COLLAS CRILL

A guide to Guernsey arbitration

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What is arbitration?

Arbitration is a form of alternative dispute resolution (**ADR**) which enables the parties in dispute to appoint an arbitrator (or a panel of arbitrators) to make a **binding decision**.

The grounds of challenge to an arbitration award are limited, as are the ability of the courts to intervene following an arbitrator's decision.

As a non-court alternative method of resolving disputes, arbitration is a substitute for traditional litigation. Parties instead resolve their disputes entirely free from the civil justice system. The binding nature of arbitral decisions distinguishes it from other forms of ADR such as mediation, where decisions are non-binding and enforcement is not automatic.

The perceived advantages for parties electing to arbitrate generally include:

1. a faster resolution when compared to traditional litigation, where parties are generally free to set their own timetable;
2. reduced costs;
3. simplified rules of evidence and procedure which are largely determined, by agreement, by the parties themselves; and
4. privacy, given arbitral awards are typically confidential and not open to the public.

Guernsey's legal framework

Guernsey law originates from the *Coutume* (or customary law) of Normandy. After the English lost mainland Normandy to the French in the 13th Century, Guernsey was retained, and successive English monarchs issued Royal Charters confirming the rights of Guernsey to be governed by its own laws. Guernsey has since go on to develop its own unique legislative framework. Over time, that framework has led to Guernsey establishing itself as a leading offshore financial centre, offering robust, well-regulated financial services products.

Owing to its size, Guernsey's volume of jurisprudence is comparatively smaller than one would find in other jurisdictions, such as England, which would otherwise help inform legal practitioners as to the determination and outcome of similar matters. Therefore, in resolving modern disputes Guernsey has needed to depart from its Norman customary roots and has instead developed to be much more closely aligned to the laws and procedures of other common law jurisdictions, particularly England and Wales, in a significant and increasing number of areas.

One example of this is Guernsey's arbitration framework.

Guernsey's arbitration framework

Guernsey's arbitral framework is a *tour de force* as a result of the bringing into force of the Arbitration (Guernsey) Law, 2016 (the **Law**).

The Law repeals The Arbitration (Guernsey) Law, 1982 (**1982 Law**), which was comparatively far less flexible, restricting the powers of the arbitral tribunal and affording greater powers to the Royal Court for judicial intervention. That Part of the 1982 Law relating to the enforcement of certain foreign arbitration awards has been retained however, and remains in full force and effect.

The Law bodies itself on two best practice models, being:

1. The Arbitration Act, 1996 (a statute which regulates arbitration proceedings within the jurisdiction of England & Wales and Northern Ireland); and
2. The United Nations Commission on International Trade Law (UNCITRAL)Model Law on International Commercial Arbitration (the **Model Law**)

The Law also takes into account and codifies developments in English jurisprudence, such as the general duties for the arbitral tribunal to treat the parties fairly and impartially and to adopt procedures suitable to the circumstances of the particular case[1].

The augmentation of the Model Law helps clarify certain issues, such as (i) the power for the arbitration tribunal to make interim measures; and (ii) decisions as to when arbitration proceedings can be terminated.[2]

The incorporation of the Model Law also increases the appeal of Guernsey as a jurisdiction for conducting international commercial arbitration. It provides an established model that will be reassuringly familiar to those from other civil law jurisdictions where the Model Law is already adopted[3]. This is particularly relevant given Guernsey's status as an international finance centre where disputes are likely to arise between parties from all parts of the world.

The combination of the 1996 Act, Model Law and latest jurisprudence ensures the Law embodies the leading standards relating to the international laws and practices of arbitration.

When are parties required to arbitrate?

Parties that have entered into an arbitration agreement/clause can apply for a stay of proceedings to the court in which the proceedings have been brought, insofar as they relate to the dispute[4]. Interestingly, this means that this section of the Law applies even if the seat of the arbitration is situate outside of Guernsey, or the seat has not yet been designated.

The court (wherever that may be) must grant the stay unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed[5]. The arbitration will be confidential and hence conducted in private, unless the agreement stipulates otherwise.

There are no known legal impediments to arbitrating any type of dispute in Guernsey, except for disputes where the relief sought is only available by order of the Royal Court.

Commencement (Part I of the Law)

The parties are free to agree when arbitration proceedings are to be regarded as having been commenced under the Law and for the purposes of any prescription period[6].

Failing agreement, arbitration proceedings will commence in respect of a matter when one party serves written notice on the other requiring that party to either[7]:

1. submit the dispute to the arbitrator designated in the arbitration agreement; or
2. appoint an arbitrator (or to agree to the appointment of an arbitrator) in respect of that dispute.

Arbitration proceedings will also be deemed as commenced if one party serves a notice on the designated arbitrator (or arbitral institution) pursuant to the terms of the arbitration agreement, requesting their appointment to preside over the dispute.

Composition and Appointment of Tribunal (Part II of the Law)

The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman. Unless otherwise agreed, a tribunal consisting of an even number of arbitrators requires the appointment of an additional arbitrator to act as chairman. If there is no agreement between the parties, the tribunal shall consist of one arbitrator[8].

The procedure for appointing the arbitrator(s) and chairman (if necessary) is a flexible one, which the parties are free to agree amongst themselves. The Law provides a statutory procedure for appointing the arbitrator(s) in default of agreement[9].

Should a chairman be appointed or required, the parties are free to agree what the functions of the chairman will comprise in relation to the making of decisions, orders and awards[10].

For decision-making, the orders and awards of the tribunal shall be made by a simple majority of the arbitrators. If a chairman has been appointed, the view of the chairman will prevail (unless agreed otherwise) if the tribunal is neither unanimous nor a majority decision has been reached.[11]

Proceedings in Arbitration (Part III of the Law)

Conduct of the parties

Once the arbitration proceedings begin, the standard to which the parties are expected to conduct themselves throughout has been codified by Law which imposes general duties.

For the disputing parties, their duty is to do all things necessary for the proper and expeditious conduct of the arbitration proceedings. This requires the parties (without limitation) to[12]:

1. comply without delay with any determination as to procedural or evidential matters, or with any order or directions of the tribunal; and
2. where appropriate, take without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law.

For the tribunal, its duty is to[13]:

1. act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting that party's case and dealing with that of the opponent; and
2. adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters to be determined.

Evidential and procedural matters

The Law confers the tribunal with wide discretion to decide procedural and evidential matters, allowing potentially quicker (and less onerous) solutions when compared to traditional litigation. Examples of such matters include (without limitation) [14]:

1. when and where any part of the proceedings is to be held;
2. the language(s) to be used in the proceedings and whether translations of any relevant documents are to be supplied;
3. whether any, and if so what form of, written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;
4. whether any, and if so which, documents or classes of documents should be disclosed between and produced by the parties and at what stage;
5. whether any, and if so what, questions should be put to and answered by the respective parties and when and in what form this should be done;
6. whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;
7. whether, and to what extent, the tribunal should itself take the initiative in ascertaining the facts and the law; and
8. whether, and to what extent, there should be oral or written evidence or submissions.

Interim measures and case management powers

Parties will need to be mindful of the tribunal's power to award interim measures, such as ordering a claimant to provide security for costs or restricting the manner in which a party may deal with its assets during the course of the proceedings[15].

The tribunal is also empowered to make provisional awards including, for instance, a provisional payment of money or the disposition of property as between the parties[16].

The tribunal can also make an award dismissing the claim if satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing the claim and that the delay gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim. It is also possible for the tribunal to dismiss a claimant's claim in similar circumstances, albeit the tribunal is satisfied that the claimant's delay has caused (or will cause) serious prejudice to the respondent. [17]

Unless otherwise agreed by the parties, the court has the power to make orders in relation to certain arbitral matters as if those matters were subject to ordinary legal proceedings. These matters include (without limitation)[18]:

1. the taking of the evidence of the witness(es);
2. the preservation of evidence;
3. the sale of any goods the subject of the proceedings;
4. the granting of an interim injunction or the appointment of a liquidator.

The Award (Part IV of the Law)

Form and content

The tribunal decides the dispute. An award made by the tribunal is final and binding both on the parties and on any persons claiming through or under them.[19]

The tribunal's decision must be made in accordance with the substantive law chosen by the parties as applicable to the dispute. The parties can also elect to use such other rules as may be agreed between them or determined by the tribunal. [20] This is often common in construction and building disputes for example, where industry codes of practice, such as RICS Best Practice Statements, might apply.

The default provisions relating to form and content require any award to be in writing, signed by all the arbitrators (or a majority of the arbitrators provided that the reason for any omitted signature is stated in the award). The award must contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons. The award must also state the seat of the arbitration and the date on which the award is made.[21]

The tribunal is not limited to making a sole award. The tribunal can make multiple awards at different times in respect of different matters requiring determination.[22] The remedies capable of award from the tribunal include (unless otherwise agreed) declarations, payments of a sum of money (in any currency), orders for parties to do (or refrain from doing) something, as well the power to rectify, set aside or cancel a deed or other document.[23]

Costs

The tribunal can make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.[24] However, any agreement between the parties which has the effect that a party is to pay the whole or part of the costs of the arbitration is only valid if it was made at a time after the dispute in question arose.[25]

By default, the tribunal will award costs on the general principle that costs should follow the event (i.e. that recovery of costs should be awarded to the party who is the 'winner' of the proceedings) except where it appears to the tribunal that, in the circumstances, this is not appropriate in relation to the whole or part of the costs.[26]

Enforcement

An award made by the tribunal pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order of the court. Where leave is given, judgment can be entered in the same terms as the award.[27]

In summary

The Law looks to provide the parties with end-to-end autonomy and control over the arbitral process, subject to the parties' ability to agree. The Law only looks to step in and impose statutory procedural requirements as to the arbitration process where there is any absence of agreement. The Law goes further by affording the parties the ability to agree, in certain situations, the exact powers of the tribunal and/or what is to happen in the event of a failure/breach by a party during the course of the arbitration[28].

To this end, the coming into force of the Law has proved a welcome advancement, providing greater clarity, much needed flexibility and a simplified process for parties electing to arbitrate in Guernsey.

Guernsey's acclaimed legislative and regulatory framework is nothing but bolstered by the Law, providing an arbitration offering akin to that of other leading international arbitration centres such as Hong Kong, New York and Singapore.

The Law reaffirms Guernsey's commitment to providing enviably modern ADR solutions and it no doubt reflects the Island's position as a revered global leader setting the standards and new norms of international law and practice. The inclusion of the Model Law is testament to this by providing a framework capable of servicing the needs of both international and local clientele.

If you find yourself in circumstances giving rise to a need for arbitration, Guernsey should definitely be explored as the preferred seat of choice. Please feel free to reach out to any of the contacts listed in this briefing or any of your usual Collas Crill contacts to discuss further.

Please note this guide gives a very general overview of this topic. It is not legal advice and you may not rely on it.

[1] S27 of the Law, https://guernseylegalresources.gg/CHttpHandler.ashx?documentid=80638

[2] https://www.gov.gg/CHttpHandler.ashx?id=100843&p=0 page 1178

[3] https://www.gov.gg/CHttpHandler.ashx?id=99842&p=0 page 1037

[4] Sections 6 and 7 of the Law

[5] S6(4) of the Law

[6] S10(1) of the Law

[7] S10(2) of the Law

[8] S11 of the Law

[9] S12 of the Law

[10] S15(1) of the aw

[11] S15 and 16 of the Law

[12] S34 of the Law

[13] S27 of the Law

[14] S28 of the Law

[15] S32(2)(a) and (b) respectively of the Law

[16] S33(2)(a) of the Law

[17] S(35)(2)

[18] S38(2)(a), (b), (d) and (e)

[19] S52 of the Law

[20] S40 of the Law

[21] S46 of the Law

[22] S41 of the Law

[23] S42 of the Law

[24] S56(1) of the Law

[25] S55 of the Law

[26] S56(2) of the Law

[27] S61 of the Law

[28] S14(1) and 35(1) of the Law, for example

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