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Arbitration and Employment Disputes

An **ELA** report

November **2017**

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Employment Lawyers Association
P.O. Box 353
Uxbridge UB10 0UN

Tel/Fax: 01895 256972
Email: ela@elaweb.org.uk

www.elaweb.org.uk

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A. INTRODUCTION

1. Arbitration has great potential to resolve employment disputes in the UK. Yet historically it has been little used in this way. That is changing. There has recently been an increased interest in arbitration amongst employment lawyers, and an increase in the use of arbitration by parties to employment disputes.

2. Why has this change come about? What does arbitration involve? What are the advantages and disadvantages of arbitrating employment disputes? Are there issues peculiar to arbitrating employment disputes, as opposed to general commercial disputes, that advisers should be aware of? What documentation is needed to commence an employment arbitration?

3. It was to explore these and other questions that the Employment Lawyers Association (**ELA**) set up an Arbitration and ADR Group (**the Group**) in late 2015. Its terms of reference are as follows:

    3.1. To explore the scope for the greater use of arbitration and alternative dispute resolution (including early neutral evaluation and mediation) as a means of resolving employment disputes.

    3.2. To consider taking steps to facilitate greater use of arbitration and ADR in employment disputes (including drafting standard arbitration rules for employment claims).

    3.3. To liaise with other professional associations of lawyers regarding the use of arbitration and ADR in employment disputes (including the European Employment Lawyers Association (**EELA**), the International Bar Association, and the American Bar Association).

    3.4. To report to the Management Committee and membership of ELA on the work of the Arbitration and ADR Group, and recommend training and other steps to encourage and facilitate greater use of arbitration and ADR in employment disputes.

4. The Group has been co-chaired by a solicitor and a barrister. Its membership comprises a broad cross-section of solicitors and barristers, in private practice and in-house, with experience of acting for individuals and institutions, employees and employers. A list of the members of the Group is found in **Appendix 1**.

5. This is the report on the arbitration aspect of the Group's work. There is a separate report on ADR. Its aim is to provide a succinct and practical guide to the key issues involved when considering whether arbitration is suitable for any particular employment dispute, and when conducting an employment arbitration.[1] It is hoped that this report will provide helpful signposts for busy employment lawyers who want to know a little more about arbitration, who want to be able to advise clients when it may be suitable to arbitrate a dispute, and who want to feel confident in pursuing their client's interests throughout an employment arbitration. We also make a number of recommendations for further consideration by ELA and its members.

B. EXECUTIVE SUMMARY

6. In this report:

   6.1. we provide an overview of arbitration, describing what it is, the difference between institutional and ad hoc arbitration, various forms of arbitration agreement, and the role of law in arbitration (paras 8 to 22);

   6.2. we discuss the advantages and disadvantages of arbitration (paras 23 to 24);

   6.3. we summarise the relevant provisions of the Arbitration Act 1996 (para 25);

   6.4. we describe the experience of arbitration of employment disputes in the UK and elsewhere, and consider the Acas and EELA arbitration schemes (paras 26 to 37);

   6.5. we address a number of questions that are relevant to employment arbitration, namely whether statutory employment claims can be submitted to arbitration, whether arbitration benefits employers and employees, whether it is suitable for high-value and low-value claims, and whether it is subject to EU Regulations on jurisdiction and applicable law (paras 38 to 51);

[1] For a more detailed analysis of the law and practice of arbitration, see textbooks such as *A Practical Approach to Alternative Dispute Resolution* (4th ed) by Blake, Browne and Sime; Russell on Arbitration (24th ed); Arbitration Act 1996 (5th ed) by Merkin. The American Arbitration Association has published a *Handbook on Employment Arbitration & ADR*, which contains a discussion of the US experience of employment arbitration.

6. 6.6. we review the merits of arbitration as a dispute resolution mechanism in the UK (paras 52 to 56); and

6.7. we make a number of proposals for ELA to have a role in relation to employment arbitration (paras 57 to 62).

7. A great deal of research and discussion has been undertaken by members of the Group into different issues that arise in relation to the arbitration of employment disputes. Rather than lengthen this report, we are simultaneously publishing a series of working papers produced by sub-groups which set out the details of the work undertaken and lessons to be drawn. Whilst this report is intended to provide a summary of our thinking, we would encourage ELA members and others with an interest in arbitration to read these working papers which provide a basis for further discussion. A list of the working papers produced by the Group is found in **Appendix 2**, and the papers will be available, along with this Report, on the ELA website.

C. AN OVERVIEW OF ARBITRATION

What is arbitration?

8. Arbitration is a form of dispute resolution. The parties must agree to arbitrate. Having done so, the arbitration is conducted before an impartial tribunal. It is private, binding, and enforced by the state.

9. Section 1 of the Arbitration Act 1996 (the Act) identifies the following principles on which Part I of the Act is founded:

9.1. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

9.2. The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

9.3. In matters governed by Part I of the Act, the court should not intervene except as provided by Part I.

10. These principles underpin much arbitration law and practice. We say more about the Act, and how it operates, below.

Institutional and ad hoc arbitration

11. The parties can agree to arbitrate under the auspices of a recognised arbitral institution (an institutional arbitration) or by directly appointing an arbitrator (an ad hoc arbitration).

12. An institutional arbitration generally has the following features:

    12.1. The arbitration is commenced by notice of arbitration lodged with the institution.

    12.2. The institution appoints the arbitrator, unless the parties are agreed on the identity of the arbitrator.

    12.3. The institution's rules govern the arbitration, save to the extent that the parties agree otherwise.

13. There are a number of well-established institutions that provide arbitration services.[2] These include the London Court of International Arbitration (**LCIA**), the International Chamber of Commerce (**ICC**), and the Chartered Institute of Arbitrators (**CIArb**). In addition, there are bodies that provide draft arbitration rules which can be adopted by others, with or without modification suitable for the dispute in question. The best known and most useful of these is the United Nations Commission on International Trade Law (**UNCITRAL**).

14. Parties can opt for an ad hoc arbitration rather than an institutional arbitration. This will involve the parties appointing an arbitrator who will then conduct the arbitration in accordance with the procedure agreed by the parties. An ad hoc arbitration does not preclude the involvement of an outside body altogether. For example, if the parties fail to agree on the identity of the arbitrator, or wish to adopt a particular set of arbitration rules, it can turn to a body that provides these limited arbitral services.

    It is intended that EELA will provide such services under its recently adopted EELA Arbitration Scheme. We discuss below whether ELA might provide similar services.

[2] See Working Paper No. 1: Arbitral Institutions.

Arbitration agreement

15. The starting-point for arbitration is the agreement between the parties to arbitrate. Section 6(1) of the Act defines an "arbitration agreement" as an agreement to submit to arbitration present or future disputes (whether they are contractual or not). Such an agreement can be bilateral (ie both parties agree to submit disputes to arbitration) or unilateral (both parties agree that one party can submit a dispute to arbitration).

16. An arbitration agreement can take several forms:

    16.1. An arbitration clause can be included in a contract at the outset whereby the parties agree to submit future disputes to arbitration. Arbitration clauses of this kind are common in LLP agreements such as those that govern professional service firms, and also in deferred remuneration agreements such as long-term incentive plans, bonus plans, share option plans and stock plans.

    16.2. An arbitration agreement can be a standalone agreement whereby the parties agree to submit future disputes (whether arising under a contract into which they have entered or otherwise) to arbitration.

    16.3. An arbitration agreement can be a standalone agreement whereby parties agree to submit an existing dispute to arbitration. This is sometimes referred to as a submission agreement. In the employment context, it can take the form of a settlement agreement whereby the parties agree to submit statutory employment claims (as well as non-statutory claims) to arbitration.

17. A number of arbitral institutions provide draft arbitration agreements which can be adopted by parties who wish to agree to submit disputes to arbitration. EELA intends to provide such a draft arbitration agreement.

How does arbitration work?

18. Once the parties have agreed to arbitrate, and a dispute has arisen, the arbitration can commence.

19. In many respects arbitration is similar to litigation. Generally, it has the following features. One party serves a notice of arbitration. Typically, a single arbitrator is appointed or a panel of three. The arbitrator will give directions for the conduct of the arbitration. It is common for there to be statements of case, disclosure, exchange of witness statements, a hearing, an award (as the arbitrator's decision is known) with reasons, which can include an award of costs.

20. There are, however, a number of differences between arbitration and litigation. The arbitral process is flexible and allows for the parties to reach agreement on many matters. They can, and often do, agree directions and the timetable. Disputes over interlocutory matters can be resolved quickly, often involving exchange of submissions by email, perhaps a telephone hearing, and a decision by the arbitrator, reached expeditiously and provided to the parties, with brief reasons, by email. Disclosure can be more limited than in the High Court, although the parties can adopt the High Court or employment tribunal rules on disclosure (and other procedural matters). The hearing takes place in private, often at the offices of solicitors representing one of the parties or at a neutral venue, such as the International Dispute Resolution Centre **(IDRC**) in Fleet Street, London. There are limited rights of appeal, intended to inject an element of finality into the arbitral process.

21. These issues are discussed further below in the section on the Arbitration Act 1996.

The law of arbitration

22. It is important to be aware of how the general law can impact on an arbitration. Broadly speaking, there are three different laws or legal systems that could apply to an arbitration.

    22.1. The law of the arbitration agreement. The law applicable to the arbitration agreement determines such matters as the validity of the arbitration clause itself. This might differ, expressly or impliedly, from the applicable law of the agreement in which the arbitration clause is found. In the UK, the position is governed by common law since arbitration is expressly excluded from the Rome I Regulation on Contractual Obligations. In accordance with common law principles, if there is a dispute as to whether the arbitration agreement is valid, the English court will apply the putative law. That is to say, the court will decide which law would apply to the arbitration agreement if it were valid, and then apply that law to determine whether or not it is valid.

    22.2. The law of the seat of the arbitration. This governs the procedural law that applies to the arbitration. Where (say) London is the seat of the arbitration, then English law governs the arbitral procedure. This law is found in the Arbitration Act 1996 (discussed further below).

22. 22.3. The law of the substantive dispute. The parties are free to choose the applicable law of the substantive dispute. If there is no express or implied choice of law governing the arbitration agreement, where the UK is the seat of the arbitration, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable (section 46 of the Act).

D. THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION

The advantages of arbitration

23. The advantages of arbitration include the following:

23.1. **Confidentiality**. Hearings in the High Court and employment tribunal are generally in public subject to well-recognised exceptions (for example, where there is a need to protect confidential information). Further, in the High Court non-parties may gain access to certain documents on the court file. In contrast, arbitration proceedings are generally confidential to the parties.

23.2. **Flexibility.** The parties have a considerable degree of autonomy and influence on the arbitral process. This includes the appointment of the arbitrator, who can be selected for their expertise and suitability for the issues in dispute. It also extends to the procedural rules that can be agreed between the parties subject to mandatory provisions of the applicable law (such as the Arbitration Act 1996). The timetable can also be agreed between the parties. This can mean obtaining a prompt decision from the arbitrator on interlocutory or final issues. Alternatively, it can mean delaying such decisions if that is agreed to be in the interests of the parties. In short, the procedure can be efficient, cost-effective and relatively predictable.

23.3. **Finality**. As we have seen, it is open to the parties to agree to exclude appeals to the court on a point of law, and this is often done. The upside is that once an arbitral award is made, that is generally the end of the matter (subject to the right to challenge the award on grounds of lack of jurisdiction or serious irregularity).

23.4. **Costs**. The parties may agree on what costs regime is to apply to an arbitration. This might be the subject of negotiation when entering into the arbitration agreement. It will also mean that the parties can avoid the costs budgeting regime applicable in the High Court, which can be time-consuming and costly in itself, if they so wish.[3]

[3] See Working Paper No. 2: Costs Issues in Arbitration.

23. 23.5. **Enforcement.** The New York Convention 1958 governs the enforcement of foreign arbitral awards. It has approximately 148 contracting state signatories. This means that the enforcement of foreign awards is often more effective than the enforcement of foreign court judgments.

The disadvantages of arbitration

24. The disadvantages of arbitration are, to an extent, a mirror of the advantages. They include the following:

24.1. **Procedural limitations**. It is not possible to join a third party to an arbitration (without their agreement), it may be more difficult to obtain summary judgment, and disclosure may be more limited, than in the High Court. It may be necessary to apply to the High Court for interim injunctive relief in aid of the arbitral process. Whilst an arbitral tribunal has power to grant final injunctive relief under the Act, it may not be possible to convene the tribunal quickly enough for the purpose of urgent interim injunctive relief.[4]

24.2. **Precedent**. If a party wishes to establish a legal precedent (for example, as to the meaning of a contractual obligation), this will not be possible through a confidential arbitral process, whereas a court ruling can have precedential value.

24.3. **Appeal.** The losing party may want to appeal a decision. This will not be possible if the parties have agreed to exclude such an appeal and, even if they have not, the grounds for an appeal to the court on a point of law are somewhat more limited than in the High Court.

E. THE ARBITRATION ACT 1996

25. As explained above, where the seat of the arbitration is in the UK, the Arbitration Act 1996 will apply to the arbitration. We have summarised the relevant provisions of the Act in a working paper published with this Report.[5]

[4] See Working Paper No. 3: Injunctions and Arbitration.

[5] See Working Paper No. 4: A Summary of the Arbitration Act 1996. In 2016, the Law Commission of England and Wales announced that it was considering reform of the Arbitration Act 1996 as part of its 13th Programme of Law Reform.

F. EXPERIENCE REGARDING EMPLOYMENT ARBITRATIONS TO DATE

Employment arbitration in the UK

26. We have already referred to the greater use of arbitration to resolve employment disputes in recent years in the UK. This view is based on a number of factors. Amongst these is the experience of members of the Group as arbitrators and practitioners. Increasingly, arbitration clauses are found in partnership and LLP agreements, deferred remuneration scheme rules, and some contracts of employment. Because arbitrations are generally confidential, there are limitations on what can be written and said about particular arbitrations.[6] However, the experience of the Group is that in recent years there have been arbitrations concerning discrimination, team moves, confidential information, restrictive covenants, executive terminations, and deferred remuneration schemes.

27. Rather than rely solely on anecdotal evidence, the Group undertook research into the experience of employment arbitration in the UK and elsewhere.

28. A number of UK law firms responded to our enquiries regarding their experience of employment arbitrations. Their recent arbitrations tackle disputes relating to discrimination, bad leaver provisions, and the enforceability of a team move covenant in a partnership deed.

29. Confidentiality and reputational considerations, as well as the international location of the parties, appeared to be key drivers behind the adoption of an arbitration clause in these cases. Respondents identified the following factors as important in assessing the success of arbitrations: the parties' willingness to co-operate; the constitution of the arbitral panel; keeping to the timetable; cost; agreeing the arbitral procedure; the relevance of injunctive relief; the existence of multiple respondents and the need for consolidation; international enforcement; limitations on the right of appeal.

[6] The recent Marathon Asset Management litigation with Jeremy Hosking was principally conducted via a number of arbitral disputes pursuant to an arbitration clause in the LLP deed which were conducted in private. It became more public owing to the fact that the arbitration clause did not exclude the right to appeal to the High Court on a question of law under section 69 of the Arbitration Act, thereby enabling Mr Hosking to challenge a ruling of the arbitrator (on the applicability of forfeiture to LLP Members) in the Chancery Division; and because it did not prove possible to involve the other parties (principally Hosking's team) in the arbitration process (they did not have arbitration clauses in their contracts with Marathon and therefore their consent was required), thereby necessitating separate proceedings against them in the Commercial Court.

The Acas Arbitration Scheme

30. In 2001, the Acas arbitration scheme ("the Acas Scheme") was introduced.[7] It was originally designed to operate in England and Wales, but was extended to Scotland in 2004. It covers only unfair dismissal claims and is expressly not intended for cases involving "jurisdictional or complex legal issues" or ones which raise points of EU law. Although the scheme will cover cases of alleged constructive dismissal, it will only do so where the parties agree that the events which took place amounted to a dismissal. The scope of the scheme is, therefore, extremely limited. It is plainly intended for claims which are (i) quite straightforward, but (ii) sensitive involving issues which both parties might well prefer not to air in public.

31. The Acas Scheme is little used. Between 2001 and 2006, 55 cases were referred to the scheme. Between 2006 and 2010, a mere 8 cases were referred. No claims were referred between 2013 and 2015. This minimal take-up could be attributable to one or more of a number of factors: the scope of the scheme is narrow; it is entirely voluntary and is only available once a dispute has arisen; entry to the scheme is only via an arbitration agreement reached with the assistance of an Acas conciliator or in the form of a settlement agreement; the scheme is not promoted well; whilst the remedies on offer are broadly similar to those obtainable from an employment tribunal, the decision-making process is arguably less robust (hearings are not intended to last more than half a day, with no cross-examination of witnesses, and the arbitrator is required to "take account of general principles of fairness and good practice in the workplace" rather than strict law or legal precedent (EU law aside)). We return to the Acas Scheme in our Recommendations below.

Employment arbitration outside the UK

32. Outside the UK, the picture is mixed.[8] Arbitration of employment disputes is common in the United States. Most employment claims can be submitted to arbitration in the US, which does not have far-reaching or mandatory rules against using arbitration for employment disputes (subject to certain exceptions). The US does not have a dedicated court system with exclusive jurisdiction for employment disputes, such as the employment tribunal system in the UK. This factor may contribute to the prevalence of employment arbitration in the US.

33. Institutional arbitration for employment disputes is well developed in the US. For example, the American Arbitration Association (**the AAA**) has separate rules governing employment disputes (Employment Arbitration Rules and Mediation Procedures) and its own Handbook on Employment Arbitration & ADR.

[7] See Working Paper No. 5: The Acas Arbitration Scheme.

[8] See Working Paper No. 6: Employment Arbitration in Different Jurisdictions – Interim Report (and Appendix); and Working Paper No. 7: Employment Arbitration in Different Jurisdictions – Second Report (and Appendices).

34. In Europe, practice in the use of arbitration of employment disputes varies. It is used frequently in Sweden and widely in Denmark. In contrast, restrictions on the use of arbitration of employment disputes apply in many other European countries as well as elsewhere (for example, Mexico, Dubai, Chile and Argentina). In other countries, arbitration is permitted but rarely used (for example, The Netherlands, Finland, Hong Kong, India, Ireland, Poland and Australia).

35. Whilst in France there are mandatory rules limiting the use of arbitration in employment disputes, case law has given at least some effect to agreements to arbitrate. In 2015, a group of leading French employment lawyers launched an employment arbitration initiative, the Centre National de l'Arbitrage du Travail (**CNAT**), although there has been limited take-up to date.

36. Two objections to arbitration of employment disputes are often voiced in other jurisdictions. First, the inequality of bargaining power between employer and employee. Second, the public interest in the open resolution of employment disputes, particularly those concerned with discrimination and whistleblowing.

The EELA Arbitration Scheme

37. In 2017, the European Employment Lawyers Association (**EELA**) adopted its own employment arbitration scheme. Under the EELA scheme, EELA will, by means of an EELA Arbitration Committee, assist the parties in conducting an arbitration. To this end, EELA is in the process of drafting EELA Arbitration Rules, a draft arbitration agreement (for future disputes) and a draft submission agreement (for existing disputes), which can be adapted by the parties to a dispute, if they wish. It proposes, in due course, to maintain a panel of EELA arbitrators. The EELA scheme might be particularly apt for disputes with a cross-border dimension.

G. ISSUES RELATING TO EMPLOYMENT ARBITRATIONS

38. In this section of the report, we consider particular issues that are relevant to arbitration of employment disputes, as opposed to arbitration generally. It goes without saying that we are not seeking to give legal advice on these (or other) topics but rather set out our thinking, with the aim of addressing concerns that have been raised from time to time, in relation to employment arbitration and promoting further discussion.

Is arbitration for the benefit of employers and employees?Is it possible to submit statutory employment claims to arbitration?

39. The short answer, we think, is yes. The issue arises because of the restrictions on contracting out of statutory employment claims. An arbitration agreement will be effective in relation to future common law disputes (such as contractual, tortious or equitable claims) but will not be effective in relation to future statutory employment claims. [9]

40. However, a settlement agreement (which complies with the statutory requirements for a valid settlement agreement for employment claims), entered into after a dispute has arisen, and which contains an arbitration clause, will be effective in relation to existing statutory employment claims. Consider the following example. An employee, who has been dismissed, wishes to bring contractual claims for wrongful dismissal and unpaid bonus, and statutory claims for unfair dismissal, unlawful deduction from wages, whistleblowing and discrimination. Neither party wishes to litigate in multiple jurisdictions and neither wants publicity. It would be possible for the parties to enter into a settlement agreement whereby they agree to submit all existing disputes to arbitration. The settlement agreement is compliant with the statutory requirements and so does not fall foul of the restriction on contracting out. All claims can be determined in one forum by arbitration.

Is arbitration for the benefit of employers and employees?

41. We think the answer to this question is yes. It might be thought that the confidentiality of an arbitration will appeal to employers but not to employees. Of course, there are cases where the employee wants a public hearing. The employee might consider that the threat of publicity will be unwelcome to the employer and will encourage them to settle. The employee might believe that it is in the public interest that the claim is heard in public.

42. On the other hand, there are many situations where an employee would prefer confidentiality rather than a public hearing. The employer's defence to a claim might be that the employee had engaged in misconduct, for example, or was incompetent. Even if the employee believes the allegations of misconduct or incompetence to be wholly unjustified, there is a risk that the airing of the allegations in public will damage the employee's reputation. Again, a person known to have brought a whistleblowing or discrimination claim might find their future job prospects harmed as a result.

[9] *Clyde & Co LLP v Bates van Winkelhof* [2012] ICR 928.

43. In addition to the appeal of confidentiality for both employer and employee in appropriate cases, the other advantages of arbitration (discussed above) apply to employees as well as employers.

44. We recognise that the costs of arbitration can be a deterrent to employees. However, there are a number of factors to consider here. An employee wishing to bring a High Court claim will be faced with having to pay court fees in order to commence proceedings. There are also ways of limiting an employee's exposure to the costs of an arbitration. An employee could insist on the employer agreeing to meet the arbitrator's fees and expenses as a condition of agreeing to arbitrate, albeit this would only be valid if agreed after the dispute has arisen (section 60 of the Act). The parties can also agree the costs regime for the arbitration. This could be the employee-friendly costs rules applicable in the employment tribunal or a regime whereby each party will bear their own costs in all circumstances.

Is arbitration suitable for high-value and low-value claims?

45. It is undoubtedly the case that arbitration is suitable for high-value claims. The costs of arbitration are unlikely to be a deterrent, the issues may be sensitive, and the parties will often place a premium on the flexibility, efficiency and finality of the arbitral process.

46. But, in our view, arbitration can be suitable for claims that might not be described as high-value. The flexibility that arbitration affords means that the parties can cut their arbitral coat according to their cloth. The parties can agree on a simplified procedure, including the nature and length of any hearing. They could, for example, dispense with or limit the normal interlocutory steps of statements of case, disclosure and exchange of witness statements. They might request a determination on the papers, or at a hearing that will have a maximum duration. They could appoint an arbitrator whose fees will be commensurate with the value of the claim. Such steps do, of course, require agreement between the parties, but we think that there is scope for such agreement in a meaningful number of cases.

47. The Acas arbitration scheme is an example of arbitration being adapted to a particular type of claim (unfair dismissal) whose maximum value is set by the statutory cap on compensatory awards (less than £100,000). Of course, the parties do not bear the costs of the arbitrator under the Acas scheme.

48. We consider that there is much to be said for the Acas scheme to be reviewed and relaunched. Its remit could be expanded beyond unfair dismissal claims to include straightforward claims for holiday pay, unlawful deduction from wages, breach of contract, all subject perhaps to a financial limit. Consideration should be given to increasing the number of employment lawyers on the Acas panel of independent arbitrators.

49. In the event that the Acas scheme is not revived or used more, there is a case for ELA promoting a separate simplified arbitration scheme for straightforward employment claims.

Is arbitration subject to the EU rules on jurisdiction and applicable law?

50. There is some debate amongst commentators as to whether an arbitration agreement falls outside or is subject to (i) the Brussels I Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (**Brussels I Recast**), and (ii) the Rome I Regulation 593/2008 on the law applicable to contractual obligations (**Rome I**). Both Regulations have particular provisions relating to individual contracts of employment.[10]

51. It is not our role to provide a monograph on the precise relationship between arbitration and these EU instruments. We note that article 1(2) of Brussels I Recast provides that "This Regulation shall not apply to…(d) arbitration", which appears to be reinforced by Recital 12. Article 1(1)(e) of Rome I similarly provides that it has no application to arbitration agreements.[11] There are, however, those who consider that the employee-protective provisions of Brussels I Recast and Rome I may preclude reliance on arbitration clauses in the employment context. This debate may ultimately be a matter for judicial determination.

H. THE MERITS OF EMPLOYMENT ARBITRATION IN THE UK

52. In light of the matters discussed above, we consider that arbitration has a great deal to offer in the resolution of employment disputes in the UK.

53. It provides an alternative to traditional forms of litigation, whether in the High Court or the employment tribunal. In contrast to litigation, arbitration offers confidentiality, flexibility (in terms of the ability to appoint the arbitrator, to adopt preferred procedural rules, and to influence the timetable), and finality (in terms of the opportunity to agree to exclude the right of appeal on a point of law).

[10] As to Brussels I, see: *Samengo-Turner v Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, [2008] ICR 18; *Petter v EMC Corporation* [2015] EWCA Civ 828, [2015] IRLR 847. As to Rome I, see: *Duarte v Black & Decker Corporation* [2007] EWHC 2720 (QB), [2008] 1 All ER (Comm) 401.

[11] See Working Paper No. 8: Issues arising from Brussels I Recast and Rome I Regulations.

54. It is well suited to high-value claims, and has been increasingly used for a range of employment disputes such as those involving team moves, enforceability of restrictive covenants, deferred remuneration schemes, discrimination, redundancy and wrongful dismissal.

55. It can also be used for low-value and straightforward claims, for which the Acas arbitration scheme was brought into existence. There is scope to review, enlarge and relaunch this scheme, failing which an alternative simplified arbitration scheme might be introduced.

56. Arbitration does not involve particularly complex law or procedure. A basic understanding will enable employment lawyers to advise their clients as to its potential suitability to resolve disputes with which they are involved, and will offer an opportunity for practice development.

I. THE ROLE OF ELA IN RELATION TO EMPLOYMENT ARBITRATION

57. As discussed above, there are a number of resources already in existence for those who wish to introduce an arbitration agreement or commence an arbitration. A number of institutions provide arbitration services, and draft arbitration agreements and rules can be found on their websites (for example, LCIA). Other institutions provide arbitration rules that can be adopted or adapted according to the needs of a particular case (eg UNCITRAL rules).

58. It is also possible to embark on an ad hoc arbitration involving the drafting of a bespoke arbitration agreement and agreement on the procedure to be followed.

59. However, we consider that there is a potential role for ELA in facilitating employment arbitrations.

60. First, ELA could make available a package of draft documentation to assist those advising on arbitration. This could include a draft arbitration clause, a draft arbitration agreement, a draft submission agreement, and draft arbitration rules.

61. Second, ELA could have a role, albeit limited, in relation to an employment arbitration scheme. We do not suggest that ELA provides a full range of arbitral services such as provided by other arbitral institutions. However, it could establish an "ELA Arbitration Scheme" and perform a limited role similar to that intended to be provided by EELA in relation to the EELA Arbitration Scheme. This could include maintaining a panel of arbitrators, and assisting parties in the selection of arbitrators where requested to do so.[12] For this purpose, ELA might wish to establish an ELA Arbitration Committee. We appreciate that ELA will wish to consider further whether such a role is appropriate, and what resources would be required to discharge such a role.

62. Third, ELA's well-developed training programme could be expanded to provide training sessions for those who wish to learn more about arbitration, or participate in arbitration, whether as arbitrators, advocates or advisers.

J. CONCLUSION

63. In this report, we have endeavoured to provide a basic description of what arbitration involves and to explain what we see as the potential for arbitration to resolve employment disputes. We have also made a number of suggestions as to how ELA might facilitate employment arbitration by providing training and resources for those who wish to explore this further.

[12] One of the issues that the US experience has brought to the fore is the need for arbitrators of employment disputes to have appropriate expertise (see the AAA Protocol – working paper no. 7).

APPENDIX 1

MEMBERS OF THE ELA ARBITRATION AND ADR GROUP

Peter Frost, Herbert Smith Freehills LLP (Co-Chair)

Paul Goulding QC, Blackstone Chambers (Co-Chair)

Ivor Adair, Slater & Gordon (UK) LLP

Michael Anderson, Lewis Silkin LLP

Joanna Blackburn, Mishcon de Reya LLP

Charles Ciumei QC, Essex Court Chambers

Maya Cronly-Dillon, Arthur J Gallagher International

Peter De Maria, Doyle Clayton Solicitors Ltd

Peter Finding, Withers LLP

David Green, Charles Russell Speechlys LLP

Shobana Iyer, Swan Chambers

Jenni Jenkins, Memery Crystal LLP

Susan Kelly, Winckworth Sherwood LLP

Esther Langdon, Vedder Price LLP

Stephen Levinson, Keystone Law

Jane McCafferty, 11 KBW

Ken Morrison, Kingston University London and St George's, University of London

Malcolm Pike, Addleshaw Goddard LLP

Mary Siddall, University of Southampton

David Widdowson, Abbiss Cadres LLP

Max Winthrop, Short Richardson & Forth LLP

APPENDIX 2

WORKING PAPERS PRODUCED BY THE ELA ARBITRATION AND ADR GROUP

1. Arbitral Institutions.
2. Costs Issues in Arbitration.
3. Injunctions and Arbitration.
4. A Summary of the Arbitration Act 1996.
5. The Acas Arbitration Scheme.
6. Employment Arbitration in Different Jurisdictions - Interim Report.
7. Employment Arbitration in Different Jurisdictions – Second Report.
8. Issues arising from Brussels I Recast and Rome I Regulations.

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Employment Lawyers Association
P.O. Box 353
Uxbridge UB10 0UN

Tel/Fax: 01895 256972
Email: ela@elaweb.org.uk

www.elaweb.org.uk