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## **Two Paths to Arbitration - cost, speed and complexity of the dispute should govern your choice**

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Those drafting arbitration clauses generally consider - or should consider - whether to specify institutional or ad hoc arbitration. The decision will affect the speed, cost and efficiency of the arbitration. So what is the difference?

### **Institutional arbitration**

In institutional arbitration a specialized organization, called an arbitral institution, assists the parties, their counsel and the arbitral tribunal by administering the arbitration process.

Arbitral institutions vary, including the types and levels of services and functions they provide, and in their quality, experience, location, credibility, costs and rules.

There can be significant differences in their fees, which are often tied to the level and quality of services they provide.

Institutions perform various administrative functions and services, ranging from limited to comprehensive.

Usually they handle all financial matters, including obtaining and disbursing funds from the parties for the arbitral tribunal's fees and disbursements.

The institution's role usually includes appointing arbitrators if the parties cannot agree. Some institutions offer a roster of qualified arbitrators. Importantly, they also handle challenges to, and replacement of, arbitrators.

Institutions generally promote and assist with efficient case management, and to varying degrees provide quality control by scrutinizing draft awards.

Each institution has its own rules; their rules are not identical but the differences may be important in particular circumstances. Choosing an institution automatically is a choice of the institution's rules (which can be altered in some ways). Parties should not agree to an institution's rules without using that institution.

Some institutions handle cases globally while others are regional or local. Leading international arbitral institutions include the International Court of Arbitration of the International Chamber of Commerce, London Court of International Arbitration, and the International Centre for Dispute Resolution. Regional institutions exist in various centres around the world.

Canadian institutions, which handle primarily Canadian arbitrations, include the ADR



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Institute of Canada, ADR Chambers, and the Canadian Arbitration Association.

Some institutions specialize in particular types of disputes such as, for example, intellectual property, complex financial products, and space law (all of which other institutions also handle).

Institutions provide model arbitration clauses (which should be altered only in limited ways). They also can provide guidance on drafting clauses and, when a dispute arises, on administrative and procedural matters.

An award from a well-established institution may as a practical matter be more readily recognized and enforced internationally.

Of course, institutional arbitration has a direct cost— the institution's fees. However, if the expenditure saves taking administrative problems to court, at the end of the day paying those fees may save both time and cost, and avoid the loss of confidentiality.

### **Ad hoc arbitration**

An ad hoc arbitration is not administered by an institution. Parties, their counsel and the arbitral tribunal deal with the functions an institution might handle. This is more difficult without co-operation between the parties.

Potential problems in ad hoc arbitration can be reduced by providing a process to deal with arbitrator appointment, challenges and replacements, or naming an arbitral institution as an 'appointing authority.'

Specifying well-accepted arbitration in the arbitration agreement, or creating complete and effective customized rules, should reduce problems when a dispute arises.

Sometimes parties adopt court rules for domestic arbitration, and many advantages that arbitration offers may be lost.

Some argue that ad hoc arbitration provides flexibility. However, institutional rules provide considerable flexibility for the parties to agree on, or the arbitral tribunal to determine, procedures that fit the dispute and circumstances. This flexibility is lost with court rules. It may be best to empower the tribunal to determine effective procedures for the dispute that arises.

Although fees are saved when ad hoc arbitration is chosen, there is greater potential for added costs and delays if things do not go smoothly.

In ad hoc arbitration the arbitral tribunal's fees are arranged between the parties and the tribunal. This may be uncomfortable and issues can arise in collecting monies and paying the tribunal.

Particularly for international transactions, institutional arbitration generally is the better choice.

When choosing between institutional or ad hoc arbitration, parties should consider the types and size of disputes most likely to arise and the parties' relationship.

Parties should decide which type of arbitration will best serve their reasons for choosing arbitration in the first place and will provide them with a faster, more cost-effective and private method to resolve their disputes.

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