Institutional And Ad Hoc Arbitrations: Advantages And Disadvantages

Sultanli Melek Rovshan
Master student, Baku State University,
Department of Civil Process and Commercial law

Key words: international arbitration, ad hoc arbitration, institutional arbitration, UNCITRAL

Abstract:

This article deals with types of international arbitration, their role in alternative dispute resolution, effectiveness of them and their advantages and disadvantages. Arbitration is a form of the alternative dispute resolution which gives the right to parties of the commercial dispute to solve their dispute out of the court. In the international business, specially in the international transactions arbitration is the most dominant method of resolving disputes.

Açar sözlər: beynəlxalq arbitraj, daimi arbitraj institutu, ad hoc arbitraj, UNCITRAL.

XÜLASƏ:

Bu məqalədə beynəlxalq arbitrajın növlərindən, bu növlərin mübahisələrin alternativ həllindəki yerindən, onların səmərəliliyindən və həmçinin üstünlükləri və mənfi tərəflərindən bəhs edir. Arbitraj mübahisə tərəflərinə mübahisəni məhkəmədən kənar həll etmək hüququ verən mübahisələrin alternativ həlli vasitələrinin bir növüdür. Beynəlxalq biznes münasibətlərində, xüsusilə də beynəlxalq əməliyyatlarda arbitraj mübahisələrin həllinin dominant metodlarından biridir.

Ключевые слова: международный арбитраж, институциональный арбитраж, арбитраж ad hoc, Юнситал

В этой статье рассматриваются, типы международного арбитража: роль в альтернативном разрешении споров их эффективность и преимуществ, а так же недостаток.Арбитраж - это форма альтернативного разрешения споров, которая дает право сторонам коммерческого спора разрешать свой спор за пределами суда. В международном бизнесе, особенно в международных сделках, для разрешение споров, арбитраж является наиболее доминирующем (эффективным) методом.

First of all, arbitration is a form of alternative dispute resolution which allows disagreements between two parties to be resolved outside of the traditional court system.Generally parties are entitled to choose the form of the arbitration which they deem appropriate in the facts and circumstances of their dispute. The choice of the right institution depends on various aspects, for example the parties' backgrounds, the subject matter, the amount potentially in dispute, the applicable law on the merits and on where the award is going to be enforced. Arbitrations are commonly divided into 2 main types: ad hoc arbitration and institutional arbitration.In fact, Article 2(a) of the UNCITRAL Model Law on International Commercial Arbitration recognizes both ad hoc and institutional arbitrations as it defines arbitration as: "Any arbitration whether or not administered by a permanent arbitral institution". (1) Similarly article of the "Law on International Arbitration" of Azerbaijan Republic also recognizes both arbitration: "arbitration - any arbitration whether or not it is conducted by the permanent arbitration office". (2)

Institutional arbitration is an arbitration which is administrated by an institution.

In an institutional arbitration, the arbitration agreement designates an arbitral institution to administer the arbitration. The parties then submit their disputes to the institution that intervenes and administers the arbitral process as provided by the rules of that institution. The institution does not arbitrate the dispute. It is the arbitral panel which arbitrates the dispute. For example, international institutions include International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), International Centre for Settlement of Investment Disputes (ISCID) and etc. All these institutions have rules expressly formulated for conducting arbitration.

Institutional arbitration may be preferred if the parties do not mind the administrative charges levied by the institution. However, the administrative fees will be also high as they are calculated based on the amount in dispute. The rules may also require parties to respond within unrealistic time frames. Such rules may be applicable to a particular trade or industry, but not to the existing or prospective needs of one or more of the parties. (3) Parties should take care in selecting and deciding which institution to designate in their arbitration agreement. They should consider the nature and value of the dispute, rules of the institution as these rules differ, reputation of the institution and parties also chose the rules which in the same line with the latest developments in international commercial arbitration practice.

In order to submit a dispute to institutional arbitration, it is necessary to use precise language in the agreement to arbitrate. Each arbitral institution has its own model arbitration clause. The ICC's is as follows: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." (4)

Features of institutional arbitration are following:

1) It involves specialized institution.
2) It has pre-established, up-to date set of rules.
3) Administered arbitration process, i.e. the institution oversees the whole proceeding and guarantees a certain standard flow of the procedure.

In the contrast to the institutional arbitration, an ad hoc arbitration is a proceeding that requires the parties to select the arbitrator(s), and the rules and procedures. If necessary, the parties can still designate an arbitral institution as an appointing authority and adopt an institution's arbitration rules, if the rules allow the parties to opt out of case administration by that institution. The parties may also adopt the UNCITAL ad hoc rules for domestic and international disputes. (5)

Ad hoc arbitration is an arbitration which is not administrated by an institution. Ad hoc arbitration has been defined as "arbitration where the parties and the arbitral tribunal will conduct the arbitration according to the procedures which will either be previously agreed upon by the parties or in the absence of such agreement be laid down by the arbitral tribunal at the preliminary meeting once the arbitration has begun." Therefore, ad hoc arbitration is arbitration agreed to and arranged by parties themselves without recourse to an institution. The proceedings will be conducted by the arbitrator in accordance to the agreement between the parties or with their concurrence. This type of arbitration is a proceeding that is not administered by institution and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The absence of administrative fees alone makes this a popular choice. (6)

An ad hoc arbitration is one where parties agree on particular, non-institutional rules to govern the arbitration rather than conduct it under the supervision of a specialist institution. The parties themselves determine all aspects of the arbitration like the selection and manner of appointment of the arbitral tribunal, applicable law, procedure for conducting the arbitration and administrative support without assistance from or recourse to an arbitral institution. The arbitral mechanism is therefore structured specifically for the particular agreement or dispute. If the parties cannot agree on such arbitral detail or, in default of agreement, laid down by the arbitral tribunal at a preliminary meeting once the arbitration has begun, it will be resolved by the Courts of State pursuant to the law of the seat of arbitration. While parties themselves may devise a bespoke set of arbitral rules to govern the arbitration, however, it is also open to the parties to adopt the 2010 UNCITRAL Arbitration Rules which are specifically designed for ad hoc

arbitral proceedings. These rules offer some of the certainty of institutional rules, without the necessity of submitting the dispute to the supervision of an arbitral institution.

The main features of ad hoc arbitration are:

1. Independent proceedings giving parties maximum flexibility;
2. The Tribunal is chosen by the parties (although if agreement cannot be reached the matter may be referred to an appointing authority);
3. There is no review of the award by an arbitral institution.

Ad hoc proceedings need not be kept entirely separate from institutional arbitration. Often, appointing a qualified arbitrator can lead to the parties agreeing to designate an institutional provider as the appointing authority. Additionally, the parties may decide to engage an institutional provider to administer the arbitration at any time. Provided the parties approach the arbitration with cooperation, ad hoc proceedings have the potential to be more flexible, faster and cheaper than institutional proceedings. The absence of administrative fees alone provides an excellent incentive to use the ad hoc procedure. (7)

So there are some advantages and disadvantages of both types of arbitration. Advantages of institutional arbitration is in the availability of pre-established rules and procedures which ensure the arbitration proceedings results consistent and predictable results. Administrative assistance from the institution, which will provide a secretariat or court of arbitration. The arbitral institution's staff will ensure that the arbitral tribunal is appointed, that advance payments are made in respect of the fees and expenses of the arbitrators, that time limits are kept in mind and, generally, that the arbitration is run as smoothly as possible. In addition to administration, certain arbitral institutions, like the International Chamber of Commerce (ICC), and the International Court of Arbitration (ICC Court) in Paris, scrutinize an award before it is published to the parties. The other advantage is in the qualified list of the arbitrators. International arbitration institutions usually benefit from vast databases of arbitrators in order to assist parties in appointing appropriate arbitrators for the resolution of their disputes. (8) The institutions have panels of experienced arbitrators specializing in various areas like construction, maritime, contract, trade, commodities, etc. available to them. In all arbitrations, speed is of essence. Where an arbitral institution is involved, there will be tight time limits for the exchange of the parties' pleadings, the main hearing and the publication of the final award.

Disadvantages of institutional arbitration is in the administrative fees for services and use of the facilities, which can be considerable if there is a large amount in dispute - sometimes, more than the actual amount in dispute, bureaucracy from within the institution, which can lead to delays and additional costs and the parties may be required to respond within unrealistic time frames.

Advantages of ad hoc arbitration are following: Ad hoc arbitration if properly structured should be less expensive than institutional arbitration. So ad hoc arbitration is a preferred mode by the big corporations. Ad hoc arbitration may be designed according to the requirements of the parties, particularly where the stakes are large or where a state or government agency is involved. The parties are in a position to devise a procedure fair and suitable to both sides by adopting or adapting to suitable arbitration rules. Thus, parties are in control of the process. Ad hoc arbitration is flexible in allowing the parties to cooperate and decide upon the dispute resolution procedure. Parties can avoid such disagreement and avoid delays if they agree to conduct the arbitration under for example, UNCITRAL selected arbitration rules. The result is less time and legal expense spent in determining complex arbitration rules to be used in the arbitration. Ad hoc arbitration is less expensive than institutional arbitration. The parties only pay fees of the arbitral tribunal, lawyers or representatives, and the costs incurred for conducting the arbitration, i.e. expenses of the venue charges, etc. They do not have to pay the arbitration institution's administration fees which, if the amount in dispute is considerable, can be prohibitively expensive.

A disadvantage of ad hoc arbitration is that it depends for its full effectiveness upon the spirit of cooperation between the parties. If the parties do not cooperate in facilitating the arbitration, there could be loss of time in resolving the issues. There may be repeated recourse to the courts to determine contested interlocutory issues which may delay the arbitration

proceedings. In ad hoc arbitrations, progressing with the proceedings in the absence of one of the parties may be somewhat riskier, given that the absent party may later challenge the award on the grounds that the arbitral tribunal has not given him a fair opportunity to be heard.

In the conclusion, institutional arbitration is, in general, more adequate for the needs of international commercial companies because of its relative reliability, predictability and acceptance, which also means an easier enforcement of the award. A good ad hoc arbitration clause can take more time to draft and a «bad» ad hoc arbitration clause might cause the procedure to end up in front of state courts with more likelihood than a «bad» institutional arbitration clause.The choice of the right institution depends on various aspects, for example the parties' backgrounds, the subject matter, the amount potentially in dispute, the applicable law on the merits and on where the award is going to be enforced.

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