncertainty and weakening the democratic principle of separation of powers.[133]

The suggestion here is not for the establishment of rigid standards of thought that limit the pursuit of justice or for a strict separation of state powers, but rather for state powers to seek to coordinate their efforts with the aim of enhancing the stability of legal relations and the predictability of the system.[134] This is important not only for safeguarding the right to access justice but also for the country's economic growth.[135]

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[131] Charles de Secondat Montesquieu, *The Spirit of Laws* (Prometheus Books 1802); Código de Processo Civil [CPC] [2015 Brazilian Code of Civil Procedure] (Lei nº 13.105, de 16 de março de 2015), Art 3ª, para 1.

[132] Stephen A Plass, 'Reforming the Federal Arbitration Act to Equalize the Adjudication Rights of Powerful and Weak` (2015) 65 Catholic University Law Review, 79.

[133] Carlos Maximiliano, *Hermenêutica e Aplicação do Direito* (20 edn Forense 20ed 2915), 148.

[134] Almiro do Couto e Silva, 'O Princípio da Segurança Jurídica (Proteção à Confiança) no Direito Público Brasileiro e o Direito da Administração Pública de Anular seus Próprios Atos Administrativos: O Prazo Decadencial do art. 54 da Lei do Processo Administrativo da União (Lei nº 9.784/1999)' (2004) 237 Revista Eletrônica de Direito do Estado, 271.

[135] Consultor Jurídico, 'Insegurança Jurídica na Justiça do Trabalho é Principal Problema para Investir no Brasil' (2024) < https://www.conjur.com.br/2024-ago-01/inseguranca-juridica-na-justica-do-trabalho-e-principal-problema-para-investir-no-brasil/#:~:text=Inseguran%C3%A7a%20jur%C3%ADdica%20na%20Justi%C3%A7a%20do%20Trabalho%20%C3%A9%20principal%20problema%20para%20investir%20no%20Brasil,-

The analysis of the Brazilian practice illustrated well how the introduction of a more liberal legislation encountered a strong movement of resistance from national courts and how this resistance gradually weakened over time.[136] While the development of measures for the uniformization of case law contributed to this shift, the recognition of the benefits of arbitration for resolving labour disputes seems to have played a key role in legitimizing arbitration as an effective ADR mechanism.[137]

National courts appear to be increasingly acknowledging that arbitration is not inherently detrimental to the working class and that modern business practices increasingly require and value predictability and freedom of contract.[138] For instance, in the Brazilian jurisdiction, recent statistics have shown that arbitration can be particularly advantageous for its speed, as it can resolve disputes much more quickly than traditional court processes.

Indeed, according to the latest statistics of the Brazilian Labour Courts, the average duration of a lawsuit is as follows: (i) in first-instance courts, approximately one year and five months from the filling of the lawsuit to its judgment, and two years and six months to begin the enforcement of the sentence; (ii) in appellate courts, about five months; and (iii) in the Superior Labour Tribunal (TST), around one year and one month.[139]

1%20de%20agosto&text=O%20principal%20problema%20atualmente%20na,controversas%20da%20Justi%C3%A7a%20do%20Trabalho> accessed 05 August 2024.

[136] See (n 38) Part II, Section II, Chapter 2.

[137] Código de Processo Civil [CPC] [2015 Brazilian Code of Civil Procedure] (Lei nº 13.105, de 16 de março de 2015), articles 926 and 927; Celso Hiroshi Iocohama, 'Access to Justice and Juridical (In) Security: The Knowledge and the Determination of Rights in the Brazilian System' (2018) 45 (144) Revista da AJURIS, 174.

[138] Ives Gandra Filho, 'Reflexões com Vistas à Modernização da Legislação Trabalhista por Ocasião dos 75 anos da Justiça do Trabalho no Brasil' (2017) Caderno de Pesquisas Trabalhistas, 9.

[139] Conselho Nacional de Justiça, 'Justiça em Números 2024' (2024) < https://www.cnj.jus.br/wp-content/uploads/2024/05/justica-em-numeros-2024-v-28-05-2024.pdf> accessed 01 August 2024.

On the other hand, in the arbitration of an individual workplace dispute, the arbitral award may be issued within the timeframe stipulated by the parties[140] or, if no timeframe is specified, within six months of the institution of the arbitration.[141]

This means that if a workplace dispute must go through all three tiers of the Labour Tribunal system, the worker will have to wait more than four years to resolve the dispute. In contrast, if the dispute is arbitrated, this waiting time can drop to around four to six months.[142]

This time factor is critical in individual workplace disputes since, not infrequently, these disputes involve workers who have lost their primary source of income. As evidenced in the study of court cases, delays in the judicial process can lead to an undue waiver of labour rights and a flatting of the value of the agreements.[143]

Regarding this issue, the illustrious Brazilian jurist Rui Barbosa very aptly remarked in his speech to the graduates of the prestigious Faculty of Law of The University of São Paulo (FADUSP) that 'delayed justice is not justice, but rather qualified and manifest injustice'.[144] In fact, delays in the delivery of justice, even if aimed at enhancing the protection of workers, may have the opposite effect to that desired, violating in a single stroke all principles designed to protect workers.

In addition to offering quicker decisions, arbitration can also be less expensive than litigation in state courts. However, certain safeguards must be established to prevent the financial aspect of arbitration from becoming a barrier to access to justice for the weak party.[145]

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[140] American Chamber of Commerce for Brazil (AMCHAM Brazil), 'Regulamento de Arbitragem para Disputas Trabalhistas' (2021) < https://estatico.amcham.com.br/arquivos/2021/arbitragem-trabalhista-regulamento.pdf> accessed 01 August 2024.
[141] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 23.
[142] Selma F Lemes, 'Arbitragem em Números' (2023) <https://www.conjur.com.br/wp-content/uploads/2024/01/Arbitragem-em-Numeros-2023-VF.pdf> accessed 01 August 2024.
[143] José A Dallegrave Neto e Phelippe HC Garcia, 'Arbitragem em Dissídios Individuais de Trabalho' (2018) 73 Revista Eletrônica do TRT 9ª Região, 26.
[144] Rui Barbosa, *Oração aos Moços* (Edições do Senado Federal 2019).
[145] See (n 47) Part II, Section II, Chapter 3.

First, clear and specific methods for assessing costs in labour arbitration must be established to ensure a system that can enable better cost control and reduce the financial burden on workers. Indeed, given that workplace disputes often involve one financially vulnerable party, costs should be handled differently than in commercial arbitration, where both parties are typically on a more equal footing.

This is why, while jurisdictions may adopt different methods for assessing costs,[146] — such as the American Rule, where parties bear their own costs and share those of the tribunal, or the English Rule, where the losing party pays the reasonable costs of the 'winner' and those of the tribunal,[147] — some arbitral institutions have decided to follow the UNCITRAL Arbitration Rules[148] or even create their own rules in order to minimize the financial burden on workers as much as possible.[149]

Some examples of these special rules could include capping the arbitration fee that the worker must pay unless the clause specifies a lower amount and, in small claims, which can be quite common in the gig economy, making the employer responsible for paying the arbitrator's fee.[150] For small or 'low-dollar' claims, as some scholars refer to them, a modest fee on

[146] Michael O'Reilly, 'Provisions on Costs and Appeals: An Assessment from an International Perspective', (2010) 76 (4) The International Journal of Arbitration, Mediation and Dispute Management, 705.
[147] Ibid.
[148] See n (48) Part II, Section II, Chapter 3.
[149] American Chamber of Commerce for Brazil (AMCHAM Brazil), 'Regulamento de Arbitragem para Disputas Trabalhistas' (2021) < https://www.amcham.com.br/index/centro-de-arbitragem-e-mediacao> accessed 27 July 2024; Câmera de Mediação e Arbitragem Especializada (CAMES Brazil), 'Regulamento do Processo de Arbitragem Trabalhista' (2023) < https://www.camesbrasil.com.br/wp-content/uploads/2023/08/4.-Regulamento-arbitragem-trabalhista-maio-2023.pdf> accessed 05 August 2024.
[150] American Arbitration Association, 'Employment Arbitration Rules and Mediation Procedures' (2023) < https://www.adr.org/sites/default/files/EmploymentRules_Web_3.pdf > accessed 05 August 2024.

employees could also be imposed to discourage frivolous claims.[151] However, this fee should not exceed a similar fee that would be charged in state court.[152]

Second, it is important to address the moment parties begin to incur costs, as the high upfront costs of arbitration — such as arbitrator's fees and administrative costs — can preclude the most financially vulnerable workers, particularly the unemployed, from asserting their claims. In this case, even if the overall costs of arbitration may be lower than those of judicial litigation, the costs would still pose a barrier to access to justice for the weak party.[153]

To address this issue, arbitral tribunals could offer low-income claimants pro bono or reduced-rate arbitrators and allow these parties to seek a waiver of the administrative fees.[154] These are all relevant measures for reducing the degree of judicial intervention that might undermine the enforceability of arbitration agreements. [155]

Thus, in summary, arbitration can serve as an effective ADR mechanism to expand access to justice in the gig economy, provided certain specific measures are implemented to protect the weaker party in arbitration. And, from the analysis of the barriers presented in this study, we can highlight the following measures: (i) the enactment of clear laws that specifically address the arbitrability of individual labour disputes involving gig workers; (ii) the promotion of a predictable legal system and the provision of adequate information to ensure workers can understand the available instruments for the effective protection of their rights; (iii) a cost-effective arbitration process, with transparent cost assessment rules and rules that reduce the

[151] Charlotte Garden, 'Disrupting Work Law: Arbitration in the Gig Economy' (2018) The University of Chicago Legal Forum, 205.
[152] Consolidação das Leis do Trabalho [CLT] [1943 Consolidated Labour Laws] (Decreto-Lei nº 5.452, de 1º de maio de 1943), Art 844, Para 2.
[153] See n (46) Part II, Section II, Chapter 3.
[154] Christopher R. Drahozal, 'Arbitration Costs and Contingent Fee Contracts' (2006) 59 (3) Vanderbilt Law Review, 729.
[155] Kazuo Watanabe, 'Acesso à Justiça e Sociedade Moderna' in Ada Pellegrini Grinover and others (eds), *Participação e Processo* (Revista dos Tribunais 1988), 128.

financial burden on weak parties; and (iv) greater cooperation between state institutions, arbitrators and parties to remove the obstacles to access to justice.

Overall, these measures aim to initially increase the necessary awareness of the arbitrability of the disputes and of the arbitration process itself, since there can be no adequate 'access' to justice where parties do not even know or understand the system. The next step, then, requires a shift in attitude towards arbitration, from a movement of resistance to one of cooperation in refining it as an effective ADR mechanism for resolving individual labour disputes in the gig economy. This is because arbitration cannot thrive in a legal environment where judges are focused on asserting their 'supremacy' over arbitrators and where arbitrators first ask themselves how they can avoid 'interference' from judges.[156]

II – Tailoring Arbitral Procedural Rules for a Fair Process - One Size Does Not Fit All

In analysing the second fundamental aspect of access to justice, which is the creation of an adjudication system with a procedure that can secure a fair process, the study of the Brazilian practice, along with insights drawn from other jurisdictions, underscores the importance of developing a regulatory framework designed to address the specific challenges of arbitrating an individual workplace dispute in the gig economy.[157]

For the resolution of individual workplace disputes, where there is no optimal equilibrium between the parties to a labour dispute, simply applying the existing procedural arbitral rules designed for the resolution of commercial disputes, where self-regulation and flexibility are valued, does not seem to be appropriate.[158]

Moreover, in the rapidly evolving world of work, the inadequacy of the automatic transposition of the existing arbitral procedural rules becomes even more apparent. This is

[156] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013), Ch 1.
[157] See (n 27) Part I, Section II.
[158] See (n 48) Part II, Section II, Chapter 4.

because in disputes involving gig workers, not only is there a risk caused by the disparity of weapons between the parties to the conflict, but also the risk that existing legal uncertainties surrounding these workers' rights may be exacerbated. In the Brazilian case study, for example, the absence of clear guidelines may prompt parties to adopt rules of strict confidentiality which, in turn, may hinder the dissemination of knowledge and the development of the law concerning platform workers.[159]

While the challenges faced by the Brazilian jurisdiction may differ from those faced by other jurisdictions that have embraced the arbitrability of individual labour disputes, the study of the Brazilian practice can help to address a common issue shared by these jurisdictions, which is the search for the right balance between the opposing principles of party autonomy and the protection of the workers. Indeed, for the development of an effective ADR mechanism in the new world of work, capable of ensuring access to justice in disputes involving a weak party, the foundational principle of party autonomy must align with the goals of efficiency and fairness in the pursuit of rights.[160]

This debate, therefore, brings to light the dialectical tension that exists between the contractual and jurisdictional aspects of arbitration as a dispute settlement mechanism. Indeed, unlike state courts, arbitration is recognized for its mixed or hybrid nature, which means that efforts to ensure access to justice in arbitration should also take this unique nature into account.[161]

On the one hand, the contractual aspect of arbitration grants parties significant freedom to establish procedural rules in their arbitration agreement, which, in turn, can raise concerns

[159] See (n 50) Part II, Section II, Chapter 4.
[160] Carolina da Rocha Morandi, 'Access to Justice in Labour and Employment Arbitration in Light of the Brazilian and USA Experiences' in Leonardo de Oliveira and Sara Hourani, *Access to Justice in Arbitration: Concept, Context and Practice* (1st edn, Kluwer Law International 2020), 148.
[161] Leonardo de Oliveira and Sara Hourani, *Access to Justice in Arbitration: Concept, Context and Practice* (1st edn, Kluwer Law International 2020), 12.

about the legitimacy of arbitration, particularly when there is a weak party in the dispute. On the other hand, the jurisdictional aspect of arbitration contemplates greater limits on parties' autonomy, risking breaking from the liberal tradition and principles that have contributed to the success of arbitration as the favoured ADR mechanism for settling disputes.[162]

Therefore, the challenge lies precisely in maximizing the effectiveness of the arbitral procedure, with its basic characteristics of flexibility, while ensuring a system of adjudication that can guarantee a fair process and safeguard the weak party's right to access justice.

While the automatic transposition of the arbitral procedural rules designed for commercial disputes is inappropriate, it is also not advisable to merely copy factors used to assess procedural justice in courts. In the arbitration of individual labour disputes, where parties are not on equal footing as in commercial disputes, additional procedural guarantees containing minimum protection provisions are the most advisable alternative to ensure fairness in both the substantive and procedural aspects of the process.[163]

This concept of designing and implementing additional procedural guarantees is not new and it has even been explored on an international level. In fact, this idea has even resulted in the development of specialized rules tailored to address the unique characteristics of disputes arising from international labour agreements.[164]

Thus, in summary, arbitration can serve as an effective ADR mechanism capable of ensuring a fair process in individual workplace disputes within the gig economy, provided additional procedural guarantees are in place to protect the weak party involved.

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[162] Franco Ferrari and Friedrich Rosenfeld, 'Limitations to Party Autonomy in International Arbitration' in Stefan M Kroll et al (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023), 47.
[163] See (n 26) Part I, Section II.
[164] The 2019 Hague Rules on Business and Human Rights Arbitration (Improvements to adapt the UNCITRAL Arbitration Rules in the context of business and human rights disputes); The 2021 International Labour and Arbitration and Conciliation Rules.

Firstly, regarding the substantive component of justice, that is, procedures that can deliver fair outcomes based on legal rights, it is possible to suggest the following provisions, considering the barriers presented in this study: (i) the arbitrator must possess the necessary expertise in the field of labour disputes and a general understanding of the law;[165] (ii) the arbitrator must decide consistent with the mandatory labour law;[166] and (iii) the confidential publication of the arbitration award, limited to the necessary information to understand the controversy and the decision.[167]

Secondly, regarding the procedural component of justice, that is, procedures that allow the parties the opportunity to be heard, the following provisions are recommended, in view of the barriers presented in this study: (i) arbitrators should be independent and impartial;[168] (ii) parties should have the right to independent advice and legal representation;[169] (iii) the procedure should be free of charge or available at a nominal fee for low-income workers;[170] (iv) the establishment of a maximum period of time for the outcome of the dispute, which should take less than litigating the same claim in court;[171] (vi) the publication of the procedural rules and costs adopted by the arbitral institution;[172] and (vii) the adoption of procedural rules that uphold the principles of adversarial proceedings and equality of the parties.

It is important to emphasize, however, that these additional provisions are in no way intended to encourage the 'judicialization' of the arbitral process or an excessive formalization

[165] Similar provision can already be found in the EU - Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 (Directive on Consumer ADR), Art 6 (a).
[166] Consolidação das Leis do Trabalho [CLT] [1943 Consolidated Labour Laws] (Decreto-Lei nº 5.452, de 1º de maio de 1943), Art 9.
[167] See n (50) Part II, Section II, Chapter 4.
[168] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 13, para 1.
[169] Ibid, Art. 21, para 3.
[170] Similar provision can already be found in the EU - Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 (Directive on Consumer ADR), Art 8 (c).
[171] Lei de Arbitragem 1996 [1996 Arbitration Act] (Lei nº 9.307, de 23 de setembro de 1996), Art 23.
[172] Similar provision can already be found in the EU - Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 (Directive on Consumer ADR), Art 7 (g).

of the arbitral practice, which could inadvertently result in the exclusion of crucial procedural aspects necessary for ensuring a fair process, or lead to courts becoming overly lenient in interpreting and applying the law.[173] Quite on the contrary, by establishing some minimum protection criteria, it is hoped to enhance access to justice for all workers and reduce the likelihood of constant judicial intervention and control, while maintaining the main characteristics that make arbitration an attractive ADR mechanism for the parties.[174]

[173] Pablo R Vallejo, 'El Arbitraje y Los Ordenamientos Jurídicos em Latinoamérica: Un Estudio sobre Formalización y Judicialización' (2013) 126 Universitas, 225.
[174] Theodore J St Antoine, 'Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?' (2017) 32 (1) Ohio State Journal on Dispute Resolution, 16.

CONCLUSION

The dissertation in question set out to assess whether arbitration can serve as an ADR mechanism capable of contributing to greater access to justice in the resolution of individual labour disputes in the gig economy and whether special rules are needed to make this possible.

In a scenario of great legal uncertainty, triggered by the rapid rise of the 'gig economy'—where the traditional binary employment classification system no longer applies and where labour is increasingly considered a mere commodity—this study initially sought to dispel the misconception that gig workers possess broad autonomy to the point of being equated to traders. Gig workers, unlike traders and entrepreneurs, remain subject to new forms of control that directly impact their ability to resolve disputes on an equal footing with gig companies. Acknowledging this power imbalance that exists between gig workers and gig companies is undoubtedly the first necessary step to successfully address the challenge of safeguarding access to justice in these kinds of disputes.

The second preliminary clarification that was necessary for the development of this study concerns the concept of access to justice. In the context of arbitration within the gig economy, the idea of 'access to justice' should encompass not only a system of adjudication that expands equitable access to justice but also one that ensures procedures capable of delivering fair outcomes for all parties involved.

The analysis of the Brazilian practice, combined with insights drawn from other jurisdictions, highlighted some key challenges in implementing arbitration as an effective ADR mechanism for settling individual labour disputes in the gig economy.

Regarding the achievement of an adjudication system accessible to all, although the law on arbitrability (objective arbitrability) is a commonly used instrument to implement government policies aimed at addressing power imbalances in arbitration, the speed at which technology is

transforming the workplace has made it extremely challenging for legislators and courts to respond in a timely and appropriate manner to the new challenges that emerge.

Indeed, the current debate on the legal classification of gig workers and the absence of legal provisions on arbitrability in the gig economy have created a scenario of excessive legal uncertainty and vulnerability for gig workers, who find themselves deprived of the minimum legal protection and certainty required to assert their rights effectively.

Regarding the development of an adjudication system with a procedure that can secure a fair process, the study highlights the legitimacy crisis that can emerge from simply applying the existing procedural rules designed for commercial arbitration to workplace disputes, where there is no optimal equilibrium between the parties to the dispute.

To overcome these barriers, the study suggests, among other measures, the enactment of clear laws that address the arbitrability of individual labour disputes involving gig workers, as well as the introduction of additional procedural guarantees containing minimum protection provisions to enhance access to justice for all parties while maintaining the main characteristics that make arbitration an attractive ADR mechanism.

These are all necessary measures to increase the much-needed legal certainty and awareness around the arbitrability of labour disputes in the gig economy and the arbitration process itself, as there can be no proper 'access' to justice where parties do not know or understand the system. Additionally, these measures also aim to tailor arbitration to the specific challenges faced by workers in the gig economy, ensuring that arbitration does not simply become a 'second-class' justice, but rather one that delivers both procedural efficiency and substantive fairness.

As the gig economy continues to expand, future developments in the area will likely focus on addressing the legal uncertainties and power imbalances that currently hinder gig worker's access to justice.

In conclusion, given that gig workers remain subject to certain forms of control capable of undermining their bargaining power, but at the same time are inserted in a more flexible and dynamic labour market that values greater freedom in managing private affairs, this thesis argues that, with the right safeguards in place, arbitration can serve as a valuable tool to enhance access to justice for all parties within the gig economy.

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