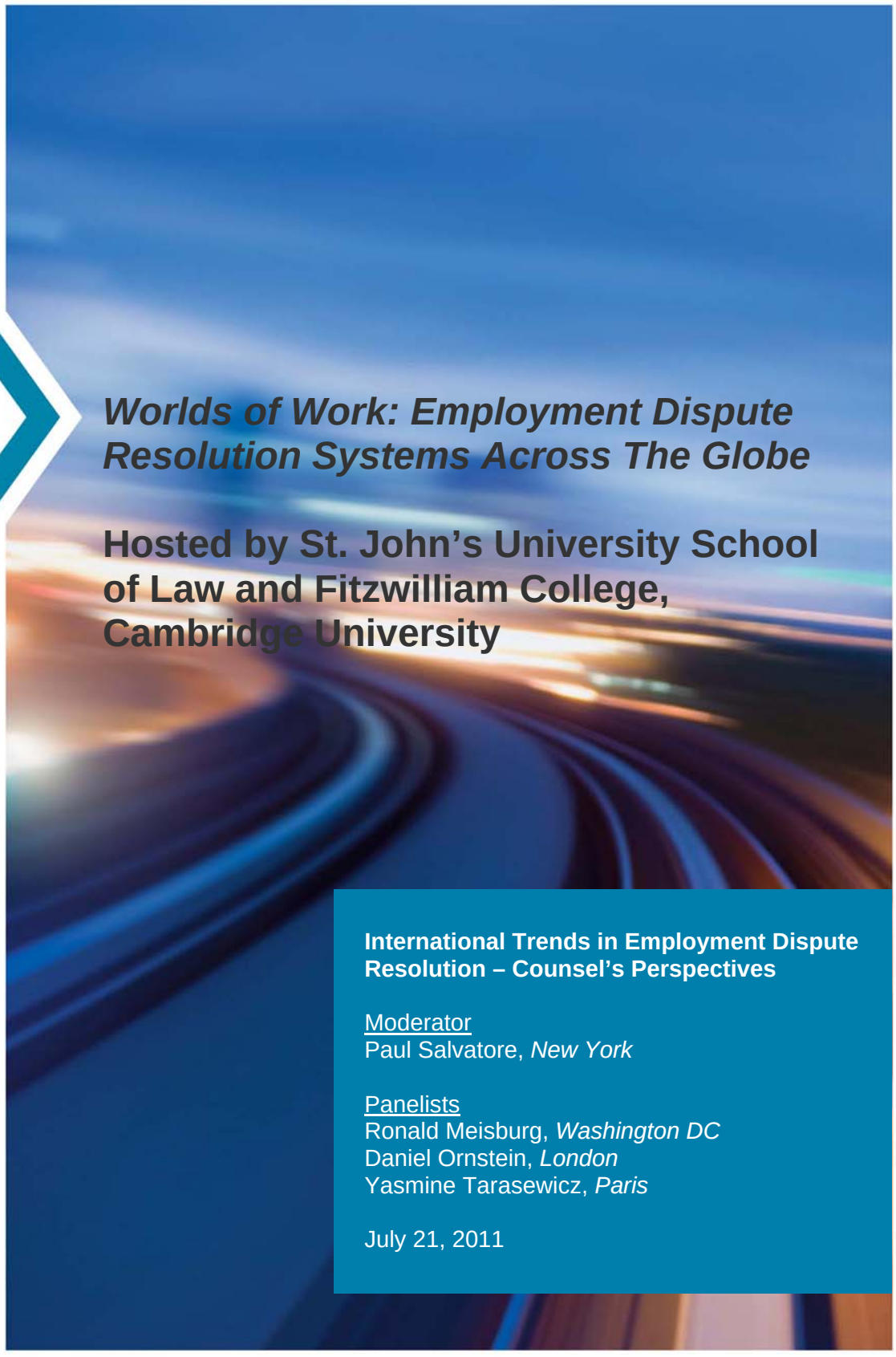

Worlds of Work: Employment Dispute Resolution Systems Across The Globe

Hosted by St. John's University School of Law and Fitzwilliam College, Cambridge University

International Trends in Employment Dispute Resolution – Counsel's Perspectives

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QUESTION 1:
Where are workplace disputes settled?

1.1 BRAZIL

In Brazil, there are specialized labor courts where all labor claims are submitted. The Superior Labor Court has held that mediation and arbitration are both incompatible with the resolution of labor disputes.

1.2 CHINA

1.2.1 **Deterrence-Based Strategies**

One means of enforcing and overseeing labor laws is through regularly scheduled site visits, documentary review and additional inspections during enforcement campaigns directed by central or provincial labor authorities. Many labor bureaus in south China, a region that has experienced a particular proliferation in the number of workplace disputes, rely on "laodong zhan" (grassroots branch offices) which are operated by "xieguan yuan" (administrative assistants), who are local political appointees responsible for additional monitoring and inspection of workplaces as well as the resolution of workplace disputes. Although these branch offices are required to notify local and regional-level labor authorities about serious workplace disputes, they also have authority to resolve minor disputes and deal with worker complaints.

1.2.2 **Private Enforcement: Labor Dispute Resolution**

Employees have rights to enforce labor laws by challenging unlawful labor practices. Examples of private enforcement mechanisms include: petitions for administrative intervention, labor dispute mediation, arbitration, litigation, collective action outside state-sanctioned channels and social accountability monitoring and certifications.

(A) Administrative Petitions and Reports

The primary means for many workers to lodge complaints is by petitioning the relevant authorities, which include the labor bureau and the "xinfang" (letters and visits) offices of the local union. The petitioning officer then attempts to mediate the dispute.

(B) Labor Arbitration and the Courts

Under the former regime, all labor disputes were generally subject to the requirement that arbitration be attempted in advance of recourse to court processes. The Law on Mediation and Arbitration of Labor Disputes of the People's Republic of China ("Mediation and Arbitration Law"), which was adopted on December 28, 2007 and came into force as of May 1, 2008, changed, to a certain extent, these procedural requirements by establishing a rule of "One Arbitration, Final Ruling." Article 47 of the Mediation and Arbitration Law provides that:

"Unless otherwise provided by Law, the arbitral award for the following labor disputes shall be final:

(1) labor disputes involving a claim for unpaid salaries, medical expenses relating to work injuries, or severance and penalties with a disputed amount not exceeding 12 months of the minimum local monthly wage; or

(2) labor disputes arising from implementation of the government's labor standards including working hours, leave entitlement and social insurance."

Notwithstanding these changes, where an employee is unsatisfied with a particular arbitral award regarding any of the labor disputes set forth in Article 47, he or she may still file a petition with a people's court. If the employer disagrees with the arbitral award, the employer is not permitted to bring an action via the court system, but may petition to cancel the award at an intermediate people's court in certain special circumstances.

1.3 FRANCE

1.3.1 Resolution through courts

Workplace disputes are mostly settled through the court process.

The judicial procedure applicable to workplace disputes is simple and inexpensive since generally:

- parties do not need to be represented by a lawyer before the Labor Court – they are entitled to appear in person. Employees may be assisted by a union representative (and frequently are);
- the proceedings in the Labor Courts are oral and public, meaning that written submissions are not required; and
- legal fees are limited.

1.3.2 Out of court workplace disputes resolution

(A) Mediation

Mediation is always voluntary. Two different types of mediation may be used:

(i) Mediation within the framework of judicial proceedings (Article 131-1 of the French Civil Procedure Code) under which a judge, with prior consent of the parties, appoints a mediator who will hear the parties and help them resolve the dispute. The main characteristics of this mediation are:

- the mediator is an impartial third party;

- there is an initial three-month time limit within which to resolve a dispute (which may be extended once for a further three-month period);
- the mediator is bound by an obligation of confidentiality; and
- the cost of a mediation is between €600 and €1,000.

(ii) Mediation implemented in the workplace (at the request of an employee) to resolve an allegation of bullying (Article L.1152-6 of the French Labor Code). This is rarely used in practice and does not fall within judicial proceedings.

(B) Arbitration

The Labor courts have sole jurisdiction to resolve workplace disputes. Arbitration clauses in contracts of employment (including international contracts) are prohibited and unenforceable. The only exception to this is that workplace disputes may be arbitrated if the parties agree to submit to arbitration after the termination of the employment contract. In practice, arbitration is mainly used for disputes that involve senior executives. The main characteristics of arbitration in France are as follows:

- an arbitrator is jointly appointed by the parties;
- an arbitrator is bound by an obligation of confidentiality;
- the parties must comply with the arbitrator's decision.

1.3.3 Out of Court settlement agreements

Settlement agreements, which include a waiver of claims by both parties, are common in France when resolving dismissal disputes.

1.4 GERMANY

1.4.1 Resolution through courts

Workplace disputes are mostly settled through the court process.

1.4.2 Out of court workplace disputes resolution

(A) Mediation

German law does not specifically provide for mediation of employment disputes. A court cannot initiate mediation. In addition, mediation is not perceived as needed in Germany because the majority of disputes are resolved quickly and cost-effectively.

(B) Arbitration

Arbitration of employment disputes is forbidden in German labor law, except for matters concerning collective issues.

1.4.3 **Out of Court settlement agreements**

Approximately 40% of employment disputes are settled out of court.

1.5 SOUTH AFRICA

In South Africa, disputes can be resolved through a number of dispute resolution institutions, namely the Commission for Conciliation, Mediation and Arbitration (the "CCMA") Bargaining Councils and private dispute resolution agencies as wells as through court processes and through the parties reaching settlement.

1.6 SPAIN

1.6.1 **Resolution through courts**

Workplace disputes are mostly settled through the court process.

1.6.2 **Out of court workplace disputes resolution**

(A) Mediation

Preliminary mediation of a dispute in Spain is mandatory (except in relation to matters concerning constitutional rights and the validity of provisions of collective agreements). Mediation is conducted out of court by an administrative service. In practical terms, mediation is usually perceived as a necessary formal step and does not usually result in resolving a dispute.

(B) Arbitration

Arbitration is generally not used in Spain for individual workplace disputes. Arbitration is more frequent in collective matters and is mandatory for widespread strikes.

1.6.3 **Out of Court settlement agreements**

The parties are permitted to enter into settlement agreements, provided formal requirements are complied with.

1.7 **UNITED KINGDOM**

In the UK, disputes can be settled through the court process, mediation or through the parties reaching settlement. Where parties reach settlement (including where this is achieved through mediation), in order for a waiver of claims by an individual to be valid, the settlement agreement must be in a prescribed form, which includes a requirement for an individual to obtain legal advice from a lawyer. It is common for an employer to agree to pay a contribution towards the legal costs of obtaining such advice (typically in the range of GBP250-500).

In the UK, there are prohibitions on resolving workplace disputes through arbitration. This prohibition broadly relates to all claims arising out of employment statutes, such as discrimination claims or claims asserting statutory rights not to be dismissed (known as

"unfair dismissal rights"). As a result, in practice, it is extremely rare for workplace disputes resolved through arbitration (even for claims where arbitration is permissible). This was highlighted in the recent decision of *Clyde & Co, v Winkelhof* [2010] [EWHC 668], where Ms Winkelhof, a partner in the law firm Clyde & Co., brought a claim against her firm for sex and pregnancy discrimination as well as whistle-blowing. It was held that a binding arbitration clause within the firm's members' agreement was in breach of the prohibition on contracting out of statutory employment rights (which in many cases apply to partners as well as employees) and was therefore unenforceable.

1.8 UNITED STATES

In the United States, workplace disputes are settled through the courts, administrative agencies, mediation, arbitration, and out of court settlement.

1.8.1 Resolution through courts

Workplace disputes are occasionally settled in federal or state civil courts. For some workplace-related claims, however, an individual must bring his/her allegations before a federal or state agency prior to commencing an action in civil court (see below).

1.8.2 Administrative requirements

Certain statutes require a party to file a complaint with an administrative body prior to having the opportunity to proceed before a court.

(A) The Equal Employment Opportunity Commission and Similar State Agencies

An individual claiming employment discrimination under Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, or the Genetic Information Nondiscrimination Act of 2008 is required to exhaust his/her administrative remedies with the Equal Employment Opportunity Commission ("EEOC") prior to having the right to pursue a court claim.[1] Similarly, many state and local anti-discrimination laws require an individual to exhaust his/her remedies before a state or local agency prior to filing a court action.[2] After exhausting his/her administrative remedies, an individual may have the opportunity to file a civil complaint with a federal or state court.

(B) The National Labor Relations Board

A party bringing a claim under the National Labor Relations Act ("NLRA") must proceed in accordance with the National Labor Relations Board ("NLRB") process. To enforce a NLRB decision, a party may ultimately appeal to a federal Circuit Court of Appeals. Federal Circuit Court of Appeals decisions are appealable to the United States Supreme Court.

[1] The EEOC enforces laws regarding allegations of discrimination on the basis of age, disability, genetic information, national origin, pregnancy, race, color, religion, gender, sexual harassment, and/or retaliation. Note that an individual alleging discrimination under the Equal Pay Act may proceed directly to court without having to file a charge with the EEOC.

[2] State and local agencies usually work with the EEOC to ensure that an individual's federal and state/local rights are addressed and that efforts are not duplicated.

(C) The Department of Labor

The Department of Labor's Wage & Hour Division ("DOL") is responsible for administering and enforcing the Fair Labor Standards Act ("FLSA") and the Family Medical Leave Act ("FMLA").[3] As a result, the DOL may conduct investigations into an employer's business to ensure that the employer is abiding by FLSA and FMLA laws. If the DOL determines that an employer may have or may be violating the law, the DOL may attempt to reach a settlement with the employer or file a lawsuit on behalf of the alleged aggrieved employee(s).

Unlike the aforementioned anti-discrimination statutes and the NLRA, however, an individual is not required to pursue their FLSA or FMLA claims with an administrative agency prior to filing a lawsuit. Indeed, individuals may personally file a FLSA or FMLA action with a civil court without involving the DOL. Once an employee or employees file a lawsuit under either statute, however, the Secretary of the DOL has the power to intervene in the case on the behalf of the employee or employees.

Note that many states maintain wage and hour statutes that are enforced by state agencies.

1.8.3 Out of court workplace disputes resolution

(A) Mediation

Parties may engage in mediation to resolve employment disputes. Indeed, some administrative agencies and some courts recommend or require mediation in employment law cases.

(B) Arbitration

Parties may engage in arbitration to resolve employment disputes, usually in accordance with an employment agreement (e.g., an employment contract, collective bargaining agreement, etc.) providing for arbitration in the case of a workplace conflict.

1.8.4 Out of court settlement agreements

The vast majority of employment disputes are settled out of court.

[3] Although the DOL is responsible for administering and enforcing over 100 federal employment laws, this presentation focuses only on the FLSA and FMLA. As a result, this presentation does not address government contractor employment laws, health and safety employment laws, employee benefits laws, immigration employment laws, whistleblower laws, etc.

QUESTION 2:
Are there special employment courts and how do they work?

2.1 **BRAZIL**

The specialized labor courts are presided over by judges.

2.2 **CHINA**

Although there are no specialist employment courts at present in China, the surge in the number of labor cases being pursued means there are growing calls for separate labor courts.

2.3 **FRANCE**

Specialist labor courts – "Conseils de Prud'homme", have sole jurisdiction to resolve most individual claims arising out of statutory employment rights.

Each labor court is divided into 5 professional sections: agriculture, commerce, industry, diverse activities and executives. The employee's occupation and role will determine which category applies.

The panel of labor courts consists of four lay members (two with employee-friendly and two with employer-friendly backgrounds). They are elected every four years.

Not all labor disputes fall within the jurisdiction of the specialist labor courts. The following courts and tribunals deal with the matters specified:

- Social Security Tribunal ("Tribunal des Affaires de Sécurité Sociale"): disputes in relation to work accidents, professional illness, payment of social contributions;
- Lower Civil Court ("Tribunal d'Instance"): disputes in relation to the elections of personnel representatives & union delegates;
- Higher Civil Court ("Tribunal de Grande Instance"): disputes in relation to collective bargaining matters;
- Administrative Tribunal ("Tribunal Administratif"): disputes in which the Labor Inspection is involved (e.g., termination of employment of an employee representative, which is subject to the authorization of the Labor Inspection); and
- Criminal courts ("Tribunal de Police" and "Tribunal Correctionnel"): criminal offences committed in the workplace (e.g., undeclared work, violation of the works council's information and consultation, discrimination and harassment).

2.4 **GERMANY**

Specialized labor courts ("Arbeitsgerichte") have jurisdiction over all disputes between employers and employees. They are also responsible for resolving workplace disputes between the companies and both their works councils and trade unions. Labor courts are composed of one professional judge and two lay judges (one with an employer-friendly background and the other with an employee-friendly background).

Labor courts are responsible for:

- disputes arising out of employment contracts, hiring an employee and the existence of a contract of employment and work-related disputes;
- work-related disputes between the employees of the same company;
- disputes arising out of collective bargaining agreements; and
- disputes on the implementation of laws and regulations governing the organization of companies and the relations between companies and their representative organizations (such as works councils).

Social security issues are dealt with by social security courts ("Sozialgerichte").

2.5 SOUTH AFRICA

South Africa has established specialist labor dispute resolution agencies and courts.

(A) The CCMA

The CCMA is the central dispute resolution agency for labor matters. It is an independent statutory body with juristic personality. It has jurisdiction in all the provinces of South Africa and maintains an office in each province. A dispute must be referred to the provincial office in the province where the dispute occurred.

The CCMA does not have an inherent jurisdiction over all labor disputes: it may attempt to resolve only those disputes within its statutory jurisdiction. Sometimes there is an overlapping jurisdiction between Bargaining Councils (see below) and the CCMA.

The CCMA's main function is to resolve disputes through conciliation, and failing that, arbitration.

(B) Bargaining Councils

Bargaining Councils are bargaining institutions which are usually industry or sector specific. They have jurisdiction to resolve both collective and individual disputes.

Bargaining Councils have two major functions: to negotiate collective agreements; and to resolve individual disputes between employers and employees within their jurisdiction (usually industry or sector specific). They have jurisdiction over disputes in relation to their specific sector or industry regardless of whether the parties to the dispute are members of the trade unions and employers' organizations that are parties to the council. A Bargaining Council must attempt to resolve the dispute through conciliation and if this fails, it must resolve the dispute through arbitration if either the Labor Relations Act (the "LRA") so requires or the parties agree that the Bargaining Council must arbitrate the dispute. If there is no relevant Bargaining Council, then the CCMA becomes the first institution of engagement.

(C) Private Agencies

The LRA also vests the CCMA with powers to license private agencies to attempt to resolve disputes through conciliation and arbitration.

(D) The Labor Court

Specialist labor courts exist side by side with the general civil courts. Whilst the High Court of South Africa retains concurrent jurisdiction with the labor courts in respect of certain issues (e.g., breach of contract and constitutional issues), the labor courts generally exercise exclusive jurisdiction over specialist labor matters. It is a court of inherent jurisdiction. The labor courts' primary tasks are to:

- adjudicate disputes relating to freedom of association (union and employer organization membership);
- adjudicate automatically unfair dismissals arising out of operational requirements (i.e., redundancy/retrenchment matters) as well as strike disputes;
- review arbitration awards of the CCMA and/or Bargaining Councils.

In determining the above matters the Labor Court may issue declaratory and interdict relief as well as make compensatory damages and costs awards.

2.6 SPAIN

Specialized Labor Courts ("Juzgados de lo social") have jurisdiction to resolve workplace disputes between employers and employees, including claims in relation to social security matters. They are also responsible for the resolution of collective disputes.

However, collective bargaining disputes which extend across more than one region are heard before the "Tribunal superior de justicia".

2.7 UNITED KINGDOM

In the UK, specialist employment courts, known as Employment Tribunals, have sole jurisdiction to resolve most individual claims arising out of statutory employment rights. Generally, the panel of Employment Tribunals consists of a three-person panel: an employment lawyer and two "lay members." The lay members are chosen on the basis of having relevant workplace experience, and to try to ensure balance, one will come from an employee-friendly background (such as a trade union official) and the other will come from a more employer-friendly background (such as a member of a trade organization). The lawyer is supposed to take responsibility for dealing with legal issues, while the two lay members are expected to apply their experience of the workplace to the facts of a particular case. The composition of Employment Tribunals is generally perceived to work well and fairly, as evidenced by employer and employee organizations recently joining forces to oppose changes to the composition of Employment Tribunals.

Employment Tribunals only have very limited scope to hear individual workplace disputes which do not relate to statutory claims. As such, many contractual disputes are resolved by

general civil courts, including disputes about non-competes and trade secrets and high value bonus disputes. Indeed, for some contractual disputes, particularly bonus disputes in connection with the termination of employment, it is not uncommon for claims to be brought before both Employment Tribunals and general civil courts – deciding whether to file or how best to deal with multiple proceedings is something which can be key to advising clients.

There are also specialist tribunals for resolving disputes about the recognition of trade unions and other employee representative bodies. Specifically, a government body called the Central Arbitration Committee has jurisdiction to resolve disputes in relation to:

- applications for the statutory recognition and derecognition of trade unions (a process that has many similarities with the process in the U.S.);
- applications for the disclosure of information for collective bargaining;
- applications and complaints under the Information and Consultation Regulations (surprisingly little-used regulations in the UK which give workers rights to establish works councils);
- disputes over the establishment and operation of European Works Councils (another little-used right); and
- complaints under the employee involvement provisions of regulations enacting legislation relating to European companies, cooperative societies and cross-border mergers (yet another little-used right).

The Central Arbitration Committee is generally perceived as an employee-friendly forum.

Finally, under UK law, there is scope for a company to seek to enjoin a strike and other forms of industrial action. Such action must be brought before general civil courts. The grounds for enjoining industrial action are generally based on a failure by a trade union to comply with procedural requirements (rather than any judicial determination on the merits of the dispute). A very recent decision of the Court of Appeal, *National Union of Rail, Maritime and Transport Workers v Serco Ltd* [2011] EWCA Civ 226 has made it more difficult for employers to enjoin industrial action by adopting a more restricted interpretation of the types of procedural failures that will give an employer grounds for enjoining a strike.

2.8 UNITED STATES

The United States does not maintain specialized employment courts. Rather, a party may bring claims before general civil courts, provided that the party has exhausted all applicable administrative remedies. Towards that end, there have been a number of specific agencies established in the United States at the federal, state and local level that deal exclusively with resolving labor and employment disputes.

(A) The EEOC

The EEOC is responsible for investigating and resolving employment disputes arising from various federal anti-discrimination laws. Generally, after an individual files a charge of employment discrimination with the EEOC, the EEOC reviews the allegations and may offer the parties the opportunity to engage in its voluntary

mediation program. If a settlement is not reached through mediation, or if the parties do not participate in mediation then the EEOC will conduct its investigation. Depending on its findings, the EEOC may dismiss an individual's charge or issue a finding that based on the investigation EEOC has concluded that there is probable cause that the employer violated the law. If the EEOC dismisses the individual's complaint, the individual will receive a right-to-sue notice allowing that indiviudal to file suit in a court of law within 90 calendar days. If the EEOC finds that probable cause that the employer violated the law, it must engage in concilation in an attempt to reach a settlement that employer, the individual and the EEOC can all agree to. If a settlement is not reached, then the EEOC may decide to bring an action on behalf of the employee in a court of law. If the EEOC ultimately decides not to file a lawsuit, the individual will receive a right-to-sue notice allowing the individual to file suit in a court of law within 90 calendar days.

Many states, counties, and cities maintain their own anti-discrimination laws that mirror or go farther than federal laws. For example, the District of Columbia Human Rights Act prohibits discrimination on the basis of marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, matriculation, and political affiliation in addition to the classes protected by federal law. As a result, akin to the manner in which the EEOC investigates claims arising under federal anti-discrimination laws, local agencies are often responsible for investigating complaints based on state, county, or city anti-discrimination laws. In addition, EEOC has entered into contracts with many state and local agencies which allow individuals to simultaneously file charges with the EEOC and the state or local agency and depending on the contract, either EEOC or the state or local agency will take the lead on investigating and resolve the charge.

(B) NLRB

The NLRB is responsible for resolving employment disputes arising under the NLRA, which mainly protects employee rights to organize and join a union or engage in concerted activities (even without a union) for the purpose of mutual aid and protection at work. Cases which come to the Board are prosecuted by the Board's General Counsel. The General Counsel does not initiate cases on his own. Instead, an individual or organization will file an unfair labor practice charge with an NLRB Regional Office, which comes under the authority of the General Counsel. The unfair labor practice charge will allege that an employer or labor union engaged in impermissible conduct under the NLRA. The Regional Office will then investigate the charge. Most cases are either dismissed following investigation, because the facts or the law do not support issuance of a complaint. If a charge is dismissed, that is the end of the matter. The General Counsel has exclusive and unreviewable prosecutorial authority and there is no private right of action.

If the Regional Office finds merit in the charge, then a complaint will be authorized. Most meritorious cases are settled either before or shortly after the complaint is issued. If a case is not dismissed or settled, case will be heard before an administrative law judge. An administrative law judge will then issue a decision on the merits of the case. The administrative law judge's decision is reviewable by the five-member Board. The Board's decisions then may be appealed to a federal Circuit

Court of Appeals for enforcement. Ultimately, a Circuit Court decision may be appealed to the United States Supreme Court.

(C) DOL

The DOL is responsible for administering and enforcing the FLSA and FMLA. Generally, the DOL will investigate an employer's business on its own accord or if it receives a complaint regarding the employer's business practices. If the DOL determines that an employer may have or may be violating the law, the Secretary of the DOL may attempt to reach a settlement with the employer or file a lawsuit on behalf of the alleged aggrieved employee(s). As previously noted, an employee or employees may bring a civil court action under the FLSA or FMLA without involving the DOL (i.e., without first filing a complaint with the DOL, without a DOL investigation, etc.). Once an employee or employees file a lawsuit under either statute, however, the Secretary of the DOL has the power to intervene in the case on the behalf of the employee or employees.

QUESTION 3:
What are the key procedural steps in a typical employment dispute?

3.1 **BRAZIL**

After an employee files pleadings, a preliminary hearing is convened, during which the employer presents its defense both orally and in writing, together with all documentary evidence related to the case. After this stage, the parties are not allowed to present further documents. At the hearing, parties present their evidence, including expert evidence where necessary. At the completion of this stage, the Labor Judge delivers a decision.

3.2 **CHINA**

In China, labor disputes that proceed to arbitration require an initial application for arbitration, including the submission of any evidence and the names and addresses of witnesses. Mediation (which, as noted above, is mandatory prerequisite to accessing arbitration) and an arbitration hearing follows. Finally, an unsatisfied party reserves the right to appeal an arbitral award to the courts. Thereafter, the case is litigated through the two-trial system, whereby an unsatisfied party may challenge the lower court's determination. Under the working rules of the Ministry of Labor and Social Security ("**MOLSS**"), the parties present their own cases.

3.3 **FRANCE**

In France dispute resolution is divided into two stages:

(A) Conciliation Hearing

- This is a hearing before the conciliation board of the court. Attendance at this hearing is mandatory for the parties or their representatives, even if they do not intend to engage in the conciliation. This hearing generally takes place within 1 to 6 months after the filing of the statement of claim by the plaintiff. Only about 10% of cases settle at this stage.

(B) Judgment Hearing

- If conciliation is not reached, the case will proceed to a subsequent hearing.
- The parties will exchange the evidence they rely on and their written briefs according to a schedule determined by the conciliation board.
- The case will be heard at the judgment hearing (generally within 6 to 18 months after the conciliation hearing) and a decision will be delivered.
- In case of split decision, the case will proceed to a further hearing before the initial panel, but this time under the presidency of a professional judge who will make a determination.

The labor court proceedings are simple. One of the characteristics is that the parties may amend their claims at any time up to the date of the judgment hearing (however,

this may delay the process as the defendant is entitled to reply and may therefore request postponement).

3.4 **GERMANY**

In Germany, there are two procedural steps in the labor court.

(A) Conciliatory Hearing

- This is a hearing before a judge of the labor court (generally, the hearing takes place within 2-4 weeks after the plaintiff has filed the claim). A large number of cases result in settlement at this stage.

(B) Judgment Hearing

- If conciliation fails, the case is scheduled for a subsequent judgment hearing.
- The court usually determines specific dates for the parties to exchange their evidence.
- Evidence is presented orally but it is common for the parties to exchange written briefs.
- At the judgment hearing, the case is heard by a panel composed of one professional judge and two lay-judges.

3.5 **SOUTH AFRICA**

(A) Conciliation

The first stage of statutory dispute resolution involves conciliation. This is compulsory and further steps in the dispute resolution process (such as arbitration, labor court adjudication or industrial action) depend on this conciliation process having been completed. The CCMA must appoint a commissioner to attempt to resolve the dispute through conciliation within 30 days of receipt of the referral. If the parties reach agreement, the conciliator will assist the parties in drawing up a settlement agreement. The conciliator then issues a certificate to confirm that the matter has been resolved. If the parties do not reach agreement, the conciliator will issue a certificate of outcome of non-resolution to indicate that the dispute remains unresolved.

If the dispute remains unresolved after conciliation the matter will be: (i) referred to arbitration (if the CCMA or the Bargaining Council has the jurisdiction to arbitrate the dispute); or (ii) referred to the Labor Court for adjudication (where it falls outside the jurisdiction of the CCMA and a relevant Bargaining Council).

(B) Arbitration

Unlike in consensus-based processes, the neutral third party plays an active role in resolving the dispute in arbitration proceedings by conducting a hearing, receiving and considering evidence and submissions from the parties, determining or deciding

the dispute between the parties and making a final and binding award to which the parties must adhere. The decision is final and binding and there is no right of appeal – there is however a right to bring a judicial review. A commissioner must issue an arbitration award in 14 days of the conclusion of the arbitration proceedings, with brief reasons for the decision.

(C) Disputes in respect of freedom of association

These disputes must be referred to a Bargaining Council having jurisdiction, or to the CCMA where no Bargaining Council exists for conciliation. If conciliation fails, the dispute must be referred to the Labor Court for adjudication.

(D) Disputes about collective bargaining

These disputes must be referred to the CCMA for conciliation. If conciliation is unsuccessful, the union has the choice to engage in strike action or to invoke arbitration by the CCMA. Where the union takes strike action, it may not refer the dispute to arbitration for a period of twelve months thereafter. A Bargaining Council, even where one exists in the sector or area, has no jurisdiction.

Disputes about the failure or refusal to admit a registered union with a significant interest in the workplace as a party to a closed shop agreement must be referred to the CCMA for conciliation, followed by labor court adjudication if conciliation fails. Such disputes fall outside the jurisdiction of Bargaining Councils.

(E) Disputes about unfair labor practices

Disputes relating to unfair conduct relating to promotion, probation (excluding dismissals related to probation), demotion, training, and the provision of benefits, unfair suspensions or other disciplinary action short of dismissal, failure or refusal to re-employ or reinstate in terms of any agreement, must be referred to a Bargaining Council having jurisdiction (or to the CCMA where no bargaining council exists), for conciliation or, if this fails, arbitration. In the case of unfair discrimination and occupational detriment (other than dismissal) on the grounds of whistle blowing, if conciliation fails at a Bargaining Council or at the CCMA, the dispute must be referred to the Labor Court for adjudication.

(F) Disputes involving workplace forums

These are disputes centering on the interpretation or application of the law in workplace forums such as: the establishment of trade union-based or other workplace forums, meetings of workplace forums, reviews of an employer's disciplinary codes and procedures at the request of a newly established forum, and the implementation of provisions relating to consultation, joint decision making and disclosure of information. All these disputes must be referred to the CCMA for conciliation and, if conciliation fails, arbitration. Bargaining Councils have no jurisdiction to resolve these types of disputes.

(G) Industrial disputes

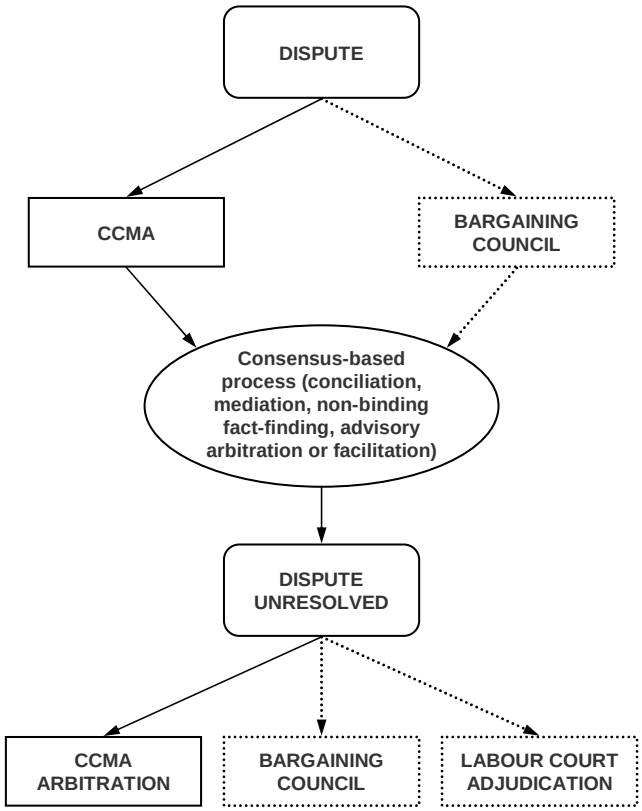
Industrial disputes, such as strikes and lock-outs, must first be referred to the CCMA for conciliation. If conciliation fails, the parties are at liberty to engage in industrial action (subject to providing requisite notice) or to invoke arbitration (a must in the case of industrial disputes affecting essential and maintenance services). Disputes about refusal to bargain must first be referred to the CCMA for conciliation, and advisory arbitration follows if conciliation fails. Disputes about picketing and unilateral changes to terms and conditions of employment must be referred to the CCMA for conciliation and, if conciliation fails, the dispute must be referred to the Labor Court for adjudication. Bargaining Councils have no jurisdiction to resolve these types of disputes.

(H) Disputes arising from unfair dismissals

Unfair dismissals (including those related to unfair discrimination, operational requirements, dismissals arising from participation in unprotected strikes, refusal to reinstate after maternity leave, transfer of employment contracts, dismissal because the employee made a protected disclosure and dismissals in the context of closed shop agreements) must first be referred for conciliation to a Bargaining Council having jurisdiction, or to the CCMA where no bargaining council exists. If conciliation is unsuccessful, the dispute must be referred to the Labor Court for adjudication.

Dismissals for conduct and capacity, individual employee retrenchment, non-renewal or unfair renewal of fixed-term contract, selective non-re-employment, constructive dismissals, dismissal relating to probation, dismissals for a reason unknown to employee and disputes over entitlement to severance pay must also be referred to a Bargaining Council or, in the absence of a Bargaining Council, to the CCMA for conciliation and arbitration if conciliation is unsuccessful.

The figure below summarizes the flow of dispute resolution at the CCMA. The figure includes alternative routes in dotted lines.



3.6 SPAIN

The dispute resolution procedure in Spain comprises:

- The submission of a written statement of claim by the plaintiff.
- A hearing before the Labor Court. A judicial conciliation must be conducted at the beginning of the judicial proceedings.
- If the dispute remains unresolved after conciliation, the judge will proceed to hear the case at the same hearing.

3.7 UNITED KINGDOM

The key stages for most litigation (whether it is before an Employment Tribunal or general civil courts) are:

- A written statement of claim by the complainant.
- A defense by the employer.
- A case management hearing (where there is scope for interlocutory applications to be made).
- Discovery and exchange of documents.

- Exchange of written witness statements.
- Trial.
- Judgment (the timing of which can vary widely and can take from a day to a number of months).

There is scope to make interlocutory applications at most stages of the process, including for example, further clarification of a claim, to strike down parts of a claim and for discovery of particular documents. However, unlike in the U.S., it is relatively unusual to make applications for summary judgment other than in the very strongest of cases. Depositions are also not available; indeed courts are particularly unwilling to grant summary judgment in cases alleging discrimination.

3.8 UNITED STATES

The key stages for most litigation before general civil courts are:

- A written complaint by the plaintiff.
- An answer and/or motion to dismiss by the defendant.
- Discovery – document production, interrogatories, and depositions.
- Dispositive motions.
- Trial.
- Judgment.

The key stages for litigation before the EEOC or similar local agency are:

- A written charge by a charging party.
- A response to the charge by the opposing party (typically in the form of a position statement).
- The administrative agency issues its findings.
- After all administrative remedies are exhausted and the matter has not been resolved through mediation or settlement, the opportunity to file a lawsuit in civil court.

The key stages for litigation before the NLRB are:

- A written unfair labor practice charge filed by a charging party, which can be an individual or an organization such as a business or a union.
- Investigation of the charge by the Regional Office acting under the authority of the NLRB General Counsel.

- Investigation may include position statements filed by the charging party, the charged party and affidavits taken by Regional Office investigators acting on behalf of the General Counsel.

- The Regional Office concludes its investigation and either dismisses the charge or authorizing the issuance of a complaint.

- If the charge is dismissed that is the end of the case. The General Counsel has exclusive and unreviewable prosecutorial authority and there is no private right of action.

- If the Regional Office finds merit in the charge it authorizes the issuance of a complaint. Most merit cases are settled before or shortly after the complaint is issued.

- Complaints that are not settled are subject to a hearing before an administrative law judge.

- The administrative law judge's decision may be appealed to the five member Board, and the Board's decisions are appealable to the U.S. courts of appeals and to the U.S. Supreme Court.

The key stages for litigation before the DOL are:

- The DOL investigates the employer's business practices.

- If the DOL believes there has been or is a violation, the Secretary of the DOL may attempt to reach a settlement with the employer or file an action in civil court on the employee's or employees' behalf.

- In a case where an employee has or employees have commenced an action under the FLSA or FMLA without the DOL's involvement, the Secretary of the DOL may intervene on the behalf of the employee or employee

- In cases where the Secretary of the DOL is a party to a case, the case will proceed in accordance with the civil court process set forth above.

QUESTION 4:
How extensive are disclosure/discovery requirements?

4.1 **BRAZIL**

The discovery phase is conducted by the Judge who determines what documents a party should produce. The parties are entitled to request the disclosure of any particular document, and the Judge determines whether documents should be disclosed, having regard to whether it is necessary to determine the case. The parties may also request that any documents disclosed are kept out of the public domain if the disclosure may cause damage to a party or the information is confidential.

4.2 **CHINA**

There are no formal discovery requirements. However a presiding judge may require a party to produce documents relevant to a dispute and the courts have extensive powers to require evidence from parties as part of their fact-finding role (which is in keeping with the inquisitorial rather than adversarial nature of the court process).

4.3 **FRANCE**

The Labor Court sets a procedural timetable, setting out the dates on which the parties must exchange their pleadings and evidence. In contrast to the US, the parties are free to decide what evidence they want to disclose to support their case and parties are not obliged to disclose documents which adversely affect their own case. However, a party may make applications seeking to compel another party to disclose particular documents.

4.4 **GERMANY**

Each party presents its own evidence and must prove the facts submitted in its favor. Generally, parties are not required to disclose evidence which is adverse to their case (save in certain cases, mostly involving discrimination, where the burden of proof lies with an employer).

4.5 **SOUTH AFRICA**

In the CCMA, the rules on disclosure are very informal. The parties generally agree at a pre-arbitration hearing on how they will deal with disclosure and when documents will be exchanged. A commissioner can be asked to make a ruling if one party requires another to produce a relevant document.

The Labor Court rules on disclosure are more formal. The basic rule of disclosure is that a party must make discovery (disclosure) of all documents, electronic communications and tape recordings relating to the matter and which are not privileged. Privilege applies to all communications between attorney and client as well as documents generated in contemplation of litigation. Third parties in possession of documents which are relevant to a matter may be subpoenaed to produce those documents at trial.

4.6 **SPAIN**

The parties are free to determine what documents they wish to disclose and are not required to submit evidence which adversely impacts their case.

4.7 **UNITED KINGDOM**

In the UK, a party to litigation (whether in Employment Tribunals or civil courts) is required to disclose:

- documents upon which they rely (e.g., documents referred to in pleadings);
- documents which adversely affect its own case;
- documents which adversely affect another party's case; and
- documents which support another party's case.

A party is only required to disclose documents in their control, where control means any of physical possession or having a right to obtain, copy or inspect a document in the hands of another party. A party is not required to disclose privileged documents.

In addition, a party is only required to make a "reasonable" search for documents. The factors which are relevant to the reasonableness of a search include the number of documents involved; the nature and complexity of the proceedings; the ease and expense of retrieval of any particular document; and the significance of any document which is likely to be located during the search. For electronic searches, the following factors are also relevant to the reasonableness of a search: the accessibility of electronic documents, servers, back-up systems and other devices or media that may contain such documents, taking into account developments in hardware and software systems; the location of relevant documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents; the likelihood of locating relevant data; the cost of recovering, disclosing and providing inspection of any relevant electronic documents; and the likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.

It is important to note that the confidentiality of a document cannot be relied upon to excuse the disclosure of a document. However, documents relied on in disclosure can be redacted (insofar as the redaction only relates to parts of the document that are not relevant) – this can often be a means of preserving confidential information. In addition, for relevant confidential information, there are mechanisms for safeguarding the protection of documentation, including limiting the identities of those to whom it can be provided and imposing conditions on the disclosure of documents (such as merely allowing a party to see a document rather than provide a copy). In addition, any disclosure to another party is subject to an "implied undertaking" – an undertaking that the recipient will not use any information received in the course of litigation for any other purpose.

4.8 **UNITED STATES**

In the United States, discovery in employment cases are dependent on the forum where the employment dispute is pending.

(A) Civil Courts

In federal civil courts, discovery is conducted in accordance with the Federal Rules of Civil Procedure and a federal court's local rules. In state civil courts, discovery is conducted in accordance with that state's rules of civil procedure. Typically, state rules of civil procedure mirror the Federal Rules of Civil Procedure with only few differences. Regardless of whether state or federal civil procedure rules govern, discovery in the United States is quite liberal. Generally, a party to litigation is required to disclose any information that appears reasonably calculated to lead to the discovery of admissible evidence, provided that the information is not subject to privilege.

(B) EEOC

During an EEOC investigation, the parties do not engage in discovery. In conducting its investigation, however, the EEOC and local agencies may interview witnesses and/or issue requests for information/documents. Additionally, the EEOC and local agencies may visit an employer's facilities to interview witnesses and/or gather information. In cases where an employer refuses to cooperate in an investigation, the EEOC and local agencies may issue an administrative subpoena to obtain documents, testimony, or gain access to facilities. The EEOC's subpoena power is quite broad and in some instances may enable the agency to obtain evidence that it could not get through litigation discovery.

(C) NLRB

The NLRB does not permit discovery. However, a Regional Office may subpoena material necessary to complete its investigation, and administrative law judges may also issue subpoenas.

(D) DOL

In conducting investigations, the DOL will often examine employer records, interview certain employees in private, and hold discussions with the employer.

QUESTION 5:
What rights of appeal exist?

5.1 **BRAZIL**

The parties may appeal to the Regional Labor Court of Appeal. In the Regional Labor Court of Appeal, the appeal is usually heard by three judges. After the decision of the Regional Labor Court of Appeal, the parties can only file extraordinary appeals to Superior Courts if there is violation of federal laws or violation of the Constitution.

The main types of appeal are the following: (i) motion for clarification, in which a party can require clarification on the terms of the award (either from labor courts or from Regional Labor Courts of Appeal); (ii) ordinary appeal, in which a party can challenge an award before the Regional Labor Court of Appeal; (iii) review appeal, filed before the Superior Labor Court in situations in which the previous decision violates federal or constitutional law. The decision of the review appeal can be appealed by way of an extraordinary appeal before the Supreme Court on the grounds that the decision does not comply with the Federal Constitution.

5.2 **CHINA**

Unsatisfied employees can appeal arbitral awards regarding any of the labor disputes contained in Article 47 of the Mediation and Arbitration Law, and court judgments may also be appealed immediately from the trial court level. On appeal from the LDAC, the trial court hears the case afresh, although these courts tend generally to review the LDAC findings and even consult directly with the LDAC in attempting to resolve the case. If the employer disagrees with the arbitral award, the employer is not permitted to bring an action via the court system, but may petition to cancel the award at an intermediate people's court in certain special circumstances.

5.3 **FRANCE**

(A) Court of Appeal

The appeal is heard by a social chamber which is composed of 3 professional judges. The parties can be represented by a lawyer but this is not mandatory. The Court of Appeal reviews issues both of fact and law. Appeals are filed in 56.2 % of cases, and 45% of the decisions of the labor courts are overturned on appeal.

(B) Supreme Court

The case is heard by the social chamber of the Supreme Court. The parties must be represented by a lawyer who is admitted in the Supreme Court. 14% of cases are heard by the French Supreme Court.

5.4 **GERMANY**

A party can appeal to the Regional Labor Court ("Landersarbetisgericht") and to the Supreme Court ("Bundesarbeitsgerich").

(A) Appeal – Regional Labor Court

An appeal is heard by a Regional Labor Court which is composed of one professional judge and two lay judges. The parties must be represented by a lawyer or a trade union representative. The Regional Labor Court hears appeals on issues of facts and law.

(B) Reviews – Federal Labor Court

The Federal Labor Court is composed of three professional judges and two lay judges. The parties must be represented by a lawyer and the Federal Labor Court only reviews on issues of law.

5.5 **SOUTH AFRICA**

CCMA arbitration awards are final and binding – there is no right of appeal. The parties only have the right to review a Commissioner's if the decision based on a procedural irregularity, the arbitrator misconducted himself during the arbitration, the arbitrator exceeded his powers or if the award was improperly obtained. In the case of disputes adjudicated by the Labor Court, an appeal against the decision of the court is possible. Appeals from the Labor Court are heard by the Labor Appeal Court.

5.6 **SPAIN**

Appeals may be brought in the Court of Appeal ("Tribunal superior de Justicia de las Communidades Autonomas") and the Supreme Court ("Tribunal Supremo").

(A) Court of Appeal

An appeal is heard by a social chamber composed of professional judges (usually three). An appeal is confined to points of law, not fact.

(B) Supreme Court

An appeal to the Supreme Court is limited to: (i) cases where the judgment of the Court of Appeal is alleged to have violated the substance of the law and to be in contradiction with a prior decision of the Supreme Court or of another Court of Appeal; and (ii) if the judgment is alleged to have violated a rule of procedure.

5.7 **UNITED KINGDOM**

In general civil courts, there are only two bases for appeal, namely: (i) the decision of the lower court was wrong; or (ii) the decision of the lower court was unjust because of a serious procedural or other irregularity in the proceedings.

However, there are slightly different and more specific rules as to when an appeal is allowed from an Employment Tribunal. Specifically, an appeal from an Employment Tribunal can only be made on a "*question of law*". Accordingly, an argument that an Employment Tribunal misunderstood or misapplied the facts is not a ground of appeal (save for limited exceptions set out below). In practice, this means that to successfully appeal, an appellant must be able to show that an Employment Tribunal:

- misdirected itself on the law, misapplied the law or misunderstood the law applicable to the proceedings before it;
- failed to give adequate reasons for its decision;
- breached the rules of natural justice; or
- delayed excessively in giving its decision.

There are limited circumstances where factual errors are considered to amount to errors of law, namely where:

- there was no evidence to support a particular finding of fact by the Employment Tribunal;
- the Employment Tribunal's decision was perverse; or
- the Employment Tribunal exercised its discretion wrongly.

Appeals from Employment Tribunals go to the Employment Appeals Tribunal, which like Employment Tribunals, generally consists of three members, a lawyer, and two lay members, one with employee-friendly experience, the other with employer-friendly experience.

5.8 **UNITED STATES**

(A) Civil Courts

In general civil courts, a party may appeal a lower court's decision to a higher court on the grounds that the lower court's decision was (i) legally flawed; (ii) factually unsupportive; or (iii) otherwise incorrect.

(B) NLRB

As previously noted, a party may appeal a NLRB decision to the U.S. circuit courts of appeals. A decision of the court of appeals may be reviewed by the United States Supreme Court.

QUESTION 6:

What limitations periods are applicable and how long does a typical case take to resolve?

6.1 **BRAZIL**

The time it takes to resolve a typical labor claim may vary from three to four years, depending on the jurisdiction where the claim is filed. An employee has two years from the date of termination to file a labor claim.

6.2 **CHINA**

The limitations periods by which petitions for arbitration must be filed by aggrieved parties and determinations by the arbitration tribunal must be made, have been amended under the Mediation and Arbitration Law. Under the former regime, the limitations period within which employees were obligated to file complaints at an arbitration tribunal was 60 days. The Mediation and Arbitration Law has extended this time limit to one year and has introduced special provisions on the termination and suspension of the limitations period, as well as identified circumstances in which it does not apply. The Mediation and Arbitration Law has also shortened the window of time in which the arbitration of a labor dispute must be concluded. Article 43 of the law prescribes that:

> "an arbitral tribunal shall conclude the arbitration of a labor dispute within 45 days of the date of accepting the application for arbitration. Where a hearing requires this period to be extended due to the complexity of the case, the hearing may be extended upon the approval of the president of the arbitration tribunal. The tribunal shall notify the parties of the extension and the extension shall not exceed 15 days."

Additionally, Article 43 of the Mediation and Arbitration Law sets forth that "where the arbitral tribunal fails to render a decision within the stipulated period, the parties may file a complaint at a people's court." The inclusion of these changes will likely compel greater procedural and decision-making efficiency by arbitration tribunals in weighing labor disputes.

6.3 **FRANCE**

It takes approximately six to twenty-four months to resolve a labor dispute in the Labor Court in France. Matters on appeal take approximately six to eighteen months after filing. An appeal to the Supreme Court will take approximately one to two years to conclude, after filing.

A claim must generally be filed before the Labor Court within five years following the date on which the plaintiff became aware of the facts that are the basis for the claim. There are exceptions to this rule:

- reductions in force for ten or more employees within a month: the action must be filed within twelve months following the date of the redundancies;
- termination by mutual agreement: the action must be filed within twelve months of the signature of the agreement.

6.4 GERMANY

Resolution of a claim in the Labor Court will take approximately two to six months from the date of filing. Court of Appeal matters take approximately one year. Supreme Court appeals are usually resolved within six months from the date of filing. Disputes about termination of employment must be filed within three weeks after notice of termination has been received by the employee.

6.5 SOUTH AFRICA

In many instances there is no specific time limit for referral to conciliation. Rather a dispute must be referred within a reasonable time from the date it arose. However, for dismissals, employees must refer unfair dismissal disputes to the CCMA within thirty days of the date of the dismissal or, if there has been an internal appeal hearing, within thirty days of the employer making the final decision to dismiss or uphold the dismissal. In the case of an unfair labor practice, the time period is ninety days from the date of the act or omission that allegedly constitutes an unfair labor practice or, if an employee only became aware of the occurrence at a later date, within ninety days of the employee becoming aware of such occurrence. In the case of discrimination, the time limit is six months of the act or omission that constituted unfair discrimination. A time frame of 90 days also exists for requests for arbitration if a dispute remains unresolved after conciliation.

If the above time periods have lapsed, the referring party must apply for condonation to request the CCMA to condone the failure to refer the case timeously. An application for condonation must set out the grounds for seeking condonation and must include details on the degree of lateness, the reasons for the lateness, the referring parties' prospects of succeeding with the referral and obtaining the relief sought against the other party; any prejudice to the other party; and any other relevant factors.

There is currently a backlog in the CCMA of at least one to three months in having a case conciliated depending upon the region in which the case is referred. The delay in having matters arbitrated before the CCMA is greater and in practice is typically in the region of a year. Matters that have been conciliated upon by the CCMA and referred to the Labor Court may take anywhere from between 6 and 12 months to be heard.

6.6 SPAIN

Labor Court matters are generally resolved within seven and a half months after the filing. Matters in the Court of Appeal are usually resolved within five months of the filing. Supreme Court matters can take seven years.

An employee must file a claim in relation to termination of employment within twenty days of the termination of employment. Disputes in respect of which no specific time limit is provided by legislation must be filed within one year following the date on which the cause for the claim becomes known by the employee.

6.7 UNITED KINGDOM

The time taken to resolve a claim can vary, but typically, the process for a claim before an Employment Tribunal will take between eight to twelve months from the issue of a claim

until judgment. It can take up to a further year for an appeal to be heard by the Employment Appeal Tribunal.

For most claims before Employment Tribunals, there is a general three-month time limit from the date of the act complained of for a claimant to bring a claim. The claim must be presented using a prescribed form. Exceptions to the general three-month rule for presenting a claim are that an Employment Tribunal will exercise its discretion to allow an otherwise out of time claim if: in unfair dismissal claims it was not "*reasonably practicable*" for the claim to be presented within the three-month time limit; in discrimination claims, it is "*just and equitable*" to extend time for the claim to be presented.

In an Employment Tribunal, a defense must be issued within twenty-eight days of the date on which the respondent was sent a copy of the claim. When the Employment Tribunal sends a claim to a respondent, it will tell the respondent the date by which the defense needs to be received at the tribunal office. Like the claim, the defense must be submitted using a prescribed form.

6.8 UNITED STATES

(A) Civil Courts

The limitations period for bringing an action depends on the statute/law that a party bases its claim upon.

Depending on its nature and complexity, a case can take anywhere from one year to several years to decide. Generally, however, it takes anywhere from one to two years to resolve an employment dispute in a federal or state court, excluding any appeals.

(B) EEOC

Generally, the anti-discrimination statutes mandate that an individual has 180 calendar days from the date of the last incident of discrimination to file a claim. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. For age discrimination, however, the filing deadline is only extended to 300 days if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law. Further, state and local anti-discrimination laws typically have similar or longer statute of limitations.

Once the EEOC receives a charge, the EEOC generally takes anywhere from three to twelve months to issue its findings, but in some instances (such as in systemic investigations the EEOC can take years to complete an investigation. In the intervening time, the EEOC may seek to settle a charge through mediation or other settlement means. After it becomes clear that the EEOC will be unable to complete its investigation within 180 days, a charging party may request a notice of right-to-sue. Once a charging party receives a notice of right-to-sue, either by request or after the EEOC issues its findings, he/she has 90 calendar days to file suit in court. If an individual plans to file an age discrimination lawsuit, however, he/she does not need a notice of right-to-sue to bring an action in court. Rather, an individual claiming age discrimination can file suit anytime after 60 calendar days have passed from the day

he/she filed his/her charge (but no later than 90 days after he/she receives notice that the EEOC's investigation has concluded).

(C) NLRB

A party has 6 months from the date of the alleged unfair labor practice to file a claim under the NLRA with the NLRB.

Regional offices typically issue a decision regarding the merits of a charge within seven to twelve weeks, although the time for investigation can vary based on the complexity of the case and some cases may take longer. If a Regional Office dismisses an unfair labor practice charge, the charging party usually has fourteen days to appeal the dismissal to the General Counsel.

(D) DOL

Under the FLSA and FMLA, an individual must commence a lawsuit in civil court within two years of the alleged violation. Additionally, the FLSA and FMLA both permit the extension of the statute of limitations to three years if an employer's violation was wilful. The Secretary of the Department of Labor must comply with these limitations periods if suing on behalf of an employee or employees.

QUESTION 7:
How are damages and other make whole remedies determined and are punitive damages or other remedies available?

7.1 **BRAZIL**

Damages are generally awarded based on actual material losses or moral distress, and include punitive damages. There are no objective rules for determining the calculation of damages, but Labor Judges usually consider the seriousness of the harm caused, the length of service, base salary and capability to work.

7.2 **CHINA**

Compared with those available in the United States, remedies for labor law violations appear to be less robust. For example, punitive damages are generally not available in China. Notwithstanding this, China's Labor Contract Law authorizes award of double wages in the event of failure to sign written contracts, as well as double severance for successful claims of wrongful termination.

7.3 **FRANCE**

There are no punitive damages under French Law. The French Supreme Court applies the "full compensation" principle, according to which damages must compensate the prejudice suffered. However, for various matters, the labor law provides for a minimum amount of damages:

(A) Unfair dismissal

- an employee with at least two years' service, working in a company with at least eleven employees, is entitled to receive a minimum award equal to six months of pay. The labor court can award a higher amount, depending on the level of prejudice suffered by the dismissed employee. Generally the amount of damages for unfair dismissal range between six months and twenty-four months of pay (higher amounts than twenty-four months are rare); and

- factors considered when awarding damages include: the employee's age, length of service, family responsibility and employment situation.

(B) Reductions-in-force of ten or more employees within a month

- where a mass reduction plan is declared void, an employee will receive a minimum payment equivalent to twelve months' pay.

7.4 **GERMANY**

There are no punitive damages under German law; damages are based on restitution. Article 249 provides that "*A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.*"

For terminations, if the labor court decides that the dismissal is unfair, it will award damages based on seniority, age, family responsibility and professional situation of the employee.

Damages are generally capped at twelve months' pay, but may be higher for employees aged fifty years or more (up to a maximum of eighteen months' salary). If termination is declared null and void, the employee may be awarded reinstatement and the back-payment of his salary from the date of dismissal to the date of reinstatement.

7.5 **SOUTH AFRICA**

If an unfair dismissal claim succeeds, the CCMA has a choice of remedies. The commissioner may:

- order the employer to reinstate the employee from any date not earlier than the date of dismissal;
- order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work or on any terms and from any date not earlier than the date of dismissal; or
- order the employer to pay compensation to the employee.

The primary remedy applied by the CCMA in respect of a dismissal which is substantively fair is to order re-instatement or re-employment. In the event that the employee does not wish to be reinstated or re-employed or the circumstances are such that a continued employment relationship would be intolerable or no longer reasonably practicable or the dismissal is unfair only because the employer did not follow a fair procedure, the commissioner may award compensation rather than re-instatement or re-employment. There are limits on compensation. In the case of automatically unfair dismissals (dismissals for participation in a protected strike, dismissal on account of pregnancy and dismissals that amount to acts of discrimination), the commissioner is enjoined to make an award which is 'just and equitable' in the circumstances but not more than twenty-four months' remuneration. In an unfair dismissal case, the commissioner may award up to a maximum of twelve months' remuneration as compensation.

The Labor Appeal Court has held that compensation arises out of statute and does not relate to patrimonial loss. The labor courts have discretion as to whether compensation should be awarded or not. If the labor courts decide that the case is such that compensation should be awarded, they have no discretion in respect of the amount. Compensation must be awarded from the date of the dismissal to the date of adjudication, subject to a maximum of twelve months' compensation.

7.6 **SPAIN**

Punitive damages are not payable under Spanish law.

If the dismissal is held to be unfair, the employee is entitled to receive forty-five days of salary per year of service, up to a maximum of forty-two months' salary. The dismissal may also be held to be null and void, which would entitle the employee to be reinstated and to receive back-payment of salary calculated from the date of dismissal to the date of the reinstatement.

7.7 UNITED KINGDOM

In most cases, the main basis for assessing damages in employment related claims is the financial loss suffered by a claimant as a result of the unlawful conduct by an employer. Punitive damages are rare, save for in discrimination claims (see further below). Any damages are subject to mitigation and a claimant is under a duty to mitigate their losses.

For unfair dismissal claims, there is no right to punitive damages, and, in most unfair dismissal claims, there is a cap on the maximum level of damages recoverable which is currently GBP80,400.

In discrimination claims, there is no cap on the level of damages recoverable. Severe cases can cause serious and long-term damage to the health of claimants. This can mean that they are too unwell to seek a new job for a significant length of time. In such cases, the level of compensation for financial losses can be very high because it will be based on multiple years of lost earnings. In addition to loss of earnings, claimants in discrimination claims are also entitled to compensation for injury to feelings. There are judicial guidelines as to the amounts payable, which are known as "*Vento*" guidelines – based on the case of in *Vento v Chief Constable of West Yorkshire Police* (No 2) [2003] IRLR 102, which split claims into three levels of seriousness. The guidelines were recently increased in the case *Da'Bell v NSPCC UK* EAT/0227/09, and are currently as follows: between £600 – £6,000 for less serious cases, such as a one-off incident or an isolated event; between £6,000 – £18,000 for serious cases which do not merit an award in the highest band; and between £18,000 – £30,000 for the most serious cases, such as where there has been a lengthy campaign of harassment. Awards can exceed this only in the most exceptional cases.

7.8 UNITED STATES

Generally, United States employment laws provide for make-whole remedies. Depending on the applicable statute, however, additional damages may be available.

(A) Anti-Discrimination Statutes

Under the EEOC-enforced anti-discrimination statutes, a prevailing plaintiff may be entitled to job placement/reinstatement, back-pay or benefits, a requirement that the employer cease any discriminatory practices, and/or other monetary or equitable awards. In cases where a court finds that an employer engaged in intentional discrimination on the basis of a person's race, color, national origin, sex (including pregnancy), religion, disability, or genetic information, a prevailing plaintiff may also be entitled to compensatory and punitive damages. In cases involving intentional age discrimination or intentional sex-based wage discrimination under the Equal Pay Act, plaintiffs cannot recover compensatory or punitive damages, but may be entitled to liquidated damages.

(B) NLRA

The NLRB has wide discretion in ordering remedies to effectuate the NLRA's purposes. Under the NLRA, an employee or employees may be entitled to back wages, reinstatement, and other make-whole remedies. In rare cases, a prevailing party may also be entitled to attorney's fees and costs. Interest on backpay amounts is

compounded daily at the prevailing rate used by the U.S. Internal Revenue Service. Charged parties are also required to post a notice physically on the employment premises and also electronically (e.g., internet, email) if that is the means typically used by the employer or the union (as the case may be) to communicate with its employees/members.

(C) FLSA and FMLA

Under the FLSA and FMLA, an employee or employees may recover back wages. In cases where the employer acted wilfully, an employee or employees may recover back wages and an equal amount in liquidated damages. Additionally, a prevailing employee or employees are entitled to reasonable attorney's fees and costs. Further, employers that have wilfully violated the law may face criminal penalties.

Moreover, state laws may provide for enhanced damages. For example, under the Maryland Wage Payment and Collection Law, an employee may recover treble damages if an employer withholds compensation not as a result of a bona fide dispute (i.e. the employer acted in bad faith).

QUESTION 8:
Are legal costs recoverable by either party?

8.1 **BRAZIL**

Typically, each party pays the fees of its attorney and court costs are borne by the losing party. Employees usually hire their own attorney under a success fee arrangement which may vary from 25% to 30% of the award. Legal aid is also available for employees with low wages. For employees to qualify for legal aid, they must present a statement declaring that they cannot afford the legal costs without affecting their ability to support themselves or their family.

8.2 **CHINA**

Attorneys' fees in China are typically shouldered by the parties themselves. Indeed, some have surmised that the cause of the relative paucity of attorneys specializing in labor law in China is the difficulty of recovering fees in labor cases.

8.3 **FRANCE**

Usually, the court's costs are very limited unless the court ordered specific measures of instructions, for example an expert. The losing party pays the court's costs and a portion of the attorney's fees (usually between €1,500 and €3,000). Employees usually pay for their own legal costs as it is not common that they are covered by insurance. Legal aid is also available for employees with low wages.

8.4 **GERMANY**

Because attorney's fees and court fees are largely set out by law and are dependent on the amount in dispute, the financial risk of litigation can be estimated in advance with a fairly high degree of accuracy. For instance, if an employee earns € 5,000 per month, the court fees for a dismissal protection case are around €750. If the employee claims a severance payment of €100,000, the court fees are generally of €2,500.

Before first degree courts, the court fees are paid by the losing party and each party pays for their own lawyer's fees. However, before the Court of Appeal and the Supreme Court, the defeated party will, in addition, be liable for the other side's attorney fees.

8.5 **SOUTH AFRICA**

In CCMA proceedings, a commissioner may not include an order for costs in the arbitration award, unless a party or the person who represented the party in the arbitration proceedings acted in a frivolous or vexatious manner in its conduct during the proceedings.

The Labor Court has a wide discretion with regard to cost orders. It will generally only award costs against the other party if such party had acted frivolously, vexatiously or unreasonably in bringing or conducting the proceedings. If costs are awarded, they are on the basis of a tariff (approximately 50% of the actual costs incurred).

8.6 SPAIN

The court fees and attorney's fees normally have to be paid up front by each party. Spanish labor law does not provide for payment of the other party's costs, in the event an employee is unsuccessful. This makes employees more likely to challenge a termination as they will not face an adverse costs award if their claim is defeated.

8.7 UNITED KINGDOM

In the civil courts in the UK, the general rule is that "costs follow the event". In practice, this means that the loser pays a proportion of the winner's legal costs (typically in the 60-70% range).

However, this general rule does **not** apply in disputes before the Employment Tribunal, where costs do not follow the event. In other words, if a party is successful in bringing or defending a claim, the Employment Tribunal will not usually make an order that the unsuccessful party pays the prevailing party's costs.

There are signs of a gradual erosion of the no costs general rule in Employment Tribunals. In particular, Employment Tribunals are increasingly willing to make costs orders where there has been unreasonable conduct by a party. The type of conduct includes: dishonesty and lying before an Employment Tribunal; trying to reinstate claims previously withdrawn; unreasonably bringing a claim (for example making an unfair dismissal claim where the dismissal was plainly a result of the claimant's dishonesty).

It is also important to be aware that individuals who bring claims before Employment Tribunals will often have their cases funded (especially given that the absence of a general rule that costs follow the event means there is limited exposure to the legal costs of the other party). Common sources of funding include: a trade union of which they are a member; an insurance scheme (for example, some household insurance contains coverage for Employment Tribunal claims); and conditional fee arrangements. This means that employers can often find themselves at risk of fighting low value cases where a claimant has little or no exposure to legal costs. This creates the conditions where individuals are willing to pursue claims with little merit. The UK Government is looking at proposals to counter this, including introducing a deposit that all claimants would be required to pay on bringing a claim.

8.8 UNITED STATES

In civil courts, each party is generally responsible for their legal fees. Under the FLSA and FMLA, however, prevailing employees are entitled to attorney's fees and costs. Further, under the anti-discrimination statutes, the NLRA, and select state laws, prevailing employees may be entitled to attorney's fees and/or costs in certain circumstances. Also, certain small businesses and organizations may be entitled to attorney's fees under the U.S. Equal Access to Justice Act.

QUESTION 9:
What trends are emerging in the resolution of workplace disputes?

9.1 **BRAZIL**

The trend in Brazil is that social rights are taken into consideration more than economic and liberal rights.

9.2 **CHINA**

The volume of labor disputes resolved through arbitration has increased exponentially since the early 1990s, with over 350,000 cases having been filed in 2007 alone. Upwards of 90% of these arbitrated disputes resulted in full or partial success for employees. Of all employees involved in LDAC cases, collective disputes have generally accounted for 40% of claimants. Court dockets have also increased in recent years due to the ever-increasing trend toward appeal arbitral awards to the courts.

9.3 **FRANCE**

In France, workplace disputes before labor courts continue to increase (in 2009, 228,901 new cases were brought before labor courts, that is an increase of 13.3% compared to 2008). This trend is due to the generally protective nature of French labor law towards employees, and the simplicity of the procedure (no need for a lawyer, reduced legal costs) which offers an incentive for employees to bring claims before courts.

95% of the disputes before the labor courts are in relation to dismissals. Employees often incorporate additional claims to their dismissal disputes.

Discrimination and harassment (bullying) claims have increased over the last 10 years. It has become common for employees to raise discrimination or harassment claims in addition to a claim for wrongful termination of employment.

9.4 **GERMANY**

In Germany, like most other countries, as unemployment is on the increase, so too do labor claims. Currently, there is an increasing trend for employees to seek reinstatement.

9.5 **SOUTH AFRICA**

There are high levels of referral to the CCMA – in 2009-2010, there were 120,000 dismissal disputes recorded.

The CCMA can refer a matter to 'con-arb'. This is a mixture of both conciliation and arbitration. It is a 'one sitting' process that has two steps. The process starts with conciliation and if the parties cannot reach agreement, the person who conducted the conciliation proceeds to arbitrate the dispute. This is an attempt to expedite the process by having conciliation and arbitration take place as a continuous process on the same day. It is compulsory in unfair dismissal or unfair labor practice disputes involving probationary employees. In all other cases, 'con-arb' is applicable only if the parties to the dispute agree at the commencement of the procedure that, if conciliation fails, arbitration will take place

immediately. Statistics show that employers object to 'con-arb' in approximately 40% of cases.

9.6 SPAIN

In Spain, there has been an increase in the number of disputes relating to dismissals – generally perceived as a symptom of the recession.

9.7 UNITED KINGDOM

Claims are on the increase. For the year ending 31 March 2010, 236,100 claims were brought, an increase of 56% on 2008-09, and 25% on 2007-08. Of these claims, 126,300 were associated with unfair dismissal, breach of contract and redundancy, which is 17% higher than for 2008-09 and 62% higher than in 2007-08. The use of mediation to resolve claims is also increasing. However, this may well be as an alternative to claims settling through negotiations, rather than a reflection of an increased number of claims being resolved without judicial determination.

9.8 UNITED STATES

Employment discrimination charges are on the rise. In 2010, the EEOC received almost 100,000 employment discrimination charges (over a 30% increase in claims compared to 2005). Further, retaliation claims have sky-rocketed over the past thirteen years (an increase of nearly 100%). In fact, in 2009 and 2010, retaliation claims overtook race discrimination claims as the most frequent charge filed with the EEOC.

Under President Barack Obama's administration, the NLRB has also taken a more aggressive stance in enforcing the NLRA. However, the NLRB only prosecutes cases that are brought to it through an unfair labor practice charges and the number of charges filed has fallen sharply over the past twenty years, and is now stabilized at around 24,000 per year.

The poor economic environment has led to an increase in some types of workplace-related claims because of the growth in disgruntled workers. The rise in employment lawsuits has resulted in the increased cost of employment practices liability insurance ("EPLI") policies. As a result, EPLI insurers are lowering policy limits, increasing premiums, and keeping a closer eye on litigation costs.

QUESTION 10:
What other matters may take a foreign-based employer by surprise?

10.1 **BRAZIL**

An employer cannot reduce core rights in a contract of employment and employment at will is prohibited under Brazilian labor laws.

10.2 **FRANCE**

In France, labor disputes are handled by specialized courts. These courts are staffed by non-professional judges, who are elected from the union lists. It leads to a high number of split decisions, because employers' representatives and employees' representatives have very conflicting views and cannot reach consensus (e.g., in cases involving discrimination against union claims). Therefore, it is very common that the labor courts hand down split decisions and appeals are brought by dissatisfied litigants.

10.3 **GERMANY**

In Germany, disputes between works councils and employers are common. The costs of these disputes are always paid by the employer.

10.4 **SOUTH AFRICA**

According to the CCMA Rules, there is no provision for legal representation in conciliation proceedings. A party may appear in person or be represented only by a director or employee of that party or by any member, official or office bearer if that party's registered trade union or registered employer's organization. At arbitration, legal representation is permitted, except if the dispute is about dismissal for conduct or capacity. However, even in this case, a party can use legal representation if all the parties, including the commissioner, consent or if the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation after having considered the nature of the questions of law raised by the dispute, the complexity of the dispute, the public interest and the comparative ability of the opposing parties or their representatives to deal with the dispute.

10.5 **UNITED KINGDOM**

It is common to use a barrister rather than a solicitor to act as a trial attorney. Frequently, a barrister only becomes actively involved relatively close to a trial. This is a system which has advantages and disadvantages.

10.6 **UNITED STATES**

Due to the vast amount of federal laws, anomalies (i.e., inconsistencies) sometime exist where two statutes seemingly contradict one another. For example, in one case, the Supreme Court found that federal immigration law precluded the NLRB from awarding back wages (a usual remedy under the NLRA for an unfair labor practice) to illegal aliens. *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002). In *Hoffman*, the Supreme Court noted that, although the NLRB has broad discretion in determining remedies under the NLRA, that discretion is not unfettered and must yield when it encroaches upon a federal

statute or policy outside of the labor realm. As a result, the Supreme Court held that the Immigration Reform and Control Act of 1986, which made employment of undocumented aliens illegal, precluded the NLRB from awarding back wages to illegal aliens because the illegal aliens could not legally be employed. This ruling also precludes most back-pay awards under anti-discrimination statutes.

The unreviewable prosecutorial authority of the General Counsel in unfair labor practice cases arising under the NLRA is also an unusual feature of U.S. labor law.

The FLSA does not provide for class actions. Rather, the FLSA only permits collective actions. The key distinction between class actions and collective actions is that class actions operate with an opt-out mechanism while collective actions are opt-in. As a result, to be part of a FLSA collective action, a potential plaintiff must affirmatively opt-in and consent to being in the action.

Finally, there are fifty states plus the District of Columbia which have a variety of employment laws that may duplicate or supplement, or sometimes conflict with U.S. federal laws.