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# **Institutional vs. ad hoc arbitration: when and why?**

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# Institutional vs. ad hoc arbitration

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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.**

→ **Institutional arbitration:** administered by an institution

→ **Ad hoc arbitration:** not administered by an institution

(ad hoc arbitration not to be confused with other ADR methods like mediation)

# Institutional arbitration È features

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## Institutional arbitration (administered arbitration) È main features:

- Specialized institution involved
- Pre-established, up-to date set of rules
- Administered arbitration process, i.e. the institution oversees the whole proceeding and guarantees a certain standard flow of the procedure

# Institutional arbitration - examples

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## Some of the most important arbitration institutions:

- International Chamber of Commerce (ICC) . Paris
- Swiss Chambers of Arbitration Institution (SCAI) . Geneva
- London Court of International Arbitration (LCIA) . London
- Arbitration Institute of the Stockholm Chamber of Commerce - Stockholm
- Singapore International Arbitration Centre (SIAC) . Singapore
- International Centre for Settlement of Investment Disputes (ICSID) . Washington D.C.
- Court of Arbitration for Sport (CAS) . Lausanne

# Ad hoc arbitration - features

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## Ad hoc arbitration È main features:

- Not administered arbitration proceeding
- Totally discretionary choice of rules and procedures
- The procedure is in the hands of the parties and the arbitrators, within the general limits of the principles of (international) arbitration and the limits of the mandatory national procedural rules at the seat of arbitration, for example:
  - Right to be heard;
  - Fair trial / equal treatment;
  - Specific, lex-arbitri related limits (example: Italian law prevents an arbitral tribunal to issue an interim measure, art. 818 CPC it.)

# Institutional vs. ad hoc arbitration 1/2

## “ Institutional arbitration È advantages:

- pre-established rules and procedures → clear way-outs in case of differences between the parties
- administrative, specialized, generally multilingual and professional assistance in case of problems arising during the procedure
- review of the award by the institution and therefore generally easier enforcement of the award
- conflict of interests are usually better avoided and managed
- models for valid arbitration clauses are provided by the institutions

## “ Institutional arbitration È disadvantages:

- administration fees can be high
- lack of flexibility
- bureaucracy can be an issue

## Institutional vs. ad hoc arbitration 2/2

### “ Ad hoc arbitration È advantages:

- No administration fees;
- Total flexibility and adaptability (tailor made);
- Parties and arbitrators are, in principle, in control of the proceeding (set of rules, timelines, etc.).

### “ Ad hoc arbitration È disadvantages:

- Constitution of the arbitral tribunal and decision about challenges can be more complex (delay, blockade, additional costs)
- As a result, possible delays and higher risk of referring to a State tribunal (and to apply the so-called *lex arbitri* at the seat of the arbitration) to get over the issues
- No review from an institution might mean possibly lower-quality award and difficulties in the enforcement
- Need to get back to pre-established set of rules to find solutions when the parties do not agree on the procedure (UNCITRAL arbitration rules for example), i.e. tailor made-concept can be illusory

# Model arbitration clauses 1/2

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## Ad hoc arbitration model clause:

Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration.

The number of arbitrators shall be ... (generally 1 or 3), and shall be nominated as follows: ò

The seat of the arbitration shall be ... (name of city and country).

The arbitral proceedings shall be conducted in ... (desired language).

The applicable procedure to the arbitration shall be ò (reference to a specific national procedure; reference to a model procedural law, for example UNCITRAL; reference to the procedure set forth by an institution; completely tailor made procedure, ò )



## Model arbitration clauses 2/2

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### Institutional arbitration model clause:

Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Rules of the  $\tilde{o}$  (Institution) in force on the date on which the notice of arbitration is submitted in accordance with these rules.

The number of arbitrators shall be ... (generally 1 or 3).

The seat of the arbitration shall be ... (name of city and country).

The arbitral proceedings shall be conducted in ... (desired language).

## General conclusion

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**As a general 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.

## Institutional vs. ad hoc arbitration: takeaways

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- “ Arbitration is a methodology; it can be the right choice for resolving a commercial dispute, but depending on the single case, it might not. Always keep the alternatives in mind.
- “ If you choose arbitration, consider the pros and cons of ad hoc and institutional arbitration.
- “ If you go ad hoc, take your time to draft a good and complete clause.
- “ If you go institutional, try to identify the best possible institution for your case. Every single contract might deserve a reflection on the right arbitral institution to be chosen, one-fits-for-all is generally not a good solution.

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**THANK YOU FOR YOUR ATTENTION**