



Arbitration of employment disputes

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There is a growing trend to submit disputes to arbitration. In view of pressures on other parts of their practice, employment lawyers should welcome this and add arbitration to their expertise. This article examines the pros and cons, and explains the basics of the arbitration agreement and process.

The increasing popularity of arbitration

Resolving employment disputes has traditionally been the domain of employment tribunals and the High Court (or county court), despite complaints about both systems. Criticisms about tribunals, rightly or wrongly, centre on lack of rigour in case management, delay in the listing of hearings and the delivery of judgments, and the general inability of a successful party to recover its legal costs. Cuts in funding – despite the introduction of fees – are only likely to make matters worse. As for the High Court, concerns are being expressed about the rigidity and intrusiveness of some of the key Jackson reforms, in particular arbitrary cost limits on the conduct of litigation and the zero tolerance ‘Mitchell’ regime, which can see relatively minor breaches in procedural timetables leading to draconian penalties.

Traditionally, arbitration has not been widely used in the UK to resolve employment disputes, unlike in the US. There is a perception that arbitration clauses are ineffective due to the inability of employees to contract out of their statutory employment rights. However, as we note below, this is by no means an insuperable obstacle. In any event, it does not explain the infrequent use of arbitration to resolve common law employment claims; the principal reason for this, we would suggest, is a simple lack of familiarity with the process. Arbitration clauses are in our experience only rarely found in employment agreements governed by English law, despite becoming standard in the partnership and LLP agreements governing many of the UK’s law firms.

Anecdotal evidence suggests that the past reluctance to arbitrate employment disputes is now on the wane. Whereas arbitration of employment disputes was virtually unheard of five

years ago, we are aware of more and more arbitrations taking place. This may also be influenced by the increasing global nature of business and the prevalence of arbitration as a means of resolving employment disputes outside Europe, particularly in the US. Some suggest the extra cost of arbitrator fees makes arbitration appropriate only for high value claims; however, the same applies to mediation and, like mediation, employers can agree to pay all or most of such fees (although note that s.60 of the Arbitration Act provides that an agreement for an employer to pay all the arbitration costs is only valid if it is made after the dispute has arisen). Once the benefits are more widely realised by practitioners, arbitration will only become more common.

However, the arguments are not all one way, and employment lawyers advising on the possible use of arbitration need to be aware of its main advantages and disadvantages.

The advantages of arbitration

Arbitration in the UK is governed by the Arbitration Act 1996, s.1 of which provides:

- ‘(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
- (c) in matters governed by this Part the court should not intervene except as provided by this Part.’

Based on these principles, arbitration in the UK has a number of advantages compared with tribunals and courts.

- **Confidentiality:** whereas tribunal and court hearings are normally in public, and court pleadings are generally accessible

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to the public, arbitration proceedings and the details of any award made are generally confidential to the parties unless they agree otherwise. Instinctively, one would assume that confidentiality would favour an employer who might not want to 'wash its dirty linen in public', but employees can also benefit from confidentiality, particularly those that may have concerns on the effect of a messy public dispute on their future career. It should be noted that where the court determines a preliminary point of law (s.45 of the 1996 Act) or an appeal on a question of law (s.69), the hearing will be in public unless the court decides otherwise (CPR 62.10), but the parties can agree to exclude such determinations altogether.

- **Efficiency:** case management is generally more efficient and flexible. The arbitrator is often copied into all inter-party communications (which serves to moderate the tone of much of it) and case management decisions can be made relatively swiftly depending on the arbitrator's diary, hearings often being conducted by telephone. The parties can also choose the venue for the hearing.
- **Party autonomy:** the parties can choose who they want to hear the case and the size of the panel (normally either a sole arbitrator or a three-person panel). They can choose the rules of 'combat'; in the case of an ad hoc arbitration pursuant to the 1996 Act this could be either specified as part of the arbitration clause or left to the arbitrator to decide. In theory the parties could select the CPR or the ET rules of procedure or simply cherry-pick the parts they think work best. Alternatively, the parties could agree to use one of the existing arbitral institutions whose pre-existing rules of procedure would apply; for example, the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC).
- **Flexibility:** an employee with claims in a number of jurisdictions and an employer potentially having to deal with multiple claims could well find it attractive to have those claims resolved in one fell swoop by arbitration.
- **Finality:** the arbitrator's decision is intended to be final and the ability to appeal is heavily circumscribed (see below).

The disadvantages of arbitration

There are also a number of disadvantages, some of which can be seen as the flipside of the advantages discussed above.

- **Lack of public scrutiny:** while confidentiality can often be advantageous to the parties, there is a corresponding lack of 'open justice', which some would see as an important

incentive to parties to comply with their respective obligations, and can also help to clarify the law.

- **Lack of jurisdiction over third parties:** the powers of an arbitrator are prescribed and the only persons who are subject to their jurisdiction are the parties to the particular arbitration. Generally, claimants cannot join other parties to the proceedings (although the LCIA rules allow a third party to be joined where that third party and one of the existing parties agree). A party may use the same procedures available in relation to legal proceedings to secure the attendance of a witness in order to give oral evidence or to produce documents or other material evidence (s.43 of the 1996 Act), but only with the permission of the arbitrator or the agreement of the other parties.
- **Interim injunctions:** while an arbitrator has power to grant a final injunction (s.48(5)(a)), it is doubtful that this provision applies to interim relief. However, in a case of urgency, a court may make such orders as it thinks fit for the purpose of preserving evidence or assets, which could include the value of a contractual right as in *Doosan Babcock* (s.44(3) of the 1996 Act).
- **Cost:** arbitration is not necessarily cheaper than proceedings in the ET or High Court. Where an institution is involved (such as the LCIA) fees will be payable, the amount of which varies, and the parties will also have to pay the fees of the arbitrator(s) – usually on an hourly rate basis. The fees of the arbitrator will normally initially be split equally between the parties.

The agreement to arbitrate

The 1996 Act only applies where the arbitration agreement is in writing (s.5). An agreement can take the form of a provision in another or a standalone agreement; it can be agreed before or after a dispute has arisen. Therefore, the starting point is to decide whether to include an arbitration clause in the employment agreement (which might be a contract of employment, a deferred remuneration scheme or another employment-related agreement). Leaving aside the issue of statutory rights, it is clearly easier to ensure that disputes are referred to arbitration if the employment agreement contains an arbitration clause.

One issue to consider is whether the party wants all related disputes referred to arbitration. Take a team move. Unless the employment agreements of all the alleged defectors contain an arbitration clause, an employer could find that it is obliged to refer its dispute with one of the defectors to arbitration while having to initiate proceedings in the High Court (or, possibly, overseas courts) against those without the arbitration clause.

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How will a party be able to predict in advance whether the particular dispute will be suitable for arbitration until it occurs? One solution is an 'optional' arbitration agreement whereby one or both of the parties has the right (but not the obligation) to refer a dispute to arbitration once it has arisen. In our experience, the fine detail of dispute resolution provisions can often escape close scrutiny when the employment agreement is being negotiated, so this is certainly worth considering when drafting such agreements.

We noted above the likelihood that an arbitration clause would fall foul of the restrictions on contracting out of UK employment protection legislation, but parties can enter into a settlement agreement compliant with the statutory requirements once a dispute has arisen, whereby they agree that the employee's statutory claims be submitted to arbitration.

The arbitral process

Arbitration is commonly started by the service of a request to arbitrate. This need only be a simple document giving basic information such as the details of the parties to the arbitration, their legal representatives (if known), a brief statement of the nature and circumstances of the dispute, specifying the claims advanced, attaching a copy of the relevant arbitration agreement, and either details of any nominated arbitrator or the qualifications and/or experience of the arbitrator required, if a third party or institution is to choose the arbitrator. The course the matter then takes will depend on the rules agreed for the arbitration.

Case management in arbitration is normally efficient. The arbitral tribunal is under a duty to adopt procedures suitable to the case, avoiding unnecessary delay or expense (s.33 of the 1996 Act). The parties are under a duty to do all things necessary for the expeditious conduct of the arbitral proceedings (s.40). Certain provisions of the 1996 Act are mandatory (Schedule 1), while others are non-mandatory, allowing the parties to reach their own agreement. It is for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter (s.34). It is common for parties to arbitration to agree case management directions, although disputed matters may be determined by the tribunal. Where a party fails to comply with any order of the tribunal, the tribunal may make a peremptory order to the same effect, which may be enforced by the court (ss.41–42).

The approach to disclosure will depend on the type of arbitration involved. For some ad hoc arbitrations under the 1996 Act, it may be that the parties choose an approach akin to the CPR. In international arbitrations the parties will usually disclose the

documents on which they rely and then applications for additional documents will be dealt with using the 'Redfern Schedules', which set out the classes of documents requested, the justification for the request, the reason for any objection to produce the documents and the arbitrator's decision. Disclosure requests are generally required to be specific and arbitration will tend to produce less documentation than litigation. Witness statements are usually exchanged, with cross-examination at the hearing. However, an arbitrator will usually keep a grip on proceedings and trials tend to be shorter in arbitration than in litigation.

Costs awards are generally at the discretion of the arbitrator but the general rule is that costs reflect the parties' relative success or failure in relation to the issues in the arbitration. Costs here comprise both the arbitration costs and party costs.

Arbitration awards are not materially harder to enforce than judgments of the High Court and, in fact, can be easier to enforce in overseas jurisdictions pursuant to the New York Convention, which has been ratified by 144 countries. Appeals against awards are comparatively rare and the grounds for doing so are severely circumscribed. For example, under the 1996 Act grounds for appeal lie only in relation to an arbitrator exceeding his jurisdiction, procedural irregularity and an error of law, and it is permissible – and common – for parties to contract out of the latter.

Conclusion

Arbitration is adaptable to all manner of employment disputes, as diverse as team moves and restrictive covenants, deferred remuneration and bonus disputes, terminations and discrimination. It is not suitable for every case, but in many situations its advantages are compelling. Parties should consider including an arbitration clause in employment contracts and other employment-related agreements and, where there is no such provision, should consider the possibility of agreeing to submit disputes to arbitration after they have arisen.

KEY:

1996 Act	The Arbitration Act 1996
<i>Doosan Babcock</i>	<i>Doosan Babcock Ltd v Commercializidora de Equipos y Materiales Mabe</i> [2013] EWHC 3010