A guide to arbitration

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What is arbitration?

In England and Wales, the courts have inherent jurisdiction to decide disputes arising under or in connection with construction contracts and other types of commercial contracts. Some contracting parties do not want their dispute decided by litigation, where there is a risk the outcome will be reported in public.

It is possible to contract out of litigation and parties can agree to resolve their disputes by arbitration.

Arbitration is a dispute resolution process that is consensual, private and confidential. Arbitration provides a binding decision ('award') on a dispute arising under or in connection with a contract.

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An arbitration agreement is one made by contracting parties who agree that existing or future disputes will be submitted to arbitration. To be effective the arbitration agreement must be in writing. The arbitration agreement can be included within the contract, or the contract can refer to another arbitration agreement in a different document. The arbitration agreement is treated as a separate contract.

If there is a valid arbitration agreement but one party refers a dispute covered by the arbitration agreement to the court, the other party may apply for a stay of those proceedings. The court will grant the stay unless it is satisfied that the arbitration agreement is void, inoperative or cannot be performed, or the party applying for the stay has taken steps in those court proceedings to answer the claim.

It is not possible for the parties to avoid court intervention entirely. If the governing law of the arbitration agreement is the law of England and Wales, then the courts have limited jurisdiction to supervise the arbitration agreement. That includes hearing challenges to points of law decided in the arbitral award, issues going to the jurisdiction of the arbitral tribunal and the enforcement of valid awards. The courts' decisions on these points may be reported in public.

These powers mostly come from the Arbitration Act 1996[1], but they sit alongside the common law rules developed by court judgments. The main purpose of the Arbitration Act 1996 is set out in section 1. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest, and the court should not intervene except as provided for in the Arbitration Act 1996.

'Part 1' of the Arbitration Act 1996 sets out the rules that apply to arbitration agreements where the seat of the arbitration is within England and Wales. It is the rules that the court has jurisdiction over.

Proposed amendments to the Arbitration Act 1996 are included in the Arbitration Act 2025, those amendments will come into force when the relevant secondary legislation is passed. The amendments include clarifying the law applicable to the arbitration (in the absence of express provision), the rules about arbitrator impartiality and immunity, the power to make awards on a summary basis and the court's jurisdiction to hear challenges to the award.

1. The Arbitration Act 1996 also applies in Northern Ireland, but this guide deals only with the law as it applies within England and Wales

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The arbitration process

The power of the arbitrator(s) to make a binding award comes from the arbitration agreement between the parties, the terms of the arbitrator's appointment and the scope of the dispute referred.

There is no mandatory, set procedure for arbitration and as such, the parties have the freedom to agree which procedural rules shall apply to their arbitration agreement, the number of arbitrators and how they will be appointed. Procedural rules are either on the basis of:

a. 'Ad hoc' arbitration whereby the procedural rules are devised between the parties themselves or the parties otherwise adopt industry model arbitration rules.

b. 'Institutional' arbitration which is administered by a specific institute such as the International Chamber of Commerce or the London Court of International Arbitration, and is conducted in accordance with the rules specific for that institution.

Other issues often agreed as part of the arbitration agreement are the seat of the arbitration (the country in which the arbitration will physically take place), and the governing law. It is possible to provide that the governing law of the arbitration agreement is different to the law of the contract to which it relates.

For a valid arbitration, there needs to be a dispute on an issue that arises under or in connection with the contract to which the arbitration agreement applies. The arbitration procedure and the determination of the dispute must be done by applying the chosen governing and procedural law.

Arbitrators are required to be impartial and independent, and to act within the scope of the dispute referred. The arbitrator cannot conclusively determine their own jurisdiction. In the event of breach, the court may decide the award unenforceable.

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How to manage a dispute under an Arbitration Agreement

Parties should check whether there is a process that must be followed to invoke arbitration or any steps to follow in advance of arbitration in the contract or agreement and, in particular, whether there is any contractual time limit in which they must bring a claim in addition to the normal limitation periods.

Usually the claimant will commence arbitration by sending a 'notice to arbitrate' to the opponent which includes a description of the issues in dispute. If arbitration is to be conducted in accordance with the rules of a particular arbitration institution, the institution's rules will often prescribe what should be included in the notice.

The arbitral tribunal will consist of one or more arbitrators. Some arbitration rules will specify the requirement, with a sole arbitrator or a tribunal of three arbitrators being common.

The tribunal is formally constituted and will set out the process and timetable the parties must follow, known as a 'procedural order'. The order will usually include deadlines to prepare points of claim, defence and reply to defence, exchange of documents and witness/ expert evidence and preparation for any hearings.

Usually one or more hearings will be listed and the tribunal will make an award following the hearing. Unless the award is successfully challenged, the parties will be bound by the award.

When does arbitration apply?

The parties must agree that disputes are to be determined by arbitration. If there is a written contract between the parties, they should check whether there is a clause which confirms arbitration applies.

If the contract does not include an arbitration clause the parties can choose to enter into an arbitration agreement, a document evidencing the parties' agreement to submit a dispute to arbitration, once a dispute has arisen.

Parties should always consider the potential benefits and risks of arbitration, which are listed on the next page, compared to litigation and other forms of alternative dispute resolution when deciding whether to select arbitration as the contractual dispute resolution method.

Pros and cons – a summary

Advantages	Disadvantages
If the parties agree that any dispute is to be decided by an arbitrator, rather than through the courts, they can appoint an arbitrator who has specific technical expertise i.e. an architect arbitrator.	An arbitrator has a 'lien' on their award, meaning they can refuse to release their decision until any outstanding fees have been paid. This means if one party does not pay, the other party may have to cover their share of the fees in order to receive the arbitrator's award, leaving the paying party with the issue of trying to recover the sums from the non-paying party.
The parties can agree which arbitration procedural rules apply so they can tailor the process to their particular dispute.	Some of the costs of arbitration may be more than the costs of court proceedings. For example parties will be required to pay for the time spent by the arbitrator on an hourly rate basis rather than the flat court fees that apply for court judges.
Arbitration is final and confidential, unless there is an application to the court, for example on appeal, enforcement or jurisdiction. This is unlike court proceedings, which are usually open to the public with court documents often being publicly available.	Sometimes the desire to avoid public court proceedings can encourage the parties to settle a dispute. This is less likely to be the case in confidential arbitration proceedings.

Appealing an award and enforcement

An award can only be challenged or appealed in very limited circumstances. For example, a tribunal's findings of fact can rarely be challenged, however, if the tribunal has:

a. not conducted itself properly;
b. answered questions it should not have answered; or
c. made an error of law

a party can challenge the award and ask that it be set aside or sent back to the tribunal to make its decision properly.

Awards are enforced through the courts and can be enforced in most countries worldwide. Enforcement will often depend on a number of factors such as the jurisdiction in which enforcement is likely to be sought.

Fees

In the absence of an agreement between the parties, the tribunal can determine which costs are recoverable and make an award allocating those costs. If the tribunal does not determine what costs are recoverable either party may apply to the court for a costs determination.

The costs of arbitration generally include:

a. The arbitrator's fees and any administrative costs such as venue hire and travel expenses.
b. The fees and expenses of any arbitration institution concerned.
c. Legal and other costs of the parties.

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