

Ad Hoc v. Institutional Arbitration – Advantages and Disadvantages

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The availability of institutional arbitration services from the ADR Institute of Canada (ADRIC) is a new development which provides parties with another option for their arbitration. Accordingly, the authors discuss the advantages and disadvantages of ad hoc arbitration and institutional arbitration in Canada.

There can be no doubt that arbitration as a real alternative to traditional litigation has taken a foothold in Canadian dispute resolution culture. Parties, counsel and arbitrators have also, generally speaking, begun to understand that arbitration is not “litigation sitting down”. Nor is it the case that institutional arbitration necessarily means resorting to well-known foreign organizations like the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), or the International Center for Dispute Resolution (ICDR, an affiliate of the American Arbitration Association). Instead, Canada now has its own national administering institution, the ADR Institute of Canada (ADRIC). Users of arbitration should be aware of the key differences between ad hoc and institutional arbitration which we would like to highlight in this paper.

What is an institutional arbitration? It is a proceeding where the parties designate an institution to administer the arbitral process in accordance with its arbitration rules. There are many excellent organizations, world-wide, that have the capability and the know-how to deliver this service.

By contrast, an ad hoc arbitration is a proceeding that requires the parties to select the arbitrator(s), and the rules and procedures. If necessary, the parties can still designate an arbitral institution as an appointing authority and adopt an institution’s arbitration rules, if the rules allow the parties to opt out of case administration by that institution. The parties may also adopt the UNCITRAL ad hoc rules for domestic and international disputes.

Each of these types of arbitration has advantages and disadvantages. We discuss some of these below, recognizing that each situation has its unique circumstances, with the result that our list is by no means exhaustive.

The availability of ADRIIC arbitration administration services in Canada is an important new development which provides parties with another option for their arbitration. More generally, institutional arbitration has the following advantages:

- Each institution publishes and makes available for use comprehensive rules which govern the conduct of the arbitration – most, if not all institutions, now also provide for emergency relief procedures (see e.g. ADRIIC Rule 3.7).
- The parties will know the procedural rules well in advance of any actual dispute. There is, therefore, no need to negotiate the rules of engagement at a time when the dispute has already begun. This may result in a potentially less adversarial and speedier approach. Many institutions have rosters of arbitrators setting out their qualifications and experience.
- Institutions, by application of their rules, are given the authority to appoint arbitrators at the parties' request or in the event that the parties cannot otherwise agree – so that the parties can avoid going to court to seek an appointment.
- Draft arbitration clauses from institutions are up to date with recent developments in arbitration law and procedure – and are less likely to lead to interpretive disputes.
- The institution – rather than the arbitrators – will communicate with the parties with respect to fees, and will hold the funds.

We perceive the following disadvantages to institutional arbitration:

- There may be situations where the parties need to respond to the institution or pursuant to its rules within unrealistic time frames, though the parties may be able to agree to time frames more appropriate for the situation.
- Some users tend to complain about an overly “bureaucratic” feeling to the process.
- One needs to carefully review the rules before agreeing to them. For example ADRIIC Rule 5.4.7(b) renders the award immune to appeal, thus ousting the right (provided in most domestic arbitration legislation) to seek leave to appeal.
- Some institutional fees may be expensive, in particular where they reflect a percentage of the value of a significant amount in dispute.

Ad hoc arbitration has the following advantages, in our view:

- The parties have more flexibility to tailor the arbitration to their specific needs.
- It tends to be less expensive than an institutional arbitration since the parties will only have to pay the fees for their lawyers and arbitrators. However, there will still be fees which reflect the time spent by arbitrators on administrative matters. An ad hoc arbitration will be cost-effective in situations where the parties and their counsel cooperate, the arbitration rules and procedures are understood, and the arbitrators have the appropriate skills and experience. All of this also assumes that counsel don't treat the arbitral process as “litigation sitting down”.

We see the following disadvantages to ad hoc arbitration:

- The failure of one or both parties to cooperate on arbitration rules and the appointment procedure can result in higher costs, delay, and the need to seek recourse from the courts. However, the parties can lessen this risk by agreement in advance on provisions for the use of institutional rules and an institutional appointing authority, if necessary. There are numerous institutions, such as ADRIAC, which will appoint arbitrators at the parties' request or in accordance with the institution's arbitration rules.
- The parties' discussion about fees with arbitrators may be awkward since no party wishes to upset an arbitrator who will determine the outcome of the arbitration.
- The arbitrators have the administrative burden with costs at their hourly rate.

Understanding these and potentially other advantages or disadvantages to arbitration processes is critical in ensuring that whatever arbitration tools are ultimately resorted to don't result in "litigation sitting down".

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