

International Arbitration

What is international arbitration?

Arbitration is a system of formal dispute resolution by one or more impartial persons (arbitral tribunals) for final and binding determination. The arbitral tribunal can be made up of legal and/or industry experts of the parties' own choosing, using procedures which they can influence. Arbitration is a private and confidential process and can provide for the quick, practical, and economical settlements of cross-border disputes.

Arbitration is particularly common in commodity, insurance, construction, engineering, oil, gas and shipping contracts. The insertion of an arbitration clause into commercial agreements enables businesses to opt to have disputes arising in connection with the contract to be decided by arbitral tribunals rather than litigating them in national courts.

Of the many available dispute resolution alternatives available, it is by far the most commonly used internationally. Each jurisdiction will have its own separate arbitration laws, but with the existence of international conventions eg. the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and international organisations such as the ICC; UNICITRAL and AAA which provide arbitration rules and procedures to suit international disputes, there is a greater ease of recognition and enforcement of arbitral awards.

Advantages of arbitration

- *Final & binding* - while other forms of ADR can help parties reach an amicable settlement (eg. mediation) they are not necessarily final and binding, in particular, in respect of cross-border disputes. Arbitral awards are not subject to appeal and are much more likely to be final than the judgements of courts of first instance. Although arbitral awards may be subject to being challenged (usually in either the country where the arbitral award is rendered or where enforcement is sought), the grounds of challenge available against arbitral awards are limited.
- *Greater enforcement* - arbitral awards have much greater and easier international recognition than judgements of national courts. Over 130 countries have signed the New York Convention. The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help enforcement.
- *Equal footing* - by entering into an arbitration agreement, parties can place themselves on an equal footing in respect of the place of the arbitration; the language used; the procedures and rules to be applied; nationality and legal representation. Arbitration may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally possible to structure a neutral procedure offering no undue advantage to any party.
- *Expertise* - arbitration allows the parties to appoint the persons of their choice as arbitrators, provided they are independent. This enables the parties to choose arbitrators who have specialised competence in the relevant field.
- *Speed and economy* - arbitration is usually faster and less expensive than litigation in the courts. Although a complex international disputes referred to arbitration may sometimes

take a great deal of time and money to resolve, the limited scope for challenging arbitral awards, as compared with court judgements, means that the parties will not subsequently be entangled in a prolonged and costly series of appeals. Furthermore, arbitration offers the parties the flexibility to set up proceedings that can be conducted as quickly and economically as the circumstances allow.

- *Confidentiality* - arbitration hearings are not public, and only the parties themselves receive copies of the awards.

Should an arbitration be on ad hoc basis or referred to institutional arbitration?

Parties using arbitration have a choice between designating an institution, such as ICC, to administer it, or proceeding ad hoc outside an institutional framework.

In ad hoc cases, the arbitration will be administered by the arbitrators themselves. However, should problems arise in setting the arbitration in motion or in constituting the arbitral tribunal, the parties may have to require the assistance of a state court, or that of an institution.

Although an institutional arbitration requires payment of a fee to the administering institution, the functions performed by the institution can be critical in ensuring that the arbitration proceeds to a final award with a minimum of disruption and without the need for recourse to the local courts.

The services an institution may offer include:

1. Determining whether there is a prima facie agreement to arbitrate;
2. Appointing arbitrators;
3. Deciding challenges against arbitrators;
4. Determining the place of arbitration;
5. Fixing and extending time-limits;
6. Determining the fees and expenses of the arbitrators;
7. Scrutinising arbitral awards.

Costs

In most instances it will be the arbitral tribunal which decides which of the parties are to meet the costs of the arbitration (and in what proportion), including the fees and expenses of the arbitrators and any tribunal appointed experts.

The precise rules on costs will however depend upon the governing rules of the arbitration and any agreement made by the parties prior to the arbitration.

Enforcement of arbitral awards Provided that the country in which the arbitral award is to be enforced is a signatory of the New York or Rome Convention, enforcement of the arbitral award will be through the local courts.

When may arbitration be appropriate?

- Where the parties are looking for a neutral forum because the courts which otherwise may have jurisdiction may not be viewed as being totally independent.
- Where the relevant country's legal system is underdeveloped or ill-suited to deal with the dispute.

- Where the parties want the dispute to be resolved by an expert relevant to the dispute.
- Where litigation through the courts may be lengthy and costly.
- Where the parties want to have some control over the procedure for resolving the dispute eg. the time of the hearing; the documents to be submitted to the tribunal and the language adopted.
- Where the decision will not be made in the same place that the debtor's assets are to be found eg. The New York Convention has established an effective and widely accepted scheme for the enforcement of foreign arbitral awards which has a wider geographical scope than courtbased systems.
- Where a final and binding decision is required with a minimum, or no right of appeal;
- Where confidentiality is required;
- Where state parties are involved, there can be a reluctance by such parties to submit to the jurisdiction of a foreign court.