

**HIGHER SCHOOL OF INSURANCE AND FINANCE - SOFIA**



**DOCTORAL DISSERTATION**

**ON THE SUBJECT**

**ARBITRATION AS A FORM OF ALTERNATIVE DISPUTE  
RESOLUTION AND ITS APPLICATION IN FINANCIAL DISPUTES**

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**ABSTRACT**

Arbitration is a dispute settlement process agreed between the parties in which the dispute is submitted to one or more arbitrators who issue a decision. It is a mechanism for alternative dispute resolution because it allows the parties to resolve their dispute outside the state courts, ie. without litigation. Among alternative dispute resolution methods, arbitration is defined as a means of resolving disputes because of the authority given to arbitrators to decide the case and make a decision. The main feature of arbitration is its consensual nature. The dispute can be resolved by the arbitrator only if both parties have agreed to it. The agreement of the parties usually takes the form of an arbitration clause in the agreement, before a dispute arises. Once a dispute has arisen, the parties may agree to submit the dispute to an arbitral tribunal.

Arbitration is a form of alternative dispute resolution where an impartial arbitrator makes a final and binding decision to resolve the dispute between the parties. Arbitration is used as an alternative to litigation as a means of resolving disputes without the involvement of the courts. Arbitration is essentially based on all parties agreeing to submit the dispute to arbitration, for example, by way of an arbitration agreement or a clause in the dispute settlement agreement.

Arbitration agreements are common in consumer contracts and employment contracts, but they can be proposed as additions to any contract agreement in which one or both parties would like to rule out a future lawsuit.

Recent years have seen an increase in the use of arbitration in the financial sector. The increasing complexity of financial transactions and financial products has an impact on the use of arbitration. Although the technical knowledge of judges in banking and finance varies from one legal system to another, there is a perception that arbitration meets the opinion expressed in the financial business that disputes should be resolved by experts in the field.

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**CONTENT**

<b>INTRODUCTION</b>	<b>8</b>
<b>METHODOLOGICAL APPROACH TO RESEARCH</b>	<b>8</b>
<b>SOCIAL JUSTICE FOR STUDYING THE TOPIC</b>	<b>10</b>
<b>SUBJECT OF RESEARCH</b>	<b>10</b>
<b>PURPOSE OF THE RESEARCH</b>	<b>11</b>
<b>HYPOTHESIS</b>	<b>12</b>
<b>RESEARCH METHODS</b>	<b>13</b>
<b>TIME FRAMEWORK OF THE RESEARCH</b>	<b>14</b>
<b>INFORMATION BASE OF THE DOCTORAL DISSERTATION</b>	<b>14</b>
<b>DEGREE OF PROBLEM DEVELOPMENT</b>	<b>14</b>
<b>PART ONE: THEORETICAL FOUNDATIONS OF ARBITRATION</b>	<b>15</b>
<b>1.1. ТЕОРИИ ЗА АРБИТРАЖАТА</b>	<b>15</b>
<b>1.2. DEFINITION OF ARBITRATION</b>	<b>18</b>
<b>1.3. CONDUCT OF ARBITRATION</b>	<b>27</b>
<b>1.3.1. Court arbitration</b>	<b>30</b>
<b>1.3.2. Contractual arbitration</b>	<b>31</b>
<b>1.3.3. Arbitration by stipulation</b>	<b>32</b>
<b>1.3.4. Purpose of the arbitration hearing</b>	<b>33</b>
<b>1.3.5. Arbitration rules and procedure</b>	<b>38</b>
<b>1.4. THE ARBITRATION PROCESS</b>	<b>40</b>
<b>1.4.1. Pre-arbitration process</b>	<b>45</b>
<b>1.4.2. Issues to be covered</b>	<b>46</b>
<b>1.4.3. Covered side</b>	<b>46</b>
<b>1.4.4. Detection parameters</b>	<b>47</b>
<b>1.4.5. Selecting an arbitrator</b>	<b>48</b>
<b>1.4.6. Arbitration hearing</b>	<b>52</b>
<b>1.4.7. Arbitration decision</b>	<b>54</b>
<b>1.5. TYPES OF ARBITRATION</b>	<b>58</b>
<b>1.5.1. Domestic arbitration</b>	<b>59</b>
<b>1.5.2. International Arbitration</b>	<b>63</b>
<b>1.5.3. International Commercial Arbitration</b>	<b>66</b>
<b>1.5.4. Ad-hoc arbitration</b>	<b>68</b>

<b>1.5.5.</b>	<b>Quick Arbitration</b>	<b>69</b>
<b>1.5.6.</b>	<b>Institutional arbitration</b>	<b>72</b>
<b>1.6.</b>	<b>ADVANTAGES FROM ARBITRATION</b>	<b>74</b>
<b>1.7.</b>	<b>OTHER FORMS OF ALTERNATIVE DISPUTE SETTLEMENT</b>	<b>79</b>
<b>1.7.1.</b>	<b>Independent negotiations</b>	<b>80</b>
<b>1.7.2.</b>	<b>Mediation</b>	<b>83</b>
<b>1.7.3.</b>	<b>Conciliation</b>	<b>89</b>
<b>PART TWO: ARBITRATION AGREEMENT</b>		<b>93</b>
<b>2.1.</b>	<b>DEFINITION OF THE ARBITRATION AGREEMENT</b>	<b>93</b>
<b>2.1.1.</b>	<b>Purpose of arbitration agreements</b>	<b>103</b>
<b>2.1.2.</b>	<b>Pros of signing an arbitration agreement</b>	<b>105</b>
<b>2.1.3.</b>	<b>Disadvantages of signing an arbitration agreement</b>	<b>107</b>
<b>2.2.</b>	<b>TYPES OF ARBITRATION AGREEMENTS</b>	<b>111</b>
<b>2.2.1.</b>	<b>Arbitration clause</b>	<b>112</b>
<b>2.2.2.</b>	<b>Filing / Arbitration Agreements</b>	<b>117</b>
<b>2.2.3.</b>	<b>Arbitration agreement incorporated by reference</b>	<b>119</b>
<b>2.3.</b>	<b>CHARACTERISTICS OF THE ARBITRATION AGREEMENT</b>	<b>121</b>
<b>2.3.1.</b>	<b>Fundamentals of an arbitration agreement</b>	<b>126</b>
<b>2.3.2.</b>	<b>Common elements of the arbitration agreement</b>	<b>129</b>
<b>2.3.3.</b>	<b>Important provisions in the arbitration agreement</b>	<b>132</b>
<b>PART THREE: IMPLEMENTATION OF THE ARBITRATION PROCEDURE</b>		<b>137</b>
<b>3.1.</b>	<b>ARBITRATION PROCEDURE</b>	<b>137</b>
<b>3.2.</b>	<b>STEPS INVOLVED IN ARBITRATION PROCEDURE</b>	<b>142</b>
<b>PART FOUR: USING ARBITRATION IN FINANCIAL DISPUTES</b>		<b>147</b>
<b>4.1.</b>	<b>CHARACTERISTICS OF ARBITRATION IN FINANCIAL DISPUTES</b>	<b>147</b>
<b>4.1.1.</b>	<b>Reasons for using arbitration in financial disputes</b>	<b>149</b>

<b>4.1.2.</b>	<b>The future of arbitration in the financial sector</b>	<b>154</b>
<b>4.2.</b>	<b>ARBITRATION IN INTERNATIONAL BANKING AND FINANCE</b>	<b>157</b>
<b>4.2.1.</b>	<b>Basic features of arbitration in international banking and finance</b>	<b>157</b>
<b>4.2.2.</b>	<b>Financial institutions and international arbitration</b>	<b>161</b>
<b>4.3.</b>	<b>REASONS FOR ACCEPTING INTERNATIONAL ARBITRATION IN BANKING INSTITUTIONS</b>	<b>163</b>
<b>4.4.</b>	<b>INDICATORS FOR ARBITRATION IN THE BANKING AND FINANCIAL SECTOR</b>	<b>166</b>
<b>4.5.</b>	<b>SETTLEMENT OF FINANCIAL BUSINESS DISPUTES BY ARBITRATION</b>	<b>169</b>
<b>4.5.1.</b>	<b>Benefits of resolving financial business disputes through arbitration</b>	<b>172</b>
<b>4.5.2.</b>	<b>Types of arbitration for resolving financial business disputes</b>	<b>174</b>
<b>4.5.3.</b>	<b>Arbitration Procedures in Resolving Financial Business Disputes</b>	<b>175</b>
<b>4.5.4.</b>	<b>Commercial arbitration</b>	<b>180</b>
<b>CONCLUSION</b>		<b>185</b>
<b>REFERENCES</b>		<b>189</b>



## **INTRODUCTION**

### **METHODOLOGICAL APPROACH TO RESEARCH**

#### **1. SOCIAL JUSTICE FOR STUDYING THE TOPIC**

Arbitration is a form of alternative dispute resolution where an impartial arbitrator makes a final and binding decision to resolve the dispute between the parties. Arbitration is used as an alternative to litigation as a means of resolving disputes without the involvement of the courts. Arbitration is essentially based on all parties agreeing to submit the dispute to arbitration, for example, by way of an arbitration agreement or a clause in the dispute settlement agreement.

Arbitration as a whole is faster than litigation, it can be cheaper and more flexible for companies to offer, and arbitral awards are generally unpublished and can be confidential and easier to enforce. Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. When choosing arbitration, the parties opt for a private litigation procedure instead of going to court.

Arbitration can only take place if both parties have agreed to it. In the event of future disputes arising out of the agreement, the parties shall insert an arbitration clause in the relevant agreement. An existing dispute may be referred to arbitration with a submission agreement between the parties. Unlike mediation, one party cannot unilaterally withdraw from arbitration. According to the arbitration rules, the parties can jointly choose a single arbitrator. In addition to selecting neutrals of appropriate nationality, the parties can choose important elements such as the applicable law, the language and the place of arbitration. This allows them to ensure that neither party has an advantage in the domestic court.

Arbitration compared to litigation and other forms of dispute resolution has advantages that are reflected in enforcement, flexibility and confidentiality, ie arbitration has less formal procedural and evidentiary rules, pragmatism and efficiency, confidentiality and ease of international enforcement.

The topicality of the research on this topic in the doctoral dissertation is especially emphasized by the knowledge that arbitration is a method for resolving disputes out of court. The parties refer their disputes to an arbitrator who reviews the evidence, listens to the parties and then makes a decision. The arbitration process is less formal than a court hearing or trial. Most arbitrations arise because of an arbitration clause in the contract, in which the parties have agreed to settle all disputes arising out of the contract through arbitration. Arbitration clauses can be simple, stating that claims will be settled according to the applicable arbitration rules and then enforced.

In addition, it should be noted that the topicality of the topic increases the awareness that arbitration clauses can be more complex, controlling a number of issues, such as how arbitrators will be selected, where the arbitration will take place, who will pay for lawyers costs and whether the final arbitral award must be kept confidential. Arbitration clauses may be mandatory or voluntary, and the arbitral award may be binding or non-binding..

## **2. SUBJECT OF RESEARCH**

The subject of research of this doctoral dissertation is the determination of the content of arbitration as a process of alternative dispute resolution in general and financial disputes.

The subject of dissertation research is also to prove the effectiveness of arbitration in resolving disputes.

The effectiveness of arbitration rules is a special subject of research.

The second special subject of research is arbitration in financial disputes.

### **3. PURPOSE OF THE RESEARCH**

The purpose of researching a doctoral dissertation is to prove that arbitration is a form of alternative dispute resolution that offers a fair resolution of disputes by an impartial third party without undue cost or delay.

Also, the purpose of research in this paper is to confirm that the parties to the dispute are free to agree on how their disputes will be resolved.

The aim of the research is also to study the differences between arbitration and other forms of alternative dispute resolution.

The research of this dissertation also aims to prove how the arbitration process is realized, as well as what are the procedures for confirmation of the arbitral award (the document that gives and explains the arbitrator's decision) and the procedure that gives effect to

the judgment and effect of judgment. after trial in court, especially in financial disputes.

An additional goal of the research of this paper is to explain the advantages of arbitration expressed as decision maker, efficiency, privacy and flexibility..

#### **4. HYPOTHESIS**

##### **Basic (general) hypothesis:**

The paper starts from the assumption that arbitration is an effective alternative settlement of disputes and in that framework especially of financial disputes.

##### *First special hypothesis:*

What are the basic issues related to arbitration as an alternative settlement of financial disputes.

##### *Second special hypothesis:*

Ensuring appropriate arbitration policies and measures as an alternative means of resolving disputes

##### *Third special hypothesis:*

How to plan and direct activities for the use of arbitration as an alternative means of resolving disputes, and within that of financial disputes.

##### **Auxiliary hypothesis:**

What are the new strategies for using arbitration as a form of alternative dispute resolution between different entities in the field of business, especially in business related to financial disputes.

## 5. RESEARCH METHODS

For the purpose of successful processing and elaboration of the topic of the doctoral dissertation that requires a multidimensional approach, a number of research methods are used, which are:

*historical* - applying this method historically determines the emergence and development of arbitration as a form of alternative dispute resolution.

*content Analysis* - Applying this method analyzes the results of conducting arbitration as a form of alternative dispute resolution

*comparative method* (comparative) - with the application of this, a comparative perception of the experiences in discovering the functioning of arbitration as a form of alternative dispute resolution is performed, domestically and internationally.

*statistical method* - by applying this method, the results of the implementation of arbitration as a form of alternative dispute resolution are processed.

*synthesis* - with the help of this method the data obtained with the help of the previous methods are combined.

The preparation of the doctoral dissertation is based on data provided by international literature which allows to perceive the

theoretical foundations of arbitration as a form of alternative dispute resolution.

In the part of the study, data available through the internet and with researches conducted by competent authorities as well as the author's own observations are used.

## **6. TIME FRAMEWORK OF THE RESEARCH**

Due to the nature of the matter being processed in the doctoral dissertation, temporal matter is researched in the period from 2000 to 2021 to determine how the conduct of arbitration as a form of alternative dispute resolution has progressed.

## **7. INFORMATION BASE OF THE DOCTORAL DISSERTATION**

The information base during the preparation of the dissertation was based on the materials from the statistical publications, statistical bulletins, Materials from the Internet, materials of the bodies for monitoring the results of the conduct of arbitration as a form of alternative dispute resolution.

## **8. DEGREE OF PROBLEM DEVELOPMENT**

There are numerous studies in the literature devoted to arbitration as a form of alternative dispute resolution. In recent years, a number of theoretical and practical aspects of the characteristics of arbitration as a form of alternative dispute resolution and its impact on the work of entities that resolve arbitration disputes have been considered.

## **PART ONE: THEORETICAL FOUNDATIONS OF ARBITRATION**

### **1.1. ARBITRATION THEORIES**

Arbitration theories can be described as judicial and political. The first may be based on how arbitration should work, while the second is based on how it actually works:<sup>1</sup>

- *Judicial theory* implies that there is in fact a "fair" solution to the dispute and that it is the arbitrator's duty to decide on the principles and facts involved. The arbitrator sits as a private judge, called upon to establish the legal rights and economic interests of the parties involved, as these rights and interests are substantiated by the information provided by the parties themselves.
- *Political theory*, on the other hand, sees arbitration as a continuation of both collective bargaining and, of course, collective coercion. The arbitrator functions as a sensitive

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<sup>1</sup> The two main theories of arbitration may be described as judicial andh, (2020), <https://gmatclub.com › forum › the-two-main-theories-of->

instrument, accurately recording the relative forces of the parties and ensuring that the lion gets his share.

Arbitration provides a method of alternative dispute resolution accepted by most public and private entities internationally and locally. The parties to the agreement may choose to resolve any dispute by establishing a private court before an arbitrator of their choice. The parties to the dispute usually have to abide by their agreements. Where the parties agree that any dispute or dispute between them should be submitted to arbitration, the court should be prepared by its decision to say what the parties have already said in their agreement and prefer arbitration. In general, the parties should be free to agree on how to resolve their disputes.<sup>2</sup>

Arbitration is an alternative way of resolving disputes where natural or legal persons, based on their agreement, do not go to court to resolve a dispute between them, but to a third party or persons selected by their agreement. Unlike the courts, arbitration is more flexible - the parties can agree on the language and place, the person and number of arbitrators and the procedure for their appointment and the law applicable to resolving disputes:<sup>3</sup>

These characteristics of arbitration are closely related to the analysis of legal decision-making and legal rules in the discipline of

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<sup>2</sup> The Philosophy of Arbitration - International Journal of Business, Economics and Law, Vol. 8, Issue 4 (Dec.) ISSN 2289-1552., 2015, <https://www.ijbel.com> › 2016/01 › law-33, p. 3

<sup>3</sup> Article "Theory Of The Arbitration. The Perspective Of Legal Realism, (2016), <https://motieka.com> › article-t., p. 1 - 3

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legal theory. Legal decision-making was the basis of both major theories of court decision-making - legal realism and legal formalism. According to the formalists, the judges follow logical reasoning to make a decision from the legal rules until the end of the case. In the extreme versions of formalism, the functions of a judge are more like a computer that makes a legal decision according to a certain logic set a code that is manifested through too strict legal norms. Therefore, most formalists considered formal legal rules to be the most important part of making legal decisions.

Given that in arbitration the parties to the dispute have the opportunity to choose both the arbitrator and the rules of applicable law, the question arises what is the theory of court decision - in arbitration prevail legal realism and legal formalism? In assessing the function of arbitration and the fact that the parties to the arbitration dispute tend to appoint an arbitrator favorable to them or their position, it is expedient to analyze the interaction of legal realism with the institute of arbitration.

Two theories are generally used to explain the legal basis of arbitration:<sup>4</sup>

- jurisdiction,
- contractual,

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<sup>4</sup> An introduction to international arbitration (Chapter 1), (2015), <https://www.cambridge.org/core/books/an-introducti>, p. 1

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*Proponents of jurisprudence suggest* that the role of national law is of paramount importance. While the parties are free to choose arbitration instead of resorting to the courts and appointing their preferred arbitrators, it is the state that allows them to do so, and as a result, arbitrators are perceived to hold public office and have the quasi-judicial status granted to them. gives the right to immunity enjoyed by ordinary judges.

*The contract theory* is based on the principle of party autonomy, which is more fully explained in the next section. Accordingly, the will of the parties expressed in their agreement dictates the choice of dispute resolution mechanism. In fact, the arbitration agreement of the parties goes beyond the jurisdiction or ordinary courts, the application of the rules of conflict of laws, as well as the vast majority of procedural rules.

## **1.2. DEFINITION OF ARBITRATION**

Arbitration is the process of hearing and resolving a dispute or resolving disputes between parties by a person or persons chosen or agreed by them:<sup>5</sup>

Arbitration is a private litigation process that parties can choose as an alternative to not going to court. The arbitration process is consensual in that the parties must agree to refer their dispute to

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<sup>5</sup> Arbitration Definition & Meaning | Dictionary.com, (2020), <https://www.dictionary.com> ›

arbitration. An arbitration agreement (commonly referred to as an "arbitration clause") is usually contained in the main agreement between the parties. However, the parties may agree to arbitration separately once a dispute has arisen. In arbitration proceedings, the dispute is resolved either by an arbitrator or by an arbitral tribunal (usually three in number). The arbitrator performs a similar role to the judge in that they are responsible for managing the proceedings to ensure that the parties to the dispute have a reasonable opportunity to present their case. At the end of the arbitration, a decision is made that is final and binding on the parties.<sup>6</sup>

- Arbitration is a form of binding dispute resolution based on an agreement. In other words, the right of one party to refer an arbitration dispute depends on the existence of an agreement (the "arbitration agreement") between them and the other parties to the dispute that the dispute may be referred to arbitration.
- Arbitration is a dispute settlement process agreed between the parties in which the dispute is submitted to one or more arbitrators who issue a decision. It is an alternative dispute resolution (ADR) mechanism because it allows the parties to resolve their dispute outside the state courts, ie. without litigation.

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<sup>6</sup> What is arbitration?, (2021), <https://www.adgmac.com> › w.

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- Among alternative dispute resolution methods, arbitration is defined as a means of resolving disputes because of the authority given to arbitrators to decide the case and make a decision. Unlike mediation and negotiations, the parties have no say in the decision found by the arbitral tribunal, which is imposed on them in a final and binding manner.
  - The main feature of arbitration is its consensual nature. The dispute can be resolved by the arbitrator only if both parties have agreed to it. The agreement of the parties usually takes the form of an arbitration clause in the agreement, before a dispute arises. Once a dispute has arisen, the parties may agree to submit the specific dispute to an arbitral tribunal.

Arbitration is a non-judicial legal technique for resolving disputes by referring them to a neutral party for a binding decision or "award". An arbitrator may consist of one person or an arbitral tribunal, usually of three members:<sup>7</sup>

- Arbitration is commonly used in resolving trade disputes and differs from mediation and conciliation, both of which are common in resolving labor disputes between management and trade unions. In mediation, the parties turn to a third party to offer a recommendation for a settlement or to help them reach a compromise. Such third-party

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<sup>7</sup> Arbitration | law | Britannica, (2021), <https://www.britannica.com> ›

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intervention, which also occurs in international disputes between states in the form of diplomatic intervention and good offices, has no binding force on disputes, unlike the arbitrator's judgment.

- The process by which the parties to a dispute submit their differences in court to an impartial person or group designated by mutual consent or legal provision.
- A binding dispute resolution process in which an impartial person or group of people listens to the facts and decides how to resolve the issue. Arbitration has the effect of a court order. Many brokerage firms ask their clients to sign contracts stating that they will use arbitration, instead of taking legal action, in the event of a dispute. Exchanges for shares, futures or options and other professional or regulatory associations are often involved in the administration of arbitration proceedings. Arbitration is in contrast to mediation, which is not binding on the parties.

The following definitions were given for the arbitration:<sup>8</sup>

- The act of arbitration is, specifically, the resolution of a dispute by a person or persons chosen to hear both parties and make a decision.

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<sup>8</sup> Arbitration Meaning | Best 12 Definitions of Arbitration, (2021), <https://www.yourdictionary.com> ›

- An arbitration definition is an environment in which two parties submit their differences to an impartial third party to determine a solution or negotiation of a problem.
- Arbitration is a method of alternative dispute resolution by which the dispute, with the consent of all parties, is submitted to a neutral person or decision group, usually involving a full evidentiary hearing and presentations by attorneys for the parties. Often, arbitration is the only form of procedure allowed under contract terms; see arbitration clause. See also conciliation, mediation and summary proceedings.
- Arbitration is generally a form of justice where both parties determine the person whose judgment they will formally accept. More specifically, in market anarchist theory (market anarchy), arbitration refers to the process by which two agencies pre-negotiate a set of common rules in the face of cases where a client from each agency is involved in a dispute.
- Arbitration procedure that is final and binding with the prior agreement of the parties or with a legal rule or statute; has no right to appeal or further proceedings. mandatory arbitration. Arbitration is required by law, not by mutual agreement of the parties to the dispute.

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- Arbitration is the process by which two or more parties use an arbitrator or arbitrators to resolve a dispute.
  - Arbitration is a clause in a contract that requires the parties to submit any dispute arising out of the contract to an arbitrator or group of arbitrators instead of proceeding with litigation. Usually, breach or rejection of the contract will not invalidate the clause.

Arbitration is an alternative dispute resolution mode under which an arbitral tribunal composed of one or more – generally three – independent persons (the arbitrators) issues one or more formal decisions (awards) that aim to settle a legal disagreement outside the ordinary judicial system according to the rules designated by a contract or a treaty. Arbitration can be defined as a situation in which a private judge or arbitrator, agreed upon by the parties and under contract, is given the task of settling a dispute through issuing an arbitration decision. This definition has a number of key characteristics.<sup>9</sup>

- Arbitration is a private way to settle a dispute. Arbitrators are therefore distinct from judges as they have the power to state the law, but not the power to apply it. The cost of the arbitration is covered by the parties involved in the dispute. This includes the cost of the arbitrator, the arbitration

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<sup>9</sup> Arbitration - Concurrences, (2021), <https://www.concurrences.com> › dictionary › arbitration, p. 7 -8

institution if there is one, and any experts involved in the process.

- Arbitration is usually adopted in cases involving commercial issues between the parties, for example resolving a contract.
- Other characteristics of arbitration include:
  - ✓ quick resolution of the dispute and methods of recourse against the final decision of an arbitrator;
  - ✓ the autonomy of an arbitration clause should be recognised, and the fact that the arbitration clause can be separated from the rest of the contract (i.e. if a contract is null and void following a competition violation, this does not nullify the arbitration clause).
- Arbitration can either be international, in which case the arbitrator has a wider freedom to establish the framework of the procedure, or domestic which means the arbitrator must apply a number of rules and regulations related to public policy.
- Arbitration can also be institutional or ad hoc.
  - ✓ Institutional arbitration is administered and managed by an arbitral institution, of which there are a number in the world to choose from.

- ✓ Ad hoc arbitration follows the law of arbitration and all the relevant procedures, but is overseen by the parties' agreement.
- Arbitration is a dispute resolution mechanism in which parties agree to have their dispute resolved by a private third-party decision-maker, rather than through litigation in public courts. The parties agree in advance that the decision-maker's ruling will be binding on them, rather than merely advisory. Consequently, while one of arbitration's primary benefits is the freedom that it gives to parties to resolve their dispute in a manner different than that adopted in national courts, it must be remembered that arbitration is nonetheless heavily dependent on both national legal systems and national courts.

Arbitration is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination. The process is private and, subject to the parties' agreement, can be confidential. Arbitration offers a flexible and efficient means of resolving disputes both domestically and internationally. The decision of the arbitral tribunal is final and binding. In the international arena arbitration can be especially effective as there may be difficulties in litigating the dispute in a jurisdiction acceptable to all parties to a contract. For international commercial disputes, arbitration is particularly useful as it allows cross

border transactions to be dealt with impartially by neutral, third party arbitrators and under a neutral legal system chosen by the parties.<sup>10</sup>

Arbitration is generally defined as ‘a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudication procedures affording the parties an opportunity to be heard’. Arbitration is triangular construction, involving at least two opposing parties (claimant and respondent) and a decision-maker (the arbitral tribunal). However, in many – if not most – of the cases, there is a further entity which plays a decisive role in the conduct of arbitration: the arbitral institution, the basic function of which is the administration of arbitral proceedings. In addition to its administrative functions, arbitral institutions sometimes act as adjudicators (decision-makers). This is especially the case if there is a dispute between the parties concerning certain procedural or organisational issues (e.g. whether an arbitrator should or should not be removed for lack of independence or impartiality).<sup>11</sup>

The characteristics of the arbitration definitions are shown in the following figure:

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<sup>10</sup> Arbitration - Australian Disputes Centre, (2021), <https://disputescentre.com.au> ›, p. 1

<sup>11</sup> Kinga, T., (2013), The Legal Relationship between the Parties and the Arbitral Institution, The Legal Relationship between the Parties and the Arbitral, [.https://eltelawjournal.hu](https://eltelawjournal.hu) › the., p. 1

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Figure 1



Source: arbitrators can resolve their dispute - ADR Notable, [https://www.adrnotable.com > uploads > 2021/03 PPT](https://www.adrnotable.com/uploads/2021/03/PPT)

### 1.3. CONDUCT OF ARBITRATION

The beginning of the arbitration process involves one party giving notice to another of their intent to arbitrate a dispute, informing them of the nature and basis for the proceeding. The other party then gets a period of time to respond in writing, indicating whether they agree to resolve this dispute via arbitration. Once it is established that the disagreement will be resolved in an arbitration, the arbitration process itself begins, based on the rules and procedures selected by the parties or specified by contract:<sup>12</sup>

<sup>12</sup> The Arbitration Process - FindLaw, (2016), [https://www.findlaw.com > adr. p. 1](https://www.findlaw.com/adr.p.1)

- One of the reasons that arbitration is often thought of as quicker and cheaper than litigation is that the paperwork involved in a dispute is cut down sharply when compared to litigation. The procedures for many arbitrations cut down sharply on some of the burdensome and expensive litigation tools collectively known as "discovery". The discovery process is intended to allow for exchanges of documents and evidence between parties in a dispute. The arbitration process usually cuts down significantly on discovery, allowing an arbitrator to take a more active role and possibly curtail excesses.
- After this, the process is somewhat similar to a courtroom trial. Parties make arguments before the arbitrator(s), call witnesses, and present evidence to establish and defend their respective cases. The rules for an arbitration hearing may differ from those of a courtroom, however, and opportunities to question or cross-examine witnesses may be more limited. Once the hearing is concluded, an arbitrator or panel is given a certain amount of time in which to consider the decision and make a ruling.

The autonomy of the users of arbitration is a guiding principle in determining the procedure to be followed in arbitration. On that basis,

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the parties may delegate to the arbitral tribunal such powers and duties as they deem appropriate in the particular case:<sup>13</sup>

- ❖ They can choose, for example:
  - formal or informal methods of conducting arbitration;
  - contradictory or inquisitorial proceedings; and
  - documentary and / or oral methods of presenting evidence.

❖ In general, there are no fixed rules of procedure in arbitration; this provides a high degree of flexibility in how to conduct arbitration proceedings. Although institutional (and ad hoc) arbitration rules provide for the review of various procedural steps, the detailed regulation of the procedure to be followed is generally established by agreement of the parties, subject to mandatory provisions at the seat of arbitration. In the absence of agreement by the parties on such matters, arbitrators will generally have the discretion to determine the arbitral proceedings.

❖ Once the proceedings have been agreed with the parties, or otherwise determined by the arbitral tribunal, the arbitral tribunal shall conduct the arbitral proceedings in accordance with those rules of procedure. Failure to do so may result in the award being revoked or denied recognition and performance. The autonomy of the parties to determine the procedure is not unlimited. The procedure must comply

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<sup>13</sup> The Arbitral Procedure - Konrad Partners, (2021), <https://www.konrad-partners.com> ›

with all mandatory rules and public policy requirements of the law of the arbitral tribunal.

The parties can be involved in the arbitration process in one of three ways:<sup>14</sup>

- court arbitration,
- contractual arbitration or
- arbitration by provision.

### **1.3.1. Court arbitration**

Court arbitration is a legal procedure by which certain types of cases are referred to non-binding arbitration before a trial. This process is designed to speed up and streamline the resolution of actions through a neutral arbitrator evaluation, achieved through a simplified and cost-effective procedure for obtaining fast and fair dispute resolution. Arbitrals ordered by a court are non-binding, which means that any party who is dissatisfied with the arbitrator's decision can request a new trial. As the process is non-binding, neither party waives any constitutional rights by engaging in this type of arbitration.

Judicial arbitration is a binding or non-binding process where an arbitrator applies the law to the facts of the case and issues an award. The goal of judicial arbitration is to provide parties with resolution that is earlier, faster, less formal and less expensive than a trial. The

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<sup>14</sup> Arbitration | ADR Services, Inc., (2020), <https://www.adrservices.com › services › arbitration>.

arbitrator's award may either become the judgment in the case if all parties accept it or if no trial de novo (new trial) is requested within the required time. Either party may reject the award and request a trial de novo before the assigned judge if the arbitration was non-binding. If a trial de novo is requested, the trial will usually be scheduled within a year of the filing date of the complaint.<sup>15</sup>

### **1.3.2. Contractual arbitration**

Contract arbitration is a legal process that resolves a dispute that arises or is related to a contract. It is based on an agreement before a dispute between the parties. In the contractual arbitration, the parties agreed in accordance with the arbitration provision in their agreement that in case of dispute, the issue will be resolved by arbitration. In most cases, contract arbitration is legally binding. Arbitration can be structured in many ways. Most often, an arbitrator or panel of arbitrators will hear evidence and arguments from both parties regarding the dispute. The arbitrator will then make a decision and make a decision that is final, except in certain exceptional circumstances. In contract arbitration, a set of rules or procedures are embedded in an arbitration clause that dictates how the parties will act.

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<sup>15</sup> Arbitration | Superior Court of California - County of San Diego, (2021), <https://www.sdcourt.ca.gov> › sdcourt › civil2 › adr2 › arb. p. 1

Contractual Arbitration is when parties to a contract agree to resolve future disputes via binding arbitration rather than in court or otherwise. In these cases, either party can initiate an arbitration pursuant to the clause in their agreement - the party that initiates the dispute is called the invoking party.<sup>16</sup>

In general, contractual arbitration includes enforcement of arbitration between the parties to an agreement, defending against arbitration clauses, participation in arbitration pursuant to an arbitration clause, and judicial proceedings to compel arbitration and subsequent awards.<sup>17</sup>

### **1.3.3. Arbitration by stipulation**

Arbitration by stipulation is based on an amicable settlement dispute between the parties with which they have agreed to arbitrate after their dispute has arisen. The parties must then choose which set of rules and procedures to follow in order to conduct the proceedings. Arbitration with a provision is typically binding and the arbitrator's decision is final, except in certain exceptional circumstances. There is a growing tendency in transnational contracting to include an agreement that the parties will arbitrate any disputes that may arise. The parties

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<sup>16</sup> What is Contractual Arbitration - FairClaims, (2019), <https://fairclaimshelp.zendesk.com › en-us › articles › 360>. p. 1

<sup>17</sup> Beverly Hills Contractual Arbitration Attorney - Law Offices, (2021), <https://www.atrizadeh.com › contractual-arbitration>, p. 1

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usually assume that, in the unlikely event a dispute arises, arbitration will be a faster and cheaper process resolution than civil litigation.<sup>18</sup>

#### **1.3.4. Purpose of the arbitration hearing**

An arbitration hearing must be conducted in a manner which is fair to all parties. This means that the parties must know their rights and responsibilities in advance so they may properly prepare and present their positions. Procedures are required to assure an orderly hearing. But procedures may and should be modified as interests of justice and truth dictate. However, in modifying established procedures, care must be taken to assure that the rights and interests of all parties are protected:<sup>19</sup>

*Remote Testimony:* Hearings may be held in person, virtually, or a combination thereof. If the hearing is in person, testimony provided in the physical presence of the Hearing Panel is preferred, however, parties and witnesses to arbitration hearings may be permitted to participate virtually in hearings at the discretion of the Hearing Panel Chair.

*Postponement of hearing:* Postponement may be granted if there are extenuating circumstances. Parties' requests for continuances shall only be granted when all parties mutually agree to a subsequent

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<sup>18</sup> Contractual Stipulation for Judicial Review and Discovery, (2014), [https://digitalcommons.law.seattleu.edu › viewcontent](https://digitalcommons.law.seattleu.edu/viewcontent), p. 1

<sup>19</sup> Code of Ethics and Arbitration Manual, Part 12: Outline of Procedure for Conduct of an Arbitration Hearing, (2021), <https://www.nar.realtor › part-12-outline-of-procedure-for>. p. 1-3

specified date, or when the hearing panel chair determines that denying the continuance would deny the requestor a fair hearing. Requests for postponement must be made in writing. Permission can be given by the Chairperson.

*Recording the hearing:* The Board shall have a court reporter present at the hearing or shall record the proceeding. Any party may, at the Board's discretion, record the proceeding or utilize a court reporter at their own expense. If a party utilizes a court reporter and orders a transcript, a copy of the transcription shall be made at the party's expense and presented to the Professional Standards Administrator. If the Board utilizes a court reporter in lieu of recording, the parties may not be prohibited from making their own recording. Videotaping is not permitted except with the advance express consent of the parties and the panelists. Any and all recording should be conducted in accordance with state law. Copies of any recording or transcription are to be used only for the purpose of appeals or procedural reviews.

*Method and objective of procedure:* The Hearing Panel shall not be bound by the rules of evidence applicable in courts of law, but shall afford all parties a full opportunity to be heard, present witnesses, and offer evidence, subject to its judgment as to relevance.

*Parties are strongly encouraged to provide any and all documents and evidence they intend to introduce during the hearing to the other party(ies) and to the association prior to the day of the*

hearing. Providing documents and evidence in advance can expedite the hearing process and prevent costly, unnecessary continuances. Evidence submitted to the association but not provided to the other party(ies) will be provided to the other party(ies) by the association at the time of submission.

*Due process procedure:* (Chairperson's Procedural Guide for the Conduct of an Arbitration Hearing is available in the Code of Ethics and Arbitration Manual.)

The purpose of the arbitral award is to give each party a full and equitable opportunity to present its case before the arbitrator. At the hearing, the arbitral tribunal has the right to be heard, to present evidence of controversy and to question witnesses appearing at the hearing:<sup>20</sup>

- Each party must be allowed the opportunity to present the party's claims in full
- Where a party having a fair opportunity to do so fails to provide evidence, the party may not later complain that the arbitrators did not hear the party.
- Compared to court proceedings, arbitration hearings are relatively informal. The arbitrators are not bound by the formal rules of procedure as long as the hearing is fairly conducted.

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<sup>20</sup> Jay E. Grenig., Rocco M. Scanza, *Conducting the Arbitration Hearing* - Chapter 9, (2013), <https://arbitrationlaw.com> > c

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- The arbitrator has wide discretion in conducting the hearing and determines the rules governing the arbitration.
  - As most arbitration agreements provide little guidance on hearings, it can be helpful if the parties' agreement addresses the arbitration rules of the organization that administers it and ensures that the proceedings are conducted properly. Arbitrators are bound by the procedure set out in the arbitration agreement, unless it is contrary to law or public policy.

The arbitration hearing is usually more informal than a civil trial in court. The traditional arbitration hearing proceeds in a manner similar to a court hearing. The parties present opening statements about the case, call witnesses to testify, and then give closing statements with copies of legal authorities:<sup>21</sup>

The procedure for witnesses is similar to a court procedure. The party calling the witness examines the witness and is subject to such court like requirements as avoiding leading questions. The opposing party then cross-examines the witness, and the party calling the witness may re-examine the witness on matters arising from the cross-examination. Arbitrators may ask questions to clarify answers, but it is not considered acceptable to pursue a line of questioning not raised by one of the parties. The practice is that the arbitrators do not prove the

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<sup>21</sup> Conduct of the Arbitration Hearing (Part 5 – Labour Management Arbitration in Canada), (2017), <https://law.missouri.edu> > con. p. 1-3

case for the parties, and if the parties do not raise an issue, the arbitrator is to assume that the parties have a good reason not to raise the issue. In a traditional arbitration hearing, arbitrators are expected to be passive listeners to an adversarial style system of questioning by counsel, and not to have an inquisitorial style of questioning.

Arbitrators have authority by legislation to receive evidence not admissible in a court. Arbitrators are also careful to exclude evidence that is properly excluded under a rule of privilege, such as communications made during the grievance procedure on a without prejudice basis, solicitor-client communications and union representative-grievor communications. Confidential business information may be redacted from documents, where the information is not relevant and necessary, or evidence may be accepted on a confidential basis for the purpose only of the arbitration proceedings. Arbitrators make rulings on evidence having regard to the principle of fairness, with consideration to the policy reasons for the rules of evidence.

Witnesses may be excluded from the arbitration hearing. There may be a concern that the witness will be influenced by having heard the testimony of other witnesses. Where requested by one of the parties, witnesses are usually excluded from the hearing room until called as a witness.

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### 1.3.5. Arbitration rules and procedure

A contract that includes an agreement to arbitrate disputes typically outlines some key aspects relating to any potential future arbitration. The rules and procedures that are used in an arbitration are typically part of agreement. If an outside (third party) service will be used to handle an arbitration, the contract may specify whether that service's already-established rules and procedures will be used. Because of the variety of arbitration services, as well as the flexibility provided to parties to draw up their own rules, there is no single set of rules or procedures that apply to all arbitrations. However, regardless of the rules used, the following are some of the key issues that are typically addressed:<sup>22</sup>

**Number of Arbitrators** - The parties typically outline in a contract whether one, or a panel of three (3) or more, arbitrators will decide their dispute. As a general rule, the more complicated and significant an issue is, the more likely multiple arbitrators will be involved.

**How Arbitrators will be Chosen** - Parties can choose to appoint arbitrators in a number of ways, including by agreement, selecting from a list of arbitrators, or via a process of elimination.

**Timelines for Arbitration** - Rules can establish timelines for resolving a dispute, including when notices are provided, how long hearings last, etc.

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<sup>22</sup> Arbitration Rules and Procedures - FindLaw, (20210<https://www.findlaw.com> > adr, p. 1-2

Evidence - Rules of evidence can be complex in ordinary litigation. They are typically more relaxed in arbitrations allowing more evidence to be considered, although there can also be less time to present and discover evidence, as well.

No set of rules or procedures applies to all arbitrations. The parties can choose their own rules and procedures. Professional arbitrators sometimes develop their own rules and procedures, although they can vary greatly depending on the service. Despite the wide range of possible forms that arbitration can take; has some features that are common to almost all arbitrations:<sup>23</sup>

- All arbitrations involve an arbitrator or arbitrators conducting the hearings and passing judgment.
- The arbitrators are chosen by the parties. This can be done by agreement, by selection from the list of arbitrators or through an elimination process.
- Arbitrations have time limits, although the details vary greatly depending on the rules and procedures used.
- Arbitrations use evidence. Rules on what evidence can be used and how it is presented are much more flexible than rules in court, although there is usually less emphasis on evidence in arbitration and there may be less time to discover or present evidence.

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<sup>23</sup> The Arbitration Process - FindLaw, (2021), <https://www.findlaw.com › adr, p. 1>

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- Arbitration awards are usually limited by agreed rules.
  - Arbitration cases can be kept secret, unlike court proceedings.

The arbitration process usually begins with the appellant notifying the other of their intention to arbitrate the dispute. The notification shall include the nature and basis of the proceedings. After this notification, the other party has a deadline to submit a written response. After this exchange, the arbitration process begins, based on the rules and procedures agreed by the parties or specified in the agreement from which the dispute arises.

#### **1.4. THE ARBITRATION PROCESS**

Arbitration involves submitting a dispute to an independent, neutral third party chosen by both parties to settle the dispute and making a final binding decision:<sup>24</sup>

- To initiate the arbitration process, the claimant submits an arbitration claim, arbitration requirement or court order to ADR Services, and the opposing party (the respondent) can respond to the claim. The neutral arbitrator gathers evidence and listens to the arguments of both parties, and then issues a verdict. Pre-hearing conferences determine procedural issues for the arbitration hearing (such as whether the

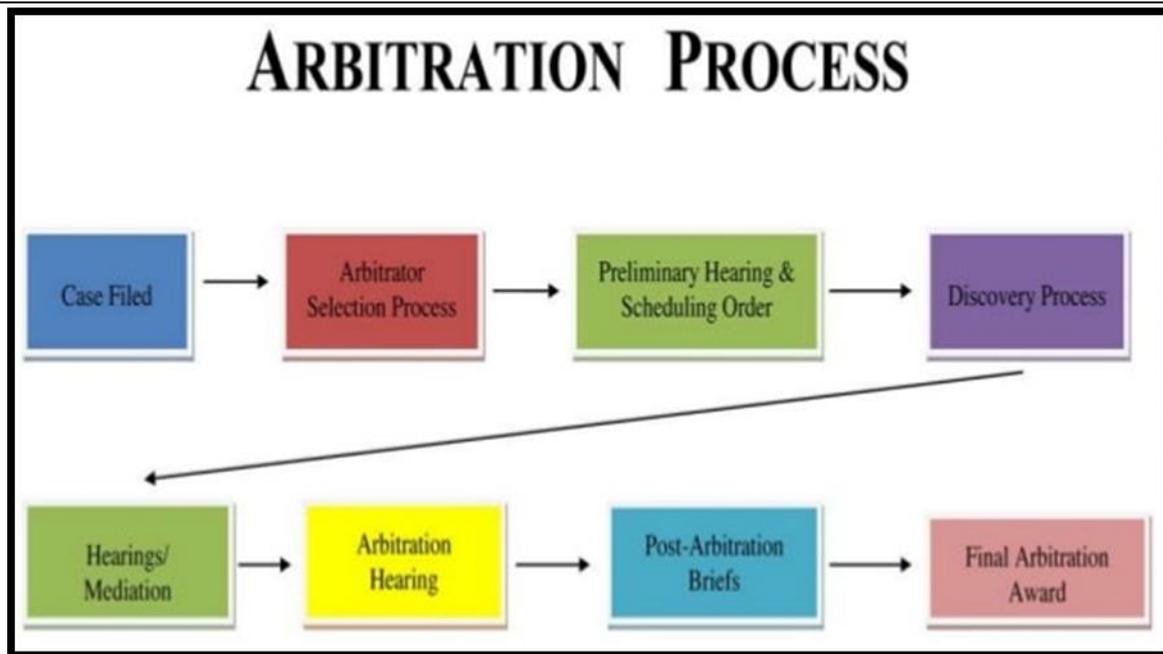
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<sup>24</sup> The Arbitration Process | Joshua M. Javits, (2021), <https://joshuajavits.com> › arbitration-process, p. 1

arbitration should be confidential). At the arbitration hearing, the parties present introductory words, evidence such as documents and material objects, and witnesses who testify and are cross-examined. Closing remarks can be made at the hearing or then submitted in the form of a briefing after the hearing. The arbitrator will then make a decision. The arbitrator's decision consists of a written decision, which may simply consist of a statement of release granted to either party, or may include a written explanation of the arbitrator's findings. An appeal or review of an arbitrator's decision is limited and must be based on extraordinary circumstances.

- For anyone facing an arbitration dispute, it is important to know how arbitration works and what to expect during the process. It has its similarities to the traditional court case, but it is fundamentally a different process. In this section, you can find resources and links to information on using arbitration to resolve your legal issues and what to expect at an arbitration hearing. Some basic information about the rules and procedures involved in arbitration is also given to better understand how one goes through this method of dispute resolution.

**Figure 2**



Source: Arbitration & its types - SlideShare, <https://www.slideshare.net/RahulGoyat1/arbitration-i>.

- ✓ *Submission and initiation.* One party submits an arbitration request, which initiates the process.
- ✓ *Selection of an arbitrator.* Both parties are working to select an arbitrator who can be agreed upon and who can meet their needs based on the nature of their dispute.
- ✓ *Preliminary hearing.* The parties meet to discuss key issues, information exchange, witness lists, etc.
- ✓ *Exchange and preparation of information.* The parties share information and the arbitrators deal with all related challenges.
- ✓ *Hearings.* The parties present evidence and testimonies before the arbitrator.

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- ✓ *Publish submissions for hearing.* If necessary, the parties submit additional information to the arbitrator.
  - ✓ *Award.* The arbitrator makes a decision (decision) and closes the case.

Commercial contracts will commonly include provision for how disputes relating to that contract are to be resolved. If the parties choose arbitration, the arbitration agreement generally be part of the document recording the terms of the commercial transaction. Parties can also enter into an arbitration agreement after a dispute has arisen. In entering into an arbitration agreement, the parties agree to refer their dispute to a neutral tribunal to decide their rights and obligations. The arbitration agreement will determine key elements of the process:<sup>25</sup>

- ❖ For example:
  - Will the tribunal comprise one person or three?
  - How will the arbitrators be selected?
  - Where will the arbitration take place and (possibly different) where will the legal ‘seat’ or place of the arbitration be?
  - Will the arbitration be conducted in accordance with the rules of a particular arbitration institution or will it be ‘ad hoc’?
  - How is an arbitration started?

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<sup>25</sup> What is Arbitration? Processes & Steps Explained - Stewarts, (2022), <https://www.stewartslaw.com> › p. 2 - 3

❖ As arbitration is a contract-based dispute resolution mechanism, there may be steps set out in the contract which have to be followed before can start arbitration. These can include holding meetings between senior people in the two organisations to attempt to resolve the dispute or mediation.

- A claimant will typically start arbitration by sending a document known as a “request for arbitration” or a “notice to arbitrate” to its opponent. If arbitration is to be conducted in accordance with the rules of a particular arbitration institution, that institution’s rules will typically prescribe what should be in your notice to arbitrate. Usually, the notice includes at least a description of the issue in dispute. Also, if the arbitration agreement stipulates that a disputing party should nominate an arbitrator, the notice should include the identity of the individual the claimant wishes to select. The other party (or parties) will then have the opportunity to respond briefly within a set period of time and, where appropriate, also select an arbitrator.
- The tribunal must be formally constituted – if there are to be three arbitrators in a two party dispute, each party will typically select one arbitrator. The nominees or the arbitral institution will select a third arbitrator to act as chair. Where there is to be

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one arbitrator and/or more than two parties, the agreement or the arbitral institution's rules will usually set out the appropriate approach to selecting the tribunal.

- The issues for determination must be identified – these can be issues of fact, law or quantum. It is not unusual for one party to contest the tribunal's jurisdiction to decide part or all of a particular issue.

#### **1.4.1. Pre-arbitration process**

The dispute usually goes through "grievance steps" in an attempt to resolve the dispute before it is submitted to arbitration. These steps include meetings or informal hearings between the employee (or the union if represented) and gradually higher levels of management. A pre-arbitration dispute resolution clause essentially provides that; the parties will attempt to resolve the dispute through other means such as negotiation, mediation, or deliberations. In other words, it can be understood as an agreement between the parties to engage in a multi-tier dispute resolution process.<sup>26</sup>

- For instance, the clause may provide that at the first tier, parties will resolve the dispute by negotiation. If the dispute is not resolved by negotiation, then parties will proceed to the second tier.

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<sup>26</sup> Visa's Chargeback Pre-arbitration Process, (2022), <https://www.chargebackgurus.com › blog › understanding>, p. 1

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- The second tier may provide that the parties will resolve the dispute by mediation. If the dispute is not resolved by mediation, then parties will proceed to the third tier.
  - The third tier may provide that the parties shall resolve the dispute by arbitration.

### **1.4.2. Issues to be covered**

Arbitration legally binding and includes all of the information about the case, along with the arbitrator's decision regarding fees, damages, or disciplinary actions to resolve the case. Arbitration is a simpler process and it's less expensive than going to court. The arbitrator can be an independent arbitrator who is unaffiliated with either side or any group that provides arbitration services, or the involved parties can choose to designate an organization. Each party can represent their own interests or hire a lawyer to make their case. Conflicts in the workplace, breaches of company policy, and legal employment requirements may be covered; everyday "interventions" should be ruled out or resolved in the earliest grievance steps.<sup>27</sup>

### **1.4.3. Covered side**

Parties refer their disputes to an arbitrator who reviews the evidence, listens to the parties, and then makes a decision. Most

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<sup>27</sup> What Is Arbitration and How Does It Work Insureon, (2022), <https://www.insureon.com › insurance-glossary › arbitration>, p. 1

arbitrations arise because of an arbitration clause in a contract, in which the parties have agreed to resolve any disputes arising out of the contract through arbitration. Arbitration clauses can be simple—stating that claims will be settled according to applicable arbitration rules and then enforced by a local court. Coverage may not include all groups of employees and may or may not include superiors or managers.<sup>28</sup>

#### **1.4.4. Detection parameters**

In arbitration there is a minimal right of disclosure; less than in litigation, but sufficient for both parties to have the opportunity to obtain the necessary information to present their case. Arbitration technology is used in various spheres of arbitration where it offers advantages like efficiency in work, effectiveness of the work and convenience it provides while completion of the work. It increases the efficiency by decreasing the cost of the work, one party do not have to travel all the way to meet the other party they can do the same through video call. Similarly in the case of documents, data can be stored online instead of handling huge piles of papers in the form case files. This not only makes arbitration effective and efficient but convenient also by facilitating easy accessibility to the documents by storing them in a digital form.<sup>29</sup>

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<sup>28</sup> Repa, K. B., *Arbitration Basics*, (2022), <https://www.nolo.com> › arbitr, p. 1

<sup>29</sup> *Role of Technology in Arbitration | VIA Mediation Centre*, (2022), <https://viamediationcentre.org> › readnews › MzQ4 › Role-, p. 1

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### 1.4.5. Selecting an arbitrator

In choosing an arbitrator, it is important to take into account the candidate's legal and jurisdictional background (e.g. civil law or common law), relevant industry sector knowledge, and the language of the arbitration. The candidate's professional standing, reputation and integrity are also important (not least as this will have an impact on the amount of influence the party-nominated arbitrator is able to exercise over the other tribunal members), as well as his or her experience of international arbitration practice and procedure. Availability should not be overlooked, as it is important to have an arbitrator who is able to focus on the case at the appropriate times:<sup>30</sup>

- Generally accepted that a potential arbitrator can be interviewed, provided that certain parameters are complied with in order to ensure the maintenance of independence on the part of the arbitrator and integrity of the arbitral process as a whole.
- While parties will of course wish to do everything possible to select an arbitrator who will steer the proceedings in a favourable direction, it is absolutely crucial to ensure that a party-nominated arbitrator remains at all times entirely independent and impartial from the party nominating that person.

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<sup>30</sup> Tirado, J., (2014), *Selecting an arbitrator: Avoiding the pitfalls* - Expert Guides, <https://www.expertguides.com>, p. 1

Most institutional rules do not provide much guidance with respect to the qualifications or skills needed to be an effective arbitrator, other than to say an arbitrator must be independent and impartial. Expanding on the institutions' guidelines, we have detailed an additional four factors to consider when selecting a candidate:<sup>31</sup>

1. **Choosing an Arbitrator with a Manageable Caseload** - Candidates inquire into their caseloads, whether the arbitrator can devote sufficient time and attention to the parties. When specific legal or professional expertise are required and time permits, it may be sensible to appoint the arbitrator best suited to the case, rather than one who could resolve the dispute faster.
2. **Choosing an Arbitrator with the Requisite Legal and Professional Expertise** -A significant advantage of participating in the selection process is the ability to choose a decision maker with expertise that mirrors the nature of the dispute. There is often a tendency to choose an arbitrator with a formal legal education, but this need not always be the case. A formal legal education and legal experience can increase the likelihood of receiving a well-reasoned and legally sound award, and an experienced lawyer will likely have the

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<sup>31</sup> Stadwick, J., (2013), Four factors to consider when selecting an arbitrator, <https://www.tamimi.com › law-update-articles › four-facto>. p. 1 - 2

appropriate judicial demeanor and familiarity with international commercial matters to resolve complex factual or legal issues.

3. In choosing arbitrator to taking in consideration arbitrator's Nationality - In arbitrations where the parties are of different nationalities, arbitral institutions often direct that a sole arbitrator or chairman of the tribunal cannot have the same nationality as one of the parties. In a three-member tribunal, party appointed arbitrators may have the same nationality as a party. Choosing an arbitrator of the same nationality is often sensible because then at least one member of the tribunal will have a good understanding of the culture, business practices and customs of the country where the party is from.
4. Choosing an Arbitrator with Strong Management Skills - If not managed properly, the absence of procedural rules can lead to protracted disagreements between the parties, thereby causing delay and the incurrence of unnecessary costs. To ensure the arbitral process is administered in an efficient, cost-effective manner, the parties should choose a strong arbitrator capable of managing people as well as the process. When vetting a candidate in respect of their management skills, the practical considerations include whether the candidate has a good judicial demeanor, is familiar with the arbitration process and is comfortable dealing with different cultures, legal

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systems, and the tensions which inevitably run high during disputes.

Qualities that make a good arbitrator are:<sup>32</sup>

*Communication Skills* - A good arbitrator is patient, understanding, flexible and an honest listener. At the hearing of the matter, an arbitrator must give all the parties an equal chance to be heard and completely present their grievances and their part of the case. Arbitration is merely effective when the arbitrator is patient.

*Flexible* - A good arbitrator is formal yet flexible and doesn't burden the parties with unnecessary formalities. He also ensures that he notes the salient points the parties raise for determination and makes sure that he makes the parties comfortable enough to share their grievances.

*Adept* - An arbitrator should have knowledge and expertise within the matters over which he presides. Eligibility is often judged either through academic qualifications or professional expertise in matters at issue, or previous arbitration experience. A decent arbitrator quickly and accurately grasps the problems of the case and applies his knowledge alongside proper rules and guidelines.

*Prudent* - A good arbitrator takes all relevant factors to make his decision since it is final and may rarely be appealed in court. He must hear each side of the case before reaching any conclusion.

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<sup>32</sup> Qualities of an efficient arbitrator | via Mediation Centre, (2021), <https://viamediationcentre.org> › readnews › qualities-, p. 1

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*Impartial* - An arbitrator must not be biased towards any party and conduct the proceeding in an even-handed manner. The parties in dispute accept the arbitral award more readily when the conduct of the proceedings is within reasonable expectations and free from any partiality.

*Discreet* - An arbitrator must keep the confidentiality of the dispute and may refrain from discussing the matter with anyone who is not involved in it unless the parties give consent for an equivalent.

#### **1.4.6. Arbitration hearing**

Arbitrations usually involve one or more hearings before the tribunal, where the parties' lawyers put forward arguments and question the other party's witnesses and experts. Hearings can last from half a day to many weeks or even months depending on the issues at stake. During the arbitration hearing, each party presents evidence through the testimony and documents of witnesses and can be recorded shorthand. Strict rules of proof usually do not apply. Although the hearing is somewhat informal, it is held in an orderly manner with the possibility of opening and closing remarks, cross-examination, rebuttal testimony, written submissions and optional representation (the representative may or may not be a lawyer).<sup>33</sup>

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<sup>33</sup> What is Arbitration? Processes & Steps Explained - Stewarts, (2022), <https://www.stewartslaw.com> › ... › International Arbitration, p. 1

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The purpose of the arbitration hearing is to give each party a full and fair opportunity to present its case to the arbitrator. At the hearing, a party to the arbitration has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing:<sup>34</sup>

- Each party must be allowed an opportunity to present the claims the party has in full. Where a party having a fair opportunity to do so fails to offer any evidence, the party cannot later complain that the arbitrators did not hear the party.
- Compared with judicial proceedings, arbitration hearings are relatively informal. Arbitrators are not bound by formal rules of procedure so long as the hearing is fairly conducted. An arbitrator has broad discretion in conducting the hearing and determines what the rules governing the arbitration are.
- Because most arbitration agreements provide little guidance with respect to hearings, it may be helpful if the parties' agreement refers to the arbitration rules of an administering organization providing for the proper conduct of the proceedings. Arbitrators are bound to the procedure specified by the arbitration agreement, unless it is in violation of law or public policy.

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<sup>34</sup> Grenig, E. J., Scanza, M.R., *Conducting the Arbitration Hearing - Chapter 9*, 2013), <https://arbitrationlaw.com> › c., p. 1

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The hearing is often the most significant—and exhilarating—part of any arbitration proceeding. The hearing provides a critical opportunity for each party to highlight the strengths of its case and, conversely, to expose the weaknesses in the opponent’s arguments. It is during the hearing that the tribunal ask questions, assess the credibility of both sides’ witnesses based on counsel’s cross-examination, and potentially request opposing experts to identify areas of mutual agreement. Cases are often won, or lost, based on the events of the hearing.<sup>35</sup>

#### **1.4.7. Arbitration decision**

The arbitrator’s final decision on the case is called the “award.” This is like a judge’s or jury’s decision in a court case:<sup>36</sup>

- Once the arbitrator decides that all of the parties’ evidence and arguments have been presented, the arbitrator will close the hearings. This means no more evidence or arguments will be allowed. The arbitrator write the award and send that to the parties once it is ready.
- Under rules, parties agree that the arbitration award can be entered as a judgment in any fstate court with jurisdiction. This means that the court can enforce it like it was any other court

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<sup>35</sup> Arbitration hearings: Top 10 tips for junior associates, (2021), <https://delosdr.org> › arbitratio., p, 1

<sup>36</sup> What Happens After the Arbitrator Issues an Award, (2022), <https://www.adr.org> › AAA229 After Award Issued. p. 1 - 2

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judgment. The arbitrator are not involved in the case anymore after the final award is sent to the parties.

- The arbitral award provides a remedy and explains the reasons for the arbitral award. The decision can be appealed only on narrow grounds. Legal error, rather than factual error or bias, usually forms the basis for a complaint.

Arbitration award is the determination on the merits by the tribunal in an arbitration. The decision is called an “award”. The award is almost always, although not necessarily, given to the parties in writing (rather than orally) and is typically just as final and binding as a court judgment. Therefore, the award is critically important; it resolves the dispute. Broadly, parties may choose among three types of awards:<sup>37</sup>

- A “standard” award that simply states the decision or announces the result in a conclusory manner and does not provide any insight into or details about how the tribunal viewed the evidence and arguments and applied the law;
- A “reasoned” award in which the tribunal sets out the bases or reasoning for its decision; and
- An award that includes detailed findings of fact and conclusions of law (a relatively exacting standard familiar to the courts and lawyers).

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<sup>37</sup> Alert, C., (2020), Types of Final Arbitration Awards: Why the Choice Matters, <https://www.stradley.com> › a. p. 1

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The contents of an award are usually determined by the arbitration agreement and the applicable *lex arbitri*. There are several information that the arbitral award should include, however, most of them are not mandatory:<sup>38</sup>

- *Type of award* – there are several types of awards (i.e. final, partial, interim, preliminary, additional, consent, default); the type of award should be indicated to determine whether the tribunal’s decision is in fact an award or simply a procedural order – however, the arbitral tribunal’s decision on jurisdiction constitutes an award;
- *The names and addresses* – of the parties, of their representatives, the arbitrators, and the secretary of the arbitral tribunal, if applicable;
- *The full text of the arbitration agreement* – it shows the basis for the arbitral tribunal’s jurisdiction to hear and resolve the case; if the tribunal’s jurisdiction had been challenged by one of the parties, this section should also consist of information on the resolution of such challenge;
- *Applicable law* – both when it comes to the applicable institutional arbitration rules, if any, and the law applicable to the arbitration agreement and the applicable substantive law;

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<sup>38</sup> Elements of an award - Jus Mundi, (2022), <https://jusmundi.com › wik>, p. 1 - 2

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- *The procedural history* – the purpose of this section is to establish that the proceedings were conducted in a proper manner and each party had an equal opportunity to present its case; it shall consist of information on the constitution of the arbitral tribunal, on the seat of arbitration, on eventual challenges to the arbitrators, on parties' submissions and briefs throughout the proceedings, and the date and the course of the hearing, the date of closing of proceedings;
  - *Parties' requests for relief* – this section shall indicate parties' requests and claims (i.e. monetary relief, specific performance, declaratory relief, injunctive relief), counter-claims, including any amendments, withdrawals or waivers of any claims, if any;
  - *Factual summary* – this section should contain a summary of the relevant facts of the case and information whether a given circumstance is agreed or disputed between the parties; if a certain factual circumstance is disputed between the parties, the arbitral tribunal should provide the reasoning and evidence it relied upon in establishing such circumstance;
  - *Summary of parties' arguments* – this section should consist of a (rather brief) summary of parties' standing with regard to the relevant key issues in the case; it may be structured on an issue-by-issue basis;

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- *Reasoning and findings* (Motivation) – the arbitral award’s reasoning is the most important part of the award (the heart of the arbitral award), required usually by both the applicable arbitration law and institutional arbitration rules;
  - *Operative part* – there the arbitral tribunal determines its decision with respect to the parties’ requests and claims; if the arbitral tribunal decided to award compensation or any other form of pecuniary relief, it should clearly specify the amount, the currency, the beneficiary of the payment alongside the information on taxes and interest;
  - *Award on costs* – the tribunal should determine who and to what extent bears the costs of the proceedings.

## 1.5. TYPES OF ARBITRATION

Unlike civil or criminal cases, the dispute is sent to an arbitral tribunal. The tribunal resolves the dispute and the final decision cannot be appealed, making it binding on both parties. No court proceedings are involved to ensure a speedy resolution of disputes. The following are the different types of arbitration according to the jurisdiction of the case:<sup>39</sup>

- Domestic arbitration,
- International arbitration

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<sup>39</sup> Arbitration - types and significance - iPleaders, (2021), <https://blog.iplayers.in › arbitration-type-significance>

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- International commercial arbitration,
  - Ad-hoc Arbitration,
  - Fast track Arbitration,
  - Institutional Arbitration.

### **1.5.1. Domestic arbitration**

Domestic Arbitration is a form of alternative dispute resolution (ADR) where one or more person(s) are appointed to hear a case that takes place within one jurisdiction. The award is binding and enforceable in court:<sup>40</sup>

- Domestic arbitration plays an important role in the business world. Arbitration goal is to provide a direct route to justice that avoids lengthy and expensive proceedings. Therefore, decisions of arbitral panels are usually not subject to appeal but instead the national courts only have a limited scope for review. Domestic arbitral awards – i.e. awards rendered in arbitration proceedings with the seat of arbitration domestic country– are directly enforceable. The enforcement procedure for a domestic arbitral award is the same as for court judgments, making them equal in force and as binding as any ruling rendered by national courts.

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<sup>40</sup> Domestic Arbitration | Comprehensive Support - Konrad, (2022), <https://www.konrad-partners.com> ›, p. 1

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➤ In domestic arbitration, both parties must be from the country, and the proceedings take place within the country itself. Domestic arbitration is when the parties agree to resolve any disputes that arise in the country. The procedure must be conducted on domestic territory and must be in place of procedural and substantive law in the country.

There are basically two main features of domestic arbitration:<sup>41</sup>

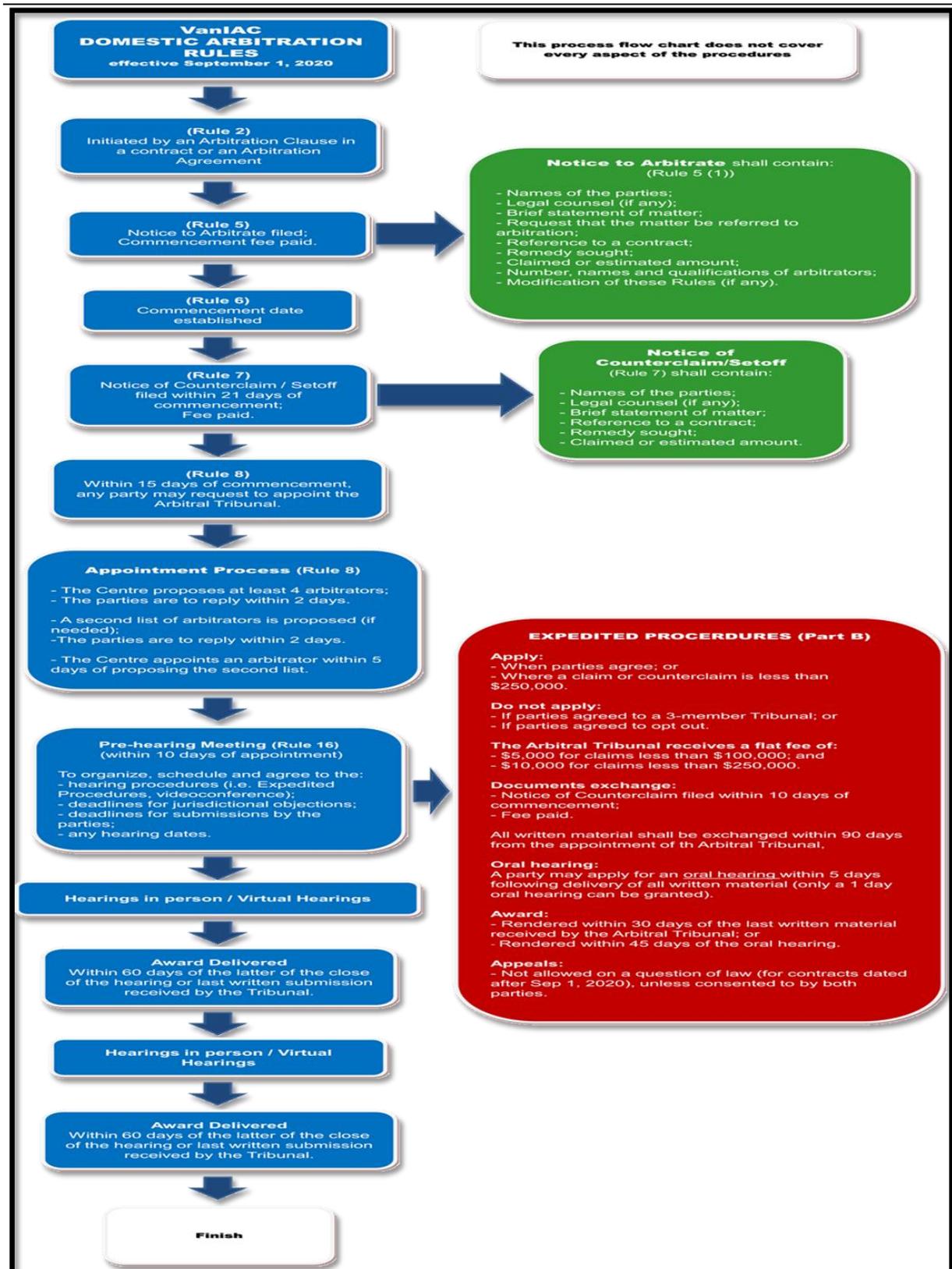
- The parties disputed should have agreed to solve if any dispute arising as per the arbitration concept. The parties at the time of execution Sales Agreement should have an Arbitration clause in the Agreement itself so as to avoid any further ambiguity in relation to the type of Arbitration to be adopted by the disputed Parties.
- The parties disputed should claim for the commencement of proceeding in country and as per the laws of the country. Also, the domestic arbitration can be either in the form of Ad-hoc arbitration where the parties have a choice to appoint the arbitrators and the settlement procedures, or Institutional Arbitration where the parties to the dispute have to follow the instructions instructions as per the agreement.

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<sup>41</sup> Domestic and international arbitration - iPleaders, (2021), <https://blog.ipleaders.in> › do., p. 1

**Figure 3**

***Domestic arbitration***



Source: Vancouver International Arbitration Centre, (2020), Arbitration Process – VanIAC

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### 1.5.2. International Arbitration

As the name suggests, international arbitration takes place outside the domestic territory either because of a clause inserted in the agreement between the parties or because of the reason for the action arising from a foreign element relating to the dispute or the parties. Depending on the circumstances that led to the initiation of the case, foreign or domestic laws will apply. International arbitration is the preferred method of resolving cross-border disputes. The neutrality it offers, together with the relative ease of enforceability of awards, can make it a more attractive forum for disputes than litigating in contracting parties' national courts.

International arbitration is similar to domestic court litigation, but instead of taking place before a domestic court it takes place before private adjudicators known as arbitrators. It is a consensual, neutral, binding, private and enforceable means of international dispute resolution, which is typically faster and less expensive than domestic court proceedings. Unlike domestic court judgments, international arbitration awards can be enforced in nearly all countries of the world, making international arbitration the leading mechanism for resolving international disputes:<sup>42</sup>

- International arbitration is sometimes called a hybrid form of international dispute resolution, since it blends elements of civil

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<sup>42</sup> What Is International Arbitration? (2022), <https://www.international-arbitration-attorney.com> ›, p. 1

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law procedure and common law procedure, while allowing the parties a significant opportunity to design the arbitral procedure under which their dispute will be resolved. International arbitration can be used to resolve any dispute that is considered to be “arbitrable,” a term whose scope varies from State-to-State, but which includes the majority of commercial disputes.

- Companies frequently include international arbitration agreements in their commercial contracts with other businesses, so that if a dispute arises with respect to the agreement they are obligated to arbitrate rather than to pursue traditional court litigation. Arbitration may also be used by two parties to resolve a dispute via what is known as a “submission agreement”, which is simply an arbitration agreement that is signed after a dispute has already arisen.

Key characteristics of international arbitration:<sup>43</sup>

- *Consensuality* - Arbitration is a voluntary and consensual process. Unlike national courts, an arbitral tribunal will not have inherent jurisdiction to decide a dispute. An arbitral tribunal only have jurisdiction if all parties to the dispute have agreed to submit their disputes to arbitration.
- *Neutrality* - Arbitration can offer dispute resolution in a neutral forum. Although the courts of the seat where the arbitration is

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<sup>43</sup> Introduction to International Arbitration | Quickguides | Ashurst, (2021), <https://www.ashurst.com> › int. p. 1 - 2

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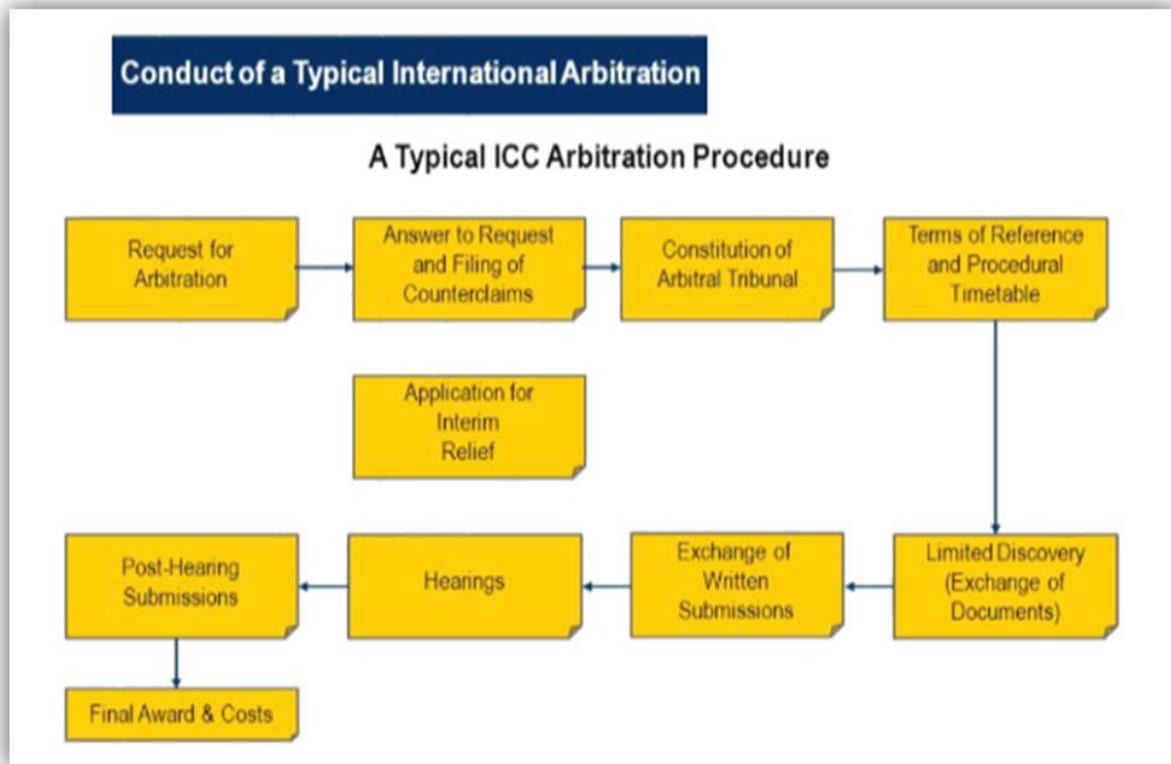
situated may have some role to play in supporting and policing the arbitration, it is generally left to the arbitrators to determine the process to be followed and the merits of the dispute.

- *Choice* - The parties to an arbitration have considerable choice in determining how, where, by whom, and in what language their dispute is resolved. Of particular importance to the parties is the choice of decision-maker.
- *Privacy and confidentiality* - Arbitration is particularly advantageous for commercial parties because of the privacy and confidentiality that it can offer. Hearings generally take place in private. Parties can agree that the hearing and evidence, and any other material created or disclosed in the proceedings, be kept confidential, and that they (and the arbitrators) will not disclose any information about the arbitration.
- *Finality* - Most arbitral laws do not allow for the award to be challenged except in very limited circumstances. In addition, choice of certain institutional rules can further limit the parties' scope to challenge the award. This means that parties avoid the cost of protracted appeal processes.
- *Enforceability* - The ease of enforcement of arbitral awards is viewed as a key advantage of arbitration. A contracting state is

obliged to recognise arbitration awards as binding and to enforce them in accordance with its procedural rules.

Figure 4

### ***International arbitration***



Source:SlidePlayer, International Construction Arbitration - ppt download

### **1.5.3. International Commercial Arbitration**

International trade arbitration can be understood as arbitration that takes place due to a dispute arising from a trade agreement where one of the parties resides in a foreign country or is a foreign citizen; or the basic steering committee of an association, company or body of individuals is controlled by foreign individuals. International commercial arbitration (ICA) is a private dispute resolution process in

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which parties from different countries choose to have their disputes decided by one or more arbitrators, without the involvement of the courts of a particular country:<sup>44</sup>

- International commercial arbitration is an alternative method of resolving disputes between private parties arising out of commercial transactions conducted across national boundaries that allows the parties to avoid litigation in national courts.
- International commercial arbitration is a means of resolving disputes arising under international commercial contracts. It is used as an alternative to litigation and is controlled primarily by the terms previously agreed upon by the contracting parties, rather than by national legislation or procedural rules. Most contracts contain a dispute resolution clause specifying that any disputes arising under the contract will be handled through arbitration rather than litigation. The parties can specify the forum, procedural rules, and governing law at the time of the contract.
- Arbitration can be either “institutional” or “ad hoc.” The terms of the contract will dictate the type of arbitration. If the parties have agreed to have an arbitral institution administer the dispute, it is an institutional arbitration. If the parties have set up their own rules for arbitration, it is an ad hoc arbitration. Ad

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<sup>44</sup> Gualtier, S., 2021, International Commercial Arbitration, <https://www.nyulawglobal.org> › p. 1 - 2

hoc arbitrations are conducted independently by the parties, who are responsible for deciding on the forum, the number of arbitrators, the procedure that will be followed, and all other aspects of administering the arbitration.

- The types of law that are applied in arbitration include international treaties and national laws, both procedural and substantive, as well as the procedural rules of the relevant arbitral institution. Previous arbitral awards carry persuasive authority, but are not binding. Scholarly commentary, or “doctrine,” may also be applied.

#### **1.5.4. Ad-hoc arbitration**

Ad-hoc arbitration refers to when the parties by mutual consent decide on arbitration to resolve the dispute. It is the most common form of arbitration used due to reasonable costs and adequate infrastructure. The arbitration is conducted without any institutional procedure, ie it is not in accordance with the rules of the arbitration institution. The parties have the opportunity to choose the rules and the procedure to be followed. This form of arbitration can be used for international commercial transactions and domestic disputes. Jurisdiction is of the utmost importance because most issues are resolved in accordance with the applicable law regarding the seat of arbitration. An ad hoc arbitration is any arbitration in which the parties have not selected an institution to administer the arbitration. This offers parties flexibility as

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to the conduct of the arbitration, but less external support for the process:<sup>45</sup>

- It can be quicker than institutional arbitration but not if the parties run into difficulties with the appointment or conduct of the tribunal. Many parties and lawyers are used to it and do not consider that an institution would add value to their arbitrations. Arbitration clauses may be amended after a dispute has arisen, or even after an arbitration has been commenced, in order to remove the proceedings from the hands of an institution and have them conducted on an ad hoc basis instead.
- Without an institution to oversee the appointment of the tribunal under its rules, the parties may agree upon an appointing authority in case their appointment procedure should fail for any reason. This may be an arbitral institution, a local law society or other trade or professional association, for example. Otherwise, the court of the seat will fill the gap, which can have disadvantages in terms of speed, costs, and loss of confidentiality.

### 1.5.5. Quick Arbitration

Rapid arbitration can be seen as an effective solution to the problems they face due to delays and time-consuming procedures in

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<sup>45</sup> Ad hoc arbitration - an introduction to the key features of ad hoc arbitration, (2022), <https://www.lexisnexis.co.uk › legal › guidance › ad-hoc-. p. 1 - 2>

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other forms of arbitration. It does not involve any time-consuming procedure that supports the main purpose of arbitration, ie resolving a dispute in a short period of time. The expedited arbitration has a period of six months. The arbitrator uses only the written submission and unlike other forms of arbitration, a single arbitrator is sufficient to resolve the dispute. Fast track arbitration can be defined as a full arbitration process compressed into a shorter period for a quicker resolution of the dispute. The conditions for the application of a fast-track arbitration vary in each jurisdiction and arbitral institution but have notably in common to apply when the amount in dispute does not exceed a certain threshold:<sup>46</sup>

- Parties can also “opt-in” or “opt-out” of this procedure and a fallback provision is often provided for in most national arbitration acts and arbitration rules. Fast track arbitration should be distinguished from emergency arbitration, which is also a compressed procedure allowing a party to apply for urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal. Such measures, and contrary to an award issued under a fast track arbitration, does not have a res judicata effect.
- The key characteristics of a fast track arbitration are as follows:

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<sup>46</sup> Chahine, H. J., (2020), Fast track arbitration: a time-efficient procedure that could hinder the award, <https://blog.jusmundi.com> › f., p. 1

- ✓ A mandatory appointment of a sole arbitrator when the arbitration institution considers it more fit, that overrides the parties' will to appoint a panel of three (or more) arbitrators;
  - ✓ Optional drafting of terms of reference by the arbitrator;
  - ✓ Shortened procedural calendar (to file submissions and to render a final award);
  - ✓ Possibility not to allow requests for document production and to limit the number, length, and scope of written submissions and written witness evidence (both fact witnesses and experts);
  - ✓ Possibility to dispense with the hearing (i.e. without examination of witnesses or experts) and to settle the case, solely based on written materials and submissions;
  - ✓ Possibility, when a hearing is to be held, to conduct it by videoconference, telephone or similar means of communication;
  - ✓ Rendering a summary award.
- Fast track arbitration could be appropriate to settle disputes in which the need to resume the project requires a quick resolution of disputes. It could also be appropriate to settle disputes arising out of transactions involving simple legal

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questions and no issues of fact that require complex expert reports, such as sale and purchase agreements.

- If a fast track procedure undoubtedly helps increase the time and cost-efficiency of arbitration, and as such renders it more attractive, it may be argued, at first sight, that such procedure might threaten the award through annulment proceedings or hinder its efficiency through a refusal to recognize and enforce it by the competent jurisdictions.
- More precisely, the fact that the appointment of a sole arbitrator overrides the parties' will to appoint a panel of three (or more) arbitrators could be seen as a violation of the general principle of party autonomy, and therefore give rise to a challenge of the award on the basis that the tribunal has not been constituted according to the parties' will.

### **1.5.6. Institutional arbitration**

In institutional arbitration, the parties are free to choose a particular arbitration institution in the arbitration agreement itself. The governing body of the institution or the parties may appoint one or more arbitrators from a panel of arbitrators previously agreed upon. The institution selects one or more arbitrators who possess the skills and experience prescribed applicable in a given case when the parties themselves do not appoint an arbitrator. On the other hand, if the parties decide to nominate one themselves, they can choose from the

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list provided by the institution. An institutional arbitration is one in which a specialised institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration, and its own form of administration to assist in the process. For those who can afford institutional arbitration, the most important advantages are:<sup>47</sup>

- the availability of pre-established rules and procedures which ensure the arbitration proceedings begin in a timely manner
- administrative assistance from the institution, which will provide a secretariat or court of arbitration;
- a list of qualified arbitrators to choose from;
- assistance in encouraging reluctant parties to proceed with arbitration; and
- an established format with a proven record.

An institutional arbitration is one that is administered by an institution agreed upon by the parties and conducted in accordance with that institution's arbitration rules. Institutional arbitration may be referred to as administered arbitration. Generally, the arbitral institution's role in an institutional arbitration includes (but is not limited to):<sup>48</sup>

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<sup>47</sup> Institutional vs. 'ad hoc' arbitration - Pinsent Masons, (2021), <https://www.pinsentmasons.com> › Out-Law › Guides, p. 1

<sup>48</sup> Institutional arbitration - an introduction to the key features of institutional arbitration, (2022), <https://www.lexisnexis.co.uk> › p. 1

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- receiving the request for arbitration and distributing it to the respondent,
  - appointing the tribunal where the arbitration agreement provides for them to do so or in default of the parties' ability to do so,
  - setting and administering the financial arrangements for the arbitration (eg setting a deposit or an advance on fees, and paying the tribunal's fees),
  - assisting the tribunal to deal with any issues that arise relating to the conduct of the arbitration (eg a challenge to a tribunal member)
  - it is also, possible for parties to use an institution as an appointing authority only (ie for appointment of the tribunal) and then conduct an arbitration on an ad hoc basis, although this is relatively rare.

## 1.6. ADVANTAGES FROM ARBITRATION

Advantages of arbitration:<sup>49</sup>

- Mutual agreement of both parties - Arbitration can only take place when both parties have agreed and the agreement includes an arbitration clause.

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<sup>49</sup> Arbitration - types and significance - iPleaders, (2021), <https://blog.iplayers.in › arbitration-type-significance>, p. 3

- Impartiality - Neither party enjoys an inadequate advantage due to the fact that the parties are free to decide on the relevant place, language and applicable law.
- Confidential procedure - Any disclosure by the parties to the proceedings and when the arbitral award is rendered should be kept confidential.
- Effective Procedure - No excessive costs are charged by the parties which makes it customary for the parties to prefer arbitration over the traditional form of litigation.
- Simple and informal procedure - The parties do not have to hire a lawyer to represent them and the outcome of the case can be adjusted according to the needs of both parties. The environment is comfortable and no formal manners are used, which makes it easier for the parties to achieve a proper outcome.
- Freedom of choice of arbitrator - The parties may choose an arbitrator or agree to obtain an arbitrator with a relevant exercise in the specific domain by the institution.
- Deadline for the award of a judgment - The tribunal shall render its judgment within a short period of twelve months from the last day of its adjudication in the case of domestic arbitration. On the other hand, in internal trade disputes, the time period is quite relaxed and no specific time period is

granted. Hence, there are no unnecessary delays in awarding the prize.

- Binding decision - The awarded arbitral awards are enforceable making the decision binding on the parties.
- Control position - The parties have a position to control the outcome as they can participate directly in the decision-making process. In this way the dispute is resolved amicably.
- The parties are encouraged to work together peacefully and often participate in structuring the resolution, thus avoiding the escalation of anger and hostility often associated with litigation.
- Because arbitration is a less formal and more flexible process, it is usually faster and more cost-effective than a more cumbersome trial.
- Unlike trials, arbitration proceedings can be scheduled around the needs and dispositions of the parties (depending on the availability of the arbitrator).
- There are more simplified rules for evidence and procedure. The confusing rules of evidence do not apply and the right of disclosure - often criticized as a tactic of delay and play - is either restricted by agreement of the parties or at the

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discretion of the arbitrator (with a limited exception in cases of personal injury).

- There are limited grounds for judicial review in order to enforce the agreement of the parties to be the judgment
- The parties directly select their arbitrator or panel of arbitrators, allowing them to select someone with the necessary amount of experience and expertise for the case to make an accurate and appropriate decision.
- The arbitration process is private and confidential.

In businesses, partnerships and investment transactions, many do not anticipate future litigation. However, when a dispute does indeed arise, there are many options to resolve it. Arbitration is essentially a paid private trial, in other words, a method to resolve disputes without going to court. The advantages of arbitration are:<sup>50</sup>

- *Efficientlibility and Flexiblity*: Quicker Resolution, Easier to schedule. The dispute normally be resolved much sooner. It may take everal years to procure a court trial date, while an arbitration date can usually be obtained within a few months. Also, trials must be scheduled into court calendars, which are usually backlogged without hundreds, if not thousands of cases in front of you. On the other hand, arbitration hearings can

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<sup>50</sup> The Advantages and Disadvantages of Arbitration - SAC, (2022), <https://www.sacattorneys.com> › Articles, p. 1  
- 2

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conveniently be scheduled based on the availability of parties and the arbitrator.

- *Less Complicated*: Simplified rules of evidence and procedure. Litigation inevitably leads down a long path of filing papers and motions, and attending court processes such as motion hearings. The normal rules of evidence used in court may not be strictly applied in arbitration proceedings, making it much easier to admit evidence. Discovery, the time-consuming and expensive procedure that involves taking and answering interrogatories, depositions, and requests to produce documents, maybe largely reduced in arbitration. Instead, most matters, such as who will be called as a witness and what documents must be produced, are handled with simple phone calls with the arbitrator.
- *Privacy*: Keep it out of the public eye. Unlike a trial, arbitration leads to a private resolution, so the information brought up in the dispute and resolution can be kept confidential. This could be enticing for well-known public figures or clients in business disputes because all evidence, statements, and arguments will be completely confidential. On the other hand, in court, even if certain records will not be released, there is still a risk of some public access to potentially sensitive business information.

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- *Impartiality*: Choosing the “judge”. The parties to the dispute usually pick the arbitrator together, so the arbitrator will be someone that both sides have confidence will be impartial and unbiased.
  - *Usually less expensive*. Most of the time, but not always the case, arbitration is a lot less expensive than litigation. Arbitration is often resolved much more quickly than court proceedings, so attorney fees are reduced. Also, there are lower costs in preparing for the arbitration than there are in preparing for a jury trial.
  - *Finality*: The end of the dispute. For binding arbitration, there are limited opportunities for appeal. That gives finality to the arbitration that is not often available with a trial decision, which maybe subject to appeals, new trials and further appeals.

### 1.7. OTHER FORMS OF ALTERNATIVE DISPUTE SETTLEMENT

Покрај арбитражата постојат и следниве форми на алтернативно рашавање на спорови:<sup>51</sup>

- negotiation,
- mediation,
- reconciliation.

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<sup>51</sup> What Are The Four Types Of Alternative Dispute Resolution, (2021), <https://brittontime.com › what.>, p. 1

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### 1.7.1. Independent negotiations

Parties to the negotiation are able to achieve their interests or objectives without assistance from another party. That is, the negotiator focuses on personal interests or objectives without regard to the interests or objectives of the other parties.<sup>52</sup>

- Parties have mutual dependence on each other. To achieve their desired outcomes, each negotiator must work to achieve the interests or objectives of the other party or parties.
- The interests and objectives of the parties may be the same or they may be characterized as interlocking.
- A negotiation is likely to be independent if a party is unable to improve her position or desired outcome by considering the interest or objectives of the other party. That is, the negotiator is driven in the negotiation solely by her own interests and objectives.
- If a party is completely dependent upon another party, she will negotiate by making concessions allowing the other party to achieve (or improve upon her position with regard to) her interests or objectives.
- Negotiating interdependently means that both parties will focus on the interests and objectives of the other party.

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<sup>52</sup> Gordon, J., (2022), Dependence Level in Negotiation, <https://thebusinessprofessor.com> › dependence-level-in-ne. p. 1

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- The extent to which one party achieves (or improves her position with regard to) her desired outcome will improve the outcome of the other party.
  - There is a give and take between the parties that allows both parties to achieve a more favorable outcome than they could achieve independently.
  - The negotiators must need to align interests or objectives or to resolve a dispute:
    - ✓ *Willingness* - The negotiators must possess a desire to negotiate - The parties believe that negotiating will further their interests or aid in achieving their objectives. This generally entails a belief that the other party can be influenced or persuaded to capitulate in some manner in the negotiators favor
    - ✓ *Ability to Improve Ones Position* - The parties must believe that, by negotiating, they have the ability to improve their positions to be better than the best available alternative available if they do not negotiate. Constraints may come in any form and make the alternative to negotiation less tenable. Aversions are a cognitive disposition with regard to a perceived result or alternative scenario in the event of a failure to negotiation (i.e., broken relations, harm to reputation, legal actions, etc.).

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- ✓ *Constraints* - All negotiations involve various situational attributes, such as time, location, nature of communication, number of parties, and party characteristics.

Two or more parties can enter into negotiations to reach a compromise that will satisfy everyone. This type of alternative dispute resolution is typically less formal than arbitration or mediation and does not involve an objective third party:<sup>53</sup>

- Negotiation is often the first approach taken to resolving an intellectual property dispute. The parties or their advocates talk in the hope that they will reach a mutually satisfactory agreement. A negotiated agreement can become an enforceable agreement by the courts.
- Negotiation is often the first option for those who want to resolve a dispute. Simply because, in some cases, both sides can resolve the arguments by taking the "cards on the table" approach and trying to negotiate a compromise. If necessary, dispute resolution specialists can take instructions and negotiate on behalf of the parties.
- This form of alternative dispute resolution is often overlooked because of how obvious it is. There is no impartial third party

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<sup>53</sup> What Are The Four Types Of Alternative Dispute Resolution, (2021), <https://brittontime.com › what, p. 1>

in the negotiations to assist the parties in their negotiation, so the parties must work together to reach an agreement.

Figure4

***Pros and cons of negotiation***

Positives	Negatives
Can maintain a good relationship	Not legally binding
Inexpensive	Can be used as a stalling tactic
Fastest ADR process	No guarantee of a resolution
Allows privacy	No expert third party opinion

Source: What Are The Four Types Of Alternative Dispute Resolution, (2021), <https://brittontime.com> › what

### 1.7.2. Mediation

Mediation, commonly also referred to as facilitation, leaves control of the outcome to the parties. An impartial mediator helps the parties try to reach a mutually acceptable resolution to the dispute. The parties control the substance of the discussions and any agreement reached. A typical session starts with each party telling their story. The mediator listens and helps them identify the issues in the dispute, offering options for resolution and assisting them in crafting a

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settlement. Mediation can take many forms, depending on the needs of the parties, such as:<sup>54</sup>

- Face to face – parties directly communicate during the process,
- Shuttle – the mediator separates the parties and shuttles between each one with proposals for settlement,
- Facilitative – the mediator helps the parties directly communicate with each other, or
- Evaluative – the mediator makes an assessment of the merit of the parties' claims during separate meetings and may propose terms of settlement.

Mediation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences.<sup>55</sup>

Mediation leaves the decision power totally and strictly with the parties. The mediator does not decide what is "fair" or "right," does not assess blame nor render an opinion on the merits or chances of success if the case were litigated. Rather, the mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while moderating and guiding the process to avoid confrontation and ill will.

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<sup>54</sup> Law, M., (2020), Types of ADR - Alternative Dispute Resolution | Miller Law Firm <https://millerlawpc.com> › Legal Topics, p. 2

<sup>55</sup> Mediation Defined: What is Mediation? - JAMS, (2022), <https://www.jamsadr.com> › m., p. 1

At the outset of a mediation process, the mediator may well seek agreement from the parties to forbear from litigation during the mediation process and to hold everything that is said in the various sessions confidential and not deemed an admission or used against any party in any other proceeding if mediation fails.

Mediation generally begins with a joint session to set an agenda, define the issues and ascertain the position and/or concerns of the parties. This allows the parties to attack the resolution process either on an issue-by-issue or group-by-group basis. The joint session is then followed by a separate caucus between the mediator and each individual party or their counsel. This allows each side to explain and enlarge upon their position and mediation goals in confidence. It also gives the mediator an opportunity to ask questions which may well serve to create doubt in an advocate's mind over the validity of a particular position.

- Mediation involves an independent trained mediator who facilitates communication between the two parties to the dispute in order to reach a solution or a solution. The mediator will discuss the issues and try to help the parties reach an agreement, but will generally not offer their own opinions or assessments.
- The mediator is a neutral party with common instructions. Their role is to help communicate between the two parties to

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the dispute to reach a solution or resolution. The mediator openly discusses the issues and tries to help the parties reach an agreement, but will generally not offer their own opinions or assessments.

- In some cases, courts insist that the parties should investigate the mediation path before bringing the case before a judge. Further, suppose one party refuses to seek mediation. In that case, the courts have a lower view of that party and may punish her with a costs order. A cost order is an instruction given by a court or tribunal regarding the payment of costs. With a costs order, the court may issue that one party will pay part or all of the claim to the other party.

What are the benefits of mediation:<sup>56</sup>

- Mediation is a private and unbiased process, which means that the parties are free to have wide-ranging and "nipples and all" discussions that will never be shared with the court or tribunal if a lawsuit arises later. Because it is private and less confrontational than litigation, it tends to "lower the temperature" and create a more conducive atmosphere for constructive settlement discussions. It is also more likely to preserve business relationships. Additionally, there is more flexibility for parties to be creative about the outcome of the

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<sup>56</sup> Types of alternative dispute resolution (ADR) methods for yourbusiness, (2021), <https://hjsolicitors.co.uk> > cho.

settlement - for example, the beneficial consequences may include current or future trade arrangements.

- Mediation costs are part of the litigation costs and are generally shared 50:50 by the parties, although it is open for you and your opponent to agree that if mediation fails and the dispute goes to court, the mediation costs are paid by the party. which loses.
- There are very few drawbacks to agreeing to mediate. However, it is worth watching every attempt by your opponent to use the process cynically to gain knowledge or information that can subsequently be used to improve their negotiating position (in the event that no mediation agreement is reached).
- Mediation is a confidential process. It offers many benefits, including the following:
  - ✓ The dispute is resolved by the parties instead of the decision ordered by a third party.
  - ✓ It is often faster and more flexible than other resolution methods.
  - ✓ The mediator can help the parties come up with creative and custom solutions.

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- ✓ It helps maintain business relationships and reduce business disruptions.
  - ✓ The parties reserve the right to proceed with litigation or arbitration unless an agreement is reached.

Figure 5

***Positive and negative sides of mediation***

Positives	Negatives
Parties can jointly choose a mediator	Not legally binding
Less expensive and faster than litigation	An incompetent mediator can hinder a resolution.
A neutral third party can help parties reach a fair agreement.	More expensive than negotiation
Allows privacy	To be legally binding, court enforcement is required.
Demonstrates a willingness to negotiate	Can become expensive

Source: What Are The Four Types Of Alternative Dispute Resolution, (2021), <https://brittontime.com › what>

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### 1.7.3. Conciliation

Conciliation is an alternative out-of-court dispute resolution instrument:<sup>57</sup>

Like mediation, conciliation is a voluntary, flexible, confidential, and interest based process. The parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party.

- The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal. A mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.
  
- Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal

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<sup>57</sup> What is conciliation? - Dispute Resolution Hamburg, (2022), <https://www.dispute-resolution-hamburg.com › information, p. 1>

positions, but also their; commercial, financial and / or personal interests.

Conciliation is generally used for work situations instead of commercial disputes. Reconciliation is a mandatory process before an individual wants to apply to the Employment Tribunal. The conciliator discusses the issues and tries to help the parties reach an agreement, often giving his opinion after assessing the situation and the various arguments.<sup>58</sup>

Conciliation is a common form of alternative dispute resolution used for employment disputes. Furthermore, conciliation is a mandatory process before the employee wants to file a lawsuit with the Employment Tribunal. The conciliator discusses the issues and will try to help the parties reach an agreement, often giving his opinion after assessing the situation and the various arguments.

The conciliator's opinion is used to help the parties recognize their positions in the dispute and reach an agreement.

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<sup>58</sup> What Are The Four Types Of Alternative Dispute Resolution, (2021), <https://brittontime.com> › what, p. 3

Figure 6

**Pros and cons of conciliation**

Positives	Negatives
The conciliator is usually an expert in their disputed field.	Not legally binding
More cost-effective than taking a dispute to court	No resolution guaranteed
Maintains privacy	Parties may not take the process seriously

Source: What Are The Four Types Of Alternative Dispute Resolution, (2021), <https://brittontime.com> › what

Conciliation means ‘bringing of opposing parties or individuals into harmony to settle the dispute. Apart from commercial transactions, the mechanism of conciliation is also adopted for settling various types of disputes such as labor disputes, service matters, antitrust matters, consumer protection, taxation, excise, etc.:<sup>59</sup>

- It is a confidential, voluntary and private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. This method provides the parties with an opportunity to negotiate, converse and explore options aided by

<sup>59</sup> Conciliation As A Process To Resolve Business Disputes, (2016), <https://blog.iplayers.in> › con. p. 1

a neutral third party, the conciliator, to exhaustively determine if a settlement is possible.

- Conciliator, also called conciliating officer tries to resolve the dispute between parties by lowering down the tensions between them or say, in a way, calms both the parties by talking to them separately. They try to improve communications between both by interpreting the key issues that caused the conflict and encourage them to explore the solutions which are beneficial to all the parties involved, that is, he tries to create a win-win situation and arrive at a mutually acceptable outcome.
- However, the conciliator does not have any power to impose the settlement arrived at. All he does is to try to break the deadlock and encourage the parties to reach an amicable settlement by acting as a conduit for communication, filtering out the disturbing elements and allowing the parties to focus on the underlying core objectives .In all, conciliator doesn't decide; he just helps the parties to arrive at a decision.
- However, it is not necessary to have a prior conciliation clause in the agreement to refer the dispute to resolution. Cases may be referred for conciliation with the consent of both the parties. The process is risk-free, and parties are not bound by it till they arrive at and sign the agreement. Once a solution is reached between the disputing parties before a conciliator and signed by

them, the agreement has an effect of the arbitration award and is legally enforceable in any court in the country.

## **PART TWO: ARBITRATION AGREEMENT**

### **2.1. DEFINITION OF THE ARBITRATION AGREEMENT**

An arbitration agreement is an agreement of the parties to submit to arbitration all or certain disputes that have arisen or which may arise between them in relation to a defined legal relationship, whether it is agreed or not. The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The arbitration agreement is in writing. The contract is in writing if it is contained in a document signed by the parties or in the exchange of letters, telex, telegrams or other telecommunications means providing a record of the contract, or in the exchange of statements of claim and defense in which the existence of a contract is claimed by one party, and another does not deny it. The reference in the contract to a document containing an arbitration clause is an arbitration agreement provided that the contract is in writing and the reference makes that clause part of the contract.<sup>60</sup>

Arbitration agreements are usually signed at the beginning of a business relationship – long before there's a disagreement. They are

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<sup>60</sup> Article 7 - Definition and form of arbitration agreement - UiO, (2021), <https://www.jus.uio.no> > html

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often just a few sentences long, and are commonly found near the end of a larger contract under a heading such as “Arbitration” or “Dispute Resolution.” An arbitration clause typically say that all disputes arising under the larger contract will be submitted to binding arbitration. Sometimes a contract say that only certain disputes will be arbitrated. The agreement may also say how the arbitration will be conducted. It may specify certain arbitration rules. The agreement may also specify how the arbitrator will be chosen. The parties to a dispute may also agree to arbitration after a conflict has arisen, or even after a lawsuit has been filed.<sup>61</sup>

An arbitration agreement is a legally binding agreement that offers an alternative settlement of disputes between two or more parties. Arbitration agreements provide an alternative to civil litigation. The parties sign an arbitration agreement and enter into a process known as arbitration if a dispute arises:<sup>62</sup>

- Arbitration is a form of alternative dispute resolution that is usually more cost-effective than going through the court system. It strengthens an agreement between two parties to a dispute using an arbitration agreement and usually limits the disclosure that can create huge litigation accounts in the

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<sup>61</sup> Haskins, J., (2022), What Is an Arbitration Agreement? What Is an Arbitration Agreement? | legalzoom.com. <https://www.legalzoom.com> ›, p. 1

<sup>62</sup> Arbitration Agreements: 7 Pros And Cons Of Signing One, (2021), <https://www.contractsounsel.com> › arbitration-agreement

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courts. Normally, the two parties agree to use arbitration to resolve disputes before establishing a formal relationship.

- Instead of using a trial judge, arbitration uses a neutral third party to analyze the facts and circumstances of the case. This neutral third party is called an arbitrator and follows a specific code of ethics.

The arbitration agreement is often referred to as the ‘foundation stone’ of arbitration as it is, generally speaking, a method of dispute resolution based on mutual party consent to arbitrate future or current disputes. An arbitration agreement encompasses an agreement by two or more parties to submit to arbitration either:<sup>63</sup>

- 'future' disputes that may arise where the agreement is set out in the substantive agreement between the parties, ie in an arbitration clause, or
- 'current' disputes where the agreement to arbitrate is set out in a stand-alone agreement entered into between the parties after the dispute.

Definition and form of arbitration agreement:<sup>64</sup>

- An arbitration agreement is an agreement of the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in relation to a defined legal

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<sup>63</sup> Arbitration agreements - definition, purpose and interpretation, (2022), <https://www.lexisnexis.co.uk> > p..1

<sup>64</sup> Article 10 - Definition and form of Arbitration Agreement - QFC, (2021), <http://qfcra-en.thomsonreuters.com> >, p. 1 - 2

relationship, whether agreed or not. The arbitration agreement must be in writing and may be in the form of an arbitration clause in the agreement or in the form of a separate agreement.

- Any standard term or condition of membership or license or other connection which requires the parties to arbitrate disputes shall be deemed to be a binding arbitration agreement under these Regulations.
- The arbitration agreement shall be deemed to be in writing if the arbitration clause or the terms of the arbitration or any arbitration rules set forth in the Arbitration Agreement are in writing, even if the arbitration agreement or special arbitration agreement is concluded orally, by conduct or other means not in writing. form.
- Furthermore, an arbitration agreement is in writing if it is contained in an exchange of documents in, or in preparation for, a court or arbitration proceeding in which the existence of an agreement is asserted by one party and not denied by the other.
- The reference in the contract to a text containing an arbitration clause constitutes a conditional arbitration agreement:
  - ✓ reference to make that clause part of the contract and

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- ✓ the text actually existed when the contract containing a reference to it was entered.
  - The written terms and conditions of arbitration, together with any written terms which they include by reference or contain those terms and conditions, or which those terms and conditions include by reference, constitute the arbitration agreement.
  - For the purposes of this article:
    - ✓ "Writing" includes any form that provides a tangible record of the contract or is otherwise available as a data message so that it can be used for subsequent reference; and
    - ✓ "Data message" means information generated, sent, received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.

What is an arbitration agreement:<sup>65</sup>

- An arbitration agreement is a legal agreement that stipulates that any disputes that may arise through business transactions will be resolved out of court. Basically, both

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<sup>65</sup> Arbitration Agreement Form | Create a Free Free Arbitration Agreement, Templates, (2020), <https://legaltemplates.net> › form, p. 1 - 5

parties agree to drop the lawsuit in case there is a business dispute.

- It should be noted that a business contract clause may be included. The clause may be just a few lines, but will state that both parties agree to resolve out-of-court disputes.
- There are advantages and disadvantages to signing an Arbitration Agreement, so it is important that all parties understand what they agree to with these documents. These agreements are usually concluded before the part of the transaction in order to map the solution if there is a dispute. They can also be drafted once a business relationship has been established, often because the clause was originally rejected.
- Arbitration agreements are used in transactions between business entities, business entities and consumers, and employers and their employees. Some specific examples include:
  - ✓ Employment contract between a freelance writer and a marketing company
  - ✓ Agreement for adding a new partner for LLC (LLC operating agreement)
  - ✓ A construction company and a real estate company agree on a joint venture for a new residential building.

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- Arbitration agreements can cover a wide range of issues that may arise during a business transaction. They will often state that any issue covered by the original contract is subject to arbitration rather than litigation. In some cases, they may be written to cover only specific questions. Here are some issues that will be resolved by a well-drafted agreement:
    - ✓ Кој е опсегот на можниот спор? Тој ќе прецизира какви видови несогласувања ќе се решаваат во арбитражата. Честопати тие се напишани нашироко за да ги покријат непредвидливите настани. Но, треба да се формулира доволно конкретно за да биде применливо.
    - ✓ Where does the arbitration take place? The seat of arbitration is the right location. For those working remotely, nationally or internationally, it is especially used in conjunction with important to specify location.
    - ✓ What are the rules for arbitration? The arbitration agreement specifies whether the process is conducted by a recognized arbitration association or in accordance with the rules applicable to the guidelines of that institution. It can also be implemented through agreed rules. It should also be noted in which state or states the laws will apply -

arbitration can take place in one location while following the laws of another.

- ✓ How many arbitrators are listed? The arbitration agreement shows the number of arbitrators who will oversee the process.
- ✓ How are arbitrators selected? The agreement may specify how the arbitrator is selected and specify the specific criteria that the arbitrator must meet. It can also represent the contribution of each party in the process of selecting an arbitrator. If one arbitrator is used, all parties must agree on an arbitrator. If the parties can not agree, they are selected according to the rules of the arbitration association.
- ✓ Are the details of the procedure confidential? With a lawsuit, confidentiality is not possible because everything becomes part of the public court record, including testimony. In arbitration, there is no public record that makes it inherently trustworthy. In sensitive cases, it may be desirable to include confidentiality specifications to ensure that information is not disseminated by either party.
- Is the arbitration agreement suitable for the parties to the dispute?

- A business may decide to use an arbitration agreement for a number of reasons. For businesses that sell services or products to the public, it can protect them from frivolous litigation and simplify the process if there is a dispute. For business partnerships and employees, this agreement streamlines the process of dealing with breaches of contract or other business disputes.
- These are just some of the goal setting shareware that you can use:
  - ✓ Class lawsuit protection: If a company sells something of minimal value, the client is less likely to sue because it is cost-effective. Classes can be sued for these small amounts when many customers are notified that they are eligible for damages.
  - ✓ Waivers the right to a jury trial: A jury trial can be extremely damaging to the company as individuals may have their own biases against corporations and individual clients or employees. This agreement may provide that all disagreements must be settled by a judge or arbitrator, who tends to offer a fairer, impartial position.
  - ✓ Reimbursement of attorney's fees: They may state that, provided you win the case, the losing party must pay the other party's legal fees. This may also require restitution

in court, but litigation tends to drag on and cost much more. In any case, this clause tends to deter people from making unnecessary requests.

- ✓ Faster procedure with less bureaucracy: This process is much more unrelated than a lawsuit. It takes less time and will often be easier to prepare and finalize. This option saves time and money.
  - ✓ Wrongful termination and discrimination lawsuits: If an employee signs this contract, he or she can not file a lawsuit for wrongful termination or discrimination. Benefit in this situation - if the arbitrator finds out about the past employee, the process will not be in the public court records and the company could add clauses to enforce confidentiality to protect the company's reputation. However, while the employee could not file a formal lawsuit against the company, they could seek help from a government agency to file a lawsuit on their behalf.
- What does this agreement mean for the signatories?
- ✓ Arbitration is the most common form of dispute resolution in employment contracts. This can be a separate contract or clause in the employment contract. Sometimes this contract is simply included in the

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employee handbook or other employment materials that the employee signs before beginning his or her term in the company. Today, these clauses are fairly standard in most employee contracts. Although it is important for employees to understand which rights they are giving up. On the surface, this seems to favor the company. But there are benefits to the employee as well.

- ✓ Arbitration agreements are commonly used for employees, they are also used in other types of business transactions. Some standard uses for these contracts include contracts in healthcare, construction, commerce, e-commerce, finance, and insurance.

### **2.1.1. Purpose of arbitration agreements**

The purpose of the arbitration agreement is to make the litigation process faster and more accessible than litigation. Cases are less formally represented than legal proceedings. However, there are pros and cons to signing an arbitration agreement that you should be aware of. Arbitration agreement includes in particular:<sup>66</sup>

- the ability of an individual to enter into a legally binding agreement to arbitrate;
- the arbitrability of the subject matter;

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<sup>66</sup> II. The Arbitration Agreement - Konrad Partners, (2022), <https://www.konrad-partners.com> > p. 1

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- the fulfilment of certain form requirements; and
  - the requirement to identify the parties, the dispute and the legal relationship that are subject to arbitration.

The purpose of an arbitration agreement is setting specific terms and requirements for arbitration, including how the arbitrator will be found, what rules of arbitration will apply, the number of arbitrators, and the place arbitration shall occur. The purpose of an arbitration agreement is to limit litigation costs and keep disputes confidential.<sup>67</sup>

With an arbitration agreement, both parties are agree to arbitrate any dispute in the future, or a current dispute, with purpose do not going to court.<sup>68</sup>

- Typically, arbitration agreements are signed at the beginning of a business relationship before there is any disagreement. There is the hope that this will never need to be used, but in case there is some kind of disagreement this will be the way to determine how it will be resolved.
- There is also an option for parties to agree to arbitration once there is a conflict, and even after a lawsuit has been filed, if they wish to do so. This can only happen if both parties agree to this option at the time of the dispute, and there is no guarantee of that happening.

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<sup>67</sup> What is an Arbitration Agreement? (2022), <https://www.iowafirm.com> > p. 1

<sup>68</sup> Dispute Resolution: The Benefits Of An Arbitration Agreement, (2022), <https://www.legalnature.com> >, p. 3

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- An arbitration agreement can be between two businesses, a business and an employee, a home owner and a builder of a home, a business and an individual, a business and a labor union, and much more. If two parties are doing business together, then it is recommended that they both sign an arbitration agreement for their work together.

### 2.1.2. Pros of signing an arbitration agreement

Arbitration agreements have several distinct advantages. Regardless of the business in which you practice, you can take advantage of the inclusion of an arbitration clause in the contract. These are the pros of signing an arbitration agreement:<sup>69</sup>

- ✓ Avoids hostility to the civil court,
  - ✓ Cheaper than civil litigation,
  - ✓ Resolutions are generally faster,
  - ✓ The process is more flexible than litigation,
  - ✓ The procedures are not in the public records,
  - ✓ Evidence rules do not apply,
  - ✓ The parties may mutually agree with an arbitrator.
- As can be seen, arbitration agreements can be useful in maintaining low costs and more flexible litigation

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<sup>69</sup> Arbitration Agreement Form | Create a Free Free Arbitration Agreement, Templates, (2020), <https://legaltemplates.net › form>, p. 6 - 7

processes. They are a popular method of alternative dispute resolution for companies based solely on these reasons.

➤ Why use an arbitration agreement? Pros versus cons:

✓ Pros of signing arbitration agreements:

- Getting employment. While this is of little use, many employers will not hire a potential employee who will not sign an arbitration agreement.
- Arbitration is faster than a legal case. In the event of a dispute, the resolution takes less time than the court proceedings.
- Arbitration is a fair process. Of course, a contract is designed to protect the company or organization from litigation, but it is also fair. The arbitrator will be skilled and should be impartial - staff and clients can request disclosure agreements for certain arbitrators to have no part in the proceedings. You also have a word about who will be the arbiter.
- There is no public court record. For obvious reasons, employees filing a lawsuit against a previous employer may have a harder time finding future employment. Without litigation, there is no public record of litigation and no reason to disclose information to prospective employers.

Advantages of arbitration agreements in commercial transactions generally are:<sup>70</sup>

1. The arbitrators are usually selected from a finite list of individuals, usually for their special expertise in a particular area.

2. Relaxed rules of pleading, discovery, and evidence generally make it easier, less time-consuming, and thus less expensive to present case.

3. An arbitration can be scheduled, conducted, and concluded more quickly and conveniently than in court.

4. An arbitration can be privately held, without public scrutiny, and transcripts of sworn testimony or other proceedings are not made public except by agreement.

5. For defendants, there is usually less chance of a “runaway verdict” because a jury does not decide the case.

6. The arbitrator generally is focused on the merits of the case and make a decision based upon a fair view of the totality of the evidence submitted, which means there is less chance of a harsh result based on a technicality or procedural fluke.

When determining whether arbitration should be utilized, it is important to review the pros and cons of arbitrating business-to-business disputes. The best decision about how to resolve a dispute depends on the specific facts and circumstances, and businesses should

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<sup>70</sup> Advantages of Arbitration Agreements in Commercial Transactions, (2021), <https://lgattorneys.com> › adva. p. 3

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always consult a lawyer to understand their legal rights and obligations. With those basic concepts in mind, the potential advantages to arbitrating instead of litigating include speed and flexibility, finality, and confidentiality. When the dispute is international in scope, arbitration has the added benefits of enforceability and neutrality:<sup>71</sup>

- *Speed and Flexibility* - Parties to an arbitration can—and should—participate in designing the process. In court, the parties are required to follow procedural rules that apply to every case. Those rules might not be right for all types of disputes and can create the potential for inefficiencies like unnecessary delay. Although most arbitration clauses incorporate a set of rules, those rules are guidelines that can be varied by the parties and thus are flexible. Parties should keep in mind that a case requiring complex procedures like extensive factual discovery might not be right for arbitration.
- *Finality* - Arbitration awards are final in that they are legally binding and are not subject to appeal. The winning party does not need to await appeals before the case is truly over. Although the lack of appeals is a benefit in that it speeds up the process, it also means that there is no higher court to correct arbitrators' errors of factfinding or law. A case that involves difficult legal issues, which might benefit from appellate review, might not be right for arbitration.

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<sup>71</sup> The Benefits of Arbitration for Business-to-Business Disputes, (2018), <https://www.pashmanstein.com>. p 1 -2

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- *Confidentiality* - Parties to an arbitration can agree that the process and results are confidential. The dispute and the arbitration award, however, will often become public if one side goes to court to enforce or challenge the award.
  - *Enforceability & Neutrality (for International Disputes)* - Arbitration has additional benefits when the dispute is international in scope. It is often easier to enforce an arbitral award against a foreign party than a court judgment. Arbitration also affords parties from different countries a “neutral” forum to resolve disputes.

### 2.1.3. Disadvantages of signing an arbitration agreement

However, there are drawbacks to arbitration agreements. It is best to discuss them and how they affect you with an arbitration lawyer:<sup>72</sup>

- These are the disadvantages of signing an arbitration agreement:
  - ✓ Limited form of legal compensation,
  - ✓ Not always a level playing field,
  - ✓ Objectivity is questionable,
  - ✓ The process is not always transparent,
  - ✓ Arbitration costs are rising,

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<sup>72</sup> Arbitration Agreement Form | Create a Free Free Arbitration Agreement, Templates, (2020), <https://legaltemplates.net › form, p. 8>

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- ✓ Decisions can be made on speculation,
  - ✓ Fewer opportunities to appeal the decision.
  - These shortcomings can significantly affect the outcome of the case, and even how the bag chooses to move forward in the future. The contract should be carefully considered when the company enters into contracts or when asked to sign one.

An arbitration agreement is a written agreement between the parties to a dispute to appoint a specific arbitrator to settle their disputes arising out of a particular business relationship. She calls for mandatory arbitration before an arbitrator. An arbitration agreement is usually legally binding. Companies often require employees to sign an arbitration agreement that prevents the employee from suing the company in court. Arbitrage contracts are unsafe for employees because they often require the employee to pay thousands of dollars to file a claim with an arbitration association where he / she could pay several hundred dollars, or at some Cons and Employee Cons:<sup>73</sup>

- The arbitration agreement will not allow a personal termination agreement to be sought in person. If the employer is considered to have done something unethical or illegal, the employee may not want to waive this right.

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<sup>73</sup> Arbitration Agreement Law and Legal Definition | USLegal, Inc., (2021), <https://definitions.uslegal.com> ›

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- Waivers the right to a jury trial. In the event of a dispute, juries are traditionally more to the benefit of the employee or consumer than to large corporations or organizations.
  - Disclosure may be less inclusive. With mediation, records may not be as accessible as they would be in a formal court case where documents can be requested or invoked. This can make it harder for you to prove your case.
  - An arbitration agreement may be specifically tailored to the business or transaction to protect the company from litigation. Other options include adding clauses to the initial agreement. It is important to use the right language so that the scope of the arbitration is not so wide as to become unenforceable.

## **2.2. TYPES OF ARBITRATION AGREEMENTS**

There are three types of arbitration agreements:<sup>74</sup>

- Arbitration clause,
- Filing / Arbitration Agreements,
- Arbitration agreement incorporated by reference.

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<sup>74</sup> 3 Types of Arbitration in UAE | Arbitration Agreements & Clauses, (2013), <https://www.tamimi.com> › kn. p. 1

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### 2.2.1. Arbitration clause

An arbitration clause is a clause in a contract that requires the parties to resolve their disputes through an arbitration process. Although such a clause may or may not specify that arbitration occur within a specific jurisdiction, it always binds the parties to a type of resolution outside the courts, and is therefore considered a kind of forum selection clause.<sup>75</sup>

❖ Many commercial contracts now have an arbitration clause built into them. The clause regulates the manner of resolving all possible future disputes. Usually these are standard clauses provided by the institution that the parties have agreed to use to administer the future dispute. Such clauses should contain, as a minimum, details of:

- ✓ the arbitration rules that will govern the proceedings and the institution, if any, that should administer the process;
- ✓ the seat or legal place of arbitration, the number of arbitrators and the language of the arbitration.

❖ A clause missing in one of these aspects may be non-functional or allow the other party to delay the proceedings until the ambiguity has been resolved. For example, if the clause does not state the number of arbitrators and no agreement has been reached on such a matter, this will have to be determined by the institution conducting the

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<sup>75</sup> 3 Types of Arbitration in UAE | Arbitration Agreements & Clauses, (2013), <https://www.tamimi.com> › kn. p. 1

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arbitration) or, if the parties have not agreed on an institution, the courts of the seat.

The arbitration clause generally requires that a party seeking to resolve a dispute first try to resolve it through arbitration:<sup>76</sup>

❖ An arbitration clause is a contract provision which states when arbitration is necessary for dispute resolution.

- It is a section of a contract that addresses the parties' rights and options in the event of a legal dispute over the contract. In most arbitration clauses, the parties agree not to sue each other. Instead, they will resolve their disputes through the arbitration process to avoid litigation.
- An arbitration clause can be either binding or nonbinding. A binding arbitration clause means that the arbitrator's decision on a specific dispute will be final. The courts will enforce that decision, and neither party can appeal or fail to act according to the decision.
- On the other hand, a non-binding arbitration clause allows the disputing parties to be free to reject the arbitrator's decision. They may then take the dispute to court in order to make a final determination. In general, parties use binding arbitration clauses due to the fact that they are more decisive and require less time.

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<sup>76</sup> What Is an Arbitration Clause? | LegalMatch, (2021), <https://www.legalmatch.com> ›, p. 1 - 2

❖ Generally speaking, contract arbitration clauses contain language similar to: “The parties to this contract hereby agree to resolve legal disputes through arbitration methods rather than civil lawsuits”. An arbitration clause may be tailored exactly to the disputing parties needs. Arbitration clauses should be as specific as possible. As a baseline, they should contain information such as:

- Information regarding which parties are affected by the clause;
- When the clause will go into effect, and when it will terminate, if ever;
- Whether the clause can be modified in the future; and
- The consequences of violating the clause.

❖ The most common way in which an arbitration clause is violated is if one of the parties seeks to file a lawsuit, disregarding the fact that they agreed to settle disputes through arbitration. By signing a contract which contains an arbitration clause, the parties forfeit their right to file a lawsuit with an arbitration clause. Doing so would constitute a violation.

❖ In response to any papers that are served against them, the non violating party may be able to present the arbitration clause to the judge. If the arbitration clause is found to be valid, the judge may order the parties to pursue arbitration according to the instructions contained in the clause. In many cases, the parties agree that their contract rights

and benefits will be terminated should they violate the arbitration clause by attempting to sue the other party.

❖ There are some notable advantages and disadvantages to including an arbitration clause in a contract:

- Arbitrations are generally faster and more efficient than going to court in order to resolve the dispute. This is because the process avoids courtroom procedures and is less technically involved. Additionally, arbitrations can be very flexible. What this means is that the parties can set up their own times in which to settle the dispute, rather than having the court give them specific dates to attend.
- The disputing parties may also choose their own arbitrator. Doing so can help ensure that the arbitrator has more technical knowledge of the specific issue that they are disputing over. This would be in opposition to having a judge provide a ruling when they have no experience in either area.
- The biggest disadvantage of arbitration is that once a ruling or determination has been made, the decision becomes final and binding. Unlike the court ruling, arbitration decisions cannot be appealed. The only way in which an arbitration decision can be appealed or set aside is if a party proves that the arbitrator was biased or unfair when making their decision. As a result, the arbitrator violated some type of public policy.

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- In addition, arbitration proceedings do not have an automatic discovery process in which the disputing parties are required to exchange information. Parties must agree to include a discovery requirement in their arbitration clause.

An arbitration clause forms the basis of the consent between parties that certain disputes are to be determined by arbitration.<sup>77</sup>

❖ Consent to arbitration by parties may be given in three ways.

- The first is via direct agreement between the parties.
- The second is via the legislation of a host State.
- The third is through a treaty between the host State and the State of other party.

❖ Whichever way the consent is given, it is important that the consent is clearly expressed and binding upon the parties in order for it to be valid. An arbitration clause, regardless of the instrument in which it exists, usually contain the following:

1. An explicit referral of disputes to arbitration;
2. The governing law of the arbitration agreement;
3. The seat of arbitration;
4. The rules governing the arbitration;
5. The number of arbitrators and their method of selection;

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<sup>77</sup> Wood, M., Willcocks, A., (2022), Arbitration Clause - Jus Mundi, <https://jusmundi.com/wiki/p.1>

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6. Arbitrator appointment); and

7. If applicable, institution govern proceedings or confirmation of Ad hoc arbitration.

❖ Clauses's might, provide that only certain disputes are referred to arbitration and other particular disputes might be referred to State courts or other forms of dispute resolution such as expert determination.

### **2.2.2. Submission Agreements / Arbitration Deeds**

A submission agreement provides for the referral of disputes for resolution by arbitration. A submission agreement maybe used in circumstances where the parties have not previously included a dispute resolution clause in their contract and/or it may be used to supersede and replace prior dispute resolution agreements. There may be circumstances where parties to a proceeding currently before a court find it appropriate to refer a matter out to arbitration. These sample agreements may be used to refer a current court proceeding to arbitration.<sup>78</sup>

Filing agreements, however, are arbitration agreements made after a dispute has arisen. Filing agreements are also known as "arbitration acts" and sometimes as "Terms of Service" (although as explained below, the arbitration act or terms of service are usually prepared whether the contract is by way of a submission agreement or arbitration clause:<sup>79</sup>

- ✓ The filing agreement is an order of magnitude of the arbitration clause. As they prepare after a dispute arises, they tend to be much longer than an arbitration clause. The submission agreement contains details of the

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<sup>78</sup> ACICA Sample Submission Agreements - Australian Centre for International Commercial Arbitration, (2021), <https://acica.org.au/acica-sample-submission-agreements>, p. 1

<sup>79</sup> 3 Types of Arbitration in UAE | Arbitration Agreements & Clauses, (2013), <https://www.tamimi.com>, p. 3

dispute and issues between the parties and will state that it has been referred to arbitration.

- ✓ It then contains the same essential details as the arbitration clause, such as the legal seat and the number of arbitrators. The submission agreement which does not clearly state the details of the dispute referred to arbitration may later be declared null and void, together with any decision taken in accordance with it.
- ✓ Filing agreements can be concluded during the litigation to remove the dispute from the jurisdiction of the court, if the Basic Court has not yet rendered its judgment and the award phase is still ongoing.
- ✓ It can be assumed that having an arbitration clause means that there is no need for a submission agreement. The purpose of the award agreement is to define and specify the scope of the arbitration to enable the court - later - to ensure that the arbitral award is within the limits set by the parties. It can be argued that the arbitration clause meets this purpose because it limits any arbitration to issues arising out of or in connection with the contract, although the boundaries are broad.
- ✓ The subject matter of the dispute must be defined in an arbitration clause or during the examination of the claim, and the arbitral award may be set aside for lack of an "arbitration document".
- ✓ It is always advisable, although there may be an arbitration clause, to sign a filing agreement (commonly known in this context as an "arbitration deed" or "working conditions") in any arbitration proceedings whether or not there is arbitration. clause in the disputed agreement or not.

Submission agreements, also known as ‘arbitration deeds’, are agreements made after the disputes have arisen. They are less common than the arbitration clause. They also tend to be much longer than the arbitration clause. They contain details of the

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dispute and the issues between the parties, and clearly record that this matter is being referred to arbitration. Submission agreements can be made while the matter is in litigation as long as the court has not issued its judgement yet. It is entered into while pleadings are still taking place. The purpose of arbitration deed is to specify the scope of arbitration so that later on the Court can determine whether the arbitration award was within the scope of the agreement.<sup>80</sup>

### 2.2.3. Arbitration agreement incorporated by reference

The question about whether or not an arbitration clause incorporated “by reference” must be regarded as valid and binding between the parties has been, and still is, central to an animated debate in most European jurisdictions. Traditionally, a distinction has been drawn by jurisprudence between two categories of arbitration agreements incorporated by reference, in respect of which a different approach has been taken by courts, and namely:<sup>81</sup>

1) the main contract makes express reference to an arbitration clause contained in a separate contractual document (so called “*relatio perfecta*”); or

2) the main contract makes general reference to the separate document as a whole, with no specific mention of the arbitration clause contained therein (so called “*relatio imperfecta*”).

The disputed agreement may not include an arbitration clause. However, if the contract explicitly and explicitly refers to another document containing an arbitration clause, the arbitration clause shall be deemed to have been incorporated into the main contract by reference, provided that the reference is clearly written (as under the heading “Settlement of disputes and governing law”). If the reference is vague or subject to conflicting interpretation, national courts may retain jurisdiction:

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<sup>80</sup> Arbitration clause, reference, deeds and submissions, (2022), <https://lawbriefcase.com › arbitration-agreement-and-deed>, p. 1

<sup>81</sup> Villani, A., (2015), Arbitration Clauses Incorporated by Reference: An Overview of the Pragmatic Approach Developed by European Courts, <http://arbitrationblog.kluwerarbitration.com ›>, p. 1

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- ✓ It is common to find this type of arbitration agreement in construction contracts, where the contract may refer to standard terms contained in a standard arbitration agreement.
  - ✓ It is sufficient to refer to an arbitration agreement, so that in case of a dispute between the client and the contractor, it is resolved through the general working conditions. This means that the parties have agreed to arbitrate all disputes arising from the obligations set out in the said agreement without the need to refer to the details of such a situation, where reference to it is sufficient.

In many jurisdictions arbitration clauses can be incorporated by reference. For example, although the main commercial terms be set out in one agreement, certain standard terms be incorporated by reference to a second document, and these standard terms may include an arbitral agreement:<sup>82</sup>

- Arbitration is viewed as a special form of dispute resolution which requires parties to clearly evidence that they both consent to the process in writing. This is because by agreeing to arbitration parties are waiving their right to refer the dispute to court.
- Incorporating an arbitration clause by reference to the terms of another document is problematic because it give rise to the possibility that party sign the main document without being fully aware of the arbitration clause that exists in the standard terms being incorporated by reference.

Arbitration has firmly established itself as an alternative means of resolving commercial disputes, for a variety of reasons including cost, speed, confidentiality and flexibility, depending on the circumstances. Whether or not the parties will be bound by an arbitration clause contained in that separate (secondary) document, will depend on

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<sup>82</sup> Mahdy, El M., (2014), When can an Arbitration Clause be Incorporated by Reference, <https://www.tamimi.com> › wh, p. 1

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whether the clause has been effectively incorporated into the parties' (primary) contract:<sup>83</sup>

- In a single-contract case, the arbitration clause is contained in a document – such as a standard form or previous contract – and that document is incorporated by reference, as a whole, into the parties' primary contract. In order to effectively incorporate the clause, there is no need to refer to it expressly – reference to the document in which it is contained will be enough.
- A more restrictive approach applies in a two-contract case, where the arbitration provision in question is contained in a contract to which only one, or neither, of the parties are party. Clear words will be required for effective incorporation, so that express reference in the primary contract to the clause itself will generally be necessary. The reasoning behind this is that arbitration clauses are not “germane or directly relevant to” the subject matter of the primary contract, are “ancillary provisions”, and “oust the jurisdiction of the courts”. It may not be evident that the parties intended not only to incorporate the substantive provisions of the other contract but also provisions as to the resolution of disputes between different parties, particularly if a degree of verbal manipulation is needed for the clause to work.

### **2.3. CHARACTERISTICS OF THE ARBITRATION AGREEMENT**

The formation of an arbitration agreement occurs when two parties enter into an agreement in which the agreement states that any dispute that has arisen between the parties should be resolved without going to court with the help of a neutral person, a third party, appointed by both parties, known as Arbitrator, who would act as a judge. The arbitrator so appointed should have been mentioned earlier in the contract they made. They should also indicate who should be chosen by the arbitrator, in terms of the type of dispute that the arbitrator should decide, the place where the arbitration would

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<sup>83</sup> Effective incorporation of arbitration clauses: a reminder, (2016), <https://www.walkermorris.co.uk> ›, p. 1

take place. Furthermore, they should list the other types of proceedings mentioned or to be required during the arbitration agreement:<sup>84</sup>

- The parties are usually required to sign an Arbitration Agreement. The decision made by the arbitrator on any issue is binding on both parties, as stated in the agreement. In any case, when one party decides that an agreement must be made before the agreement is concluded, it can be said that the agreement was made to avoid the troubles of the court.
- These agreements are like contingencies, which means that these agreements will enter into force or become enforceable only if a dispute arises and on the basis of the same dispute between two parties mentioned in the agreement. It also takes place or is enforceable in the light of any dispute that may arise between the parties to the agreement.

Characteristics of the arbitration agreement:<sup>85</sup>

- In addition to the legal requirements for a written agreement between the parties, existing or future disputes or issues and the intention to refer to arbitration, other attributes that are necessary to be present to consider the arbitration agreement are:
  - ✓ The arbitration agreement must provide that the decision rendered in the arbitral proceedings of the arbitral tribunal shall be binding on the parties to the agreement.
  - ✓ The jurisdiction of the arbitral tribunal to decide on the rights of the parties to the dispute must arise either from the consent of the parties or from an order of the Court or of the statute, the terms of which clearly indicate that the dispute resolution process must be arbitrary.

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<sup>84</sup> Significance of the Arbitration agreement - iPleaders, (2020), <https://blog.iplayers.in> › significance-of-the-arbitration-a.

<sup>85</sup> Arbitration agreement and its attributes. | VIA Mediation Centre, (2021), <https://viamediationcentre.org> › readnews › MzIz › Arbitr. p. 1 - 2

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- ✓ The agreement must provide that the substantive rights of the parties to the dispute will be determined by the arbitral tribunal.
  - ✓ The arbitral tribunal must determine the rights of the parties in an impartial and judicial manner, with the tribunal having an obligation of equality and justice to each party.
  - ✓ The agreement of the parties to the dispute to refer their issue to the decision of the arbitral tribunal must be enforceable by law.
  - ✓ The agreement must stipulate that the tribunal will decide on a dispute that has already been formulated at the time it is referred to the tribunal.
  - ✓ The agreement should provide that the Tribunal will receive information or evidence from both parties and hear their allegations or at least give the parties an opportunity to present them.
- It is very possible to write an arbitration agreement in a contract by correspondence with the Government. But even then such an agreement through correspondence with the Government should be concluded by a government official who is duly authorized to conclude an agreement on behalf of the Government. An agreement of any person not authorized by the government for such an issue is invalid.

A well-drafted arbitration agreement, taking into account the issues identified may serve to mitigate risks:<sup>86</sup>

❖ **Scope of the arbitration agreement** - The scope sets out the types of disputes that can be referred to arbitration. A poorly drafted scope is a common source of disputes and may deprive the tribunal of jurisdiction over all or part of the dispute. Critical aspects to consider are:

- *Language*: Common phrases such as arising “out of”, “under” or “in connection with” all have different meanings, some broader than others;

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<sup>86</sup> Top 10 tips for drafting arbitration agreements | Global law firm, (2021), <https://www.nortonrosefulbright.com>, p. 1 - 3

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- *Carve outs*: Trying to carve out certain types of disputes often results in unforeseen consequences and should be avoided wherever possible; and
  - *Parties*: The right parties need to be party to the arbitration agreement. This can be a problem where the contractual counterparty is a newly incorporated joint venture without assets or a state owned entity. The arbitration agreement should include the party against whom any award will be enforced.
  - *Seat of the arbitration* - The seat of arbitration determines the procedural law of the arbitration. Its importance cannot be overstated: amongst other things, it determines the availability of interim remedies and rights relating to the enforcement of the award. The seat of arbitration may be different to the venue of arbitration (where the arbitration will physically take place), and the governing law of the arbitration agreement.
- ❖ Most parties opt for a ‘neutral’ jurisdiction as the seat but this should not be the only consideration. Arbitral laws differ between countries and have important consequences on the efficiency of the arbitration and enforceability of an award.
- *Governing law of the arbitration agreement* - The arbitration agreement is a contract in its own right. Consequently, the law governing the arbitration agreement (which determines the validity and scope of the arbitration agreement) can differ from the governing law of the substantive contract. In international contracts, performance may be in one jurisdiction while the parties are located in others; the governing law of the contract may be that of one jurisdiction while the seat of the arbitration may be another jurisdiction still. The absence of an express governing law for the arbitration agreement can lead to lengthy disputes. Despite this, arbitration agreements often fail to specify the governing law of the arbitration agreement. We strongly recommend doing so.
  - *Choice of rules* - One of the most important decisions when drafting an arbitration agreement is whether to adopt the rules of an established arbitral
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institution, such as the ICC or LCIA, to govern the arbitration procedure. The main benefits of doing so is that the institution, in return for a fee, plays a key role in administering the dispute and their rules offer a well-established and predictable procedure.

❖ If the parties wish to refer their disputes to ad hoc (un-administered) arbitration, they should consider either setting out a bespoke process, adopting existing ad hoc procedural rules (such as the UNCITRAL rules) or incorporating the rules of an institution but making clear that those provisions in which the institution plays an administrative role and receives fees for doing so will not apply. If this is not agreed prior to entry into the transaction between the parties, such options will need to be agreed between the parties. Parties should also consider using an institution as an appointing authority.

- *Language* - The arbitration clause should identify the language of the arbitration, especially where parties are from countries with different first languages. This is an important choice as all submissions and evidence will be presented in the agreed language during the proceedings. Selecting the language that the parties most commonly use in their communications could save significant translation and interpretation costs.
- *Number and appointment of arbitrators* - As a general rule, where disputes are likely to be high value and complex, it is usually advisable to specify that the tribunal will consist of three arbitrators. Whereas if the dispute is likely to be low value and uncomplicated it may be more appropriate and cost effective to provide for a sole arbitrator. In multi-party disputes, where it is unworkable for each party to select an arbitrator, parties should agree on an appointment procedure. For example, parties can agree that appointments will be made by an appointing authority.
- *Specifying arbitrator characteristics* - Arbitration allows parties to agree upon the characteristics and experience that arbitrator.

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### 2.3.1. Fundamentals of an arbitration agreement

It is very possible to write an arbitration agreement in a contract by correspondence with the Government. But even then such an agreement through correspondence with the Government should be concluded by a government official who is duly authorized to conclude an agreement on behalf of the Government. An agreement of any person not authorized by the government for such an issue is invalid:<sup>87</sup>

- Another essential is the written agreement. The arbitration agreement must always be in writing. The arbitration agreement will be considered a written agreement when:
  - ✓ It is signed by both parties and is in the form of a document.
  - ✓ It can be an exchange of telex, letters, telegrams or any other means of communication that provides records of the exchange and the arbitration agreement.
  - ✓ There must be an exchange of statements between the parties making the statement of claim and the defense in which the existence of the arbitration agreement is agreed by one of the parties and which is not defined by the other party.
  - ✓ The third essential intention. The intention of the parties in forming the contract is extremely important and it is the basis of the contract. There was no precondition in the agreement for quoting terms such as "arbitrator" or "arbitration". Therefore, it is necessary to note that the intention of both parties plays a very important role in such an agreement. However, it must be borne in mind that even if the words are not mentioned, the intention must show that both parties have agreed to comply with the Arbitration Agreement.

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<sup>87</sup> Arbitration agreement and its attributes. | VIA Mediation Centre, (2021), <https://viamediationcentre.org> › readnews › MzIz › Arbitr. p. 3 - 4

- ✓ The fourth essential element is the signature of the parties. The signature of the parties is an essential element for constituting an arbitration agreement. The signature may be in the form of a document signed by both parties to the contract containing all the conditions, or it may also be in the form of a document signed by only one party to the contract containing the terms and conditions of acceptance by the other party to the contract. It will be enough for one party to sign the agreement and the other to accept it.
- The agreement must state that the tribunal's decision will be binding on both parties.
- That the jurisdiction of the tribunal for the rights of the parties should be decided by both parties by consensus or by order of the Court stating that the proceedings will be conducted through arbitration.
- The tribunal has the right to determine the rights of the parties by being fair and just.
- The agreement that the parties will refer to the Tribunal must be enforceable by law.
- The agreement must state that any decision taken by the tribunal on the dispute must be formulated before the time of referral.

Arbitration agreement is the cornerstone of international commercial arbitration which records the parties' consent to submit the dispute for arbitration. Such consent is the prerequisite for the smooth progress of arbitration proceeding and the recognition and enforcement of arbitral awards. The contents of an arbitration agreement can be detailed or brief. In accordance with some relatively lenient arbitration laws, the contents of an arbitration agreement may only include the intention of the parties to submit the dispute (i.e. matters for arbitration) to arbitration. However, in general, in order to make such issues as the location, institution and procedure of arbitration more

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foreseeable, the following elements are mostly covered in a common arbitration agreement:<sup>88</sup>

A. Applicable laws: procedural law (*lex arbitri*, crucial law), governing law of the arbitration agreement, substantive law;

B. Location: seat of arbitration, venue/place of arbitration;

C. Institutions and rules: arbitration institution, arbitration rules, constitution of arbitration tribunal, arbitrator, language of arbitration.

***Procedural law applicable to arbitral proceedings***, which refers to the law that the arbitral proceedings themselves shall be subject to, governing both internal procedural matters and external regulatory matters of domestic courts in arbitration. Specifically, the most important content is the boundary of judicial review of arbitration, including formal elements, jurisdiction, and enforcement of awards. In principle, the arbitration procedural law shall be the arbitration law of the seat of arbitration. However, under very limited circumstances, if it is otherwise expressly agreed in the arbitration agreement, there are judicial precedents recognizing that the arbitration procedural law may differ from the arbitration law of the place of arbitration. However, such inconsistency will cause great trouble to the arbitration proceeding itself and the possible judicial review.

***Seat/forum*** of arbitration refers to the legal situs of the arbitration proceedings. It determines the court in the corresponding jurisdiction which shall conduct the supervision and judicial review of the arbitration and the procedural law applicable to the arbitration may also be known from the seat of arbitration. These issues are some of the most important factors in determining the influence of courts on arbitration and the enforcement of arbitral awards. The parties concerned shall pay special attention thereto and make express agreement thereon. In principle, in the absence of an express agreement, the seat of arbitration shall be the place where the arbitration institution is located. Therefore, if the arbitration agreement provides an ad hoc arbitration without a

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<sup>88</sup> Mallesons, W., (2020), IA Fundamentals | 4. International Arbitration Agreement (I), <https://www.chinalawinsight.com › dispute-resolution › ia.>, p. 1 - 2

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determined arbitration institution and doesn't determine the seat of arbitration neither, the country where the arbitration will take place is very likely to be unknown, resulting in uncertainty in the later actions.

Among the *leading international arbitration institutions*, model clauses stand out in terms of completeness, standardization and guidance. The model clauses are set out as follows:

- Any dispute, controversy, difference or claim arising out of or relating to contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it be referred to and finally resolved by arbitration administered by Arbitration Centre.
- The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.
- The parties' voluntary consent to arbitration is the prerequisite for arbitration, and such consent is embodied in an agreement to arbitrate, which will generally be concluded in writing and signed by the parties. Arbitration agreements are generally included in contracts signed by the parties to the transaction, and are therefore naturally binding upon the parties.

### **2.3.2. Common elements of the arbitration agreement**

The following are some of the common elements included in the arbitration agreement, which is generally not considered an essential element but will be included if the parties wish to mention it in the agreement.<sup>89</sup>

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<sup>89</sup> Arbitration agreement and its attributes. | VIA Mediation Centre, (2021), <https://viamediationcentre.org/readnews/MzIz/Arbitr.p.5>

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- *Arbitration seat* - the seat here means place. Therefore, this clause states that there will be a place for arbitration in the event of a dispute. This provision is important, especially in the case of international commercial arbitration, as this seat helps to determine the procedural laws governing the arbitration procedure. However, the seat of arbitration does not have to be the same as the hearing of the proceedings. This is where the arbitration takes place, although it differs from the place of the hearings.
  - *Procedure for appointing arbitrators* - the procedure is the same as stated in the Law on Arbitration. It states that any person, regardless of nationality, may be appointed as an arbitrator, unless the parties agree otherwise. The parties may agree on the appointment of an arbitrator themselves.
  - *Language* - Language plays an important role when concluding a contract. It is necessary that the language chosen in the agreement does not have to be one that is not understood by both parties. There must be no communication gap and that the agreement reached by the parties is such that each clause mentioned in the agreement is in fact understood by both parties signing the agreement. Choosing a language that both parties can understand is important because it will save both parties the cost of a translator.
  - *Number and Qualifications of Arbitrators* - The law allows the parties to determine the number of arbitrators, with the sole condition that the number be not an even number but an odd number of arbitrators, so that a decision can be made even if there is disagreement between the arbitrators.
  - *Type of arbitration* - The parties have a choice between institutional and ad hoc (meaning that it was created for that particular purpose) type of arbitration. Institutionally it means that if they agree to be bound by the

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rules of the arbitration institutions ad hoc it means that the parties themselves agree to agree on an arbitrator.

- *Rule of Law* - It is important to mention the substantive law under which they wish to be governed as failure to mention this substantive right may be a major issue in future disputes that may arise between the parties, if any.

The presence of a dispute amongst the parties is an essential condition for the contract to take place. Another essential is the written agreement. An agreement related to the arbitration must always be in writing. An arbitration agreement will be considered as a written agreement when:<sup>90</sup>

- It has been signed by both parties and it is in the form of a document.
- It can be the exchange of the telex, the letters, the telegrams, or any other means of communication which provides the record of the exchange and the agreement for arbitration.
- There must be an exchange of statements between the parties that gives the statement of claim and defence in which the existence of the agreement of the arbitration is agreed by one of the parties and which is not defined by the other party.
- The intention of the parties while forming the contract is of utmost importance and it forms the basis of the agreement. Therefore, it is necessary to note that the intention of both parties plays a very important role in such an agreement. However, one must keep in mind that even if the words have not been mentioned, the intention must show that both the parties have agreed to come to the terms with the Arbitration Agreement.
- The fourth essential element is the signature of the parties. The signature of the parties is an essential element to constitute an arbitration agreement. The

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<sup>90</sup> Significance of the Arbitration agreement - iPleaders, (2020), <https://blog.iplayers.in/significance-of-the-arbitration>. p. 1 - 2

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signature can be in the form of a document signed by both the parties to the contract which comprises all the terms and conditions, or it can also be in the form of a document which is signed by only one party to the contract which contains the terms and acceptance by the other party to the contract. It will be sufficient if one party puts up a signature in the agreement and the other party accepts that.

### 2.3.3. Important provisions in the arbitration agreement

There are several important provisions in an arbitration agreement, and they are:<sup>91</sup>

- *Written agreement* - As stated as an essential condition, there must be a written agreement. Each contract must be in the form of a written document or even in the form of any kind of communication whether those communications take place via telegrams, telex or even other telecommunication devices provided. that there must be records of communication.
- *Appointment of arbitrators* - The arbitrator may be appointed freely to the parties to the contract. In the event that the parties fail to decide on the appointment of an arbitrator, the Chief Justice shall be approached, in the case of domestic arbitration, and the Chief Justice of the Supreme Court, in the case of international commercial arbitration.
- *Temporary relief* - A request for exemption can be made if there is prima facie evidence that there is an agreement on arbitration. The parties may, if they so wish, move to the Court before the arbitral proceedings commence or even after the arbitral award has been rendered, but before its execution. At the request of the parties, the tribunal may order the

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<sup>91</sup> Arbitration agreement and its attributes. | VIA Mediation Centre, (2021), <https://viamediationcentre.org> › readnews › MzIz › Arbitr. p. 8

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party to take interim measures, as it deems appropriate and necessary in relation to the subject matter of the dispute.

- *Finality of the arbitration* - The decision given by the arbitration is final and binding on the parties to the contract. Once the decision is made by the court, it will be enforceable.
- *Appeal* - If the parties are not satisfied with the decision of the arbitrators, an appeal is filed against the order for award or refusal to grant any measure as well as against the refusal to revoke the decision. An appeal may also be lodged against the order of the tribunal accepting the application for acceptance or refusal to grant an interim measure. However, there is no provision for appeal against the appointment of an arbitrator.
- *Meaning:*
  - ✓ The growth of arbitration means that there is a fundamental change that is present in the way of legislation.
  - ✓ Another significance is in resolving matters in a significantly shorter period of time and the different or special clauses mentioned in the trade agreement. They pave the way for the most effective and convenient remedy without having to go through court recourse.
  - ✓ Arbitration is generally the most effective form of litigation for resolving disputes between parties, which does not actually require lengthy court proceedings to reach decisions.
  - ✓ Arbitration is economical, saves time, and also allows one to choose one's own arbitrators. Through this, decisions are made quickly, and depending on the nature of the case, they are often satisfactory.
  - ✓ The separability and principle of autonomy of the Arbitration Agreement prevent the validity of one agreement from overlapping

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with another. However, both agreements can coexist. Having such a principle does not negate the value of the other principles mentioned in the agreement, but rather complements those principles. Thus, it plays an important role when contractual clauses appear when it comes to disputes.

Prerequisite arbitration law is a valid arbitration agreement. This especially includes:<sup>92</sup>

- ✓ the ability of the individual to enter into a legally binding arbitration agreement;
- ✓ the arbitrariness of the case;
- ✓ meeting certain form requirements; and
- ✓ the request to identify the parties, dispute (s) and legal relationship (s) subject to arbitration.

The arbitration agreement forms the basis of the right to arbitration. A valid arbitration agreement excludes the jurisdiction of state courts and serves as a procedural obstacle due to the agreement of the parties to arbitration:

- *The subjective capacity* of a person to validly enter into a binding arbitration agreement (and to be a party to the arbitration proceedings) is regularly referred to as subjective arbitration. Whether a person has a subjective ability arises from the law applicable to that particular person. The law usually determines the right that applies to a natural person according to his or her citizenship. In terms of legal entities, the seat is decisive. However, for EU companies, due to the founding theory developed by the European Court of Justice), the place of establishment is decisive. It is therefore advisable to clearly identify the parties to the contract by referring, for example, to company registration numbers. If the subjective capacity of the person concluding the arbitration agreement

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<sup>92</sup> The Arbitration Agreement - Konrad Partners, (2021), <https://www.konrad-partners.com> ›, p. 1 - 3

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is lacking, the decision can be challenged before the Supreme Court of the country in which the arbitration is conducted.

- *Objective arbitration* - Whether the subject matter of the dispute is arbitrary or not is called objective arbitration. If the subject of the dispute is not arbitral, the decision may be revoked. Any monetary claim that is within the jurisdiction of the courts may be the subject of an arbitration agreement. An arbitration agreement in respect of intangible assets is legally effective if the parties can reach an agreement on the disputed issue. Examples of questions that can not be referred to arbitration are:
  - ✓ family law issues such as divorce, inheritance or adoption, personal or marital status disputes; and
  - ✓ public law disputes, such as criminal cases.
- *Claims for Forms* - When the parties agree on arbitration clauses, the potential dispute is removed from the jurisdiction of the state court. "This can be seen as a violation of the constitutional right to have one's case heard in a state court - as a result, most legal systems impose special form requirements when concluding an arbitration agreement, especially the requirement that the arbitration agreement must be concluded." in writing“.

The arbitration agreement must be contained either in a written document signed (including any appropriate electronic signature form) by the parties or in the exchange of letters, faxes, e-mails or other forms of communication exchanged between the parties providing evidence of the agreement. Additionally, where the contract that meets the form requirements referred to above relates to a document containing an arbitration agreement, it shall also constitute an arbitration agreement, provided that the reference is such that the arbitration agreement forms part of the agreement. It should be noted that if the party (who can try to object on the ground of failure) addresses the substantive issues in the dispute without stating the lack of form, this defect in the

arbitration agreement will be remedied (or rather, waived). ) in arbitration. procedure. This waiver will occur unless an objection is raised, at the latest, when the said party enters into a discussion on the substance of the dispute:

- *Minimum content of the arbitration agreement* - The arbitration agreement must identify the parties, the existing or future dispute and the legal relationship (contractual or non-contractual) from which the dispute arose or may arise.
- *Special Consumer Requirements* - Arbitration agreements between an entrepreneur and a consumer can only be validly concluded for disputes that have already arisen. Additionally, arbitration agreements with consumers must be contained in a document that is personally signed by the consumer. This document must not contain any agreements other than those relating to the arbitration proceedings. As a consequence, under Austrian law, it is practically impossible to conclude an arbitration agreement with a consumer.

## **PART THREE: IMPLEMENTATION OF THE ARBITRATION PROCEDURE**

### **3.1. ARBITRATION PROCEDURE**

The arbitral proceedings shall begin on the date on which the request is made that the dispute be referred to arbitration by the other party:<sup>93</sup>

- Rules and legislation,
- Restriction period,
- Equal treatment of parties - There are two basic principles. First, it provides that the parties to the arbitration proceedings will be treated equally and, second, each party will be given a full opportunity to present its case. This part is a mandatory provision and the arbitral tribunal should abide by it. The tribunal should act impartially towards the parties and neither side should gain an advantage over the other.
- Sequence of arbitration proceedings - The right of the parties to agree on the procedural rules applicable to the conduct of the arbitration proceedings is recognized. This provision establishes procedural autonomy of the parties. When the parties fail to agree on a procedure or to institute proceedings, it gives the arbitral tribunal a wide range of discretionary powers to shape the arbitral proceedings. The law does not prescribe any standard rules governing arbitration proceedings.

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<sup>93</sup> How are arbitral proceedings conducted - iPleaders, (2020), <https://blog.iplayers.in> › Arbitration Act, p. 1

- Place of Arbitration - The parties are free to agree on the place of arbitration and if they fail to agree, then the arbitral tribunal should determine the place of arbitration in a court of law, taking into account the circumstances of the case and the convenience of the parties. The place of arbitration is also of great importance because the laws of the place of arbitration play a fundamental role in the arbitration proceedings. It determines the substantive laws that are currently in force.
- Language to be used in arbitration proceedings - The parties to the arbitration agreement are free to choose the language or languages to be used in the arbitration proceedings. In cases where the parties fail to reach such an agreement, then the role of the arbitral tribunal is to determine the language or languages to be used in the arbitration proceedings. Language shall also apply to any written statement by, to any hearing and to any arbitral award, decision or other communication by the arbitral tribunal. When the arbitral tribunal agrees on the language to be used in the arbitral proceedings, it may order that any documentary evidence be accompanied by a translation into the language agreed upon. The arbitral tribunal must ensure that all parties are able to follow and understand the proceedings.
- Claim and Defense Statement - Following the establishment of an arbitral tribunal, it is common practice to exchange and submit their claims before the tribunal. The claimant states the facts and other relevant matters, while the defendant opposes the facts and allegations given in the statement of claim and challenges the exemption sought by the applicant. The content of the statement may vary from case to case depending on the facts and circumstances of each case.
- Hearing and Written Procedure - In the absence of any prior agreement between the parties on this matter, the arbitral tribunal has the power to decide whether the proceedings will be conducted orally or on the basis of documents and other materials.

- Default for the procedure - Three situations when the parties are in default:
  - ✓ First, the arbitral tribunal terminates the proceedings when the claimant fails to transmit his statement of claim without giving sufficient reason.
  - ✓ Second, the arbitral tribunal continued the proceedings when the defendant did not make his defense statement.
  - ✓ Third, if there is a sufficient reason, the interruption is revoked and the procedure is resumed.
- Appointment of Experts - The power of the arbitral tribunal to appoint one or more experts on the request or request of the parties. He asks the parties to provide relevant information to the experts. Also, the arbitral tribunal may not appoint experts and delegate the duty to determine the sport.
- Judicial Assistance - The arbitral tribunal has the power to request judicial assistance in taking evidence. Persons can also be found guilty and tried in court if they refuse to testify or do not cooperate.
- Termination - The arbitral proceedings shall be terminated either by a final arbitral award or by order of the arbitral tribunal terminating the arbitral proceedings. The arbitral tribunal shall terminate the arbitral proceedings in any of these cases when:
  - ✓ the claimant withdraws the claim and the defendant does not object to it,
  - ✓ both parties are in consensus and agree to terminate the arbitration proceedings, or
  - ✓ the continuation of the arbitration proceedings has become impossible or irrelevant given the current facts of the case.

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- ✓ upon termination of the arbitral proceedings, the mandate of the arbitral tribunal shall expire and the arbitral tribunal shall become *functus officio*. The term "*functus officio*" means that a function is no longer performed or that there is no official authority to decide.

Arbitrations generally are intended to streamline the process and decrease the costs when compared to resolving a dispute in court. Arbitration is generally thought to be more informal than litigation, and is typically intended to provide a more streamlined, time-saving, and cost-effective method for resolving potential legal disputes.

- The beginning of the arbitration process involves one party giving notice to another of their intent to arbitrate a dispute, informing them of the nature and basis for the proceeding. The other party then gets a period of time to respond in writing, indicating whether they agree to resolve this dispute via arbitration. Once it is established that the disagreement will be resolved in an arbitration, the arbitration process itself begins, based on the rules and procedures selected by the parties or specified by contract:<sup>94</sup>
- One of the reasons that arbitration is often thought of as quicker and cheaper than litigation is that the paperwork involved in a dispute is cut down sharply when compared to litigation. The procedures for many arbitrations cut down sharply on some of the burdensome and expensive litigation tools collectively known as "discovery". The discovery process is intended to allow for exchanges of documents and evidence between parties in a dispute. However, this can often lead to costly and time-consuming disputes, with mountains of paperwork. The arbitration process usually cuts down significantly on discovery, allowing an arbitrator to take a more active role and possibly curtail excesses.

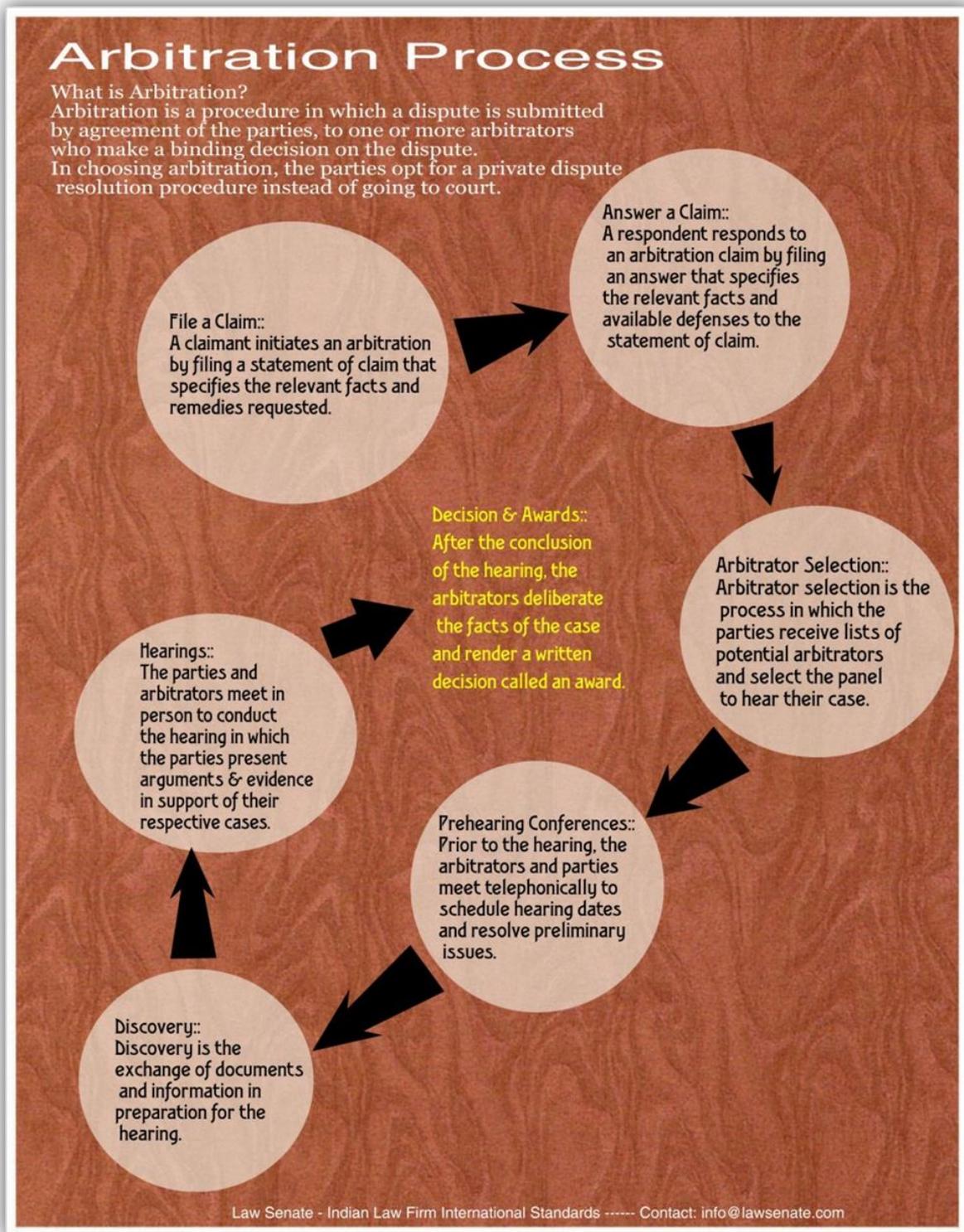
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<sup>94</sup> Arbitration Rules and Procedures - FindLaw, (2016), <https://www.findlaw.com> › adr, p. 1

- After this, the process is somewhat similar to a courtroom trial. Parties make arguments before the arbitrator(s), call witnesses, and present evidence to establish and defend their respective cases. The rules for an arbitration hearing may differ from those of a courtroom, however, and opportunities to question or cross-examine witnesses may be more limited. Once the hearing is concluded, an arbitrator or panel is given a certain amount of time in which to consider the decision and make a ruling.

**Figure 7**

***Arbitration procedure***



Source: Law Senate Law Firm Blog - WordPress.com, (2022), arbitration procedure « Law Senate Law Firm Blog

### 3.2. STEPS INVOLVED IN ARBITRATION PROCEDURE

Arbitration as a form of alternative dispute resolution and its application in financial disputes

Arbitration having five main steps:<sup>95</sup>

- Filing and initiation. One party files a Demand for Arbitration, which starts the process.
- Arbitrator selection. Both parties work to select an arbitrator, one they can agree on and who can meet their needs based on the nature of their dispute.
- Preliminary hearing. Parties meet to discuss substantive case issues, information exchange, witness lists, etc.
- Information exchange and preparation. Parties share information and arbitrators handle any related challenges.
- Hearings. Parties present evidence and testimonies before the arbitrator.
- Posting hearing submissions. If necessary, parties submit additional information to the arbitrator.
- Award. The arbitrator renders a decision (award) and closes the case.

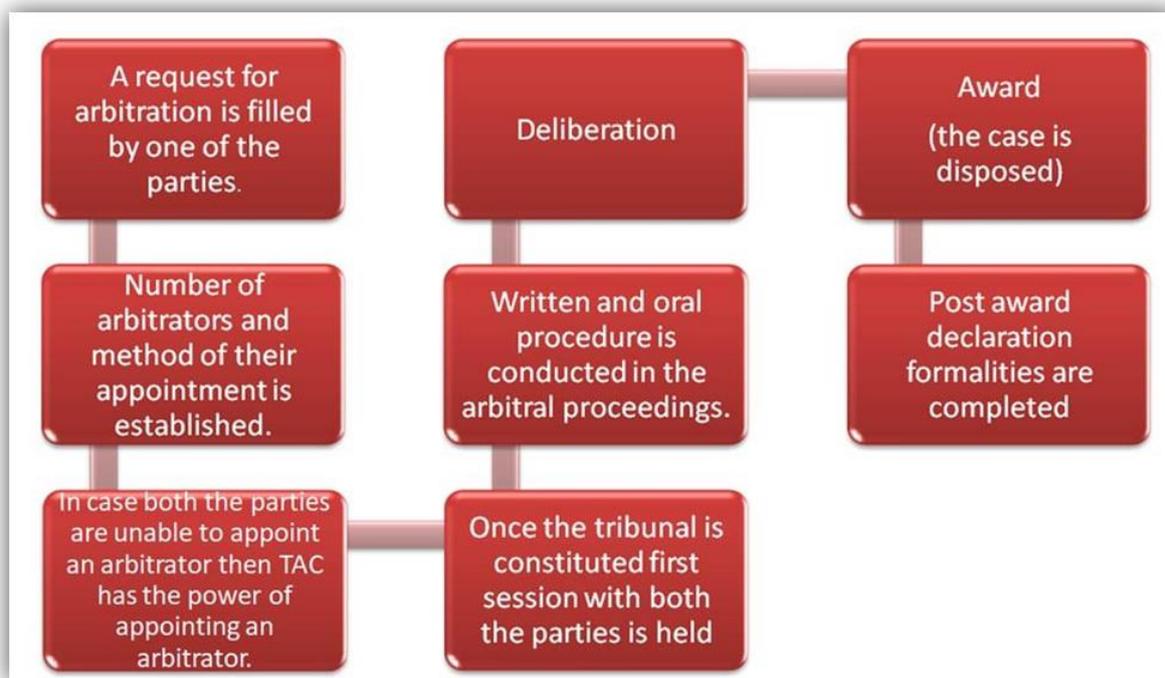
**Figure 8**

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<sup>95</sup> Daniel F. Q., (2020), What is Arbitration? Processes & Steps Explained - Stewarts, <https://www.stewartslaw.com> ›, p. 1

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### **Steps involved in arbitration procedure**



Source: Thane Arbitration Centre, 05 септември 2019 , The Arbitration Process, Facebook  
Thane Arbitration Centre - Home | Facebook

Arbitrations generally aim to streamline the process and reduce costs compared to resolving a dispute in court:<sup>96</sup>

- The beginning of the arbitration process involves one party notifying the other of its intention to arbitrate the dispute, informing it of the nature and basis of the proceedings. The other party is then given a period of time to respond in writing, indicating whether it agrees to resolve the dispute through arbitration. Once it is determined that the dispute will be resolved by arbitration, the arbitration process itself begins, based on the rules and procedures chosen by the parties or specified in the agreement.
- Many arbitration proceedings have abruptly reduced some of the burdensome and costly tools of litigation, collectively known as "disclosure." The disclosure process aims to enable the exchange of

<sup>96</sup> Arbitration Rules and Procedures - FindLaw, (2021), <https://www.findlaw.com › adr., p. 1>

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documents and evidence between the parties to the dispute. However, this can often be time consuming. The arbitration process usually significantly reduces disclosure, allowing the arbitrator to take a more active role and possibly reduce excesses.

- The process is somewhat similar to a courtroom trial. The parties present arguments before the arbitrator (ies), call witnesses and present evidence to establish and defend their respective cases. However, the rules of arbitration may differ from those in the courtroom, and the possibilities for questioning or cross-examination of witnesses may be more limited. Once the hearing is over, the arbitrator or the council is given some time to review the decision and make a decision.

Arbitration procedure means a procedure conducted by an arbitral tribunal for the settlement of an arbitration dispute which is referred to arbitration in the sense of an arbitration agreement. Arbitral tribunal means an arbitrator, arbitrators or judge acting as such under an arbitration agreement. The arbitration proceedings are conducted through the following steps:<sup>97</sup>

- *Arbitration clause*: a clause stating that the parties will accept an arbitration method for resolving the dispute.
- *Notification of Arbitration*: In the event of a dispute between the parties, the party will send a notice to the party who has not fulfilled its obligations to initiate arbitration proceedings known as arbitration notice.
- *Appointment of an arbitrator*: the party appoints an arbitrator as it deems appropriate to resolve the dispute.
- *Claim statement*: once the arbitrator has been appointed to claim, a statement of claim is prepared by both parties. Statement of claim between the parties and the compensation requested by the injured party.

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<sup>97</sup> Steps involved in Arbitration Proceedings | VIA Mediation Centre, (2021), <https://viamediationcentre.org/readnews/MjQz/Steps->.

Sometimes, the other party may find a counterclaim in response to the statement of claim.

- *Hearing of the parties:* The arbitral tribunal will hear both parties.
- *Arbitral Award:* A decision made by an arbitral tribunal is called an "arbitral award" and is binding on both parties.
- *Execution of the judgment:* Once the arbitral award has been rendered, it should be enforced.

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## **PART FOUR: USING ARBITRATION IN FINANCIAL DISPUTES**

### **4.1. CHARACTERISTICS OF ARBITRATION IN FINANCIAL DISPUTES**

The increasing complexity and sophistication of financial markets and financial products all call for a larger variety and more sophisticated methods of dispute resolution in cross-border banking and finance transactions. Recent years have seen an increase in the use of arbitration in the financial sector. Arbitration is sometimes considered more appropriate for resolving disputes in some industrial sectors than in others. Although long used in transportation, insurance and construction, it has traditionally been less popular with banks and other financial institutions. Reasons for this include:<sup>98</sup>

- The absence of a binding system of arbitration precedent, which is considered to lead to inconsistent decision-making, in contrast to judgments rendered by courts in leading jurisdictions such as England and New York.
- Perception that three-arbitral tribunals tend to make compromise decisions that offer something to both parties, while the courts of the leading jurisdictions are considered more likely to take a firmer approach to enforcing legal (and especially contractual) rights and obligations.
- Belief that arbitration does not offer any expedited processes, such as a summary judgment, by which debt claims can simply be settled quickly.

Financial institutions as commercial parties, besides their role in credit supply, often participate in commercial transactions as any other corporate entity. They purchase products, supply services, invest in equity stakes in other companies, agree to engage in joint venture projects with other financial or nonfinancial entities, discount

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<sup>98</sup> Use of arbitration in finance disputes | Ashurs, (2021), <https://www.ashurst.com> › qu, p. 1

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their long-term receivables, or issue shares to the public, all of which are common business transactions that involve no idiosyncrasies unique to banking.<sup>99</sup>

- Financial institutions do use arbitration. They do so in situations which require a neutral forum and decision makers with specialized knowledge, such as project finance involving sovereign counterparties in emerging countries, derivatives in certain regions of the world, sensitive capital restructuring and mergers/acquisitions, certain multilateral loans, and asset management.
- Amongst the many reasons why arbitration is attractive to banking businesses feature the international recognition and enforcement of awards member countries, the possibility to choose the arbitrators according to the parties' requirement of a specific skillset, the adaptability of the arbitral procedure potentially offering an opt-in appeal, and the possibility to obtain from the tribunal early dismissal of claims and provisional measures, including on an emergency track. The flexibility of the arbitral procedure is also a key advantage. It can accommodate both of the expectation of confidentiality in certain banking businesses, such as advisory banking, and of standard-setting precedent publication that other banking businesses, such as syndicated lending and derivatives, require to control risks in their field.

The continuing globalisation of the finance market entails that parties from emerging jurisdictions are increasingly involved in cross-border transactions. These parties may refuse to submit future disputes to the courts where a vast majority of financial disputes were historically resolved. Arbitration may be the result of a compromise between parties who do not accept the risks of litigating in the courts of their counterpart's jurisdiction. In addition, financial institutions and other stakeholders have become more alert to the complications associated with the enforcement of court

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<sup>99</sup> Blogger, G., (2018), Arbitration in banking and finance deconstructed - LexisNexis, <https://www.lexisnexis.co.uk> > p. 1

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judgments beyond. The rise of arbitration would therefore appear to be largely related to the prospects of obtaining a decision that will be recognised in the places, where the assets are located:<sup>100</sup>

- The growing complexity of financial transactions and financial products may equally have an impact on the use of arbitration. Although judges' technical knowledge of banking and finance varies from one jurisdiction to another, there is at least a perception that arbitration meets the industry-expressed view that these disputes need to be resolved by experts in the field. Further, more complex transactions tend to generate multi-party or multi-contract disputes, in relation to which arbitration used to fail to provide a satisfactory solution. New rules do not, however, remove the need for an agreement to arbitrate.. Viewed from another angle, limitations inherent with the consensual nature of arbitration might prove advantageous. Financial institutions may want to consider agreeing to arbitration in order to avoid class actions, which are generally considered incompatible with arbitration.
- Aside from developments in the financial services sector, the rising popularity of arbitration seems to be attributable to the industry's better understanding of the arbitral process and its potential benefits. These include the sometimes overstated portability of awards, confidentiality, finality and flexibility, all of which need to be put into perspective and considered only in light of the available alternatives, the jurisdictions involved and the type of disputes likely to arise, including amount at stake, need for interim relief, types of remedies, etc.

#### **4.1.1. Reasons for using arbitration in financial disputes**

Reasons for using arbitration as a means of resolving disputes in the finance sector include:<sup>101</sup>

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<sup>100</sup> Banking and finance arbitration on the rise – a trend to follow? (2013), <https://www.financierworldwide.com> › p. 1

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- the comparable ease with which an arbitral award can be enforced thus potentially reducing significantly the enforcement risk often associated with parties in emerging markets;
  - the provision of a neutral forum (where the alternative would be unreliable local courts);
  - the greater finality of arbitration, with limited rights of appeal;
  - the potential for keeping the existence of the dispute and its details confidential; and
  - the fact that arbitration agreements and procedures can be tailored to suit the circumstances of the specific transaction or business
  - Arbitration offers a great deal of flexibility to its users. In order to make a success of arbitration, it is important to make the right choices, both in the arbitration agreements and in the arbitration procedures subsequently applied – choices which suit the needs of the particular financial transaction. The choices include:
    - ✓ the seat of the arbitration: providing for a seat where the courts are supportive of arbitration – for example, where they may be willing to provide interim relief in support of arbitration, to avoid dissipation of assets, and so forth;
    - ✓ the selection of arbitrators: choosing an arbitral institution which will make sensible arbitral appointments if necessary, and potentially also specifying qualifications for the arbitrators, for example that they should be qualified in the governing law of the transaction or have expertise in a particular sector or type of transaction;

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<sup>101</sup> Freeman, J., Fisher, L., (2022), The rise and rise of Arbitration in banking and finance disputes, <https://www.allenoverly.com › en-gb › global › publications, p. 1 - 2>

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- ✓ consolidation and joinder provisions: to provide for a single dispute resolution procedure for disputes which, especially in finance cases, could involve a number of related contracts; and
  - ✓ procedures to effect swift decisions: where available via an expedited procedure, by bifurcating proceedings or, possibly, via summary dismissal.
- Despite the increasing popularity of arbitration in the finance sector, there remain valid reasons why the use of arbitration should sometimes be avoided. It might be that arbitration is simply not possible (for example if an issue is not arbitrable, such as criminal matters) or that the formalities for an arbitration agreement have not been satisfied (for example if not all parties to the dispute have signed the relevant contractual documentation).
- The finance sector has acknowledged the increasing prevalence of arbitration as a means of dispute resolution by creating initiatives to encourage, and set rules for, arbitration within the sector; these include FINRA-administered arbitration and P.R.I.M.E.

Since the late 2000s, there has been a significant increase in the use of arbitrage in the financial sector. This is mainly due to the expansion of financial institutions in emerging markets and the greater ease of enforcing an arbitral award in those jurisdictions, as opposed to a court ruling. For many financial parties, litigation remains their advantage if it is an acceptable choice from an enforcement perspective. Other reasons why it might make sense to choose arbitrage in the financial sector include:<sup>102</sup>

- Arbitration offers a neutral dispute resolution forum, where the alternative may be precarious local courts in emerging markets or litigation against a state (or state-owned enterprise) before that state's own courts.

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<sup>102</sup> Use of arbitration in finance disputes | Ashurs, (2021), <https://www.ashurst.com> › qu., p. 1

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- Arbitration offers the possibility of appointing expert decision-makers to the arbitral tribunal, instead of filing disputes in a national court with a limited understanding of financial markets or contractual practices.
  - Arbitration agreements and procedures may be adjusted to suit the circumstances of the particular transaction or business (for example, the provisions for highly expedited arbitration in some clearing house rules).
  - Arbitration proceedings tend to be confidential (or they can be done by agreement or by order of a tribunal), which can be attractive to (for example) the private wealth sector and some merger and amalgamation transactions.
  - An arbitral award is a final decision that can usually only be challenged on very limited grounds, such as irregularities affecting the proceedings or lack of legal rulings by the tribunal.

Reasons to use arbitration as a means of resolving disputes in the financial sector include:<sup>103</sup>

- the comparable ease with which an arbitral award can be enforced, potentially significantly reducing the enforcement risk often associated with emerging market parties;
- providing a neutral forum (where uncertain local courts would be an alternative);
- greater finality of arbitration, with limited rights of appeal;
- the potential for secrecy of the dispute and its details;
- the fact that arbitration agreements and procedures can be adjusted to suit the circumstances of the particular transaction or business.

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<sup>103</sup> Freeman, J., Fisher, L., (2022), The rise and rise of Arbitration in banking and finance disputes, <https://www.allenoverly.com › en-gb › global › publications>, p. 1 - 2

Arbitration offers great flexibility to its customers. In order for an arbitration to be successful, it is important to make the right choices, both in the arbitration agreements and in the arbitration proceedings that are subsequently applied - choices that meet the needs of the particular financial transaction. Elections include:

- ✓ seat of arbitration: providing a seat where the courts uphold the arbitration - for example, where they may be prepared to provide temporary assistance to support the arbitration, to avoid spending the property, and so on;
  - ✓ selection of arbitrators: selection of an arbitral institution that will make reasonable arbitration appointments if necessary, and potentially also specify the qualifications of the arbitrators, for example that they should be qualified in transaction governance or have expertise in a particular sector or type of transaction;
  - ✓ consolidation and amalgamation provisions: to provide for a single dispute settlement procedure for disputes which, especially in financial cases, may involve a number of related agreements; and
  - ✓ rapid decision-making procedures: where available through an expedited procedure, a double procedure or, possibly, a shortened dismissal procedure.
- Despite the growing popularity of arbitrage in the financial sector, valid reasons remain why the use of arbitration should sometimes be avoided. It may be that arbitration is simply not possible (for example, if an issue is not arbitral, such as a criminal case) or that arbitration agreement formalities are not met (for example, if not all parties to the dispute have signed the relevant contract documentation). ).
- The financial sector has recognized the increasing prevalence of arbitration as a means of resolving disputes by creating initiatives to encourage and

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establish arbitration rules within the sector; these include arbitration administered by FINRA and P.R.I.M.E.

#### 4.1.2. The future of arbitration in the financial sector

Financial institutions value the ability of national courts to quickly dispose of claims that have little basis or prospect of success, or are undisputed debt claims, through relatively quick and inexpensive processes such as aggregate or default. Historically, this has been one of the main reasons for financial institutions to prefer litigation to arbitration. Whether this perception is fair is a moot point:<sup>104</sup>

- On the one hand, summary judgment may not be a clear advantage of litigation: appeals in summary judgment courts are usually avoided by defendants and counterclaims based on intense allegations (e.g., fraudulent sale) that can only be settled at trial. .
- On the other hand, it has always been disputed that arbitral tribunals had the power to make various forms of summary available under their general case management powers (although it must be acknowledged that there is no equivalent in arbitration for non-enforcement, that is, non-enforcement of the appearance of a party in the procedure.)
- This power can be deduced from the tribunal's extensive procedural discretion in many of the major arbitration rules to adopt procedural measures as it deems appropriate. Of course, nothing clear in the main arbitration rules prevents this.
- The summary procedure can be considered as a "short cut", avoiding full examination of all potentially relevant issues on the basis that the final decision can be made only on the basis of certain dispositive issues. An alternative way to make an expedited decision is to provide an expedited schedule for arbitration.

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<sup>104</sup> Arbitration of banking and financial disputes | Practical Law, (2021), <https://uk.practicallaw.thomsonreuters.com> >

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- In the context of financial disputes, the relevant circumstances for the separation of claims may include:
    - ✓ Where fixing a particular issue (such as the law that applies to the core issues in the case) at an early stage will save time or costs.
    - ✓ Where the determination of a particular issue (for example, the alleged lack of capacity of the respondent in response to requests for early termination amounts under the General Agreement is likely to be decisive for the whole or for a substantial part of the dispute.
    - ✓ Where at least part of the debt (for example, a simple debt claim) does not appear to be seriously disputed.
    - ✓ Where the applicant's losses are ongoing and it is reasonable to award a reward for those losses to date.
    - ✓ Where the procedure is so complex that the only sensible way to manage the procedure is to divide the questions into stages.

Financial institutions have traditionally favoured court litigation as a means of resolving their contractual disputes. However, there are situations in which financial institutions may want to consider opting for arbitration for certain types of deals, especially in light of recent developments in arbitral procedure designed to make arbitration more attractive to the banking community. In addition, financial institutions are increasingly alive to the protections available under investment treaties in the event of government action that adversely affects their investment.<sup>105</sup>

- Where financial institutions opt for arbitration over litigation, it is often because a deal involves a counterparty based in a jurisdiction where arbitral awards are more readily enforceable than court judgments, or the institution anticipates that it may benefit from the increased confidentiality protection and/or narrower disclosure requirements of arbitration as compared to litigation.

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<sup>105</sup> Arbitration and financial institutions - Freshfields Bruckhaus, (2022), <https://www.freshfields.com> > p. 1

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- To make arbitration more attractive to financial institutions and other businesses, in recent years many of the major arbitral institutions have amended their rules to introduce or clarify certain procedural tools aimed at making arbitration more efficient and cost-effective. These changes include new rules on summary dismissal, emergency arbitrator procedures for urgent interim relief before the arbitral tribunal is constituted, and expedited procedures (see trend 6 for a more detailed analysis of these tools).

The use of arbitration between different banking and financial activities has untapped potential for arbitration in:<sup>106</sup>

- Islamic Finance: Unlike litigation (where many national courts are restricted to the application of national law), arbitrators can respect the parties' decision to submit the dispute to Sharia law. In addition, arbitration allows the appointment of specialists in Islamic finance and sharia law.
- International financing: especially when financial institutions deal with assets located in jurisdictions where the courts are considered unreliable, the parties may not agree on a choice of jurisdiction or in multilateral disputes involving several jurisdictions.
- Advisory issues and asset management: Arbitration is not normally used despite the neutrality and confidentiality it offers, as well as the opportunity to appoint a decision maker with the appropriate knowledge and experience to resolve complex litigation that usually arises.
- Derivatives disputes: Arbitration is used when contracting parties are established in emerging markets or where contracting parties suggest its use.

Banks, like other global businesses, are increasingly looking to emerging markets for investment and growth, and arbitrage can significantly reduce transaction-related execution risk. Arbitration is fast becoming the market standard in financial

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<sup>106</sup> Are banks making the most of arbitration | Ashurst, (2017), <https://www.ashurst.com> › are, p. 1

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transactions. As a result, there is an increased interest in arbitration from banks and other market participants:<sup>107</sup>

Banking transactions typically involve complex suites of contractual documentation. Two particular difficulties arise. The first is joinder: ie joining an extra party to an existing arbitration. The second is consolidation: ie joining two existing arbitrations into a single proceeding. National courts have innate joinder and consolidation powers, but arbitral tribunals need the prior consent of all relevant parties. This can be achieved in the arbitration agreement, but requires careful drafting.

A strong trend in the market practice of banks isto use “optional” arbitration clauses. These clauses provide that a dispute be resolved by arbitration, unless a party exercises an option to litigate the dispute (or vice versa). Generally, the option is open only to the banks, rather than the debtor.

## **4.2. ARBITRATION IN INTERNATIONAL BANKING AND FINANCE**

### **4.2.1. Basic features of arbitration in international banking and finance**

International arbitration is an independent dispute resolution mechanism. In this process, claims arising out of significant contractual matters are decided by party-appointed arbitrators. The process and operation of international arbitration is not attached to any state or government. Arbitrators, whom have been elected by parties, have the authority to render an award by applying the appropriate law, which is chosen by the parties. Considering the globalisation of lending and other services offered by banks, more jurisdictions are involved in cross-border transactions and cross-border dispute resolutions are unavoidable:<sup>108</sup>

- Cross-border transactions can involve risk in some form or another for both contacting parties. To reduce the level of risk involved in these transactions,

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<sup>107</sup> Freeman, J., (2022), The growth of arbitration in the finance sector - Allen & Overy, <https://www.allenoverly.com> › p. 1

<sup>108</sup> Alamdari, H. B., (2016), The emerging popularity of international arbitration in the banking and financial sector – Is this a fashionable trend or a viable replacement? <https://sas-space.sas.ac.uk> ›, p. 17 -20

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parties engaged in the transaction should consider risk-mitigating measures. Incorporating a dispute resolution clause into the agreements is one such act that would protect parties against uncertainties and possible risks involved in the transaction. By thinking ahead and providing a mechanism for dispute handling in the contract, parties exercise due diligence as they increase the sustainability of their contractual relationship.

- Banks are involved in a huge variety of transactions. These transactions are contracts by nature; therefore, as a result of the application of freedom of contract principles, contracting parties have the free choice of incorporating their own favoured dispute resolution clause in the contract. In this section bank contracts are explored. Nonetheless, this principle is not an absolute principle under contract law and there are limitations imposed on the doctrine of freedom of contract.
- The main source of regulating bank-customer relationships is the contract existing between them. There are different forms of contracts between banks and their customers. The differences depend on the services offered by the banks and nature of their customers. Contracts between a bank and customers may take different shapes, but the main forms can be categorised as:
  - ✓ contracts conducted between banks and large corporate customers;
  - ✓ contracts conducted between banks and smaller corporate or unincorporated business customers;
  - ✓ contracts conducted between banks and consumer customers.
- The bank-customers relationship is based on a contract and obviously there are duties and obligations alongside the contract and which are integral to it. Similar to any other contract, there may be different categories of terms, such as implied terms, expressed terms or statutory terms, present in a banking contract. Express terms are those that both the bank and the customer have incorporated into the agreement and are both are aware of. Implied terms are

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terms that are not expressly written in the contract but all parties know that the fulfilment of the terms is vital to the contract. For instance, banks have a duty to use reasonable skill and care when providing services to their customers.

Historically, financial institutions have preferred to settle disputes before national courts in established financial centers, avoiding not only courts in emerging markets but also arbitration sites. The global financial crisis of 2008 has greatly changed the perception of financial institutions about the value of arbitration. The crisis has resulted in increasing claims between and against financial institutions. Additionally, the post-crisis belt tightening has brought new rigor to disputed cost management. Financial institutions thus take a fresh look at arbitration as an alternative means of resolving disputes:<sup>109</sup>

- Arbitration is increasingly encouraged by international commercial and financial institutions. Some international stock exchanges, such as Euronext, refer to arbitration as a method of resolving disputes. Arbitration institutions focus on disputes over complex financial transactions. There are also arbitration initiatives established by banking regulators.
- Arbitration also offers much greater procedural flexibility than litigation. The parties may choose, in advance or at the time of the dispute, their preferences in the selection of an arbitrator, the language of the proceedings and the governing procedures. However, few financial institutions are aware of the scalability that current arbitration practice can provide, especially the ability of parties to tailor proceedings to their needs before and even during the case. Even those who were aware of the flexibility of arbitration express an interest in receiving clear advice on how arbitration procedures can be adjusted. In particular, financial institutions should be aware of the recent trend towards more robust

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<sup>109</sup> International Arbitration by Financial Institutions - Thompson, (2021), [http://www.thompsonhine.com › uploads › doc, p. 3 - 4](http://www.thompsonhine.com/uploads/doc, p. 3 - 4)

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preliminary and summary procedural options offered by more and more arbitration institutions and which may replicate some of the most attractive features of national judicial systems.

Financial institutions are increasingly open to arbitration due to the changing (and often increasingly stringent) regulatory environment and the consequences faced by banking and financial institutions after the global financial crisis that brought "an unprecedented wave of claims against and against financial institutions, as well as between them":<sup>110</sup>

- The ability to handle financial disputes in private and confidential arbitration proceedings offers a welcome break from playing them in public. Financial institutions, like most businesses, also prefer to avoid jury trials where possible.
- Another point in favor of arbitration is the growth of transactions in emerging markets where local courts are considered inexperienced or unreliable, especially when the state is a contracting party. Arbitration offers neutrality. Financial institutions also better understand the fact that if their foreign investments are properly structured and the financial instrument is a qualified investment, they can benefit from protection under investment agreements. They give investors a direct right to take action against the host country for any international wrongdoing, generally by instituting arbitral proceedings in a neutral seat.
- The ability of the parties to select specialist arbitrators with expertise and experience is also cited by financial institutions as a key benefit of arbitration; financial transactions are becoming more complex and disputes over financial services are often very technical. Specialized arbitrators, arbitration institutions and rules tailored to resolve complex financial disputes have emerged in recent years.

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<sup>110</sup> Financial institutions and international arbitration, (2021), <https://www.nortonrosefulbright.com> ›

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#### 4.2.2. Financial institutions and international arbitration

Financial institutions, which traditionally prefer litigation in certain select jurisdictions, are increasingly open to the use of international arbitration for cross-border banking and financial disputes. A majority prefer using institutional arbitration owing to the settled procedural rules and proven ability to handle complex and high-value disputes.<sup>111</sup>

- Financial institutions are increasingly open to arbitration because of the changing (and often increasingly strict) regulatory environment and the fall-out faced by banking and financial institutions after the global financial crisis which brought "an unprecedented wave of claims by and against financial institutions, as well as among them". The ability to deal with such disputes in private and confidential arbitral proceedings offers a welcome respite from playing them out in public. Financial institutions, like most business, also prefer to avoid jury trials where possible.
- Another point in favour of arbitration is the growth in emerging market transactions where local courts are regarded as inexperienced or unreliable, particularly where the state is a counterparty. Arbitration offers neutrality and party-autonomy. Financial institutions are also more alive to the fact that if their foreign investment is structured appropriately and the financial instrument is a qualifying investment, they may benefit from protections under investment treaties. These afford investors a direct right of action against the host state for any internationally wrongful act, generally by bringing arbitral proceedings in a neutral seat.
- Parties' ability to select specialist arbitrators with industry expertise and experience was also cited by financial institutions as a key benefit of arbitration; financial transactions are increasingly complex and financial services disputes are often highly technical. Specialist arbitrators, arbitral

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<sup>111</sup> Stothard, P., (2017), Financial institutions and international arbitration, <https://www.nortonrosefulbright.com>, p. 1

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institutions and rules tailored to resolving complex financial disputes have all emerged in recent years.

Financial institutions tend to use international arbitration when: the transaction is particularly complex; confidentiality is a concern; the counterparty is a state-owned entity; or the counterparty is in a jurisdiction where the enforcement of an arbitral award is easier than enforcement of a court judgment. Financial institutions express the following key preferences when opting for international arbitration:<sup>112</sup>

- Ad hoc vs. Institutional Arbitration - Most of the financial institutions preferred institutional arbitration, rather than ad hoc arbitration.
- Arbitration rules are most frequently selected, although ad hoc proceedings under rules have occasionally been chosen are:
  - ✓ Seat - The arbitration seats selected most frequently are, in alphabetical order, Geneva, Hong Kong, London, New York, Paris and Singapore.
  - ✓ Number and Qualification of Arbitrators - Financial institutions generally prefer three-member tribunals, except for more straightforward matters when a sole arbitrator may be appropriate. When selecting an arbitrator, financial institutions consider industry expertise and experience, availability and responsiveness, common sense, language skills, and independence and impartiality.
  - ✓ Multitier and Unilateral Clauses - Multitiered clauses (involving negotiation or mediation before arbitration) are rarely used in agreements involving financial institutions. Unilateral clauses are still viewed as important by a number of financial institutions which consider that litigation provides them with greater legal certainty.
  - ✓ Appeals - Most financial institutions perceive the finality of an award in arbitration and the limited grounds for challenge to be an advantage

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<sup>112</sup> Salomon, C., (2016), What Financial Institutions Think Of Int'l Arbitration, [https://salomonarbitration.com › uploads › 2020/11, p. 1](https://salomonarbitration.com/uploads/2020/11/p.1)

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compared to litigation. However, a minority of financial institutions wish to have a means of appeal in arbitration, provided this does not undermine certainty, and there is an upfront agreement between the parties addressing the circumstances in which a party could appeal and the parties have an agreement as to the overall timing.

- Financial institutions perceive the enforceability of awards as a key advantage. For loans and financing in developing markets, one institution reported. Other advantages of international arbitration include: the ability to appoint arbitrators with sector-specific expertise, the flexibility of the process, neutrality, finality and confidentiality.

#### **4.3. REASONS FOR ACCEPTING INTERNATIONAL ARBITRATION IN BANKING INSTITUTIONS**

Banks and financial institutions favoure arbitration as the means of resolving international disputes for this reasons which given include:<sup>113</sup>

- financial disputes typically involve straightforward payment claims and do not involve complex legal questions or fact finding, with the latter more suited for arbitration;
- arbitration does not provide for the possibility of default judgments or summary judgments, and as a result arbitration is not as efficient and cost effective as court proceedings;
- disputes about the tribunal's jurisdiction may lead to unnecessary delays;
- arbitrators tend to render more equitable decisions than judges;
- the flexibility of the arbitral process creates legal uncertainty;
- banks appreciate control of decisions by higher courts on appeal;

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<sup>113</sup> Sheppard, A., (2009), Arbitration of International Financial Disputes, <http://arbitrationblog.kluwerarbitration.com> ›, p. 1

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- arbitration can permit unnecessarily extensive document production (particularly compared with civil law courts);
  - arbitration is problematic in multi-party disputes;
  - arbitral confidentiality means that proceedings cause less embarrassment to the debtor; and
  - awards have limited precedential value.

International arbitration to the banking and finance sector as a primary form of dispute resolution is used for this reasons:<sup>114</sup>

- *Enforcement of Awards Almost Anywhere*. Unlike decisions from local courts, international arbitration awards are often enforceable in any of the 159 signatory states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). By way of example, this means a bank can take an arbitration award against a defaulting party or guarantor and attach it to that party's assets in 159 countries — something that does not occur as simply with court decisions.
- *Choice of Arbitrator*. Parties need not fear biased judges in a foreign court because the parties play a role in deciding who will be the fact-finders that decide their international arbitration. Parties can choose arbitrators based on experience, industry expertise and nationality. For instance, some arbitration rules prohibit appointment of an arbitrator with the same nationality as one of the parties to the arbitration. Some arbitration institutions also have specialist panels with recognised experts in finance from which parties may choose arbitrators.
- *Neutral Forum*. International arbitrations typically are seated in neutral forums selected by the parties or, in some instances, by the administrator or the arbitrators. This ensures that the dispute is secure from the biases of local

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<sup>114</sup> Banking and Finance Disputes Drive Record International Arbitration Caseloads, (2019), <https://www.mcguirewoods.com> ›, p. 1

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courts, providing a sense of comfort for parties seeking to bring claims against influential local companies or local government entities. Simply put, arbitration is a means to avoid bringing a claim against a government in its own courts.

- *Procedural Flexibility.* Unlike court proceedings, parties in international arbitrations can tailor the arbitral procedure to their needs, either at the start of the underlying transaction when drafting their dispute resolution clause, or once a dispute arises. Among the numerous procedural options, parties can agree to restrict the number of written memorials or submissions, the amount of and presentation of evidence, the language of the arbitration and the location of hearings. Some arbitral rules also offer an expedited procedure. Such procedural planning can help control costs and make for a more efficient arbitration, as the parties can fit the process to their needs.
- *Finality of Decision.* Absent party agreement, awards are not generally subject to appeal and can be challenged only on limited grounds.
- *International arbitration a valuable risk-mitigation tool.* It provide a sense of security for lenders in international transactions, particularly those doing business in jurisdictions with poor reputations for the treatment of foreign investors. The deterrent for bad actors is, as explained above, that an international arbitration award can be enforced almost anywhere relevant assets are located.
- *International arbitration is the most logical dispute-resolution mechanism* for international banking and finance dealings. Besides providing an effective means to resolve disputes, it can serve as a risk-mitigation tool to counter the uncertainty of today's global economic scene.

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#### 4.4. INDICATORS FOR ARBITRATION IN THE BANKING AND FINANCIAL SECTOR

International Centre for Settlement of Investment Disputes (ICSID), the World Bank's arbitration institution, published its annual statistics of arbitration:<sup>115</sup>

- The statistics show that, in the period from its first case, registered in 1972, to 31 December 2021, has registered 869 arbitration and conciliation cases under the ICSID Convention and Additional Facility Rules.
- In 2021, are registering 66 new cases. The majority of these new cases (i.e., 58%) continues to involve claims brought under bilateral investment treaties (BITs). Cases brought under the Energy Charter Treaty (ECT), a multilateral treaty protecting energy investments, accounted for 8% of cases registered in 2021.
- Energy and Mining Remain Top Sectors for Disputes, with Construction Cases and Telecoms Cases on the Rise
- In terms of sector distribution, the energy and mining sectors continue to dominate with a total of 47% of the new cases, followed by construction disputes (16.5%) and telecommunications (11%). Disputes in the latter two sectors are on the rise compared to their historical average.
- The data reveals a relative historical stability in a balanced resolution of investor-State cases. In 31% in 2021, the tribunal upheld at least some of the investor's claims, 33% of concluded cases were dismissed (either on the merits or on jurisdiction), while the remaining 36% of cases were discontinued for various reasons. At the same time, the statistical data reinforces the utility of the current neutral dispute resolution system provided by existing investment treaties, thereby calling into question the need for a permanent multilateral investment court system.

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<sup>115</sup> World Bank Arbitration Statistics, (2022), <https://www.cms-lawnow.com> ›, p. 1

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- In terms of gender and geographical diversity of arbitrators, the data shows a slight improvement on gender diversity, but still a considerable way to go to achieve gender parity: women represented only 27% of arbitrators, ad hoc committee members, and conciliators appointed in 2021.
  - Geographical diversity shown that 43% of arbitrators, ad hoc committee members, and conciliators hailing from Western Europe, and 20% from North America.

Financial institutions enter into commercial transactions like any other corporate entity. These might include the purchase of products, services, or investments in equity stakes in other companies all of which may give rise to disputes that can be resolved by arbitration. The industry also encompasses many specific types of transactions and areas of financial activity:<sup>116</sup>

1. Arbitration of derivatives disputes: The framework for the resolution of derivatives disputes through arbitration evolving in recent years. Notably, optional arbitration clauses are introduced in 2013. Knowledge of arbitration is growing in the sector as "arbitration has increasingly been presented as a viable alternative to litigation". This is particularly the case when dealing with counterparties from emerging markets where the strong system surrounding the enforcement of arbitral awards can be particularly attractive. In this sector, the expertise of decision makers is important, and arbitration may prove attractive to financial parties who can select arbitrators with specific derivatives expertise.

2. Sovereign finance disputes: 20% of sovereign bonds included arbitration as a dispute resolution mechanism. When contracting with a sovereign counterparty, there is a strong preference for arbitration (immunities from suit typically enjoyed by a State can be waived by agreements to arbitrate). Non-payment is the most common issue in the context of sovereign finance. For these sorts of disputes, arbitration may not prove a particular advantage (for example, there is no need for arbitrators with specific finance

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<sup>116</sup> ICC Examines the Use of International Arbitration by Financial Institutions, <https://www.cliffordchance.com › dam › 2016/11, p. 1 - 2>

expertise). However, more complex sovereign finance disputes such as sovereign debt restructuring may well engage a state's liability under investment treaties, which invariably provide for arbitration.

3. Investment arbitration and Banking & Finance: . Whilst there are some notable exceptions, investments relating to the oil & gas, mining and other sectors traditionally associated with long-term foreign direct investment are often protected by such treaties. In relation to financial instruments, it can be said that the investment has been "made", it may be difficult to establish protection for the instrument under an investment treaty. The landscape in this area will change as more case law considers these issues closely and as investment treaties provide more specific reference to the type of financial instruments that qualify for protection.

4. Arbitration for regulatory disputes: Arbitration is much rarer than regulatory matters. This is not surprising as regulatory issues also often involve issues of public policy and are handled by courts and special administrative tribunals. Indeed, arbitration has proved successful in the context of disputes between financial institutions and their clients.

5. Arbitration of international financing disputes: Arbitration is prevalent in international project finance and general loans. In relation to trade finance (an area where disputes have traditionally been resolved through litigation), there is a general recognition that litigation may not always be the best option. Taking into account the diversity of the international financing sector, the is concludes that hether arbitration is attractive in any given transaction will depend on the specific circumstances including the quality of the courts available and potential arbitrability issues (enforcement of certain security provisions or insolvency matters).

6. Arbitration of Islamic finance disputes: The potential of international arbitration in the context of Islamic finance remains "completely untapped. Arbitral tribunals are free to apply Shari'a law if the parties have chosen it (subject to any restrictions regarding applicable law in the law of the seat).

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7. Arbitration is often seen as a more neutral process than court litigation, and arbitral awards are likely to be more easily enforceable than a court judgment in certain jurisdictions.

8. Arbitration of disputes relating to advisory matters: Financial institutions have limited experience of arbitration in the context of advisory work more generally despite the fact that arbitration appears to be "ideally suited" to these types of work given the complexity of the issues typically raised and the need for confidentiality in this field.

9. Arbitration of disputes relating to asset management: Arbitration is well suited to the resolution of the potentially complex disputes relating to asset management activities (with the added benefits of confidentiality), and remains underutilised in this sector.

#### **4.5. SETTLEMENT OF FINANCIAL BUSINESS DISPUTES BY ARBITRATION**

People or firms engaged in any type of business today need to know something about the system of the resolution of disputes. The resolution of disputes is very expensive, time consuming and frustrating. But proper planning will help reduce the financial risk, position the business better to favorably resolve the dispute and lessen the financial exposure. Resolution of Business disputes are resolved today, by:<sup>117</sup>

- (1) voluntary negotiation and settlement or work-out;
- (2) court litigation in either State or Federal Courts;
- (3) Mediation, or
- (4) Arbitration.

❖ All agreements should clearly specify the method of dispute resolution. If the parties wish only to litigate the dispute in court, the agreement should specify the "venue" or location of the courts, designate which State's law will govern the

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<sup>117</sup> Arbitration Is Usually Better for Business - HG.org, (2022), <https://www.hg.org › legal-articles › arbitration-is-usually->, p. 1

agreement and provide for how attorneys fees and costs will be assessed between the parties.

❖ Usually, all courts today will refer disputing parties to Mediation before a trained and licensed Mediator. That person will not have the right to adjudicate or decide the dispute, but will help the parties (and their lawyers) settle the dispute. After adjudication, a litigant normally has a right to at least one appeal, which could take another year. Appeals are normally decided on purely legal and not factual issues.

❖ Arbitration is a good alternative to court litigation. Arbitration is a procedure specified by the parties in their agreement. A typical arbitration clause will be inserted into the contract, after negotiation. One common form of clause is as follows:

- Any dispute or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the arbitration administrator, s in accordance with Commercial [or other] Arbitration Rules. Judgment award rendered by the arbitrators may be entered in any court having jurisdiction thereof.
- By virtue of the above clause inserted in the agreement, the parties not only vest the resolution of the dispute with arbitrators, but they also agree that the Award of the Arbitrators may be enforced by a court, if the losing party does not honor the award.

❖ By agreeing in writing that disputes will be resolved by arbitration, the parties do some very important things:

- (a) They make clear that all disputes are arbitrable. Thus, delay tactics, such as those used to stretch out payment obligations, are reduced.
- (b) By inserting the name of the arbitration organization which will supervise the arbitration, the parties automatically incorporate a complete set of rules of informal procedure, used commonly to resolve similar disputes.
- (c) The location of the dispute resolution proceeding is agreed upon.

- (d) The matter will be decided by experienced arbitrators, selected by the parties, who have expertise in the general area of the business. For example, in a construction dispute, the parties would specify the use of Construction Arbitration Rules, and select arbitrators who have experience in construction disputes. The same is true for Commercial matters, Employment disputes, , etc.
- (e) The arbitrators are experienced, vetted adjudicators. They will take the time to hear the evidence and decide the dispute in a more informal procedure than court litigation. The parties can agree on one or three arbitrators to decide the dispute. Obviously, a three arbitrator panel will cost more and involve more time in procedure.
- (f) Discovery procedures are very limited, saving the parties substantial time and expense.
- (g) The parties can agree, by separate clause, that the costs and attorneys fees will be assessed by the arbitrators against the losing party. Not only does this add benefit, but it acts to encourage settlement discussions at an early time.
- (h) The arbitration hearings tend to be much more informal than court proceedings; the arbitrators are not bound by formal rules of evidence, nor the rules of procedure utilized and required by law.
- (i) Arbitrators decide and do not settle or mediate disputes. Their function is simply to hear the evidence, the views of the parties and make a final and binding decision.

Parties will use arbitration when the relevant law states that they should resolve their dispute through arbitration. Additionally, another situation where parties will use arbitration is if the commercial or contractual agreement in dispute requires them to do so. Specifically, the contract's arbitration clause will state that parties must resolve disputes through arbitration. Therefore, you should ensure that you read what your

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contract states to determine whether you can use arbitration. The industries that commonly use arbitration as a method of dispute resolution are:<sup>118</sup>

- construction;
- engineering;
- infrastructure;
- oil and gas;
- mining; and
- transport.

#### **4.5.1. Benefits of resolving financial business disputes through arbitration**

There are several benefits that arbitration has over “traditional” forms of litigation. In a commercial or business context, some of the main reasons cited by parties as to why they prefer arbitration to litigation include:<sup>119</sup>

- Commercial disputes can and often involves sensitive information. This may include the identity of investors, the balance sheet of a company, or commercial deals in the process of being negotiated. Arbitration, unlike court proceedings are private. Parties can have more certainty and confidence in disclosing sensitive commercial information that they may not be keen to do in open court.
- In business, speed and certainty helps. Arbitration can be a much faster process than issuing a claim at court, as the parties are not at the mercy of the court’s timetable, which may not have the capacity or availability for judges to hear claims as soon as the parties would like. As parties can choose their

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<sup>118</sup> Tran, C., (2021), When Should I Consider Arbitration in a Commercial Dispute? <https://legalvision.com.au> › al., p. 1

<sup>119</sup> Downie, S., (2021), Why is arbitration preferable in a business dispute? - Francis, <https://www.franciswilksandjones.co.uk> ›, p. 1

arbitrator, this issue is negated considerably, as they can ensure that the arbitrator that they choose is available within their particular time constraints.

- Arbitration is more certain than litigation. There are no higher courts for parties to appeal to. Challenges available are limited, and empirical data shows that very few challenges succeed. A party who arbitrates has more certainty that once an award is made, it is highly unlikely to be successfully challenged.
- Arbitration awards are easier to enforce. This means that regardless of the above advantages, for practical reasons, it is often the most material point for disputing parties.

Arbitration is a viable solution to many commercial disputes for the following reasons:<sup>120</sup>

<b>Advantage</b>	<b>Explanation</b>
Speed	Arbitration is generally faster and more efficient than traditional litigation. Therefore, parties are able to save time and costs by avoiding lengthy court procedures.
Flexibility	Arbitration proceedings are also very flexible. This is because you can adapt it to the size and complexity of the commercial matter in question.
Privacy	Moreover, you can hold arbitrations in private. By contrast, court hearings are open to the public and the media.
Enforceability	The orders or awards from an arbitration proceeding are final and enforceable. This is advantageous as it increases certainty.
Arbitrator experience	Generally, the appointed arbitrator will have relevant professional or technical experience in your industry.

<sup>120</sup> Downie, S., (2021), Why is arbitration preferable in a business dispute? - Francis, <https://www.franciswilksandjones.co.uk> >, p. 2

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Source: Downie, S., (2021), Why is arbitration preferable in a business dispute? - Francis, <https://www.franciswilksandjones.co.uk> ›,

In an increasing globalised world of complex multi-jurisdictional trade links, underlying treaties and more closely enmeshed logistics, supply and value chains, sharp increases in the level and significance of commercial disputes have inevitably ensued. This new paradigm has frequently laid bare the limits of litigation as a viable, practical and cost-effective means of solving contentious international matters:<sup>121</sup>

- Arbitration typically offers lower costs and shorter time to resolution; and awards that are final and enforceable. With arbitration, the parties have full control of the process, they can choose the place and language of arbitration, and arbitral proceedings are confidential, contrary to those held in an open court.
- Arbitration still relies to a considerable extent on the purview of the courts, to which arbitral awards must be submitted so that they may deliberate on whether they should be enforced.
- Parties to a transaction have a high control over the handling of their possible dispute provided that they have adequately drafted arbitration clauses in their respective contracts. Since arbitration is a contractually agreed dispute resolution mechanism, it is therefore very important to use the correct wording and conducting an efficient arbitration starts with drafting an effective arbitration clause.

#### **4.5.2. Types of arbitration for resolving financial business disputes**

The types of arbitration that the parties may select are different:<sup>122</sup>

- In its simplest form, the parties may simply agree on the identity of a third neutral party who will hear their respective arguments and evidence and make

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<sup>121</sup> Arbitration: the More Business Savvy, Practical International Bedfellow of Litigation, (2021), <https://www.dfdl.com> › arbitr., p. 1

<sup>122</sup> Arbitration of Business Disputes | Stimmel Law, (2022), <https://www.stimmel-law.com> ›, p. 1

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a binding decision. In most cases, however, the parties submit the matter to arbitration under the auspices and according to the rules of one of the long standing organizations that exist worldwide to provide arbitration services.

- If the Parties' contracts do not provide for specific procedures as to how arbitration is to occur and the parties cannot informally agree between themselves as to procedures, most states have statutes that provide binding procedures for how the arbitration is to occur. Most states allow the Parties to alter those procedures by mutual agreement.

#### **4.5.3. Arbitration Procedures in Resolving Financial Business Disputes**

Parties can always agree on what procedures to incorporate in an arbitration, if they do not but can only agree to have arbitration, the statute or the rules of the arbitration association will impose the procedure:<sup>123</sup>

- In most cases, the strict rules of evidence seen in Court are relaxed somewhat, no jury is provided, merely an arbitrator or a panel of three arbitrators, and their judgement, once rendered is then entered in court by motion of the prevailing party:
- Most arbitrations follow the basic form of an American court trial: both sides get to make an opening statement; the plaintiff presents its case by testimony and documents with the witnesses being cross examined by the defendant; defendant then presents its case by documents and witnesses who are, in turn, cross examined by the plaintiff; then closing arguments by both sides. Unlike a judge in a public trial, Arbitrators often become quite active in the arbitration, asking questions, advising the lawyers what evidence to present, and "managing" the entire matter in a way familiar to our clients used to European or Asian courts. Nevertheless, most arbitrators do follow the basic

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<sup>123</sup> Arbitration of Business Disputes | Stimmel Law, (2022), <https://www.stimmel-law.com> ›, p. 2

procedure of an American court room and cross examination, opening and closing arguments and the like are common.

- The rules of evidence may be rigidly enforced by the arbitrators but seldom are. Quite often arbitrators allow types of evidence, such as written statements, that would not be allowed in a court of law due to the Hearsay Evidence rules. Discovery is normally restricted to exchange of documents and lists of witnesses: the tremendous expense of depositions and written interrogatories is eliminated unless the parties agree to the contrary. Arbitration is also a private forum. The public has no right to attend (as in American civil trials) and until the motion to enforce the award is entered in the civil court, there is usually no public record of the dispute at all.

In recent years, many companies have adopted the practice of including arbitration clauses upon entering into agreements. They stipulate that in the event of a dispute between the parties, it shall not be resolved by State courts but referred to a third party, that is to say, an expert of their choice. In general, the arbitration panels are usually comprised by more than one person, typically attorneys. However, parties can also convene other subject matter specialists such as economists or engineers to ponder technical criteria:<sup>124</sup>

❖ Although the parties can freely chose the rules to which the arbitration will be subject, usual practice consists of referring to one of the regulating systems available such as the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC).

❖ Arbitration is useful not only for agreements between companies located in the same country but for agreements between foreign companies. In fact, on the website of the American Society of International Law (ASIL), Gloria Miccioli explains that arbitration has become a particularly important international tool, “As the number of

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<sup>124</sup> Six reasons for choosing commercial arbitration, (2020), <https://connectamericas.com> ›. p. 1 - 2

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international commercial disputes mushrooms, so too does the use of arbitration to resolve them”.

❖ There are several reasons why companies tend to choose international arbitration over the jurisdiction of State courts. Here are six important reasons:

- *Greater technical knowledge of those resolving the dispute:* a document from the United Nations Conference on Trade and Development (UNCTAD) affirms that “ Arbitration permits the parties to choose persons with specialized knowledge to judge their dispute. Judges in State courts are less likely to acquire the same degree of expertise in the technical aspects of the transactions that come before them as are the lawyers who represent the parties and who may later serve as arbitrators in similar transactions. In a construction arbitration there may be engineers or architects as well as lawyers serving as arbitrator.”
- *Greater flexibility throughout the procedure:* the International Chamber of Commerce explains that “the arbitration procedure is driven by ‘party autonomy’, that is choices made by the parties themselves about how they want the dispute to be dealt with.” The UNCTAD document affirms that this is useful because, for example, “an arbitration in respect to the quality of the grain delivered in a sales contract does not call for the same procedure as would an arbitration in regard to the construction of a factory.” According to UNCTAD, this is even more important in the case of international arbitration, “where the parties and their advocates may have strikingly different expectations as to the procedure to be followed”.
- *Faster and cheaper:* although recently doubts have been raised as to whether arbitration is in fact less expensive and faster, according to UNCTAD the truth is that “the parties can have a relatively speedy arbitration at lower costs if that is what they want.” As a result of the flexibility of the procedure, according to ICC, “the parties can choose to have a slow and thorough or a

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fast and economical arbitration. For obvious reasons, speed, efficiency and costs are usually considered important. Where appropriate procedures are put in place, arbitration can be faster and less expensive than litigation, especially considering that there is generally no appeal from international arbitral awards”.

- **Final decisions:** local judicial proceedings usually extend way over time because the parties have the possibility of appealing each decision made throughout the proceeding. In this regard, UNCTAD explains that : “arbitration is not subject to appeal on the merits. What the parties lose in legal security, because errors made by the tribunal in the application of the law cannot be corrected, they gain in the reduced amount of time required to reach a final decision and reduced costs.”
- **Neutral procedure:** when an international dispute reaches the courts of the home country of one of the parties in the dispute, the risk is that the other party will feel that the proceeding is not fully equal. The ICC website affirms that “at the very least, the procedure, and possibly also the language of the proceedings, will be less familiar to one side than to the other, thus creating a real or perceived advantage for one side. “ In contrast, in international arbitration “The parties can choose any place of arbitration, any applicable law, and any language for their arbitration. All of these elements can be neutral with respect to the parties. ”
- **Ease of enforcement:** unlike State courts, arbitrators do not have the means to enforce their decisions. There is no international police to make the parties abide by the decision and therefore they need a State judge to order compliance.

❖ Hence, in the case of domestic arbitration, the decisions are more difficult to execute than those of local judges. However, in international arbitration.

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Arbitration is a dispute resolution process where the parties agree that an impartial and independent third party (the arbitrator) will determine the outcome of a dispute based on the issues presented. The arbitrator's decision is final and binding. The disputing parties will be able to choose where the arbitration takes place, who (and how many people) will make up the arbitration panel and what procedure the arbitration will follow. Arbitrations are normally confidential, and this may be attractive to parties wishing to avoid the negative publicity that open court proceedings might risk. When the parties decide to use arbitration, the rules of arbitration will also be agreed. Those rules will include:<sup>125</sup>

- the conduct of the arbitration, including the documents to be shared between the parties,
  - the procedure for the appointment of arbitrator,
  - the procedure for the arbitration itself (including statements of claim and defence)
  - the time limits.
- ❖ Arbitration is a suitable for disputes across different countries because the decisions are internationally binding.
- Choosing an arbitrator - Arbitration is a good option when the dispute arises from technical or operational issues because the parties will be able to choose arbitrators with expertise in that particular field.
  - No legal qualifications are needed to be an arbitrator, so the parties could choose a member of a regulated professional body (for example, chartered accountant or chartered surveyor).

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<sup>125</sup> Commercial dispute resolution: arbitration | nibusinessinfo.co.uk, (2022), <https://www.nibusinessinfo.co.uk> › ...  
› Sales and marketing, p. 1

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#### 4.5.4. Commercial arbitration

Arbitration customarily has been used for the settlement of disputes between members of trade associations and between different exchanges in the securities and commodities trade. Form contracts often contain a standard arbitration clause referring to specific arbitration rules. Numerous arrangements between parties in industry and commerce also provide for the arbitration of controversies arising out of contracts for the sale of manufactured goods, for terms of service of employment, for construction and engineering projects, for financial operations, for agency and distribution arrangements, and for many other undertakings.<sup>126</sup>

❖ The usefulness and significance of arbitration are demonstrated by its increasing use by the business community and the legal profession in many countries of the world. An advantage of arbitration can be the speed with which controversies can be resolved by arbitration, compared with the long delays of ordinary court procedure. The expert knowledge of arbitrators of the customs and usages of a specific trade makes testimony by others and much documentation unnecessary and thereby eliminates some expenses generally associated with court procedures. The privacy of the arbitration procedure also is much valued by parties to the controversy; situations unfavourable to the party's credit or deficiencies in manufactured goods revealed in arbitration proceedings do not become known to outsiders. There are, however, disadvantages in the arbitration process. Because in Anglo-American practice arbitrators generally do not have to provide any reason to accompany an award, it has been difficult to develop guidelines for the conduct of business relations. Moreover, this uncertainty makes the arbitral decision less predictable. Further obstacles to the wider use of commercial arbitration are the divergences in municipal laws and court decisions that result in different interpretations of similar arbitration questions and the fact that awards usually are not published.

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<sup>126</sup> Domke, M., (2022), Commercial arbitration | law - Encyclopedia Britannica <https://www.britannica.com> ›, p. 1

❖ The arbitration process is governed by the rules agreed to in the arbitration agreement; otherwise, the procedure is determined by the arbitrators. The arbitration proceedings must be conducted so as to afford the parties a fair hearing on the basis of equality. The arbitrator generally has the authority to request the parties and third persons to produce documentary evidence and to enforce such a request by issuing subpoenas. If a party fails to appear at a properly convened hearing without showing a legitimate cause, the arbitrator in most instances can proceed and render an award after investigating the matter in dispute.

❖ Under the law and arbitration practice of most countries, an award is valid and binding upon the parties when rendered by a majority of the arbitrators unless the parties expressly request a unanimous decision of the arbitrators. The statutory law of various countries and the rules of agencies administering commercial arbitration contain provisions on the form, certification, notification, and delivery of the award, with which requirements the arbitrator has to comply.

❖ A much-disputed question in commercial arbitration concerns the law to be applied by the arbitrators. Generally, the award must be based upon the law as determined by the parties in their agreement. This failing, the arbitrator must apply the law he considers proper in accordance with the principles of the conflict of laws. In both cases, the arbitrator must take into consideration the terms of the contract and the usage of the specific trade. If a compromise is reached by the parties during any arbitration proceeding, that compromise may be recorded as an award by the arbitrator.

❖ Appeals to the courts from the award cannot be excluded by agreement of the parties, since the fairness of the arbitration process as a quasi-judicial procedure has to be maintained. However, any court control is confined to specific matters, usually enumerated in the arbitration statutes, such as misconduct of the arbitrator in denying a party the full presentation of its claim or refusing a postponement of the hearing for good cause. A review of the award by a court generally does not address the arbitrator's decisions as to facts or his application of the law. The competence of the courts usually is restricted so as not to make the arbitration process the beginning of litigation instead

of its end. Recognition of an award and its enforcement will be denied when it appears to be contrary to public policy. An arbitration award has the authority of a court decision and may be enforced by summary court action according to the procedural law of the country in which execution is being sought.

❖ International commercial arbitration between traders of different countries has long been recognized by the business community and the legal profession as a suitable means of settling trade controversies out of court. The procedure in international commercial arbitration is basically the same as in domestic arbitration. In the mid-1960s, in order to establish more uniformity in procedure and to make access to arbitration facilities more easily available, the United Nations economic commissions published new rules applying to international arbitration for Europe and Asia.

- The development of international commercial arbitration is furthered by uniform arbitration legislation prepared by the UN Conference on International Commercial Arbitration in 1958 and by the Council of Europe and the Inter-American Juridical Committee of the Organization of American States. One particularly difficult problem of international commercial arbitration is the enforcement of awards in a country other than the one in which they were rendered. Statutory municipal laws usually do not contain provisions for the enforcement of foreign awards, and parties are faced with uncertainty about the law and practice of enforcement procedure in a country other than their own.
- International agreements facilitate the enforcement of foreign awards to the extent that no further action is necessary in the country in which the award was rendered; the opposing debtor must establish that the award has been set aside or that its effects have been suspended by a competent authority, which thus shifts the burden of proof of the nonbinding character of the award to the losing party. Further development of international commercial arbitration has been encouraged by the UN Commission on International Trade Law, which

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aims at promoting the harmonization and unification of laws in the field of international commercial arbitration.

Commercial arrangements can break down even at the best of times. The risk of disputes arising typically increases at times of political and economic change and uncertainty and, where business is conducted across borders, this can add a further layer of complexity:<sup>127</sup>

❖ Arbitration is an alternative to court litigation as a formal means of resolving disputes. The parties agree to submit the dispute in question to arbitration – there is usually an arbitration agreement/clause to this effect included in the contract itself for this purpose – and then an independent arbitrator or panel of arbitrators makes an award, acting in a judicial fashion, which is final and binding on the parties. Parties are free to choose, in their agreement/clause:

- the number of arbitrators;
- which rules will apply (for example, those of a particular arbitral institution);
- where the arbitration will take place (known as the “seat”);
- the governing law of the contract and the arbitration agreement/clause itself;
- the language to be used in the proceedings.

❖ The seat of the arbitration is a key consideration, because this impacts on issues such as: the extent to which arbitral awards can be challenged; the enforceability of awards; confidentiality; and how “friendly”, effective and interventionist the national courts will be in supervising and supporting the arbitration process.

❖ It is essential to give careful thought to dispute resolution clauses from the outset. All too often, contracting parties are keen to push forward with their commercial arrangements and they fail to plan effectively for how disputes will be managed if things go wrong. Careful drafting can lead to significant time and costs savings and make disputes easier to resolve in the long run.

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<sup>127</sup> International Trade: Resolving commercial disputes through arbitration, (2021), <https://www.walkermorris.co.uk> ›, p. 1 - 2

❖ Parties should consider whether tiered dispute resolution clauses may be suitable for the commercial relationship or transaction in question, i.e. clauses that mandate an escalating procedure designed to encourage an open and frank exchange to explore whether a commercial solution is possible and, if not, whether resolution can be achieved through mediation or another form of alternative dispute resolution (ADR), before proceeding to arbitration (or court litigation).

❖ In complex contracts, it may be appropriate to apply different dispute resolution mechanisms to different aspects of the contract. If arbitration is chosen, and it is already clear what types of dispute are likely to arise, it may be possible for the parties to agree in the contract on a suitable procedure and timescale for the arbitration, including the use of fast-track rules where appropriate. Where the relevant law allows, parties may wish to consider excluding certain challenges to an arbitral award in the courts. While there is an implied duty of confidentiality in relation to arbitration in England and Wales, parties should consider agreeing express provisions to maximise protection.

❖ In a recent survey:

- 90% of respondents chose arbitration as their preferred method of resolving cross-border disputes, either standalone or in conjunction with ADR. Parties often identify the following as the most valuable characteristics of arbitration: enforceability of awards; avoiding specific legal systems/national courts; flexibility; ability of parties to select arbitrators; and confidentiality and privacy. The inherent flexibility and adaptability of the arbitration process gives the parties the freedom to shape how their disputes will be resolved, and the different arbitral institutions offer parties a wide range of innovative options to tailor the process to suit their needs, including faster and cheaper routes where appropriate. A new set of Digital Dispute Resolution Rules was recently published, offering a bespoke, streamlined arbitration procedure aimed at facilitating the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technologies such as cryptoassets and smart contracts.

- 54% of respondents to the survey selected London as one of their most preferred arbitration seats, together with Singapore, ahead of Hong Kong at 50% and Paris at 35%. London is a very well-established and sophisticated arbitration centre with world-class facilities and a wealth of high-quality and experienced professionals. It is also home to the London Court of International Arbitration (LCIA), which is consistently named as one of the top choices of arbitral institution. In 2020 the LCIA received the highest number of new cases to date (444) and of those 92% (407) were administered according to the LCIA Rules.

## **CONCLUSION**

Arbitration is a purely consensual method of resolving disputes. In the present circumstances, the parties may choose to drop the civil suit to enter into arbitration which may resolve disputes more quickly or more easily adopt measures such as social distancing.

A key advantage of arbitration is the ability to choose institutional rules or ad hoc rules that are suitable for effective dispute resolution. Finding expert arbitration advice is crucial in determining which set of institutional rules or ad hoc rules should be adopted. Arbitrations allow parties to calibrate the right balance of procedural protection to efficiency.

The parties may also select arbitrators who are most suitable for resolving their dispute. An arbitrator with relevant industry experience and knowledge can

significantly speed up dispute resolution. This is especially true for industries that involve a high degree of technical knowledge.

Arbitration can be done easily and virtually. Procedural hearings and case conferences are already usually done by teleconferencing in arbitration.

Arbitral tribunals and institutions are also increasingly accustomed to videoconferencing. For example, many institutional rules provide that evidence may or must be presented by a witness statement rather than orally, and it is generally open for the tribunal to make these decisions rather than just follow the rules of evidence applicable in court proceedings. If the evidence is to be presented orally, it is also more often presented remotely in arbitration, via video or telephone conference. Therefore, the infrastructure may already be in place.

Arbitration will be an even more effective option given the potential backlogs the courts will face when reopened. With the help of experienced arbitrators and arbitrators, the process is generally more efficient than litigation - and indeed a more flexible and readily available option that may be crucial in the current circumstances.

Arbitration does not have to exclude other forms of alternative dispute resolution. Arbitrators may encourage conciliation where appropriate and eventually reach agreement if the parties so request. Under some arbitration rules, the tribunal itself may even conduct mediation, conciliation or other proceedings as appropriate.

Unlike courts, arbitrations are generally private, allowing for confidentiality (including sensitive information) that may be important in the context of disputes arising in the current climate.

Arbitration can have significant benefits for financial institutions. This is especially true for clients, partners and service providers in an international context. An arbitral award is better enforceable than a court decision. Arbitration in financial disputes provides a higher degree of confidentiality. Arbitration may be the preferred choice for financial institutions if the client or business partner is unwilling to agree to litigation. Arbitration can be invoked as a neutral alternative to agreeing with the legal

systems of foreign courts. Not only can the risk of a biased court be avoided, but also proceedings with a very long duration. Even in legal systems with a judicial system that is known to be effective, the possibility of a few appeals makes arbitration more attractive with its very limited possibilities for appealing the judgment.

Other advantages of arbitration are that arbitrators with specific expertise and experience in banking law and / or financial litigation can be selected and that the proceedings can be conducted in English.

The International arbitration is a private and effective method to resolve disputes. And it is an alternative dispute resolution method (ADR), in general, voluntarily chosen by the parties. Nowadays, it tends to be the preferred means for settling disputes within the international business community.

Confidentiality and trust between adversaries based this a special system to settle the disputes in accordance with the privacy of international commercial and its requirements.

International commercial arbitration is a means of resolving disputes arising under international commercial contracts. It is used as an alternative to litigation and is controlled primarily by the terms previously agreed upon by the contracting parties, rather than by national legislation or procedural rules. Most contracts contain a dispute resolution clause specifying that any disputes arising under the contract will be handled through arbitration rather than litigation. The parties can specify the forum, procedural rules, and governing law at the time of the contract.

Arbitration can be either “institutional” or “ ad hoc .” The terms of the contract will dictate the type of arbitration. If the parties have agreed to have an arbitral institution administer the dispute, it is an institutional arbitration. If the parties have set up their own rules for arbitration, it is an ad hoc arbitration. Ad hoc arbitrations are conducted independently by the parties, who are responsible for deciding on the forum, the number of arbitrators, the procedure that will be followed, and all other aspects of administering the arbitration.

The types of law that are applied in arbitration include international treaties and national laws, both procedural and substantive, as well as the procedural rules of the relevant arbitral institution. Previous arbitral awards carry persuasive authority, but are not binding. Scholarly commentary, or “doctrine,” may also be applied.

Arbitration rules are generally available on the relevant arbitral institution's web site. Individual institutions' rules may also be available in print, either from the institution itself or as part of a larger work discussing the particular institution and its process. The rules of some of the key international arbitral institutions are also available through subscription databases such as WestlawNext and Lexis Advance.

Unlike litigation proceedings, commercial arbitration proceedings are usually confidential. Decisions, awards, and other documents relating to arbitration proceedings are generally not published, and there is no centralized database or publication for researching arbitration proceedings.

Arbitration is viewed as an outstanding type of dispute resolution process. The law necessitates that consent to mediate must be recorded as a hard copy and marked by the parties who have the legitimate ability to discard the contested right. Without such an understanding recorded in the agreement, a party can't refer the matter to arbitration. The Arbitration Law expresses that the arbitral court has the force, on the use of any party or an outsider to permit a third party to intercede or be participated in the arbitration, if it is involved with the intervention understanding.

In the end note, the most significant organizations overseeing the arbitration particularly in the region of universal commercial disputes should keep the procedures and methodology as straightforward and less perplexing as conceivable in comparison with litigation with the goal that the engaging quality arbitration cases would not be lost and endeavor to accomplish an increasingly uniform, universally even arrangement of international arbitration to guarantee simplicity of enforcement of arbitral awards.

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