



INSPIRED  
RESOLUTION



# Arbitration

An Inspired Choice for Resolving your Dispute

# Guide to Arbitration

## Background

### What is Arbitration?

Arbitration is a private process whereby parties can have their dispute heard and finally determined by an independent impartial “arbitrator”.

### Role of the Arbitrator

The arbitrator’s role is to insure the fair resolution of the dispute without unnecessary delay or expense. The Arbitrator must act in an independent impartial manner throughout the proceedings.

### Advantages of Arbitration

There are a number of advantages to going to arbitration over going to court:

- Private and confidential - Members of the public are not allowed to attend the hearing and the final award is not normally published. The Parties normally agree that the process is confidential but this is not true in all Countries.
- Minimal court intervention- however a National Court can assist for example where a freezing or search order or a witnesses attendance at the hearing is required. Also a point of law may be referred to the court for determination.
- Flexibility of process - parties may agree how the arbitration should be run or failing that the Arbitrator will decide with due regard to the overriding principle of fairness.
- Speed – party co-operation means a swift conclusion and cheaper process.
- Award is final and binding on the parties –there can be no appeal to the arbitration award except on a point of law.
- Arbitrator may have specialist knowledge - In most cases parties are free to choose an Arbitrator with industry knowledge this means the process should run a lot smoother as the arbitrator understands the technical concepts being discussed.

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- No precedents to follow – Arbitrators are not bound to follow awards or judgments made in previous cases. In some arbitrations the parties can in fact ask the arbitrator to decide the matter *ex Aequo et Bono* which means they just have to decide what is right in the interests of fairness.
- Superior Enforceability – An arbitration award made in a New York Convention Country is enforceable in any other New York Convention country which means in some cases it is easier to enforce an Arbitration award than a judgment from a National Court. This is particularly useful where one of the parties has assets over seas.
- Costs may be kept in check— The Arbitrator may order a costs cap prior to costs being incurred.
- Lawyers are not always required. In some Arbitration for example GAFTA Arbitrations parties are represented by trade representatives rather than lawyers.
- Voluntary process - Arbitration can be entered into at anytime. However once the arbitration agreement has been signed the parties are bound by it.
- Choice of Law – the parties are free to decide which rules and laws govern the dispute.
- The Seat of Arbitration-The parties are free to choose where the seat of arbitration is. This can make a massive difference to the enforceability of the Award and the Mandatory law which will apply to the Arbitration.
- Hearings– can be heard anywhere, any place, anytime, they could even be held on a paradise beach at 3pm on a Sunday afternoon
- Document only – Arbitrations may be conducted under a documents only procedure which saves time and money.

**Disadvantages of Arbitration:** There are no appeals except on a point of law, specialist arbitrators may have busy diaries, once an arbitration agreement has been signed it is hard to get out of it unless both parties agree, without party co-operation the process can be drawn-out and just as time consuming and expensive as going to court, some matters cannot go to arbitration for example; criminal, family and land disputes, this will also vary from country to country.

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## Process

### Arbitration Clause

For an Arbitration to be started there needs to be an arbitration clause. This may have been written into a contract already signed by the parties or an arbitration agreement drawn up after the dispute has arisen “Ad hoc Arbitration”. An arbitration clause normally sets out:

- 1) which disputes can be referred to arbitration
- 2) what arbitration rules or law applies
- 3) where the seat of arbitration is
- 4) how many arbitrators should be appointed.

### Ad hoc Arbitration

Arbitration is a voluntary process so the parties at any point can decide to go to arbitration rather than the national courts. UNCITRAL Rules are commonly used in ad hoc arbitrations but the parties can agree any procedure they wish to follow.

### Appointment

The Arbitration Clause may provide for a sole arbitrator or an uneven number of arbitrators (often 3) to hear the dispute. There are advantages and disadvantages of having 1 or 3 arbitrators. In small non-complex claims it is often better to have a sole arbitrator who can quickly decide the matter. In complex and large matters the parties often like to pick their own arbitrator then those two arbitrators pick a chairman or umpire. It maybe difficult to arrange meetings but more expertise can be used to decide each issue. If the parties can no decide on an arbitrator an institution or the court can appoint someone on their behalf.

### Ex Parte Communications

The only ex-parte communication allow is the initial contact with an arbitrator to check their availability and fee. Although a party has appointed their own arbitrator they may not have ex-parte communications with them. All correspondence must be copied to the other side and other arbitrators on the tribunal. The Arbitrator must remain impartial and independent all times.

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## Terms of Business

The parties are jointly and severally liable for the arbitrators fees and expenses. Most Arbitrators will insist on their Terms of Business being signed before they accept an appointment. Parties will normally pay a booking fee when appointing an arbitrator to cover admin costs of setting up a new file and the preliminary meeting.

## Preliminary Meeting

After the initial contact the Arbitrator will normally arrange a preliminary meeting to set the timetable and procedure for the arbitration. This maybe done by conference call to save time and costs. Often the arbitrator will provide the parties with an Arbitration checklist to insure all aspects of house keeping are covered. At the end of the Preliminary meeting the arbitrator will issue practice directions which must be complied with by the parties.

## Powers which can be given to Arbitrator

The beauty of Arbitration is the flexibility of the process, if both parties agree to something then in most cases unless it will lead to unnecessary delay and expense the arbitrator will make an order to that effect. The Parties may give the Arbitrator additional Powers under sections 35, 38, 39 of the English Arbitration Act 1996, for example allow the arbitrator to order consolidation of proceedings, order security of costs, interim payments or directions as to the preservation of property.

## Security for costs

If the parties have given the arbitrator the power to do so under certain conditions he can order security of costs against a claimant or counter claimant who is ordinarily resident in the UK.

## Pleadings / Statement of case

An Arbitrator may order the Claimant and Respondent to prepare a Statement of Case attaching all documents the party wishes to rely on or Pleadings as seen in English litigation matters. Parties will normally put forward submissions at the Preliminary Meeting as to which they would prefer to provide.

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## Witness statements

The Parties may have witnesses of fact in support of their case. Witness statements are normally prepared the same way as they are for court with the Witness signing a Statement of Truth.

## Experts

Party appointed or tribunal appointed Experts may be asked to produce a report and attend the hearing. The Arbitrator may order a Single Joint Expert or use Witness Conferencing where all experts are asked the same question at the same time. Civil and Common Law jurisdictions use experts in different ways.

## Pre hearing review

A Pre-Hearing review is often used in complex matters to set a more detailed timetable for the hearing.

## Bundles

The Arbitrator will normally order an agreed bundle to be prepared. This should include all the documents which the parties refer to in their case and which they rely on. It is helpful to have files colour coded and page numbered with an index.

## Opening submissions

Open submissions may be in form of a written statement or oral presentation or both. The arbitrator will allow each party a reasonable opportunity to present their case.

## Hearing of witnesses

Witnesses may be required to attend the hearing. The Arbitrator may ask direct questions of the witnesses and there may be cross examination by the other party. In some circumstances a party may use court proceeding to secure the attendance of a witness at an Arbitration hearing.

## Closing submissions

As with opening submission the closing submissions may be in writing or heard orally at the Arbitrators discretion.

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## Costs

As with litigation the parties may have made offers to each other in an attempt to settle the dispute. These may carry costs implications. The general principle is costs follow the event unless it appears to the tribunal in the circumstances it is not appropriate in relation to whole or part of the claim. Parties may decide to deal with the issue of costs between themselves or ask a Costs Judge or the Arbitrator to make a ruling.

## The Award

The parties may decide the form of the award and whether they require reasons. Normally the award is set out in writing with reasons and signed by the Arbitrator. The Arbitrator has a lien over the award until their fees have been paid in full.

## Enforcement

Where an Award has been made in a New York Convention country the Award is enforceable in any other New York Convention country. The losing party may have assets in another jurisdiction which makes recovery of those assets a lot easier than if the party had just obtained a court order. The parties can go to the National Court to have the award enforced.

## Confidentiality

In general Arbitration is a private and confidential process, however in some countries it is not. In some instances the Arbitrators Award may be published, this is more common when an arbitration institution is involved. The Parties are encouraged to sign a confidentiality agreement at the start of Arbitration proceedings.

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## About Inspired Resolution

Inspired Resolution was created to provide a top quality alternative to going to the National Courts and offers Mediation, Arbitration, Conciliation and Conflict Prevention Seminars.

## Fees

The Arbitrators fee may be worked out on the basis of a % of the claim, an hourly rate or fixed fee. At Inspired Resolution each matter is considered on an individual basis and the complexity and estimated time needed to hear the dispute is taken into account. An initial payment on account is required on booking time in the Arbitrators diary.

## Information

For more details about Mediation, Conciliation, Arbitration, Conflict Prevention Training and the Research of Inspired Resolution please contact us.

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