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Anatomy of an arbitration

**A PRACTICAL GUIDE TO
INTERNATIONAL ARBITRATION**





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Contents

Foreword	1
Why arbitrate?	2
Key elements of an arbitration clause	5
Pre-dispute strategy considerations	7
Interim measures	10
Commencing arbitration	15
Appointing a tribunal	19
Arbitration procedure	23
Document production and evidence	28
Evidential hearing	32
Award - challenges and enforcement	37

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Foreword

Arbitration has long been a preferred means of resolving commercial, investment and other international disputes. Its popularity has increased steadily with globalisation of trade since the middle of the 20th century. Parties from around the globe, with their diverse legal, commercial and cultural backgrounds, increasingly opt for arbitration to resolve their disputes because of its neutrality, flexibility and the widespread ability to enforce arbitration awards.

This short guide provides practical insights into the arbitration process from beginning to end. They are drawn from Ashurst practitioners' experience of arbitration across different industries, institutions and rules, and jurisdictions. Although it is not possible to capture every possible permutation of the arbitration process – the ability to tailor the procedure to suit the parties or a dispute is, after all, one of the key advantages of arbitration – most international arbitrations will involve certain essential steps and give rise to some common issues. A body of expertise has developed to deal with these, shaped by relevant international treaties, national laws and the practice of arbitration practitioners and leading institutions administering arbitrations.

From choosing to arbitrate an existing or future dispute through to challenging or enforcing a final award, this guide highlights key considerations to bear in mind at each stage of the process. We hope you find it useful.



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Other relevant international arbitration resources include our QuickGuides on:

- [Introduction to international arbitration](#)
- [Drafting arbitration clauses](#)
- [International arbitration: Which institution?](#)
- [Third party funding in international arbitration](#)

Why arbitrate?



Litigation or arbitration? This is one of the first questions that lawyers new to the field of international dispute resolution grapple with. Is it preferable for parties to submit their disputes to the national courts, or to an arbitrator, or panel of arbitrators, sitting in a neutral jurisdiction?

The commercial reality

In practice though, do parties negotiating international contracts really spend a great deal of time debating the respective merits of litigation vs arbitration? Take a scenario where you have Egyptian and Italian counterparties - the Egyptian party may favour dispute resolution in the Egyptian courts and the Italian in the Italian courts. Neither may be prepared to concede to the other: international arbitration is the compromise. In the words of leading practitioner, Jan Paulsson:



"We can be certain that lawyers' cupboards across the globe are filled to bursting with myriad contracts referring to international arbitration even though each side actually preferred courts. You all see why international arbitration finishes first even though it was perhaps never better than second best in anyone's mind. The problem was that the most preferred alternative of each side was the least acceptable to the other".¹

That is not to say that international parties are always unwilling to submit to national courts. The English courts see a significant volume of international cases, and the same is true of the New York courts, and those of a (small) number of other jurisdictions. Equally, in certain sectors (for example, shipping and insurance), arbitration will be preferred over litigation (for reasons we explore in more detail below).

But why has international arbitration grown to become the default dispute resolution option for international parties?

Reasons to choose arbitration

Analysis of users' expectations of international arbitration produces similar results. A survey in 2015 found that the enforceability of awards, the ability to avoid specific legal systems, the flexibility of procedure and the ability of parties to select their arbitrators drives the popularity of arbitration.²

Why is this?

- **Enforceability:** international arbitration benefits from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**). Despite its title, the New York Convention provides for the enforcement of both international arbitration awards and international arbitration agreements. Over 150 countries are presently party to the New York Convention, making it one of the most successful and influential treaties in the field of international commerce. Although enforcement of European court judgments within Europe is relatively straightforward, and certain countries (such as the United Kingdom) have entered into a network of treaties for the reciprocal enforcement of court judgments, the enforceability of arbitration awards pursuant to the New York Convention, is one of the principal reasons for arbitration's popularity. The New York Convention is not perfect: it was drafted half a century ago in a world which bore little resemblance to today's globalised and interconnected economy, and the record of compliance with the New York Convention in certain regions is mixed. But it remains the case that a party with an international arbitration award is often in a far better position to enforce than a party with a court judgment.
- **Neutrality:** arbitration offers 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 merits of the dispute. Parties worried about the sophistication, or partiality, of national courts can have their dispute resolved by neutral arbitrators in a neutral forum.
- **Privacy:** arbitration proceedings are generally private and the parties can agree that the fact of the arbitration, any information exchanged during it, and the outcome of the process are kept confidential. This is in stark contrast to litigation, which is invariably public and involves the airing of "dirty laundry" in the press in high profile proceedings. There is some evidence that the confidentiality in arbitrations is being progressively chipped away, but the nature of arbitration is that it is consensual: parties can seek to agree watertight confidentiality provisions when they agree to arbitrate.
- **Finality:** one of the reasons why litigation is unpopular is the perceived opportunity to frustrate the enforcement of any judgment with lengthy appeals. By contrast, arbitration awards are generally final and, where scope exists to challenge them, this is on narrower grounds than that found in national court systems. Arbitration is often more efficient, with "one stop" adjudication substituting for trials and extensive appellate reviews.
- **Flexibility:** there are the factors that provided the motivation behind the origins of arbitration: flexibility of the process, speed and efficiency, and the ability to select a tribunal of arbitrators with technical experience. Although these remain the reason why, in certain sectors (such as shipping and insurance), arbitration is the preferred choice, their value has diminished as the development of arbitration as a forum for resolving high-value international disputes has resulted in a more formulaic, time-consuming and expensive disputes process. This is a common criticism of arbitration and is an issue that institutions are grappling with.



"Enforceability of awards" is seen as arbitration's most valuable characteristic, followed by "avoiding specific legal systems", "flexibility" and "selection of arbitrators".

QMUL 2015 INTERNATIONAL ARBITRATION SURVEY

Reasons to choose litigation over arbitration

There are, of course, countervailing factors in favour of litigating, rather than arbitrating.

If enforcement is not a concern, the courts of a well-regarded jurisdiction, known for its independent and experienced judiciary, may be satisfactory. Litigation may also be better suited to summary determination of disputes (desirable to finance parties who may want to obtain a quick judgment against a defaulting debtor) and multi-party disputes, with the courts able to join parties and consolidate proceedings where appropriate. In the latter case, the consensual nature of arbitration makes joining third parties difficult. That said, leading arbitration rules are being adapted to provide for both summary disposal and consolidation and joinder. In addition, multi-party arbitration agreements can be drafted for the purposes of multi-party projects.

Other reasons for preferring litigation include cost; litigation in some jurisdictions is quicker and cheaper than international arbitration, or where parties want publicity for a claim or want to set a precedent.

In the words of one expert, arbitration is "the ordinary and normal method of settling disputes of international trade".³ Enforceability, neutrality, privacy and finality are the principal reasons why this is so. Unless there is a radical change in the landscape of court litigation, this is likely to remain the case. Lawyers' cupboards (and email folders) will remain "filled to bursting" with lengthy contracts incorporating short, perhaps barely considered, arbitration provisions.



"Cost" is seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of insight into arbitrators' efficiency" and "lack of speed".

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Notes

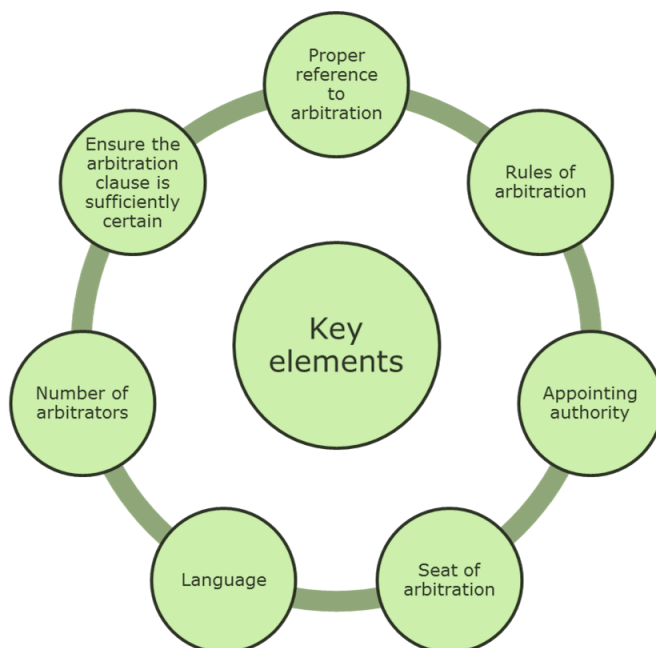
1. International arbitration is not arbitration; Jan Paulsson; John E.C. Brierley Memorial Lecture, McGill University, Montreal 28 May 2008.
2. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, Queen Mary University of London/White & Case.
3. Transnational (or Truly International) Public Policy in Arbitration, in P. Sanders (ed.), Comparative Arbitration Practice and Public Policy in Arbitration 257, 293 (1987).

Key elements of an arbitration clause



Arbitration is founded upon the principle that two or more parties have consented to their disputes being resolved by arbitration rather than national courts. It is a creature of contract and requires agreement between the parties. That agreement is commonly found in an arbitration clause (included in a contract prior to a dispute arising) or a submission agreement (entered into once a dispute has arisen). In this part, we focus on the key elements of the former.

Key elements of an arbitration clause



Proper reference to arbitration

The purpose of the arbitration clause is to refer disputes arising under the contract to arbitration. The parties must identify which disputes they want to finally resolve by arbitration and ensure that the drafting of the clause achieves that.

Parties will often want a "one-stop shop" dispute resolution procedure for all disputes arising in relation to a contract. The arbitration clause should therefore be broadly drafted to cover all disputes arising out of or in connection with the contract in question, whether those disputes are contractual or non-contractual in nature.

Rules of arbitration

One of the benefits of arbitration over litigation is the ability of the parties to define the procedure by which the arbitration will be conducted. The level of flexibility accorded to the parties depends on whether they opt to resolve their dispute through institutional or ad hoc arbitration.

If institutional arbitration is chosen, it is usual for the selected institution's rules to govern the conduct of the arbitration. If ad hoc arbitration is chosen, the parties may choose to draft their own rules or, as is more common, to use other rules, such as the UNCITRAL Rules.

Appointing authority

In an institutional arbitration, the selected institution will be the appointing authority. Unless agreed otherwise, the appointment of the arbitrators will be governed by that institution's rules. However, in an ad hoc arbitration it is important to specify a mechanism for appointment of the arbitrators in default of appointment by the parties. This is usually done by nominating a third party appointing authority. Most of the arbitral institutions offer an appointing service, even if their arbitral rules are not being used.

Seat of arbitration

The seat or place of the arbitration is one of the most important matters to specify when drafting an arbitration clause. It is the law of the seat that governs how the arbitral proceedings are to be conducted. So, for example, if the seat is specified to be London, the English Arbitration Act 1996 will apply to the arbitration.

The choice of seat can also affect: whether the national courts will intervene in the arbitration; whether the subject matter of the dispute is capable of being resolved by arbitration; the ease with which an arbitral award can be challenged or appealed; and the enforceability of an arbitral award in other jurisdictions. The parties should ensure that the chosen seat has ratified the New York Convention to maximise the likelihood of an award being enforced in other jurisdictions.

Language

The language of the arbitration will be the language of the written and oral submissions and of any hearings. The language chosen will usually be the language of the contract underlying the dispute. If the language is not specified in the arbitration clause, the arbitral tribunal will determine it.

Number of arbitrators

Usually an arbitration is heard by one or three arbitrators. An even number of arbitrators should always be avoided. Although cheaper, choosing a sole arbitrator can be more risky as the award depends on the opinion of only one person. In complex disputes, parties often feel more comfortable knowing that their chosen arbitrator is part of a three-person tribunal.

Ensure the arbitration clause is sufficiently certain

National courts will generally try to uphold arbitration provisions. However, the arbitration clause should always be clearly drafted to avoid any argument as to its application once the parties' relationship has broken down.

Other points to consider

The parties may also wish to make express provision in the arbitration clause for the governing law of the arbitration agreement (sensible if the law governing the contract does not coincide with the seat, e.g. English law but Singapore seat). Under the law of most developed arbitration jurisdictions, an arbitration agreement is considered separate to the main contract in which it is located and so may be governed by a different law. Provision should also be made for the exclusion of rights of appeal, confidentiality, and interim measures.

Invest in the drafting of the arbitration clause to avoid future difficulties

Parties should carefully consider what they want from the arbitral process and ensure that the drafting of the arbitration clause reflects those wishes. An ambiguous arbitration clause is open to attack once a dispute arises and the effectiveness of such a clause will likely be contested, adding a further layer of expense and delay.

Pre-dispute strategy considerations



Effective dispute management is a challenge, and one which needs to be tackled early. A comprehensive and well-planned approach at the initial stages of a dispute is crucial in optimising your legal position and ensuring any proceedings run as efficiently as possible. Here we provide a checklist of the key issues to consider at the outset of a dispute.

Watch the clock

One of the first questions to consider is whether you are facing an imminent deadline to bring a claim. There are statutory, and sometimes contractual, limitation periods which dictate by when claims must be brought. If you are facing a potential claim, a limitation period can provide a complete defence if the other party is out of time. If you are the claimant, you should diarise the deadline early on so as not to get caught out.

Contractually required steps – to comply or not?

Some dispute resolution clauses require certain steps to be taken prior to commencing proceedings, for example, issuing a notice of dispute and attempting resolution through negotiation. If there are contractually required steps, you need to consider whether or not to take them. It may be that such steps are futile at this stage, and that further delay cannot be tolerated. It is important to consider the potential consequences of not complying with pre-action procedures. One of the risks is that the respondent will argue that the arbitration has been improperly commenced and should not be allowed to proceed. A challenge to the jurisdiction of the arbitrators may be brought. An award may be challenged or refused enforcement down the line.

Letter before action

If you are initiating the claim, you should consider whether you are legally required to notify the respondent that proceedings will be commenced, setting out a brief background of the facts and your complaint. This letter should be carefully drafted as it may subsequently be used as evidence. Such compulsory procedures are rare in arbitration, but a letter before commencing arbitration may focus your opponent on the shape of any arbitration proceedings, facilitating pre-arbitration settlement.

Documents – preserve existing and avoid creating

Documents are perhaps the most important source of information about the dispute. At the outset, you should prepare a documentary record. It is common in international arbitration for the tribunal to order some document production, although the scale of the exercise varies. Once arbitration is imminent, you will need to ensure that existing documents are not destroyed, so you are able to comply with any future order. Destruction of documents may lead a tribunal to draw adverse inferences if no satisfactory explanation can be provided.

While you need to ensure that existing documents are not destroyed, it is also prudent to avoid creating new documents once the dispute has arisen. Privilege will protect some documents from disclosure, but it only arises in certain circumstances and can be lost or waived. Practically, this means sending a document retention letter or email to all relevant employees requesting that they do not destroy any existing documents and also avoid creating new ones that discuss the dispute.

Identify key employees

The input of key employees will be crucial in preparing your case, both in terms of providing facts for the initial submissions and possibly witness evidence in the arbitration. It is advisable to contact these employees and/or HR at the beginning of the dispute. You will need to gauge the extent of their knowledge, their willingness to co-operate and provide reassurance as giving evidence can be a stressful and time-consuming process.

Insurance notification

Some losses, including as a result of arbitration, may be covered by your insurance policy. You should notify your insurance provider as soon as possible about the potential dispute to ensure you do not forfeit the benefit of the coverage by failing to give timely notice.

Media

You should consider whether your dispute is likely to attract media attention. Often, disputes involving public concerns such as natural resources or infrastructure projects attract significant interest. While arbitration is often confidential, this is not always the case, and there are a number of ways in which information about arbitral proceedings can slip into the public domain, for example, by a party making a mandatory regulatory announcement. In our experience it is surprising how often the media incorrectly reports disputes. Subject to compliance with any confidentiality obligations, it may be necessary to prepare a press statement and/or engage the services of a PR adviser to manage the media.

Costs management

At the outset of any dispute, it is important to assess the commerciality of any claims. As with any commercial project, a dispute should be subject to budget control and costs should be kept under constant review. A costs estimate can also inform the timing of any settlement negotiations.

Settlement

Arbitration is inherently uncertain and unpredictable. If a settlement opportunity arises, it deserves careful consideration and should be a part of your strategy at the outset of the dispute. Like costs, settlement opportunities should be at the forefront of your mind. A costs-benefit analysis of continuing with the arbitration should be undertaken at the outset of the dispute, and reviewed on a continual basis.

Any correspondence which is intended to resolve the dispute should be marked "without prejudice". The principle of the sanctity of bona fide settlement communications is upheld by most tribunals on the basis of either national or international legal principles. However, you should be very careful when proposing any settlement in pre-action correspondence, as lawyers from different jurisdictions may produce the settlement offer in subsequent proceedings on the grounds that the offer was an admission of liability.

Pre-dispute checklist

- ✓ Are there any statutory or contractual deadlines by which a claim must be brought?
- ✓ Does the contract require any steps to be taken before proceedings are commenced? Consider sending a letter before commencing proceedings.
- ✓ Have you circulated a document retention letter? Remember to preserve existing documents and avoid creating new ones.
- ✓ Who are your key employees/witnesses?
- ✓ Consider insurance coverage.
- ✓ Assess media interest and possibly prepare a press statement.
- ✓ Assess commerciality of the claim and develop a costs budget.
- ✓ Consider settlement opportunities.

Interim measures



What is an interim measure?

All but the simplest disputes take time to resolve. In the context of international arbitration, an arbitrator, or tribunal of arbitrators, must be appointed, factual and legal submissions exchanged, evidence produced, and an award prepared. But what if one party seeks to take advantage of the time required to determine a dispute by taking the law into its own hands?

Consider, for example, a dispute regarding the ownership of certain goods. The buyer refers the dispute to arbitration. The seller decides that rather than wait for an arbitral award, it will sell the goods to a third party. If the buyer wants to retain any entitlement to the goods, it will need to move quickly. It will need some form of interim relief to safeguard the goods until resolution of the disputed ownership.

It is in scenarios like this that interim measures play an important role in international arbitration.

Interim measures are also referred to as provisional or conservatory measures. They are a temporary form of relief which subsists only until a final order or award is made. Such measures may take the form of an order preserving assets or evidence, or requiring a party to take certain steps or preventing it from taking certain action. In general terms, their purpose is to preserve the status quo and protect the parties' rights pending final resolution of the dispute.

Interim measures in international arbitration

The ability of national courts to order interim measures in litigation proceedings has been long established. It is taken for granted that parties to litigation can apply to the court for such relief, usually during the early stages of a dispute.

By comparison, the use of interim measures in international arbitration is, relatively speaking, still in its infancy. But the need for interim measures in arbitration is identical to that in litigation and is obvious: without them the actions of one party may seriously and irreparably damage the rights of the other, rendering the arbitration process futile.

Interim measures are a temporary relief which subsists only until a final order of award is made; their purpose is to preserve the status quo and protect the parties' rights pending final resolution of the dispute.

Who can impose interim measures?

Interim measures in support of arbitration proceedings may be imposed by:

- the arbitral tribunal, or an emergency arbitrator appointed prior to formation of the tribunal; or
- a national court.

Which of these bodies is empowered to act will depend on the applicable arbitration rules, the law of the seat of the arbitration (or the national courts where relief is sought), the arbitration agreement itself, and the stage at which the application for interim relief is made.

The law of the seat of the arbitration often entitles the parties to choose to seek interim measures from either the arbitral tribunal/emergency arbitrator or the court. In some jurisdictions, the parties' freedom is restricted. In England, for example, absent contrary agreement by the parties, the court may only grant interim measures if certain conditions are met, such as urgency and if the arbitral tribunal "has no power or is unable for the time being to act effectively".¹

The rules of the leading arbitral institutions empower the arbitral tribunal to order interim measures² - unless the parties have agreed otherwise. While this allows all issues relating to the dispute to be dealt with in a single forum, interim measures are often needed at the very outset of a dispute, before the arbitral tribunal has been constituted. At that early stage, rapid action is imperative; for example when an order is sought preventing the dissipation of assets by a respondent to proceedings. If an arbitral tribunal has not been constituted, it will not be able to act.

In such circumstances, a party's recourse has historically been to the national courts.³ Most countries' arbitration legislation, and particularly those which have based their legislation on the UNCITRAL Model Law, allows national courts to order interim measures in support of the arbitral process. Some will also recognise and enforce interim measures awarded by an arbitral tribunal. To address this, arbitral institutions have developed procedures by which an "emergency arbitrator" can be appointed on a short-term basis and within a short time frame to consider and issue interim measures (where appropriate).

The procedure is designed to bridge the period between the dispute arising and the arbitral tribunal being constituted. The ICC, SIAC and LCIA are examples of institutions which have included emergency arbitrator provisions in their latest rules. Although the institutions clearly hope that such provisions will divert applications for interim measures away from the national courts, the procedures have limitations. In particular, many arbitral institutions require applications for an emergency arbitrator (as well as applications for interim measures from the tribunal more generally) to be made on notice, which could defeat the purpose of seeking the interim measure. Where, for example, relief is sought to prevent the dissipation of assets, notification of an application for a freezing order to a respondent may merely encourage the respondent to transfer assets out of the reach of the claimant, and the arbitral process. Where an institution's rules do not expressly prohibit without notice applications, the arbitral tribunal/emergency arbitrator will often refuse such applications and, even when they do not, there are often difficulties enforcing any resulting award. Another potential limitation relates to the enforceability of the awards of emergency arbitrators, as there are doubts as to whether they are considered final and binding under Article V of the New York Convention. Certain jurisdictions have specifically catered for this and amended their arbitration legislation, but many have not.

A party's recourse has historically been to the national courts. To address this, arbitral institutions have developed procedures by which an "emergency arbitrator" can be appointed on a short term basis to consider, and issue interim measures.

Another reason why the assistance of national courts is preferred to that of an arbitral tribunal is enforceability. For example, the penal nature of a freezing injunction issued by a national court (the ability to hold a party in contempt for breach) and the ability to enforce it against third parties, such as banks.

Once an arbitral tribunal has been constituted, the rules of most institutions prefer applications for interim measures to be made to the arbitral tribunal rather than the national courts. If the application is made to the wrong body, it may be refused or face jurisdictional challenges from the other party.

In what circumstances will interim measures be awarded?

The applicable test depends on the forum in which interim measures are sought. If interim measures are sought from the arbitral tribunal some guidance is provided by the UNCITRAL Model Law. Article 17A of the Model Law provides that a party which requests interim measures from a tribunal must satisfy the tribunal that:

- harm not adequately compensated by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

Even if the seat of the arbitration is in a jurisdiction which has not adopted the Model Law, in international arbitration proceedings this test is likely to influence the approach a tribunal takes to interim relief.

Will the interim measures be enforceable?

An arbitral tribunal is not able to compel performance with its own order or award. Only a national court can enforce an arbitral award, or provide for execution of assets. This can lead to the conclusion that the award of interim measures by a tribunal lacks teeth. The granting of interim measures, like a final award, may be enforceable in the national courts (subject to the law of the national courts permitting enforcement). It is also said that many parties to an arbitration will comply with an interim award to avoid being viewed unfavourably by the tribunal for the remainder of the proceedings, making enforcement unnecessary. Failure to comply with an award of interim measures may also attract costs sanctions.

Key considerations

It will be for the applicant to consider the specific circumstances of its situation and determine the best forum in which to seek interim measures. Its choice may be constrained by the applicable rules, the applicable law and the arbitration agreement itself. In addition, it should consider the following in deciding whether to seek relief in the national courts or from the arbitral tribunal (or emergency arbitrator if applicable):

CONSIDERATIONS	NATIONAL COURT	ARBITRAL TRIBUNAL
Can interim measures be sought at the very outset of the dispute?	Yes: for example, under English Law, applications can be made to national courts at any time.	Maybe: It is possible if the rules provide for the appointment of an emergency arbitrator. Otherwise, applications can only be made once the tribunal has been constituted.

Can interim measures be sought without notice?	Yes: national courts are receptive to applications made without notice where there is a particular urgency or need to obtain an order without the other party being made aware (for example, where an order is sought to protect evidence or assets).	Generally, no: arbitration is based on the agreement of the parties and arbitral tribunals and emergency arbitrators are unlikely to be willing to award an interim measure in the absence of the other party being able to make representations.
Can interim measures be awarded against a third party?	Yes: the court has the ability to impose an order on a third party.	No: the arbitral tribunal's power is limited to those parties which have agreed to be subject to it. It cannot bind third parties. This is a key disadvantage of seeking interim measures from a private arbitral tribunal.
Will an order imposing interim measures be enforceable by the courts?	Yes: generally, national courts can compel parties to comply with their orders. Although there may be difficulties in enforcing the decision of the court in other jurisdictions.	Maybe: an arbitral tribunal cannot compel compliance with its awards. If the decision to impose interim measures takes the form of an award, it should be capable of enforcement by the national courts of states that are party to the New York Convention, but there is no guarantee. However, it is generally thought that parties will voluntarily comply with the interim award so as to avoid the tribunal viewing them unfavourably in the main arbitration proceedings.
Will the award of interim measures be confidential?	No: certainly from an English law perspective, orders made in open court will not be confidential (although appropriate relief may be sought to ensure confidentiality if there is a special need for it).	Yes: confidentiality is a basic principle of arbitration and is perceived as a key benefit. However, if a national court is required to enforce the award of interim measures, the element of confidentiality will likely be lost.

Notes

1. Section 44 of the English Arbitration Act 1996.
2. For example, Article 28.1 of the ICC Rules (2012); Article 25 of the LCIA Rules; and Article 30 of the SIAC Rules.
3. Usually, but not always, those of the arbitral seat.



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"Ashurst's prominent international arbitration group consists of practitioners praised at both partner and associate level by one source as being 'the best tacticians I've ever worked with'."

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Commencing arbitration



Choose your target

Arbitration is consensual: it can only take place between or among parties who have agreed to arbitrate their disputes. Careful consideration must therefore be given to:

- against which party a claim lies;
- against which party a remedy is sought (if different); and
- whether there is a valid agreement to arbitrate the dispute with such party or parties.

Issues can (and often do) arise in arbitration which make it necessary or desirable to involve multiple parties.

By way of an example, a party may have a claim against two parties arising out of the same circumstances (e.g. a contractor and a sub-contractor), but only have an arbitration agreement with one of them. In that case, it will be necessary to commence separate arbitration and court proceedings against each relevant party. A party defending a claim before an arbitral tribunal may in turn have a contribution claim against a third party, but will need to bring that claim separately. Unless all parties reach an agreement to arbitrate the relevant dispute after it has arisen, it will not be possible to avoid parallel proceedings and the risk of inconsistent results.

There are circumstances where the joinder of non-signatories to the arbitration agreement may be allowed, including cases of joining a parent or a subsidiary of the signatory. Whether joinder will be possible will depend on the specific factual matrix, both the substantive governing law of the agreement and the law of the seat of the arbitration, and the procedural rules that govern the arbitration. These are important strategic considerations for the conduct of the claim which must be planned at an early stage.

Causes of action

Once satisfied that there is an arbitration agreement binding on the parties, it is equally important to consider the wording of the arbitration agreement to ascertain whether the intended claim(s) fall(s) within the parties' agreement. For example, the parties may have agreed that all disputes involving them will be resolved through arbitration or they may have restricted their agreement to claims under a particular contract (but excluding other claims, such as claims in tort (e.g. negligence claims)).

If there is ambiguity or disagreement, the arbitral tribunal will usually have jurisdiction to decide whether a claim falls within the arbitration agreement. It is important to make the following distinction here:

- The arbitral tribunal will apply the law of the arbitration agreement to determine its validity. The parties may have made an express choice of law, which may (but not necessarily) be the same as the law governing the underlying agreement. Absent an express agreement, the law of the arbitration agreement typically follows the law of the seat.
- Any challenge to the arbitral tribunal's finding will be determined by the courts of the seat of the arbitration. Consideration must therefore be given to both the governing law of the agreement and the practice of the courts of the seat of the arbitration when considering a jurisdiction challenge.

Many courts interpret arbitration agreements liberally and, absent clear words to the contrary, are likely to find that even claims based on tort fall within the arbitration agreement, provided there is some connection with the parties' contractual relationship. This is because of the presumption that parties to an arbitration expected a "one-stop shop", with all related disputes being determined by arbitration. This could include, for example, a claim for negligent misrepresentation inducing the other party to enter into the contract containing the arbitration agreement.

Remedies sought

A monetary award (damages) is the primary remedy sought in international arbitration. However, in all sophisticated jurisdictions and under all major institutional rules, the arbitral tribunal has wider powers to order remedies similar to those available to national courts.

There are three main points to check carefully:

1. Check that the arbitration agreement (including any rules incorporated by reference) does not limit the powers or remedies available to the arbitrator.
2. As any potential challenge to an award will be heard by the courts of the seat of the arbitration, check the approach such courts take on particular remedies, such as specific performance.
3. It is also important to consider where any favourable award is likely to be enforced and whether that jurisdiction places any restrictions on the enforceability of remedies available to the party.

Press the button

The exact procedure to follow to commence arbitration proceedings will depend on the applicable arbitration rules and the arbitration agreement itself. Under most major institutional rules, proceedings are commenced by the filing of a "Request for Arbitration" or "Notice of Arbitration" with the relevant institution. The arbitration usually commences when the Request for Arbitration is received by the relevant institution, an important point for limitation purposes. In ad hoc arbitrations (i.e. those not administered by an institution), proceedings are typically commenced by a Notice of Arbitration sent to the other party and the arbitration usually commences on receipt by the other party. This is the case, for example, under the UNCITRAL Arbitration Rules, which are popular with parties opting for ad hoc arbitration.

The information and the level of detail required in the Request for Arbitration (or Notice) varies from institution to institution, and also depends on any express provision in the arbitration agreement. In some cases, the Request is a comprehensive document serving as the claimant's statement of case. In others, it is a short document with detailed pleadings to follow at a later stage, after the tribunal has been appointed.

The information contained in the Request for Arbitration usually includes some or all of the following:

- An express reference to (and often attaching) the relevant arbitration agreement.
- Identity of the parties.
- A description of the claim(s) and its/their value.
- Identification of the remedies sought.
- Depending on the applicable rules and the parties' agreement on the number of arbitrators, the claimant's nomination or proposal as to the arbitrator(s).
- The language of the arbitration.
- Proposals as to the place of the arbitration and the applicable rules of law (if not previously agreed).
- For institutional arbitrations, a filing fee is usually payable at the time of sending the Request for Arbitration. It is important to check the applicable procedure carefully, as failure to observe the applicable rules may result in delay in commencing the proceedings

Answering back

The respondent must file with the relevant institution (or send to the claimant for ad hoc arbitrations) an Answer or Response to the Request for Arbitration within a short time frame. The Answer must contain the respondent's counter-proposals as to the matters raised by the Request for Arbitration.

For a party on the receiving end of a Request, the first point to consider is whether there is a valid arbitration agreement between the parties covering all the claims in the Request for Arbitration. It is also important to check whether the tribunal has the power to order the remedies sought.

A challenge to the tribunal's jurisdiction must be made without delay. If not, a party may lose the right to challenge the substantive jurisdiction of the arbitral tribunal before the national courts. This is, for example, the case for arbitrations seated in England or Wales.

It's not me, it's you

What if the respondent wishes to introduce a counterclaim? Under some rules (e.g. ICC), if the respondent wishes to introduce a counterclaim, it must do so in the Answer. Under other rules, detailed statements of case or defence are usually filed and exchanged after the tribunal has been appointed. In any event, while most institutional rules allow the introduction of a counterclaim at a later stage, it is preferable to do so without delay.

Counterclaims present real challenges in arbitration. A counterclaim must generally satisfy the same principle as the original claim: it must fall within the scope of the arbitration agreement. Generally speaking, it is only possible to bring a counterclaim arising out of the same arbitration agreement as the original claim. If the counterclaim arises out of a separate contract providing for arbitration under the same rules, it may be possible to consolidate the two claims. However, it will not be possible to bring a counterclaim arising out of a separate contract which provides for a different dispute resolution mechanism. For example, where the Request for Arbitration is on the basis of a contract which provides for the application of the LCIA Rules, it will not be possible to introduce a counterclaim arising out of a contract which provides for ICC arbitration. This is the case even if the parties' governing law of the contracts, and seat of arbitration are the same under both contracts.

A defence of set-off to extinguish the original claim can present similar difficulties as a counterclaim. It is therefore important to consider the point carefully before raising the defence and, conversely for the claimant, to check that a defence of set-off falls within the parameters of the arbitration agreement or raise a challenge without delay.

This feature of international arbitration can create difficulties but also presents tactical opportunities for a claimant who has forced a respondent to bring its counterclaim in separate proceedings. The respondent may not have the will, resources or confidence in its counterclaim to commence separate proceedings, be it a separate arbitration or before the courts.

If a counterclaim is successfully introduced, the claimant is usually then allowed a short period of time to submit a Defence to the Counterclaim.

Be well prepared

Commencing (and responding to) arbitration proceedings is a critical step in the arbitration process. It is crucial to get the parties and the claims (if you are a claimant) and any potential challenges (if you are a respondent) right first time and to do so without delay. Any mistake may have serious consequences for the remainder of the proceedings.

Checklist

If you wish to bring a claim:

- ✓ Identify the party or parties you wish to bring a claim against. Is there a valid arbitration agreement with that party or those parties?
- ✓ Does the intended claim fall within the scope of the arbitration agreement?
- ✓ What remedies are you seeking? Are there any restrictions contained in the arbitration agreement, imposed by the applicable law, or otherwise prohibiting enforcement?
- ✓ Check the applicable rules and the arbitration agreement carefully for the correct procedure to commence proceedings to avoid any delay.

If you are on the receiving end of a claim:

- ✓ Raise any challenges without delay: does the tribunal have jurisdiction to hear the claim? Have proceedings been properly commenced?
- ✓ Do you have a counterclaim? Does it fall within the scope of the arbitration agreement? If so, bring it without delay.

Appointing a tribunal



Appointing a tribunal

The opportunity for parties to select their arbitrators has been described as "the very essence of arbitral justice"¹ and is one of the key attractions of international arbitration for commercial parties today.

Choosing the right arbitral tribunal is critical to the success of the arbitration. The parties must ensure that the best available arbitrator or arbitrators are appointed, as they will have a significant influence, not only on the outcome of the arbitration, but also on its duration and cost.

There are a number of factors to be taken into consideration.

The arbitration agreement

The first step is to check the arbitration agreement, which may specify:

- the characteristics of the tribunal (e.g. the number and qualifications of the arbitrators; any requirements of nationality or language); and/or
- the appointment process, which may be specified in the contract or governed by the rules that apply to the arbitration (e.g. in an ICC arbitration, the ICC may either appoint arbitrators or "confirm" arbitrators nominated by the parties; in an UNCITRAL arbitration the parties usually agree that appointments should be made by a third party, often the LCIA, ICC or ICDR).

How many?

The first thing to consider (if not specified in the agreement) is the number of arbitrators to appoint. It is advisable (and the laws of some countries, e.g. France, Netherlands, Belgium, Italy and Portugal, forbid even-numbered tribunals) that the number is uneven as this eliminates the risk of deadlock. Tribunals of five or more are likely to be cumbersome and unduly costly. In practice, therefore, the choice for the majority of international arbitrations is between one and three arbitrators.

Factors in favour of choosing a sole arbitrator include:

- cost;
- convenience and flexibility – appointments for meetings and hearings will be more easily arranged; and
- speed – the proceedings should be completed more quickly since the arbitrator will not need to debate with colleagues.

Choosing the right arbitral tribunal is critical to the success of the arbitration.

If both parties are able to agree upon a sole arbitrator in whom they have confidence, it makes sense for them to do so. However, the modern preference, particularly in international arbitrations of significant value, is for three arbitrators.

A feature of arbitration is its finality: having three arbitrators gives parties some comfort that a "rogue" result which cannot be appealed will not be reached.

With three arbitrators, the usual position is for each party to have the right to nominate one arbitrator, leaving the third to be chosen by agreement or a third party institution. The advantage of this is that it gives each party a sense of "investment" in the tribunal. With three arbitrators the tribunal may comprise a diversity of backgrounds and outlooks; it encourages debate and the testing of points, the risk of an error of law is lower and as a result the ultimate award is more likely to be acceptable to the parties.

The arbitrator who is not nominated by the parties is normally the presiding arbitrator or chairman. Parties strive to agree on a presiding arbitrator, so as to avoid the uncertainty of having an institution select this key figure.

Issues may arise where there are more than two parties to the dispute, as it may not be possible for each party to nominate its "own" arbitrator. Most institutional rules now provide for this scenario, however. The ICC Rules provide that where there are multiple claimants or respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation. If the parties are unable to make a joint nomination and cannot agree an alternative method, the court may appoint each member of the tribunal and will designate one of them as chairman. The LCIA Rules are similar, providing that where an arbitration agreement entitles each party to nominate an arbitrator and there are more than two parties, the parties may agree in writing that the disputant parties represent two sides for the purposes of the formation of the tribunal. Failing such agreement, the LCIA Court will appoint the tribunal.

Choosing an arbitrator – what to look for

The fundamental qualities that every arbitrator must have are independence and impartiality. In general, impartiality means that an arbitrator will not favour one party over another, while independence requires that the arbitrator remain free from the influence of either party. However, the application of these standards under national law and institutional arbitration rules typically depends heavily on the specific context of the arbitration agreement and factual circumstances of individual cases.

The contract may also specify certain requirements (e.g. legal qualifications or experience) which must be adhered to. The risk of not doing so is that the tribunal is not constituted in accordance with the parties' agreement and so any award may be challenged or its enforcement resisted. Beyond this, there are several factors to consider:

Qualifications: both legal and non-legal. While at least one (or the sole) arbitrator should be legally qualified, there may be some circumstances where it is appropriate or beneficial for one or more of the arbitrators to have substantive expertise or qualifications in another area which may be relevant to the dispute. If technical experts are required, however, it may be best to agree with the other party that both sides will appoint non-lawyers, to eliminate any possibility of two lawyers effectively "overruling" the third arbitrator, thus placing that arbitrator's appointing party at a disadvantage.

The fundamental qualities that every arbitrator must have are independence and impartiality.

Nationality and language: The usual practice is that the sole or presiding arbitrator should be of a different nationality from that of the parties to the dispute. This is a requirement of the ICC and LCIA Rules, and is recommended by UNCITRAL and ICDR. The arbitrator should also be fluent in the language of both the arbitration and the evidence.

Experience and background: Parties should seek to select arbitrators who, while maintaining independence and impartiality, are likely, by reason of background and/or experience, to be sympathetic to the case the party wishes to put forward. For legal appointments, it is also important to select practitioners with experience of arbitration, rather than litigation, as a seasoned litigator may approach the arbitration with the wrong focus or emphasis.

Availability: The arbitrator must not only be available for the requisite period, but also able to devote sufficient time and attention to the matter. Institutions are increasingly requiring arbitrators to confirm this before appointment, in the interests of efficiency of the process.

Other key factors: These include personal competence, intelligence and diligence. It is advisable to seek recommendations from counsel and other experienced practitioners familiar with the community of international arbitrators and the manner in which they conduct proceedings to ensure the most appropriate people are selected.

Reaching agreement

If the arbitration agreement requires all parties to agree to the identity of the arbitrator(s), both sides must address this. It can be a delicate task and should be approached carefully. The usual procedure is for each party to suggest three possible candidates to the other, though it is common practice for each side to reject the other's nominees. It is good practice to consider meeting with the other side or their counsel to discuss suitable candidates at an early stage to avoid potentially suitable candidates being eliminated unnecessarily.

Timing

If you are seeking to agree the appointment of a sole arbitrator, it is better to postpone any approach to an arbitrator until you have an agreement in principle with the other side as to their identity: any contact between one party and the proposed arbitrator may be likely to arouse suspicions and lead to the rejection of the proposed arbitrator.

When approaching potential candidates, you will need to confirm: their capacity (it is important to make a realistic estimate of the likely length of the arbitration); whether the arbitrator is willing to act; the arbitrator's fees and charging basis; and terms of appointment (some have their own; while others may accept appointment on institutional terms). It is vital that you do not discuss the merits of the dispute with the proposed arbitrator at any time.

Some parties like to interview arbitrators prior to their appointment. There are strict guidelines concerning what can and cannot be done in this context.

Making the appointment

Once you have selected your preferred arbitrator, the necessary steps for appointment are: making a request to the arbitrator to accept the appointment; acceptance by the arbitrator; and communicating the arbitrator's acceptance to the other party to the arbitration.

The Equal Representation in Arbitration Pledge has attracted over 1,600 signatories and aims to improve gender diversity in international arbitration and encourage the appointment of more female arbitrators.

The appointment will not be complete until all three requirements are satisfied. Where the tribunal consists of more than one arbitrator, it will not be complete until the specified number of arbitrators has been appointed, and until that happens the tribunal will have no power to act. However, if remedies such as freezing injunctions are required before the tribunal is fully constituted, national courts may be able to assist (e.g. in England the courts can grant interim relief in these circumstances under the Arbitration Act 1996). Institutions have also incorporated emergency arbitrator provisions into their rules in recent years, to enable parties to obtain interim relief prior to the composition of the full tribunal.

Challenge – grounds

Challenges can in principle be brought against any arbitrator, appointed by any means. In general, the parties to an arbitration may challenge an arbitrator only where they have reasonable doubts as to the arbitrator's impartiality or independence. The leading institution's rules contain a variety of tests on this point, so the applicable rules should be checked carefully in each case. Grounds include:

- where there is an alleged connection between the arbitrator and one of the parties;
- where the arbitrator acts as counsel for a third party in a dispute involving similar issues, or is advancing a case contrary to that of one of the parties to the dispute before him (issue conflict); and
- where the arbitrator makes a statement alleged to prejudge an issue in the dispute (prejudgment).

National arbitration laws also contain tests which operate in the case of an ad hoc arbitration seated in the country. For example, the English Arbitration Act 1996 provides that a challenge can be made on the following grounds:

- circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality;
- they do not possess the qualifications required by the arbitration agreement;
- they are physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to their capacity to do so; or
- they have refused or failed to properly conduct the proceedings, or to use all reasonable despatch in conducting the proceedings or in making an award;
- substantial injustice has been or will be caused to the applicant.

Challenge – procedure

The procedure for challenge is set down in the arbitral rules (or the legislation of the arbitral seat in the case of an ad hoc arbitration). For example, the ICC Rules provide that a party seeking to challenge must do so within 30 days of the date of notification of appointment, or when the party becomes aware of the circumstances giving rise to the challenge; the LCIA and UNCITRAL rules are broadly similar but the window is 15 days. Under ICSID any challenge must be made "promptly, and in any event before the proceeding is declared closed".

If an arbitrator is removed (or resigns), then the typical approach is to provide that vacancies will be filled in the manner in which the disqualified arbitrator was selected.

Notes

1. J. Scott, *The Proceedings of the Hague Peace Conference, Translation of the Official Texts, II The Conference of 1907, Meetings of the First Commission 2 (1921)* (Leon Bourgeois).

Arbitration procedure



Unlike court litigation, arbitration does not have a "one size fits all" approach to procedural rules. This flexibility in determining key aspects of the arbitration procedure is one of its main attractions.

Fundamental principles

Party autonomy in determining procedure is paramount in arbitration. This is encapsulated in the Model Law,¹ which states:

"Subject to the provisions of [the Model Law], the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".²

In practice, the parties have a high degree of control over proceedings at the outset, but this reduces once the tribunal is appointed and assumes control of the proceedings. It is therefore important to consider procedural matters at both the transaction stage, when drafting the arbitration agreement, and at an early stage of any subsequent arbitration.

Starting point: the arbitration agreement

Two principal factors will determine the procedural framework of an arbitration: choice of seat and choice of rules.

Choice of seat

The seat will determine the legislative framework of the arbitration, and that will provide important rules as to arbitral procedure. So, for example, if London is selected as the seat, the Arbitration Act 1996 will apply. That sets out both the public policy principles and the procedural framework of the arbitration. Some of its provisions are mandatory.³ These include:

- provisions conveying certain powers on the courts of England and Wales, for example, to stay legal proceedings, extend time limits and remove arbitrators;
- provisions relating to the status, duties and powers of the tribunal; and
- provisions relating to enforcement and challenge of arbitral awards.

The remaining provisions constitute the default position for certain aspects of the procedure in the event the parties cannot agree.

Procedural rules

The parties can also set out any particular procedural rules they want to apply in the arbitration agreement. Typically, they will adopt the rules of an arbitral institution (such as the LCIA or the ICC), or incorporate the UNCITRAL Rules where the arbitration is ad hoc. However, it is becoming increasingly common for parties to supplement these rules, particularly in relation to disclosure, in the arbitration agreement itself. Another trend is the incorporation of fast-track arbitration procedures where disputes meet certain criteria (usually based on value).

Arbitration does not have a "one size fits all" approach to procedure rules.

Procedural building blocks

Guided by and within the limits of the relevant national legislation and the procedural rules, the parties can agree the procedural structure of the arbitration. This need not be the same as for, nor include all the steps common to, court litigation. The parties are responsible for deciding both the steps and also the time limits within which each step must be completed.

However, once a dispute arises, agreement on the procedural structure and timetable is often difficult to reach. In most cases procedural decisions will be taken by the tribunal. Once appointed, the tribunal will record the procedural structure and timetable as a procedural order. It is common for a chairman of the tribunal or the other side to propose a *pro forma* procedural order. This should not be accepted without careful consideration.

Procedure will vary depending on the institutional rules used, the composition of the tribunal, and the seat of the arbitration. That said, the basic building blocks are the same. Important issues to consider and document in the procedural order include the following:

Preliminary issues

Are there any issues to be determined before the tribunal turns to the substantive claims, for example, the applicable substantive law or whether liability and quantum should be dealt with in separate phases of the proceedings?

Initial written submissions

Under some institutional rules, the claimant may choose to have its request for arbitration treated as its statement of case.⁴ Under others, the Request and Answer are the parties' initial opportunity to frame their claim or defence.⁵ In both cases, it is important that the initial written submissions contain sufficient detail in terms of issues in dispute and amounts involved to enable the preparation of a procedural order and, if relevant, the tribunal's Terms of Reference.⁶ A party may find it difficult to amend its case materially once these documents have been signed.

Alternatively, a further round of initial written pleadings may be required or desirable, which may add time and expense to the proceedings.

Further written submissions

The parties will expand on their legal arguments in further written submissions. These are often exchanged as part of "memorials". A memorial will also include witness statements, expert reports and documents on which the party relies.

The parties must decide the following:

- Is the memorial approach to be adopted or is sequential exchange of the parties' pleaded cases with evidence to follow preferable? The latter is more usual in common law jurisdictions such as England.
- Are further written submissions to be exchanged simultaneously or sequentially?
- Is there to be a second round of documents to give the parties an opportunity to reply?

Document production

In arbitration it is common for a tribunal to order that document production be managed in accordance with the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 (the IBA Rules).

Under the IBA Rules, the document production obligations are significantly less onerous than those in court litigation in common law jurisdictions, although we are seeing "litigation-creep" in this area.

However, there will often be an opportunity to request production of particular documents or categories of documents by way of a "Redfern Schedule" which, when complete, shows:

- a party's document request;
- the requesting party's reasons as to the relevance of the document;
- the response of the party to whom the request was addressed; and
- if the party to whom the request was addressed objects to disclosure, the tribunal's ruling on the matter.

The tribunal's approach to document production may be guided by its legal background. Civil law arbitrators may be less willing to permit extensive production; common law arbitrators are more comfortable with this. However, these stereotypes are often confounded, and the scope and scale of document production is determined by the nature of the factual matters in dispute.

Oral hearing

Once the parties' pleadings, evidence and disclosure have been submitted, there is often an oral hearing before the tribunal. In some cases, where the issues are simple or the value low, the matter may be dealt with "on the papers". However, many arbitral laws permit a party to request a hearing.

Hearings in arbitration are usually run very efficiently. The tribunal will have made itself available for a specific period only. Often, an arbitration will operate on a chess-clock basis with the advocates given strict time limits for openings and cross-examination of witnesses.

Consequently, there is heavy reliance on written submissions. The parties will usually prepare pre-hearing submissions and any opening oral submissions may be limited to specific points raised by the tribunal. This will be followed by witness and expert evidence. The witnesses' written statements will be relied on and questions posed by the opposing advocate and the tribunal. Hot-tubbing, where the experts give their evidence together "in the tub", is increasingly used as an efficient means of dealing with expert evidence. Written post-hearing submissions are usually provided shortly after the hearing has finished.

Need for speed?

In some cases, the parties will agree that the arbitration should be expedited. This means that the arbitral tribunal will be appointed quickly and will ensure a degree of urgency is attached to the proceedings and publication of the award. The arbitration will otherwise be carried out in accordance with the relevant procedural rules.

Institutions are also increasingly providing for fast-track arbitration. For example, the Singapore International Arbitration Centre (SIAC) included a fast-track procedure when it revised its rules in 2010. Criteria for adopting a fast-track procedure is usually based on value (for SIAC it applies to claims under S\$6million) and the procedure provides for the case to be referred to a sole arbitrator to be decided on a documents-only basis.

Notes

1. The UNCITRAL Model Law on international commercial arbitration has been adopted by many countries, either entirely or in part.
2. Model Law, Article 19(1).
3. See Arbitration Act, Schedule 1, for a complete list.
4. E.g. LCIA Rules, Article 15.2.
5. E.g. ICC Rules, Articles 4 and 5.
2. The Terms of Reference are a feature of ICC arbitration. They set out the nature of the dispute and issues to be decided by the tribunal, the arbitration agreement and other key aspects of the arbitration, such as substantive and procedural law and the seat and language.



“

"I think they're phenomenal as far as I'm concerned. It's a combination of the hard and soft skills and, from what I've found, the level of client care is phenomenal. They are very, very dedicated to the cause."

CHAMBERS AND PARTNERS

Document production and evidence



Parties to arbitration often do not expect to have to hand over their confidential documents. However, document production is an important stage of the arbitration process, and one with which all users of arbitration should be familiar.

Document production, discovery, or disclosure?

These terms all refer to the same procedural step in the arbitral timetable: the point at which the parties to arbitration request from each other documents that support the requesting party's case or undermine that of their opponent.

The outcome of any dispute will usually be determined by the specific facts of the case. The parties to the dispute will produce evidence of those facts to support their case or challenge their opponent's case. That evidence may be in the form of documents or the testimony of witnesses. However, an arbitral tribunal will inevitably find contemporaneous documents more persuasive than an individual's imperfect recollection of past events.

Generally, the parties to an arbitration are only required to produce documents which support their case.¹ In circumstances where one party holds the majority of documentary evidence, this could lead to a one-sided view of the dispute. To overcome this problem, many arbitration laws and institutional rules empower the arbitral tribunal to order that a party produces to the tribunal and the other parties certain documents or categories of documents.

Power and discretion of a tribunal to order document production

An arbitral tribunal will usually be given the power to order production of documents by national arbitration legislation and by the applicable institutional rules. For example, section 34(2)(d) of the English Arbitration Act 1996 provides the arbitral tribunal with broad powers to determine "*whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage*". Rule 22.1(v) of the LCIA Rules 2014 and Article 22 of the ICC 2012 Rules grant the arbitral tribunal similarly broad powers.

In almost all cases, the disclosure powers of the arbitral tribunal are limited to ordering the **parties** to the arbitration to produce documents. This is because arbitration is based on the contractual agreement of the parties to the arbitration. As such, third party disclosure cannot be obtained unless the supervisory court is able to assist.

It is important to remember that the parties do not have a right to document production. The tribunal has the discretion to decide whether or not to order that certain documents should be produced. Although it may be empowered to do so of its own volition, in almost all cases it will consider the parties' requests for certain documents or classes of documents, often using the criteria set out in the IBA Rules.

The disclosure powers of the arbitral tribunal are limited to ordering the parties to the arbitration to produce documents.

¹

It is often thought that the background of the parties' legal counsel and the arbitrators has an impact on the extent of document production ordered. The general perception is that counsel and arbitrators from a common law background are more likely to request and order extensive document production than counsel and arbitrators from a civil law background. However, recent years have seen a shift in international arbitration towards more extensive document production. Arbitrators generally recognise that parties to international arbitration expect a certain degree of document production. Cultural background of the participants is therefore no longer a guide to the approach to document production.

That said, document production in international arbitration is generally less onerous than disclosure or discovery in litigation in common law countries. However, that does not necessarily mean that document production in international arbitration is not time-consuming or far-reaching. Depending on the nature of the case, a party may still find itself having to disclose to its opponent a significant number of internal documents.

How does a party make a request for documents?

The arbitral process belongs to the parties. They can agree a bespoke procedure for disclosure if they wish. However, in most cases, the IBA Rules are adopted. These specify the essential requirements of the request and the criteria the tribunal must apply when deciding whether to grant that request.

Article 3(3) of the IBA Rules states that a request to produce documents must contain:

- a sufficiently detailed description of the requested document or a narrow and specific category of documents to enable identification of the same;
- an explanation of the relevance of the requested documents and why they are material to the outcome of the case; and
- a statement that the requesting party does not have possession custody or control of the documents requested and why it is assumed that the other party does.

Article 3(5) permits the other party to object to the request (in whole or in part) if the requirements of Article 3(3) have not been satisfied or on one or more of the grounds set out in Article 9(2) of the IBA Rules concerning the admissibility and assessment of evidence (e.g. that the document: is not sufficiently relevant nor material; is privileged; or that it would be disproportionate or unfair to have to produce it).

If the parties cannot agree on which documents or categories of documents should be produced, the tribunal will be asked to make a ruling on the basis of the request and any objections.



In most cases, the IBA Rules are adopted.

In practice, a request for document production usually takes the form of a "Redfern Schedule". This is essentially a table to be completed by the parties and, when it makes its order, the tribunal. It looks like this:

REQUEST	REASON FOR REQUEST & REBUTTAL TO OBJECTION	OBJECTION	TRIBUNAL'S DECISION
All documents relating to the steps taken to establish and appoint members to the ABC Association.	<p>Relevance to pleading Relevant to paragraph 10 of the Request for Arbitration.</p> <p>Reason for request This category of document is relevant to the claimant's claim for breach of the respondent's obligation to create favourable conditions for investment and to accord the claimant fair and equitable treatment.</p> <p>Rebuttal to respondent's objection The request relates to all documents within a specific and clearly identified category of documents which are material and relevant.</p>	The request is unduly burdensome as it relates to "all" documents "relating to" the subject matter of the request and no time limit is specified.	<p>Although the documents requested are relevant, their production is unduly burdensome insofar as the request relates to "all" documents "relating to" the subject matter of the request.</p> <p>The respondent should produce to the claimant documents relating to the appointment of members to the ABC Association between 1 June 2008 and 31 December 2008.</p> <p>If the claimant does not consider the documents supplied sufficient, the claimant will have an opportunity to file a request for additional specific documents on the second round of requests for document production.</p>

What if a party does not comply with an order for the production of documents?

Arbitral tribunals lack the teeth of the courts in regard to enforcement of arbitral orders. However, if a tribunal orders document production and a party does not comply without good reason, the tribunal may draw an adverse inference. This means that the party requesting the documents will be given the benefit of the doubt and the tribunal will assume that the documents were either harmful to the producing party's case or helpful to the requesting party's case.

The ability of a tribunal to draw adverse inferences as a result of a party's failure to comply with a disclosure order is expressly recognised in Article 9.5 of the IBA Rules. However, a tribunal will only exercise this power if a satisfactory explanation for non-compliance is not provided.

Withholding documents: privilege and confidentiality

Privilege is a very important tool that can be used to prevent certain documents (such as those containing legal advice) from being disclosed to the other parties in legal proceedings. In domestic arbitration or litigation, it is often clear what the rules of privilege are. However, in international arbitration, where the arbitrators, seat of arbitration, lawyers, parties and subject matter of the dispute may be based in a range of jurisdictions, the position is more complex. It will ultimately be for the tribunal to decide which rules of privilege apply, although it will usually take into account the expectations of the parties (and this is expressly stated in Article 9.3(c) of the IBA Rules).

There is, however, no guarantee that it will apply the rules of privilege that parties are familiar with.

While asserting privilege may narrow the scope of documents a party has to produce, the fact that a document is commercially sensitive, or perceived to be confidential, is not a bar to its disclosure. This often causes significant concern, especially for those not familiar with the disclosure process. However, the parties can agree, or the tribunal can impose, safeguards such as the redaction of non-relevant and commercially sensitive elements of a document, or that such documents are only to be provided to a limited class of persons (such as the other party's legal advisers). As a last resort, if a party considers that the commercial damage that would result from disclosure of a document is greater than the damage that would be caused by the tribunal drawing an adverse inference from non-disclosure, it may choose not to produce that document. However, this would be ill-advised in all but the rarest cases.

Agreements to limit disclosure

Parties can take steps to limit the extent of disclosure by specifically agreeing limitations at the outset of a dispute or in the arbitration agreement itself. While agreements once a dispute has arisen are rare, contracting parties are increasingly seeking to limit the scope of disclosure in the arbitration agreement itself, often by specifying that the IBA Rules, with their narrow approach to document production, should apply. It is always hard to anticipate in advance which party will be seeking or avoiding disclosure. As such, while an agreement to apply the IBA Rules is sensible, careful consideration should be given before agreeing any further restrictions.

Notes

1. See, for example, Article 3.1 of the IBA Rules.

Evidential hearing



What is an evidential hearing and why is it important?

An evidential hearing provides each party with the opportunity to present both factual and expert evidence and for counsel to make legal submissions to the tribunal. It is the parties' opportunity to explain their case to the arbitrators, answer any questions they may have, and to challenge and discredit the evidence advanced in support of their opponent's case.

Hearings can last from a few hours to many weeks. Their duration will often be determined by the number of factual and expert witnesses put forward by the parties, although the availability of the tribunal and its attitude to procedural matters are key factors.

Conduct of the hearing is governed by the principle of equality of treatment and the right to be heard. Article 18 of the UNCITRAL Model Law states that "*the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*". This is also reflected in institutional rules. For example, Article 22 of the ICC Rules and Article 14.4 of the LCIA Rules stipulate that the tribunal must "*act fairly and impartially*" and ensure that each party has a reasonable opportunity to present its case.

Are evidential hearings mandatory?

Oral hearings are generally mandatory in most international arbitrations unless the parties agree that the tribunal may issue an award simply "*on the documents*", i.e. without hearing evidence.¹

This is reflected in Article 24 of the Model Law, which gives the tribunal discretion to decide whether an oral hearing is necessary, subject to any contrary agreement by the parties. However, it also provides that the tribunal shall hold a hearing if requested to do so by a party. A hearing therefore usually takes place. Institutional rules provide similarly. Article 17.3 of the UNCITRAL Rules states that "*If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.*" See also Article 19.1 of the LCIA Rules and Article 21.1 of the Singapore International Arbitration Centre rules (SIAC Rules), which state that a party is entitled to a hearing, unless the parties have agreed to a documents-only arbitration.

It is the parties' opportunity to explain their case to the arbitrators, answer any questions they may have, and to challenge and discredit the evidence advanced in support of their opponent's case.

A tribunal will be reluctant to dispense with an evidential hearing as it could be accused of not giving a party the chance to present its case, potentially rendering its award unenforceable. For example, under the English Arbitration Act 1996, while a hearing is not mandatory the tribunal is under a general duty to give each party a "*reasonable opportunity of putting his case and dealing with that of his opponent*". Failure to comply with this duty constitutes a "*serious irregularity*" which provides grounds for a party to arbitral proceedings to apply to the court challenging any award made. Therefore, while in specific circumstances, in order to reduce costs and save time, tribunals can dispense with the oral hearing, in most arbitrations an award will not be made without a hearing of the parties. This is reflected in the wording of Article 24 of the Model Law, which refers to a tribunal holding hearings where requested by "*a party*"; a rare example of a tribunal acting on a unilateral request rather than with all parties' agreement.

Scheduling the hearing

Pre-hearing planning is critical to the efficiency and fairness of the arbitral process.

The tribunal will typically invite the parties to agree on a proposed hearing timetable and procedure, which will be discussed at a pre-hearing conference (which may take place in person or by teleconference). This includes prescribing the order and timing of opening legal submissions, factual and expert witnesses, the expected sitting times and the order and timing of any closing submissions. Conduct of the hearing is then set out by the tribunal in a procedural order or other communication.

One potentially contentious issue is the amount of time allocated to each party at the hearing. Both parties want a full opportunity to present their case, and can be suspicious of the counterparty's efforts to intrude upon "their" time or delay and prolong the proceedings.

In order to comply with the principle of equal treatment, each party is usually allocated an equal amount of time. This is often referred to as a "chess clock arbitration" where time is divided equally between the two parties and each party is free to use its time as it sees fit for the introduction and examination of witnesses.

Fair and equal treatment is not always achieved with a 50/50 division of time. For example, if one party's case requires more factual evidence than the other party's, it may be unfair to limit such party's time on a 50/50 basis. However, even the most experienced arbitrators are often reluctant to deviate from the 50/50 presumption.

The tribunal may also require the parties to submit pre-hearing documents, including skeleton arguments or "pre-hearing submissions", a chronology of key events, a *dramatis personae* (identifying the key players in a dispute) and a glossary. A core bundle of key documents is often useful to the tribunal.

Unlike litigation, the hearing will not take place at a predetermined court room. The parties will need to agree on the location of the hearing.

An agreed list of issues may also be submitted to the tribunal, highlighting the main points of dispute between the parties.

Unlike litigation, the hearing will not take place at a predetermined court room. The parties will need to agree on the location of the hearing, with the tribunal making an order to this effect, absent agreement.

Structure of the hearing

Common practice in international arbitrations dictates that the tribunal will begin the hearing by reviewing with the parties how the examinations will be conducted, in what order, and to finalise any outstanding procedural issues.

Counsel for the parties will usually then deliver opening statements which will often be based on their skeleton arguments. This will be followed by the examination of fact and expert witnesses. The hearing may conclude with oral closing submissions.

In international arbitration, evidential hearings focus on the evidence of witnesses and experts as opposed to oral argument. As such, the opening and closing arguments tend to be relatively short. It is increasingly common for opening statements to be brief, or disposed of altogether, in particular where the case is expected to turn on the expert and factual evidence. Closing submissions, on the contrary, will usually be important.

Opening statements

An opening statement sets out an overview of the party's case and an introduction to the witnesses the party is about to call to give evidence. Counsel will aim to provide a road map of the case, identifying the key issues and evidence, and seek to persuade the tribunal that its client has a compelling case by highlighting the evidence in its favour.

Closing statements

Closing submissions will focus on key evidence emerging from the witnesses and will ask the tribunal to draw certain conclusions from that evidence. It is usually the parties' last chance to put their case to the tribunal orally.

Examination of witnesses: factual and expert

National arbitration legislation and institutional rules often do not regulate the conduct of the examination-in-chief and cross-examination of witnesses. As with many aspects of international arbitration, it is left to the parties to agree in advance on the nature, sequence and duration of witness examination. In the absence of agreement, this would be decided by the tribunal at the pre-hearing conference.

The IBA Rules on the taking of Evidence in International Arbitration will usually apply. According to those Rules, the claimant will generally present its witnesses first, followed by the respondent's witnesses. This approach is often adopted in common law jurisdictions. However, parties familiar with civil law jurisdictions may be more comfortable following a different structure.

Parties will often have submitted written witness statements in advance of the hearing that set out the direct testimony of the witnesses on whom they rely. Accordingly, in practice, parties often agree that the witness statement or expert report will serve as the witness' direct testimony or "evidence in chief" to prevent unnecessary repetition of the contents of the witness statements.

It is becoming more common for expert witnesses testifying on the same subject, to be examined side by side, rather than in sequence (known as "witness conferencing" or "hot-tubbing") in order

to save time and clearly identify and evaluate areas of disagreement. While witness conferencing can be a powerful tool for appraising expert testimony, it requires careful preparation and adequate control of both witnesses and counsel by the tribunal.

Tribunal's role in an evidentiary hearing

The conduct of arbitral hearings is subject to the tribunal's control.

Under Article 8 of the IBA Rules, the tribunal has "*complete control*" over the hearing of evidence and may limit or exclude witnesses or their questions and answers if they believe them to be irrelevant, immaterial, burdensome or duplicative. It can also question the witnesses or the parties' counsel at any time. Similarly, under section 34 of the English Arbitration Act 1996, the tribunal has the power to decide "*all procedural and evidential matters*" while Article 26 of the ICC Rules states that the arbitral tribunal shall be in "*full charge*" of the hearings.

Some commentators support arbitrators taking on a more active role in the proceedings to enhance the parties' presentation of the facts. This includes conducting pre-hearing conferences and, if appropriate, issuing orders requiring parties to submit specific evidence. This approach is especially beneficial in international arbitration where the parties, counsel and witnesses come from different legal backgrounds and with different approaches to presenting evidence.

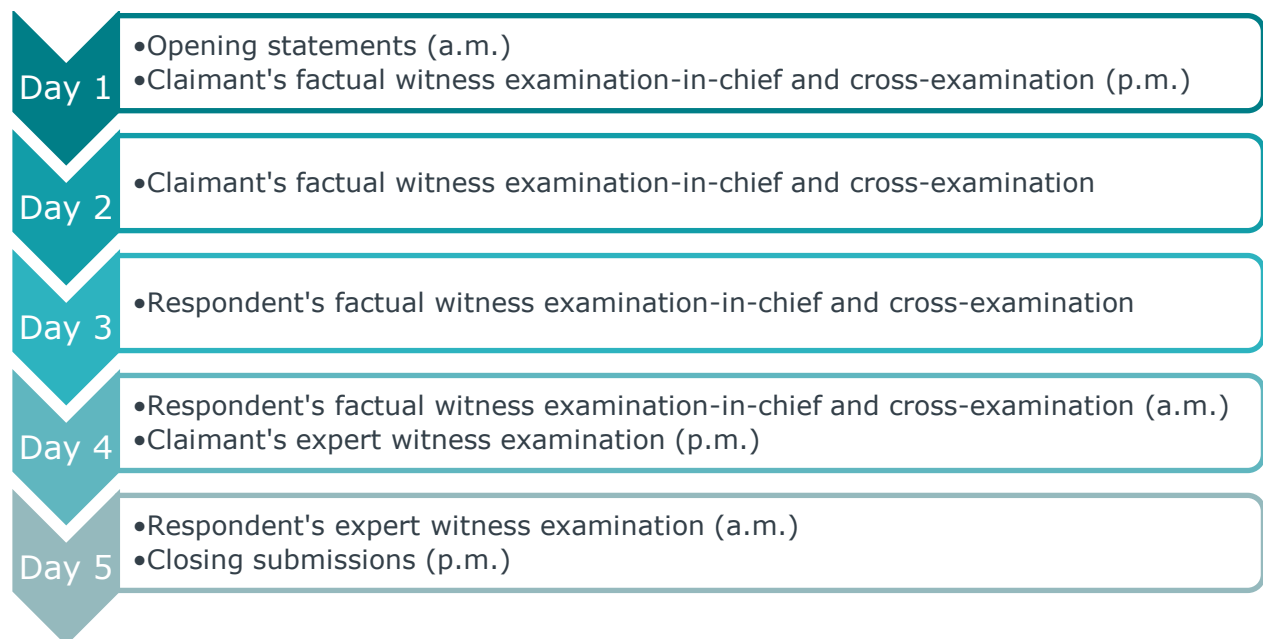
It is also increasingly the case that arbitrators will take an inquisitorial approach to the hearing and ask questions of the witnesses and counsel. While familiar to those with experience of legal proceedings in a civil law jurisdiction, this approach is often alien to practitioners with experience of proceedings in common law jurisdictions, where counsel is expected to take the lead in examining witnesses.

Post-hearing submissions

Following the hearing, the tribunal requests that the parties review and correct the transcript and make submissions as to costs. The tribunal may also request post-hearing briefs which can relate either to specific questions the tribunal wants answered or issues it wants clarified. Such briefs can also be used to provide a summary of the parties' positions after all evidence has been considered.

Following this process, the tribunal may declare the proceedings closed (i.e. the parties have completed the presentation of the case and are not entitled to submit further evidence or argument without the tribunal's authorisation). This step is often mandatory, as in ICC and ICSID arbitrations. The tribunal will then proceed to publish its award.

Example of conduct of a hearing



Notes

1. A hearing is not mandatory under the English Arbitration Act 1996, but as most rules provide for a hearing if a party requests one, a hearing will usually take place.

Award - challenges and enforcement



What is an arbitral award?

Following the conclusion of arbitral proceedings, the tribunal will deliberate and make a final award, granting (or withholding) relief on the parties' claims and resolving their dispute.

An arbitral award is final and binding on the parties and creates legal rights and obligations.

The vast majority of arbitral awards are complied with voluntarily. However, in some instances one party may not accept an award, resulting in post-award proceedings in which a party may challenge the award.

Alternatively, or at the same time as a challenge, the other party may seek to enforce the award against the assets of the party that has lost the arbitration.

How can you challenge an award?

The unsuccessful party to the arbitration (the award debtor) may challenge the arbitral award under the laws applicable at the "seat" of the arbitration.

An application to set aside (or annul or vacate) an arbitral award should be submitted to the courts of the place (or "seat") of arbitration. These courts will be the only courts with jurisdiction to consider a challenge to an award. Some international arbitration rules also provide an "internal" appeals procedure, whereby a separate panel reviews the award. For example, in GAFTA arbitrations that deal with commodity disputes, a party can also appeal to a Board of Appeal.

In general, it is difficult to challenge an arbitral award. By their nature, arbitral awards are intended to be final and binding upon the parties; most modern arbitration laws follow the UNCITRAL Model Law approach which provides for the presumptive validity of international awards (Article 34), subject to specified exceptions that reflect Article V of the New York Convention. As such, most laws and rules set a high threshold for any challenge.

The procedure to set aside an arbitral award varies by jurisdiction. This article will address some common features.

Time limits

In many countries, there is a short time limit within which an action to set aside an award must be brought. Article 34.3 of the UNCITRAL Model Law requires an application for setting aside to be made within three months of the date on which the party making the application received the award. Some jurisdictions provide for shorter timescales. Under the English Arbitration Act 1996, an application must be brought within 28 days of the award. In Switzerland, the deadline is 30 days after notification of the award.

An arbitral award is final and binding on the parties and creates legal rights and obligations.

Grounds

The grounds for setting aside an arbitral award are jurisdiction-specific. However, many jurisdictions follow the UNCITRAL Model Law approach, which in turn reflects the non-recognition provisions of Article V of the New York Convention.

The Model Law sets out limited and exhaustive grounds for setting aside arbitral awards. These are:

- the incapacity of a party or invalidity of the arbitration agreement;
- the party making the application was denied the opportunity to present its case;
- the award deals with matters outside the scope of the arbitration agreement;
- the composition of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties;
- the subject matter was not capable of resolution by arbitration; and
- the award violates public policy.

The scope of these grounds will be influenced by the national laws of the jurisdiction in which the application is made and, where a jurisdiction has adopted the Model Law, international practice. The most variable ground is "public policy" and some jurisdictions, for example India and Russia, have adopted a broader definition than others, allowing their courts to review the merits of an award. However, as jurisdictions look to become more arbitration-friendly, the local courts are becoming more restrictive in their approach.

In addition, national laws may provide further grounds for challenge. While many jurisdictions have followed the Model Law, some have provided additional grounds for challenge; the most common is based on the assertion that the tribunal made serious errors in reaching its decision. For example, section 69 of the English Arbitration Act 1996 allows a party to challenge an award based on error of law. However, it is possible for parties to waive their right to appeal on a point of law and such a waiver is typically provided for in the rules of the leading arbitration institutions (e.g. Article 26.8 LCIA Rules, Article 34.6 ICC Rules).

Effect of setting aside an award

If an award is set aside, it ceases to exist and cannot be enforced in the jurisdiction in which the set-aside proceedings took place, i.e. the seat of the arbitration. However, there is some debate about whether it is still possible to enforce the award elsewhere. The New York Convention states that enforcement may be refused elsewhere if an award has been set-aside at the seat. It is discretionary and different jurisdictions have taken different approaches to this question. The law in this area continues to evolve, and recent decisions appear to have been influenced by a perception of political interference in annulment proceedings. However, although not an absolute bar to enforcement elsewhere, annulment at the seat will make enforcement more difficult.

Challenges are generally only available in very limited circumstances and are often unsuccessful due to the high threshold that must be met.

How can you enforce an award?

In cases where the award debtor does not voluntarily comply with the award, the award creditor can apply to the courts to "recognise and enforce" the award. Recognising an arbitral award involves allowing the applying party to rely on the binding force of the award within the relevant jurisdiction where recognition is granted. Enforcement goes further. It allows an applicant to seek a particular remedy such as payment of a monetary sum in the relevant jurisdiction. In the majority of cases, these concepts are dealt with jointly.

One highly advantageous feature of arbitration, compared to litigation, is the widespread enforceability of arbitral awards across international borders. This is principally due to the New York Convention to which over 150 states are party. Article III of the Convention states that "*Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*". Under Article IV of the Convention, in order for the court to recognise and enforce an award, the award creditor must provide (a) the duly authenticated original award or a certified copy; and (b) the original arbitration agreement or a certified copy. If the award or agreement is not made in an official language of the country in which the award is relied upon, a certified translation must also be provided.

While the Convention provides an overarching framework for enforcing arbitral awards, signatory states can specify their own procedures that need to be complied with in order to recognise and enforce an award, both at the place of arbitration and the place of enforcement.

One important factor an award creditor must keep in mind is the time limits imposed under national law with respect to enforcement. For example, in the US, enforcement proceedings under the Convention must be brought within one year of the date of the award, while in France, no such enforcement deadline exists.

Another valuable feature of the Convention is the limited grounds on which a party can resist enforcement. These are identical to the grounds for challenging an award under the UNCITRAL Model Law set out above, but with an additional ground stating that a court may refuse to enforce an award if it has not yet become binding on the parties or has been set aside by the courts of the place of arbitration.

In many countries, the Convention forms the domestic framework for the recognition and enforcement of international arbitral awards. However, it should be noted that national statutes can operate alongside the Convention and other treaties to enhance enforcement mechanisms for arbitral awards.

Conclusion

While an arbitral award may be challenged, such challenges are generally only available in very limited circumstances and are often unsuccessful due to the high threshold that must be met. This contrasts with the generally easier route to appealing a first instance court judgment.

Enforcement of an arbitral award is also much easier than enforcement of court judgments, thanks to the New York Convention. The nature of arbitral awards as final and binding, and their global enforceability, gives commercial and state parties more certainty in relation to the resolution of disputes.

Notes

1. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
3. Section 70(3).
4. Article 100 of the Swiss Federal tribunal Act.
5. Although arbitrator bias and fraud are not expressly provided for in the six grounds set out in the Model Law, it is widely accepted that they are included, as discussed by Gary Born in Chapter 16: Annulment of International Arbitral Awards of *International Arbitration: Law and Practice* (Second Edition).

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