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ARBITRATION: LAW AND PRACTICE – THE CORNERSTONE OF MODERN COMMERCIAL DISPUTE RESOLUTION

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1. Introduction: The Rise of Arbitration

Arbitration has evolved from a simple business practice into a major mechanism for resolving complex domestic and international commercial disputes. It is a process where the parties agree to submit their dispute to an impartial tribunal (the arbitrator), who renders a final and binding decision (the arbitral award) without recourse to national courts. Its popularity stems from its main advantages: party autonomy, neutrality, confidentiality, and, critically, the almost universal enforceability of awards under international treaties. This paper explores the essential legal framework, important procedural practices and current challenges that define modern arbitration.

2. The Foundational Law: Consensual and Statutory Basis

Arbitration is fundamentally a consensual process, but its validity and enforceability derives from statutory law and international treaties.

2.1. Arbitration Agreement

The cornerstone of the entire process is the arbitration agreement (often an arbitration clause within the main contract). It must meet the key essentials:

In writing: Almost all jurisdictions and the UNCITRAL Model Law require documentation of the agreement, although modern interpretations include electronic communication.

Intention to arbitrate: There must be a clear and express intention by the parties to submit their existing or future disputes to arbitration.

Separability (or severability): This principle states that the arbitration clause is a separate agreement from the main contract. Even if the main contract is found void, illegal or ineffective, the arbitration clause remains valid.

2.2. The Governing Legal Regime (The Tripartite Structure)

A complex arbitration involves the interplay of three different sets of laws, reflecting the principle of separation:

Substantive law (proper law of the contract): The law chosen by the parties to govern the rights and obligations under the main contract.

Procedural law (lex arbitrator/law of the seat): The law governing the conduct of arbitration proceedings. This is almost always the law of the seat of the arbitration (for example, London, Singapore, Geneva). The seat determines which national court has supervisory jurisdiction over the arbitration.

Law governing arbitration agreements: The law governing the validity and scope of the arbitration clause. In the absence of a clear alternative, courts often disregard the law of the main contract or the law of the seat.

2.3 International Treaties: The Pillars of Enforcement

The global efficacy of arbitration is dependent on international legal instruments:

New York Convention (1958): The most important treaty in arbitration, ratified by more than 170 countries. It obliges signatory states to recognize and enforce written arbitration agreements and foreign arbitral awards, subject only to certain narrowly defined grounds for refusal (e.g., public policy, lack of due process).

UNCITRAL Model Law (1985/2006): Although not a treaty, this Model Law provides a template for national arbitration laws. Its widespread adoption (for example, in Singapore, Canada, India) has successfully promoted the harmonization and modernization of the arbitration process globally, thereby ensuring a predictable legal environment.

3. The Practice of Arbitration: Process and Procedure

3.1. Ad Hoc vs. Institutional Arbitration

Arbitration practice generally falls into two categories:

Institutional arbitration: The dispute is administered by a specialized body (e.g., ICC, LCIA, SIAC, AAA). The institution provides comprehensive procedural rules, manages arbitrator appointments and challenges, checks awards for formal compliance, and provides administrative support. It provides efficiency and structure.

Ad hoc arbitration: The parties and the tribunal design the process themselves, without a permanent administering body. It offers maximum flexibility but requires high cooperation and expertise from the parties and arbitrators.

3.2. Jurisdiction: The Kompetenz-Kompetenz Principle

The principle of competence-competence is fundamental to arbitration practice. It asserts that the arbitral tribunal has the competence to rule on its own jurisdiction, including any objections relating to the existence or validity of the arbitration agreement. This allows the

process to proceed without immediate and lengthy judicial intervention.

3.3. Due Process and Arbitrator Independence

The practice of arbitration is strictly bound by the principle of due process and natural justice, which requires:

Equal treatment: Both parties should be treated equally, and each should be given full opportunity to present his case.

Impartiality and independence: Arbitrators must be and appear to be independent and impartial from the parties. Guidelines (for example, the IBA Guidelines on Conflicts of Interest) are often used to manage disclosure and conflicts, which is an area of frequent debate in practice.

4. Current Trends and Challenges

The field of arbitration is constantly evolving to meet the demands of global commerce:

4.1. Efficiency and Speed

Concerns over the rising cost and delay (sometimes called the "judicialization" of arbitration) have spurred reforms:

Expedited Procedures: Institutions have introduced Fast-Track or Expedited Rules for lower-value disputes to deliver awards within shorter time limits (e.g., 6-9 months).

Emergency Arbitration: Provisions allowing a party to seek urgent interim relief from an "emergency arbitrator" before the main tribunal is constituted.

4.2. Technology and Arbitrability

Digital Asset Disputes: Arbitration is becoming the preferred method for resolving complex disputes involving digital assets, smart contracts, and cryptocurrency, given the lack of clear geographic nexus and the need for subject-matter expertise.

Non-arbitrable matters: The scope of which disputes can be submitted to arbitration (arbitration) is subject to continuous review. While commercial rights (personal rights) are generally arbitrable, public law (rights in rem)

such as bankruptcy, family law and competition law matters are often excluded or subject to strict limitations.

4.3. Transparency and ESG

There is a growing demand for increased transparency away from the traditional, strict secrecy of commercial arbitration, particularly in investor-state dispute settlement (ISDS). Furthermore, environmental, social and governance (ESG) factors are increasingly influencing the underlying contracts and arguments presented in arbitration, particularly in the energy and infrastructure sectors.

5. Conclusion

Arbitration is not just an option, but an integral part of the global economic infrastructure. Its strong legal framework, built on the consensus foundation of arbitration agreements and supported by the New York Convention, makes it uniquely suited to the complexities of cross-border commerce. While challenges related to cost, speed and conflicts of interest remain, continued reform by legislatures and governance institutions ensures that arbitration remains a flexible, enforceable and essential mechanism for the governance of international trade.

