

Arbitration: a quick guide

What is arbitration?

Arbitration is an alternative to litigation as a means of resolving a dispute. The parties must agree to submit any disputes to arbitration for resolution and this is usually done by way of an arbitration clause in the parties' contract (although the parties can enter into a separate agreement after the dispute has arisen). Arbitrations that have their seat in England, Wales or Northern Ireland are governed by the Arbitration Act 1996 (**AA 1996**), however the provisions are by and large non-mandatory, allowing the parties to have autonomy in determining how the arbitration should proceed.

Do I have the right to commence an arbitration?

Does my contract include an arbitration clause?

- The parties must have agreed to resolve their disputes by arbitration rather than by court proceedings – is there a clause in the contract to that effect?
- Check which arbitration rules apply and be sure to follow them.

NO

YES

If the contract does not include an arbitration clause, then the parties can choose to enter into an arbitration agreement once a dispute has arisen.

Is there a dispute?

- An arbitration should only be commenced when a dispute(s) has arisen between the parties.
- Claims where there is no substantive defence, a respondent has failed to provide a response, or which are admitted (but unpaid) are still 'disputes'.
- Claims can be added or amended after the arbitration has commenced (depending on the nature of the claim, when it accrued, and the provisions of any applicable arbitration rules).

NO YES

There is no right to commence an arbitration.

Have any time limits been complied with?

- Arbitration clauses may impose a limit for commencing arbitration proceedings or provide that a claim is barred or extinguished if an arbitration is commenced after the time limit.
- S.13 AA 1996 states that the Limitation Act 1980 applies to arbitral proceedings just as they apply to legal proceedings.

NO

YES

- Some arbitration rules allow tribunals or arbitral institutions to extend contractual time limits. This option should be exhausted before parties make any applications to court.
- Parties may apply to court for an extension of a contractual time limit (but not a statutory time limit) under s.12 AA 1996.

Commencing an arbitration (Example Procedure – ICC RULES 2017)

Claimant files a Request for Arbitration

- Description of the parties and dispute giving rise to claims (*Article 4(3)(a)-(c)*);
- Details of contract(s) and arbitration agreement (*Article 4(3)(e)*);
- Relief sought; and
- Proposals concerning the number of arbitrators and their choice in accordance with provisions of *Articles 12 and 13*, and any nomination of any arbitrator required (*Article 4(3)(g)*).

Defendant files an Answer to the Request for Arbitration

- Once the Defendant has received a copy of the Request it has 30 days to file an Answer (*Article 5(1)*);
- No prescribed form of the Answer but, as a minimum, should contain details of the parties (*Article 5(1)(a)*); comments on the dispute and claims (*Article 5(1)(c)*); and a response to relief sought (*Article 5(1)(d)*); and
- Bring any counterclaims at the same time as filing Answer (*Article 5(5)*).

Initiating the Arbitration

- The tribunal orders a provisional timetable on what directions may be necessary (*Article 24(3)*); and
- The timetable usually identifies provisional dates for the final hearing and other steps.

Formation of the Tribunal

- Parties select an arbitrator - must be impartial and independent (*Article 11(1)*); and
- If parties cannot agree, the ICC Court will appoint a sole arbitrator (*Article 12(2)*).

Arbitration Proceedings

- Statement of Claim / Defence served according to timetable set;
- Documentary evidence: it is up to the tribunal to decide the scope of disclosure (*Article 25(5)*); and
- Witness and Expert evidence: Tribunal has the right to hear witnesses, experts or any other person but has no obligation to do so (*Article 25(3) – (4)*).

Hearings

- Tribunal may decide the case on documents alone, unless any of the parties request a hearing (*Article 25(6)*); and
- Tribunal has broad scope to conduct any hearings it thinks appropriate and these are private (*Article 26(3)*).

Award

- Tribunal must inform the Secretariat and parties of the date by which it expects to send its draft award to the ICC Court for scrutiny to identify mistakes as to form and substance (*Article 27*).
- Once it has been made, the Secretariat sends the award to the parties, provided all costs of the arbitration have been fully paid to the ICC (*Article 35(1)*).
- Parties are bound by the award (*Article 35(6)*) (subject to any challenges regarding serious irregularity or jurisdiction of the arbitrator).