**Introduction to arbitration**

An introduction to international commercial arbitration

**The decision to arbitrate**

Typically, the question of whether to arbitrate or not arises at two key stages:

*Before the dispute arises*

When negotiating a contract, the parties may decide to include an arbitration clause in their agreement to cover how disputes will be dealt with in the future. It is vital that the pros and cons of arbitration are given proper consideration by the parties at the time of contracting.

*After the dispute arises*

When a dispute has arisen the parties can choose to resolve it by way of arbitration, even if they had not agreed that in any earlier contract.

**Arbitration terminology**

**Tribunal**

The term ‘tribunal’ is used to describe the arbitrator or arbitrators (1 or 3) sitting as a “tribunal” to resolve the dispute.

**Claimant \ Respondent**

The claimant is called the ‘claimant’, but the other party is the ‘respondent’ (and not the defendant, as it would be in litigation).

**Sir / Madam**

At an arbitration meeting or hearing, the arbitrator is usually addressed as ‘Sir’ or ‘Madam’.

**The award**

An award is equivalent to a judgment in litigation. It is ‘final and binding’ in that it provides a final determination of the dispute, subject only to closely defined statutory rights of challenge.

**The seat**

An arbitration cannot exist in a legal vacuum; it must be ‘anchored’ to some system of law. The “seat” of the arbitration facilitates this – if an arbitration has its seat in England, it will be anchored to the English system of law. The seat might be specifically designated by the parties in an arbitration agreement, applied by default from any rules applicable to the arbitration, or ascertained from the circumstances of a case. The concept of the “seat” is considered further below.

Where any hearings take place is a different concept – an arbitration can have its seat (in the sense explained above) in England but have all the hearings in a different jurisdiction. The location of the hearings is usually called the “venue”. However, the seat and the venue will often (but do not have to) be the same.

**Governing law of the contract**

The governing law of any contract between the parties from which their dispute has arisen may be different from the law of the “seat”. Parties may, for example, agree that the governing law of their contract will be German law, but provide that all disputes arising out of the contract will be resolved by arbitration with a seat in England.

If the parties have not made an express choice of governing law for their contract, it will be necessary to determine the proper law of the contract by applying conflicts of law principles. In England and Wales the rules regarding how to determine the proper law of the contract come from the Regulation 593/2008, often referred to as the ‘Rome I Regulation’. The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 provide for the rules in the Rome I Regulation to be retained as domestic law in all parts of the UK.

**Law of the dispute**

S. 46 of the Arbitration Act 1996 (the ‘Act’), discussed in more detail in the element ‘An English seat’, states that the arbitrator will decide the dispute in accordance with the law the parties have chosen. In a standard contract the parties might have agreed that their contract will be governed by English law. If so, disputes should be decided in accordance with English law. However, s. 46 also allows the parties to agree that the dispute shall instead be decided in accordance with other considerations. This gives the parties the freedom to have their disputes decided in accordance with, for example, equitable or commercial principles rather than an established legal system. Another example might be where the parties agree to have their dispute decided in accordance with a set of religious rules.

**Arbitration agreement**

An arbitration agreement is a contract for the resolution of disputes between the parties by arbitration rather than by court proceedings. For an arbitration agreement to be enforceable under the Act, it must be in writing or evidenced in writing (s. 5 of the Act.) S. 6 of the Act defines an arbitration agreement as an agreement to submit to arbitration present or future disputes.

An arbitration agreement can be a “stand alone” agreement to refer an existing dispute to arbitration; or it can be included in some other contract by which the parties agree to refer future disputes to arbitration.

**Separability**

What happens to an arbitration clause if the contract which contains such a clause is brought to an end or the contract is found to be invalid? Does the arbitration clause also cease to exist?

S. 7 of the Act confirms that the separability doctrine applies to arbitration agreements. This means that an arbitration agreement is separate from the contract for which it provides the means of resolving disputes. The arbitration agreement can then survive breach, termination or a finding of invalidity of the contract of which it forms part in order to deal with any disputes in respect of liabilities under the contract arising before or after the termination.

**Law of the arbitration agreement**

Because an arbitration clause is separable from the main contract, it can be subject to a different law than the law governing that main contract. In practice, the law of the arbitration agreement will often be the same as the governing law of the contract, or it could be stated expressly that it will be subject to another law such as the law of the seat. The law of the arbitration agreement regulates substantive matters relating to that agreement (for example interpretation and validity).

**Summary**

- An arbitration agreement must be in writing.

- An arbitration agreement can be included in a contract or be a stand-alone agreement.

- If included within a contract, the arbitration agreement itself is separable and can be subject to a different law to the main contract.

- The ‘seat’ of the arbitration tells you the system of law to which the arbitration will be anchored.

- The law of the ‘seat’ may be different to the law that the dispute will be decided in accordance with.