Advantages and Disadvantages of the Ad Hoc Arbitration

Introduction

Today, arbitration plays a significant role on resolving international commercial disputes. According to Rene David, arbitration can be defined as a device whereby the settlement of a question which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a State and who are to proceed and decide the case on the basis of such agreement.[1]

Due to the fact that international trade and investment have been increasing rapidly, parties to international agreement might prefer to resolve their international disputes via arbitration before a foreign court system.[2] As a consequence, experienced institutions such as International Court of Arbitration (“ICC”), the London Court of International Arbitration (“LCIA”), the American Arbitration Association (“AAA”) have emerged to provide impartial arbitration services, an effective treaty network guaranteeing the enforcement of arbitral agreement and awards with time tested rules for the conduct of arbitral proceedings.[3]

There are several reasons why arbitration is a very important alternative method of dispute resolution in the commercial world. Parties might benefit from arbitration to resolve their disputes which include savings cost and time, privacy of the proceeding, carrying on the business relationship if the parties desire. Moreover, parties are entitled to decide some aspects of the proceedings; such as language, governing law, the arbitrators and a neutral locale.[4]

The object of arbitration is to provide fair and impartion solution of disputes by being faster and less expensive for the parties. In this study, it will be explained with two forms of arbitration namely, institutional and ad hoc arbitration with their advantages and disadvantages over each other by giving an example of some case laws.

Basically, the main difference between an ad hoc and institutional arbitration is that in the latter parties choose to submit the arbitration to the administration of any particular institutions while in the ad hoc arbitration, parties do not.

This paper considers the difference between ad hoc and institutional arbitration which are well known types of arbitration, with the advantages and disadvantages of each of them. The aim of this paper to explain institutional and ad hoc arbitration, by comparing advantages and disadvantages with each other. In first part, institutional arbitration and ad hoc arbitration are going to be explained in a very brief way as a single title. Then it will be mentioned disadvantages and advantages of institutional and ad hoc arbitration models, respectively in detail.

Institutional Arbitration and Ad Hoc Arbitration
In institutional arbitration, proceedings are managed by an established institution, and routinely pursuant to that institution’s pre-existent rules of procedure. Such an agency can specialize solely in offering arbitration services or it can propose them among other functions performed within its scope of activity.[5] In addition, there is a quality control system in order to review the tribunal’s award by institutions. These rules of the institutional arbitration are generally up dated and prepared by experienced practitioners.

There are some well known institutional arbitrations such as, the International Chamber of Commerce (ICC) and American Arbitration Association (AAA).[6]

The ICC is the most widely accepted arbitration institution which established in 1921 and over 7,000 cases have had so far. It also continues to take roughly 400 new cases every year. Even though its rules are considered to be inflexible and its procedure is pricey, the ICC has proved itself that it is viable institution over the years. [7]

American Arbitration Association is the second important institutional arbitration. The AAA established in 1926 in New York as a non profit organization by providing alternative dispute resolution services. In 1996, the International Centre for Dispute Resolution (“ICDR”) was established as the AAA’s international division in Dublin in order to deal with conflict management services in more than eighty countries. Many arbitration rules and codes were established specialized with in the field of, in particular; consumer, labor construction, real estate arbitration, insurance and so on. The current AAA Arbitration Rules were made effective in June, 2014. [8]

On the other hand, in ad hoc arbitration there is no allocation of administrative authority like institutional arbitrations. The parties have a freedom to determine the rules of procedure by themselves. They can achieve that either by contractually designing a set of rules for a specific purpose of a particular arbitration, or by opting for already-existing rules of procedure (such as the UNCITRAL Arbitration Rules, CPR Rules), or by transferring the rights to regulate the procedure upon the arbitral tribunal. [9]

Comparison between ad hoc and institutional arbitration

Before comprasing and discussing the advantages and disadvantages of these two model arbitrations, it is useful to look at some statistics for dispute resolution options. These statistics emerged from three studies conducted by the Queen Marry University of London which will be referred to as the “2006 Study” [10], School of International Arbitration, the “2008 Study” [11] and the “2010 Study”. [12] According these statistics, it is shown that 86% which is the great majority of awards are rendered through arbitral institutions rather than ad hoc arbitrations.[13] 2006 Study is shown that 76% of corporations prefer to choose institutional arbitration rather than ad hoc arbitration to resolve the disputes.[14]

By considering these statistics which are mentioned above, it could not be wrong to say that institutional arbitrations provide many advantages with parties rather than ad hoc arbitration.

What are these advantages the parties have if they decide to choose institutional arbitration in their disputes?

According to the 2006 Study as mentioned above; reputation, experience, reasonable costs and fees
besides with the convenience of the process are the reasons why institutional arbitration are chosen by parties rather than ad hoc arbitration.

Institutional arbitration provides parties with procedural rules that have been proven to work in practice and that already exist conveniently at the outset of the proceedings. The rules are generally laid down in a small booklet. If parties decide to solve their disputes with the rules of a named institution, the institution’s “rulebook” incorporate into their arbitration agreement in an effective way. The rulebook might be determined as an advantage of institutional arbitration, since in case that the defending party is unwilling to arbitrate and fail or refuses to appoint an arbitrator, the rulebook will provide with this kind of situations. The rules are involved provisions that the arbitration might carry on in the event of default by one of the parties. According to Article 26 (2) of the ICC Rules, “If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.” This rule is also involved in other institutional rules, in addition to the UNCITRAL Arbitration Rules themselves, is valuable to a tribunal faced with a defaulting party. To sum up, it could be explained that, according the provision of institutional arbitrations, even if a party which refuses to take part in the arbitration or fails in dispute, the arbitration might carry on. This rule is might be very advantageous feature of the institutional arbitration for the other party. In addition, due to the practice of international arbitration’s changing rapidly, new laws, rules and procedures come into existence. The rules of arbitral institutions should be updated to reflect modern practice. Hence, the parties might ensure that the rules which are imposed by institutional arbitration are always updated.

They are also entitled to make an appointment or replace arbitrators who are experts in their fields with their knowledges and this model of arbitration also determine arbitrators with their previous case handling. This assistance is not only to making sure that time-limits are observed, arranging accommodation and visas, it is also to advise on suitable procedures by referencing to past experience as well as knowledge. It is an area in which the ICC sets the standard, with each arbitration being under the supervision of a designated “Counsel”, drawn and multi-lingual lawyers. In addition, if the arbitration agreement has a gap-filling such as fixing the language or the seat of the arbitration, institutions handle about it. They handle the financial aspects of the arbitration, fixing advances on costs and confirming fees and expenses payable to arbitrators. Institutions also manage the limits and other administrative aspects of the case and their staff are available for consultation on various questions that may arise during the proceedings.

On the other hand, even though, institutional arbitration has many advantages for the parties and arbitration system, it has some drawbacks of it at the same time.

It is often argued that institutional support causes additional cost, bureaucracy and delay. According to some institutional rules such as the ICC and the Cairo regional centre, the parties pay the expenses and fees of the institution and arbitral tribunal. If the amounts at stake in the dispute are remarkable, and the parties are represented by advisers experienced in international arbitration, it may be less expensive to conduct the arbitration ad hoc which will be explained later.

Secondly, due to the fact some certain steps are required for the process during the arbitral proceedings, there might be some delay. The time limits which are determined by institutional rules are very short. With regards to a plaintiff, he has several times to prepare the case before submitting to respondent, however, the respondent has as plenty time as the claimant has. Thus, this situation could cause to be
delayed especially in some particular cases such as a dispute under an international construction
conduct.[22]

And lastly, bureaucracy of the proceeding could be given that even if the both parties agreed on an
arbitrator, the institution could refuse to appoint an arbitrator. Thus, the parties should move depending
upon the institution’s rules and this situation could also explained that the parties are not allowed to
behave independently, basically lack of flexibility causes the parties in dispute move with the
insitutions’s decisions.[23]

Turning to ad hoc arbitration, the parties could establish their own rules of procedure.[24] They enjoy
their wishes by designing the procedure and in accomodating the particularities of the dispute at hand.
Parties might modify case-specified procedural as they wish or they could apply for established
processures such as the UNICITRAL arbitration rules that the parties agree to accept as a convenient and
uptades set of rules and also agree to address in ad hoc arbritration models.[25]

If the issue of the dispute is very important, it might be necessary to negotiate and agree the rules that
take into account the status of the parties and the circumstances of the particular case. For instance, any
right to restitution might be expressly abondoned in favour of an award of damages. This kind of drawn
rules which will generally be set out in a formal “submission to arbitration”, agreed and negotiated when
the dispute has arises. This submission agreement will confirm the appointment of the arbitral tribunal,
set out the substantive law and place (or “seat”) of the arbitration and detail any procedural rules upon
which the parties have agreed for the Exchange of documents, witness statements and so forth.[26]

One particular advantage of an ad hoc arbitration the parties might shape the rules as they wish.[27] In
other words, the flexibility which is offered by ad hoc arbitration means that many important arbitrations
involving a state party are conducted on this basis. The choice of arbitrator is the main issue that is
undertaken after the parties agree to solve the disputes between them. Ad hoc arbitration provides the
parties with the freedom to determine arbitrators as they wish in addition to the right to decide the
arbitrators with regards to their discretion without any limitation.[29] Many of the well-known
arbitrations under oil concession agreements are made by ad hoc arbitrations. For instance, in the Aminoil
arbitration between the government of Kuwait and the American Independent Oil Company, could be
shown as a good example of the advantages for the parties in dispute involving legal issues of great
importance of the flexibility in the ad hoc proceedings. Sapphire, Texaco, BP, Lianco could be also given
as a good example for the ad hoc arbitration.[30] These issues were defined in a way that considerably
shortened the time spent in dealing with the case. [31]

Seondly, in ad hoc arbitrations, arbitrators do not have the comfort of pre-determined fees and will have
to engage in sensitive fee discussions with the parties themselves. This may well have an impact on the
overall conduct of the proceedings to the extent that the monetary interest of the individual arbitrator may
temporarily detract his attention from the case and cause undesirable procedural delays. On the other
hand, however, given that there is no administrative body involved, parties in ad hoc arbitrations do not
have to pay any administrative fees, which makes the proceedings cheaper overall.[32]Because of the fact
that, comparison with institutional arbitration, ad hoc might be more reasonable since it has less extensive
and less expensive administrative bureaucracy needed in parmanent institutional bodies. Administrative
functions including the location of the chambers, obtaining a deposit from each party against
administrative cost, communications with the parties and other arbitrator, could be arranged easily by the
chairman of an ad hoc panel or by his secretary. These all functions that mentioned might be less expensive than administrative fees that institutional bodies must charge.[33]

Thirdly, the timeliness could be one of the main advantages of the arbitration proceedings. This is mostly due to the existence of American trained lawyers using discovery proceedings that are only used in the American legal system. In the preliminary hearing procedure however, there is less possibility to be ambushed as in the American system since the evidence, list of witnesses are submitted prior to the arbitration hearings. Some institutional rules require the submission of arbitrator’s decisions to the court for confirmation which causes the procedure to last longer. In ad hoc arbitration the lack of such an administrative requirement makes the ad hoc arbitration more advantageous with less attorney time and fees. In AAA administered arbitrations, for example, communication between the arbitrators/counsels or the parties directly, are mostly maintained through the AAA, which causes a delay in the process. However, some AAA administrators, try to avoid this problem by asking the AAA to receive copies of the direct communications with and between the parties. Without the requirement of administrative oversight and approval, it is obvious that legal matters may be resolved faster through ad hoc arbitration.[34]

Having explained the advantages of ad hoc arbitration models, it might not work well for the parties every time. The principal disadvantage of an ad hoc arbitration depends on its full effectiveness on cooperation between the parties and their lawyers, supported by an adequate legal system in the place of arbitration.[35] Due to the some specific issues which will be explained hereinafter, the parties might have to deal with some issues to resolve their disputes through the ad hoc arbitration.

Firstly, because of the fact that there is no arbitral tribunal exist and no agreed book rules in an ad hoc arbitration, arbitral proceedings could be delayed easily. What is meant by saying that is, for instance, one of the parties refuse at the outset to appoint an arbitrator. It will then be necessary to rely on such provisions of law may be available to offer the necessary support. If a set of rules has been established and if an arbitral tribunal exist, then an ad hoc arbitration could be worked efficiently. This situation might prevent delaying the resolution of disputes, if one of the parties fail or refuses to play its part in the proceedings.[36]

Second of all, the dispute resolution clause should be extensive so that it encompass as many as possible of the issues with regard to the contract, agreement or licence. If the dispute has arisen out of a situation that no dispute resolution clause pre-existed, the submission clause might more narrowly limit the defined issue.[37] In the light of the fact that, this situation might create a problem to resolve the disputes since they do not have pre existed rules. It is necessary that arbitration clauses should include sufficient terms to complete the gap, the reasonable needs sought. UNCITRAL Model Law on International Arbitration which is adopted on 21 June 1985 could be helpful to resolve these problems.[38]

Conclusion

As explained above in detail about the pros and cons of the ad hoc and institutional arbitration, it could be explained that either ad hoc or institutional arbitration might be in favor of parties if one of the arbitration model could be used efficiently. It could be difficult to say that one type is better than another.

In my opinion, unless ad hoc arbitration supported by the UNCITRAL Rules, the main advantage of ad
hoc arbitration, for instance; less cost, speed, efficiency are entirely dependent the co-operation between the arbitrating. However, in my opinion, even though ad hoc arbitration provide parties with great flexibility, this situation could create some problems such as delay because of non agreement between parties. In this case the foremost feature could turn into as an disadvantage for parties if one of the parties refuse the procedure, proves un-co-operative.

On the other hand, due to the fact that institutional arbitration has a certain rules in addition to the jurisdiction, some issues such as delaying in ad hoc arbitration could be prevented by insitutional arbitration. Furthermore, because of the fact that the rules of the institutional arbitration are always updated and are prepared by experienced practitioners, this model of arbitration might be more trustable than ad hoc arbitration. Even though, it has some disadvantages of it, it could not be wrong to say that insitutional arbitration could be more guarantee way and reliable due to the features that explained above for parties in order to resolve the disputes.

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4. See above, 2


12. School of International Arbitration, Queen Marry University of London, *International Arbitration Survey: Choices in International Arbitration* 2010


[17] See above, p.45

[18] See above, p.67


