



Skillnet International Arbitration in Ireland

Introduction to *Ad hoc* and Institutional Arbitration

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20 June 2022

Introduction to Ad hoc and Institutional Arbitration

Programme

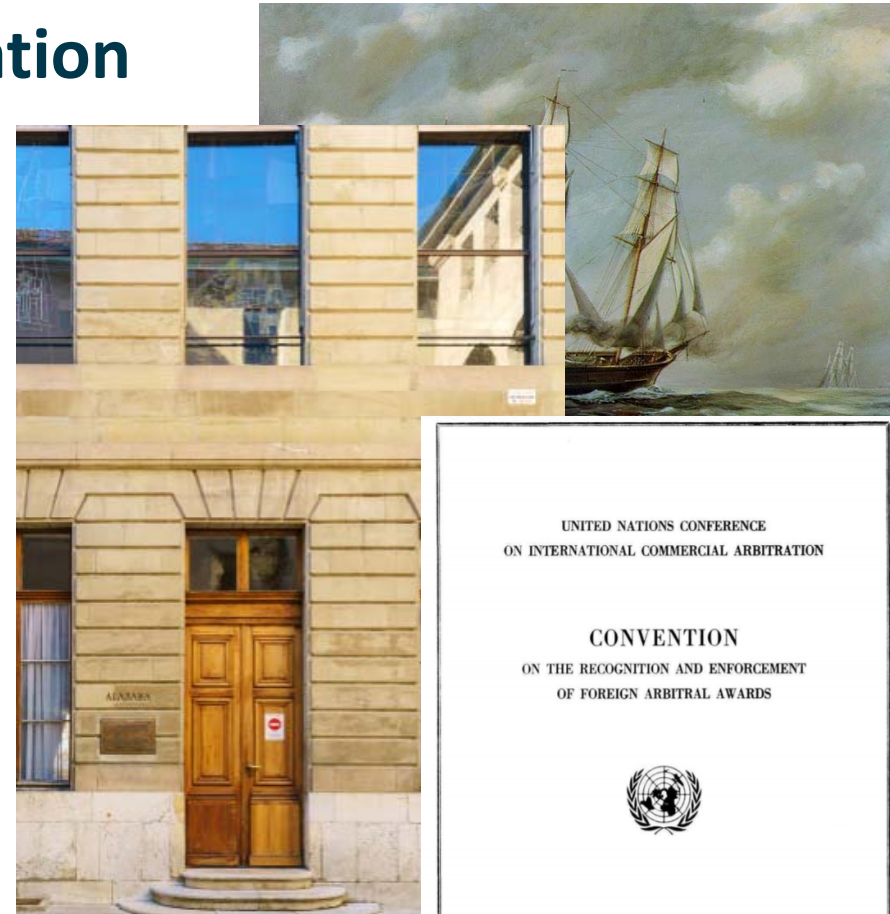
1. History and Development of International Arbitration (10')
 - a. *Origins of International Arbitration*
 - b. *The Rise of International Arbitral Institutions*

 2. Comparing and Contrasting Ad hoc and Institutional Arbitration (35')
 - a. *General Features of each Form*
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 3. Major Ad hoc and Institutional Rulesets (35')
 - a. *UNCITRAL Arbitration Rules*
 - b. *ICC/LCIA/SAC/SCC/SIAC/HKIAC Rules*
 - c. *Appointing Authorities*
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1.a. The Origins of International Arbitration

- Antiquity (disputes between states, city-states)
- Sales of goods and transport contracts
- Alabama Arbitration in Geneva (1872)
- The Hague Convention for the Pacific Settlement of International Disputes (1899)
- Founding of the International Chamber of Commerce (1919)
- The New York Convention (1958)



1.b. The Rise of International Arbitral Institutions

- According to the Queen Mary White & Case 2021 survey (1200 lawyers):
 - International arbitration is the preferred method of resolving cross-border disputes for 90% of respondents
 - 5 most popular seats – London, Singapore, Hong Kong, Paris and Geneva
 - 5 most preferred institutions: ICC, SIAC, HKIAC, LCIA, CIETAC
 - 6 largest arbitration institutions combined: 5000 cases a year
 - New Rules: Emergency arbitrators and expedited proceedings
 - Covid-19: Virtual hearings
- Significant growth in Southeast Asia (Chinese and Indian markets) – SIAC and HKIAC
- Brexit – arbitration has benefitted from uncertainty regarding enforcement of judgments between UK and EU

2.a. General Features of *Ad hoc* Arbitration

- Not administered by an institution (ie LCIA, ICC) – no administrative fees
- Parties will have to determine all aspects of arbitration
 - ie number of arbitrators; appointment of arbitrators, applicable law and procedure for conducting arbitration
- Potential to be more flexible, faster and cheaper
- The arbitration agreement may simply state dispute will be arbitrated
- Advisable to at least specify seat or place of arbitration
 - Will impact procedural laws and enforceability of award

2.a. General Features of *Ad hoc* Arbitration

Ad hoc arbitration clause – suggested minimum requirements

- Scope of the arbitration agreement
 - Number of arbitrators, the procedure for their appointment and if necessary replacement
 - The place or seat of arbitration
 - Governing law of the arbitration (may be different from contract)
 - Language of the arbitration
 - Confidentiality
 - Declaration that the award is final and binding on the parties
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2.a. General Features of *Ad hoc* Arbitration

Ad hoc Arbitration Clauses – “Tailor made suit v off the peg”

- Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration [in accordance with the UNCITRAL Arbitration Rules as at present in force].
 - Arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce. *Insigma Technology Co. Ltd v Alstom Technology Ltd* – [2008] SGHC 134
 - Arbitration under the ICC Rules with the proceedings administration by the American Arbitration Association – *Exxon Neftegas v WorleyParsons*, Supreme Court of New York
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2.a. General Features of Institutional Arbitration

- Administered by an institution (i.e. LCIA, ICC, SAC, CAS, SIAC, etc.) under a set of arbitral institutional rules
- The institutional rules of the institutions sets out nearly all aspects of the arbitration proceedings
 - i.e. notification, appointment and challenges of arbitrators, multiple parties and contracts, language, conduct, time-limits for award, scrutiny, costs.
- Entails a non-negligeable administrative cost, however, have a role for speed, efficiency and enforceability
- Special services: scrutiny of awards, administration of costs, publication of guidelines and notes

2.b. Benefits/Drawbacks of *Ad hoc* Arbitration

Benefits	Drawbacks
Very flexible – party autonomy to choose process	Effectiveness relies on party cooperation
Can be designed to meet party needs	Vulnerable to obstructive tactics – delay in appointing arbitrator
Arbitration can be designed after dispute arises	May be hard for parties to agree after dispute arises
More cost effective	Costs more uncertain than institutional arbitration where published
Arbitrator is in control	Lack of support for enforcing time limits or appointing arbitrators

2.b. Benefits/Drawbacks of Institutional Arbitration

Benefits	Drawbacks
Predictability of the process	Can entail significant fees
Professional support throughout the proceedings	Arbitrator under the “control” of the institution
Avoidance of procedural flaws and thus setting-aside/enforcement issues	Less flexibility – bound by the arbitral rules
Arbitration rules periodically reviewed	Appeal internal decisions from the institution?
Push for expeditiousness and efficiency	Confidentiality?
Emergency, expedited proceedings	

2.c. Current Usages: Industries and Statistics

- Ad hoc arbitration traditionally shipping, commodity and construction disputes.
- More recent construction, insurance and energy industries
- Now increasingly used in financial, technology and life sciences industries
- The UNCITRAL Arbitration Rules are the most popular regime for *ad hoc* arbitration – QMWC 2021.
- Significant growth in Southeast Asia (Chinese and Indian markets) –
 - SIAC: Total value of claims heard in 2020 totals US\$8.5bn
 - HKIAC: 99.4% of its arbitrations choose HK as seat and HK law as governing law
- QMWC Survey 2021 – key concerns for seat
 - Greater support for arbitration by local courts
 - Increased neutrality and impartiality of the local legal system
 - Better track record in enforcing agreements to arbitrate & awards

2. Comparing and Constrating *Ad hoc* and Institutional Arbitration

<i>Ad hoc</i>	Institutional Arbitration
Party autonomy	Precedential value
Need experienced counsel	Institutional support
Less costly	More certainty on cost
Flexible	Clear guidance in rules

3.a. UNCITRAL Arbitration Rules

- Most commonly used rules for *ad hoc* arbitration: 1976, 2010 & 2013 Rules
- Used for both commercial and investor state arbitration (2013 transparency update)
- Stand alone rules not necessarily dependent on institutional support
- 2010 Rules – Expanded role for appointing authority
 - Constitute the Tribunal and revoke appointments already made
 - Authorise a truncated tribunal to issue an award
 - revise tribunal's decision on fees
- Parties can designate appointing authority or request the Secretary-General of the Permanent Court of Arbitration to act as appointing authority
- Arbitral institutions can be designated as appointing authority
 - ICC, LCIA, AAA, SCC, DIS, HKIAC, PCA
- ICC will act as appointing authority but will not administer arbitrations under UNCITRAL Rules

3.b. Major Institutional Rules

➤ Europe

- International Chamber of Commerce (ICC)
- London Court of International Arbitration (LCIA)
- Swiss Arbitration Center (SAC)
- Stockholm Chamber of Commerce (SCC)
- Court of Arbitration for Sport (CAS)
- VIAC, CIAM, CAMilan, DIS, etc.



Swiss Arbitration
Centre

2017
ARBITRATION
RULES

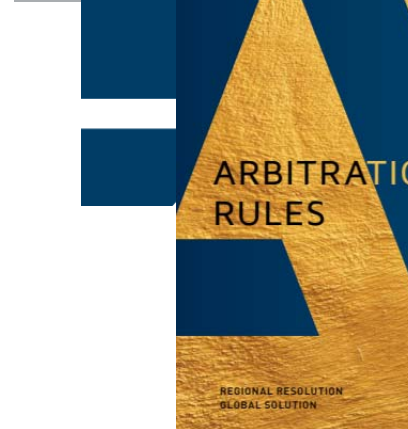
Tribunal Arbitral du Sport
Court of Arbitration for Sport

Code of Sports-related Arbitration

In force as from 1 July 2020

3.b. Major Institutional Rule

- Asia
 - SIAC / HKIAC / AIAC
- America
 - ICDR
 - Cámara de Comercio Lima
 - CAM Santiago
- Middle East / Africa
 - DIAC
 - CRCICA / NCIA



3.b. Major Institutional Rules

- Investment arbitration
 - International Center for the Settlement of Investment Disputes (ICSID)
 - Permanent Court of Arbitration (PCA)

The image shows a screenshot of the ICSID website's 'News & Events' section. The top navigation bar includes 'HOME', 'ABOUT', 'SERVICES', 'CASES', and 'RESOURCES'. The 'News & Events' header is prominent, with sub-links for 'News Releases', 'Blogs', and 'Speeches and Articles'. A news release dated 'MARCH 21, 2022' is titled 'ICSID Administrative Court Rules'. The text of the release states: 'March 21, 2022: Member States of the Inter Investment Disputes (ICSID) have approved amendments to ICSID's flagship rules for resolving investor and their host States.' To the right of the text is the official seal of the Permanent Court of Arbitration (PCA), featuring a central figure and the text 'COUR PERMANENTE D'ARBITRAGE' and 'MDCCCXCIX'. Below the seal, the text reads 'PERMANENT COURT OF ARBITRATION' and 'ARBITRATION RULES 2012'. At the bottom of the document, it states 'Effective December 17, 2012'.

3.c. Appointing Authorities (PG/TNB)

- Role:
 - Appoints arbitrator if a party fails to appoint on time
 - Decides on challenges to arbitrator and appoints substitute arbitrator if a party fails to do so
- Can be designated by law of seat – national courts or arbitration institution
- Article 6 UNCITRAL Model law – national institution
 - Australia (ACICA), Hong Kong (HKIAC), Malaysia (AIAC), Singapore (SIAC)
- Parties can appoint institution as appointing authority
- Institutional arbitration: appointing authority will be the institution itself

