INTERNATIONAL COMMERCIAL ARBITRATION - THE ESSENTIALS

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The Issues

1. **Arbitration as a mechanism for resolving disputes**
2. **Why Arbitrate rather than Litigate or Mediate**
3. **Drafting Arbitration Agreement**
4. **Difference between *Ad Hoc* and Institutional Arbitration**
5. **Pre- Arbitration Actions**
6. **Arbitral Process**
7. **Challenging an Award**
8. **Enforcement of Award**

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1. Arbitration

- Most widely used method of dispute resolution in international business
- Arbitration is a contract based method of dispute resolution
- Parties must consent to arbitration, their consent expressed in an arbitration agreement
- It is a private method of dispute resolution
- It is a mechanism whereby disputes can be finally resolved pursuant to parties' agreement by independent non-governmental decision makers

1. Why Arbitrate ?

- **Enforceability of Arbitral Awards**
  - 144 countries are parties to the 1958 New York Convention on Recognition and Enforcement of Foreign Awards
  - Qatar – March 2003
  - All countries in region bar Yemen are signatories
  - Arab League Convention

- **Neutrality**
  - Parties from markedly different national, cultural and legal background
  - Fear of bias by national courts in favour of local entity and unfamiliarity with laws and procedure

- **Flexibility**
  - Parties free to decide where arbitration will take place, what form it will take, even down to the language used in the proceedings
  - Tailor make it to suit your needs

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1. Why Arbitrate ?

- **Confidentiality**
  - Parties wishes to resolve disputes privately and spared damaging publicity
  - NB. In many countries and under arbitral rules of many institutions confidentiality is not guaranteed

- **Speed**
  - In many countries courts are slow, unpredictable and bureaucratic
  - Typically abitral tribunals take less time than national courts to reach a final decision
  - Appeal against arbitral awards usually restricted

- **Cost-effective**
  - Generally, parties pay less in the long run than if they litigate
  - Factors like place of arbitration and number of arbitrators influence expenses

2. Comparing Arbitration to Litigation

Arbitration	Litigation
Private	Public
Parties chose arbitrators	No choice
Flexible procedure	Procedure fixed by court
Limited scope of appeal	Appeal available
Confidential	Public
Limitations on joinder and consolidation	Available
Cost ?	Cost?
Expedition ?	Expedition
Limited powers	Broad powers
Uncertainty about procedure	

2. Comparing Arbitration to Mediation

- Mediator's role is to assist the parties to reach a settlement
- The mediator does not have the power to issue a binding decision
- Procedure followed in an arbitration more judicial in nature
- The different mechanisms for resolving disputes are not mutually exclusive
- Careful consideration should be given to which method of dispute resolution is most appropriate given the nature of the dispute, the nature of the relationship between the parties, the objectives sought

3. *Arbitration Agreement*

- Arbitration Agreement should preferably be drafted when the terms of the main agreement are being negotiated

- Purpose of the Arbitration Agreement:

  - Evidences the consent of the parties to arbitrate
  - Defines the jurisdiction and authority of the arbitral tribunal
  - Sets out the procedure under which arbitration will be conducted

- No set form. Arbitration agreements differ in form and length and from country to country.

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3. *Drafting Arbitration Agreement*

- Things to consider when drafting the Arbitration Agreement

- *Ad Hoc* or Institutional Arbitration
- Seat of Arbitration (crucially important)
- Start with model clause and then sensible to supplement it *at a minimum* with following:
  - ✓ Number of arbitrators (usually uneven)
  - ✓ Law governing the contract
  - ✓ Consider whether to insert law governing Arbitration Agreement
  - ✓ Language of the arbitration
- Decide whether you want to deviate from institutional/national rules or give tribunal special powers

- Golden Rule: Think carefully where the parties and their assets are located and consider what is the best suited place and mechanism for resolving disputes

3. *Examples of Model Arbitral Agreements*

- Every conflict related to the conduct, implementation, interpretation, cancellation, termination or avoidance of the contract or that which is in any way related to the contract shall be referred for arbitration pursuant to the provisions of the Regulation of the Qatar International Center for Commercial Arbitration of the Qatar Chamber of Commerce and Industry. (QICCA)

- All disputes arising out of or in connection with the present agreement shall be finally settled under the Rules of Arbitration of the ICC by one or more arbitrators appointed in accordance with the Rules. (ICC)

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4. Ad Hoc and Institutional Arbitration

Ad Hoc Arbitration

- Rules regarding the conduct of arbitration are agreed for the specific arbitration

- Advantages:
  - ➢ Tailor made to specific contractual arrangement
  - ➢ Commonly used for in case of multi-party or multi-contract arbitrations, or if state or state-owned entity party to contract

- Disadvantages:
  - ➢ Lengthy drafting either at time of conclusion of the main contract or after the dispute has arisen
  - ➢ No default rules to fall back on

4. Ad Hoc and Institutional Arbitration

Institutional Arbitration

- Typically, companies choose arbitration administered by a specialist arbitral institution

- Arbitral institution has its own detailed rules for the conduct of arbitral proceedings

- Effect of using a Model Arbitration Agreement is to automatically incorporate those rules

- Advantages:
  - Cheaper and less complex to draft
  - Permanent support staff that administers the arbitration

- Disadvantages:
  - Fixed fee on an *ad valorem* basis
  - time limits often very short

5. *Pre-Arbitration Actions*

- Locate the assets of the other party wherever they are in the world
- Obtain orders freezing assets
- Stay court proceedings which may have been commenced by the other party
- Obtain anti-suit injunction
- Locate all the documentation potentially relevant to the proceedings

6. *Arbitral Process*

- Request for arbitration
- Reply to the request for arbitration
- Appointment of the Chairman
- Statement of claim
- Defence
- Terms of reference
- Procedural hearing
- Discovery
- Drafting of witness statements and expert opinions
- Hearing (unless document only arbitration)
- Post-closing submissions
- Award

7. Challenging an Award

- Time limits (often short)
- Grounds for Challenge:
  - Lack of capacity to conclude AA
  - Lack of a valid AA
  - Lack of proper notice of appointment of tribunal or arbitral proceedings or otherwise unable to present case
  - Award deals with matters not contemplated by or falling within the AA
  - Composition of tribunal or arbitral procedure not in accordance with the AA or mandatory provisions of the law
  - Subject matter of dispute is not capable of being settled by arbitration (arbitrability)
  - Award is in conflict with the public policy

8. *Recognition and Enforcement of an Award*

- Principle advantage of arbitration over litigation: ability to enforce awards worldwide
- Distinguish between enforcement in seat and enforcement of outside the seat
- Grounds for recognition and enforcement vary from state to state
- Process of enforcement is not an appeal
- Grounds for refusal are listed in Article V of 1958 New York Convention (an exhaustive list)
- Time Limits
- Check local formalities regarding enforcement
- Check conventions, bilateral agreements and local law as may have more favourable rules regarding enforcement

8. Grounds for Refusal of Recognition and Enforcement

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Under the New York Convention

1. Lack of capacity
2. Invalidity of agreement
3. Lack of due process
4. Arbitrators acted beyond jurisdiction
5. Irregular composition of the tribunal or procedure not in accordance with AA or relevant law
6. Award not binding or has been set aside in the seat of award
7. Arbitrability
8. Public policy