INTRODUCTION TO ARBITRATION – KEY ELEMENTS

1. International arbitration is the preferred method of resolving cross-border disputes. The neutrality it offers, together with the relative ease of enforceability of awards, can make it a more attractive forum for disputes than litigating in contracting parties' national courts.

2. Arbitration is a method of dispute resolution that provides a final and binding outcome. Generally regarded as an alternative to court litigation, the existence of a valid **agreement to arbitrate** should mean that state courts refuse to hear disputes falling within the scope of that agreement.

In arbitration the parties submit a dispute to an appointed decision-maker (**sole arbitrator**), or panel of arbitrators (the **arbitral tribunal**). This is typically done by providing for arbitration in the contract (the arbitration agreement). The agreement should also cover the number of arbitrators, the legal place or seat of the arbitration (see below), and the procedural rules that will govern the arbitration.

The tribunal will generally give its decision (the award) following a process during which each party will have the opportunity to present its position.

Arbitration is a **voluntary** and **consensual** process. Unlike national courts, an arbitral tribunal will only have jurisdiction if all parties to the dispute have agreed to submit their disputes to arbitration. Parties will usually provide for this by inserting an appropriately drafted arbitration clause into their agreement.

3. The main benefits of arbitration are ease of enforcement of awards, the ability to choose who decides the dispute, procedural flexibility and privacy. The neutrality that arbitration offers is also a key point. Contracting parties often want the dispute to be heard in their local courts where they have a perceived home advantage: international arbitration in a neutral country is the compromise.

The parties to an arbitration have considerable choice in determining how, where, by whom, and in what language their dispute is resolved. Of particular importance to the parties is the choice of decision-maker. Unlike commercial litigation where disputes are resolved by state-appointed judges, parties to an arbitration may select their arbitrator. This is especially advantageous in the context of a technical matter that requires particular expertise, or where parties are from different jurisdictions and each wants to appoint an arbitrator from their own jurisdiction.

Most arbitral laws do not allow for the award to be challenged except in very limited circumstances. In addition, choice of certain institutional rules can further limit the parties' scope to challenge the award. This means that parties avoid the cost of protracted appeal processes.

4. To understand how arbitration works, it is important to understand the significance of the seat of the arbitration. When parties agree to arbitration, they should specify the seat of the arbitration, which is a legal concept rather than a material one (the place where the arbitration process takes place – for example, where the hearings are held – may not coincide with the seat). Typically, parties specify a city, for example, London or Paris. The choice of seat gives the arbitration a "nationality", so in this example, English or French.

The seat of the arbitration determines the legislative framework within which the arbitration will be conducted and regulated by triggering the national law governing arbitrations that take place in the State of the seat (*lex arbitri*). Many countries' national arbitration laws are based on the UNCITRAL Model Law on International Commercial Arbitration. The Model Law is intended to suggest a common standard for arbitral practice.

Most national arbitration laws give the parties great flexibility on the arbitral procedures. They also generally prescribe elements from which the parties cannot depart by agreement, including the more fundamental aspects of the process such as fairness of the proceedings and the duties of the tribunal.

The "nationality" of the arbitration extends to the award. So the award of a London-seated tribunal will be regarded as English. This is significant when it comes to enforcement. It is important that the country of the seat of the arbitration has ratified the New York Convention, an international treaty which provides for the reciprocal enforcement of arbitration awards in over 160 countries.

5. Institutional arbitration means referencing to an arbitral institution into the arbitration clause and incorporating the rules of the selected institution by reference. That institution will then administer the arbitration. Institutional rules are designed to set out a framework for the proceedings comprehensively from beginning to end. This is particularly useful where a counterpart is refusing to co-operate in the arbitral process.

There are many institutions to choose from. Popular institutions include: the International Court of Arbitration at the International Chamber of Commerce (ICC); the Singapore International Arbitration Centre (SIAC); the Hong Kong International Arbitration Centre (HKIAC); the London Court of International Arbitration (LCIA); the Milan Chamber of Arbitration (CAM).

The procedural rules of the different arbitral institutions vary. In general terms, they provide the procedural framework for the arbitration from start to finish and cover (i) commencement of the arbitration, (ii) constitution of the tribunal, (iii) conduct of the proceedings, (iv) rendering of decisions, and (v) determination of costs. The procedures adopted, although different, typically provide the parties with an opportunity to put forward their case via written submissions together with any documentary, factual and expert evidence.

6. *Ad hoc* arbitration is conducted under rules adopted for the purpose of the specific dispute, without the involvement of an arbitral institution. The parties can draft the arbitral rules themselves or leave the rules to the discretion of the arbitrators. *Ad hoc* arbitration lacks the supportive role of an institution and depends for its full effectiveness on a spirit of co-operation between the parties which is usually lacking by the time disputes have arisen. The potential problems of arbitration more generally, such as the ability to delay proceedings, are more likely to arise in ad hoc arbitration.

7. The appointment of the arbitrators will be made in accordance with the terms of the arbitration agreement or, if silent, the rules of the relevant institution or national law. It is standard for disputes to be referred to one or three arbitrators. Where three arbitrators are to be appointed, it is common for each party to nominate one and for the relevant institution or the two chosen arbitrators to nominate the third arbitrator who will act as chairman. If a sole arbitrator is appointed, absent party agreement, it is usual for that appointment to be made by the institution or, if *ad hoc*, a designated appointing authority.

8. The principal duties of the tribunal are to determine the dispute fairly and efficiently, adopt suitable procedures for the particular case and ensure that time and costs are not expended unnecessarily. In order to discharge these duties the arbitrators have a range of powers deriving from: the arbitration agreement, the procedural rules and the applicable national law.

9. The award in an arbitration is equivalent to the judgment in litigation. It is "final and binding" subject to limited rights of challenge. Generally the award must be in writing, be signed by all the arbitrators, contain reasons, and state the seat of the arbitration and the date the award was handed down. Once the tribunal has issued its award it is functus officio and has no further authority to act.

Unlike court judgments, awards cannot generally be challenged except in very limited circumstances. These include where there has been a serious irregularity affecting the tribunal, the proceedings, or the award which has caused injustice to one or more of the parties. So, for example, where the tribunal exceeded its powers, failed to conduct proceedings in accordance with the agreed procedure, or where the award is ambiguous or was obtained by fraud.