

ARBITRATION

A COMPREHENSIVE GUIDE



Arbitration – A Few Definitions

- ▶ A form of **Alternative Dispute Resolution**
- ▶ A non-judicial process wherein a dispute is submitted to one or more arbitrators whose final decision is legally binding
- ▶ A **cost-effective and swift** alternative to a lawsuit
- ▶ A way to deal with disputes without having to go to court
- ▶ A private process where two or more parties present their respective arguments and agree to let one or several individuals decide who's right and who's wrong
- ▶ The process of letting **a disinterested third-party** settle a dispute

(American Bar Association, 2018; Atlas et al., 2000, p. 9; CIArb, 2018; WIPO, 2018)



Key Features (Part 1)

▶ Consensual

- ▶ Arbitration can only take place if all disputing parties have agreed to let an arbitrator settle their dispute
- ▶ An ongoing dispute can be submitted to an arbitrator, as long as all parties have agreed to do so
- ▶ Unilateral withdrawal of the claim is not possible - all parties should agree to withdraw it

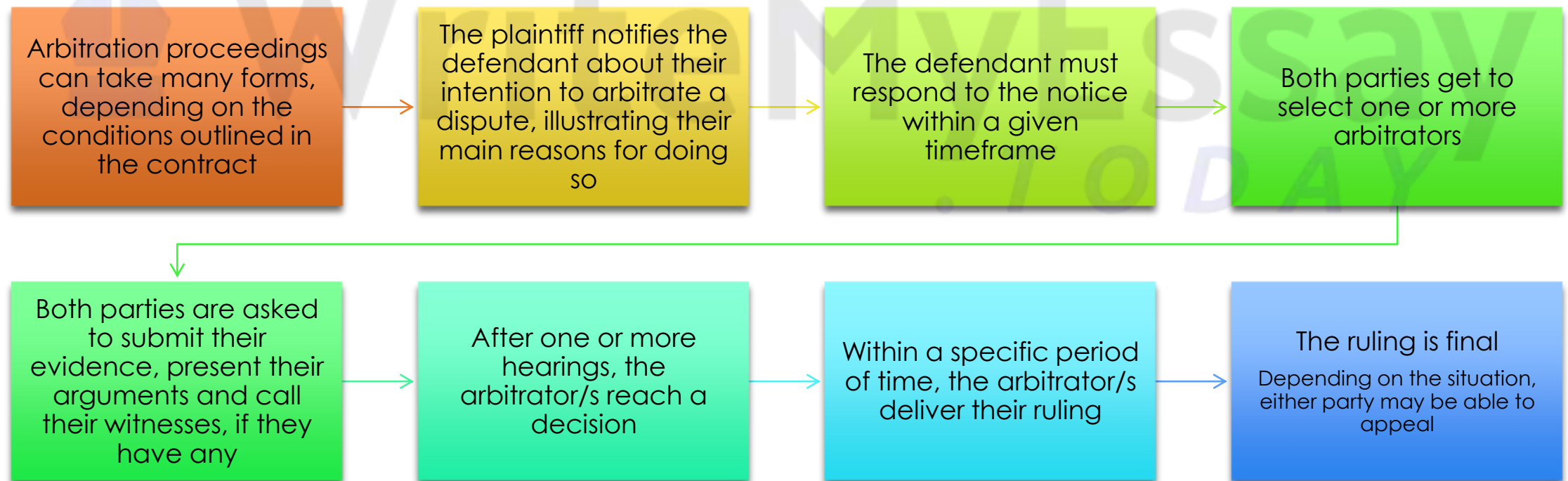
▶ Neutral

- ▶ Very important, especially in international arbitration proceedings
- ▶ If the arbitrator is found to be biased or partial, their arbitral award may be challenged
- ▶ Neutrality is an ethical duty according to the International Bar Association

Key Features (Part 2)

- ▶ Enforceable
 - ▶ The arbitrator's decision is final and legally binding
 - ▶ Since all disputing parties must agree to carry out the arbitrator's decision, arbitral awards are relatively easy to enforce
- ▶ Confidential
 - ▶ Disputing parties can keep the dispute as well as any disclosures made during the proceeding confidential
 - ▶ Only those who are directly involved in the dispute can attend the hearings
- ▶ Flexible
 - ▶ Parties can nominate an arbitrator
 - ▶ The whole process is more flexible and less time-consuming than a court proceeding

How Does It Work?



Arbitration vs. Common Alternatives

Arbitration

- More streamlined process
- Inexpensive
- Quick
- The plaintiff and the defendant have some input into who will be their arbitrator
- The plaintiff and the defendant can choose an arbitrator who is an expert in a specific field
- Parties can keep their details private
- In most cases, results are not subject to appeal

Mediation

- More flexible
- A mediator helps the parties reach a solution, without having to settle the dispute
- The parties have full control over the entire process
- Mediator should be impartial
- The final decision can be incorporated into a contract
- Suitable when parties are willing to cooperate and want to preserve their relationship

Conciliation

- An intermediary listens to both parties' claims and offers possible solutions
- It may involve a great deal of negotiation
- The process has no legal standing
- The conciliator does not have the power to demand evidence or interview witnesses
- The final decision is not recorded

Litigation

- Lengthy
- More expensive
- Neither the plaintiff nor the defendant get to choose the judge
- The judge may not be an expert in the field involved in the lawsuit
- Public records
- Convenient if minor claims are handled by small claims courts
- Results are subject to appeal

When It Is Used

- ▶ Arbitration is particularly suitable for any dispute that demands an **evaluative answer**
 - ▶ **Non-binding arbitration** gives an award that can be used as a basis for further negotiation
 - ▶ **Binding arbitration** gives a legally binding result
- ▶ When the parties need to settle a dispute quickly
- ▶ When the parties want to keep the dispute confidential
- ▶ When the parties have signed a contract with an **arbitration clause** (i.e., a clause that requires them to solve any future disputes via arbitration)
- ▶ **Employment and commercial disputes**
- ▶ **Consumer matters** (consumers agree to resolve their disputes via arbitration when performing a wide range of everyday transactions and activities, e.g., travel, shopping, etc.)
- ▶ When arbitration is compulsory (in many states, court-annexed arbitration has become the norm when dealing with certain types of civil cases)
- ▶ **Investment disputes**

Main Issues

- ▶ Confusion surrounding the issue of “**partiality**”
 - ▶ It is difficult to prove that an arbitrator is biased
 - ▶ Which nation’s law should be used to determine an arbitrator’s lack of neutrality in domestic and international arbitration proceedings?
 - ▶ Different nations have different laws and dominant perspectives (e.g., in the United States, enforceability is crucial, whereas in the United Kingdom, neutrality is more important (Chehata, 2016)
- ▶ Confusion surrounding the issue of “**confidentiality**”
 - ▶ Lack of a consistent approach to ensure confidentiality
 - ▶ According to French law, only arbitral deliberations must be kept confidential
 - ▶ According to English law, confidentiality is not mandatory, even though case law has given rise to an implied duty of confidentiality (Smellie, 2013)

Rules

- ▶ **National and international arbitral institutions** provide arbitration rules to which the parties must agree before initiating a proceeding
- ▶ Best-known rules are developed by key/influential institutions
 - ▶ International Chamber of Commerce (ICC)
 - ▶ United Nations Commission on International Trade Law
 - ▶ London Court of International Arbitration
 - ▶ International Centre for Dispute Resolution of the American Arbitration Association
 - ▶ World Bank
- ▶ **New York Convention (1959)**
 - ▶ Ratified by most UN members
 - ▶ Made arbitral awards enforceable

Arbitration as a Process (Part 1)



1

The plaintiff/claimant submits a request for arbitration to an arbitral institution (or an arbitrator) and pays a filing fee

2

The respondent pays their part of the fee (if required)

3

The arbitral institution serves the plaintiff/respondent the request

4

Parties agree on an arbitrator (each party selects an arbitrator of their choice, or the arbitral institution/tribunal selects one; the number of arbitrators is usually specified in the contract)

Arbitration as a Process (Part 2)



- 5** Arrangements are made (when and where the arbitration will take place)
- 6** Preliminary hearing and submission of claims – the claimant submits their claim, and the respondent submits their counter claim
- 7** The arbitrator/s collect all documents and summon all parties (the claimant, respondent, witnesses, experts, etc.)
Expert reports are prepared, if needed
- 8** The arbitrator/s render an award

Arbitral Awards

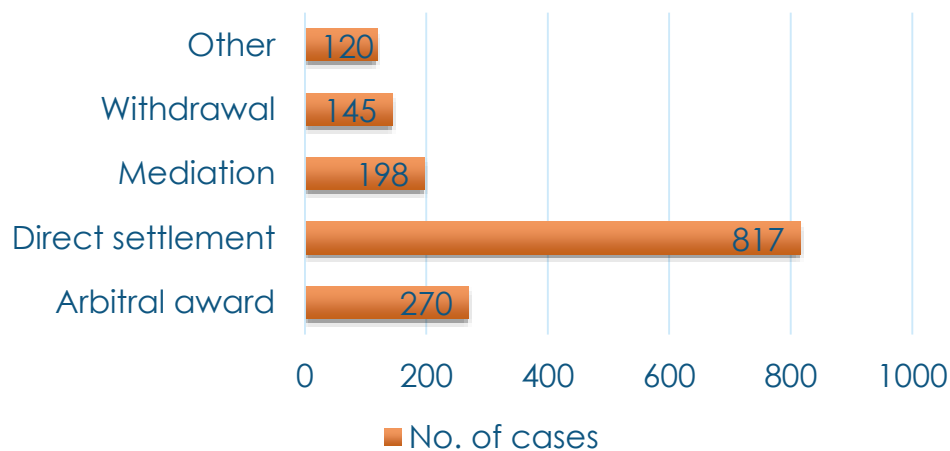
- ▶ The arbitrator orders the payment of a sum of money
- ▶ The arbitrator makes a declaration related to any of the matters discussed in the proceeding
- ▶ The arbitrator orders either party to either do something or refrain from doing something
- ▶ The arbitrator orders the plaintiff to fulfill a contractual obligation
- ▶ The arbitrator requests that a deed or document be modified or canceled



Arbitration in the United States

- ▶ Number of arbitration cases on the rise
- ▶ Turnaround time decreased between 2016 and 2018

Outcome of arbitration cases (2018)



Source: Finra (2018)

Year	Number of case filings	Turnaround time
2016	1,487	14.9 months
2017	1,365	14.3 months
2018	1,908	14.1 months

Source: Finra (2018)

- ▶ Main controversies
- ▶ Customer arbitrations: breach of fiduciary duty, suitability, misrepresentation, negligence
- ▶ Intra-industry disputes: breach of contract, promissory notes, defamation, compensation, wrongful termination, suitability, misrepresentation

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