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ELA Arbitration and ADR Working Group Arbitration Work Stream
Different Jurisdictions sub-group[1]
Second report 17 March 2017

Introduction

1. This is the follow up to the sub-group interim report 3 June 2016.

2. It is helpful to recall our terms of reference: *To investigate, collate information and learn from the experience of employment arbitrations in these different jurisdictions: (1) North America; (2) Europe; and, (3) Elsewhere*.

3. With that in mind, our further work focussed on the following:

   3.1. A more detailed examination of the approach to employment arbitration in the USA, which appears from our initial survey to be the most developed jurisdiction for employment arbitration in the world;

   3.2. A follow up of our general survey in relation to some other areas of the world that were not covered in the first survey;

   3.3. A follow up on any developments in France, and in particular the proposed Centre National de l'Arbitrage du Travail ("CNAT")[2], that we mentioned in the first report.

4. We have tried throughout to draw out any lessons for the development of employment arbitration in the UK.

5. Hence, this report is organised as follows:

   5.1. Introduction and executive summary;

   5.2. Some further information on employment arbitration in Singapore, South Africa, India and Canada;

[1] The sub-group members are: Peter Finding, Susan Kelly, Esther Langdon, Ken Morrison, Maya Cronly-Dillon and Charles Ciumei.

[2] In relation to the CNAT update, we are indebted to Richard Ryde (an ELA member in France) for his generous assistance in following up with that organisation.

5.3. A consideration of the issue of fairness in relation to employment (and consumer) arbitration in the USA, including a consideration of court rulings on the enforceability of arbitration agreements and attempts at legislative reform, the relevance of US consumer dispute arbitration and a consideration of the American Arbitration Association ("AAA") Employment Due Process Protocol ("the Due Process Protocol" or "the Protocol");

5.4. There are a number of appendices to the main report (see list at end of main report), including the following:

5.4.1. An update on CNAT;

5.4.2. A brief summary of the AAA Employment Arbitration Rules and Mediation Procedures ("the Rules");

5.4.3. A consideration of the Financial Industry Regulatory Authority ("FINRA") arbitration scheme mentioned in our first report (para. 35);

5.5. The appendices also contain supporting material, referred to in the other parts of the report, namely: PLC AAA Arbitration Flowchart; the AAA Rules; the Due Process Protocol; PLC FINRA Arbitration Flowchart.

Executive Summary

6. Our preliminary view at paragraph 12 of our first report has not changed. Indeed, evidence from Singapore, South Africa, India and Canada, has broadly confirmed that view. Having investigated the position in the USA in more detail, we describe the forces for and against employment arbitration there. Of particular interest in terms of the development of employment arbitration in the UK are the AAA and FINRA rules and arbitration schemes and the Due Process Protocol, because they show how arbitration in the US works in practice and what practical steps have been taken to counter the impression that arbitration is a process generally antithetical to the interests of employees. We draw particular attention to these features of the various rules and Due Process Protocol that seek to ensure:

6.1. a lack of bias and neutrality in any arbitration;

6.2. that employment disputes are dealt with by arbitrators with sufficient training and experience in the relevant law (and where appropriate sector experience);

6.3. that the arbitration proceeds expeditiously;

6.4. that costs are apportioned fairly, including fees and legal expenses, bearing in mind that in many cases the resources of employees will be much less than those of employers.

Survey extended to Singapore, South Africa, India and Canada

7. We investigated these jurisdictions using broadly the same questions as in our survey last year. The results were broadly in line with the trends identified in our first paper. Rather than set out our findings in full, we make the following observations that seem to us to be of relevance to any development of employment arbitration in the UK.

8. Consistent with the trend that we identified in our previous paper, in Canada, India and South Africa we observed a marked distinction in the availability and/or use of arbitration depending on the relative bargaining position of the worker/employee vs that of the employer:

8.1. In Canada, there is a sharp dichotomy between unionised and non-unionised workforces in Canada in relation to how widespread is the use of arbitration for resolving employment disputes. In all states, arbitration is the norm in unionised workplaces, which are governed by collective agreements. By contrast, in non-unionised workplaces, arbitration is very rare in Canada, though is increasing somewhat, for example, in professional services.

8.2. In India, there is a clear distinction between "*employees*" who occupy managerial positions and those who do not: "*workmen*". Employees can bring claims in the civil courts or arbitrate them. Arbitration is not common but is increasing. In the case of workmen, their rights are protected by statute and disputes are assigned to specialised labour courts. In principle

arbitration is possible, but the rules of the arbitration are proscribed by statute and would be effectively the same as in the labour court.

8.3. In South Africa, any arbitration seems to be mainly confined to unionised workplaces (which in any event predominate).

9. In our view, this fits with the concern recorded in our first paper about the potential for abuse of arbitration by employers given the typical inequality of bargaining position between employers and employees, particularly non-managerial or less skilled employees. It is therefore essential to wider acceptance of employment arbitration in the UK that this perception is addressed. Our comments on how this has been done in the US below are hopefully of value.

10. We noticed a trend in the preference for arbitrators with specialist knowledge (something picked up in the Due Process Protocol discussed below):

10.1. In Canada, we were informed that there are no institutional arbitrations as such. The default position is that parties choose their own arbitrator and set their own rules. However, mature companies with long-standing relations with unions will often have a list of appropriate arbitrators in their collective agreements. These arbitrators tend to be well respected, very knowledgeable and with relevant sector expertise.

10.2. In India, we were informed that one of the perceived disadvantages of arbitration is the lack of experienced and specialized arbitrators.

10.3. The position in South Africa is that arbitrations are conducted on a sector specific basis in the mainly unionised workplaces. We infer from this that the arbitrators are likely to be very experienced in dealing with disputes in their particular sector.

CNAT, France

11. We referred to this in our first paper and said that we would follow up on its development. The CNAT is up and running, although it has only dealt with one

case so far. Nevertheless, the Centre has generated interest (at least amongst lawyers) and there are about 70 members to date. Full details are given in the two notes in the appendices. There have also been some relevant relative pro-arbitration legislative developments in France, explained in the note from Richard Ryde.

US Employment Arbitration: Fairness, Bias and Neutrality

12. As we noted in our first report (para.11), the prevailing trend worldwide is against arbitration of employment disputes. In paragraph 12 we said:

> "*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. Our further work has not changed that preliminary view. Ideas of fairness, bias and neutrality are all bound up in this conclusion. There are two key aspects to this. The first is external, in relation to the perception by putative parties, lawyers and even legislators of the fairness of the process as a whole. There is likely to be a strong perception that the whole process favours employers: For example, by the mere fact that invariably pre-dispute agreements are not freely negotiated or from the perception of repeat player advantage by employers using the same arbitral panel repeatedly. The second can be characterised as internal: How can any arbitration process be organised to ensure that it is operated neutrally and without bias for one side of the other? A failure to safeguard against bias within the process risks frustrating the effectiveness of individual arbitrations, for example, by the tactical use of apparent bias allegations to frustrate the progress of an arbitration, as is increasingly common in international commercial arbitration. It also adds to the overall perception that the process as a whole is unfair and that unfairness is typically viewed as telling against employees.

14. Employment arbitration in the US is highly developed, yet even there the picture is a complex one. It is instructive to consider in some detail the various arguments for and against arbitration that are and have been in play.

Case law background

15. Arbitration has been used in employment disputes in the US for over a hundred years, but until relatively recently it was only in the context of employees who were represented by a union. This was in large part because section 1 of the Federal Arbitration Act 1925 ("the FAA" – see below) had been understood to mean that the FAA did not apply to employment contracts.

16. However, arbitration of employment claims and, in particular, statutory claims, received a huge boost from two Supreme Court decisions.

17. *Gilmer v Interstate/Johnson Lane Corp* 500 U.S. 20 (1991) concerned the claim of Mr Gilmer for age discrimination[3] arising out the termination of his employment as a financial services manager. Mr Gilmer brought his claim first with the Equal Employment Opportunity Commission ("EEOC**"**) (which is typically a required precursor to a legal claim) and then in the US District Court in North Carolina. His former employer argued that the court should not deal with his claim and moved to compel Mr Gilmer to arbitrate his claim under the arbitration agreement contained in his registration as a securities representative with a number of stock exchanges including the New York Stock Exchange.

18. The case was appealed to the Supreme Court, which held by majority that Mr Gilmer could indeed be compelled to arbitrate his statutory claim of age discrimination. The Supreme Court ruled that an arbitration agreement is the selection of an alternative, equivalent forum for the hearing of a dispute.

19. Mr Gilmer put forward a number of arguments, all of which were rejected by the majority, including an assertion that arbitration would not further the purpose of legislation against discrimination. A central theme of his arguments was that by forcing him to arbitrate he would in effect be denied a fair hearing. The Supreme Court pointed to several reasons why this was not the case, of which

[3] Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq.

the following are noteworthy: (i) the freedom of the parties to retain competent, conscientious and impartial arbitrators; (ii) protections in the NYSE arbitration rules which applied to the case; and, (iii) the rule under the FAA that a court may vacate an arbitration award "*where there was evident partiality or corruption in the arbitrators*" (s. 10(a)(2)).

20. Note that s.1 of the FAA expressly excludes from its scope certain employment contracts. However, the Supreme Court in *Gilmer* did not have to rule on the scope or effect of this exclusion because the arbitration agreement was not contained in Mr Gilmer's contract of employment.

21. The Supreme Court tackled the scope of the exclusion in s.1 FAA in *Circuit City Stores, Inc. v Adams* 532 U.S 105 (2001). Saint Clair Adams ("Adams") was employed by Circuit City Stores and entered into an arbitration agreement that was part of the employment contract. Subsequently, Adams brought a claim against Circuit City Stores alleging, inter alia, discrimination contrary to the California Fair Employment and Housing Act, Cal. Govt. Code Ann. 12900, et seq.

22. Section 1 FAA provides that:

> *"Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."*

23. It was argued on behalf of Adams, that this exclusion should be widely construed based on the legislative history, to cover all contracts of employment and, hence, Adams should not be compelled to arbitrate the discrimination dispute. The Supreme Court by majority disagreed. The exception was to be narrowly construed.

24. Hence, the cumulative impact of the *Gilmer* and *Circuit City* decisions is that arbitration agreements governing employment and statutory employment related claims can be subject to compulsory arbitration, even where the agreement is contained in the contract of employment. Limited exceptions remain for employment contracts in particular sectors (see s.1 FAA) and

possibly in relation to collective bargaining disputes[4]. Otherwise, to avoid being compelled to arbitrate, an employee bears the heavy burden of showing that in his or her particular case, the arbitration agreement is so one-sided that there is a real prospect that any arbitration will not provide a fair hearing.

25. Further, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), the Supreme Court decided to enforce a union contract which required that all age discrimination claims be decided through arbitration.

26. Although this appears to be the current position in the USA, that is not the end of the story as explained below.

Reaction against arbitration of employment claims

27. The *Gilmer* and *Circuit City* decisions have been deeply unpopular in some quarters. There is a wealth of academic comment and several vocal critics of the way in which arbitration of employment claims is developing in the US, in particular in relation to statutory employment (and class action) claims. Concerns, which apply most forcefully to (a) claims of discrimination and harassment and (b) pre-dispute mandatory arbitration, include:

    27.1. unconscionability of pre-dispute mandatory arbitration ("take it or leave it" approach to employment);

    27.2. in the case of pre-dispute mandatory arbitration, the risk that employees fail to read/understand the terms of their employment agreements;

    27.3. the coupling of arbitration clauses with class-action waivers (i.e. clauses that prohibit employees from pursuing their claims as part of a class action);

    27.4. the risk of biased arbitrators (including because arbitration organisations are incentivised to ensure companies are satisfied with the arbitration services);

    27.5. the risk of arbitrators without sufficient expertise or experience;

[4] "*Arbitration In The Collective Bargaining Context After Circuit City Stores, Inc. V. Adams*", Quinn, J.L., ABA Labor And Employment Law Section Annual Meeting, 6 Aug 2001

27.6. limited discovery (including cases which often depend on extensive discovery, such as discrimination);

27.7. private vs pubic nature of arbitration vs litigation, which could discourage voluntary compliance by entities covered by the legislation and erode constitutional protections, public scrutiny and accountability of both process and outcome;

27.8. erosion of the precedential value of litigation, damage to development of law, and reducing exposure of judicial opinion to public scrutiny;

27.9. insufficient damages (including consideration that decisions in the public record can ensure remedies that are appropriate);

27.10. the risk that it will negatively impact employees' awareness of workplace rights (in particular in keeping discussion of discriminatory practices hidden from other workers, who might be experiencing the same thing);

27.11. the risk of "repeat player" advantage for employers;

27.12. constrictive procedural rules imposed by some arbitration agreements (for example, altering the burden of proof, limiting amount of time for presentation of case);

27.13. fees, in particular risk of it being prohibitive to pursue claims, and costs consequences of losing.

28. The overarching concern about mandatory arbitration provisions is that these enable corporates to take advantage of individuals who will often be relatively less powerful and less able to fund the costs associated with a legal dispute.

29. The EEOC has taken a strong position against pre-dispute mandatory arbitration and has issued policy guidance outlining its stance[5]. Part of the EEOC's argument is that federal civil rights laws are of national importance and that the federal government is uniquely responsible for interpreting, administering and enforcing federal employment anti-discrimination laws

[5] https://www.eeoc.gov/policy/docs/mandarb.html

through the courts[6]. There is clearly a risk that in allowing parties (and in particular, employers) to pursue private justice outside the jurisdiction of the courts the benefits of 'public justice' will be lost.

30. The Civil Rights Act 1991 gives employees the right to a jury trial in certain types of claim. This right is considered important because juries are generally thought to be more sympathetic than judges (and indeed their awards are often more generous, though those awards may subsequently be revised downwards by judges).

31. Section 118 of the Civil Rights Act provides that:

> *"Where appropriate and to the extent authorised by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provision of Federal law amended by this title."*

32. The interpretive memorandum on the Civil Rights Act stated that the encouragement of ADR (including arbitration) "*is intended to supplement, not supplant, remedies provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available*".[7] However, it was held in *Rosenberg v Merrill Lynch, Pierce, Fenner & Smith, Inc.* that a valid pre-dispute arbitration agreement (i.e. one that was entered into knowingly and voluntarily) will trump the right to a jury trial.[8]

33. An agreement to arbitrate is arguably not entered into knowingly and voluntarily where it is contained in an employment agreement or handbook which the individual was not in a position to negotiate, or where it was not drawn to the employee's attention (as was the case in *Rosenberg v Merrill Lynch, Pierce, Fenner & Smith, Inc.*). In such a case, the individual may be able to insist on a jury trial.

34. In practice, the extent of the EEOC's concerns on this issue might be somewhat overplayed – a study carried out by Orrick, Herrington & Sutcliffe

[6] Although note that the Supreme Court in *Gilmer* was unconvinced by the argument.
[7] Interpretative Memorandum on the Civil Rights Act 1991, 137 Congressional Record H9530
[8] 170 F.3d 1, 75 Emp. Prac. Dec. P 45,823, 22 Emp. Benefits Cas. 2980 (1999)

LLP[9] points out that of the 3,000 discrimination cases filed in the NY Federal Court between 1997 and 2001, only 125 cases (3.8%) were tried to conclusion, 115 of those by juries. Therefore, it may be that the extent to which arbitration results, in practice, to an individual losing their 'day in court' is lesser than sometimes stated, given employees apparently often forego the right to have their case heard by a jury for reasons not associated with arbitration. Furthermore, as explained below, arbitration under the AAA Rules is not wholly private in that copies of the award are publicly available (for a fee), albeit the names of the parties are removed unless they consent.

35. Several of the concerns and arguments above would appear to apply to arbitration of statutory employment claims in the UK. We discuss the extent to which these concerns are ameliorated by the Due Process Protocol below. Interestingly, one solution which the critics of pre-dispute mandatory arbitration of employment claims in the US have put forward is the creation of a legislatively sanctioned arbitrating body.

Relevance of US consumer dispute arbitration

36. It is also instructive to consider the approach to arbitration of consumer disputes in the US. Here, as in employment disputes, the FAA has in recent years been a key tool in opening up the freedom of parties to resolve consumer disputes by arbitration.

37. Many of the arguments against arbitration being an appropriate means of resolving employment disputes are grounded in concerns that might equally apply to arbitration in the consumer context – namely, that arbitral procedures risk individuals being at a disadvantage relative to their corporate counterparts. When considering how a regime of employment arbitration could negate such concerns, there may, therefore, be lessons to be learned from the world of consumer arbitration.

[9] American Arbitration Association Handbook on Employment Arbitration and ADR third edition, pages 3-5

38. For some time the FAA was thought of purely as a means of resolving commercial and maritime disputes.[10] However, in the last couple of decades, the Supreme Court has reinterpreted the FAA to apply to a much broader range of disputes, including statutory disputes, brought in both federal and state courts.

39. The Supreme Court has repeatedly struck down state laws which attempted to protect consumers by restricting the use of arbitration, holding that the FAA (a federal law) takes precedence over state laws which conflict with it[11].

40. In the wake of these cases, the use of mandatory arbitration clauses has become widespread in the consumer context. In recent years there has been a particular focus on bank account and credit card contracts including such clauses, but other companies which impose mandatory arbitration clauses include Amazon, Netflix, eBay, Comcast, Google Fiber and Niantic (makers of Pokemon Go).[12]

41. Certain large corporates, however, have moved away from mandatory arbitration clauses, often in response to public disapproval, e.g. General Mills[13] and Facebook.

42. Indeed, there are substantial movements in the US judiciary and political arenas to limit the use of arbitration in the consumer context. In particular, several of the Supreme Court justices strongly oppose the decisions regarding consumer arbitration and the decisions are often taken by a narrow majority.[14] For example, in *DirecTV Inc v Imburgia* Justice Thomas said he did not think

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[10] https://www.thenation.com/article/how-consumers-are-getting-screwed-court-enforced-arbitration/ ; http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0

[11] E.g. *Allied-Bruce Terminix Coso v Dobson* 513 U.S. 265 (1995); *AT&T Mobility v Concepcion* 563 U.S. 333 (2011); *DirecTV Inc v Imburgia* 577 U.S. (2015)

[12] https://consumerist.com/2016/07/14/pokemon-go-strips-users-of-their-legal-rights-heres-how-to-opt-out/; http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0; http://arstechnica.com/tech-policy/2016/06/like-comcast-google-fiber-now-forces-customers-into-arbitration/

[13] Food manufacturer General Mills amended the terms on its website so that consumers who received any 'benefit' from the company (including downloading coupons from its Facebook page) were subject to mandatory arbitration, although it later abandoned this policy due to the public outcry: http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html?_r=0; http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html?_r=0.

[14] 5:4 in *14 Penn Plaza LLC v Pyett* and *AT&T Mobility v Concepcion* and 6:3 in *DirecTV Inc v Imburgia*

that the FAA applied to proceedings in state courts, while Justice Ginsburg (with whom Justice Sotomayor agreed) said 'Acknowledging the precedent so far set by the Court, I would take no further step to disarm consumers, leaving them without effective access to justice'.

43. Judges in California have repeatedly tried to protect consumers – see for example *Discover Bank v Superior Court* (which was overruled by *AT&T Mobility LLC v Concepcion* discussed above). As recently as August 2016, the 9th Circuit held in *Morris v Ernst & Young LLP* that a mandatory arbitration agreement which precluded class actions was invalid because an employee's right to bring a 'concerted legal claim' regarding wages, hours, and the terms and conditions of employment is a 'substantive right' under Sections 7 and 8 of the National Labor Relations Act which cannot be waived. Ernst & Young LLP is appealing this decision.[15]

44. In May 2016 the Consumer Financial Protection Bureau proposed blocking companies from forcing customers to take disputes to arbitration instead of joining group lawsuits.[16]

Attempts at legislative reform in relation to arbitration

45. Several laws have also been proposed in Congress to try to protect consumers and employees. An Arbitration Fairness bill was introduced first in 2007, then in 2011 and again in 2013 which would ban the enforcement of mandatory arbitration clauses between corporations and consumers or non-union employees.[17] However, none of these bills has been enacted.

46. The most recent abortive attempt to limit the effects of *Gilmer* and *Circuit City* decisions was in 2015. In April 2015, Senator Al Franken and Representative Hank Johnson (both Democrats) introduced the Arbitration Fairness Act of 2015 in the 114th Congress, which met from 6 January 2015 to 3 January 2017. The bill would have amended s.1 FAA, by invalidating pre-dispute

[15] http://www.natlawreview.com/article/ninth-circuit-strikes-down-class-action-waivers-employment-arbitration-agreements; http://www.scotusblog.com/case-files/cases/ernst-young-llp-v-morris/

[16] http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/ ; http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[17] https://www.congress.gov/bill/113th-congress/senate-bill/878

agreements requiring arbitration of employment, consumer, antitrust, or civil rights disputes. Under the proposed legislation, agreements to arbitrate such disputes could only be made after a dispute had arisen. However, the proposed legislation was not enacted and it was cleared from the books at the end of the 114th Congress. It is assumed that it is unlikely any new bill has any realistic chance of becoming law in the near future given the present disposition of Congress.

Limiting the impact of arbitration by US courts

47. The US courts have made various rulings seeking to protect those who are in a weaker position relative to a respondent employer. The particular issues considered appear to be reflected in the Due Process Protocol (discussed below) and provide some guidelines to assess whether arbitration provisions in an employment context should be enforced. In particular:

47.1. the employee's consent must be voluntary and informed;[18]

47.2. decision makers must be neutral;[19]

47.3. the process must allow for all remedies which would be available under statute (including legal fees);[20]

47.4. arbitration fees and costs must not be such that they effectively deny access to the arbitral forum;[21] and

47.5. there should be some limited review of a final and binding arbitration award.[22]

47.6. It is also broadly accepted that the employee must have access to relevant information and a right to representation.[23]

[18] See e.g. *Alexander v Gardner-Denver Co* 415 US 36 (1974); *Rosenberg v Merrill Lynch, Pierce, Fenner & Smith, Inc.* 170 F.3d 1, 75 Emp. Prac. Dec. P 45,823, 22 Emp. Benefits Cas. 2980 (1999); *Retentia v Prudential Ins. Co. of America* 113 F.3d 1104, 1105-06 (9th Cir. 1997)
[19] *Cheng-Canindin v Renaissance Hotel Associates* 57 Cal. Rptr.2d 867 (Cal. Ct. App. 1996)
[20] See e.g. *Stirlen v Supercuts Inc* 60 Cal. Rptr. 2d 967 (Cal. Ct. App. 1997); *Armendariz v Foundation Health Psychcare Services Inc*. 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Cal. Rptr. 2d 745 (2000)
[21] 43 F.3d 1244 (9th Cir. (1994); *Green Tree Financial Corp-Ala. v. Randolph* 531 U.S. 79 (2000); *Cole v Burns International Security Services* 105 F.3D 1465 (D.C. Cir. 1997)
[22] Uniform Arbitration Act 2000; Federal Arbitration Act 1925

Another solution

48. Some large US employers (e.g. Texaco and TRW Inc) have workplace ADR systems with mandatory arbitration procedures which are binding on the employer but not the employee. These are intended to create a situation whereby both parties can enjoy the potential advantages of arbitration (e.g. reduced costs, faster decisions and confidentiality) but without the risk that employees are forced into arbitration against their wishes.

Due Process Protocol

49. Following the *Gilmer* decision, the Protocol was developed in 1995 by a special task force composed of individuals representing management, labour, employment, civil rights organizations, private administrative agencies, government, and the AAA. Its purpose is expressly to address the issue of fairness and the perception of the same in relation to employment arbitration.

50. The AAA Rules are informed by the Protocol: see brief survey of the Rules in relevant appendix.

51. It is noteworthy that the Protocol has been widely approved, see p.9 of the Rules:

> "*The Due Process Protocol has been endorsed by organizations representing a broad range of constituencies. They include the American Arbitration Association, the American Bar Association Labor and Employment Section, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the National Society of Professionals in Dispute Resolution. The National Employment Lawyers Association has endorsed the substantive provisions of the Due Process Protocol.*
>
> *It has been incorporated into the Report of the United States Secretary of Labor's Task Force in Excellence in State and Local Government and cited with approval in numerous court opinions*."

52. The Protocol repays reading in full, but the following parts are of note:

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[23] American Arbitration Association National Rules for the Resolution of Employment Disputes. According to the American Arbitration Association Handbook on Employment Arbitration and ADR third edition, there does not appear to be a case where the employer denied employees the right to representation or access to information.

52.1. The Task Force recognised the difficulty inherent in the timing of an agreement to arbitrate statutory disputes and was unable to reach a consensus in the Protocol. Pre-dispute agreements in particular are likely to be seen by employees as resulting from an inequality of bargaining power. In the absence of a consensus, the Protocol records the various positions of the contributors.

52.2. The selection of impartial arbitrators is recommended in contrast to having a panel with 'employee' and 'employer' sympathetic arbitrators. Further, the Protocol emphasises the importance of special training for such impartial arbitrators to ensure they possess the requisite knowledge of the statutory environment in which employment disputes arise and of the characteristics of the non-union workplace.

52.3. Conflicts of interest are to be dealt with as follows: "*The … arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The designated … arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or pre-existing ties*." Note that this appears to be reflected in rules 16 and 25 of the Rules.

52.4. In relation to the choice of representation, the Protocol suggests that: "*The mediation and arbitration procedure … should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc*." In fact that does not appear to have been implemented in the Rules, but it seems a very practical suggestion for employees who may have limited resources.

52.5. In relation to fees, the Protocol recommends that impartiality is best assured by the parties sharing the fees and expenses of the arbitrator. It also suggests the possibility of an arrangement whereby the body that under which the arbitration takes place could collect the fees from the parties and not disclose to the arbitrator who had paid what.

52.6. In relation to legal costs, the Protocol makes the following recommendation: "*We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.*" This is reflected in the Rules.

Concluding remarks

53. At first sight, the US position might be thought to be of limited application to the UK for several reasons:

53.1. There appears to be no specialised tribunal system in the US which has exclusive jurisdiction for discrimination and other statutory employment claims. On the contrary, the US court system often involves jury trials in the ordinary courts of employment (including statutory) claims;

53.2. It has been argued that the interest in arbitrating employment disputes in the US is driven not by the attractiveness of arbitration as means of dispute resolution, but by frustration with the cost and delay of court proceedings: see: "*Access vs process in employment discrimination: why ADR suits the US but not the UK*", Baker A., I.L.J. 2002, 31(2), 113-134;

53.3. The Supreme Court has interpreted the FAA in a way that strongly endorses arbitration even of statutory employment disputes. Contrast that with the UK position: see s.203 Employment Rights Act 2006[24] and, for example, by way of analogy *Johnson v Unisys Ltd* [2001] ICR 480 (HL), where the majority of the House of Lords held against extending the scope of the implied term of trust and confidence on the basis that an entire statutory scheme had been created to remedy the complaint of Mr Johnson. That kind of thinking is unlikely to make the Supreme Court in

[24] Although this does not preclude the possibility of arbitration of statutory employment disputes, it might be thought to be a clear indication of the attitude of legislators to any dispute resolution process outwith the employment tribunal.

the UK as enthusiastic about arbitration of statutory employment disputes as the US Supreme Court has been;

53.4. There is a marked contrast between the jurisdictions in relation to class actions, which are much more prevalent in the US than in the UK: see para.38 of our first report. One of the biggest perceived advantages of arbitration given by Respondents in answer to our survey was the ability in the US to get class action waivers and avoid class action claims. This is an issue which is now on the Supreme Court's docket.

54. However, despite these differences, it is plain that since there is much greater prevalence of employment dispute arbitration in the US, there are lessons to be learned from the US process. In this context, the court rulings, legislative attempts to curtail the scope of employment arbitration and the contents of the Due Process Protocol as discussed above (and thus the Rules) are informative for the development of UK employment arbitration.

17 March 2017

Appendices

(1) Summary of Financial Industry Regulatory Authority (FINRA) Arbitration Scheme for Industry

(2) Brief Survey of the AAA Rules

(3) Update on CNAT and Singapore

(4) Update note on CNAT from Richard Ryde

(5) AAA Employment Arbitration Rules and Mediation Procedures

(6) AAA Employment Due Process Protocol

(7) PLC AAA Employment Arbitration Flowchart (AAA Employment Arbitration Rules)

(8) PLC flowchart on FINRA arbitration