International Labor and Employment Arbitration:  
A French and European Perspective

American Bar Association
*International Labor and Employment Law Committee*
*Midyear Meeting*
Paris, France, May 13-17, 2012

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Introduction: Labor and Employment Arbitration in France and the EU

While the growth of international arbitration as a means of alternative dispute resolution is virtually ubiquitous, trends for the important sub-sector of labor and employment arbitration must be treated as a wholly separate category. Moreover, different jurisdictions have divergent rules concerning the legality of arbitral proceedings. A snapshot of how different countries treat the question of labor and employment arbitration reveals stark differences. Whereas North America, led by the United States and Canada, embraces employment arbitration, its reception in Europe is decidedly chillier, and often wholly outlawed.¹

In France, as a general rule, arbitration concerning individual employment contracts is prohibited. This holds true even in cases where the parties have included an arbitration agreement and a valid choice of law clause designating that foreign law applies to the entirety of the employment contract. Such a strict interpretation is seen as a public policy measure intended to protect employees who are considered to be in a necessarily weaker bargaining position compared to their employers. By giving Labor Courts the unique competency to adjudicate such matters, France can effectively safeguard its workforce.

Similar interests motivate protective regulatory schemes in most European Union (EU) nations where, as we will discuss, the prevalence of arbitration in labor and employment disputes remains limited and political weariness towards the practice pervades.

1) The Possibility of Employment Arbitration

Global companies employ shockingly high percentages of expatriate employees, especially in top management positions.² These so-called “Third Country Nationals” are sent to work on a temporary basis at one of the parent company’s locations abroad. The challenge of managing these professionals spanning multiple jurisdictions makes the idea of including arbitration agreements in their international employment agreements very attractive. Such a practice however could lead to a false sense of legal security. Unfortunately, things are not as simple as the clauses contained within the four corners of a contract once an employment relationship in a foreign country exists. As an example, in 2007, the United Kingdom Courts in the Samengo-Turner³ affair established the precedent that “a multinational business must be expected to be subject to the employment laws applicable to those they employ in different jurisdictions.”⁴ Similar

¹ Jean-Michel Oliver, Arbitrage et droit du travail, NOUVELLES PERSPECTIVES en matière d’arbitrage, Droit et Patrimoine (2002) at page 1.
² Okuh at page 6.
restrictions apply in France, where arbitration agreements are often found to be contrary to national public policy and unenforceable. As a result, a closer study of arbitrability is recommended in order to mitigate and prepare for potential conflicts.

**a) In the European Union ("EU")**

Although arbitration exists in some form in most EU Member States, it is not widely practiced.\(^5\) As a general rule, other forms of Alternative Dispute Resolution, such as conciliation and mediation are much preferred over arbitration. National laws drastically limit the extent to which employment-related issues can be arbitrated, often with the goal of protecting individual employees.

Within the EU a diversity of frameworks govern collective dispute resolution ranging from the Netherlands, which has no specific regulations, to Lithuania’s elaborate legal system.\(^6\) Moreover, States often differentiate between individual employment disputes and matters concerning collective bargaining, with the trend to prohibit arbitration in the first type of cases and allow or even mandate it in the second.

A quick overview of EU law reinforces the observation that employment arbitration is a relatively rare phenomenon for individuals and more widely employed when unions are involved.

Arbitration of employment disputes is forbidden in German labor law, except for matters concerning collective issues.\(^7\) In Spain, arbitration is generally not used for individual workplace disputes, but is more frequent in collective matters and mandatory for widespread strikes.\(^8\) In Austria, a 1993 Supreme Court decision outlawed arbitration clauses contained in CBAs as contrary to the Labour Constitution Act. Since this decision no such collectively agreed provisions have been operable. However, works agreements at the company-level can provide for methods of ADR.\(^9\) In Poland, national law allows for employees to seek redress through arbitration before bringing suit in court, however very few individuals exercise this right.\(^10\) In the UK, there are prohibitions on resolving workplace disputes through arbitration. This prohibition broadly relates to all claims arising out of employment


%20Resolution%20in%20Europe.pdf
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 in the UK (even for claims where arbitration is permissible).11 Despite the fact that an employment arbitral scheme was created in 2001 to hear grievances relating to unfair dismissals and flexible working, recent reports show this specially designed instance receives less than 10 cases per year.12

b) In France

Despite the fact that Paris is a world-renowned site for international commercial arbitration, national laws drastically limit arbitration in labor and employment matters.13

The historical context of France’s aversion to arbitration in the employment context helps illustrate the philosophical underpinnings of contemporary regulations. As early as the French Revolution, legislators and judges concerned with reinvesting judicial power in the State were skeptical of this alternative method. Indeed, an 1846 decision from France’s Supreme Court voices the institution’s distrust of the arbitrator’s role in adjudicating employment disputes.14 Over the centuries, this trend has continued and a result laws are in place today that significantly diminish the possibility of arbitrating employment disputes.

In the 1950s, French legal scholars posited that “arbitration assumes the balance of respective strength; where this balance no longer exists, arbitration becomes asphyxiated.”15 This theory, in connection with the widely-held belief that individual employees are not on equal footing with employers and the French State’s strong commitment to the protection of its workers has meant that legislators and courts are loath to allow for arbitration of employment issues. Decisions regarding employment disputes linked to France are seen as questions of public policy and therefore require state control.

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13 A new law on arbitration was promulgated by the French legislature on 13 January 2011. Although articles 1442 to 1527 of the French Civil Procedural Code were completely replaced, few substantive changes resulted. The main purpose of the amendments was to codify clear jurisprudence of the French Courts, not to introduce new legal doctrine. See generally, GAR’s The European & Middle Eastern Arbitration Review 2012, Chapter on France by Tim Portwood and Bredin Prat.
14 Cour de cassation, 10 juillet 1843, as cited by L’Arbitrage des litiges en droit du travail: à la redécouverte d’une institution française en disgrâce.
2) The basic process of arbitration in France

In general, The Labor Courts have sole jurisdiction to resolve workplace disputes.\(^\text{16}\) Arbitration clauses in employment contracts (including international contracts) are prohibited and usually unenforceable. The major 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; and
- The parties must comply with the arbitrator’s decision.

A more detailed discussion of work-related arbitration yields two distinct categories: individual disputes and collective disputes.\(^\text{17}\)

a) Individual disputes

i) French employment contracts (internal arbitration)

As alluded to above, Article L. 1411-4 of the French Labor Code provides that the Labor Courts (les Conseils de Prud’hommes) have exclusive jurisdiction over all employment matters and that any clause contrary to this principle shall be considered void.\(^\text{18}\)

For many years the French Civil Code completely banned arbitration clauses, however in 2001 this rule was relaxed by Civil Code Article 2061, which states that such clauses, called compromis, are valid “unless provided otherwise in statutory provisions” and as long as they are in contracts concluded in relation to professional activities.\(^\text{19}\) Many legal scholars interpret the first part of this law to include reference to Article 1411-4 of the Labor Code thereby placing employment questions outside

\(^{16}\) French Labor Code, Article L. 1411-4 states in relevant part: Le conseil de prud’hommes est seul compétent, quel que soit le montant de la demande, pour connaître des différends mentionnés au présent chapitre. Toute convention contraire est réputée non écrite.

\(^{17}\) ILO, High-Level Tripartite Seminar, at page 3:
Generally speaking, employment disputes are divided into two categories: individual and collective disputes. As the term implies, individual disputes are those involving a single worker whereas collective disputes involve groups of workers – usually represented by a trade union.

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\(^{19}\) See note 13, supra.
the reach of arbitral procedures. Others have noted that since a work contract can be understood as an example of a “professional activity,” this Article does not invalidate the possibility of an employment arbitration clause. In fact, the legislative intent was not to carve out a space for work-related arbitration, and regardless of doctrinal pontification, the courts have refused to uphold arbitration agreements in internal (as opposed to international) work contracts.

The right of an employee to access the protections of the French Labor Courts is deemed to be a public policy concern and is protected vehemently by the courts. A steady stream of jurisprudence from the Social Chamber of the French Supreme Court supports this contention and has established that any such clauses are null and void. Consistently since 1999, the Social Chamber has held that arbitration agreement clauses in employment contracts cannot be enforced against employees.

In 2011, the Supreme Court found arguments invoking the principle of “competence-competence,” the theory that only the arbitrator (and not the State judge) is competent to determine his own competency, unconvincing and held that this principle does not apply in the realm of employment law. In this same 2011 decision, the Supreme Court held that a clause located in an association charter mandating arbitration constituted an amendment to the employment contracts in question and therefore fell within the sphere of employment law and was subject to the exclusive jurisdiction of the Labor Courts. This finding of jurisdiction was as a matter of public order and resulted in the nullification of the impugned arbitration clauses.

ii) International employment contracts (international arbitration)

In the context of international employment contracts, two different chambers of the Supreme Court have taken separate approaches to the interpretation of arbitration clauses in individual employment contracts.

1. Social Chamber jurisprudence

Building on the jurisprudence discussed above in relation to internal arbitrations, the Social Chamber continues to protect employees bound by international contracts, holding that clauses obligating arbitration in such contracts are unenforceable against

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20 Professor Fouchard, as quoted in Jean-Michel Oliver, Arbitrage et droit du travail, NOUVELLES PERSPECTIVES en matière d’arbitrage, Droit et Patrimoine (2002).
21 Ibid.
22 The French Civil Code of Procedure distinguishes between internal and international arbitration and sets forth different but overlapping rules for both scenarios. So-called “internal arbitration” is not defined by the Code, however, its scope can be understood as procedures which do not involve “international commerce” in contrast to “international arbitration” defined later in Article 1504.
24 Cass. soc., 30 novembre 2011, No. 11-12905.
25 L’Arbitrage est exclu en matière prud’homale, Liaisons Sociales Quotidien N° 15989, 5 December 2011.
employees. Although the courts do not consider such clauses null and void in and of themselves, they are not operable against employees.\textsuperscript{26} In effect, this means that should an employee want to proceed to arbitration, he or she would have the ability to do so, and this decision would be binding vis-à-vis the employer. Conversely, the fact that \textit{compromis} clauses are not enforceable means that an employer can never force an employee to arbitrate. This jurisprudence underlines the fact that the Labor Courts can always be seized should the concerned employee so desire.

The Social Chamber has justified these findings regardless of the law that the parties have chosen to govern the contract. International employees are guaranteed the right of access to French Labor Courts even if they are not French citizens and even in cases where their contracts are performed elsewhere, as long as the employer is established in France.\textsuperscript{27} This jurisprudence is epitomized by decision of 12 March 2008, holding that “the choice of applicable law could not have the effect of depriving the employee of the labor law protections to which she would be entitled” according to applicable public policy regulations.\textsuperscript{28} In this case, the Social Chamber analyzed the issue as a jurisdictional question and decided that since the employee had properly brought his complaint in the Labor Courts, the impugned arbitration clause could not be enforced against his will.\textsuperscript{29}

Cases in which arbitration might be clearly advantageous to employees are rare, but they do exist. First it is necessary to understand that French Labor Court panels are comprised of four non-professional judges who hear and decide cases: two “employee” representatives and two “employer” representatives. In disputes involving high-ranking executive employees, individuals from the supposedly employee-friendly list of panelists might not be as sympathetic to the executive, and in this situation arbitration could offer a more favorable avenue of resolution for this particular kind of employee.\textsuperscript{30} Another example of an atypical situation arises in the field of professional sports where the disgruntled employee is not necessarily the “weaker” party and could benefit from arbitration.\textsuperscript{31}

2. \textit{First Chamber jurisprudence}

Running parallel to the jurisprudence from the Social Chamber, a line of case law from the First Chamber of the French Supreme Court has posited that there are

\begin{itemize}
\item \textsuperscript{26} Cass. soc., 16 fevrier 1999, No. 96-40643.
\item \textsuperscript{27} Cass. soc., 9 oct. 2001.
\item \textsuperscript{28} Cass. soc., 12 mars 2008, No. 01-44654; Cass. soc. 16 fevrier 1999.
\item \textsuperscript{29} Guido Carducci, \textit{The Arbitration Reform in France: Domestic and International Arbitration Law}, Abritration International, (Kluwer Law International 2012 Volume 28 Issue 1) at page 132.
\item \textsuperscript{30} An example of this concern is illustrated in \textit{Vivendi Universal v. Messier}, as referenced in Beatrice Castellane, \textit{Arbitration in Employment Relationships in France} at footnote 18.
\item \textsuperscript{31} Examples of this situation are rare in French jurisprudence, as referenced in Beatrice Castellane, \textit{Arbitration in Employment Relationships in France} at footnote 19, see e.g. TAS No. 2005/A/876, December 15, 2005; Y v. Chelsea Football Club, 2007 J.D.I. 207; TAS No. 2004/A/791, October 28, 2005, Le Havre A.C. v. FIFA, Newcastle United & Charles N'Zogbia, 2007 J.D.I. 216.
\end{itemize}
circumstances under which arbitration clauses in international employment contracts can be both valid and opposable to the employee in question.

This so-called “principle of validity of international arbitration clauses” is supported by a solid progression of decisions by the First Chamber. In 1999, this Chamber held that such clauses are valid regardless of whether or not the contract involves issues of a “commercial nature” and regardless of the applicable law.32 This jurisprudence only applies to transactions that involve the economies of more than one state. The threshold for this Chamber is that the arbitration meet French Code of Civil Procedure Article 1504’s definition of “international arbitration,” namely that is must “involve the interests of international commerce.”33

A famous, but isolated, 1993 decision of the Appeals Court of Grenoble held that an arbitration agreement within an international employment contract was valid, noting that:

[T]he employee, a person engaged in commercial activities, may have an interest in the application of arbitration rules which enable him to participate in the designation of the arbitrators rather than being judged by a national court which does not include a judge who shares his legal background…34

The Appeals Court in this case argued that the according to the concept of competence-competence, the arbitrators should make the call as to if such a clause is enforceable against an employee or not.35 This hypothesis has been rejected by the Social Chamber with regard to internal labor disputes.36 The theory for international arbitration is that because arbitrators are charged with applying mandatory rules of law in all arbitration proceedings, they are properly competent to apply the protective rules of French employment law if they deem that this is proper. Breaking down this decision into its stages, the arbitrators settling an international employment dispute would first check to ensure that the parties’ choice of law does not deprive the employee of his protections under French public policy law.37 The Paris Appeals Court found, in a 1993 decision, that arbitrators are competent to ascertain which

33 Article 1504 of the French Code of Civil Procedure defines international arbitration as that which involves “the interests of international commerce.” (http://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000023450640&cidTexte=LEGITEXT000006070716&dateTexte=20120430)
35 See generally, Beatrice Castellane, Arbitration in Employment Relationships in France.
36 See note 16, supra.
37 Article 6 of the Rome Convention of 1980 states that the choice of law may not serve to refuse a party of mandatory protections that would normally be applicable to his contract absent the express choice.
legal provisions are mandatory. Applying the appropriate laws as determined via this procedure, the arbitrators would be properly empowered to hear and decide the international employment dispute without risking violation of the employee’s inalienable rights.

iii) Exceptions to the rule: journalists and lawyers

Two exceptions to the general ban on employment arbitration merit note. First, in instances where a journalist with more than 15 years of seniority is dismissed, Article L. 7112-4 of the Labor Code requires mandatory arbitration before a panel in order to determine the journalist’s compensation. Second, employment disputes between salaried lawyers and their law firms must be submitted to arbitration before the President of the Bar. Although the term “arbitration” is used for both of these procedures, many legal scholars question the authenticity of such denomination. In particular, the fact that neither process is voluntary and in both cases that the decisions of the so-called arbitrators have executive effect without needing to be enforced raise doubts to their true identity as bona fide arbitrations.

iv) A timing distinction: post contractual arbitration

The third major “exception” to the prohibition of work-related arbitration is that arbitral agreements that occur after the employment contract has been terminated are valid. In a landmark decision of 5 November 1984, the Supreme Court held that an arbitration agreement that had been signed after the employment relationship tying the two parties in question had been dissolved was licit and enforceable. The Court reasoned that once the employment relationship was over the parties regained their ability to commit to arbitration.

While this jurisprudence renders such agreements legal, they are quite rare in practice. Most often instances of arbitration agreements after an employment contract has been broken involve senior management personnel employed by North American companies operating in France. Otherwise, settlement agreements are a much more


39 Article L. 7112-4 of the Labor Code begins: Lorsque l'ancienneté excède quinze années, une commission arbitrale est saisie pour déterminer l'indemnité due.

40 Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques, at Article 7 states: “Les litiges nés à l'occasion d'un contrat de travail ou de la convention de rupture, de l'homologation ou du refus d'homologation de cette convention ainsi que ceux nés à l'occasion d'un contrat de collaboration libérale sont, en l'absence de conciliation, soumis à l'arbitrage du bâtonnier…”

prevalent and favored solution in similar situations. As a purely practical matter, after ongoing and often contentious negotiations, parties are not usually eager to sign an additional agreement to arbitrate matters.

b) Collective disputes

Collective employment conflicts present a very different picture. Before delving into any discussion, the fact that the right to strike is a constitutional guarantee in France needs to be stressed. When strikes occur, negotiations are the preferred routes to resolution, however talks most often take place directly between unions and employers without the intervention of a third-party neutral. In addition, under the French system (and in similar systems in Greece, Spain and Turkey) labor inspectors often function as conciliators to help resolve collective disputes. If and when conciliation procedures fail, parties usually next turn to mediation. Only when all other methods fall short is arbitration considered, as a means of last resort.

Keeping in mind that such procedures are not widely commonplace, collective bargaining agreements (CBAs) do sometimes provide for arbitration in cases of deadlock or dispute.

The Labor Code explicitly allows for the existence of such voluntary contractual arbitration procedures in Article L. 2524-1 and following. These articles also set forth various procedural mechanisms for collective bargaining arbitration, including that:

- CBAs may contain arbitration agreements and lists of arbitrators;
- Parties may agree to submit disputes to arbitration following unsuccessful mediation or conciliation procedures;
- Arbitrators apply the law and CBA regulations and rules in equity on all other conflicts, especially those concerning wages and working conditions;
- Arbitral decisions must be “motivated” and list the reasons for the decision;
- A Supreme Court of Arbitration hears appeals of awards for excess of power or violation of a law;
- Decisions can be appealed up to this Supreme Court twice, and if annulled the second time are decided by an “award” rendered by the Supreme Court; and

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43 The preamble of the Constitution of 1946, referenced by the Constitution of 1958, lists the right to strike as a “fundamental” right: *All men may defend their rights and interests through union action and may belong to the union of their choice. The right to strike shall be exercised within the framework of the laws governing it.*


45 The prevalence of arbitration clauses in CBAs is nowhere near that found in similar instruments coming from US jurisdictions.
The exequatur procedure is unnecessary as awards are effective immediately upon their deposit.

Unions may also include arbitration clauses in their bylaws that allow for the settlement of inter-union disputes via this mechanism. Such clauses allow for the confidential resolution of highly charged matters by an arbitrator of the union’s choice who can be empowered to take a more holistic approach to the issues under debate and integrate social and political considerations beyond a simple application of the law into his determination.46

3) Is arbitration a good idea in France and the EU?

a) Benefits

i) Individual cases

- **Allows for greater adaptability to individual cases**
  Arbitrators with specific knowledge bases can be appointed and can be imbued with the flexibility to judge based on a totality of the circumstances where pertinent. Especially in cases where a certain level of technical competency is required in order to understand the employment claims at stake, the freedom to select arbitrators from a pool of qualified candidates could yield more just outcomes.

- **Particularly well-suited for certain high-level employees**
  As mentioned previously, not all employees find themselves in a less advantageous bargaining position. Senior management and other executives can benefit from the flexibility, efficiency and privacy of arbitral proceedings. Practical experience illustrates that such individuals are typically the most receptive to voluntarily arbitrate employment disputes.

- **Predictability and lack of substantive appeal**
  In many countries, the Labor Courts are notoriously volatile and subject to national political pressures. In France, decisions from the Labor Courts are frequently get reversed on appeal. Avoiding this tumultuous system might save money and time.

- **Ease of enforcement of arbitral awards**
  Thanks to the Convention on the Recognition of Foreign Arbitral

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Awards, also known as the New York Convention parties are assured that the outcome of this procedure will have legal force. With more than 140 signatory countries and a 90% successful enforcement rate around the globe, this mechanism offers significant legal certainty. Moreover, the New York Convention effectively limits the recourses for appealing an arbitral decision.

- **Confidentiality**
  Arbitration is a confidential process and protects the privacy of the employees and the company. Third parties may not freely observe proceedings, as is the case in most state courts, and the arbitrators are usually bound by confidentiality obligation. The privacy afforded by arbitration can safeguard the reputations of both parties and keep the matter off the public record. This advantage is particularly useful in cases where the dispute could cause professional damage to high-ranking employees or risk endangering the public image of the company.

- **Speed and Efficiency**
  Arbitration is well-known for its ability to reduce the amount of time necessary to resolve disputes. With regard to employment matters, this feature can be particularly advantageous. The typical time line involving a French Labor Court decision of first the instance is at least one year. Most cases are then appealed and incur an additional year’s delay before resolution. In both Italy and Portugal State court process can last from one to almost three years.

It has been reported that one third of all civil cases in Italy are related to employment rights. In conjunction with offering speedier resolution, arbitration of employment disputes could also help alleviate heavily burdened dockets and improve efficiency in national court systems.

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48 CREFAA’s Article V details the seven grounds upon which recognition and enforcement of an award can be refused.
ii) Collective disputes

While most of the advantages listed above also apply to collective disputes, a few aspects that can be particularly beneficial are listed below.

- **Attractive, affordable alternative to strikes**
  Arbitration procedures offer unions and employers the opportunity to resolve disputes without threatening to strike or bringing in public pressure.\(^{51}\) Because of the financial burdens associated with strikes, employees may be amenable to exercising their collective power through this less punitive mechanism. In addition, arbitrators can be freed to consider all of the issues at play in a given situation. With the liberty to take social and political tensions into account, the proposed resolution could offer a more complete, balanced and well-informed version of justice.

- **Confidentiality**
  The benefit of resolving problems out of the purview of the public eye can be beneficial to maintaining a positive public image that is essential in keeping a strong bargaining position for the future. In addition, inter-union squabbles can be settled quietly using the discretionary measures offered by arbitration.

b) Problems

- **Cost**
  While arbitration might be a cost-saving measure outside of Europe, many EU countries cover the legal costs associated with Labor Court proceedings or charge only nominal fees. Although these courts are expensive to maintain, government proposals to introduce even meager filing fees for complaining employees are unpopular. In the UK, the specter of charging from £150 to £1250 prompted the Law society to decry the measure as a “barrier to justice.”\(^{52}\)

- **Diversity of ADR laws and practices**
  Determining how employment issues are resolved is a sensitive issue for each country. This sentiment is only strengthened with the current economic crisis and high rates of unemployment. As a result, each

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nation has a heightened stake in finding the best ways to solve labor and employment grievances. Although organizations such as the ILO continue to make efforts to harmonize how EU Member States manage arbitration, a vast array of methods still exist.\footnote{Silverstein at page 123.} There is no singular mechanism or trend in Europe, and as a result no blanket arbitration clause or strategy can be applied to the region.

- **Differing jurisprudence: Social Chamber v. First Chamber**
  As seen in France, the question of arbitrability is not necessarily an easy question even within the borders of a country. The fact that the enforceability of an arbitration clause within an international employment contract is the subject of two conflicting lines of French Supreme Court case law illustrates the complexity of the topic. This fact translates to uncertainty for all interested parties and the need to engage specialized local counsel.

- **Essential philosophical differences**
  Throughout Europe, employees are understood to be in a subordinate position vis-à-vis their employees, and there is a major policy concern regarding how to protect their interests. The notion that an employee can fairly accept an arbitration clause included in his or her employment contract runs contrary to this basic assumption.

  French Labor Law is particularly designed to help protect employees and readily acknowledges that the bargaining power of a single worker is no match for a large employer. Arbitration perturbs the meticulous system that has been created in order to level the playing field and offer employees a fair and just hearing.

- **Perceived threat to the right to strike**
  Arbitration is viewed as a tactic incompatible with the constitutionally given (in France) right to strike. This clash hits a historically sensitive nerve and risks becoming polemic.

c) **Additional considerations particular to France**

- **Union resistance**
  Arbitration is viewed as an employer-friendly vehicle and most unions oppose its proliferation based on this perception.

- **Unsuccessful experience with “Conciliation Boards”**
The low rate of settlement as a result of the conciliation meetings that are already a mandatory part of the Labor Courts procedures could taint opinions on the ability of ADR systems to work well.

4) What is the trend in France and the EU?

d) EU

In the mid 1990s, the non-arbitrability of issues arising out of employment contracts was the norm throughout Europe.\(^{54}\) Over the past 20 years, there has been some movement towards the recognition of arbitration as a possibility in international employment contracts, however countries remain hesitant to relinquish state jurisdiction concerning such matters.

The arbitration of collective disputes, while a legal option in most countries, is still not widely practiced within Europe.\(^{55}\) Arbitration is often the last phase in a recommended cocktail of ADR solutions (usually after conciliation and/or mediation). Perhaps as a consequence of this anchoring position, it is far less common than these other two procedures. This phenomenon appears to be stable.

The newest members of the EU have extensive laws and regulations governing labor and collective bargaining dispute resolution, however the effectiveness and fairness of these regimes remains to be seen. For example, Lithuanian disputants can access arbitration through the creation of an ad hoc institution called a “Third Party Court” in which both parties appoint one or more arbitrators and a 14-day limit is set to reach agreement. The outcome of this panel is legally binding on both parties.\(^{56}\) Lithuanian law also requires the creation of a Labour Disputes Commission comprised of employee and employer representatives with instances in each organization. This body is tasked with resolving disputes via mutual agreement at the company-level. Since there is no independent third party involved, this system does not fit into a classic category of ADR, and unfortunately no data has been gathered to assess the usefulness of such mechanisms.\(^{57}\) It has been posited that the prevalence of such legal schemes in newly inducted EU Member States is evidence of social partners’ relative weakness and a lack collective bargaining negotiations on these matters.


In order to facilitate better cross-border harmonization, the creation and dissemination of a European-level instrument explaining arbitration and best practices is envisioned. Still, recent data shows that while other forms of alternative dispute resolution may be gaining ground, arbitration remains unpopular across Europe.

**e) France**

Despite the fact that France’s Labor code offers the possibility of arbitration agreements in collective bargaining contexts, this practice has not caught on. One legal commentator, Professor Malaurie, has gone so far as to call these references to arbitration in collective bargaining “dead law.”

Though some legal wiggle room has been afforded for the enforcement of arbitration clauses in international employment contracts, France remains reluctant to allow arbitration in employment matters that do not have an international component. Some scholars are advocating for a loosening of this jurisprudence so that arbitration clauses in internal employment agreements can be viewed in the same light as those in international contracts. This progress would lift the absolute ban concerning arbitration of domestic employment agreements and allow employees the choice to pursue their complaints through arbitration if they considered it to be advantageous. This idea remains highly speculative shows no sign of support from the courts.

## Conclusion

International labor and employment arbitration in Europe remains a complex affaire. Varying historical traditions, differences in the political strength of social partners, labyrinthine labor court procedures and inconsistent strains of jurisprudence join to render seemingly simple questions about if, when and how arbitration is appropriate anything but easy to answer. Although there are strong arguments in favor of allowing for a greater scope of employment arbitration in cross-border disputes, many European nations have a tenacious hold on their right to exclude extrajudicial powers from this socially important sector.

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58 See generally, European Parliament’s activities on Collective Redress and ADR (July 2011).
60 Jean-Michel Oliver, Arbitrage et droit du travail, NOUVELLES PERSPECTIVES en matière d’arbitrage, Droit et Patrimoine (2002) at page 2.