Guide to Arbitration

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Introduction

Arbitration is often used as an alternative to litigation. Its appeal lies in the fact that it allows the parties more freedom to decide which process they wish to adopt, how long they want the process to take and ultimately who they want to use to decide the dispute. It therefore gives the parties greater control over the resolution of the dispute between them and gives them far more say than they would get if they referred the matter to the court service.

Arbitration is increasingly favoured by business as a way of resolving disputes in preference to litigation.

The Law and its application

In England and Wales the Arbitration Act 1996 ("the act ") governs all arbitration's within this jurisdiction. The rules relate to disputes which can be either domestic or international.

In order to refer a matter to arbitration there generally has to be an arbitration agreement. This usually takes the form of a particular clause in the contract between the parties which stipulates that in the event of a dispute the issue in dispute must be referred to arbitration.

The act does not require the document containing the parties' arbitration agreement to be signed but it does require that the agreement is in writing or is evidenced in writing. An agreement to arbitrate made orally would only be recognised by the common law and the provisions of the arbitration act would not apply in such circumstances.

Appointment of an Arbitrator

Once an obligation to arbitrate has been identified the next step is to appoint an arbitrator.

In most cases the arbitration agreement itself will contain a process for the selection and the appointment of a suitable arbitrator. In the event that the arbitration agreement does not contain such a process then there is a default procedure that is set out in the act. In the final analysis the parties can reach an agreement themselves if that is possible or if it is not then they may apply to the court for an appointment.

Any arbitrator that is appointed should have sufficient experience of the area in dispute to enable them to reach a decision. The arbitrator should be free from any

conflict-of-interest and must ensure that they deal with the matter fairly and impartially.

In the event that any of these requirements are not met then there is a risk that a disaffected party may challenge the appointment of the arbitrator. If such a challenge does arise then it is usually determined by the appropriate organisation chosen by the parties to decide such challenges or ultimately the court.

The process

Once an arbitrator has been appointed they will usually call an initial meeting with the parties. The meeting is designed to identify which issues need to be determined and put in place a process that will ensure that all documents and evidence are made available to the arbitrator prior to a final determination.

The process generally follows a similar pattern to litigation. For instance each party will need to disclose those documents upon which it intends to rely in the arbitration or those documents which it is asked to disclose by the other party following specific requests.

Generally speaking disclosure in arbitration tends to be more limited than in litigation.

In addition to disclosure of documents the parties may wish to rely upon witnesses to support their case. In that situation there will usually be a direction that each party must exchange witness statements setting out their version of events.

If any experts' reports are required to support a party's case then appropriate directions will again be given.

It is perhaps sensible to pause at this juncture and stress that the parties are able to agree to any particular structure that they want as regards resolving their dispute. This is one of the great benefits of arbitration over litigation. The court process tends to place the parties in a straitjacket as far as the litigation process is concerned and there is little flexibility. Arbitration is entirely different in that regard and the process can essentially be tailored by the parties with disagreements ultimately being decided by the arbitrator.

Therefore, it has the potential to both save money, streamline the process and ensure a speedy resolution of disputes. If the parties agree, a straightforward dispute could be over within a matter of weeks. If the matter were placed before the courts it would take months if not longer.

Once all of the procedural requirements have been finalised there will usually be a final hearing.

The Hearing

The act requires that the arbitrator acts fairly and impartially and allows both parties a reasonable opportunity to present their case. The arbitrator must not adopt procedures which give rise to unnecessary expense or delay. However, aside from these basic duties of fairness those hearing the dispute have a wide discretion as to how the hearing is conducted. Indeed if the parties agree there may be no hearing at all and a decision can be reached purely on the basis of written submissions.

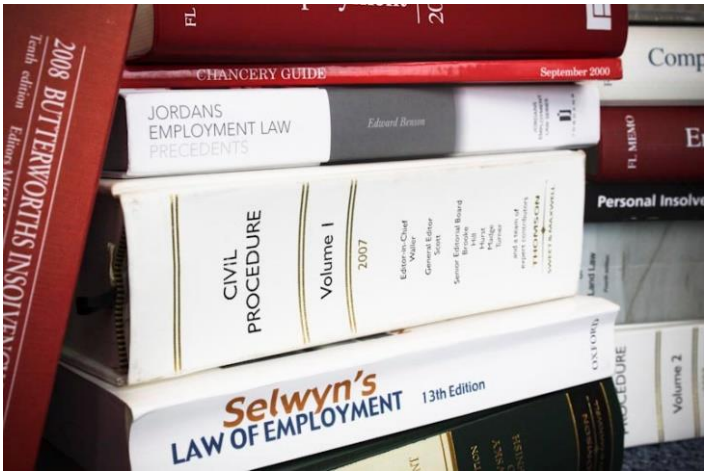
However, if a party requires a hearing then a hearing must be held.

The length of the hearing and the venue can be determined by the parties.

There are no formal requirements as to how the hearing is conducted or as to how evidence is presented.

The Award

The parties can agree on the formal requirements of the award. If they are not able to reach agreement then the act sets out a default regime to be applied. In order to be valid any award must be in writing and signed by the arbitrator. It must contain the reasons for the award, the seat of the arbitration and the date that the award was made.



As part of the award the arbitrator may award costs against either party and in the absence of any agreement the act sets out a general principle that costs should follow the event unless it would be inappropriate to do so. The arbitrator can award both damages and interest.

Challenges to an award

Whilst it is generally very difficult to challenge an award there are three grounds upon which challenges can be made.

1. Jurisdiction

Under this heading it is possible for a party to challenge an award on a number of bases. For instance a party may challenge the award on the merits of the substantive award or may challenge the existence or validity of the arbitration agreement, the constitution of the tribunal or indeed scope of the agreement itself.

2. Serious irregularity

The award can be challenged if there has been a serious irregularity which will result in a substantial injustice to the party challenging. The irregularity may relate to the arbitrator, the process adopted the hearing or the award itself. For instance, one could mount a challenge if the arbitrator failed to act fairly and with impartiality, failed to deal with all of the issues or give proper consideration to the evidence which was placed before them.

3. Appeal on a point of law

An appeal under this heading can be brought with the agreement of the parties or with leave of the court. In order to obtain leave of the court the applicant must show that a determination of the question will substantially affect it's rights, that the question of law is one which the tribunal was asked to determine, that the decision of the tribunal is obviously wrong or that the question is of general public importance and the tribunal's decision is open to serious doubt. The court must also be satisfied that it is proper and just to determine the question.

Any challenges must be bought within 28 days of the award or within 28 days of being notified of the outcome of any appeal, review, correction or addition to the award.

Enforcement of Award

Most awards are satisfied voluntarily. However, in the event that one party does not comply there are two alternative procedures available to enforce the award.

The first procedure is to seek leave of the court for permission to enforce the award.

The second procedure would be to begin a court claim based upon the award where you would be seeking the same relief from the court as set out in the award made by the arbitrator.

The courts are generally supportive of enforcing awards made in arbitration.

Any enforcement action must be taken within six years of the award being made or 12 years if the arbitration agreement was made under seal. If the award does not specify a time for compliance then the court will usually imply a term of reasonableness.

Conclusion

We hope that this brief guide to the arbitration process has given you an insight into how arbitration works when resolving disputes. The benefits are that arbitration allows parties to control the process more closely than litigation and also control the time taken to bring the dispute to a conclusion. Straightforward arbitrations can be concluded within a matter of weeks although more complex arbitrations can take years.

In our experience arbitration is not necessarily cheaper than litigation but the benefits to the participants are that they can tailor the process and thereby reduce costs and the time taken in resolving conflict.

If you require further information arbitration then please contact Andrew Grant on (01244) 394230.

This guide is for general information only and is not intended as legal advice.

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This article is intended as a general statement only and does not purport to render any specific advice, legal or otherwise. Specific advice on a particular problem should always be sought.

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