



# Why Should Parties Arbitrate?

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## EXECUTIVE SUMMARY

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Arbitration has become an increasingly popular method of dealing with disputes. For example, in 2019 there were over 2,700 new arbitration cases received by a number of key arbitral institutions (208 DIAC, 308 HKIAC, 869 ICC, 39 ICSID, 406 LCIA, 199 PCA, 479 SIAC, 175 SCC, 7 ECT and 62 WIPO).

The question of whether or not to arbitrate typically arises when the parties are negotiating a contract, or when a dispute has arisen. There is often a temptation for the parties to overlook dispute resolution clauses to get a contract signed or due to lack of knowledge as to its importance should a dispute arise. Given the implications of a poorly drafted dispute resolution clause, this temptation should be resisted, and it is vital for the parties to consider the pros and cons of arbitration at the time of contracting.

With this in mind, the purpose of this article is to explain what is arbitration, consider the advantages and disadvantages of arbitration, and provide guidance on whether arbitration is the most appropriate dispute resolution procedure, or if litigation or a different form of alternative dispute resolution is most suitable.

## WHAT IS ARBITRATION

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Arbitration is a private form of binding dispute resolution which is conducted before an arbitral tribunal.

Arbitrations are typically conducted by either one or three arbitrators who are referred to as the “arbitral tribunal” or “tribunal”. The tribunal is equivalent to a judge in a court and will decide upon the outcome of the case. However, unlike court proceedings, parties can choose who to appoint as the arbitral tribunal which gives them greater control and certainty over their case and establishes a bespoke and tailored approach to dispute resolution.

For the most part, the panel is selected so that it is comprised of individuals who are experts in their respective fields relating to the particular facts of the dispute or experienced lawyers who (like a judge in a court case) can adequately interpret and determine an issue of law.

We set out below the advantages and disadvantages of arbitration to provide guidance on whether arbitration is best suited in circumstances where a dispute arises.



## WHAT ARE THE ADVANTAGES OF ARBITRATION?

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- **Appeals** – A court judgment will often be subject to appeal whereas the opportunities to challenge or appeal an arbitration award is much more limited which provides the parties with conclusiveness. One of the main reasons why arbitration is popular is because of the lack of an appeals mechanism and the certainty generated by the final award.
- **Certainty** – Disputes over jurisdiction can be expensive and time consuming. A carefully drafted arbitration clause setting out the arbitral institution and the rules that will apply provides the parties with procedural certainty and minimises the chance of a jurisdictional dispute arising between the parties.
- **Choice** – Put simply, parties can choose the appointment of their tribunal. Subject to the wording of the arbitration clause in the contract, in most circumstances the parties can choose how many arbitrators should make up their tribunal, what (if any) professional qualifications or expertise the individuals comprising of the tribunal should have and whom they would like to act. The parties can agree upon certain criteria for the arbitrators or the presiding arbitrator. For example, in a construction dispute where there are technical and/or scientific issues that need to be considered to determine the decision in a case, the parties can choose a tribunal member who possesses relevant technical expertise in that field. Likewise, in a dispute which turns on an issue of law, the parties can instruct a legal practitioner with experience in that area of law.
- **Confidentiality** – Arbitration hearings are usually held in private. Whilst the degree of confidentiality afforded by the arbitration laws of different jurisdictions varies, arbitration provides greater confidentiality and privacy than litigation (which is often public). However, it should be noted that in circumstances where enforcement through the Courts becomes necessary, confidentiality may be put at risk by the court process and parties should have regard to mandatory reporting obligations.
- **Cost** – In arbitration there are no court fees and parties are able to agree upon a process that is tailor-made to their dispute. For example, this could be in the form of a streamlined fast track procedure. International arbitral tribunals are generally empowered to award the successful party the majority, or at least a measure of its costs; however, this practice varies depending upon the laws and rules that have been chosen for the arbitration proceedings.
- **Delays** – Arbitrations can represent a fast method of dispute resolution. This is particularly attractive during the COVID-19 pandemic where lead times to trial in court have been extended in cases. However, what should be borne in mind by the parties in arbitration proceedings is that a multi-party tribunal can cause delays if not coordinated correctly and because arbitrators' powers of coercion are more limited than the courts, there is greater opportunity for breaches of procedural deadlines.



- **Enforcement** – Arbitration awards are more widely and readily enforceable than court judgments primarily due to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which provides for an extensive enforcement regime for international arbitration awards and where over 150 states are party.
- **Experience** – The parties can select arbitrators for their familiarity with relevant commercial practices, trade knowledge, ability to apply different applicable laws and deal with comparative law issues. The parties can select arbitrators based on their technical expertise and experience. In some jurisdictions, parties run the risk of their dispute being decided by a judge who has little or no relevant experience.
- **Flexibility** – Arbitration allows the parties to tailor the procedures to the needs of a particular dispute. As part of this, there is scope for the parties to adopt innovative, effective and efficient procedures as well as the adoption of the procedural rules of an international arbitral institution. This allows the parties to agree a suitable procedure tailored to their needs. The consensual nature of arbitration allows the parties to choose how many arbitrators should resolve the dispute, as well as who those arbitrators should be. This flexibility is a crucial advantage over litigation during the COVID-19 pandemic. Arbitration rules are generally simpler and more flexible than court rules and easier to understand for parties of different nationalities.
- **Language** – Unlike the Dubai Courts where proceedings are conducted in Arabic, subject to the wording of the arbitration clause within the agreement, the language of arbitration proceedings can be in English. This can make it more attractive for international businesses and avoids any associated translation costs.
- **Neutrality** – A party to an international contract will often wish to avoid resolving disputes through the local courts of another party. This is important when the parties originate from different jurisdictions and national legal systems and may prefer to seek an impartial, efficient and pro-arbitration legal system. Arbitration provides the opportunity for neutral dispute resolution where international rules can be applied by a multinational tribunal in a mutually acceptable venue.
- **Party Autonomy** – The parties to an arbitration can craft their dispute resolution process by selecting the place of arbitration, the governing law, the number of arbitrators and arbitrators whom they believe will ensure a fair hearing of the case.

## WHAT ARE THE DISADVANTAGES OF ARBITRATION?

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- **Default Judgment** – In court proceedings, judgments can be made against parties that are in breach of the rules of the court procedure which is generally not available in arbitration. In circumstances where a party has committed a procedural breach, the arbitral tribunal is still required to examine the merits of the claim based upon the evidence it has available.



- **Multi-Party Disputes** – In arbitration proceedings, the right to arbitrate derives from the arbitration agreement and whilst some institutional rules contain provisions for consolidation of related proceedings, it will often require the parties and the third party to agree. This means that in multi-party situations, arbitration can be inconvenient and non-practical in situations that involve multi-party disputes.
- **No Binding Precedent** – An arbitration award does give rise to any binding precedent and are generally confidential to the parties. In cases where a binding ruling on a point of law is required, litigation/court proceedings is a better choice of dispute resolution forum.
- **Summary Judgment** – An arbitral tribunal can determine claims and defenses summarily; however, it is often less likely to adopt such an approach. Accordingly, where there is one defendant, a claimant may prefer to issue court proceedings and apply for summary judgment.

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