



# *Arbitration and Forensic Accounting*

## **BACKGROUND**

This practical perspective is intended for members of the Forensic & Expert Witness Community new to the process of arbitration. Its aim is to provide an insight into this dispute resolution process and the role of the forensic accountant as expert witness and/or adviser. This practical perspective is not advice for acting as arbitrator and should not be used as such.

It reflects an understanding of English law, based on research undertaken. This is not legal advice and should not be relied upon as legal advice, which, if required, should be obtained from a suitably qualified legal adviser.

## **WHAT IS ARBITRATION?**

Arbitration is a private, confidential and binding civil dispute resolution method conducted as agreed by the parties under the available set of rules of an appointing authority – be it an arbitral institution (including, for example, the International Centre for the Settlement of Investment Disputes, the London Court of International Arbitration and the International Chamber of Commerce) or professional body (including, for example, the Chartered Institute of Arbitrators), or the bespoke arbitration arrangements the parties themselves have agreed. It can be applied in national as well as international disputes.

Where the ‘seat’ of the arbitration is in England, Wales or Northern Ireland, the arbitration is subject to and supported by the Arbitration Act 1996 (AA96). Although the position in other jurisdictions may vary, the comments which follow are set in the context of AA96 as this is considered a helpful basis for explaining this method of dispute resolution.

The scope of arbitration extends to cover issues of law and fact. Arbitration also offers a range of remedies similar to those available from a court and not limited to financial compensation (for example, interim relief).

Unlike court-based litigation, the parties can choose their judge (arbitrator) or decide the composition of the panel of arbitrators, and how their disputes will be resolved in a neutral forum. For the purposes of this helpsheet and consistent with AA96 a sole arbitrator or panel of arbitrators are also both referred to as ‘the tribunal’.

## **PRINCIPLES AND DUTIES**

AA96 provides a statutorily controlled and court supported environment in which arbitration (seated in England, Wales or Northern Ireland) operates. This covers the powers of the tribunal and how these may be varied and also the powers of the court in support of an arbitration.

The following extracts from AA96 set out the fundamental principles and the mandatory general duties of the tribunal and the parties which underpin the court's regulation of the arbitral process.

The requirement for the application of the rules of natural justice which includes the doctrine of due process can be found in Section 33(1)(a).

## **HOW DOES IT OPERATE?**

The parties agree in writing (in a pre-existing agreement or after the dispute has arisen) that their dispute is to be resolved by arbitration. That is, they agree to put their dispute to a neutral third party, the tribunal, for a binding and legally enforceable decision.

The tribunal is appointed, either by agreement between the parties or by the method laid down in the rules selected to govern the arbitration. The appointment is personal. In the absence of agreement, the parties may authorise the head of an appointing institution or professional body to appoint an arbitrator on their behalf.

The arbitrator, once appointed, is empowered by the parties (subject to the governing rules) to decide procedural and evidential matters. Issues of jurisdiction, possible bifurcation of liability and quantum assessment and other procedural issues may arise from the outset and these will need to be dealt with. The requirement for full pleadings, as in statements of claim and defence, expert or factual evidence and the need for an oral hearing are matters to be decided and may or may not be required.

## **THE DECISION**

The arbitrator produces a judicial decision based on the arguments and evidence presented, and the applicable law or other agreed basis for determination.

Ordinarily the decision will be issued in the form of a written award with reasons, and is legally enforceable "...in the same manner as a judgement or order of the court to the same effect..." (Section 66 AA96).

The tribunal may make provisional awards if the parties agree. It may also make more than one award at different times in relation to different aspects of the dispute.

## **PROCEDURAL RULES**

Procedural rules applied to the arbitration can be those chosen by the parties or those supplied in default of choice by AA96.

The Civil Procedure Rules (CPR) issued by the Ministry of Justice (including Section 35, which relates to expert witnesses in court proceedings) do not apply to arbitrations (unless the parties agree that they should).

Furthermore, unless the parties agree otherwise, amongst other things the tribunal has power:

- to decide which documents should be disclosed;

- to decide whether or not expert evidence may be called by either party and what the scope of such evidence should be;
- to decide whether any expert evidence should be presented in writing or orally (or both);
- to decide whether an oral hearing is required or whether to decide any issue on a documents-only basis and whether to adopt a simplified approach to case presentation without court-like pleadings, that is, written statements of claim and defence; and
- to decide to what extent it ‘... should take the initiative in ascertaining the facts and the law...’ (Section 34 (2)(h) AA96).

Under Section 37 of AA96, unless otherwise agreed by the parties, amongst other things, the tribunal is entitled to appoint its own expert(s) whose contribution will be available to them for examination and comment. The costs of the tribunal’s expert would be part of the costs of the arbitration.

## OTHER CHARACTERISTICS

Other characteristics of arbitration include:

- An arbitrator need not be an expert in the technical aspects of the dispute.
- Unless otherwise agreed, the tribunal has general powers, for example, to order security for costs and to require that witnesses are examined on oath.
- Unless otherwise agreed, the tribunal has powers of sanction against an uncooperative party.
- Unless otherwise agreed, where appropriate court (High Court or county court) assistance can be obtained to enforce tribunal orders.
- The court can be asked to assist in securing the attendance of witnesses.
- The tribunal may award interest (and can award compound interest) where appropriate and may award the costs of the arbitration including the parties’ own costs as well as the tribunal’s costs.
- General immunity of an arbitrator except for acts or omissions shown to have been in bad faith.
- The process is confidential, unlike civil court proceedings.
- There is more procedural flexibility in the arbitral process than in court proceedings.

## ARBITRATION IS NOT EXPERT DETERMINATION

Arbitration is not expert determination. Indeed, whilst expert determination may appear similar, it is critically different.

The scope of arbitration will cover the dispute between two parties, for example, arising from a transaction or contract, where there may be various legal and factual issues as claimed and defended. Expert determination is ordinarily used to provide a final and binding answer (usually save for manifest error or fraud) by way of independent determination by a technical expert to a defined technical question on which answer the parties themselves are unable to agree.

Because of the judicial nature of the arbitration process, an arbitrator is not necessarily chosen for his/ her expertise in the particular technical aspects of the issue(s) in dispute. However, such expertise may be seen as an advantage in dealing with a matter which involves such relevant

technical issues. In expert determination, the determiner is chosen particularly for his/ her expertise in the relevant specialist area. The determiner is tasked with making a decision on the issues based on this expertise and his/ her investigations. Unlike arbitration, the determiner need not share his evidence with the parties; furthermore, although the determiner is required to act fairly, due process is not a requirement of an expert determination unless agreed by the parties that it is. The expert determination process is typically set out in the agreement between the parties, as supplemented/modified by the expert's terms of engagement.

It should be noted, however, that an arbitration appointment can be tailored to resemble an expert determination.

Expert determination is based on a contractual agreement between the parties but unlike arbitration is without statutory support and control. For example, under AA96, subject to the parties' agreement, the tribunal can direct that witnesses are examined under oath/affirmation – introducing the prospect of court penalties for perjury in the event of false testimony – has powers of sanction against an uncooperative party, and can call upon the court's assistance to enforce procedural orders.

The expert determination decision, which is ordinarily given without reasons, is not legally enforceable except as a contractual provision. By contrast an arbitration award may be made legally enforceable.

"...in the same manner as a judgement or order of the court to the same effect..." (Section 66 AA96)

In addition, unlike the arbitrator, the determiner is not immune from actions for negligence.

## **THE ROLE OF THE FORENSIC ACCOUNTANT**

The need for forensic accounting input in a matter subject to arbitration will, of course, depend on the issues in dispute. In the context of arbitrations under AA96 the types of expert role may be identified as either:

- party appointed expert adviser; or
- party appointed expert adviser and/or expert witness; or
- jointly appointed expert witness; or
- tribunal appointed expert witness.
- 

As expert witness the accountant can expect to be examined by the parties and the arbitrator in writing and/or orally at a hearing.

Under Section 36 of AA96: 'Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.'

The terms of reference for appointment as expert adviser and expert witness in other jurisdictions not under AA96 will be subject to any applicable arbitration procedures and local laws and practice. It is suggested that for appointments in those jurisdictions, in principle similar considerations to those mentioned below apply.

## **PARTY APPOINTED EXPERT ADVISER**

If no accounting expert witnesses are to be called in an arbitration matter then, unless engaged as party representative, the engagement by a party of a forensic accountant will be in a background advisory role.

The scope and obligations of the engagement will be those of the private consultancy arrangement between the party and the accountant.

## **EXPERT WITNESS ROLE**

The CPR obligations on expert witnesses in the civil legal system of England and Wales which are dominated by the overriding duty to the court, do not automatically apply in arbitration. However, the tribunal may direct what the expected standard of the expert contribution should be and whether evidence will be given under oath.

In any event, particularly as arbitration exists within a statutorily controlled legal environment, in evaluating the expert contribution the tribunal is likely to consider, amongst other things, its independence, objectivity and impartiality when assessing its effectiveness. Accordingly, whether the engagement in an arbitration matter extends from adviser to that of party-appointed expert witness, or as either jointly or tribunal-appointed expert witness, the accountant would be advised:

- to ascertain the tribunal's directions as to the expert evidence required;
- to take account of these directions when giving evidence, including whether evidence will be given under oath;
- to take account of the factors the tribunal might consider when evaluating this type of evidence, such as its independence and impartiality – a general framework for the quality of expert witness evidence is represented by the principles of the CPR. For present purposes particular reference is made to Practice Direction Part 35 clauses 1 and 2 ([www.justice.gov.uk](http://www.justice.gov.uk)).
- to take account of the duty of the parties under Section 40 AA96;
- to take account of any expert witness code of practice of a professional body or institute to which the expert may belong, which may extend to cover arbitration; and
- to clarify and agree with those instructing, how the expert witness role will be performed.

## **PARTY REPRESENTATIVE**

The appointment as party representative in an advocacy type role would be a private matter between the party and the appointed accountant. The intended approach should be discussed and terms of reference agreed. Members would be advised to carefully consider any 'advocacy' requirement based on their skills and expertise in this regard, and seek to construct acceptable terms of engagement accordingly. For reasons of lack of impartiality and independence it seems improbable that the advocacy role occupied would be extended to that of expert witness.

## ETHICAL ADVICE

If you are ever in doubt as to whether or not your conduct is ethical, you should step back from the situation and analyse it. It often helps if you put your thoughts down on paper or take a second opinion. Section 100 of the Code of Ethics (paragraphs 100.16 – 100.20) includes a framework for ethical conflict resolution. This outlines a series of steps that can help you not only to identify the problem but also to resolve the ethical conflict. In resolving such ethical conflicts it is important that you make a file note to explain the rationale for your position. This will help if your conduct is later challenged.

ICAEW members, affiliates, ICAEW students and staff in eligible firms with member firm access can discuss their specific situation confidentially with the Ethics Advisory Service on +44 (0)1908 248 250, via webchat or via e-mail [ethics@icaew.com](mailto:ethics@icaew.com).

---

## ACKNOWLEDGEMENTS

The Forensic & Expert Witness Community gratefully acknowledges Laura Dymott and Nishad Morjaria of FRP Advisory in the preparation of this practical perspective.

ICAEW Forensic & Expert Witness Community  
E [communities@icaew.com](mailto:communities@icaew.com)  
[icaew.com/forensic](http://icaew.com/forensic)

This practical perspective is produced for guidance only. If in any doubt, members are always advised to seek expert advice.

© ICAEW 2021 All rights reserved.

ICAEW cannot accept responsibility for any person acting or refraining to act as a result of any material contained in this practical perspective.

This practical perspective is designed to alert members to an important issue of general application. It is not intended to be a definitive statement covering all aspects but is a brief comment on a specific point.