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Introduction to International Arbitration

International arbitration is the preferred method of resolving cross-border disputes.[1] The neutrality it offers, together with the relative ease of enforceability of awards, can make it a more attractive forum for disputes than litigating in contracting parties' national courts. Its sophistication continues to develop and its popularity grow. But how does it work? Who decides the dispute? And according to what laws and processes?

This Quickguide provides an introduction to international arbitration, its key characteristics and how it works. It concludes with a comparison between arbitration and court litigation.

What is arbitration?

Arbitration is a method of dispute resolution that provides a final and binding outcome. Generally regarded as an alternative to court litigation, the existence of a valid agreement to arbitrate should mean that state courts refuse to hear disputes falling within the scope of that agreement.

In arbitration the parties submit a dispute to an appointed decision-maker (arbitrator), or panel

of arbitrators (the tribunal). This is typically done by providing for arbitration in the contract (the arbitration agreement). The agreement should also cover the number of arbitrators, the legal place or seat of the arbitration (see below), and the procedural rules that will govern the arbitration.

The tribunal will generally give its decision (the award) following a hearing during which each party will have the opportunity to present its position. If appropriate, arbitrations can be conducted on paper only, for example, where the sums or issues in dispute do not justify a hearing. Generally, the tribunal will decide the dispute in accordance with the law governing the relevant contract.

Why arbitrate?

Dispute resolution lawyers always advise clients to choose the method of dispute resolution (usually litigation or arbitration) which puts them in the strongest position should a dispute arise. Both litigation and arbitration have their advantages and disadvantages depending on the circumstances and, in particular, where the contracting parties are based or their assets located. The key differences are analysed at the end of this Quickguide.

The main benefits of arbitration are ease of enforcement of awards, the ability to choose who decides the dispute, procedural flexibility and privacy. The neutrality that arbitration offers is also a key selling point. Contracting parties often want the dispute to be heard in their local courts where they have a perceived home advantage: international arbitration in a neutral country is the compromise.

Key concepts

The seat of the arbitration

In order to understand how arbitration works, it is important to understand the significance of the seat of the arbitration. When parties agree to arbitration, they should specify the legal place – or seat – of the arbitration. Typically, parties specify a city, for example, London or Paris. The choice of seat gives the arbitration a "nationality", so in this example, English or French. This is significant for a number of reasons: the legislative framework, involvement of the courts and enforcement.

Legislative framework

Most countries have legislation governing arbitrations that take place in their territory. This does not replace the procedural rules chosen by the parties to govern the arbitration (discussed below) but provides a framework in which those rules operate and may fill gaps not addressed in the rules . Many countries' national laws are based on the UNCITRAL[2] Model Law on International Commercial Arbitration. The Model Law is intended to even out disparities between national laws and suggest a common standard for arbitral practice.

Most arbitration laws give the parties flexibility on matters such as the appointment of the tribunal and the procedures to adopt, while providing a safety net where agreement is lacking.

They also generally prescribe elements from which the parties cannot depart by agreement, including the more fundamental aspects of the process such as fairness of the proceedings and the duties of the tribunal.

Support of the courts

The national law will also give powers to the courts of the seat in relation to certain aspects of the arbitration. Broadly speaking, these include issues such as the ability of the parties to apply to the national courts for support (for example an order to freeze assets or obtain evidence), the ability to challenge decisions of the tribunal and the award, and provisions on enforcement. The national law, and the general attitude of the judiciary in a country, will determine how supportive or interventionist those courts will be. Interventionist jurisdictions, where courts interfere in the arbitral process to the detriment of its autonomy, are to be avoided.

Enforcement

The "nationality" of the arbitration extends to the award. So the award of a London-seated tribunal will be regarded as English. This is significant when it comes to enforcement. It is important that the country of the seat of the arbitration has ratified the New York Convention, an international treaty which provides for the reciprocal enforcement of arbitration awards in over 160 countries. Some state signatories to the Convention will only enforce awards made in countries which are also signatories to the Convention. This is expanded on below.

The choice of seat is therefore important as it dictates the legislative framework within which the arbitration will proceed, the level of support the courts of the seat will provide and the enforceability of any award. The most popular seats selected in international arbitration include: London, Paris, Singapore, Hong Kong, Geneva, New York and Stockholm.[3]

Institutional or *ad hoc*?

It is the procedural rules of an arbitration that govern the conduct of the arbitration, especially in its early stages. In deciding which rules to apply, parties have to decide between institutional or *ad hoc* arbitration.

Institutional arbitration

Institutional arbitration involves incorporating the rules of the selected institution into the arbitration clause by reference. That institution will then administer the arbitration. Institutional rules are designed to set out a framework for the proceedings comprehensively from beginning to end, so are better suited to cater for contingencies that might arise. This is particularly useful where a counterpart is refusing to co-operate in the arbitral process.

There are many institutions to choose from. The best known arbitral institutions include:[4]

- the International Court of Arbitration at the International Chamber of Commerce (the ICC);
- the London Court of International Arbitration (the LCIA);
- the Singapore International Arbitration Centre (the SIAC);
- the Hong Kong International Arbitration Centre (HKIAC);
- the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC); and
- the American Arbitration Association's International Centre for Dispute Resolution (the AAA/ICDR).

Ad hoc arbitration

Ad hoc arbitration is conducted under rules adopted for the purpose of the specific dispute, without the involvement of an arbitral institution. The parties can draft the arbitral rules themselves. However, they usually either leave the rules to the discretion of the arbitrators or they adopt rules specially written for *ad hoc* arbitration, for example, the UNCITRAL Rules.[5]

Ad hoc arbitration lacks the "support net" of an institution and depends for its full effectiveness on a spirit of co-operation between the parties which is usually lacking by the time disputes have arisen. The potential problems of arbitration more generally, such as the ability to delay proceedings, are more likely to arise in *ad hoc* arbitration. The parties will also have to deal with additional administrative issues, such as negotiating the tribunal's fees. In addition, certain jurisdictions only recognise institutional arbitration. Although the use of *ad hoc* arbitration avoids the need to pay fees to an institution, unless the parties are sophisticated users of arbitration or trade practice dictates the use of ad hoc arbitration, institutional arbitration is to be preferred.

Key characteristics of international arbitration

Consensual

Arbitration is a voluntary and consensual process. Unlike national courts, an arbitral tribunal will not have inherent jurisdiction to decide a dispute. An arbitral tribunal will only have jurisdiction if all parties to the dispute have agreed to submit their disputes to arbitration. Parties will usually provide for this by inserting an appropriately drafted arbitration clause into their agreement. For further guidance, see our quickguide on drafting arbitration agreements.

One important consequence of the consensual nature of arbitration is that, unlike court judges, arbitrators are often unable to join additional parties to the dispute resolution procedure or consolidate related arbitral proceedings. Arbitral institutions have revised their rules to address this, but it can still be more difficult to join a third party or consolidate two disputes in arbitration than court litigation - in appropriate circumstances third party defendants can be joined to court litigation without their consent if they fall within the jurisdiction of the court.

Neutral

Arbitration can offer dispute resolution in a neutral forum. Although the courts of the seat where the arbitration is situated may have some role to play in supporting and policing the arbitration, it is generally left to the arbitrators to determine the process to be followed and the merits of the dispute. Often, tribunals will comprise arbitrators of different nationalities, which adds to the neutrality of the process and the decision.

Choice

The parties to an arbitration have considerable choice in determining how, where, by whom, and in what language their dispute is resolved. Of particular importance to the parties is the choice of decision-maker. Unlike commercial litigation where disputes are resolved by state-appointed judges, parties to an arbitration may select their arbitrator. This is especially advantageous in the context of a technical matter that requires particular expertise, or where parties are from different jurisdictions and each wants to appoint an arbitrator from their own jurisdiction.

Privacy and confidentiality

Arbitration is particularly advantageous for commercial parties because of the privacy and confidentiality that it can offer. Hearings generally take place in private. Parties can agree that the hearing and evidence, and any other material created or disclosed in the proceedings, be kept confidential, and that they (and the arbitrators) will not disclose any information about the arbitration. In comparison, court documents and hearings are generally public.

Finality

Most arbitral laws do not allow for the award to be challenged except in very limited circumstances. In addition, choice of certain institutional rules can further limit the parties' scope to challenge the award. This means that parties avoid the cost of protracted appeal processes.

Enforceability

The ease of enforcement of arbitral awards is viewed as a key advantage of arbitration. Enforcement is facilitated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (the New York Convention). A contracting state is obliged to recognise arbitration awards as binding and to enforce them in accordance with its procedural rules. Over 160 countries have ratified the Convention, including most of the world's leading trading nations. For a full list of countries see the UNCITRAL website.[6]

A contracting state may only refuse to enforce an award if:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was not valid;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- the award goes beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the award is not final and binding or has been set aside;
- the subject matter of the award is not capable of settlement by arbitration under the law of the contracting state; or
- it would be contrary to public policy to enforce the award.

These provisions are incorporated into the national law of contracting states.

Analysis shows that arbitral awards are usually complied with voluntarily. Where enforcement proceedings are necessary, the New York Convention greatly assists award creditors, although it should be noted that not all states have a good track record of compliance with their obligations under the Convention.

How it works

Agreement to arbitrate

As arbitration is a consensual dispute resolution mechanism, a necessary pre-cursor to any arbitration is a valid agreement to arbitrate. This is commonly dealt with by inserting a clause into the principal contract between the parties obliging them to resolve any dispute arising "out of or in connection with" that contract in arbitration. There are a number of key aspects of the arbitral process that may be agreed in the arbitration provision itself including:

- the place (i.e. seat) and language of the arbitration;
- the number of arbitrators; and
- the procedural rules that will govern the arbitration.

Drafting an effective arbitration clause is key. If the dispute falls outside the scope of the clause, or if the clause is invalid for uncertainty, parties could find themselves before the very national court they hoped to avoid. For more information on drafting arbitration agreements see the Ashurst Quickguide on International Arbitration Clauses.

An arbitration clause in a contract operates as a self-contained contract. This means that, even if the main contract is invalid, the clause will still stand and bind the parties, unless it is itself invalid for some reason.

Appointment of the arbitrators

The appointments will be made in accordance with the terms of the arbitration agreement or, if silent, the rules of the relevant institution or national law. It is standard for disputes to be referred to one or three arbitrators. Where three arbitrators are to be appointed, it is common for each party to nominate one and for the relevant institution or the two chosen arbitrators to nominate the third arbitrator who will act as chairman. If a sole arbitrator is appointed, absent party agreement, it is usual for that appointment to be made by the institution or, if ad hoc, a designated appointing authority.

Fees

Fees will usually be paid, at least in part, up-front upon appointment of the tribunal. If the arbitration is being administered by an institution, a fee will also be payable to that institution. The rate of fees varies but they are usually calculated either by reference to the time spent by the tribunal members or the value of the dispute.

The powers and duties of the tribunal

The principal duties of the tribunal are to determine the dispute fairly and efficiently, adopt suitable procedures for the particular case and ensure that time and costs are not expended unnecessarily. In order to discharge these duties the arbitrators have a range of powers deriving from:

- the arbitration agreement;
- the procedural rules; and
- the applicable national law.

The procedure

The procedural rules of the different arbitral institutions vary. In general terms, they provide the procedural framework for the arbitration from start to finish and, in particular, cover: commencement of the arbitration, constitution of the tribunal, conduct of the proceedings, rendering of decisions, and determination of costs.

The institutions revise their rules to keep pace with the perceived needs and desires of the users of arbitration. Certain institutions provide a fast-track mechanism for disputes under a certain value. And increasingly institutions are revising their rules to provide for early determination/summary disposal.

The procedures adopted, although different, typically provide the parties with an opportunity to put forward their case via written submissions together with any documentary, factual and expert evidence. Certain institutions, for example the ICC, favour a Memorial approach which requires a party to provide legal submissions and evidence at the same time. Others, for example the LCIA, prefer a staged approach which requires exchange of submissions, followed by exchange of documentary evidence and then factual and expert evidence.

Where appropriate, there will be interim hearings to agree timetables, and other interlocutory hearings. The arbitration will usually conclude in a hearing in the seat chosen or at a different venue if agreed by the parties. The award itself should ideally be delivered within six months, although often takes longer. Here the institution can add value by encouraging the tribunal to deliver the award promptly.

Awards and challenging awards

The award in an arbitration is equivalent to the judgment in litigation. It is "final and binding" subject to limited rights of challenge. Generally the award must be in writing, be signed by all the arbitrators, contain reasons, and state the seat of the arbitration and the date the award was handed down. Once the tribunal has issued its award it is *functus officio* and has no further authority to act.

Unlike court judgments, awards cannot generally be challenged except in very limited circumstances. These include where there has been a serious irregularity affecting the tribunal, the proceedings, or the award which has caused injustice to one or more of the parties. So, for example, where the tribunal exceeded its powers, failed to conduct proceedings in accordance with the agreed procedure, or where the award is ambiguous or was obtained by fraud.

At a glance: Arbitration vs. litigation

	ARBITRATION	LITIGATION
Choice	Ability to choose country, city, arbitrator(s), language and procedure.	Subject to the legal system of the country in which the dispute takes place. Limited choice as dependent on where dispute takes place and the availability of the judge.
Expertise	Parties can appoint arbitrator with relevant technical expertise.	State-appointed judges.
Neutrality	Parties can agree on a neutral forum in which to hear the matter.	The courts of a state have jurisdiction over the dispute.

	ARBITRATION	LITIGATION
Finality	Rights of challenge usually limited to serious procedural irregularity or jurisdictional issues.	Court proceedings can be long, drawn-out affairs because of the ability to appeal on points of law.
Privacy/Confidentiality	Although the position varies from jurisdiction to jurisdiction, generally arbitration proceedings are held in private. The existence of the arbitration, the evidence and documents exchanged during proceedings as well as the award itself may be confidential, depending on the applicable law and agreement between the parties. If there is any doubt, express confidentiality provisions should be agreed.	Disputes heard before national courts will be public save in exceptional circumstances. In the UK, for example, court documents and judgments are public documents.
Cost and speed	Arbitration used to be cheaper and faster than litigation. There is a perception that this is increasingly not the case. The parties must pay the arbitrators for their services and will also need to pay for the hearing venue as well as the costs of an administering institution (if not *ad hoc*).	Court proceedings can be costly and timely affairs, particularly if litigating in a common law jurisdiction.
Enforceability	The New York Convention is ratified by over 150 countries, which means, in theory, an arbitration award can be enforced in any of those countries.	There is no equivalent of The New York Convention for court judgments. Countries have reciprocal arrangements in place but these are less extensive.

1. In a 2018 survey, 97% of the respondent group selected arbitration as their preferred method of resolving cross-border disputes, either as a stand-alone method (48%) or in conjunction with ADR (49%) (Source: the 2018 *International Arbitration Survey: The Evolution of International Arbitration* by the School of International Arbitration at Queen Mary University of London. The survey is available on the QMUL's website: http://www.arbitration.qmul.ac.uk/research/2018).

2. The United Nations Commission on International Trade Law (UNCITRAL).

3. According to the 2018 International Arbitration Survey: The Evolution of International Arbitration by the School of International Arbitration at Queen Mary University of London. The survey is available on the QMUL's website: http://www.arbitration.qmul.ac.uk/research/2018.

4. According to the 2018 International Arbitration Survey: The Evolution of International Arbitration by the School of International Arbitration at Queen Mary University of London.

5. The United Nations Commission on International Trade Law Arbitration Rules (as revised in 2010 and 2013). Please note that UNCITRAL is not an arbitral institution and does not administer arbitrations.

6. www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

Key Contacts

We bring together lawyers of the highest calibre with the technical knowledge, industry experience and regional know-how to provide the incisive advice our clients need.

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