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Choosing Institutional Arbitration over Ad-Hoc Method: A Critical Analysis

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ABSTRACT

The international commercial arbitration system has been gaining quite some popularity in the present times. The methods of dispute resolution that it provides namely the ad-hoc and institutional arbitration systems are two most accepted methods. However, both of these comes with their own advantages and disadvantages, so a debate is sure to ignite on which one is the better method of arbitration when it comes to international commercial disputes. This paper aims to address that issue and tries to find out, which one in fact is the sensible method to choose between the two to resolve a dispute in the field of international commercial arbitration. The paper compares the advantages and disadvantages of the two methods in order to reach to a definite outcome. It also tries to identify the problems that an ad-hoc arbitration contains within its mechanisms.

I. INTRODUCTION

With the evolving time, field of dispute resolution has changed gradually based on the demand. In case of disputes arising out of international commercial transactions, the best method considered for resolving such situation is the mechanism of International Commercial Arbitration.[3] Based on this process, the private parties involved in the dispute are ensured to have an effectual and impartial procedure with a simple yet successful method of obtaining an award.[4] Due to globalization not only international commerce has risen but also there has been a significant change in the international legal field as well.[5] As a result the modification of the existing arbitration laws have taken place and new laws have been introduced regarding arbitration.[6] The concept of International Commercial Arbitration can be perceived from the *UNCITRAL Model Law on International Commercial Arbitration 1985* which gives the

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[3] Andrew B Arraclough and Jeff Waincymer, 'Mandatory Rules of law in International Commercial Arbitration ' [2005] 6(2) Melbourne Journal of International Law
[4] Ibid
[5] Wuraola O Durosaro, 'The Role of Arbitration in In ternational Commercial Disputes' [2014] 1(3) International Journal of Humanities Social Sciences and Education (IJHSSE) 3
[6] Ibid

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essence that if the businesses of the parties to the arbitration agreement are situated in two different states can initially be called an International Commercial Arbitration.[7]

Although there are several methods of dispute resolution available namely Mediation, Conciliation, Expert determination etc to the parties, the arbitral process appears to be more reliable due to its binding nature.[8] Besides that, the different advantages that an arbitration process provides such as the scope for parties to consensually come to an agreement on the subject matter of arbitration, beyond which the tribunal does not have any jurisdiction to exercise power.[9] Also the arbitration process includes a non-governmental decision maker who could be more sympathetic towards the parties involved in the dispute and the chance for a private dispute settlement maybe guaranteed by the arbitrator.[10] The finality of decision and the binding nature of awards given are also another contributing factors for parties to bring dispute in this forum rather than the others available.[11] However when choosing the arbitration for dispute resolution, parties are also supposed to choose the method of arbitration which could be the "Institutional Arbitration" or "Ad-Hoc Arbitration".[12]

Both of these methods come with their own advantages and disadvantages. A close comparison between the two reveals that, although these are meant to be used as interchangeable, one is a far better method than the other. A little glimpse of the argument that is about to unfold throughout this paper can be given in the form that, Institutional Arbitration unlike the Ad-Hoc process has specialist arbitral establishment and is administered under its own sets of rules.[13] This simple fact is not enough to establish the advantages of one over the other. So as the paper progresses the differences between these two methods are to be inspected closely as it is capable of shedding some light upon the question, to which the answer has been long sought for.

II. DEFINING THE TWO PROCESSES

Before taking the discussion further to the comparison, it is better to briefly define the two procedures first. As earlier mentioned above Institutional arbitration is the arbitration process which is governed by its own rules and has its own establishment where it can operate. On the

[7] *UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006 24 ILM 1302 (1985) Art 3 (a)*
[8] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 13
[9] Ibid 2
[10] Ibid
[11] Ibid
[12] Ibid
[13] Alan Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 47

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other hand the ad-hoc arbitration process is not quite like the institutional arbitration, neither having own sets of rules nor a fixed institution to work at. Here it is worth mentioning that the rules by which an international commercial arbitration may be governed could be the domestic law of a country or known as (lex arbitry), international conventions for example the New York Convention.[14] Institutional regulations established by parties like ICC, could also operate as contractually binding provisions to govern the process of arbitration. Besides these, the parties are also at liberty to apply specific legislations depending on the case at hand.[15] So based on this discussion an arbitration process can be of two characteristics, one being the strictly following the rules and not much concerned of the party's will, while the other being the complete opposite and not following the strict rules while putting the party's will as priority.[16]

The two processes of arbitration are defined below:

(A) Ad-Hoc Arbitration:

An Ad-hoc arbitration can be said to be an arbitration method which is totally chosen by the parties to the dispute and on their own terms, without the help of a definite institution.[17] To be more precise, it is a process where the arbitration proceeding conducted by the tribunal between the parties in accordance with the terms either previously decided by the parties themselves or at the commencement of the proceeding has been set by the tribunal decided in a meeting with the parties.[18] As there is no institution involved in an ad-hoc arbitration system, the parties are at full liberty to decide upon matters such as procedures for appointing the arbitrators, how many arbitrators is there going to be or even the manner of carrying out the arbitration process.[19] Being a self driven process Ad-hoc proceeding of arbitration, the parties have the freedom to apply the rules for the arbitration and even choose the law that they think is appropriate.[20] Due to these facts a certain sense of flexibility within conducting of this arbitration exists and also because there is no formal way of submitting any procedural fee to conduct the course.[21]

[14] CaritaWallgren- Lindholm, Ad-hoc arbitration v institutional arbitration. in GiudittaCordero- Moss (ed), *International Commercial Arbitration: Different Forms and Their Features* (Cambridge University Press 2013) 62

[15] Ibid
[16] Ibid
[17] Edlira Aliaj, 'Dispute resolution through ad hoc and institutional arbitration' [2016] 2(2) Academic Journal of Business, Administration, Law and Social Sciences 242
[18] Ibid 243
[19] Ibid
[20] Ibid
[21] Ibid

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(B) Institutional Arbitration:

An institutional arbitration is the one where the process is conducted by a fixed arbitration tribunal and is administered by set of rules exclusively implemented by such tribunal and has a fixed fee schedule for conducting such process. It is actually a link between the parties and the arbitrators.[22] As a result the decision taken by the institution's arbitrators are taken in neutrality and with greater competence.[23]The institutional arbitration has turned into such a famous form of arbitration that it is integrated within the agreement and are inserted on a contract basis along with the arbitration clause.[24] Institutional Arbitration is all about institutions for arbitral proceeding and there are several institutions around the world which conducts arbitration process such as International Center for Dispute Resolution (ICDR), Inter-American Commercial Arbitration Commissions (IACAC), International Chamber of Commerce (ICC) to name a few.[25] Aside from these, there are also arbitration institutes which are established regionally for example the ones in Singapore, Switzerland, Vienna etc.[26]

III. A DISTINCTION BASED ON ADVANTAGES AND DISADVANTAGES

Not everything is perfect and the arbitration procedures are no exception to this statement. Just as the ad-hoc arbitration has its own advantages and disadvantages, so does the institutional arbitration. Advantages and disadvantages of Ad-Hoc arbitration are compared to the ones of Institutional Arbitration in the discussion below.

There are several advantages that an Ad-Hoc Arbitration usually provides to the parties which are willing to execute the arbitration process under it. First the advantages of an ad-hoc arbitration that gets the most attention is the fact that the rules and laws of this arbitration is customizable based on the needs of the parties involved.[27] As a result the flexibility of making such provisions according to the will of the parties in dispute often plays a crucial role in making this a more favorable one.

Also the parties have a certain sense of control over a procedure which is run as ad-hoc.[28] Due to the fact parties are able to create their own guidelines and rules and also have the ability to take control over the time of the arbitration going into proceeding.

[22] Ibid
[23] Ibid
[24] Ibid
[25] Redfern (n 11) 47
[26] Ibid
[27] Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration* (Routledge 2016) 73
[28] Ibid

Besides that, the ad-hoc arbitration procedure is not lengthy and can dispose of the matter earlier as it does not have to follow the institutional procedures to resolve a dispute.[29] The less time that an ad-hoc arbitration takes, is also considered to be an advantage of it.[30]

Another fact of having a readymade sets of regulations under the *UNCITRAL Model Law* has surely paved the way for Ad-Hoc arbitration process.[31]

However the disadvantages of an ad-hoc arbitration process starts to show up when it is compared to the advantages of Institutional arbitration which appear to be far more detailed. Starting with the cost efficiency of ad-hoc arbitration; although it seems that not having a fixed fee like the institutional arbitration, the ad-hoc one is relatively cheaper. In reality the fee that the institutional arbitration charges are made justified by moving the process efficiently under the mechanism of the institute, while ad-hoc arbitrations may end up charging more invisible fee which was not previously mentioned.[32]

Besides that Institutional Arbitration provides maximum efforts to keep the proceedings smooth and running by assisting the arbitrators with advice on deciding the matter.[33]

Unlike the Ad-Hoc Proceeding, the institutional one also rechecks the award granted so that it can be ensured that the award given, complies with the minimum standards of the institute.[34] Such award granted by an institutional arbitration also have a certain weight to it when the winning party tries to enforce it at a court as opposed to an award granted by an ad-hoc arbitration.[35]

Also when it comes to fixing fees of the arbitrators, the parties do not have to go to a negotiation with their judges as the institution does it for them.[36] One thing that can be observed from here is, in case of ad-hoc arbitration the arbitrators may end up charging fees which is higher than the fees that they would have received from an institutional arbitration.[37]

It is evident from the comparison above, although in some cases, the ad-hoc arbitration process may have a slight advantage over the institutional arbitration, but if it is a matter of dispute that which one is comparatively better form of arbitration based on comparison of advantages and

[29] Ibid
[30] Ibid
[31] Ibid
[32] Michael Mcilwrath and John savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International 2010) 63
[33] Ibid
[34] Ibid
[35] Ibid
[36] Ibid
[37] Ibid

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disadvantages, institutional arbitration will always have the upper hand. However, the disadvantages of institutional arbitration are not totally nonexistent as well.

IV. THE PROBLEMS WITH AD-HOC ARBITRATION

The ad-hoc arbitration which appears to be an easy choice for the parties at dispute at first glance due to its flexible nature, the real scenario is not quite that easy. There are few reasons as well which may establish this fact. The suppleness of settling fee of arbitrators which is deemed to be procedures worth boasting about, itself may run a risk of going unbalanced.[38] Connected along with this fact is the fact of not having an institutional support due to no fixed fee payable by the parties in an ad-hoc arbitration.[39] As a result, the parties may end up going to the court which they wanted to keep themselves away from through choosing the arbitration method in the first place.[40] Another big issue that can be identified here, is that the flexibility of establishing an ad-hoc tribunal is not a guaranteed advantage of it, because it is totally reliant on the way the rules and the tribunal have been established.[41] The major weakness of ad-hoc arbitration can be identified as the fact of being dependant on the cooperation of the parties, because once a dispute arises, trying to make the parties to cooperate becomes a daunting task.[42] An ad-hoc arbitration runs the risk of going wrong in circumstances, if the way it is formatted is flawed from the beginning.[43] As happened in the case of *A v B 2007* where due to disagreement of the parties led them to a rigorous and costly ad-hoc arbitration procedure in three different occasions by an English court.[44]

V. CONCLUSION

As can be perceived from the above discussion, both the ad-hoc and institutional arbitration methods are well acceptable and useful depending on the situation. But one issue here worth noting is the over glorification of the ad-hoc process in international commercial arbitration is somewhat misguiding. The very flexibility based on which the reputation of ad-hoc arbitration has built up, turns out that same strength could prove to be a reason of its criticism at one point. Also when looked closely and compared to the institutional arbitration, the advantages of the ad-hoc arbitration process appears to be, although not inferior but less convincing. However, it is not to be said here that institutional arbitration should be the one and only method for

[38] Lindholm (n12) 69
[39] Ibid
[40] Ibid
[41] Ibid
[42] Ibid
[43] Clare Stanley, 'Traps for the unwary: the pitfalls of ad hoc arbitration' [2012] 18(4) Trusts & Trustees 333
[44] *A v B* [2007] 2 CLC 157 (Colman J)

carrying out an arbitration process but it is safe to say in comparison, the smarter choice is to choose an institutional arbitration over an ad-hoc one. Because, on one hand the ad-hoc process may be easy to establish but if gone wrong could have consequence adverse to the interests of the party. On the other hand, even though in institutional arbitration many formal procedures have to be followed along with fixed fees, the process is worth it.

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