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A DEBATE ON
INSTITUTIONAL v *AD HOC* ARBITRATION

By Michael Hwang S.C.
Senior Counsel and Arbitrator
michael@mhwang.com

Parameters of Debate

- This is in some ways an artificial debate. There are strengths and weaknesses of arbitration which are common to both institutional and *ad hoc* arbitration. I will therefore try to concentrate on areas where the strengths and weaknesses arise from the inherent nature of the type of arbitration (as well as how they work in practice).
- No comparative discussion of institutional and *ad hoc* rules, because defects in those rules simply reflect defects in drafting rather than defects in the process
- I will only discuss supervised institutional arbitration otherwise Philip Yang will be in difficulty defending the HKIAC, which practices unsupervised institutional arbitration.
- Some advantages and disadvantages are common to both *ad hoc* and institutional arbitrations: no discussion of those
- I will assume *ad hoc* arbitration under UNCITRAL Arbitration Rules as being the example of *ad hoc* arbitration at its best.

Pease of Nicias

- One of the earliest known arbitrations was an agreement between Athens and Sparta in 421 BC. (Pease of Nicias).

> *"It shall not be permissible for the Lacedaemonians and their allies to make war upon the Athenians and their allies or to inflict upon them damage in any manner under any pretext whatsoever. The same prohibition is made to the Athenians and their allies as to the Lacedaemonians and their allies, but if there should arise a difference between them they will remit its solution to a procedure according to a method upon which they will come to an agreement"*

This agreement only lasted 6 years. Possibly this was due to the faulty construction of the clause, as it contained only an agreement to arbitrate without providing important details relating to selection of arbitrator, or the procedure. Perhaps this clause might have worked better if they had sought the assistance of a neutral, third party institution for guidance and support. Those who have seen the movie "Troy" will agree that the parties would probably have chosen combat in some form between their respective champions, and disputes about the rules for the contest and the ultimate adjudication of the winner could have been supervised by the forerunner of the Court of Arbitration for Sport now based in Lausanne.

Comfort Element

- When you opt for institutional arbitration, you also opt for a well-drafted set of rules which have stood the test of time. On the other hand, in *ad hoc* arbitrations, there are often no rules (unless it is an UNCITRAL arbitration), and so the rules of procedure depends on the law of the seat of arbitration. Model clauses which automatically incorporate institutional rules are an advantage because they not only appoint the arbitrators but also adopt the rules of procedure which are typically well drafted and comprehensive. Users know what they are getting if they have done research on or have actual experience of institutional arbitration
- Institutions are particularly helpful to first time users because they give extensive guidance to neophytes in arbitration.
- Institutions often provide panels of arbitrators which gives users information on potential arbitrators for their selection
- They maintain ethical standards by prescribing a code of ethical conduct and reminding arbitrators of it.

Administrative Support

- Trained staff and highly qualified governing body to administer arbitration
- They ensure smooth flow of arbitration by case management system
- They handle deposits; otherwise money will have to be kept by Chairman of Tribunal who may not have resources or experience of cash management, and who may even be threatened with court action by unreasonable parties.
- They negotiate with or moderate fees of the arbitrators, thereby reducing potential source of friction and conflict of interest.
- ICC provides scrutiny service: it has been found of particular value to have lawyers trained in international arbitration look over the draft award to pick up: -

    - whether all issues raised by the parties have been addressed
    - apparent inconsistencies in reasoning
    - the drafting of the dispositive part of the Award (the actual orders) is clear and unambiguous
    - incidential matters like costs, interests, return of deposits are properly dealt with (bearing in mind that Tribunal is *functus officio* after giving its award unless rules allow for rectification or supplemental award)

Time Limit

- Most arbitrations impose a time limit for the issue of the award (e.g. 6 months for ICC, 45 days after hearing for SIAC). No such limitation in *ad hoc* arbitrations unless specifically written in.

Enforcement

- Illusion: prestige of institutions (particularly long established ones) should give it more respect before national courts when enforcement is challenged.
- Reality: administration and case management processes should have picked up potential matters giving grounds for challenge during the proceedings and been rectified accordingly
- ICC scrutiny process (confirmed and supplemented by the ICC Court) should have eliminated any infelicities in the award itself so as to pre-empt any valid grounds for challenge.
- Random survey of setting aside cases shows that 7 out of 8 cases where awards were set aside were *ad hoc*. The 8th case was an ICC award which was remitted back to the Tribunal by the Indian court (which may say more about the Indian Court than about the ICC process). But not all were UNCITRAL arbitrations nor can I safely say they would not have gone wrong had they been institutional.

Costs

- Is institutional arbitration more expensive than *ad hoc*?
- *Ad hoc* saves institutional fees but then the institutional fee is meant to pay for the cost of the services provided. You pay for what you get.
- In *ad hoc* arbitrations, Tribunal or Chairman has to perform services otherwise performed by the institution.

    - Is the Chairman qualified for this task? How would the user know?
    - The Chairman has to change his hourly rate for administrative services (not cost-efficient).
    - I can perform such tasks well, but parties would not like to pay me my hearing rate for carrying out such tasks.

- In *ad hoc* arbitrations, who guards the guardians? There is no control over arbitration fees: rates may be freely agreed but there is no control over time (Article 41 of the UNCITRAL Arbitration Rules provides some benchmark, but it is not binding on arbitrators). Further, the tribunal has to ask for deposits, as compared to institutional arbitration, where the institution will usually take up this function.

Responses to PY points

Flexibility

- Flexibility is seldom (if ever) prevented by the institution. The Tribunal can be as flexible as it wishes in an institutional arbitration, except that it cannot adopt or abandon certain procedures which are considered fundamental to that institution's branding of its arbitrations (e.g. ICC will not administer an arbitration with umpires, nor an arbitration which seeks to exclude the scrutiny process). Further, the institutional tribunal is also master of its own procedure through the TOR. But the answer is that these are the typical

characteristics of ICC arbitration: if you don't like it then don't opt for ICC arbitration.

Costs

- It may be thought that institutional arbitrations are more expensive than *ad hoc* because:

  (a) *ad hoc* arbitrations do not incur institutional fees; and
  (b) some scale fees (esp ICC) are high in absolute terms

  But the reality is that:

  (a) someone has to do the administrative work, and the lack of an institution will mean that the Tribunal (or at least the Chair) will have to do the work at a very expensive charge-out rate

  (b) ICC's administrative fees are capped at USD 88,800 after USD 100 mio. Although the perception is that Arbitrators' fees are high, in practice, they do not work out to be that much in hourly terms where they tend to be more commonly USD 200 to USD 400 per hour than USD 500 and above.

  (c) apart from ICC, other institutions generally perform a moderating or a fixed fee system, which usually mean that arbitrators will charge less than their quoted hourly rate – so usually cheaper for arbitrators' fees. (c.f. KCAB or BANI, where the scale fees are so low such as to discourage international arbitrators from accepting appointments)

Saving of time

- Philip says that instant arbitrations are possible in *ad hoc* arbitrations. But they would be equally possible in institutional arbitration, since most institutions allow parties to shorten filing periods or don't have time rules about certain procedures. Institutions also provide for "fast track" rules or at least do not prevent them. The only thing you can say is that ICC does not allow waiver of certain procedures like Terms of Reference and scrutiny, so these procedures do consume additional time. But in return, you get some quality control with scrutiny, and the TOR give some assurance that all issues are clearly identified at an early stage

Confidentiality

- Leaks can come from any source, even from arbitrators in *ad hoc* arbitrations. In an institution, more people are exposed to the file, but their staff would all have been instructed about the obligation of confidentiality, possibly more so

than a private arbitrator, especially one who is not a lawyer and may not have the same instinctive obligations to respect clients' confidences.

- It is true that institutions publish sanitized versions of awards, but parties have the right to insist that no summaries shall be published, even in sanitized form

Institutional rules may be badly drafted

- This is a criticism directed against the rules of particular institutions, which criticism need not apply to other institutional rules. In any event, a defective rule can always be changed, so this is not a criticism against institutional arbitration as such.

Institutional work may be unnecessary

- Theoretically, ICC has to confirm the appointment of arbitrators even if they are made by parties. In practice, they will confirm if the parties don't object. Their reserved right to disapprove a nomination comes from a caution in case they know something about the arbitrator that the nomination party(ies) does not. Since they do not have a pre-approved panel of ICC arbitrators, this right is necessary for the protection of the parties and the process. The confirmation process is also a useful substitution for court challenge, especially if the other party is not represented and the nominated arbitrator is not independent (c.f. UNCITRAL Articles 6 and 7 on the appointment of arbitrators procedure).

- ICC would certainly disagree that scrutiny is unnecessary. Their job is to spot things which may not be apparent to busy arbitrators when writing their award, and certain issues which need to be addressed are so addressed. They also check for consistency in argument, ensure that no issues raised in the TOR or in the pleadings have been overlooked, and that no issues which are normally consequent upon the determination on merits are adequately addressed, e.g costs and interest.

Conclusion

- ICC Case No. 3383, 1982 VII Yearbook of Commercial Arbitration, pg. 119 –124:-

  A Belgian company concluded 5 contracts with an Iranian company which were governed by Iranian law and contained an arbitration clause stipulating that disputes were to be decided in accordance with the ICC Conciliation and Arbitration Rules. The seat of the arbitration was Tehran. A dispute arose between the parties and a request for arbitration was filed with the ICC Court of Arbitration. After a first hearing, the parties decided to withdraw from ICC jurisdiction and made an agreement that they would submit to arbitration on an *ad hoc* basis. The *ad hoc* arbitration agreement, which was entitled 'Convention' provided that the award

would be made within 3 months of the date of the last signature, but that this term could be prolonged four times, each time by 3 more months. The arbitrators found that they were competent to hear the case and the Claimant's lawyers duly signed it. The Defendants then added the last signature on 28 October 1976, although this was opposed by its lawyers.

One day before the due date for the award (i.e. 27 January 1977), the arbitrators decided to prolong its mandate for a further 3 months. The Defendant did not sign this decision. In a letter dated 26 December 1977, the Defendant stated that it no longer recognized the existence of the arbitration since under Iranian law, a prolongation of the arbitrators' mandate could only validly take place through a formal agreement of the parties and that this procedure had not been followed. The arbitrators eventually confirmed that their mandate had expired and that they had no competence to continue the proceedings.

Subsequently, the Claimant commenced a new arbitration before the ICC. The Defendant argued that there was no valid arbitration agreement because of the Convention. The sole arbitrator in the new arbitration found that the Convention was highly irregular, in that the provision on prolongation of the tribunal's mandate was void under Iranian law. Nevertheless, the sole arbitrator found that there was no valid arbitration clause over which the ICC and the arbitrator himself had jurisdiction since, by the Convention, the arbitrators had concluded that they had competence and that, accordingly, the Convention superseded the original arbitration clause which provided for ICC arbitration.

- The moral is that *ad hoc* arbitration can work well but is much more dependent on the quality and experience of the Tribunal, especially the Chair. When the relationships between the Parties and the Tribunal becomes hostile (especially if this is reflected in the relationship between different members of the Tribunal), then the presence of the institution will be invaluable in providing a buffer as well as an additional neutral party to hold things in check and proceed to a smooth conclusion.

- *Ad hoc* arbitrations are too dependent on good tribunals and reasonable parties. The test of arbitration is an enforceable award. If you had to bet on whether a particular arbitration would be more likely to result in an unenforceable award, I would put my money on an award rendered in an *ad hoc* arbitration.