The road less travelled? The decision whether to submit to ad hoc or institutional arbitration.

Administered institutional arbitration is conducted within the framework of an existing arbitration institution. Parties will pay for and submit to a process which is conducted by a body such as the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC). There are also specialist institutions such as the International Centre for Settlement of Investment Disputes (ICSID) and the World Intellectual Property Association (WIPO). Matters will be conducted in accordance with that institution's rules and administered by its secretariat which will be responsible for such things as constituting (in the sense of organising but not choosing) the arbitral tribunal and fixing the arbitrators' compensation. There will be a professional, specialised staff that can administer an arbitration wherever it takes place[1]. As noted by commentators the institution's involvement can be particularly helpful on issues relating to appointment, resolution of challenges to arbitrators and selection of seat[2].

Ad hoc arbitrations however are the creatures of the parties themselves and are conducted without involvement of such institutions. Whilst the rules of institutions are generally broad with scope for flexibility as to procedure within them, *ad hoc* arbitrations provide the most flexibility available. They avoid the control that parties submit to when they opt for an institutional process and thus parties have almost complete freedom to decide on everything from the number of arbitrators to the procedures for identifying issues and presenting evidence. Such freedom is limited only by the provisions of national or international law.

Thus in practical terms an *ad hoc* arbitration may be more attractive than an institutional one because of the parties' desire to control the process itself. This goes to one of the theoretical basis of arbitration; at its heart it is a consensual process. It can be readily appreciated why, consistent with a desire to resolve matters their own way, the parties themselves wish to choose the process to be adopted. It is, perhaps, arbitration in its purest form.

As no one involved has submitted to a separate institution but rather chosen to arrive at a result in an independent way the parties are sovereign and thus *ad hoc* arbitrations are perhaps most attractive when sovereignty is an issue. Where a party is a state it may have chosen arbitration in the first place because it will not submit to either its own or another's legal or other dispute resolution process. Further several institutions bring with them

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[1] Born *International Arbitration Cases and Materials* p 71

[2] [2] Born *International Arbitration Cases and Materials* p 71

particular limits, in particular waiver of any potential rights of appeal[3]. Constraints of this nature are likely to make such an option less attractive to states who wish to deal with a dispute by the exercise of their own freedom of action no matter how independent an institution may seek to present itself. Thus it is in these types of practical circumstances that a party might insist on *ad hoc* arbitration if there is to be any arbitration at all. Arbitrations relating to oil concession agreements have fallen into this category[4]. For any non-state participant there is a clear advantage in getting a state to consent to a set of ground rules which, given such agreement, may make it more difficult for the state to later seek to renege on.

Further confidentiality is important; whilst the institutions do have rules relating to confidentiality, if the parties conduct the process themselves knowledge of matters can be more closely controlled and obviously will not require knowledge of the dispute by another third party entity, apart from the appointed arbitrator.

Even where there is no issue of state sovereignty involved an *ad hoc* arbitration may have perceived advantages because it may not actually be clear which of the many institutional processes will be the most appropriate. Whilst many of the institutions have common approaches (for example, rules on consolidation and joinder) there are significant differences between them. The approaches to confidentiality are perhaps a good example of this; the American Arbitration Association (AAA) rules expressly prevent the disclosure of confidential information during proceedings and there is an obligation of confidentiality in relation to the award whilst the WIPO have detailed confidentiality provisions which extend to appointment of a confidentiality advisor. Either of these two approaches may appeal to the parties who may also be keen to have a type of early determination procedure of the type that is provided for by the HKIAC Rules[5] or the HKIAC's fee cap on arbitrator's hourly rates. Thus the advantage of an *ad hoc* arbitration is that it can incorporate particular elements from different procedures used by different institutions into a single bespoke process.

However having to administer and establish the rules of the process themselves may be a disadvantage. In a context where there is a substantive dispute where the stakes may be high the temptation to be obstructive might be considerable. Associated increased costs will wipe out any savings represented by not having to pay an institution (which may, of itself, have been a reason for opting for an *ad hoc* process). The other parties' aim of getting the dispute resolved expeditiously will be frustrated. The breadth and clarity of an institution's rules on the other hand will generally cover most common issues such as competence-competence or separability and thus may minimise the scope for such tactics. However this perceived disadvantage should not be overestimated for two reasons.

Firstly, parties can minimise the scope for time, effort and argument relating to such matters by agreeing an existing and established body of rules such as the UNCITRAL rules.

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[3] ICC Rules Article 35, Article 26.8 LCIA Rules 2014 (unless otherwise agreed).
[4] For examples, Libyan American Oil Co. ("LIAMCO") v. Libya, 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB. 177 (1979) and Sapphire International Petroleums Ltd v National Iranian Oil Co. Arbitral Award. March 15, 1963
[5] Article 43, HKIAC Rules 2018

These are comprehensive; for example, they cover separability and competence-competence[6]. The success of the UNCITRAL rules is exemplified by their use by some institutional arbitrations themselves[7]. Further, given the UN origin of the UNCITRAL rules there is the added advantage that no state party is deferring to a non-state institution or process associated with a particular national legal system.

Secondly, even with an institutional arbitration there is still scope for such tactics as typically great leeway is given to the parties to decide the appropriate procedure, as, for example, with the SIAC rules.

Notwithstanding the above, *ad hoc* arbitrations may not be attractive to commercial organisations whose principal aim is to have their dispute resolved as quickly, expediently and as fairly as possible. Time is money. Thus there is the attraction of working within an established framework organised by a secretariat that is able to assist and advise on all aspects of its process leading to an award which has a significant stamp of legitimacy when it comes to enforcement.

Support can be provided not just in administration but also in substance whether in relation to interim matters or in respect of the final decision. For example, as far as interim relief is concerned the International Centre for Dispute Resolution (ICDR) Rules provide for the appointment of an emergency arbitrator for urgent relief[8] as do similar provisions under the ICC Rules[9] . This may not be especially significant as such measures are used rarely[10] but something that may be more influential when deciding which form to take is the availability of review and scrutiny by an institution. Awards made by ICC arbitrators are scrutinised by the ICC court and under the German Arbitration Institution (DIS) Rules the tribunal sends the draft award to the DIS for review. Ensuring an unimpeachable award will be a key factor.

Thus *ad hoc* arbitration is likely to be preferred where principled issues of sovereignty arise or where the parties wish to adopt a 'mix and match' approach of taking different elements of different institutions. Otherwise in practical terms an institution will be more attractive for the very reason that principally distinguishes it from *ad hoc* arbitration; namely that there is an administrative framework that is properly resourced to ensure an award can be obtained with maximum expediency. Other benefits such as minimising opportunities for procedural disputes and conferring legitimacy on an award contribute to achieving the aim of resolving matters as painlessly as possible. Ultimately that is the very need that has fuelled the development of arbitration generally and the creation of arbitration institutions themselves.

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[6] 2010 UNCITRAL Rules Art 23
[7] For example HKIAC
[8] ICDR Rules Article 6
[9] ICCR Rules Article 29
[10] For example in 2016 there was only one unsuccessful application made to the LCIA and two successful applications to HKIAC. See Maxwell *Arbitration Statistics; and the winner is* 23.5.17
http://arbitrationblog.practicallaw.com/arbitration-statistics-and-the-winner-is/