

## **ARBITRATION**

### **Background**

Arbitration is a procedure used to resolve disputes without use of the Courts. It is often used in a commercial context. In arbitration, the parties refer a dispute for determination by an arbitrator whom they have appointed. They agree to abide by the results of the arbitration in a binding agreement.

An arbitration reference can be agreed after a dispute has arisen. Alternatively and more commonly, the parties may have pre-agreed in a contract to refer disputes to arbitration. In this case, either party can compel that the matter goes to arbitration. If one party applies to Court, despite the arbitration agreement, there is a special procedure by which the other party can stop the court proceedings so that the arbitration is undertaken.

Arbitration in England and Wales has a high strong reputation throughout the entire world. Many disputes have been settled by arbitration in England and Wales even though neither party has a connection with the Country. Traditionally, arbitration was very common in shipping, insurance and construction disputes. However, arbitration is now used in a whole range of commercial disputes.

### **Advantages over Court Litigation**

Arbitration enables parties to have their dispute resolved in private. The parties may choose to have the dispute determined by an expert in a particular area. Arbitration is commonly recognised and supported by international bodies. It has become particularly important in cross border commerce.

Arbitration allows the parties to decide the procedures the arbitrator will follow. The terms of arbitration are usually determined by the parties' contract. Therefore, specific suitable powers and procedures can be laid down.

## **Arbitration Agreements**

There are standard forms of arbitration agreements which incorporate standard arbitration rules issued by certain arbitration bodies. Arbitration bodies publish rules which can be used in and are appropriate to particular types of disputes. These include trade and professional bodies. This allows the parties to cross refer to the pre-chosen arbitration which is appropriate to a particular type of industry or business and the issues which arise in it.

Arbitration legislation provides a framework for enforcement. However, it states that parties are free to agree how their disputes are resolved subject only to basic safeguards in the public interests.

Although parties can agree a very detailed arbitration agreement, it is usually more convenient to refer to rules as published by an established body. For example, the Chartered Institute of Arbitrators publish rules. Accordingly, a clause might provide that any dispute is referred to arbitration and resolved under the rules of the Chartered Institute of Arbitrators.

The arbitration agreement may name the arbitrator. More usually, it sets out a mechanism to appoint the arbitrator. If the arbitration agreement does not provide the mechanism the Arbitration Act provides a procedure for appointment of an arbitrator by Court if necessary. More commonly the agreement will specify that the arbitrator is to be appointed by a particular person. For example, the President of the Chartered Institute of Surveyors would commonly be the appointing party in the case of building disputes.

An alternative mechanism is that one party initiates the arbitration and proposes a number of alternative parties from whom the other party picks. If one party refuses to co-operate in making the appointment, there are procedures in the Arbitration Act to ensure the arbitrator is appointed.

### **Stopping Court Proceedings**

Sometimes a party to an arbitration agreement may issue Court proceedings instead of referring the dispute to arbitration in breach of the terms of the agreement . If this occurs the defendant must acknowledge service but can apply to Court to “stay” or terminate the Court proceedings and require reference to arbitration. This must be done within 14 days after filing an acknowledgement of the service. A Court will grant a stay unless it is satisfied the arbitration agreement is null and void, inoperative or capable of being performed. This would very rarely be the case.

### **Commencement of Claim**

An arbitration agreement usually sets out the procedure for commencement of the claim. The claim is often commenced by one party sending a written request to arbitrate, setting out the details and nature of the dispute and the relief being sought. The agreement will require the other party to appoint or agree to the appointment of an arbitrator. If the arbitrator is to be appointed by a third party, the arbitration commences when one party asks the appointing party to make the appointment.

It is a matter for the arbitrator to decide whether he is prepared and willing to act. The Chartered Institute of Arbitrators provide minimum standards whereby the arbitrator should reveal any connection he has with the dispute or with any of the parties indirectly or indirectly or otherwise.

The arbitration legislation allows for an objection to the arbitrator's powers and jurisdiction. This must be taken before any steps are taken in the dispute. Alternatively, it is possible to apply to Court in the course of dispute if the arbitrator exceeds his powers.

## **Procedures**

There are no set procedures in arbitration as there are in Court proceedings. Generally however, the arbitrator will conduct a preliminary meeting. The arbitrator decides all procedures and evidential points subject to what is set out in the arbitration agreement. The arbitrator decides the dispute under the law the parties have chosen. This will usually be English law. The parties are free to add to the arbitrator's powers in such a way as they see fit.

The arbitration agreement itself or otherwise the arbitrator will determine to what extent the parties present and prepare details of the case, and discover and disclose documents to each other. The strict rules of evidence applicable in Court may or may not necessarily be followed. The arrangements for hearing, the language and the way of handling dispute can be flexibly decided by the arbitrator subject to the terms of the arbitration agreement of the parties.

The parties must pay the arbitrator's fees. Unless the respective payment arrangements are set out in the prior agreement, it will be necessary for the parties to agree payment of the fees before arbitration begins. The fees or the method for charging fees should be agreed in advance.

The arbitrator has legal duties to act fairly and impartially, and to give each party a reasonable opportunity to put his case and deal with that of his opponent. He must adopt procedures that are suitable to the case and avoid unnecessary delay.

The parties to arbitration are obliged to do everything necessary for the proper and speedy conduct of the proceedings. This requires that they comply without delay with any determination of the arbitrator in relation to procedure and proofs. The preliminary meeting with the arbitrator will deal with preparation for the hearing. The arbitrator can call further pre arbitration meetings to deal with problems as they arise or can deal with them by correspondence.

If one party is not co-operating, it is possible for the other party to proceed (after proper notice) without the non cooperating party. Under Arbitration legislation, the arbitrator can make an order giving a party in default a specified time in which to comply with his orders. If they do not comply then the arbitrator can preclude the party from relying on the material covered by the order can draw adverse conclusions, proceed with the award on the basis of existing evidence or can impose costs penalties.

Alternatively, either the arbitrator or one of the parties with his consent can apply to Court for an order requiring a party to comply with an arbitrator's pre-hearing order. The advantage of applying to Court is that the Court can attach penal notices for non-compliance and punish it as if it was contempt of Court.

### **Court Assistance and Involvement**

The Arbitration legislation allows application to Court to make orders to assist the proceedings where necessary. This can include orders requiring taking evidence from third parties, preserving evidence, inspection, photographing, taking samples of relevant property, interim injunctions and appointing a receiver. The arbitration agreement can exclude these powers.

Generally, an arbitrator has many of the powers of a Court. However, the Arbitrator may require the Court's assistance to actually enforce them. An arbitrator will not have power to grant injunctions, which carry the sanction of imprisonment for non-compliance. The arbitrator can seek the assistance of Court and the Court can exercise its wider powers before referring the matter back to the arbitrator.

Sometimes disputes depend on interpretation of points of law. Where this is the case, it is possible to apply to Court on the basis that the arbitrator's interpretation of the legal point is wrong. It would not be possible to apply on the basis that the arbitrator's interpretation of the facts or application of the law are incorrect. This means, in practice, that the courts power to change the Arbitrator's decision is limited.

The parties' agreement can set out under what circumstance the arbitrator can be removed and replaced. If this is not set out, then an application to Court will be necessary to remove an arbitrator. An arbitrator will be removed if there are grounds to justify doubts about his impartiality, his lack of qualifications, if there are doubts about his ability to conduct proceedings or he has failed to conduct the proceedings with reasonable speed so as to cause injustice.

### **Arbitration Award**

The arbitration award i.e. (the decision) will usually be in writing and reasons will usually be given for the award. The Arbitration legislation provides that unless the parties otherwise agree to the contrary the arbitrator can award one party or the other, their costs. "Costs" can include the whole of the arbitrator's fees. The arbitrator can refuse to make his award until his fees and expenses have been paid. The arbitrator will usually require some of his fees to be paid in advance. The arbitrator will have power to award interest unless the original agreement otherwise specifies. If the party settle their dispute, the arbitrator is to record it as an agreed award.

The arbitration award will be binding on the parties as if it was a Court order and can be enforced as such. There are limited grounds upon which an arbitrator's award can be challenged in Court. It can only be challenged, on the basis of serious irregularities. Serious irregularity can include failure to follow the duties imposed by the agreement, duties imposed by law, exceeding powers, failing to follow procedures, uncertainty or ambiguity in the award, fraud and bias. However, the general position is that the arbitrator's award will be binding in the absence of exceptional circumstances.

Unless the agreement says otherwise, it is possible for either party to appeal to a Court on a question of law. The arbitrator's findings in relation to the facts in dispute will be binding. The appeal on a point of law is of narrow application and is made on the basis that the law applied is wrong. It is possible to preclude this right by agreement. This is often done when parties are outside the UK, so as to avoid involvement in litigation in the UK.

The Court will only allow appeals on a point of law where it grants permission. This will be given where the decision may substantially affect the rights of the parties or it is just and proper. Even then, the Court will only intervene if the arbitrator's decision is obviously wrong or the question is one of serious importance.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

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