ELA Arbitration and ADR Working Group
Arbitration Work Stream - Different Jurisdictions sub-group
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Contents

A. Introduction

Terms of Reference

1. Our task is to investigate, collate information and learn from the experience of employment arbitrations in these different jurisdictions: (1) North America; (2) Europe; and, (3) Elsewhere.

Executive Summary

2. We developed a questionnaire[1] and carried out a survey of employment lawyers in other jurisdictions. Out method and results so far are discussed in this interim report. The headline trends drawn from our survey are:

   2.1. 82% of practitioners across 28 jurisdictions[2] stated that arbitration is used infrequently or not at all to resolve contentious employment disputes.

   2.2. 53% of practitioners across 28 jurisdictions stated that there are mandatory rules prohibiting arbitration in their jurisdiction.

Method

3. We developed the questionnaire at Appendix 1 and carried out a survey of employment lawyers in a variety of jurisdictions[3] by contacting them directly. We have also followed up with some of the survey respondents and have carried out a small amount of research in journals, articles and books.

4. At the time of writing we have received 45 survey responses, from:

   4.1. **North America**, namely the USA (12, including 2 NYC, 6 Illinois, 2 California, 1 Washington DC);

[1] Attached at Appendix 1
[2] Note, we counted each US State from which we obtained information as a separate jurisdiction.
[3] This approach was decided upon as we understand sub-group 2b is liaising with professional associations in other jurisdictions.

4.2. **Europe**, namely, Austria, Belgium, Denmark, Finland (2), France (2), Germany (2), Italy (2), Ireland, Luxembourg (2), Netherlands, Poland, Portugal, Spain (2), Sweden, Switzerland (2);

4.3. **Elsewhere**, namely, Argentina, Australia, Chile, Dubai (2), Hong Kong (2), India, Mexico, Turkey, Turks & Caicos Islands[4].

5. Quality of data: There is obviously a risk that survey responders are self-selecting to a degree. We also believe that there is some bias towards practitioners who predominately represent employers. Nevertheless, we believe that the survey provides a useful overview of trends and serves as a starting point for further research.

Proposal

6. Our current intention is to use our initial findings to drill down further into what is happening in selected jurisdictions, both by reading any published academic research of relevance and by further questioning selected survey respondents and/or questioning others in the same jurisdiction. We have provisionally selected the following jurisdictions for this purpose, for the reasons indicated:

7. **USA/North America** – a wealth of data is available and there are interesting variations between States. Arbitration is quite widespread in some sectors, so there is plenty of practical experience as well as proposed reform. In particular, the Californian and New York experiences appear worthy of further investigation. We also intend to follow up on Canada.

8. **Sweden** – because our one respondent says that arbitration is used frequently here and there is no legislative constraint on the use of arbitration in employment disputes.

9. **France** – although currently the employment tribunals have exclusive jurisdiction, case law has given at least some effect to agreements to arbitrate and there are various distinctions drawn between types of contract (international or domestic). There is also a very recent private initiative to set up a specialist centre for employment arbitration.

[4] Without wishing to enter the political arena we have placed Turkey in the Elsewhere category (along with Australia – obviously a blow to Eurovision fans).

10. **Elsewhere** – We are considering **Turkey**, which is of interest because there is currently a law before Parliament dealing with ADR, and that this focuses on mediation not arbitration. Other jurisdictions that we are considering following up in more detail are: **Hong Kong**, **Malaysia**, or **Singapore**.

Trends

11. In brief, arbitration is not widely used worldwide for resolving contentious employment disputes and in many jurisdictions this is the result of explicit prohibition. Key trends drawn from our survey are:

    11.1. 82% of practitioners across 28 jurisdictions stated that arbitration is used infrequently or not at all to resolve contentious employment disputes.

    11.2. 53% of practitioners across 28 jurisdictions stated that there are mandatory rules prohibiting arbitration in their jurisdiction.

12. Our preliminary view is that the predominant reason for the lack of enthusiasm for or outright prohibition of arbitration in the employment context is motivated by a desire to protect employees who are generally in a weaker bargaining position as well as a general predilection for open justice.

13. Restrictions on the use of arbitration in employment disputes are very common, indeed, appear to be the norm in Europe and in our small South American sample. Restrictions or prohibitions apply in France, Luxembourg, Switzerland, Spain, Austria, Germany, Belgium, Portugal, Mexico, Turks & Caicos, Dubai (per one participant), Chile and Argentina.

14. There are some distinct strands in terms of the types of restrictions. The most common are that this is not allowed for individual disputes, but only for collective disputes and that the use of employment arbitration is restricted to agreement either post-termination (of employment) or, at least, after the dispute has arisen.

15. In several jurisdictions, the response is that arbitration is permitted in this context, but is rarely used. This is so in The Netherlands, Finland (per

one participant), Hong Kong (per one participant), India, Ireland, Poland and Australia.

16. The USA is a notable exception to the general trend. In this context, we note the absence of a specialised employment court. It also appears that in some States there is consideration being given to restriction the use of arbitration in employment disputes.

17. Common themes on the topic of obstacles to arbitration are:

    17.1. Cost of arbitration (particularly as labour courts are often free)

    17.2. No right of appeal

    17.3. Mistrust of quality and impartiality of arbitrators

    17.4. Unenforceability of arbitration agreements

18. Enforcement of arbitral awards is not generally seen to be a problem, either within the jurisdiction or internationally.

19. However, there are some sharply conflicting views on

    19.1. The expertise or otherwise, of arbitrators

    19.2. Speed – or slowness – of arbitration

    19.3. Simplicity or complexity of the process

20. Clearly, views on the comparative merits and demerits of arbitration versus the default mechanism for resolving disputes depend on the quality (speed, simplicity, and so on) of the method being contrasted. In the USA, for example, where litigation is notoriously complex and costly, arbitrations are seen as streamlined and less expensive. Elsewhere, if labour courts or tribunals are highly specialised and free, arbitration compares much less favourably, being characterised more often as slow, expensive and complex.

Other ideas

21. Other interesting ideas for the resolution of employment disputes emerge from some of our respondents. For example, in Hong Kong, the Labour Tribunal has

exclusive jurisdiction over money claims arising out of an employment contract and lawyers are not allowed to represent the parties in that forum (although they can assist with advice and documents beforehand). In Germany, disputes between the works council and the employer are often resolved by something called the "mediation board", whose proceedings are said to be similar to an arbitration.

B. Summary of points arising from US survey answers

Introduction

22. We have collated 12 answers from 4 US states, broken down as follows:

    22.1. 7 Illinois;

    22.2. 2 New York State;

    22.3. 2 California,

    22.4. 1 Washington DC.

23. Respondents came from 2 law firms only.

24. The vast majority of Respondents answered from experience of acting for employers.

USA as a comparator jurisdiction

25. There are fundamental differences between employment law and mindsets in the US and the UK (and between the US and the EU). These differences must be borne in mind in considering the use of arbitration for employment disputes in the US, why it has developed there more than in the UK, and what lessons can be drawn from this for the more widespread use in the UK. Differences include that the US has far less pervasive statutory protection over many aspects of individual employment rights, has employment "at will" and does not have a dedicated Court/Tribunal with exclusive jurisdiction to hear employment related claims. It does not have mandatory rules prohibiting the use of arbitration for employment related disputes (subject to certain exceptions, see

below). Generally speaking, UK employment laws tend to protect the employee over the employer to a greater degree than in the US, and to be even more resistant to the use of arbitration for the settling of disputes.

26. Institutional arbitration for employment disputes is well developed in the US (for example, the American Arbitration Association (AAA) has separate Rules governing employment disputes (Employment Arbitration Rules and Mediation Procedures) and its own Handbook on Employment Arbitration & ADR). On its website, the AAA lists under "Areas of Expertise", "Labor, Employment & Elections", with the following specialisms: Labor, Employment, Elections, Pension & Employee Benefit Plan Claims.

27. Several issues raised by the Respondents, in particular the advantages of arbitration for employment disputes, do not apply to such disputes in the UK for example the attraction of avoiding a jury trial and the strong emphasis on wage and hour class action claims.

28. Various possible advantages or disadvantages of arbitration for employment related disputes often cited by UK practitioners were mentioned only infrequently, if at all, by the US respondents, as follows:

    28.1. Confidentiality of proceedings, cited by only 5 (of 12) Respondents as an advantage (one of whom cited it also as a possible disadvantage);

    28.2. Lack of confidence in and/or mistrust of impartiality of arbitrators: cited by only 5 (of 12) Respondents as a concern;

    28.3. Lack of right of appeal: not cited by Respondents as either an advantage or disadvantage;

    28.4. Possibility of using arbitration to settle international claims governed by various jurisdictions and applicable laws: not cited by Respondents.

How widespread is use of arbitration?

29. Whilst the US has a developed system for and practical experience of arbitration of employment disputes, this is by no means a widespread form of

dispute resolution there. The majority of our Respondents (7 of 12) (across all 3 states who replied) said it was "*used infrequently*".

30. Some of our Respondents commented that they are seeing an increase in the use of arbitration for employment disputes, and support this.

31. However, there are also several proposals for legal reform, all of which would be to limit the use of arbitration in employment disputes (see below). There is also a great deal of opposition to the use of mandatory arbitration for employment disputes amongst academics and social commentators[5].

Mandatory legislative provisions

32. As above, the US does not have far-reaching or blanket statutory, mandatory rules against using arbitration for employment disputes. Most employment claims can be subject to arbitration by agreement. However, prohibitions against (mandatory) arbitration apply on a limited basis, which we understand varies across states. In particular, Respondents commented:

    32.1. Certain states have issued legislation that precludes employers from having mandatory arbitration programs for employment disputes. But the US Supreme Court and lower federal courts generally favor arbitration where the parties agree to it.

    32.2. Employee Retirement Income Security Act (ERISA) claims cannot have mandatory arbitration;

    32.3. Certain federal contracting claims cannot have mandatory arbitration;

    32.4. Legislation prohibits the use of arbitrations for corporate whistleblower claims arising under the Sarbanes-Oxley Act unless both sides agree to arbitration after the dispute arises.

[5] See by way of example only, "Arbitration Everywhere, Stacking the Deck of Justice" by Jessica Silver-Greenberg and Robert Gebeloff in the New York Times, 1 November 2015 and "The Arbitration Epidemic, Mandatory Arbitration Deprives Workers and Consumers of their Rights" by Katherine V.W. Stone and Alexander J.S. Colvin in the Economic Policy Institute Briefing Paper, December 7, 2015.

Use of arbitration clauses and agreements

33. Respondents referred to the need for a binding arbitration clause, either in in the employment agreement and/or a signed arbitration agreement as part of the terms of employment. One Respondent commented that an increasing number of employers are now requiring employees to sign arbitration agreement when hired.

34. The enforceability of these agreements is cited as an obstacle to the more widespread use of arbitration for employment disputes (see below).

35. One Respondent mentioned that, in the securities industry (a large portion of the financial sector), a segment of professionals must be licensed through a self-regulatory organization named FINRA (similar in some respects to the FCA). Such individuals are required to arbitrate all non-discrimination employment disputes.

Trends in use of arbitration

Trend	Number of responses (/12)
Industry sector	8
Type of case/dispute	4
Complexity	4
Class/collective claims	2
Value	2

Advantages/disadvantages of arbitration: from both sides

36. One Respondent summarises his view of the four reasons that employees generally oppose arbitration and employers generally favour arbitration over Court in the US:

    36.1. Less discovery and prohibition/restriction on depositions.

    36.2. No jury.

    36.3. Costs. The employer often selects and pays the arbitration organization. There is a school of thought on the employee-side that this can lead to an employer-bias amongst the arbitrators.

36.4. Confidentiality/privacy.

Advantages of arbitration

37. As above, the vast majority of Respondents replied from the employer's perspective.

38. One of the biggest perceived advantages of arbitration given by Respondents is the ability in the US to get class action waivers and avoid class action claims. We understand that terms of employment can include a clause that obligates the employee to arbitrate all disputes they might have with their employer and also one that prohibits them from pursuing their claims in a class or collective action in court. The authors of the "Arbitration Epidemic" (see above) say: "*The most controversial issue in arbitration law today grows out of the interaction between arbitration and class actions*." Class action claims are not such a dominant feature of employment litigation in the UK as they are in the US.

39. Other advantages were: faster resolution/ more streamlined; costs; avoidance of jury; confidentiality/not public record; limitation of discovery (especially e-discovery); smaller awards.

40. As above, it is striking that certain advantages that we would expect to be mentioned by UK practitioners are not mentioned (see paragraph 28 above).

Disadvantages of arbitration

41. As above, the vast majority of Respondents replied from the employer's perspective.

42. Disadvantages given were costs; quality of decision (including a perception that arbitrators tend to award some amount to the employee rather than entering a complete defense verdict); risk of more claims; difficulty in getting cases dismissed at an early stage; not faster or more streamlined; less likelihood of having dispositive motions granted; quality of arbitrator.

Obstacles to more widespread use of arbitration for employment disputes

43. Problems/issues with the enforceability of arbitration agreements;

44. Concern by employers that arbitration clauses will not reduce their litigation costs or that they might actually increase the number of claims brought;

45. A lack of knowledge;

46. A perception that plaintiffs prefer court litigation;

47. Strong public feeling that consumer and employment disputes should not be settled in arbitration, in private.

Changes to the law under consideration or being proposed

48. Many Respondents mentioned proposed reform in this area, all of which shows a shifting against the use of arbitration for employment law disputes.

49. This includes:

    49.1. A variety of proposed legislation at the state and federal level that would limit or even restrict mandatory arbitration of employment claims.

    49.2. In California, the validity of arbitration agreements for class waivers is currently being considered. Elsewhere, arbitration of class actions is challenged by some administrative agencies as unfair and unlawful.

    49.3. In New York, there is general discussion of whether or not to limit the enforceability of pre-dispute arbitration agreements, with employees pushing for change and employers resisting it.

How enforceable are arbitral awards?

50. Enforcement of arbitral awards is not generally seen to be a problem in the US, either within the jurisdiction or internationally.

51. In some jurisdictions, the employer must pay the full cost of the arbitration (but not the employee's attorneys' fees) in order for the arbitration program to be enforceable.

Forms of ADR other than arbitration

52. Respondents from both Illinois and California commented that private mediation is more popular than arbitration. One of our Californian respondents cited

alternate dispute resolution (typically private mediation) as the default means of resolving employment disputes.

Areas identified for further consideration, research and information include:

53. Comparison of outcomes of employment arbitration and litigation in the US;

54. The trends in the employment cases which most commonly use arbitration (see above);

55. Insofar as is possible, a more factual and objective analysis of the advantages and disadvantages of arbitration referred to above (especially in relation to the issues of costs and time);

56. The changes to the laws under consideration or being proposed (see above);

57. A review of the institutional arbitration rules (including the AAA's Employment Arbitration Rules and Mediation Procedures and its Handbook on Employment Arbitration & ADR);

58. Enforceability of arbitration clauses and agreements and the issues which arise in relation this this, including a review of Supreme Court decisions on this;

59. Consideration of FINRA's Arbitration Scheme (including the Code of Arbitration Procedure for Industry Disputes (Industry Code) and "The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986-2008");

60. If possible, views directly from employees and employers who have used arbitration in the US.

C. Case study – Turkey

61. Turkey's approach to ADR in employment disputes is a clear example of mediation being favoured over arbitration. Indeed, this is reflected in a proposed law currently under consideration by the Turkish Parliament which, if

passed, would make mediation a mandatory step before bringing a dispute before the Labour Courts.

62. Our findings indicate that the Turkish position is affected partly by the attitude that employment disputes are fundamentally matters of public concern, and that arbitration is not suitable for such matters, which are seen to belong in the public Labour Courts. Added to this is the perception that Turkey is a relatively employee-friendly jurisdiction, and employee representative groups do not have a desire for change.

63. Consequently, one respondent to our survey stated that "*arbitration is not [yet] an effective alternative for employment disputes*." Indeed, there is a suggestion that, even where parties have freely agreed to submit a dispute to arbitration, courts tend not to be strict in enforcing such agreements. Even in instances where a party objects to a court claim on the basis that arbitration is the appropriate method of resolution, courts (including appeal courts) often proceed to hear the case regardless. Similarly, foreign arbitral decisions on employment matters tend not to be recognised by the Turkish courts, despite Turkey being a party to the New York Convention.

64. In this context, it is perhaps unsurprising to note that for the few employment cases that are handled through arbitration, a major perceived risk is that the arbitrators available will not be of a high standard. Given the infrequent use of arbitration, experienced employment arbitrators are rare. Practising arbitrators in this field are mostly individuals listed by trade unions or chambers of commerce.

65. Nonetheless, some of the advantages of arbitration that are seen in other jurisdictions are also evident in Turkey. The arbitral process is significantly quicker than the courts. A respondent to our survey indicated that the process from the beginning of the dispute to the final award, including enforcement, can be expected to take between one to two years for arbitration, as opposed to two to three years in court. Thus, we understand that the cost of arbitrating an employment dispute may be roughly 2/3 of the cost of taking the same matter through court. Mediation is deemed even better in this respect. Mediation can

resolve a dispute within months, at a cost generally around 1/3 of going to court.

66. As such, it appears that Turkey is a telling example of a jurisdiction that is very much open to encouraging ADR for employment disputes, but has opted for mediation over arbitration.

D. Case Study - France

Current position

67. In France arbitration is rarely used for resolving contentious employment disputes. There are mandatory rules in the French Employment Code governing disputes arising out of employment contracts which severely limit the use of arbitration in this context.

Mandatory rules and exceptions

68. Article L.1411-4 of French labour code provides that employment tribunals (*Conseil de Prud'hommes*) have exclusive jurisdiction to hear employment-related disputes. The article also provides that: "*Any agreement to the contrary is deemed nugatory*".

69. Despite the apparent prohibition, case law has given at least some effect to agreements to arbitrate. However, the use of arbitration remains highly controversial. There is no legal academic consensus about the scope of employment disputes that might be arbitrated.

70. An important distinction seems to be drawn between an agreement to arbitrate a future dispute and an agreement to arbitrate a dispute that has already arisen between employer and employee. In the latter case, there is current case law that an agreement to submit an existing employment dispute to arbitration (known as a "*compromis*") is valid in the sense that an having agreed to arbitrate, an employee will not be permitted to bring a claim before the employment tribunal after the award of the arbitration. In these cases,

the arbitration agreement is invariably made after the termination of the employee's employment.

71. In the case of agreements to arbitrate future disputes (known as a "*clause compromissoire*"), these are most likely to be part of the employment contract or entered into during employment. These are not likely to be enforceable by the employer by the application of Article L.1411-4 and will not prevent an employee bringing his or her claim before the employment tribunal.

72. However, such an agreement may still be valid at the instance of the employee, so that an employee may in effect be able to choose whether to arbitrate or to bring an employment tribunal claim. There is a divergence of legal academic opinion about the scope of any choice available to an employee by such a clause compromissoire. On one view, a clause compromissoire is only valid and enforceable (against an employer) where the contract is an 'international contract' (i.e. where the law of the contract is not French). There is case law support for the validity in these circumstances.

73. The opposing view (supported by an employment practitioner who responded to the survey) is that the proper interpretation of the current case law of the French Supreme Court (*Cour de Cassation*) is that in all cases (including purely domestic employment contracts) a clause compromissoire would be enforceable by but not binding on an employee who wishes to bring the case before the employment tribunal.

Rationale

74. The rationale for the mandatory rule is the prevailing suspicion of what is seen as a form of private justice that favours employers. Further the lack of equality of bargaining position for the majority of employees means that they would not generally not able to prevent an arbitration clause in a contract of employment being forced upon them.

75. In relation to the exception from the general prohibition as regards agreements to arbitrate an existing dispute, our preliminary research indicates an interesting

parallel with French consumer protection law, which appears to expressly prohibit pre-dispute arbitration clauses in consumer transactions[6].

Future developments

76. Prior to the recent French employment law reforms which became law on 6 August 2015 (the *Loi Macron*), there were discussions about whether arbitration clauses should be given full effect. In fact, the law as enacted contained no such provisions and further reforms currently before the French Parliament concerning reform contain no further draft provisions dealing with arbitration.

77. However, there is a very recent initiative to set up a specialist centre for employment arbitration, the CNAT – *Centre National de l'Arbitrage du Travail*. This is a private initiative at the instigation notable of Maître Hubert Clichy, a leading employment law practitioner and Professor Thomas Clay, who is a leading academic in arbitration.

78. The centre has been in development for over a year. It is understand that it will be open in about mid-2016. The website is not yet live and its arbitration rules are also not available currently.

79. It may be that the CNAT will prove to be a catalyst for development in this field.

Further research areas:

80. Further work in relation to the experience in France may include:

    80.1. Examining some of the primary sources underlying survey responses and further discussion with French lawyers.

    80.2. Explore how the approach in employment law is informed by the French approach to other areas of law, such as consumer law.

    80.3. Finding out if there is any different approach for collective disputes.

    80.4. Further research into the CNAT.

[6] See, Jean R. Sternlight: *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. Miami L. Rev. 831 (2002) at p.18. Available at: http://repository.law.miami.edu/umlr/vol56/iss4/3