

Arbitration procedures and practice in Jamaica: overview

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USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration

Arbitration is mainly used in Jamaica in the following cases:

- Commercial agreements: leases, insurance contracts, management agreements, shareholders' agreements, mergers and acquisitions, technology transfers, managing directors' terms of employment, pension funds and superannuation fund agreements.
- Construction contracts.
- Telecommunications contracts.
- Intellectual property agreements.

Recent trends

It is difficult to determine trends within arbitration due its confidential nature. However, most leases, insurance, telecommunications and shareholder agreements include arbitration clauses.

The main trend in arbitration is that parties in Jamaica tend to litigate about whether or not to arbitrate. Further, as discussed below, the Jamaican courts have come full circle in support of arbitration so it is difficult to get out of an agreement to arbitrate.

Advantages/disadvantages

The advantages of arbitration compared to court litigation include:

- The parties are able to control costs.
- The parties choose their judge.
- The parties control the time that the matter is disposed of particularly in commercial transactions.

Generally in arbitration, there is more flexibility overall in disposing of the matter and resolving the dispute even if it has to be determined by the arbitrator.

The disadvantages include:

- It is not necessarily less costly than litigation.
- The matter can still end up in court because parties still find a way to challenge the proceedings either before or after the arbitration.

LEGISLATIVE FRAMEWORK

Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

The Arbitration Act 1900 applies to arbitration in Jamaica, which was modelled on the UK Arbitration Act 1889.

The UNCITRAL Rules are not incorporated into Jamaican domestic law.

Mandatory legislative provisions

3. Are there any mandatory legislative provisions? What is their effect?

The court will stay proceedings to give effect to the agreement between the parties to proceed to arbitration (*section 5, Arbitration Act 1990*).

4. Does the law prohibit any types of disputes from being resolved via arbitration?

Arbitration is not applicable in criminal proceedings. It is also not applicable where agreements involve an illegality or may be void for being in breach of public policy.

Limitation

5. Does the law of limitation apply to arbitration proceedings?

Arbitration proceedings are generally governed by the terms of the agreement between the parties.

If there is a triggering event giving rise to the right to arbitrate, within a specified period, the party must take the steps to initiate arbitration within that period. If the steps are not taken within this period, the party entitled to the benefit of the time limit can object, as the parties are bound by the terms of their agreement and the arbitrator is bound by the terms of his appointment.

Parties can raise the usual defences available to them to the cause of action in the arbitration.

ARBITRATION ORGANISATIONS

6. Which arbitration organisations are commonly used to resolve large commercial disputes?

The arbitration organisations commonly used to resolve large commercial disputes are:

- Dispute Resolution Foundation of Jamaica.
- International Court of Arbitration.
- UNCITRAL.
- London Court of International Arbitration.

Although the parties select arbitration as an alternative method of dispute resolution, generally no organisation is selected. Parties that select an organisation tend to also operate internationally.

JURISDICTIONAL ISSUES

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

Arbitration practitioners in Jamaica recognise the concept kompetenz-kompetenz.

The tribunal or the court can determine issues of jurisdiction. It depends on how the question of jurisdiction arises. If it is within the tribunal, the arbitrator deals with it using the concept kompetenz-kompetenz.

The question of jurisdiction may arise as a question where a party argues that the tribunal was not the agreed forum. In that respect the party can file its claim in court. In those circumstances the court determines jurisdiction under section 5 of the Arbitration Act.

ARBITRATION AGREEMENTS

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

Section 2 of the Arbitration Act 1900 defines a "submission" to arbitration as a written agreement to submit future differences to arbitration whether an arbitrator has been named or not (see also *House of Blues Limited & Anor v Secret Paradise Resort Limited SCCA No 43 of 2005, 21 September 2005*).

Additionally, the court will find that there is an enforceable arbitration agreement, even though there is no formality in terms of offer and acceptance or formal written contract or agreement (*Clarke v Bank of Nova Scotia Jamaica Limited; see SCCA No 38 of 2009 decided 2 October 2 2009*).

Separate arbitration agreement

A separate arbitration agreement is not required: a clause in the main contract is sufficient.

It has never been tested in Jamaica whether an arbitration clause incorporated in a contract only by reference to another document is enforceable to resolve disputes arising under the contract. However, there is no reason that it would not be

possible, provided the parties and the subject matter are the same.

Unilateral or optional clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

It has never been tested in Jamaica whether unilateral or optional clauses are enforceable. If both parties agree that only one party has the option of determining that the matter proceeds to arbitration, the enforceability of that clause is likely to turn on the facts of the particular case.

10. In what circumstances can a third party that did not sign the contract incorporating the arbitral clause in question be compelled to arbitrate disputes relating to the contract in question?

A party that did not sign the arbitration clause cannot be forced to arbitrate the dispute in question. A party can only be bound by a "submission" to arbitrate in a contract if that party was a party to the submission. In *House of Blues* one party was not a party to the agreement to arbitrate. The court of appeal held that that party was therefore entitled to have his lawsuit proceed in the usual way (*House of Blues Limited & Anor v Secret Paradise Resort Limited SCCA No 43 of 2005, 21 September 2005*).

11. In what circumstances is a third party that did not sign the contract incorporating the arbitral clause in question entitled to compel a party that did sign the contract to arbitrate disputes relating to the contract?

There are no circumstances in which a third party that did not sign a contract incorporating an arbitral clause can be compelled to arbitrate; it is entirely a matter between the parties to the agreement.

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

The doctrine of separability, which allows an arbitration agreement to be considered entirely separately from the underlying contract in which it is contained, is applicable in Jamaica.

Breach of an arbitration agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

The court can grant a stay of proceedings under section 5 of the Arbitration Act 1900. It can grant an anti-suit injunction if it is shown that proceedings are commenced in breach of an arbitration agreement.

Arbitration in breach of a valid jurisdiction clause

The concept of kompetenz-kompetenz can be invoked to challenge the tribunal's jurisdiction. In the alternative, the relevant party can file proceedings in court and challenge the tribunal's jurisdiction on the basis of forum conveniens or forum non conveniens.

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

An anti-suit injunction can be granted to restrain proceedings in another jurisdiction provided the parties and the subject matter of the arbitration are in the jurisdiction of the court. The court will exercise jurisdiction on the same principles on which it will exercise personal and subject matter jurisdiction over parties and property within the jurisdiction.

Joinder of third parties

15. In what circumstances can a third party be joined to an arbitration or otherwise be bound by an arbitration award?

The author is not aware of any circumstances where a third party can be joined to an arbitration or otherwise bound by an arbitration award as the agreement between the parties determines the jurisdiction and discretion of the arbitrator to make orders.

ARBITRATORS

Number and qualifications/characteristics

16. Are there any legal requirements relating to the number and qualifications/characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in, your jurisdiction in order to serve as an arbitrator there?

There is no legal requirement for a maximum number of arbitrators. However, in practice the number does not exceed three.

There are no legal requirements for the qualifications of arbitrators. However, the party making an application to appoint an arbitrator under section 6 of the Arbitration Act 1900 may prefer to appoint an arbitrator who has qualifications from or membership with the Chartered Institute of Arbitrators or any other accredited body that trains arbitrators. Additionally, parties are likely to choose arbitrators that are experienced in the area that is the subject matter of the dispute.

There are no qualification prerequisites for arbitrators. Arbitrators do not have to be a member of the Jamaican Bar and do not have to be an attorney-at-law. However, it is common practice that arbitrators are attorneys-at-law who have gained the confidence of the parties in the subject area of the arbitration proceeding.

There are also trained arbitrators in the region and the numbers have been increasing. The qualifications of trained arbitrators include being chartered arbitrators and being members and fellows of the Chartered Institute of Arbitrators.

Arbitrators practising in Jamaica do not have to be nationals of Jamaica.

Independence/impartiality

17. Are there any requirements relating to arbitrators' independence and/or impartiality?

Arbitrators can be removed for misconduct (*section 12, Arbitration Act 1900*). At common law misconduct by an arbitrator includes corruption, fraud, unfairness, bias or impartiality.

Appointment/removal

18. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

If no reference exists in the arbitration agreement on the number of arbitrators, a single arbitrator must be deemed to be included into the agreement (*section 4, Arbitration Act 1900*).

Removal of arbitrators

See *Question 17*.

PROCEDURE

Commencement of arbitral proceedings

19. Does the law provide default rules governing the commencement of arbitral proceedings?

There are no default rules governing the commencement of proceedings.

However, there is case law that provides that arbitration proceedings are commenced by sending the notice of arbitration. In addition, arbitration proceedings are otherwise commenced in accordance with the procedural rules that the parties agreed to submit their dispute to arbitration, for example, the rules of the International Court of Arbitration, the London Court of International Arbitration and UNCITRAL.

Applicable rules

20. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

Arbitrators must follow the rules agreed by the parties.

If no rules are agreed by the parties, the arbitrator determines the rules to be followed at the initial meeting. These can be by adopting existing rules or ad hoc rules.

Default rules

If the parties fail to agree the procedural rules, section 4 of the Arbitration Act 1900 has default rules that can be applied.

Further, the overriding principle at common law is that the arbitrator must adopt proceedings that are fair and equitable and guided by the principle that justice must not only be done but should manifestly appear to be done.

Arbitrator's powers

21. What procedural powers does the arbitrator have under the applicable law? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

Section 8 of the Arbitration Act 1900 (Arbitration Act) gives the arbitrator the power to do the following unless the arbitration agreement expresses a contrary intention:

- Administer oaths to or take the affirmation of the parties and witnesses appearing at the arbitration.
- Compel a party to disclose documents by reference to the default procedure in section 4(f) of the Arbitration Act barring any contrary provision in the agreement or any legal objection. Arbitrators cannot compel third parties to give evidence or appear at hearings.

Section 9 of the Arbitration Act enables a party to issue writs of subpoena to persons to testify or produce documents. However, they can only be compelled to do so on the same basis as they could at the trial of any action.

EVIDENCE

22. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of disclosure

Section 4(f) of the Arbitration Act 1900, subject to any legal objection, gives arbitrators the power to request any documents, books, deeds, papers, accounts and writings that may be required for the proceedings providing no contrary provision exists in the arbitration agreement.

The parties can also set rules of disclosure by agreement.

Disclosure of documents in the arbitration court is more relaxed than that of domestic courts in that the procedure for disclosure is in a manner that is beneficial to the proceedings of the arbitration. (Disclosure is by order in the domestic courts. There are orders for standard and specific disclosure of documents.)

Parties' choice

Parties can set rules on disclosure by agreement.

CONFIDENTIALITY

23. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

The Arbitration Act 1900 does not include any special provisions that protect the confidentiality of arbitration proceedings. Arbitration is confidential because it is agreed by the parties and the general position is that the parties must ensure confidentiality in the arbitration proceedings. Parties choose arbitration because they want confidentiality. If confidentiality is agreed between the parties they and the

arbitrator are bound by the confidentiality obligation. Additionally, if the arbitration is done through an institution, the institution is equally bound by the confidentiality obligation.

COURTS AND ARBITRATION

24. Will the local courts intervene to assist arbitration proceedings seated in its jurisdiction?

Under section 19 of the Arbitration Act 1900 (Arbitration Act) the court or a judge can compel a person to attend to testify or produce documents to or before the arbitrator.

The court or judge can also compel the attendance of a prisoner on a writ of habeas corpus to testify and be examined before the arbitrator (*section 20, Arbitration Act*).

The Supreme Court of Judicature of Jamaica is the court that has jurisdiction over arbitration-related applications.

25. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

Risk of court intervention

The Jamaican courts respect arbitration proceedings and there is no risk of local courts intervening to frustrate an arbitration.

The courts in Jamaica have stridently upheld arbitration agreements (*Clarke v BNS SCCA 38 of 2009 decided 2 October 2009; CFC Construction Developers v Runaway Bay Development Company Limited 2005 HCV 5008 per Sykes J [2]*) and the law is now at the point where the courts should seek to uphold arbitration awards rather than seek to assiduously overturn them.

Although the decisions in *Clarke* and *CFC* related to awards, the reasoning in each was directed at the binding nature of the agreement between the parties. It seems therefore the courts are likely to look to the bona fides of the application before them, which is the same basis on which the courts will stay the proceedings in favour of arbitration.

Delaying proceedings

The court will not lightly allow frequent court applications from parties to delay proceedings. Proceedings would in any event be dealt with expeditiously in the commercial division.

REMEDIES

26. What interim remedies are available from the tribunal?

Interim measures

Interim remedies are not available from the tribunal and must be applied for in court.

Ex parte

A tribunal cannot grant interim relief on an ex parte basis.

Security

It is usually unnecessary to award security for costs in arbitrations as costs are determined and secured at the outset by agreement.

The Arbitration Act 1900 (Arbitration Act) does not include any specific provision concerning security for costs. However, section 4(i) of the Arbitration Act enables the arbitrator or umpire to direct how the costs of the reference are paid. Where security for costs is ordered, the arbitrator or umpire will seek to justify it under section 4(i).

27. What final remedies are available from the tribunal?

The type of awards given out by the arbitrator is not restricted by the Arbitration Act 1900.

Remedies or awards that can be given by the arbitrator include damages and declarations, costs and compound interest.

APPEALS

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

Under the Arbitration Act 1900 (Arbitration Act) arbitrations are final and binding (*clause 4(h), Arbitration Act*). Awards cannot be appealed (in the strict sense). In practice awards are challenged but the opportunities to challenge the awards are limited (*see below, Grounds and procedure*).

There are provisions for interlocutory appeals once the awards are challenged. The legal requirements for interlocutory appeals are the same as in other litigation matters. However, permission is not required in relation to an interlocutory order where the arbitration was referred to the court as a special case under section 8(b) of the Arbitration Act (section 11(1)(f)(iv) of the Judicature Appellate Jurisdiction Act 1962).

Under section 8(b), if the submission does not prevent it, the arbitrator or umpire can refer the whole or part of an award as a special case to the court for an opinion.

Grounds and procedure

To apply to challenge (set aside) an award there must be an error on the face of the record, which is usually understood to be an error of law. The application to set aside an award is made to the Supreme Court of Judicature of Jamaica under section 12(2) of the Arbitration Act. A Fixed Date Claim Form must be filed, supported by affidavits or particulars of claim under the Civil Procedure Rules 2002.

(*See National Transport Co-operative Society v Attorney General of Jamaica 2003 HCV 0169* decided on the 29 November 2004 (upheld on appeal to the Court of appeal overturned at the Privy Council see [2009] UKPC Case Ref 48; *Privy Council Appeal No 0017 of 2009*).

Excluding rights of appeal

Arbitration awards cannot be appealed but they can be challenged (*see above, Grounds and procedure*). However, the parties are bound by whatever they agree and the courts are likely to hold them to their agreement.

There is nothing in the Arbitration Act that precludes parties from making agreements regarding how they will resolve their disputes. The only limiting considerations are illegality and public policy. As a general rule the parties also agree that their submission to arbitration is final and binding and excludes

rights of appeal. The various rules such as UNCITRAL, LICIA or ICC exclude rights of appeal and have limited rights of challenge.

29. What is the limitations period applicable to actions to vacate or challenge and international arbitration award rendered?

If enforcing the award requires a writ of execution then the limitation period is six years. A writ of execution is used for the following (see r. 46.1 of the Civil Procedure Rules, 2002):

- An order for seizure and sale of goods;
- A writ of possession.
- An order for sale of land.
- A writ of delivery.
- An order for confiscation of assets.

Where six years have lapsed since the award was entered, permission may be required to enforce it (*CPR r. 46.2(1)(a)*).

COSTS

30. What legal fee structures can be used? Are fees fixed by law?

There are no particular fee structures and fees are not fixed by law.

31. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

The issue of costs allocation is determined by the arbitration agreement. However, in the absence of agreement, costs follow the event so that the unsuccessful party usually pays the costs of the proceedings.

Cost calculation

The costs to be considered include:

- The arbitrator's fee and expenses.
- The parties' costs.
- The costs of the arbitral institution, if any.
- Other related costs.

Factors considered

The factors the courts consider when calculating costs include:

- Complexity of the matter.
- Importance of the matter to the parties.
- Nature of the matter.
- Conduct of the parties.
- Seniority of the counsel involved.

ENFORCEMENT OF AN AWARD

Domestic awards

32. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

Section 13 of the Arbitration Act 1900 (Arbitration Act) provides for the enforcement of an arbitration award, which when granted is enforced in the same manner as an order or judgment of the Supreme Court.

The party must apply to the Supreme Court and the court grants leave to permit the enforcement of the award. The procedure is set out in the Civil Procedure Rules 2002 (*see r. 43.10 and more particularly rule 43.10 (3) to 43.10(5)*).

Under the Arbitration Act an application for permission to enforce an award or to register an award can be made without notice but must be supported by evidence on affidavit (*rule 43.10(5), Arbitration Act*).

The applicant must also exhibit the award or a copy of it if the award is for the payment of money to certify the amount remaining due to him (*Chang (Egerton) and Anor v Supreme Ventures 2014 JMCA App 24*). Additionally, the applicant must give an address for service on the person against whom the applicant seeks to enforce the award.

Foreign awards

33. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Jamaica is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

34. To what extent is a foreign arbitration award enforceable?

Foreign arbitration awards are enforceable as the New York Convention was incorporated into the law of Jamaica under section 3 of the Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001.

The award is enforceable in a similar manner to a judgment or order of the court (*section 13, Arbitration Act 1900*).

A party who makes an application to enforce a foreign award must supply the authenticated original award or a certified copy of the award along with the original agreement with an arbitration clause, showing the signatures of the parties.

The award and agreement must be in English. Any translations to English must be certified by an official translator. The applicant must also satisfy the requirements of article V of the New York Convention, which has been included in the

Schedule to the Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001.

The applicant must also satisfy the court that both the:

- The subject matter of the dispute would have been capable of settlement under the laws of Jamaica.
- Recognition and enforcement would not be contrary to the public policy of Jamaica.

35. What is the limitations period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

There are no prescribed time limits. Expediency in exercising enforcement is however advised to ensure the assets that one party is claiming are not frustrated by the other party.

Length of enforcement proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

It is difficult to estimate how long enforcement proceedings take in the local courts as arbitration proceedings are usually confidential. The enforcement proceedings that are made public are those that are subject to challenge under section 12(2) of the Arbitration Act 1900 or applications for enforcement under section 13 of Act.

Both sections have varying lengths for proceedings including appeals. However, the commercial division enables expedited hearings so that subject to the appeals process a proceeding can be completed within six months.

REFORM

37. Are any changes to the law currently under consideration or being proposed?

It has been long acknowledged the Jamaican legislation is out of date. It is based on the United Kingdom Act 1889. Jamaica is a member state of the Caribbean Community and Common Market (CARICOM), which comprises of 15 member states. CARICOM had since the late 1980s to early 1990s been attempting to modernise and harmonise the arbitration laws at the regional level, which was unsuccessful. However, the effort to modernise and harmonise is ongoing including work done by the Chartered Institute of Arbitrations Caribbean Branch (CI Arb) who compiled a draft report dated 25 August 2009.

In August 2014, Parliament advised the Arbitration Law Sub-Committee of the Jamaican Bar Association that it was going to introduce new legislation, which would, among other things, address the UNCITRAL model law approach. However, no new legislation has been passed to date.

MAIN ARBITRATION ORGANISATIONS

Chartered Institute of Arbitrators (Caribbean Branch)

W www.CIArb.org

Main activities. Regional conference and training workshops including the Accelerated Route to Fellowship Programme (Regional Conference on Arbitration).

Practical Law Contributor profiles



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Professional qualifications. Jamaica, Attorney-at-Law; Ontario, Barrister and Solicitor, Notary Public; FCIArb, Chartered Institute of Arbitrators

Areas of practice. Commercial and civil litigation; arbitration; intellectual property and technology; corporate governance; employment; labour; finance and securities.

Non-professional qualifications. BA in History and Government, University of the West Indies; LLM, University of Toronto; EC Council (CCFE, CHFI)

Recent transactions

- Acting as arbitrator in a recent employment law dispute where the issue concerned the use of the employer's computer equipment to download prohibited material.
- Acting as counsel in arbitrations in telecommunications and cable matters.
- Handling commercial matters shareholder and director disputes, technology and information security matters.

Languages. English

Professional associations/memberships. Member of the Jamaican Bar Association; Chair of the Continuing Legal Education Committee; International Trade Mark Association; Integrated Advisory Group; International Technology Law Association.

Publications

- *Legislating Cybercrimes in Jamaica: Issues in Corporate Liability, Ringtones of Opportunity: Policy, Technology and Access in Caribbean Communications*, edited by Hopeton S Dunn.
- *Copyright Laws in the Creative Economy: How can Science and Education Flourish in the Digital Era in LAC?, Enabling Openness: The Future of the Information society in Latin America and the Caribbean*, edited by Bruce Girard and Fernando Perini.