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#MondayArbitrationDay

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AD HOC AND INSTITUTIONAL ARBITRATION

In terms of organization and functioning, arbitration can be: (i) *ad hoc,* (ii) institutional or combined (a combined form of both previous forms).

A. Ad Hoc Arbitration

Ad hoc arbitration refers to arbitration that is not supervised or controlled by an institutional body. An *ad hoc* arbitration is an arbitration procedure based on which the arbitral tribunal has control over all aspects of the proceedings subject to any rules which the parties may agree.
Article 4 of the Geneva Convention stipulates that the parties to an arbitration agreement shall be free to file the dispute between themselves to a permanent arbitral tribunal or to an *ad hoc* arbitration procedure.
In the event that the parties refer the dispute between them to the *ad hoc* procedure, it means, inter alia, that they have the right to appoint arbitrators or to decide on the appointment of arbitrators in the event of an actual agreement; determine the place of arbitration and decide on the applicable procedure by the arbitrators.
In case of *ad hoc* arbitration, the arbitration clause is drawn up by the parties in the form of a contract. In the event of a dispute, the parties apply this clause, select arbitrators and agree on the procedural rules for conducting the arbitration process.
Ad hoc arbitration is an arbitration procedure that is not administered by others, but the parties themselves make an agreement between them for the selection of arbitrators, for the determination of the rules of arbitration, the applicable law and the necessary procedural and administrative assistance during the arbitration.
In such case, there are no rules incorporated and no appointing authority nominated. In the event that the parties are unable to agree on the appointment of an arbitral tribunal, usually it is the domestic courts of the seat of the arbitration that nominate the arbitrator or arbitral tribunal.
Theoretically, this type of arbitration should be more flexible, faster and more economical. In practice, it turns out that negotiating terms after the dispute arises, the moment when the application of this type of arbitration is usually required, is much more difficult than before the dispute arises.
Under these conditions, the negotiation time for the selection of arbitrators to set the rules of arbitration, the applicable law as well as the procedural and administrative assistance to be implemented, becomes extremely significant and reduces the time gained from a simpler arbitration process.
The other pro is its lower cost. The parties pay only the fees for arbitrators, lawyers, their representatives and the costs of conducting the arbitration. Therefore, they do not pay costs for fees of institutional costs, which are generally determined depending on the value of the claim.

In terms of financial costs, parties and arbitrators may agree to conduct arbitration in the offices of arbitrators. In this type of arbitration, the parties agree to negotiate fees with arbitrators, while in institutional arbitration, arbitrators' fees are paid to the institution and are usually made public. *Ad hoc* arbitration is tailored to the needs of the parties on a case-by-case basis and is more cost effective than institutional arbitration. Practice has shown that *ad hoc* arbitration is difficult to function completely separately from institutional arbitration, as it is almost impossible that after the dispute arises between them, the parties agree on the choice of an impartial arbitrator, on the procedural rules of development of arbitration, etc.

In most international *ad hoc* arbitrations, there will be a reference to, or incorporation of, a set of rules that the parties agree to adopt. These may be bespoke to the particular agreement or those of a body like UNCITRAL. Many of these rules include provisions for the appointment of the arbitral tribunal and will make reference to an appointing authority in case of a breakdown in the appointing process. In comparison to institutional arbitration, *ad hoc* arbitration offers its users a great deal flexibility. However, the parties to an *ad hoc* arbitration under UNCITRAL arbitration rules do not have to be in a worse position than those under, for instance, the ICC rules of arbitration. If the parties in the *ad hoc* arbitration come to an agreement to use the ICC or LCIA as the appointing authority, they can feel safe that, in default of agreement regarding the selection of the arbitral tribunal it will be appointed quickly by a recognized, competent and respected institution.

B. Institutional Arbitration

The arbitration agreement should specify whether the parties shall turn to an arbitration or *ad hoc* arbitration institution. Arbitration rules provide the framework based on which the arbitration proceedings are to take place. It is usual for such rules to be agreed at the time when the arbitration agreement is conducted. In this regard, the parties may choose whether to conduct their arbitration under institutional rules or under ad hoc arbitration rules.
According to Article 4 of the Geneva Convention, if the parties refer the dispute between them to a permanent arbitral institution for settlement, the arbitral proceedings shall be conducted in accordance with the rules of the arbitral institution.
The clause that defines the reference to institutional arbitration obliges this institution to conduct arbitration according to its rules, and the rules of the arbitration institution become part of the arbitration agreement.
An institutional arbitration is an arbitration that is administered by a specified body or organisation.
Parties may appoint their own arbitrators but agree that the arbitration should be run under a set of institutional rules. The institution may then play no role in the arbitration or only a limited role. Similarly, the parties may choose ad hoc rules for their arbitration but agree a nominating authority, such as the International Chamber of Commerce (ICC), or the London Court of International Arbitration (LCIA), or the

London Court of International Arbitration (LCIA), or the International Centre for Dispute Resolution (ICDR) for the appointment of the arbitral tribunal.
In the past 45 years, there has been an exponential growth in international commercial arbitration.
This is attributed to a large part to the globalisation of commerce and development in instantaneous communications. Many new arbitral institutions have been created in the last 35 years and their success is yet to be measured.
Below a summary of the more well- known arbitral institutions that deal with international commercial arbitration is provided: The London Court of International Arbitration; American Arbitration Association and the International Centre for Dispute Resolution; Stockholm Chamber of Commerce Arbitration Institute; Singapore International Arbitration Centre; Hong Kong International Arbitration Centre; Netherlands Arbitration Institute; The International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation; The London maritime Arbitrators Association; World Intellectual Property Organization; German Institution of Arbitration; The International Chamber of Commerce.

It is considered that one of the disadvantages of institutional arbitration is the financial cost of this type of arbitration, which is intended to be higher than that of *ad hoc* arbitration. The duration of the arbitration process is not a favourable indicator of institutional arbitration, because the duration in the latter is not entirely dependent upon the parties.
Some of the advantages of institutional arbitration are:

I. It protects the parties from the adverse consequences of an arbitration proceeding. Institutional arbitration maximises the vacuum in procedural or material law that may be encountered during the arbitration process;
II. Arbitration institutions with a wide international reputation guarantee an independent arbitral tribunal capable of administering the arbitration process without being influenced by political and economic persuasions. In *ad hoc* arbitration, the assignment of arbitration is usually based on the parties' trust in the arbitrators and not necessarily on their qualifications and experience. Institutions enable arbitrators to be appointed with the consent of the parties, but also without their intervention;
III. Administrative assistance from arbitration institutions. Institutional arbitrations make available an administrative staff, which assists the entire arbitration process which is not only technical but also professional as interpretation of the regulation, monitoring of the arbitration procedure in order to ensure the issuance of the decision within the prescribed time limits.
IV. In some cases, it provides a further link to appeal against the arbitral award, such as the appeal review procedure before an appellate court.

For all its advantages and disadvantages, international commercial practice has shown that *ad hoc* arbitration is only appropriate for disputes involving relatively small claims

with few litigants, as well as mainly for domestic arbitrations, unless the parties are states.

Institutional arbitration is more appropriate although seemingly is more costly. It takes more time and is more rigid than *ad hoc* arbitration, but it guarantees support, control and monitoring process, review of decisions more than *ad hoc* arbitration, and more importantly it strengthens the credibility of arbitral awards.

The Court of Arbitration of the International Chamber of Commerce is one of the most notable examples of the arbitral institution. ICC in Paris established the ICC's International Court of Arbitration in 1923. The ICC arbitration is designed for international commercial disputes and the ICC is generally regarded as the world's leading international commercial arbitration institution. The ICC's role in arbitrations is extensive. The ICC, its secretariat and the court of Arbitration are responsible for the service of the Request for Arbitration, the fixing of advances on costs, and confirming the appointment of the arbitral tribunal and appointing the arbitral tribunal in default of agreement. The Court of Arbitration also deals with challenges to the independence of the arbitral tribunal and the scrutiny of the arbitral tribunal's award.

The Court of Arbitration does not decide on the merits of the dispute and this is left to the arbitral tribunal. The role of the Court of Arbitration is mainly administrative although it acts in a supervisory capacity when reviewing the terms of an award. Although the ICC is based in Paris, arbitrations can take place in any country in the world. ICC arbitration has sometimes been criticised as being expensive. However, the ICC's arbitration is effective and the quality of decisions emanating from ICC tribunals is generally of the highest standard.

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