

MARITIME ARBITRATION
between
AD HOC ARBITRATION
and INSTITUTIONAL ARBITRATION

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Preface

In concluding commercial relationships, the parties concerned put the condition of arbitration, before disputes arise or resort to arbitration after disputes exist. They agree on referring the disputes that may arise or that have already existed to be settled through one of the two forms of commercial arbitration: Ad Hoc Arbitration or Institutional Arbitration.

By ad hoc arbitration we mean the sort of arbitration that takes place far away from the constant centers of commercial Arbitration. Both parties of the arbitration agreement decide to arrange and control arbitration on their own. They decide: the formation of an Arbitration commission, the setting of all rules applicable on the procedures, the choice of the place of arbitration, the law to be applied on the subject and the over coming, by themselves, of all difficulties that may obstruct arbitration. As for the Institutional arbitration, we mean that sort of

arbitration the parties concerned agree to refer the disputes - that have actually existed or may arise-to arbitration before any constant center of commercial Arbitration, that organizes and controls the process of arbitration, through its administrative agents and according to its arbitration rules; since it receives the request for arbitration, till it issues the arbitration award.

Mixing both sorts of maritime Arbitration

Now, let us raise this question:-

Is the differentiation between the ad hoc arbitration and the institutional arbitration clear in the field of maritime arbitration? In other words: Is the maritime ad hoc arbitration itself the same arbitration organized and controlled by the parties concerned themselves?

Again, is the maritime institutional arbitration itself the same arbitration organized and controlled by the administrative agencies of this maritime center of arbitration and according to its rules?

The answer to these questions in the field of maritime arbitration comes in the negative. The conventional differentiation between the ad hoc arbitration and the institutional arbitration is not clear in the area of maritime arbitration. This statement can be justified when we scrutinize the cases of maritime arbitration that had taken place at the chamber of maritime Arbitration (C M A); the international organization of Maritime arbitration (IOMA), Paris; the Maritime Arbitrators society (M A S); Lloyd's institution (L I) , London ; the maritime Arbitrators society (M A S), New York ; the Alexandria center of Maritime Arbitration(A C M A) , Egypt ; or at any other place

according to the Arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), 1976.

We scrutinize the cases studied at these centers specialized in maritime arbitration, we will clearly distinguish the differentiation between both sorts of arbitration in some cases; whereas in the others we will be confused because of the multiple forms of arbitration stratified as sub-items of each sort of arbitration. Parties enjoy freedom, to a great extent, in taking part in the institutional arbitration through assigning arbitrators, choosing the place of arbitration, or selecting external arbitrators not enrolled in the list of arbitrators presented by the centers of arbitration. We will also notice that some centers of maritime arbitration confine their role to the assignment of the tribunal or the arbitration commission, upon the demand of the parties; the act that comes nearer to the image of ad hoc arbitration.

This particular confusion in distinguishing both sorts of maritime arbitration has affected professor "LALIVE" to say :

The term "Institutional Arbitration" that we are accustomed to use in contrast with the term "Ad Hoc Arbitration", was misinterpreted by the jurists; and is no more used in the same meaning conventionally known among all and sundry ; as jurists are divided in their answer to the following question : Is Institutional Arbitration merely arbitration commission that bears the responsibility thrown upon it by the parties to settle their disputes , through organizing and controlling all stages of the arbitration process ?

Or, does it mean also arbitration assigned to a constant arbitration commission that does not bear the burden of settling the dispute in the previous concept, but confines its role to the presentation of administrative activities, such as the formation of arbitration tribunals only ?

Professor “kassis “ also assumes that:-

The term Ad Hoc Arbitration is not a single acting one, as it comprises several forms and images of arbitration, and never occurs in a genuine image. We rarely notice the parties concerned discussing in their agreement of arbitration a variety of fundamental topics affected by the arbitration process in detail; yet they almost assign to others - i.e. the previously prepared ones - only the task of appointing arbitrators. Then the parties agree upon the rest, or they assign to others the task of: determining the arbitration procedures, locating the place and time of arbitration, deciding the law to be applied to the subject and other tasks that may be assigned by others, providing that the parties will arrange the other topics.

The institutional arbitration also, comprises a variety of images; and the parties therein may carry out by themselves the task of arbitration commissions to assign them, on condition that the selected arbitrators will be qualified to fulfill certain purposes. The parties also have to agree upon the applicable law, leaving the other items to the arbitration commission and its rules.

Therefore, the absence of the proper image of both sorts and the appearance of various forms classified under each of them , have diminished the breach between both . Having been affected by this concept , professor “ Berlingieri “ states that :

The status quo depicts that the term “ Ad Hoc Arbitration” is a cheating one ; though it theoretically assumes that both parties have mentioned in their agreement of arbitration all the fundamental rules necessary to put forward arbitration , they practically do not follow them , but complete their agreement with the legal rules followed in the country where in arbitration takes place .

Thus, the only difference sometimes between both sorts of arbitration is that in the as hoc arbitration , the legal rules of the country wherein arbitration takes place are complementary to the arbitration agreement whereas in the institutional arbitration these rules merge frankly with the items of the arbitration agreement that both parties refer to . These rules always have specific nature the arbitration commission herein referred to - puts into consideration .

The same misinterpretation of both sorts of arbitration leads others to make an innovation of a third sort of arbitration . Professor “ FOUCHARD “ argues that :

“ The arbitration rules of the united Nations commission (UNCITRAL), 1976, allows both parties - in case of their disagreement on assigning the arbitrator, the failure of the defendant to assign the tribunal if the arbitration tribunal is formed of a tripartite organization , or the disagreement of the previously selected arbitrators on assigning a third one - to resort to an authority they agree on nominating to assign the tribunal . If they disagree, the secretary General of the constant court of Arbitration, Hauge, may assign it. This sort of arbitration may be called “Semi Organized Arbitration”, as those who have laid down the arbitration rules intended to find an arbitration discipline that lies on the midway between the ad hoc arbitration in its pure image - with emphatic effectiveness that renders it development in the general form of this kind of arbitration, i.e. the ad hoc arbitration, through the declaration of a discipline that helps assigning arbitrators or forming arbitration commissions “.

Professor “ sanders ” argues that “ arbitration according to the UNCITRAL rules 1976 may he called “ Organized Ad HOC Arbitration”, as it is actually neither the well known “ Institutional Arbitration”, nor the “ Ad HOC Arbitration”. If these rules are only regarded as “Ad HOC Arbitration rules, they will not interfere to help assigning arbitrators .

Standard of Differentiation between both sorts of maritime Arbitration:

In fact, we again raise a question, in spite of the multiplicity of the subdivisions of the intruding forms of arbitration enrolled under each sort of maritime arbitration:

Does the multiplicity justify the confusion of one sort of arbitration with the other? Is there any necessity, according to that confusion, to make innovation of a third sort of arbitration, which we know as the “ Organized Ad HOC Arbitration” or the “Semi organized Arbitration”?

To answer these questions we maintain that there is no excuse to mix both sorts of maritime arbitration; and there is no need to innovate a third sort thereof. We can tell of a bipartite standard to distinguish the institutional arbitration from the ad hoc arbitration. The first part is the existence of a constant center of Arbitration, with its organic and organizational structure: the headquarters, the board of directors, the list of arbitrators, the secretariat, and the administrative bodies that carry out the organization and control of the arbitration process as well as supervising it, since they deliver the request for arbitration , till they issue the a word .

When this standard is available with its double parts, we are liable to disciplined maritime arbitration . In the absence of one of these parts, we are liable to ad hoc arbitration , as though we are liable to an arbitration organization that possesses arbitration rules but does not perform any role of supervising the application of its rules , nor organizing and controlling the procedures of arbitration

In the absence of the second part , and the proceeding of the arbitration process that is no more supervised , we are liable to ad hoc arbitration , if we find the arbitration commission does not have an organizational structure .

We notice that this standard is sufficient to distinguish the maritime institutional arbitration from the maritime ad hoc arbitration, and many supporters in the field of jurisprudence are :

Professor “ Van Ommeren “ , maintains that institutional arbitration exists when both parties possess the will to geld in advance to the rules of the arbitration commission ; which itself supervises their application . Hence , we are liable to ad hoc arbitration , not only when we encounter the institutional arbitration through the agreement of the parties upon each individual case , but also when we encounter the arbitration wherein the parties agree to refer their dispute to be resolved according to the rules of this or that arbitration commission without authorizing it to interfere in managing and controlling the arbitration process .

And professor “ Robert “ distinguishes the institutional arbitration from the ad hoc arbitration through three elements : first , the existence of arbitration rules ; second , the existence of an authority qualified to assign arbitrators and to solve the problems that arise during the arbitration procedures ; and third , the existence of a secretariat that secures contact with the parties , arbitrators and experts .

Therefore , the existence of arbitration commission that controls and supervises the arbitration process is the element that distinguishes maritime institutional arbitration from maritime ad hoc arbitration .

According to this standard, the maritime arbitration becomes institutional if it occurs before: the chamber of Maritime Arbitration (C M A), Paris ; the international organization of maritime arbitration (I O MA), Paris ; the commission of Lloyd’s, London or the chamber of the Alexandria center of maritime arbitration. Its purpose being to apply the standard with its double parts, as it is emphatic through the arbitration rules of these bodies, wherein the arbitration centers, with their organizational

and administrative structures, exist. They interfere in the organization, the supervision and the censorship of the procedures of the arbitration process.

But, the maritime arbitration becomes ad hoc arbitration - with its pure concept - if it occurs before: the maritime Arbitrators society. (M A S), London; or the maritime Arbitrators society, New York, as it is evident through their arbitration rules; because the standard with its second part falls behind; where there is an arbitration commission with its organic and organizational structure (part I). There is no interference from this or that commission in managing or controlling the arbitration process. This act is confined to providing with the arbitration rules and the list of arbitrators to serve the parties, their consultants and arbitrators who perform and control the arbitration process (part II). The maritime arbitration may also be ad hoc arbitration if it is carried out according to the arbitration rules of the UNCITRAL, 1976, as both parts of the standard fall back, and the UNCITRAL did not establish a constant arbitration commission that can supervise the application of these rules; thus, there is no interference in the arbitration process.

As most of the maritime arbitrations that take place in Paris are presented to the chamber of maritime Arbitration; or the international organization of maritime Arbitration, most of the maritime arbitrations that take place in France are maritime institutional arbitrations. But most of the maritime arbitrations that take place in London and New York before arbitrators members of the society of maritime Arbitrators, London, or the society of maritime Arbitrators, New York, are maritime ad hoc arbitrations, because both societies are of the Arbitration centers of maritime Ad Hoc Arbitrations. If we scrutinize the map of maritime arbitration, we will notice that most of maritime arbitrations are referred to London and New York, then to Paris. Hence, the great majority of maritime arbitration is maritime ad hoc arbitration.

Advantages of the maritime Ad hoc Arbitration:

As the maritime ad hoc arbitration in general contradicts the conventional attitudes of the international commercial arbitration, we have to enquire about the reasons that made the Ad-hoc arbitration occupy the first stage in the maritime arbitration ? The answer to this question falls in the following causes:

1- Cost of Arbitration

The first reason, why the parties prefer to resort to the maritime ad hoc arbitration , is its cost , that is less than the cost of the maritime institutional arbitration . In the maritime institutional arbitration the parties have to pay the fees of the arbitrators , the lawyers or the counselors , in addition to the administrative services the arbitration commission provides .

For example, in a dispute amounts to one million six hundred and twenty thousand American Dollars , presented to the international organization of maritime arbitration and heard by a single arbitrator , the administrative wages only amounted to seventeen thousand and six hundred dollars (i.e. 1.8 % of the total value of the dispute) . If the formation of the arbitration committee consists of three arbitrators in a dispute amounting to twenty million American Dollars, the administrative wages will reach thirty eight thousand Dollars (i.e. 0.15% of the total value of the dispute) . These administrative costs are calculated by the constant committee of the Organization, deposited as insurance trust, in addition to the fees of arbitrators. The institution secretariat almost receives these funds in advance before arbitration starts.

The administrative warranties guaranteed by the institutional arbitration to the parties concerned, through: the ascertainment of the existence of arbitration accord, the assignment of arbitrators, the supervision of their appointment, the allocation of the place of arbitration, the definition of the total sum deposited as insurance, the control of the process procedures , and the censorship of the

arbitration award issued , may be necessary for whom who resorts to arbitration for the first time , in order to make sure that the management of the arbitration passes in good order through competent arbitrators and the award is world wide applicable .

As for the parties of maritime arbitrations - themselves are proficient experts of international arbitration - these warranties may not be necessary for them, because most of them are joint liability companies . If dispute arises among the parties, they decide to settle it through a specialized, professional and active resolution as quickly as possible . Therefore , they would proportionally solve their problems through agreement between them and the arbitrators with considerable cut in the arbitration expenses .

2- Secrecy of Arbitration:

The second reason , why the parties prefer to resort to the ad hoc arbitration rather than the institutional arbitration is secrecy . The cost of arbitration may not be concerned ; as it depends on each individual case , on the importance of the dispute to each party , on the services offered in proportion to the claimed price , and on the possibility to get these services in another place for less costs. The great majority of parties of arbitration relations need to keep their secrets in their arbitration . Though many arbitration commissions deal secrecy with great care , the danger of openness magnifies more in institutional arbitration than in ad hoc arbitration . This is due to the fact that many members of the arbitration commissions reside in many countries far away from their native counties and differ from them in traditions and cultures . Thus , the institutional arbitration , is no doubt liable to be accused of penetrating secrecy considerations , the parties more preserve in the ad hoc arbitration . This danger is unavoidable in the institutional arbitration . The available fiction of arbitration adopts various stories about breaking the principles of secrecy .

Secrecy is more preserved in the ad hoc arbitration .

3- Arbitration pliability:

The third reason , why the ad hoc arbitration is preferable to the institutional arbitration , is the pliability of the rules governing the arbitration procedures . Each constant arbitration commission adopts the rules set in its arbitration rules that it follows accurately and emphatically . These rules are usually regarded as insufficient neither controlling the Arbitration, nor in considering it an honest guide to the parties in dispute . As they indicate severe shortage in the procedures and evidences , they are in need of adopting other numerous rules , wherein the parties in the ad-hoc arbitration can add , delete or change in the adopted rules far away from the arbitration commissions , according to the needs of the arbitration procedures .

4- Arbitration Quickness:

The maritime disputes need quick solutions , that the arbitration award must be issued within a few weeks or even days . Saving time should be taken into consideration , even to the losing party . Here is a well known example . If the subject of the maritime arbitration is a ship arrested , and a national tribunal decided that one party or both must bail for releasing the ship or pay a counter - bail for the wrongly arrest , the arbitration procedures have to pass in the center of institutional arbitration through long procedural stages : the plaintiff presents an arbitration request to the center of arbitration , the defendant receives a copy of the request from the center , he sends his vindication or presents a counter action , the center conveys to the parties the deposited insurance account together with a petition to pay , the stage of the oral arguments , the discussions , the reciprocity of documents and notes through arbitrators continues until the award is issued . All these stages may prolong the time needed to issue the award : the arbitration commission may refer the case to the experts or extend the fixed times according to the texts of its rules , which state that

all correspondences between both parties must pass through the commission , and any dispute that arises about the arbitration accord should be discussed in the arbitration commission . As for the ad hoc arbitration , the parties can change or fix any time , and agree upon concise rules for procedures . They can also accelerate the arbitration procedures through their agreement upon : fixing the times they previously fixed, continuing correspondence between them directly without middlemen, receiving the arbitration award directly after issuing it , authorizing only the arbitrators to be free in dealing with its form and content as well as other agreements upon all that leads to the acceleration of the arbitration process which the ad hoc arbitration facilitates .

5- International susceptibility

The nation that practices any maritime activity such as transportation of cargo , may find it necessary to conclude arbitration accords its agents . Some nations fiercely refuse or oppose to be party of an arbitration dispute presented to an arbitration commission , and prefer to be party of ad hoc arbitration to avoid supremacy considerations . They regard the center of institutional arbitration part of its locating nation that may adopt different economic regimes , in addition to other considerations the developing countries place in the first grade .

Therefore , the ad-hoc arbitration is a widespread system , in the disputes wherein one party is a foreign country in particular , e.g. the disputes of the oil cargo transportation , and the commercial disputes between East and west . The New York convention 1958 , on the recognition of and carrying out the international arbitrators awards also are globally acceptable to most countries to assume recognition of the maritime ad hoc arbitrators awards and their application .

For all these considerations , the ad-hoc is triumphant in the field of settling the maritime disputes . All the advantages of the institutional arbitration , may also be traced in the ad hoc arbitration .

If the centers of maritime institutional arbitration help the parties assign arbitrators , in case of the defendant refusal to cooperate with the plaintiff in forming the arbitration commission , the arbitration laws in different countries in general extend their assistance to the plaintiff through the national justice that may carry out this mission .

If the maritime institutional Arbitration commission provides the parties with arbitration rules that organize and control arbitration , the parties may be satisfied with referring their disputes to be settled according to the ad hoc arbitration rules such as those of the UNCITRAL , 1976 , or those of the society of maritime Arbitrators society , London or New York . These societies help the parties through presenting lists of competent arbitrators specialized in the maritime field , for the parties to choose their arbitrators out of them .

If the maritime institutional Arbitrators commissions provide the parties with their administrative services through their boards of directors, their members and secretariats , the parties may have these services , easily with the least cost and shortest time through the arbitrators themselves and their secretariats .

If the arbitration commissions provide the parties with administrative assistance on the legal level , this will be an indication that the parties did not prepare well their case ; the act that becomes dangerous for the parties and the arbitration commission itself . If these legal services are provided from the arbitration commission to the arbitrators , the same thing occurs ;

i.e. it is not appropriate , as the arbitrators will be accused of lack of experience and efficiency .

At last, we raise this question: Can the maritime institutional arbitration provide the parties with guarantees at the level of application of the arbitration award, that exceed the available guarantees they acquire if they resort to the ad hoc arbitration?

In this case , the maritime arbitration yields an arbitration award , more liable than others to optional application . If the losing party hesitates or abstains from the optional application of the award issued by the arbitrator or the arbitration commission specialized in the same maritime field , he will be liable to the cessation of his commercial activities and commercial boycott . His commercial reputation will be in danger , and may be deprived of many advantages extended to the members of the specialized professional communities by the agencies specialized in the custody of these communities .

More than one hundred countries in the world have signed the New York treaty , 1958 , about the recognition and application of the international arbitrators awards .

In fact , there is no evidence that may emphasize that the rate of the juristic repeal to arbitration awards on the one side and the optional acceptance on the other , is related to arbitration , either in its institutional or ad hoc aspect . The action is related to arbitration in general , not to the differentiation between both sorts of arbitration , as the supporters of the institutional arbitration claim .

Conclusion

Concisely speaking , the maritime arbitration enjoys wide range application in particular places in the world due to historical and economic circumstances . At the topmast of these places are London , New York and Paris . yet the vast majority of these

maritime arbitrations take place in London and New York in the form of ad hoc arbitration , as it is mentioned above . Herein exists one of the differences between the maritime arbitration and the commercial arbitration in general . Whereas the institutional arbitration is considered the antidote of the commercial disputes in general , the ad hoc arbitration is still a paradigm and is ideal in settling the maritime disputes . The maritime arbitrator is still the guard to the maritime commerce attitudes ; his fairness and competence are examples of justice and efficiency in the field of maritime arbitration .

This article provides for a general overview only and must not be relied upon as constituting advice in any specific case. Advice should always be sought before taking steps in proceedings- For Further information pls. Contact Mr. U. Soliman