

# An introduction to arbitration

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## What is arbitration?

Arbitration is an alternative form of dispute resolution to litigation which does not require recourse to the Courts. It is a consensual process in the sense that it will only apply if the parties agree it should.

## Origins in England

Arbitration grew out of the international and local courts that were set up as an alternative to the royal court system in the Middle Ages. These courts were set up in response to the demand by merchants for an alternative system for the resolution of commercial cases because the royal court system was slow, not well suited to mercantile disputes and not accessible to parties who were not resident in England. A predominant feature of these courts was that strict formalities should be waived or set aside in commercial cases to allow for the law to be speedily administered.

The practice of arbitration was eventually given a statutory basis in England when Parliament passed the first Arbitration Act in 1698. Subsequent legislation led to the Arbitration Act 1996 (the 'Arbitration Act'), which is the principle English arbitration statute.

[References: AA 1996](#)

## Is there a definition?

Despite various attempts to define arbitration, there is no single accepted definition. This may reflect the multi-faceted nature of the process and the way it has evolved over time.

Halsbury's Laws of England has defined arbitration as:

*"a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it."*

The Arbitration Act does not contain a definition of arbitration. However, as explained below, it does set out clear statements of principle regarding what is expected from arbitration.

# General principles

Section 1 of the Arbitration Act provides:

- the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- the parties should be free to agree how their disputes are resolved, subject only to such safe-guards as are necessary in the public interest, and
- court intervention should be restricted

References: AA 1996, s 1

## Contractual basis

Aside from the statutory basis for arbitration provided for in the Arbitration Act, the other basis of arbitration is contract. As a consensual process, all the parties must agree to submit the dispute in question to arbitration. The rights and obligations of the parties to arbitrate their dispute will arise from the arbitration agreement they have concluded.

## Differences to litigation

Whilst arbitration is closely related to litigation, there are several key differences:

### Confidentiality

An arbitration is heard in private. The tribunal, the parties and their representatives are the only persons allowed to participate in the proceedings unless the parties and the tribunal agree otherwise. The parties can agree that the arbitration will be confidential. If they don't so agree, following the case of *Emmott v Michael Wilson Partnership* (2008), under English law, a duty of confidentiality will be implied into the arbitration agreement.

References: *Emmott v Michael Wilson Partnership* [2008] EWCA Civ 184

### Flexibility

Unlike the civil procedural rules, which govern how court cases are to be conducted, there is no rigid arbitration procedure. The form of every arbitration is different and will vary according to the particular characteristics of the case and what is agreed by the parties.

### Party autonomy

The parties can choose where the arbitration is to take place and the rules to govern the procedure of arbitration. The parties also have the ability to choose the arbitrators.

### Finality of award

The decision of the arbitrators is usually final and binding on the parties. Permission to appeal may only be obtained in special circumstances and the grounds for otherwise challenging an arbitral award are restricted.

## Enforceability of award

A domestic award can generally be enforced in the same way and as simply as a national court judgement. There is no review of how the arbitrator's decision was reached.

Internationally, arbitration awards are widely enforceable due to international conventions such as the New York Convention on the Recognition and Enforcement of Arbitral Awards concluded in 1958 (the 'Convention'). The Convention provides a regime for the recognition and enforcement of arbitral awards within Contracting States. More than 145 Contracting States have ratified the Convention. The Convention provides only limited grounds to refuse enforcement. Enforcement of an arbitral award under the Convention is generally considered an easier route to enforcement than enforcing a foreign court judgment abroad.

## Is it quicker and cheaper than court?

Given its origins, there is often an expectation that arbitration will be quicker and cheaper than litigation but this is not necessarily the case.

In a court case the parties only have to pay a modest fee for the services of the judge and the use of court facilities; most of the true cost is met by taxpayers. In arbitration, the arbitrator (or arbitrators) have to be paid and their costs are often significant, particularly in complex construction cases with an international dimension.

The market for good arbitrators with the relevant experience in construction law is small and their services are increasingly in demand. One reason for this is the growth of international arbitration as businesses increase their presence in new global markets resulting in a proliferation of cross border disputes. The law of England and Wales remains the favoured choice for many contracts where the parties are from different jurisdictions, which means arbitrators qualified in English law are busy and it may be difficult to find convenient dates for hearings. Also, because it is a consensual process, arbitrators are often reluctant to interfere in the management of the proceedings, whereas the courts see case management as a means to keep control of costs and avoid delays.

The arbitration community is aware of these issues and arbitral institutions are working to reduce time and cost in arbitration. In some cases, arbitration may be less costly and time consuming than litigation, for example because there is a limited right of appeal.

## Comparisons with adjudication

While the Housing Grants, Construction and Regeneration Act 1996 as amended (the 'Construction Act') does not define adjudication and the Arbitration Act does not define arbitration, the aims and duties laid down by both are similar. Both Acts aim to promote the concepts of impartiality on the part of the decision makers, as well as expedition and avoidance of unnecessary expense. The powers given to the adjudicator and the arbitral tribunal are very similar and neither is liable for their decisions unless they act in bad faith.

References: HGCRA 1996, as amended by LDEDCA 2009

However, there are some notable differences, which include:

- all arbitrations are governed by the Arbitration Act, whereas only adjudication of disputes under construction contracts are governed by the Construction Act
- the arbitration process is underwritten by a written contract, whereas as of 1 October 2011 construction contracts need no longer be in writing in order to benefit from the statutory right to adjudicate
- parties to construction contracts are entitled to devise their own scheme for adjudication but it must comply with the principals laid down by s.108 of the Construction Act. Parties to an arbitration have a great deal more freedom to manoeuvre
- unlike with an adjudicator's decision, there is no statutory time limit on an arbitrator to issue an award
- adjudication is a holding process. An adjudicator's decision is binding pending litigation, arbitration, or subsequent agreement. An arbitrator's award is final and binding subject to appeal in very limited circumstances
- an adjudicator's decision cannot be enforced as a judgment, whereas an arbitrator's award may be enforced in the same manner as a judgment or order of the Court to the same effect

## Arbitration in the construction industry

Arbitration used to be the favoured form of dispute resolution for many members of the construction industry. This is less so today for two reasons.

Firstly, the majority of disputes (particularly more straightforward disputes) are resolved in adjudication. Secondly, some of the historic advantages of arbitration over litigation have been lost. The Technology and Construction Court (the 'TCC') has now tailored itself to better meet the needs of the construction industry. The judges are construction specialists and it has become apparent that resolving a dispute through litigation in the TCC can be both quicker and less costly than resorting to arbitration.

However, arbitration remains a common forum for resolving construction disputes, and all major standard forms of construction contract contain arbitration clauses or an option to select arbitration. In particular, arbitration remains the favoured choice for dispute resolution in international contracts where neither party wants to submit to the jurisdiction of the local court.

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## Comparison Between Arbitration & Mediation

<b>Arbitration</b>	<b>Mediation</b>
Adjudication	Expedited negotiation
Arbitrators control the outcome.	Parties control the outcome.
Arbitrator is given power to decide. Final and binding decision.	Mediator has no power to decide. Settlement only with party approval.
Often extensive discovery is required.	Exchange of information is voluntary and is often limited. Parties exchange information that will assist in reaching a resolution.
Arbitrator listens to facts and evidence and renders an award.	Mediator helps the parties define and understand the issues and each side's interests.
Parties present case, testify under oath.	Parties vent feelings, tell story, engage in creative problem-solving.
Process is formal. Attorneys control party participation.	Process is informal. Parties are active participants.
Evidentiary hearings. No private communication with the arbitrator.	Joint and private meetings between individual parties and their counsel.
Decision based on facts, evidence, and law.	Outcome based on needs of parties.

Result is win/lose award—Relationships are often lost.

Result is mutually satisfactory—A relationship may be maintained or created.

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More expensive than mediation, but less expensive than traditional litigation.

Low cost.

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Private (but decisions are publicly available).

Private and confidential.

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