Harper James Solicitors video transcript: Arbitration

I’m Michael Key, senior dispute resolution lawyer, Harper James Solicitors.

Arbitration: first of all, what is it? Well, it is an alternative means to litigation to resolving a dispute. It shouldn’t be confused with mediation. Mediation is something quite separate. Mediation is a process whereby the mediator looks to try and get the parties to reach a settlement but, ultimately, the mediator’s got no power to make a determination on the parties’ disputes. Arbitration, by contrast, the arbitrator does have power to make a decision over the dispute in much the same way that a Judge has. In order to proceed to arbitration, it is necessary for there to be an arbitration agreement. The agreement can arise either before the dispute’s arisen or after the dispute’s arisen. Generally speaking, the agreement will have been drafted prior to the dispute arising. Usually, the parties will have entered into a contract and, when you look at the dispute resolution clause in that contract, it provides for arbitration. In some circumstances, parties may decide it is better to resolve the dispute through arbitration rather than go to court. It is possible for the parties to agree how they go about arbitration after the dispute’s arisen.

So, what are the advantages of arbitration? I think it is fair to say arbitration was originally spawned from the idea that an expert would preside of the dispute. The advantage of an expert determining the dispute, as opposed to a Judge, is that the expert uses their expertise to cut through matters. There’s no need for extensive expert evidence and, hopefully, the arbitrator can set a quicker process and perhaps sometimes achieve the process. Another advantage of arbitration is privacy in that the arbitration is confidential between the parties. In certain circumstances, parties would prefer not to have the fact that they’re involved in litigation known by everyone, so arbitration does have the advantage of keeping the terms of the dispute private between the parties.

Disadvantages of arbitration: I think it is fair to say that the current criticism of arbitration is that sometimes people think it’s been hijacked by the lawyers and sometimes you get arbitrators who will give Directions for arbitrations which will more or less mirror Directions given by Judges in litigation procedure. Now, the disadvantage of that is where arbitration is effectively following a very similar litigation procedure, is that it results in increased costs because you’ve got to bear in mind that you’re not only paying your own lawyer in respect of the arbitration, in the short term at least you’ve got to fund the arbitrator’s costs which is effectively almost the same as another lawyer’s costs. Some people criticise arbitration because of the differing standards applied because arbitrators may come from a variety of backgrounds, and sometimes criticism made of arbitration is that it often doesn’t lead to legalistic decisions. Sometimes the arbitrator’s bias is imposed and sometimes to reach what they see as a fair decision but that’s not necessarily following the structures of the law.