Arbitration

Arbitration is a form of dispute resolution and an alternative to conventional litigation. The primary difference between litigation and arbitration is that, in the case of arbitration, the parties do not approach a court of law.

An arbitration is a private method of dispute resolution where the parties have agreed that their dispute will be heard and decided upon by an arbitrator and not a judge in a court of law. Arbitration is often referred to as "alternative dispute resolution" i.e. an alternative to approaching a court. In many respects arbitration and litigation are similar but there are key differences which we will highlight in the course of this article.

Why would a party choose arbitration over litigation?

The legal system of England and Wales and in particular its commercial law has an international reputation for fairness to all parties. It is often the case that parties to agreements, who may not be resident within England and Wales, agree that in the event of disputes English law will apply. The difficulty is when a dispute arises but the cause of action or parties are located outside the territorial jurisdiction of England and Wales. Notwithstanding that English law will apply to the dispute, the parties would not be permitted to approach the English courts.

Arbitration fills this gap by providing a dispute resolution mechanism that is similar in procedure and requirements of fairness to a trial but allows anyone to utilise it.

Arbitration clauses are common in international agreements where the parties are from multiple jurisdictions.

Legal framework for arbitration

The Arbitration Act 1996 is the act of parliament that governs the conduct of arbitrations within England, Wales and Northern Ireland. Scotland has its own rules for regulating arbitrations which are contained in schedule 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

The Arbitration Act imposes upon an arbitration tribunal a duty to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting their case and answering that of their opponent. The arbitration tribunal is permitted to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense and to provide a fair means for the resolution of the dispute.

Aside from these overriding duties an arbitration tribunal has a broad discretion to regulate the conduct of the proceedings before it. This is in contrast to the strict and detailed provisions of the Civil Procedure Rules which apply to litigation.

Who will be the arbitrator?

The arbitrator is usually a very senior lawyer (often a retired judge) who will be appointed by agreement between the parties to hear the case. A unique feature of the arbitration process is that the arbitrator can be assisted by expert assessors to assist in the assessment of complex technical evidence. In ordinary litigation, a judge would not have the advantage of this type of assistance and would have to rely on the evidence of the parties' own expert witnesses.

Where does the arbitration take place?

Arbitrations can take place anywhere. There are a number of professional organisations which facilitate the hearing of arbitrations. These organisations often have venues that are designed very much like courtrooms for the hearing of an arbitration. Arbitrations can take place in board rooms or spaces rented specifically for the hearing. They could also take place outside of England and Wales.

Who appears at an arbitration?

Some arbitrations are decided entirely on "the papers" and sometimes appearance before the arbitrator is not necessary. In other cases the arbitration will be conducted in a similar manner to an ordinary trial save for the fact that it is not necessary for counsel or solicitor advocates to wear gowns and that the formalities of court are not required to be observed.

What are the advantages of arbitration?

The primary advantage is that the parties to arbitration have an almost free reign to determine the structure and procedure applicable to the proceedings:

- **Full control of the process** – the parties can, by agreement, determine the conduct of the proceedings. This can lead to a streamlining of the procedure to suit the specific requirements of the case at hand;
- **Finality** – the grounds for challenging an arbitrator's decision are severely limited by the Arbitration Act. The decision of the arbitrator is agreed to be final which can bring proceedings which could have continued for years through the court system to a swift conclusion;
- **Privacy** – arbitrations are closed whereas court proceedings are open to the public. If the subject matter is sensitive such as proprietary technology or trade secrets it would benefit the parties to limit the number of persons who would have access to the evidence before the arbitration tribunal;
- **Convenience** – in litigation the dates for trials are determined by the Court with little regard for the convenience of the parties. There can often be a long wait for trial dates particularly where a matter requires a number of court days. In the arbitration process dates can be agreed between the parties to those most suitable to them and their witnesses.

What are the disadvantages of arbitration?

In the global economy arbitration, conducted in England, has emerged as the dispute resolution method of choice for a wide range of parties. Despite its popularity there are a number of disadvantages to the process which parties should bear in mind if they are contemplating inserting arbitration clauses into their contracts or becoming involved in arbitration proceedings.

- It requires good faith and agreement between the parties. A court has wide powers under the Civil Procedure rules to punish litigants who are obstructive or dilatory in their conduct of the proceedings. An arbitrator's powers are not as strong as to find someone in contempt of court;
- The pre-arbitration procedures are often not as clear and direct as those under the Civil Procedure Rules which can lead to delays and unduly long hearings;
- There is limited scope to challenge the decision of an arbitrator. An aggrieved party would have to show that:
    - The tribunal lacked substantive jurisdiction;
    - there was a serious irregularity in the proceedings which would justify the setting aside of the award;
    - The arbitrator erred on a specific point of law.

Costs

While there is more flexibility for parties in arbitration proceedings there is a slight difference between the costs of it versus those of litigation. The parties would have to incur the cost of the arbitrator and the venue in which the arbitration is to take place. They would still require legal representation. As with ordinary litigation it is vital that you discuss the estimated costs with your solicitor to ensure that costs of litigation do not outweigh the benefits should you be successful.

The future of arbitration in United Kingdom

Arbitration as a means of dispute resolution enjoys solid support from the Ministry of Justice and the judicial system. It is likely that London will continue to rank as a leading dispute resolution venue. Simple but effective reforms to the Arbitration Act have been proposed by the Law Commission in the hope that it will make London even more attractive to international litigants, these reforms include:

- Allow a summary judgment procedure to resolve cases where the defences raised are weak and manifestly bound to fail;
- Extending the remit of arbitration to include trust law disputes;
- Codification (in similar manner to the Civil Procedure Rules) of offers to settle.

using the contact form below. Source: https://burlingtonslegal.com/insight/what-is-arbitration-all-you-need-to-know-about-the-process/

Arbitration Cases for Role Play

Case 1

Companies from France and Portugal entered into two sales agent agreements relating to photovoltaic projects in the territory of France. The agreements provided that any dispute will be resolved under the WIPO Arbitration Rules in accordance with the laws of France.

Three and a half years after the conclusion of the first agreement, a dispute arose regarding the payment for services provided under the agreements, and was submitted to WIPO Arbitration. Following consultations between the parties and the Center, a sole arbitrator based in Paris was appointed from the list of candidates submitted by the Center. The sole arbitrator held a one-day hearing in Paris and rendered a final award within 12 months after the commencement of the arbitration.

Case 2

A European art gallery concluded an exclusive cooperation agreement with a European artist in order to promote the artist in the international market. The agreement contained a WIPO arbitration clause providing for a three-member tribunal. Three years after the signing of the agreement, the parties' relationship began to deteriorate and the artist sent a notice terminating the agreement. At that point, the art gallery initiated WIPO arbitration proceedings.

Following consultations between the parties and the Center, the Center appointed three arbitrators experienced in art law issues.

After studying the parties' pleadings, the tribunal considered that there was potential for settlement. With the agreement of the parties, the tribunal issued a preliminary case assessment encouraging the parties to resume settlement negotiations which the parties had attempted at an earlier stage. The parties reached a settlement and asked the tribunal to render a consent award, incorporating the parties' settlement agreement. The terms of the settlement included the termination of the cooperation agreement and the provision of a number of works by the artist to the gallery in final settlement.

Case 3

A French biotech company, holder of several process patents for the extraction and purification of a compound with medical uses, entered into a license and development agreement with a large pharmaceutical company. The pharmaceutical company had considerable expertise in the medical application of the substance related to the

patents held by the biotech company. The parties included in their contract a clause stating that all disputes arising out of their agreement would be resolved by a sole arbitrator under the WIPO Arbitration Rules.

Several years after the signing of the agreement, the biotech company terminated the contract, alleging that the pharmaceutical company had deliberately delayed the development of the biotech compound. The biotech company filed a request for arbitration claiming substantial damages.

The Center proposed a number of candidates with considerable expertise of biotech/pharma disputes, one of whom was chosen by the parties. Having received the parties' written submissions, the arbitrator held a three-day hearing in Geneva (Switzerland) for the examination of witnesses. This not only served for the presentation of evidence but also allowed the parties to re-establish a dialogue. In the course of the hearing, the arbitrator began to think that the biotech company was not entitled to terminate the contract and that it would be in the interest of the parties to continue to cooperate towards the development of the biotech compound.

On the last day of the hearing, the parties accepted the arbitrator's suggestion that they should hold a private meeting. As a result of that meeting, the parties agreed to settle their dispute and continued to cooperate towards the development and commercialization of the biotech compound.