



Ad hoc or Institutional Arbitration? Choose Wisely

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Abstract

Alternate dispute resolution mechanisms are now more keenly pursued by litigants mainly due to defects such as laws delays in national courts. Arbitration is one such mechanism. It is generally accepted that there are two principal forms of arbitration namely ad hoc arbitration and institutional arbitration. The choice of the form of arbitration is an important one and will be influenced by the circumstances of each case. Factors such as flexibility, selection of arbitrators, assistance, administrative matters, cost, delays, and the finality of the award ought to be considered when making this choice. This essay will include a thorough analysis of the two forms of arbitration, the distinction between the two, a discussion as to whether the distinction has become blurred especially with reference to mix and match arbitrations, and the specific circumstances under which parties may prefer one form over the other with reference to the aforementioned factors.

Keywords: *Ad hoc Arbitration, Institutional Arbitration, Choice, Distinction, Factors*

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Introduction

Lew, J.D.M., L. A. Mistelis and S. Kröll,¹ note the agreement of the parties, national law, relevant international instruments and arbitral rules may influence the choice between ad hoc and institutional arbitration. These considerations affect the amount of control that the parties have over the process, the legal regimes and the enforceability. Thus, this decision should not be taken lightly.

In general, arbitration is considered ad hoc when the parties to the dispute have not chosen an arbitration institute and the mechanism is tailored specifically for the particular dispute. Institutional arbitration on the other hand is where an arbitration is administered by a particular institution which has been agreed upon by the parties.

There is a general acceptance that institutional arbitration is now more popular than ad hoc arbitration. In the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,² it was found that 79% of the respondents' arbitrations were institutional rather than ad hoc. In 2008 the percentage favoring institutional arbitration was 86% while in 2006 it was 73%. The objective of this paper is to assess what factors drive litigants to choose ad hoc arbitration over institutional arbitration and vice versa. In order to accomplish this objective a qualitative research paradigm is employed. This study considers case law and rules of arbitration institutions as primary sources. Secondary sources of this research include journal articles, research papers, books, and web resources.

Ad hoc arbitration

Ad hoc arbitration is not influenced by an institution. Ulrich G. Schroeter in his article stated 'ad hoc arbitration has primarily been defined as

¹J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International B.V. 2003).

²Queen Mary, University of London and White & Case LLP, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 26 November 2022.

the opposite of institutional arbitration, as a category encompassing all arbitrations that are not institutional'.³ The parties are free to determine the number of arbitrators, the procedure, how the arbitrators are to be appointed, the time table and a host of other factors. Thus, the parties have a high level of flexibility.

A common way of regulating ad hoc arbitration is by the selection of the arbitration rules expressly in the arbitration agreement. The United Nations Commission on International Trade Law (UNCITRAL) is a common choice and is often considered as prima facie evidence that the parties intended the arbitration to be ad hoc. However, as time has progressed institutions such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the Hong Kong International Arbitration Centre (HKIAC) have adopted the UNCITRAL Rules. Thus, one may argue that one cannot make such a presumption anymore.

Institutions may provide the service of acting as an appointing authority even under ad hoc arbitrations where the parties have so agreed. This is a situation where an institution will get involved in an ad hoc arbitration.

Institutional Arbitration

Each institution is unique, and the parties should be educated on the special characteristics of each of them in order to make a well-informed decision as to which institution is to carry out their arbitration. The International Chamber of Commerce (ICC) for example is skewed towards administering the terms of reference, scrutinizing procedures and fixing times and deadlines for making an award. The London Court of International Arbitration (LCIA) on the other hand has a more restricted involvement in administration as its role is limited to collecting and paying fees and to dealing with challenges to the arbitrators.

³ Ulrich G. Schroeter, 'Ad Hoc Or Institutional Arbitration - A Clear-Cut Distinction? A Closer Look At Borderline Cases' (2017) 10 Contemporary Asia Arbitration Journal 142, 146.

Other factors that should be considered when choosing an institution include the number of arbitrators the parties intend to have (the LCIA prefers one arbitrator if there is no agreement while the Stockholm Institute prefers three arbitrators), the degree of independence required of the arbitrators, the power of the arbitrators, how the costs and fees are to be calculated, the right to nominate arbitrators etc.

Concerning the appointment of arbitrators Article 12 of the ICC Rules provides the ICC will appoint a sole arbitrator in the absence of an agreement between the parties. Article 5 of the LCIA Rules provides that regardless of the arbitration agreement between the parties the LCIA will appoint the arbitrators.

According to Article 31 of the ICC Rules the time limit for an arbitral award is 6 months from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference, while the time limit is 3 months after the last submission of the parties according to Article 15.10 of the LCIA Rules. Thus, if the parties want to expedite the process the LCIA may be chosen as the institution over the ICC.

The ICC as per Article 34 will scrutinize the award and it states, 'No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form'. The LCIA on other hand does not include such a provision for scrutiny.

The ICC appears to be the most popular choice as evinced by the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration given that when the respondents were queried as to their three preferred institutions 68% chose the ICC while 37% chose the LCIA. The report suggests 'The ICC and LCIA respectively rank first and second as preferred institutions, just as in the 2006 and 2010 Surveys. These institutions appear to have remained leaders in their field for at least ten years'.⁴

⁴ Queen Mary, University of London and White & Case LLP (n 2).

Arbitration institutions can be divided between those created under private law and those created by public international law. Private international arbitration institutions include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the American Arbitration Association (AAA). Public international law institutions include the Permanent Court of Arbitration and the International Centre for Settlement of Investment Disputes. Further there exists industry-focused and commodity institutions as well as special purpose institutions.

The Distinction between the two forms

In the aforementioned article, Ulrich G. Schroeter stated ‘the traditional ad hoc/institutional arbitration dichotomy has increasingly been challenged in recent years, and it has been pointed out that the boundaries between these established categories can become blurred’.⁵

The case of *Insignia Technology Co. Ltd. v. Alstom Technology Ltd*,⁶ concerned an arbitration clause which provided for an, ‘arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce’. Such arbitrations are called ‘mix and match’ arbitrations where the parties have agreed to conduct the arbitration under the rules of one institution but wish to have it administered by another. Interestingly in this case the Singapore Court of Appeal considered the arbitration to be ad hoc and not institutional.

In the case of *Exxon Neftegas Ltd. v WorleyParsons Ltd*,⁷ the parties to the dispute had included a similar clause where the ICC rules were to be applied and the proceedings were to be administered by the AAA. The court did not address the issue as to whether it was an ad hoc arbitration or an institutional arbitration.

⁵Schroeter (n4) 154.

⁶*Insignia Technology Co. Ltd. v. Alstom Technology Ltd.* [2009] SGCA 24.

⁷*Exxon Neftegas Ltd. v WorleyParsons Ltd.* Case no. 654405/2013 (NY 2014).

However, if the standards of the *Insignia* case were to be applied it is likely that it would have been considered as an ad hoc arbitration.

These are situations where an institution has been named. If we go by the standard definition, we would consider them to be institutional arbitration. However, it appears that the matter is not so straightforward.

In *Bovis Land Lease Pte Ltd v Jay-Tech Marine and Projects Pte Ltd*,⁸ it was held that it was an ad hoc arbitration and not an institutional arbitration as the parties had merely made references to the institutions' rules and had not submitted it to the administration of an institution in particular. In this case, one institution was designated to be the default appointer while another institution was to provide procedural rules.

Nevertheless, Ulrich G. Schroeter noted, 'the discussion of borderline cases has confirmed that the traditionally prevailing approach of distinguishing between merely two categories of arbitration—ad hoc arbitration on one hand, and institutional arbitration on the other—continues to be convincing, even in the face of borderline constellations that may be difficult to qualify'.⁹ Thus, it appears the traditional approach of distinguishing the two forms continues.

The factors in detail

With reference to factors such as the flexibility, selection of arbitrators, assistance, administrative matters, cost, delays, finality of the award etc. a deep dive is required to ascertain the differences of the two forms and the instances where one is recommended over the other.

Flexibility v. predictability

There is no question that ad hoc arbitration is flexible given that the parties are free to draft the procedure. Article 19 of the UNCITRAL Model Law allows the parties freedom to agree on the procedure. As Klaus Peter Berger stated, 'In institutional arbitration, the respect for the parties'

⁸ *Bovis Land Lease Pte Ltd v Jay-Tech Marine and Projects Pte Ltd* [2005] SGHC 91.

⁹ Schroeter (n4) 184.

autonomy is endangered by the autonomy of the arbitral institution'.¹⁰

However, one cannot underestimate the arduous task of providing for every contingency in an ad hoc arbitration. Forming an all-inclusive flowless procedure is complicated. When it comes to institutional arbitration there is more certainty. Arbitration institutions have a procedure set and it has been tested against many a case which has come before it.

One of the main reasons institutional arbitration is recommended is the relative ease of mind and comfort that the institution provides given that such institutions have experience in determining such issues. In 2021 the ICC International Court of Arbitration recorded a total of 853 cases and the LCIA received 387 referrals.

Ziadé, N.G. stated, 'The institution must in all respects act as the guardian of the arbitral process in order to ensure the predictability of its procedures'.¹¹ Namrata Shah and Niyati Gandhi put this point fittingly by stating, 'the choice boils down to be one of flexibility in ad hoc arbitration compared to predictability in institutional arbitration'.¹² Thus, the form of arbitration to be recommended will depend on the needs of the party.

Selection of arbitrators

When it comes to the matter of selection of arbitrators the parties have more freedom under ad hoc arbitration. In institutional arbitration the choice of selection of arbitrators is limited to the list of arbitrators provided. This means there is more chance of arbitrators being unbiased when it comes to institutional arbitration. Under ad hoc arbitration, as the parties have discretion to choose the arbitrator there is a greater

¹⁰ Klaus Peter Berger, 'Institutional arbitration: harmony, disharmony and the 'Party Autonomy Paradox' (2018) 34 *Arbitration International* 473, 473.

¹¹ Nassib G. Ziade, 'Reflections on the Role of Institutional Arbitration Between the Present and the Future' (2009) 25 *Arbitration International* 427, 429.

¹² Namrata Shah and Niyati Gandhi, 'Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries' (2011) 6 *Journal of International Commercial Law and Technology* 232, 235.

chance of biasness towards one party over the other. Yves Derains stated, 'Too often, the interest of the arbitrator is to favor the party that has appointed him, either by endorsing all those party's positions or, more rarely, by suggesting creative and favorable solutions when he considers that such party is poorly advised by its counsel'.¹³ If the parties consider unbiasedness to be a priority, then institutional arbitration is recommended.

Assistance

There is considerable support and assistance which comes with an institution. The ICC and the LCIA have large secretariats comprising counsel who are on hand to provide advice. Such advice may not be available under ad hoc arbitration. When it comes to ad hoc arbitration the only option may be to go to national courts if there is a need for assistance. This would defeat the primary purpose of the parties turning to arbitration as the parties would have to deal with additional delays and costs. Thus, the consideration of assistance points towards institutional arbitration being preferred over ad hoc arbitration.

Administrative matters

Discussing or fixing the payment often creates an uneasiness and discomfort among parties. The costs of an arbitration institution are generally fixed. For example, this can be seen in the Schedule of Costs of the London Court of International Arbitration (LCIA). Appendix III to the ICC Rules for Expertise also provides a schedule for the expertise costs.

Further, the institutions have a method of collecting money from the parties without direct involvement with the arbitrators. The administrative secretariat will generally deal with such matters. Thus, there would be a higher degree of independence and detachment between the parties and the arbitrators.

¹³ Yves Derains, 'The Arbitrator's Deliberation' (2012) 27 American University International Law Review 911, 915.

There is no questioning the fact that institutional arbitration is more consumer-friendly and would be recommended over ad hoc arbitration in light of administrative matters.

Place of arbitration

If the place of arbitration cannot be agreed upon in an ad hoc arbitration the parties may have to face delays. Generally, an institution's rules provide guidance on this issue. For example, Article 19 of the AAA International Rules provides, in a situation where the parties fail to agree on a place of arbitration the place is determined by the administrator which is subject to the power of the arbitration tribunal to determine finally. Institutional arbitration is recommended with reference to this factor.

Cost

It is argued that since the parties have more control over the proceedings under ad hoc arbitration the costs may also reduce. As the parties have to make all arrangements without the assistance of an institution excessive arbitration fees and administrative fees can be avoided. However, this would depend on each case.

An indication as to the difference in costs can be identified in the following situation. The London Court of International Arbitration (LCIA) administers arbitrations under the UNICTRAL or other ad hoc rules as well. When assessing the Schedule of Costs of the London Court of International Arbitration (LCIA) the administrative charges such as the registration fees and hourly rates for the registrar, counsel, case administrators and casework accounting functions concerning ad hoc arbitration is approximately 10% less than institutional arbitration.¹⁴ According to the schedule the hourly rate in respect of the arbitral tribunal's fees for institutional arbitration cannot exceed £500,¹⁵ but the

¹⁴ The London Court of International Arbitration, 'Schedules of Costs' (2020) <https://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs.aspx> accessed 30 November 2022.

¹⁵ The London Court of International Arbitration, 'Schedule of Arbitration Costs' (2020) <https://www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-lcia-arbitration-2020.aspx> accessed 30 November 2022.

rate for ad hoc arbitration cannot exceed £450.¹⁶

Thus, it is argued the cost is a factor that may make ad hoc arbitration more attractive, and it is recommended over institutional arbitration. However, one may argue that if the corporation between the parties fails under ad hoc arbitration this would lead to more costs being borne as the parties would be compelled to go to court to settle the issue.

Delays

Arbitration was born to circumvent laws delays in national courts. Institutions have fixed timetables and limits as to when the case must be concluded. This leads to a speedy disposal of cases. Nevertheless, procedural defects and a lack of coordination between the parties may lead to more delays under ad hoc arbitration.

Finality of the award

Awards under both ad hoc and institutional arbitrations are final in the eyes of the law. However, an arbitration award may be challenged on limited grounds in some jurisdictions on principles such as the violation of natural justice or in situations where the arbitrators have exceeded the jurisdictional authority.

Under institutional arbitration the institution makes it a point to undergo the arbitration through a thorough screening process before declaring the final award. This is to ensure that there has been no injustice that has been caused to either of the parties. Ad hoc arbitrations may not be subject to such scrutiny which may lead to lengthy delays.

On this point William K. Slate II commenting on institutional arbitration stated 'Quality control occurs in at least two ways: through process oversight by trained administrative staff, and by garnering and monitoring feedback from system users.

¹⁶ The London Court of International Arbitration, 'Schedule of Costs (Ad Hoc Arbitration)' (2020) <https://www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-ad-hoc-arbitration.aspx> accessed 30 November 2022.

The AAA finds it useful to monitor the parties' reactions and comments as to the level of quality of the entire process'.¹⁷ Such a level of control may not be available under ad hoc arbitration.

Micheal F. Hoellering commenting on the AAA pointed out that 'The AAA uses such a survey, asking the parties questions regarding the administration, fees, costs and billing practices, and the quality, demeanor and performance of the arbitrators. The feedback is often helpful to identify things that work particularly well or poorly, and to learn about problems with neutrals which parties might be reluctant to reveal during the life of the case'.¹⁸ Thus this a circumstance where institutional arbitration is recommended over ad hoc arbitration.

Disagreement on institution

Often parties are unable to agree on an arbitration institution which may lead to delays. One party may believe that the rules of an arbitration institution is unfavorable to itself and favorable to the adverse party. In such instances ad hoc arbitration may be preferred. This is another circumstance where ad hoc arbitration is recommended.

Situations where one party is a state

Lew, J.D.M., L. A. Mistelis and S. Kröll,¹⁹ state that a popular reason that parties prefer ad hoc arbitration are situations when one of the parties is a state. The justification is that when the state is subject to the authority of an institution it would result in the devaluation and denial of a state's sovereignty. Thus, the international law concept of sovereign supremacy is of relevance here. However, it is argued that such a conclusion is unjustified. Although there may be a truth to the concerns of partiality or non-neutrality of the institutions it is argued that such factors cannot be avoided even under ad hoc arbitration.

¹⁷ William K. II Slate, 'International Arbitration: Do Institutions Make a Difference?' (1996) 31 Wake Forest Law Review 41, 54.

¹⁸ Michael F. Hoellering 'The Institution's Role: Managing International Commercial Arbitration', (1994) 49 Dispute Resolution Journal 12, 17.

¹⁹ Lew, J.D.M., L. A. Mistelis and S. Kröll (n1).

Nevertheless, in a circumstance where one of the parties is a state it appears institutional arbitration is chosen.

Government of the State of Kuwait v American Independent Oil Co. (AMINOIL),²⁰ ***Sapphire International Petroleum Ltd. v National Iranian Oil Company***,²¹ and ***Libyan American Oil Company (LIAMCO) v Socialist People's Libyan Arab Jamahiriya***²² which concerned oil-concession agreements were conducted by way of ad hoc arbitration most likely because one of the parties was the state.

Prestige factor

The prestige and the reputation of the arbitration institution are one of the main reasons parties prefer institutional arbitration. This is all the more important in countries where the courts are not arbitration-friendly and where there is considerable political influence in the court system. In such circumstances an internationally respected institution is preferred. Ad hoc arbitration does not have such an advantage as it is not influenced by an institution.

Conclusion

Although it appears that institutional arbitration has proved to be the more popularly recommended form of arbitration the distinction between ad hoc and international arbitration has become blurred and in such a situation it would be difficult to identify which form is in reality more popular. Nevertheless, at present there is a necessity for the existence of ad hoc arbitration. Therefore, institutional arbitration should co-exist with ad hoc arbitration. In conclusion, it is submitted that a wide array of factors should be considered when making the decision as to what form of arbitration is chosen.

²⁰ *Government of the State of Kuwait v American Independent Oil Co. (AMINOIL)* [1984] IX YBCA 71.

²¹ *Sapphire International Petroleum Ltd. v National Iranian Oil Company* [1967] 35 ILR 136.

²² *Libyan American Oil Company (LIAMCO) v Socialist People's Libyan Arab Jamahiriya* 482 F Supp 1175, 1178 (DDC 1980).