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Expert Analysis

International Workplace Dispute Practices: Key Concepts For Today's Global Employers

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Increasingly, companies with operations or employees in more than one country are exposed to the risk of court proceedings in a foreign jurisdiction and the unfamiliar practices and procedures arising out of overseas litigation. Naturally, a flurry of questions arises: Can we arbitrate? Must mediation be pursued? How long will the process take?

Understanding the basic mechanisms used in labor and employment dispute resolution around the world can help companies understand what to expect and better prepare strategies and tactics tailored for specific jurisdictions.

CHINA

The latest trend in settling labor and employment disputes in China involves a progression of mediation, arbitration and court proceedings. Mediation, as the first step of the dispute resolution process, is less formal and always encouraged. If parties fail to reach settlement through mediation, they continue on to arbitration and then litigation. However, reaching a settlement through mediation remains a possibility throughout the dispute resolution process. The parties to a dispute do not choose mediators, and normally they belong to the same organization as arbitrators.

Arbitration, the second stage of dispute resolution, is typically conducted through China's labor dispute arbitration commissions and is more formal and procedural than mediation. While arbitral awards are final with regard to certain statutorily defined subjects, the parties to the dispute can generally file an appeal to the courts. Although there are no specialist employment courts in China at the moment, recent surges in cases have generated calls for separate labor courts.

FRANCE

Most workplace disputes in France are settled before a specialized labor court ("conseil de prud'hommes") that has exclusive jurisdiction to resolve individual claims arising from the employment contract. The court is composed of a panel of four lay members representing employers and employees.

The judicial procedure applicable to workplace disputes is simple and inexpensive since the parties before the labor court do not generally need to be represented by a lawyer — they are entitled to appear in person but may be assisted by a union representative (and frequently are).

A preliminary conciliation hearing is required for all disputes. If the conciliation fails, the matter is heard at a subsequent hearing on the merits. This simple procedure makes it easy for employees to file actions before the labor courts and in turn results in a large number of litigations. The process can be protracted and it usually takes six to 18 months before a judgment is obtained from the labor court and the same amount of time again if there is an appeal. To avoid this lengthy procedure the parties often prefer to reach a settlement.

Mediation is also possible in France. Indeed, some courts of appeal encourage mediation to help reduce their workload. However, parties rarely agree to mediate. Arbitration is forbidden for employment disputes, unless the parties agree to it after termination of employment, which is highly unusual.

GERMANY

The lion's share of workplace disputes in Germany is settled through the courts, and in general, these procedures are handled quickly and cost-effectively. Specialized labor courts ("Arbeitsgerichte") have exclusive jurisdiction over employment matters and are presided over by three-judge panels of one professional judge and two laypersons with employee- and employer-friendly backgrounds.

Nearly 40 percent of disputes are settled by parties outside of court, often after mandatory conciliatory hearings imposed by labor court procedure. With regard to alternative dispute resolution, German law forbids the arbitration of employment disputes. In addition, because the overall system is relatively efficient, there is little demand for mediation.

German law does not specifically provide for mediation, and German courts are not allowed to initiate mediation. The speed of the German labor court process is impressive, with a first-instance complaint taking four to nine months to resolve, an appeal up to one year and a decision from the country's highest court taking just six more months.

SPAIN

Except in special cases involving constitutional rights or the validity of a collective bargaining agreement, all Spanish employment disputes must first be mediated. These obligatory mediations are mostly a procedural formality and rarely result in settlement. They are merely a necessary stop before a case can be heard in Spain's specialized labor courts ("juzgados de lo social"), which have jurisdiction over workplace disputes.

Although arbitration is rarely used in individual employment disputes, it is regular practice for the treatment of collective matters. In addition, parties may settle out of court as long as they respect formal requirements.

Depending on the type of claim, a first-instance decision from the Spanish labor courts will take four months to one year. An appeal usually takes six to 10 months,

with larger cities' jurisdictions yielding longer waits, and Supreme Court of Spain decisions can take an additional two to three years.

SOUTH AFRICA

In South Africa, disputes can be resolved through a number of dispute resolution institutions, namely the Commission for Conciliation, Mediation and Arbitration; bargaining councils; and private dispute resolution agencies, as well as through court processes or through the parties reaching settlement.

The CCMA is the central dispute resolution agency for labor matters, although it does not have inherent jurisdiction over all labor disputes. The CCMA's main function is to resolve disputes through conciliation and, failing that, arbitration.

Bargaining councils are bargaining institutions that are 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 so requires or the parties agree that the bargaining council must arbitrate the dispute. If there is no relevant bargaining council, the CCMA becomes the first institution of engagement.

Labor courts exist side by side with the general civil courts and generally exercise exclusive jurisdiction over specialist labor matters. The labor courts' primary tasks are to adjudicate disputes related to freedom of association, automatically unfair dismissals and strike disputes, as well as to review arbitration awards of the CCMA and/or bargaining councils.

UNITED KINGDOM

In the U.K., disputes can be settled through the courts, mediation or by parties independently reaching settlement. Where parties reach settlement (including through mediation), in order for a waiver of claims to be valid, the settlement agreement must satisfy certain procedural requirements, including that the individual has obtained advice from a lawyer.

U.K. laws prohibit the resolution of most workplace disputes through arbitration, a prohibition that extends to all claims arising from employment statutes, like discrimination claims or unfair dismissal rights. Consequently, workplace disputes are almost never settled by way of arbitration in the United Kingdom.

In the U.K., specialist employment courts known as employment tribunals have sole jurisdiction to resolve most individual claims arising from statutory employment rights. On matters unrelated to statutory claims, employment tribunals have very limited scope to hear individual workplace disputes.

As a result many contractual disputes are resolved by general civil courts, especially disputes about noncompete agreements, trade secrets and high-value bonuses. There are also specialist tribunals for resolving disputes about the recognition of trade unions and other employee representative bodies.

Generally, claims before the employment tribunals take about eight to12 months to be resolved, with a further year necessary for an appeal to be heard by the Employment Appeal Tribunal.

UNITED STATES

Multiple options exist for the resolution of workplace-related disputes in the United States, ranging from voluntary engagement in arbitration or mediation to court proceedings. Employment contracts for executives and company policies may require that all disputes be resolved by these so-called alternative dispute resolution mechanisms.

Employees may file claims in federal and state courts, but for claims under certain anti-discrimination laws(leading to jury trials, they are required to first file complaints with the Equal Employment Opportunity Commission or state organizations such as the New York State Division of Human Rights (and similar agencies in the other states).

Because state and federal courts' dockets are often overburdened, delays are common. As a result, alternative dispute resolution methods are often used to achieve resolution.




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