

INSIDE ARBITRATION: THE ROLE OF ARBITRATION IN EMPLOYMENT-RELATED DISPUTES

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Legal Briefings

PRACTICAL USES AND LIMITATIONS

In this article, Paul Goulding QC of Blackstone Chambers, Peter Frost, London and Barbara Roth, New York, Partners in Herbert Smith Freehills' contentious Employment practice, and Hannah Ambrose, Senior Associate in the Global Arbitration practice, explore the growing appetite to resolve employment-related disputes by arbitration, focusing on some recent examples. They also focus on the policy considerations which mean that arbitration may not be suitable in circumstances where there is no true consent between the parties.

The UK Employment Lawyers Association (the **UK ELA**) published its Report on Arbitration and Employment Disputes in November 2017, following over two years of research considering use of arbitration in the context of employment across the globe, conducted by ELA's Arbitration and ADR Group. The Report concluded that arbitration clauses are increasingly found in partnership and LLP agreements, deferred remuneration scheme rules and contracts of employment. As identified in the Report, there are a number of key reasons why arbitration may be particularly suited to resolution of employment-related disputes. However, in certain circumstances arbitration may not be desirable, particularly when used as part of a mandatory process.

PRIVATE DISPUTE RESOLUTION IN EMPLOYMENT-CONTEXT

One of the features of arbitration is that the process is usually private and often confidential. Whilst there are circumstances in which the details of an arbitration may become public (for example, if the arbitral award is challenged or enforced before national courts), arbitration hearings are held in private and there is no public access to the file.

In some circumstances, the confidential nature of arbitration raises legitimate concerns about its suitability as an alternative to litigation for resolution of employment-related disputes. In particular, public policy considerations may arise when employees are compelled to enter into employment contracts, non-disclosure agreements and settlement agreements which purport to bind them to confidential settlement of disputes. This issue has been the subject of much discussion in the US in particular. Mandatory arbitration clauses are prima facie enforceable under the Federal Arbitration Act (**FAA**), with the US Supreme Court finding in *Gilmer v Interstate/Johnson Lane Corp.* in 1991 that the Age Discrimination in Employment Act did not preclude arbitration of age discrimination claims and confirming in *Circuit City Stores, Inc. v. Adams* in 2001 that the FAA covers all contracts of employment. More recently in May 2018, by a 5-4 majority, the US Supreme Court decided in *Epiq Systems Corp. v Lewis* that arbitration agreements containing class and collective action waivers of wage and hour disputes were enforceable under the FAA. It is possible that the reasoning of the court would also apply to other types of claim.

"... the confidential nature of arbitration raises legitimate concerns about its suitability as an alternative to litigation ..."

Recognising, however, that the effective "silencing" of claims for, for example, discrimination and harassment, may contribute to a negative workplace culture and potentially enable the perpetuation of such conduct, many US states are introducing laws to restrict the use of mandatory employment arbitration, unless agreed after a dispute has arisen. Similar laws exist across Europe and these restrictions are discussed further below. Many companies are also reflecting on their employment policies and considering whether mandatory arbitration clauses should be removed, or their scope limited. Google, Microsoft and Uber are amongst the companies which have reconsidered their policies in recent years.

However, there are employment-related disputes in which confidentiality may be in the interest of both parties. For example, it may be damaging to enforce a restrictive covenant concerning the use of confidential information in a public forum - the litigation may increase the risk of losing the confidentiality in the information, raise questions as to whether the business or the ex-employee can be trusted by customers or business partners with confidential information, or advertise the fact that the business and ex-employee have parted company on bad terms. More specifically, some contracts of employment are high-profile and resolution of any dispute would attract significant media interest, which may be unwanted by one or both sides. An obvious example is contracts involving sports personalities, particularly players and managers on the one hand and sports clubs on the other (with many of these disputes being referred to arbitration under the auspices of the Court of Arbitration for Sport, or other specialist tribunals). High-profile employment-related disputes clearly exist beyond the world of celebrity and sport. In particular, financial institutions and corporates may find that disputes concerning the exit of senior executives, intra-board conflicts, and

disagreements between the directors and shareholders are matters of interest to the business and mainstream media, even though the parties (or some of them) consider their dispute is best resolved without public scrutiny. Employees, particularly those working in the regulated sector, and other senior executives or partners in firms, may not want to litigate in public, particularly where allegations of misconduct or incompetence form part of the employer's case. Indeed, resolution of a matter in a private hearing may serve to protect both individual and corporate reputations.

"... a key principle of arbitration is party autonomy"

The private nature of hearings and largely confidential nature of arbitral awards might even, in many cases, positively influence the substantive outcome. For instance, witnesses may be more comfortable in private proceedings than they would be in open court proceedings and may therefore give evidence with a greater degree of clarity.

However, one key issue for parties wishing to use arbitration to ensure that the nature and purpose of their relationship and any related information passing between them remains confidential, is ensuring that a threatened breach of confidentiality can be quickly and effectively prevented. Whilst an arbitral tribunal usually has the power to grant urgent interim relief, including to prevent the use or disclosure of confidential information, the coercive powers of the tribunal in relation to any interim order may be limited. The most effective remedy may therefore be granted by a court. The court of the seat of arbitration is usually the first port of call in respect of interim relief and therefore the speed with which a party may be able to get an effective remedy and the scope and any restrictions on the court's powers to grant interim relief are relevant. Potential restrictions on access to the court for the purpose of seeking interim injunctive relief may be found in international institutional arbitration rules – if so, this should be addressed when the arbitration clause or agreement is drafted. It is not unusual for an agreement to explicitly specify that the parties agree that a particular court has the authority to issue injunctive relief.

PARTY AUTONOMY AND GETTING THE RIGHT DISPUTE RESOLUTION PROCESS

Other features of the arbitral process can be an advantage in employment claims – for example, a key principle of arbitration is party autonomy. The parties can thus influence the procedure to craft an efficient and effective way of resolving their specific dispute, without being bound by the often rigid civil procedure rules of national courts. They can, in many cases, also appoint arbitrators with industry knowledge or experience, which makes them better suited to understand and decide the case.

As employment-related contracts are regularly entered into with individuals, the potential to craft a suitable process can lead to the dispute resolution provisions being more heavily negotiated, particularly as the potential claims on each side are often different in scale. Unlike a state court system, parties to arbitration must pay for all expenses (eg hearing of their dispute and the tribunal's remuneration). In many jurisdictions, an arbitral tribunal allocates these costs between the parties after it determines the dispute, generally following the principle that costs follow the event (ie, the loser pays the winner's costs) except where it appears that this is not appropriate. Nevertheless, the costs involved are undoubtedly a consideration for parties, particularly individuals, and cost drivers can influence the type of dispute resolution process that the parties are willing to accept. For example, take a situation in which an employee leaves employment subject to restrictive covenants, and for the purposes of continuity of service delivery by the employer to third parties, enters into short-term consultancy agreement under which he or she continues to perform tasks related to the previous employment. In this scenario, if the restrictive covenants are breached, the ex-employer may have a substantial claim for damages and may consider that the expense of an arbitration before a three-member tribunal is justified. The ex-employee, however, anticipates that he or she will need to enforce the payment obligations under the consultancy agreement quickly and cost-effectively. The arbitration process proposed may not be acceptable. Careful drafting will be needed to marry these two imperatives, potentially with certain types of disputes carved out of the arbitration clause but taking into account how different claims and counter-claims may be interrelated. Alternatively, the parties can agree other ways to reduce the potential costs of an arbitration (for example, by using a sole arbitrator or by increased use of technology to minimise in-person hearing time).

CASE STUDY 1: CONFIDENTIAL CONSULTANCY AGREEMENT

Consultancy agreements may be relevant in a myriad of different scenarios. In a recent example, a client engaged a consultant in the highly confidential context of exploring business prospects in a new market in order to achieve certain due diligence objectives on potential business partners. Arbitration was used in the consultancy agreement and accompanying non-disclosure agreement (**NDA**) in part to ensure that any disputes between the consultant and the client could be resolved in as confidential a manner as possible, consistent with the need to keep the purpose of the consultancy agreement confidential.

A secondary objective was to ensure that the consultancy agreement and NDA could be effectively enforced against the company through which the individual consultant supplied his services. Consultancy agreements are regularly made with a company established by the individual consultant, often in a tax-advantageous jurisdiction. Whilst the party engaging the consultant may be familiar with a certain court system in the broader context of their business (for example, the English court or New York court), there may not be a clear and certain route to enforcement of a judgment of that court in the jurisdiction in which the consultant is based or their company is incorporated. It is likely, however, that an arbitral award could be enforced using the New York Convention 1958.

Additional considerations in these kinds of scenarios are: (i) the appropriate seat of arbitration (and any restrictions on the choice of seat which may affect enforcement of the arbitration agreement or any award); and (ii) the powers of the tribunal and the court of the seat to grant interim relief, in particular to preserve confidentiality during the arbitration proceedings or to provide injunctive relief to maintain the status quo and prevent irreparable harm prior to the arbitration proceeding.

INSTITUTIONAL ARBITRATION

There are a number of general domestic and international institutions which may be suitable to administer employment-related disputes. Arbitral institutions can assist with communications between the parties and the arbitrator(s), selection and/or appointment of the tribunal, fundholding, and scrutiny of the award.

Some arbitration institutions offer specific rules for employment disputes. The American Arbitration Association which has developed the Employment Arbitration Rules and Mediation Procedures and the International Institute for Conflict Prevention and Resolution has an Employment Dispute Arbitration Procedure. The UK ELA's Report of November 2017 notes that a similar rise in the interest in, and use of, arbitration to resolve employment-related disputes across Europe led to the development of the European Employment Lawyers Association (**EELA**) arbitration scheme, including EELA's bespoke arbitration rules, a model arbitration clause and a submission agreement under which existing disputes can be resolved by arbitration. Further, sector-specific arbitral bodies also offer services in the context of employment-related arbitration. In the US securities industry, for example, the majority of all employment disputes between broker-dealers and their employees are resolved through arbitration administered by the Financial Industry Regulatory Authority (**FINRA**); however, discrimination cases are heard by FINRA only where both parties expressly agree. Because of limitations on discovery available to parties before FINRA as well as the absence of a meaningful appeal from an arbitral decision, many parties do not file, or agree to, proceed with, discrimination disputes before FINRA.

Bespoke employment arbitration rules may offer an appropriate process, including addressing the concerns discussed above. However, this should not be assumed. Employers and employees alike need to scrutinise the rules of an institution to ensure that they are suitable for the disputes in contemplation. The rules should provide a fair and cost-efficient process and both parties should be wary of rules unduly limiting scope of disclosure, restricting a party's ability to insist on an oral hearing, or providing procedures which may not give the parties an opportunity to test the evidence. Further, if an institution will appoint an arbitrator, it is important that the pool from which it chooses contains individuals who are independent and impartial, appropriately qualified, and culturally diverse. If the institution's appointments do not satisfy these criteria, questions about the quality of justice are inevitable. Such questions attain particular significance if arbitration is mandatory.

While some FINRA arbitrators are highly qualified, a significant number of the randomly proposed panels of arbitrator candidates have limited or no experience with either the law or with the securities industry and therefore are unlikely to provide the level of expertise parties should want when reaching conclusions about their claims. In addition, FINRA procedure requires only limited disclosure between the parties and does not generally permit the filing of dispositive motions – something that, in court, can eliminate the need for trial of a party's claims.

CASE STUDY 2: GLOBAL ENFORCEMENT OF A SETTLEMENT AGREEMENT

In a recent example, a client entered into a settlement agreement on termination of an employment contract. Given the international nature of the client's business, the ex-employee was likely to move on to engagements across the world and there was therefore a potential for breach of the restrictive covenants in the settlement agreement in a number of jurisdictions.

Arbitration was a suitable method of dispute resolution as it would enable the client to take advantage of the New York Convention and enable the client to enforce an award against the ex-employee in whatever jurisdiction he settled. However, it was also important to preserve the ability of the client to seek interim relief in both the court of the seat and the courts in which the ex-employee was engaging in breach of the restrictive covenants. This factor was relevant to the choice of both the seat and institutional arbitration rules which would apply to arbitration of any dispute under the settlement agreement. As injunctive relief is often a more desirable remedy for breach of covenant than damages, it was also important that the tribunal had the power to grant a permanent injunction in its final award if required, which award could then be enforced under the New York Convention. The English Arbitration Act 1996 provides that, unless otherwise agreed, the tribunal has the same power as the English court to order a party to do or refrain from doing anything. In other jurisdictions, the powers of the tribunal with regard to remedies are less clear but injunctive relief is generally accepted as being available.

Additional considerations in these kinds of scenarios may include: the ability to serve proceedings in support of an arbitration (including proceedings for interim relief) in different jurisdictions; consolidation of disputes under related agreements.

ENFORCEMENT

An arbitration award also offers significant benefits in terms of enforcement of the outcome of a dispute. Whilst there is no global system for reciprocal enforcement of judgments, 159 countries are party to the New York Convention on Recognition and Enforcement of Arbitral Awards 1958 (the **New York Convention**), under which state courts are obliged to recognise and enforce arbitral awards on a reciprocal basis as if the award was a judgment of the enforcing court. Enforcement considerations may be particularly relevant in employment-related contracts of an international nature.

LIMITATIONS ON HOW ARBITRATION MAY BE USED IN AN EMPLOYMENT CONTEXT

It is clear that parties that seek to have their disputes resolved by arbitration must be aware that, unlike standard commercial contracts, employment-related issues may be subject to additional requirements and therefore not all disputes arising out of an employment relationship are arbitrable. In the U.S. however, some types of disputes must be arbitrated – including claims arising out of interpretation of a collective bargaining agreement in a unionized workforce. In some other types of claims, the parties will seldom choose to arbitrate because of the limitations on discovery and the unavailability of motion practice or appeals. In addition, though arbitration originally was believed to be less costly than litigation in court, participants have found that arbitration can be as expensive as any other method of dispute resolution. In a number of jurisdictions, certain types of employment dispute are considered non-arbitrable as a matter of public policy and statutory restrictions apply to claims for, for example, harassment or discrimination.

The pitfalls of ignoring the interrelation of different types of claim are demonstrated in a recent case in the Swiss court relating to the dismissal of a football coach. The club was not able to insist on arbitration of the dispute as it included a statutory claim for wrongful dismissal which, under Swiss law, could be referred to arbitration only by separate arbitration agreement entered into after the termination of the employment contract. The Swiss approach to arbitration agreements that extend to future statutory employment claims is not unique. In the UK, whilst contractual and tortious claims arising from an employment relationship are largely arbitrable without restriction, there are constraints on contracting out of future statutory employment claims.

Inconsistency between the dispute resolution provisions in an employment contract and statutory requirements as to those dispute resolution provisions can lead to undue delay, costs and has the potential for increasing publicity regarding the claim. A court is unlikely to stay proceedings and refer a dispute to arbitration in circumstances where the arbitration clause violates mandatory statutory provisions or covers the types of employment claim which it regards as non-arbitrable.

Depending on the jurisdiction, the most practical and effective way of making sure that all claims arising from a single dispute / set of disputes – whatever their legal basis – can be resolved in the same forum and minimise the risk of parallel proceedings may be to agree to arbitration after a dispute has arisen. For example, to use arbitration effectively and ensure compliance with statutory restrictions in the UK, parties may agree to arbitrate after the dispute has arisen by entering into a settlement agreement. Providing that such settlement agreement is compliant with the statutory requirements, the arbitration clause therein (known as a submission agreement), will be enforceable in relation to all the claims that have arisen. In a situation where an employee has brought a number of claims based in both contract and statute, this can be an appealing solution for both parties who wish to resolve all their claims (sometimes in more than one jurisdiction) in a single forum. They can take advantage of the benefits of arbitrating, rather than litigating, and avoid the risk of inconsistent outcomes, inherent in cases of multiple related proceedings.

A VALUABLE OPTION FOR RESOLUTION OF DISPUTES IN EMPLOYMENT-RELATED TRANSACTIONS

Whilst arbitration will not be suitable for all employment-related transactions and may raise considerations as to whether there is true consent, bringing together expertise in both employment law and arbitration law and practice can help parties identify where alternative dispute resolution methods can be used. Arbitration can bring advantages in a wide variety of employment disputes from those concerning bonuses and deferred remuneration, to disputes about restrictive covenants and team moves, although there can also be serious limitations to consider, particularly where mandatory arbitration procedures are engaged. Parties are encouraged to consider the pros and cons of including an arbitration clause in employment-related contracts and the opportunity to submit their dispute to arbitration after it has arisen.

[More Inside Arbitration](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



PETER FROST
CONSULTANT,
LONDON
+44 20 7466 2325
Peter.Frost@hsf.com



BARBARA ROTH
PARTNER, NEW YORK
+1 917 542 7858
barbara.roth@hsf.com



HANNAH AMBROSE
SENIOR ASSOCIATE,
LONDON
+44 20 7466 7585
Hannah.Ambrose@hsf.com

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