A guide to arbitration

Please note, the Arbitration Bill 2024 is currently passing through parliament which will bring in changes to the Arbitration process. This guide is correct as at October 2024.

What is arbitration?

Arbitration is a method of determining disputes in which an arbitrator, or panel of arbitrators, makes a binding decision. It is an alternative to court proceedings.

The procedure is private and confidential and only becomes a matter of public record should there be any applications to the court, for example on appeal, enforcement or jurisdiction.

It is governed by the Arbitration Act 1996, however the majority of the provisions are non-mandatory. This allows the parties to have autonomy in determining the manner and process of the arbitration. The arbitrator's decision, known as an 'arbitration award', is binding and enforceable and can only be challenged/appealed in very limited circumstances.

It can be used for all types of commercial disputes and is often the preferred method of determining disputes of the international business community rather than going to court.

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Arbitration process

There is no mandatory, set procedure for arbitration and as such, the parties have the freedom to agree the process and tailor it to the needs of the particular dispute. The process may also be adapted as the arbitration progresses, depending on the circumstances of the case.

The process is usually set out in the contract/arbitration agreement which should confirm whether:

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

b. 'Institutional' arbitration applies 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.

You should also 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 you 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, you 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.

You 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 your 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, you 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

You can only challenge or appeal an award 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
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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