Osgoode Hall Law School
LLM Course
International Commercial Arbitration
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WILLIAM G. HORTON
Commercial Arbitration

Ad Hoc Arbitration

Should you commit yourself to an institution?

Malcolm Gladwell: *David and Goliath*

"We spend a lot of time thinking about the ways that prestige and resources and belonging to elite institutions make us better off. We don't spend enough time thinking about the ways in which those kinds of material advantages limit our options."

Examples of international *ad hoc* arbitration

- Canadian company in dispute with international insurers over coverage for a satellite outage
- Dispute between US and Canadian company re right to use a brand name after corporate divestiture
- German auto-parts manufacturer in dispute with North American companies re licensing arrangements
- US and Canadian companies dispute re sale of a forest products facility
- Canadian and Eastern European companies dispute re rights to health care product
- Dispute re alleged corrupt payments on IT consulting contract

Examples of non-international *ad hoc* arbitration

- Dispute over construction of a nuclear facility
- Dispute regarding a telecommunication interconnect agreement
- National advertizing disputes
- Dispute regarding environmental remediation costs of a manufacturing facility
- Disputes re alternative energy projects
- Dispute regarding accountants liability
- Rate renewal disputes: pipeline, commodity terminal, major commercial building

What is *ad hoc* arbitration?

- Not administered by an arbitral institution (such as AAA, ICC, LCIA etc.)
- Arbitration agreement needs to be largely self-executing
- May or may not adopt the rules of a particular institution or use a particular institution for limited purposes (e.g. appointment of arbitrators)
- Depends to a greater extent on party co-operation

What is the legal status of *ad hoc* arbitration?

New York Convention of 1958, UNCITRAL Model Law on International Arbitration, judicial decisions on arbitration make no distinction based on arbitration being institutional or *ad hoc*

NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought

The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

…

Arbitration Principles

- Principles such as jurisdiction based on consent, party autonomy, severability of arbitration clause and judicial non-interference apply equally to *ad hoc* arbitration
- bigger difference legally between international and "domestic" than between institutional and *ad hoc* arbitration: esp. re judicial review and enforcement

How common is *ad hoc* arbitration?

- In Canada *ad hoc* arbitration for non-international (aka "domestic") commercial arbitration (cases can exceed $1 billion in dispute) is the norm
- Surprisingly large percentage of international arbitration is also *ad hoc*
- 2006 Queen Mary Law School/ PwC international arbitration survey found that 76% of respondent businesses favoured institutional arbitration

Queen Mary Law School / PwC Survey of 2006:

"The 24% of respondents that stated their organisations prefer ad hoc arbitration proceedings are primarily from corporations with a gross annual turnover of more than US$5 billion. In many cases, these corporations have large, sophisticated in-house legal departments with experience of managing arbitration proceedings."

24% *ad hoc* compared to:

- ICC 42%
- LCIA 20 %
- AAA 13%
- Swiss 3%
- HKIAC 1%
- *Ad hoc* content of international conferences, arbitration textbooks and university courses ???

Gerard Malynes "The Ancient Law Merchant" published in 1685:

- "The second meane or rather ordinary course to end the questions and controversies arising between Merchants, is by way of Arbitrement, when both parties do make choice of honest [individuals] to end their causes, which is voluntarie and in their own power, and therefore called Arbitrium, or free will, whence the name Arbitrator is derived: and these [individuals]…give their judgments by Awards, according to Equitie and Conscience, observing the Custome of Merchants, and ought to be void of all partialitie or affection more or lesse to the one, than to the other, having onely care that right may take place according to truth, and that the difference may be ended with brevitie and expedition…"

- (edited for gender neutrality)

Two Perspectives on Arbitration

Alternative to Litigation

- Arbitration chosen because litigation is not a good solution (neutral forum, enforcement, confidentiality)
- Choose process that is like litigation but does not have the same problems
- Substitute an institution for the Court
- Substitute the institution's Rules for Court Rules

Alternative to Business Agreement

- Arbitration chosen because business people can not agree
- Choose a process that arrives at a conclusion with only whatever additional process and information is necessary
- Substitute trusted third party's opinion for that of the contending parties
- Make own rules, allow arbitrators to set the Rules or use off the shelf rules like UNCITRAL or CPR

Two Conceptual Bases of Arbitration

Jurisdictional

- Procedural problem solving is by lawyering
- Dispute dynamic is adversarial and largely unsupervised
- iatrogenic* content of dispute is higher

Contractual

- Procedural problem solving is by pragmatism
- Dispute dynamic is collaborative and supervised
- iatrogenic content of dispute is lower

* iatrogenic= disease caused by the process of examination or treatment

The history and promise of *ad hoc* arbitration

- Arbitration pre-existed the Courts by many centuries as a way of resolving business disputes
- Business people turned to someone they knew because both sides needed the matter resolved
- The market itself provided the arbitrators and the means of enforcement
- Even after the advent of national Court systems, many business and other communities provided their own non-Court dispute resolution mechanisms

Ad hoc arbitration today

- More complex business relationships
- Global economy
- International corruption and fraud
- Many jurisdictions inhospitable to arbitration
- International arbitral institutions provide a safe haven
- But it comes at a cost

The costs of institutional arbitration

- Administrative fees
- Institutional Rules can create complexity and reduce flexibility (the “Meta-Dispute”)
- Institutions have biases that may not be obvious
- Institutional choices of arbitrators may not be transparent
- Institution’s role, if meaningful, may add significantly to time and cost

When to consider *ad hoc* arbitration

- parties have a common desire to get to a businesslike result (more common than you might think)
- therefore often best chosen after dispute has arisen (perhaps instead of implementing a pre-dispute institutional clause)
- Consider an *ad hoc* clause which defaults to an institution if parties can not agree on a tribunal within a set period of time

When to avoid *ad hoc* arbitration

- Contracts or disputes involving states and state entities (but identity of institution becomes very important)
- Where counterparty insists on arbitration being sited in an arbitration unfriendly jurisdiction
- Where new multi-party and emergency arbitrator rules of some institutions may be helpful (not as often as you may think)

Optimizing *ad hoc* arbitration

- Specify that the arbitration is subject to the laws of an arbitration friendly jurisdiction (legislation and Courts) and that it will be held there
- provide a clear mechanism for appointing the tribunal or specify an appointing authority if the parties can not reach agreement
- Consider whether arbitration laws of site eliminate need for specifying a specific set of rules
- Ensure that all necessary parties sign the arbitration agreement
- If needed, use UNCITRAL Rules of Arbitration
- ensure that any procedural safeguards you consider essential are not automatically ruled out (e.g. party representative discovery if needed)
- Resist unreasonable time limits
- Select arbitrators with a track record for the type of dispute in question and experience in conducting *ad hoc* arbitrations

Sample *ad hoc* Arbitration clause

- All disputes or differences relating to or arising out of this agreement or the business relationship created by it, including any dispute as to its existence, validity or termination, will be decided by final and binding arbitration under the laws applicable to arbitration in [State/Province/Country]. The arbitration shall be conducted in [City].

UNCITRAL ARBITRATION RULES

Article 17

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with **equality** and that at an appropriate stage of the proceedings each party is given **a reasonable opportunity of presenting its case**. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

Additional Provisions

- Specify language of the arbitration
- Specify a mechanism for commencing an arbitration and appointing arbitrators
- Specify an appointing authority to deal with disputes regarding appointment of arbitrators
- If specifying UNCITRAL Rules of Arbitration or any other rules, review them and determine if any changes by agreement are required

Cautions for *ad hoc* Clauses

- If UNCITRAL Rules are not specified, Court where arbitration is held will decide issues re arbitrators
- If UNCITRAL Rules are specified without an appointing authority, Secretary General of the Permanent Court of Arbitration at the Hague will designate an appointing authority
- Be careful about adopting the arbitration rules of some existing institutions for ad hoc arbitration: role of the institution is embedded in its rules
- Be aware that when using existing arbitral institutions as appointing authorities you are buying into a particular network of individuals who may or may not have the qualities you are looking for
- Be careful about naming entities as appointing authorities that are not prepared or able to fulfill the function (check correct name of the entity and willingness to serve in advance)

Additional Tools for *ad hoc* Arbitration

- CPR Institute for Dispute Prevention and Resolution (Materials and Tools for *Ad Hoc* Arbitration)

- IBA Guidelines for Drafting International Arbitration Clauses http://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx

- LCIA arbitrator payment facility

- LCIA: "The Case for Administered Arbitration" http://www.lcia.org/Dispute_Resolution_Services/The_Case_for_Administered_Arbitration_.aspx

The future of *ad hoc* arbitration

- *Ad hoc* arbitration needs no advocates: businesses and lawyers will turn to it instinctively as they always have
- Business groups and legal specialties will continue to develop their own forms of ad hoc arbitration tailored to their specific needs
- As commercial arbitration becomes more mainstream less reliance will be placed on institutions
- *Ad hoc* arbitration will come into its own when young counsel turn to somewhat older counsel to arbitrate their smaller and mid-sized cases rather than relying on high priced, retiring baby boomers to fill the role

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