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Chapter 6: Ad Hoc Arbitrations

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Roger Enock; Alexandra Melia
(*)

§6.01 Introduction

6-1 'Ad hoc' is a phrase used to imply that something is for a particular situation or purpose. In selecting ad hoc arbitration, parties forgo the procedural support and supervision typically provided by an arbitral institution. Instead, the parties will have to make their own decisions, either before or after a dispute arises, about the procedures that are to govern the resolution of their dispute and how the costs of the dispute will be shared. The responsibility for running any arbitration accordingly lies with the parties and, once it has been appointed, the arbitral tribunal.

6-2 Parties can, in theory, choose to devise and agree a bespoke set of procedural rules to govern their dispute. This is relatively rare in practice, not least because it is both time-consuming and (in many cases) unnecessary. Parties will more commonly choose to conduct their arbitration in accordance with the rules and procedures set out in the 1996 Act [(1)] or an established set of procedural rules specifically created for use in ad hoc arbitrations, such as the UNCITRAL Rules.

6-3 The data available suggests that the majority of 'international' arbitrations in England today are institutional arbitrations, as opposed to ad hoc arbitrations. A survey of in-house counsel suggested that ad hoc arbitrations accounted for only 14% of the arbitral awards rendered over the past ten years. [(2)] Over the past five years, there
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appears to have been an increasing preference among parties toward opting for institutional arbitration. That trend is underpinned, among other factors, by the growing reputation of a number of arbitral institutions and the convenience of having an independent secretariat or third party administer a case. However, in some spheres, ad hoc arbitration is still the preferred mode of dispute resolution.

6-4 For example, the very large number of 'every day' domestic arbitrations in England are ad hoc and conducted under the 1996 Act. These would include rent-review arbitrations, and disputes arising out of professional partnerships, various types of commercial contracts (including small business and joint venture disputes), building contracts and agency and distribution agreements.

6-5 In addition, and as discussed in greater depth elsewhere in this work, ad hoc arbitration has also been adopted as a preferred mode of dispute resolution for commodities, maritime and construction disputes.

6-6 Ad hoc arbitration has also traditionally been very popular in the insurance market. It is probably fair to say that, over time, insurance arbitration disputes of any value have, like many international commercial arbitrations, become more 'formal' and 'lawyer-driven'. It was not always so. In the 'good old days' of the London market, before asbestos, pollution, London Market Excess of Loss (or 'LMX') spirals and endless reinsurance disputes, virtually all (re)insurance market wordings provided for ad hoc arbitration with people familiar with the business (often retired underwriters) sitting as arbitrators. Those individuals would, in many instances, be required to treat the contract as an 'honourable engagement' (whatever that may mean legally), and to conduct the dispute speedily with no (or little) input from lawyers. There were no wigs (as in court), no document production, no rules, and no detailed reasoning at the end of the day. There was also no need for an institution to supervise matters and to charge a fee for doing so.

§6.02 Aspects of Ad Hoc Arbitration

[A] Why Choose Ad Hoc Arbitration?

6-7 Much has been written about the supposed advantages and disadvantages of ad hoc and institutional arbitration. Ultimately, much will depend in either form of proceedings on the ability of the arbitrator(s) to manage the procedure effectively, the nature of the dispute and the degree of cooperation between the parties. In support of ad hoc arbitration, it is fair to say that an efficient tribunal sitting in England (with, perhaps, the support of an administrative secretary, as described below) will be able to run an arbitration as smoothly as an institution. Any ad hoc arbitration with its

seat in
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England has the notable advantage of a supportive and ‘arbitration-friendly’ legal system behind it.

[1] Procedural Flexibility

6-8 Along with the ability to tailor an arbitration to the parties' specific needs, the control and flexibility that ad hoc arbitration provides is one of its most significant features and arguably an advantage over institutional arbitration. By definition, institutional arbitration requires the parties to a dispute to submit to the rules and administrative supervision of the chosen institution. This comparatively rigid structure may not entirely or effectively meet the parties' needs or fit well with the nature of the matter in dispute. By contrast, the parties to an ad hoc arbitration will have a greater degree of flexibility with respect to the conduct of their dispute, as a result of the absence of any form of institutional control. Such control is a desirable feature when the subject matter of a dispute does not easily fit within the pre-existing rules, or in the event that the parties wish to change the terms governing the arbitration. It is usually more suited to parties with a level of sophistication and experience of conducting arbitration.

[2] Costs

6-9 The costs associated with any form of arbitration can be considerable. However, the issue of cost may well be relevant to parties when deciding between ad hoc and institutional arbitration. In institutional arbitration parties will incur costs charged by the relevant institution in connection with the administration of the arbitration. One potential advantage of ad hoc arbitration, therefore, is the absence of institutional fees which, when combined with the arbitrator's expenses and other professional advisory fees, can be significant and, in some cases, prohibitive. However, the ‘cost savings' offered by ad hoc arbitration can, on occasion, prove illusory. First, the costs of administering an ad hoc arbitration are generally more difficult to assess as compared to institutional arbitrations (institutions frequently publish their costs and fees). Second, without the structural support offered by institutional arbitration, the ad hoc arbitration process can become delayed, thus increasing the overall cost. For example, fees can quickly escalate in the event that the parties cannot resolve disagreements that may arise, such as a dispute concerning the composition of the arbitral tribunal. In addition, and as discussed further below, without the discipline of an institution's fee scale, arbitrators can be slow to agree fees, demanding their own ‘rate’. This is often perceived to be a potential disadvantage of ad hoc arbitration although it is hard to gauge how real this concern is in practice.

[3] Speed

6-10 It is inadvisable to generalise about the relative speeds or efficiency of ad hoc and institutional arbitration. In reality, both ad hoc and institutional arbitrations can
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encounter delays: experienced arbitration practitioners will be able to cite examples of both institutional and ad hoc arbitrations that proved interminable. Where a party is minded to employ dilatory tactics (including making tactical applications to the tribunal or the courts) the procedure in either an ad hoc or an institutional arbitration will be threatened.

[4] International Acceptance

6-11 Arbitral institutions provide access (whether through institutional lists or extensive knowledge and contacts) to a large pool of experienced arbitrators. An award issued by a respected arbitral institution also benefits, whether directly or indirectly, from the respect and standing of that institution. For example, both the ICC and the LCIA have global name recognition which, although not relevant as a purely legal matter, generally lends authority to any award issued under the auspices of those institutions. This, in turn, may lend weight to any application to a foreign court to have the award recognised and enforced, although parties should certainly not rely on that being the case.

[5] Cooperation of the Parties

6-12 As noted above, as with so many other facets of ad hoc arbitration, the cooperation of the parties is a precondition to the effective running of the arbitration. In the absence of such cooperation, one of ad hoc arbitration's greatest strengths can become its greatest weakness. An ad hoc arbitration conducted before a tribunal that does not manage the case effectively is vulnerable to obstructive tactics (e.g. an un-cooperative party can easily paralyse proceedings by, for example, refusing to nominate an arbitrator). [(3)] Any delay would also be likely to have the effect of increasing the cost of the proceedings overall.

[B] The UNCITRAL Rules

6-13 As will be discussed in detail below, where no rules are specifically chosen or drafted, an ad

hoc arbitration could still go ahead successfully, with the 1996 Act 'filling the procedural gaps'. However, as noted above, it is common for parties to an ad hoc arbitration to adopt a set of procedural rules. The UNCITRAL Rules are the pre-existing ad hoc procedural rules that are most often adopted by parties in contracts relating to cross-border transactions. The UNCITRAL Rules were originally published in 1976 with the aim of producing a universally acceptable system for use in international ad hoc arbitrations by parties that had not agreed on an arbitral institution. The fact that the rules are endorsed by the UN General Assembly goes a long way toward making them acceptable to parties from a wide range of cultural backgrounds.

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6-14 The UNCITRAL Rules were substantially revised in 2010. Any party considering submitting to those rules for an arbitration with its seat in England should be aware that they do not exclude the parties' right of appeal on a point of law pursuant to section 69 of the 1996 Act and, if that is an important consideration for the parties, the arbitration agreement should be amended so that section 69 (which is non-mandatory) is excluded. (4) As described below in detail, where an appointing authority is required but none has been agreed by the parties, the revised UNCITRAL Rules provide that the parties must apply to the Secretary-General of the Permanent Court of Arbitration, who will designate the appointing authority. (5) The chosen appointing authority will in turn then appoint, as the case may be, an arbitrator or the tribunal. Parties should note that the UNCITRAL Rules do not provide for a particular fee structure. As in other ad hoc arbitrations, arbitrators and parties will have to come to an agreement on such matters.

§6.03 Ad Hoc Arbitration: Procedure and Practice

[A] Commencing an Ad Hoc Arbitration

[1] The Arbitration Agreement

6-15 For arbitrations that have their seat in England, the arbitration agreement in an ad hoc arbitration need only record the parties' wish that any dispute be resolved by arbitration. In that case, the agreement would be supplemented by the provisions contained in the 1996 Act. Ideally, however, the parties would have given consideration and added provisions into the arbitration agreement regarding some, if not all, of the following factors: the constitution of the tribunal and the method of its appointment; (6) the language of the arbitration; the procedure to be followed; the governing law of the arbitration; and confidentiality.

[2] The 1996 Act and Ad Hoc Arbitrations

6-16 To the extent that the parties have not created their own procedures or adopted existing ad hoc rules, as noted above the provisions of the 1996 Act provide a framework for the conduct of ad hoc proceedings where the seat is in England. (7) In what follows, the way in which such 'fall-back' provisions for the conduct of an ad hoc arbitration operate is considered at each stage of the process.

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[3] Beginning an Ad Hoc Arbitration

6-17 The parties to an ad hoc arbitration can agree when arbitral proceedings are to be regarded as commenced. (8) When there is no agreement between the parties on that issue, and no arbitral rules have been chosen which might resolve the question, section 14 of the 1996 Act contains default provisions that will apply. The commencement date under section 14 will turn on the precise mechanism for the appointment of a tribunal chosen by the parties, but in all cases the key to starting proceedings will be the service by one party on the other of a notice in writing. (9)

[4] Choice of Arbitrators

6-18 In accordance with the principle of party autonomy, the parties to an ad hoc arbitration are free to choose the number of arbitrators that will form the tribunal and whether there is to be a chairman or an umpire. (10) If the parties appoint an even number of arbitrators, there is a presumption that a third arbitrator will be appointed to preside as chairman, unless the parties agree otherwise. (11) In the absence of agreement as to the number of the arbitrators, section 15(b) of the 1996 Act provides that a sole arbitrator will be appointed.

6-19 The case of *Itochu Corporation v. Johann M.K. Blumenthal GMBH & Co KG & Anr* (12) considered the interpretation of section 15(3) and is a reminder of how carefully ad hoc (or indeed any) arbitration clauses should be drafted. In the said case, the arbitration agreement in a letter of guarantee had provided that:

> Any dispute … shall be submitted to arbitration held in London in accordance with English law, and the award given by the arbitrators shall be final and

> binding on both parties.

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6-20 In *Itochu Corporation*, the Court of Appeal agreed with the judge below that section 15(3) is clearly engaged where an agreement (or 'merely an indication of an agreement') about 'arbitrators' did not specify the number. A sole arbitrator, rather than a tribunal of three arbitrators was therefore to be appointed.

[5] Appointment of Arbitrators under the 1996 Act

6-21 The parties to an ad hoc arbitration are free to agree upon the procedure for the appointment of the arbitral tribunal. In the event that they are unable to agree on the selection of an arbitral panel and have not agreed what is to happen in the event of a disagreement, section 16 of the 1996 Act sets out a default procedure for the appointment of the tribunal. (13)

6-22 Where there is a failure to appoint the tribunal, under section 18 of the 1996 Act any party to the arbitration agreement (upon notice to the other party or parties) may make an application to the court for it to resolve the deadlock by deciding the composition of the arbitral tribunal. The court has the power to give directions as to the making of any necessary appointments, to direct that the tribunal shall be constituted by such appointments as have been made, to revoke any appointments already made, and to make any necessary appointments itself. The court's authority is clearly wide: it can create and completely reconstitute an arbitral tribunal, and any appointments it makes have the same effect as if they were made with the agreement of the parties. (14)

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[B] Appointing Authorities

[1] Arbitral Institutions as Appointing Authorities

6-23 Parties will generally seek to avoid court procedures for the appointment of arbitrators under section 18 of the 1996 Act. To that end, parties frequently choose to specify an 'appointing authority' in their arbitration agreement, which will step in when a party or parties fail(s) to make a nomination. Such 'appointing authority' may be (as set out below) a recognised arbitral institution. The LCIA and the ICC commonly fulfil this function in respect of arbitrations in England, upon payment of the requisite fee. (15)

[2] Appointing Authorities under the UNCITRAL Rules

6-24 The role of the appointing authority under the UNCITRAL Rules merits special mention in this context. Unlike other arbitral rules, the UNCITRAL Rules do not provide for the automatic selection of an appointing authority. Instead, they state that in the absence of agreement between the parties, the Secretary-General of the Permanent Court of Arbitration will 'designate' a suitable appointing authority. When that circumstance arises, the role of the Secretary-General is to appoint an appropriate appointing authority, rather than to act as an appointing authority itself.

6-25 The recently revised UNCITRAL Rules provide that to the extent the parties are unable to agree upon who should serve as an appointing authority thirty days after a party has proposed that a particular person or institution should so serve, any party may request that the Secretary-General of the Permanent Court of Arbitration designate the appointing authority. (16)

6-26 As noted above, the Secretary-General of the Permanent Court of Arbitration does not appoint arbitrators unless the parties agree that it should act as an appointing authority. When it is asked to act as the appointing authority, the Secretary-General will generally follow the list procedure as provided for under the UNCITRAL Rules (see below). The Secretary-General's choice of arbitrators for the list procedure or direct

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appointments is not limited to any list or panel, and the Secretary-General is therefore free to choose the most appropriate person for the matter at hand. (17)

[3] Other Appointing Authorities

6-27 Arbitral institutions are by no means the only appointing authorities in England. The President of the Law Society, the 'CEDR' and 'CIArb' are all frequently asked to act as appointing authorities in ad hoc arbitrations in the United Kingdom. It is also common for specific industry-related institutions to act as appointing authorities for disputes arising in a particular industry, such as the Royal Institution of Chartered Surveyors, the Royal Institute of British Architects and the Institute of Chartered Accountants.

[4] The 'List' Procedure

6-28 In an ad hoc arbitration under the UNCITRAL Rules in which an appointing authority (e.g. the

LCIA Court) is designated for the purpose of appointing a sole or presiding (third) arbitrator, the parties may request the appointing authority to produce a list of at least three potential candidates from which the sole/presiding arbitrator shall be appointed. The parties then return the list to the appointing authority after having deleted the name(s) to which they object and numbering the remaining names on the list in order of preference. The appointment can then be made by agreement or by the list procedure, as described above. In a non-UNCITRAL ad hoc arbitration, the appointing authority selects the arbitrator independently of the parties involved in the arbitration.

[C] Procedure in Ad Hoc Arbitrations

6-29 As discussed above, the 1996 Act provides flexibility for the parties to an ad hoc arbitration to agree the procedural steps that are to be taken. Any procedural steps agreed by the parties must comply with the tribunal's overriding duty to 'adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters to be determined'. (18) Any agreement that falls short of those principles could be held to be void and therefore unenforceable. (19)

6-30 In the absence of agreement between the parties, the 1996 Act empowers the arbitral tribunal to prescribe appropriate procedural measures (section 34). In doing so, the tribunal must comply with its overriding duty. The arbitral tribunal has the
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authority to decide all procedural and evidential matters, subject to the agreement of the parties, including:

(1)when and where proceedings are to be held;

(2)the language in which proceedings are to be conducted;

(3)whether written statements of claim or defence are to be used;

(4)whether and to what extent document production will take place;

(5)whether and to what extent oral submissions should be permitted; and

(6)the rules and form of evidence. (20)

6-31 The wide latitude ad hoc arbitration affords parties to agree on the procedural steps that govern their dispute makes it difficult to provide a definitive overview of the steps that will occur in any particular arbitration. Also, the complexity of the procedure may to some extent be influenced by the subject matter of the arbitration and the amounts at stake. In a small-scale dispute, for example, the parties and tribunal may be minded to keep the procedure as short and simple as possible. However, in a larger scale, commercial dispute, the following steps are likely to occur:

(1)The tribunal is likely to encourage the parties to set out their positions clearly and to seek to narrow the issues in dispute from an early stage.

(2)The tribunal will almost always make provision for written statements of case, in which each party sets out its claim – or defence, as the case may be, – in writing. These statements provide the parties with an opportunity to set out their version of events, as well as the factual and legal basis for their position and are generally supplemented by fact and/or expert witness statements. There may then be subsequent rounds of pleadings if required (i.e. the claimant's reply and the respondent's rejoinder).

(3)The tribunal is also likely to make provision for document production. The tribunal could, in theory, order document production similar in scope to 'standard disclosure' in English court proceedings, which requires a party to disclose: (1) documents on which it relies; (2) documents that support another party's case; and (3) documents that adversely affect its – or another party's – case. In most international commercial ad hoc arbitrations, however, the tribunal will tend to order more limited document production. (21) It is common for parties to an ad hoc international arbitration to adopt the IBA Rules on Evidence to provide an objective standard for assessing the relevance of documents. The IBA Rules on Evidence provide for an initial disclosure of the documents on which a party relies, after which the parties are able to request the production of further, specific documents or narrow and specific categories of documents. Even if the IBA Rules on Evidence are not formally adopted by the parties, it is common to find them being referred
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to as a 'benchmark' by parties and being given weight by tribunals as they decide on appropriate orders.

(4)The tribunal may appoint experts or legal advisers to report to it or assessors to assist it on technical matters. (22) It is, however, almost always the case that the tribunal will adopt a similar procedure to that employed in English court proceedings. In such proceedings, parties tend to instruct their own experts and are permitted to put written questions to experts. Experts also may be

required to discuss their reports before the final hearing with a view to producing a joint memorandum of issues upon which they disagree, in order to narrow the issues in dispute between the parties. Experts typically will be required to provide oral evidence at a hearing. (23)

(5)The prevailing practice in England in substantial commercial matters is for there to be a final oral hearing (by contrast, many small, low value matters are commonly decided 'on the papers'). (24) This may well be preceded by one or more shorter procedural meetings, depending on the complexity of the case, in which, among other things, the procedural timetable is fixed and/or procedural applications are heard. It is standard practice in England for both witnesses of fact and expert witnesses to be cross-examined.

(6)The allocation of costs between the parties is at the sole discretion of the tribunal, although the 1996 Act contemplates that costs should follow the event unless – based on the facts of the case – that approach is inappropriate (section 61).

[1] The Award

6-32 Unless the parties agree otherwise, the 1996 Act empowers arbitrators to make either a final award that disposes of all the issues to be determined, or more than one partial award at different times and on different aspects of the matters to be determined. (25) The arbitral tribunal may, in particular, make a partial award relating to an issue affecting the whole claim – such as jurisdiction – or to part of the claim(s) or cross claim(s) submitted to it for decision. If the tribunal does so, it is required to specify in its award the issue, or the claim or the part of the claim(s) disposed of. (26) An award made by a tribunal in England may, by permission of the court, be enforced in the same manner as a judgment or order of the court and to the same effect. (27)

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[2] Remedies

6-33 The powers of the arbitral tribunal with regard to remedies and the award of interest also can be decided by the agreement of the parties (sections 48 and 49). In the absence of any such agreement, the 1996 Act provides the tribunal with the power, among other things, to make a declaration as to any matter to be determined in the proceedings, order the payment of a sum of money (in any currency) and grant injunctive relief (other than injunctive relief confined to the English High Court and specified county courts). (28) With regard to interest, a tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case on all or part of any amount awarded by the tribunal or claimed and outstanding at the commencement of the proceedings but paid before the date of the award. The tribunal may also award interest from the date of the award until payment on the amount of any award and any interest or costs. (29)

[3] Support of the Courts

6-34 The court's supervisory powers in ad hoc arbitrations pursuant to the 1996 Act are the same as those that it has in an institutional arbitration. These are covered in detail in Chapter 20 below, but in addition to those already referred to in this chapter, it is worth recalling here that such powers include the court's ability to stay proceedings brought in breach of an arbitration clause (section 9), secure the attendance of witnesses (section 43) and provide interim injunctive relief in support of the arbitration (including freezing orders and 'search and seizure' orders) (section 44).

[D] The Arrangements between the Parties

6-35 The procedural elements that parties will need to ensure are covered in any ad hoc proceedings have been described above. In addition, where there is no institution to ensure that the administration of the arbitral proceedings runs smoothly, parties will need to give consideration to a number of other key 'administrative' arrangements.

[1] Arbitrator Fees

6-36 The determination of a tribunal's fees pursuant to sections 28, 56 and 64 of the 1996 Act is considered in detail in Chapter 11. (30) For present purposes, however, some key points about the settling of the tribunal's fees in an ad hoc arbitration must be

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made. Arbitrator fees can constitute a significant proportion of the total cost of an ad hoc arbitration and they should be carefully negotiated at the outset of a dispute. Section 28 of the 1996 Act, whilst not dealing with contractual provisions as such, provides that in the absence of agreement between the parties, they are jointly and severally liable to pay the tribunal's 'reasonable' fees and expenses. In practice, the parties should agree the arbitrator's fees prior to appointment and draw up a contract setting out the terms of the arbitrator's appointment thereby ensuring certainty and guarding against any attempt by the arbitrator subsequently to alter the level of his or her fees. It is worth recalling in this context that the tribunal has the power to withhold an award to the parties except

upon full payment of the fees and expenses to the arbitrators. (31)

6-37 The main arbitral institutions generally publish details of their administrative fees and the hourly rates charged for persons involved in arbitrating a dispute. This transparency allows parties involved in institutional arbitration to roughly predict the fees payable in connection with their dispute. There is no comparable resource available to parties in ad hoc arbitrations. Therefore, when estimating costs in the context of an ad hoc arbitration, consideration should be given to all potential phases of the arbitration (through to successful enforcement and attachment of assets, where applicable). Included in this will be, among other things: legal fees, arbitrator fees, administrative fees, experts' fees (when necessary) and any applicable fees for a secretary to the tribunal.

[2] Administrative Secretary to the Tribunal

6-38 In ad hoc proceedings relating to high value commercial matters, it is common practice for arbitrators to appoint an administrative secretary to the tribunal, thereby freeing the tribunal from unnecessary administration. In small scale matters the practice would be exceptional (the level of administration would likely not justify the costs). If carefully used, the employment of a secretary to the tribunal can result in a substantial cost saving to the parties as well as a considerably reduced administrative load. Tribunal secretaries are, relatively speaking, far cheaper than arbitrators and they may take on tasks that otherwise would have fallen to the arbitrators, or the parties themselves, to organise. Tribunal secretaries are typically junior lawyers, perhaps a member of the arbitrator's team at his firm or a junior barrister in chambers. The cost of an arbitral secretary can either be met out of the arbitrator's fees or fall to the parties themselves to pay. The parties should seek to agree at the outset with the arbitrator(s) who will meet the secretary's fees. In negotiating with the arbitrator(s), parties should consider the basis on which the fees of the arbitrator are to be charged as this will have an impact on the cost saving realisable by the parties. When an arbitrator charges fees on an ad valorem basis, the use of a secretary will result in additional expense for the parties. Conversely, when an arbitrator charges fees on an hourly rate, the use of a

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secretary can reduce the number of hours that the arbitrator will need to spend on the matter and therefore may result in a cost saving for the parties.

[3] 'The Shadow Arbitrator'

6-39 The principal purpose of appointing an administrative secretary is to assist the arbitrator(s) in the performance of the tribunal's arbitral mandate. However, the precise role of an administrative secretary to a tribunal can vary from one arbitration to the next. (32) The responsibilities delegated to a secretary range from basic administrative tasks at one end of the scale to an involvement in the substantive tasks facing an arbitrator (e.g. legal research, analysing parties' submissions and drafting of awards) at the other. While it can be argued that appointing secretaries to tribunals increases the efficiency of the arbitration process, concerns have been expressed in relation to those instances in which secretaries play more substantive roles in the proceedings. (33) Given that arbitrators are often selected for their own specific qualities or qualifications, there is a fear that the secretary may encroach on, or usurp, the decision making power of the arbitrator(s) and deny the parties the opportunity to have their dispute heard by their selected arbitrator(s). In other words, there is a fear that an administrative secretary can end up being a 'shadow arbitrator', doing the analysis that the tribunal should do and having too much influence on procedural decisions. That said, the prevailing view is that secretaries can continue to perform an important role that does not detract from the arbitrator's responsible fulfilment of his or her function. This view relies on the assumption that the administrative secretary will remain under the watchful eye of the arbitrator(s) and that there is 'disclosure, transparency and informed consent of the parties'. (34)

[4] Chairperson

6-40 Many ad hoc arbitrations provide for the appointment of arbitrators who are not lawyers; for example, retired underwriters in the insurance context or traders in a particular market. In practice, and particularly where there is no arbitral institution to provide support, it is often wise for the party appointed arbitrators to be encouraged (if they need to be) to appoint a lawyer to act as the 'chairperson', largely for two reasons. First, he or she will have experience in managing a case from a procedural point of view. Secondly, they will write the award in appropriate cases.

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[5] Trust Accounts

6-41 In institutional arbitration, the nominated institution will assist the parties with the management of financial aspects of the arbitration. In ad hoc arbitration that responsibility falls to the parties themselves. The parties will need to consider the practical aspects surrounding the payment of the arbitrator's fee. One particular option in arbitrations in England is to make use of the deposit handling services operated by some arbitral institutions, such as the LCIA.

[6] Right to Resign

6-42 The parties to an ad hoc arbitration should ensure that they have procedures in place to deal with the resignation of an arbitrator. [(35)] The parties should consider what, if any, impact an arbitrator's resignation would have on his or her entitlement to receive the payment of fees and expenses from the parties. Consideration should also be given to the mechanism to be used to replace the resigning arbitrator. One fairly straightforward option is to provide that any vacancy on the arbitral panel be filled in the same manner as the resigning arbitrator was originally appointed.

§6.04 Ad Hoc Arbitration in England Today

6-43 In sum, ad hoc arbitration continues to play an important role in arbitration in England today. Indeed, in some sectors ad hoc arbitration has essentially become the norm.

6-44 For example, the majority of maritime arbitrations are conducted on an ad hoc basis and standard shipping contracts generally contain a standard form arbitration clause, such as the LMAA Clause. The LMAA Clause expressly provides that any dispute arising out of the contract will be referred to arbitration and governed by the LMAA Terms. The LMAA is not, however, an administrative body such as the LCIA and ICC and arbitrations under the LMAA Terms remain ad hoc and are administered by the tribunal in question.

6-45 And finally, as noted in the introduction, along with a large number of other commercial contracts, many London market insurance and reinsurance contracts contain ad hoc arbitration clauses. In the reinsurance context, some lawyers charged with conducting arbitrations tend to conduct them as if they were High Court 'Commercial Court' proceedings that just happen to be being heard by an arbitral tribunal. Some of the attendant features of High Court proceedings can therefore accompany the process, including lengthy pleadings, extensive disclosure, expert
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evidence, witness statements, and relatively long hearings. However, sector 'practice' aside, there is of course no reason why this *should* be the case. Ad hoc arbitration still provides parties with a platform, if they wish, to deal with their disputes in an altogether more efficient and timely manner.

References

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Roger Enock is a dispute resolution and arbitration partner and Alexandra Melia is an associate in the London office of Covington & Burling LLP.

1)

It should be noted that even if parties do not specifically adopt the terms of the 1996 Act, the mandatory sections will nonetheless apply in those arbitrations having their seat in England and Wales.

2)

International Arbitration: Corporate attitudes and practices 2008 – PricewaterhouseCoopers (see www.pwc.co.uk/eng/publications/international_arbitration_2008.html). It should be borne in mind, however, that the aforementioned survey was based on a relatively small sample of eighty-two questionnaires and forty-seven interviews conducted with major corporations that are users of arbitration.

3)

See para. 6-21 for how this situation would be resolved.

4)

See Ch. 25 for further explanation of a challenge under s. 69.

5)

See para. 6-25.

6)

Parties should ensure that an appointing authority is designated in the agreement to arbitrate. See paras 6-24 to 6-26 below.

7)

Section 2(1) of the 1996 Act.

8)

The point at which an arbitration can be considered to be commenced can be an important consideration in terms of both statutory time limits (e.g. see the Limitation Act 1980) and any contractual time limits.

9)

If the agreement is silent on the question of when the arbitration is deemed to have commenced, s. 14 of the 1996 Act provides as follows:
(1)In those cases where the arbitration agreement specifies the arbitrator, arbitral proceedings will be regarded as commenced when one party serves on the other party a notice in writing requiring them to submit the matter to the designated arbitrator.

(2)In those cases where the arbitrator is to be appointed by the parties, arbitral proceedings will be regarded as commenced when one party serves on the other party a notice in writing requiring them to appoint an arbitrator or to agree to the appointment of an arbitrator.

(3)In those cases where the arbitrator is to be appointed by a person other than a party to proceedings, arbitral proceedings will be regarded as commenced when one party gives notice in writing to that person requesting him to make the appointment in respect of the matter.

10)

An umpire may only be appointed where there is express agreement between the parties to that effect (s. 21 of the 1996 Act).
11)

Section 15(2) of the 1996 Act.
12)

[2012] EWCA Civ 996.
13)

Section 16 of the 1996 Act provides for a default procedure, which can be summarised as follows:

> (1)If the tribunal is to consist of a sole arbitrator, the parties must jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.
> (2)If the tribunal is to consist of two arbitrators, each party must appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.
> (3)If the tribunal is to consist of three arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.
> (4)If the tribunal is to consist of two arbitrators and an umpire, each party must appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so and the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.
> (5)In any other case, the provisions relating to the failure of the appointment procedure in s. 18 of the 1996 Act apply.

14)

Section 18(2) to (4) of the 1996 Act. Note also that pursuant to s. 18(5), the leave of the court is required for any appeal from a decision of the court under s. 18. The Court of Appeal in *Itochu* (*supra* n. 12), citing *Henry Boot Ltd v. Malmaison Hotel Ltd* [2001] QB 388, confirmed that, where s. 18(5) of the 1996 Act applies, the reference to 'the court' is to the court at first instance. Accordingly, where leave is refused by the judge below, the Court of Appeal cannot itself grant leave to appeal. This is part of the policy embodied in the 1996 Act of restricting appeals.
15)

At the time of writing, the appointment fee that must accompany any request for the LCIA to act as an appointing authority is GBP 1,750, excluding fees for time spent (LCIA Schedule of Arbitration Fees and Costs (effective 1 July 2012)). A party that wishes the ICC to act as appointing authority must submit a request to the Secretariat of the Court containing all the information that the requesting party deems appropriate as well as a fee, currently USD 3,000 (Arts 2(1), 2(2), 6(1) and Appendix Art. 1, Rules of ICC as Appointing Authority in UNCITRAL or Other Ad Hoc Arbitration Proceedings (in force as from January 2012)).

16)

Article 6(1) and 6(2), UNCITRAL Rules (as revised in 2010). That provision is similar to the equivalent provision contained in Art. 6(1) and 6(2) under the UNCITRAL Rules (1976). Where the parties to an arbitration agreement concluded after 15 August 2010 refer to the UNCITRAL Rules, they shall be presumed to have referred to the 2010 Rules, unless the parties have agreed to apply a particular version of the Rules. Where parties to an arbitration agreement concluded on or before 15 August 2010 refer to the UNCITRAL Rules, they shall be presumed to have referred to the 1976 Rules, unless the parties agree that the 2010 Rules should apply.

17)

Permanent Court of Arbitration, Designation of PCA Secretary-General as Appointing Authority www.pca-cpa.org/showpage.asp?pag_id=1063.

18)

Section 33(1)(b) of the 1996 Act. See further Ch. 15 in relation to arbitrators' duties.

19)

DAC Report, paras 155–158.

20)

Section 34 of the 1996 Act.

21)

For the position in ad hoc maritime arbitrations, see further at Ch. 8, paras 8-34 to 8-37 below.

22)

Section 37 of the 1996 Act.

23)

In English court proceedings, experts owe their duty to the court and not to the parties and their role is to provide independent assistance to the court in the form of objective, unbiased opinion. Expert evidence should, therefore, be seen to be the independent product of the expert, rather than influenced in its form or content by the demands of litigation.

24)

Hearings can be held at a number of venues, ranging from the offices of one of the parties' legal representatives to a purpose built dispute resolution centre such as the International Dispute Resolution Centre in London.

25)

Section 47(1) of the 1996 Act.

26)

Section 47(3) of the 1996 Act.

27)

Section 66(1) of the 1996 Act.

28)

Section 48(1)–(5) of the 1996 Act. An arbitral tribunal in England and Wales is not permitted to award punitive damages for breach of contract and can only do so in limited tort actions. Where the parties' arbitration agreement is, however, wide enough to encompass claims under a foreign statute that provides for special or punitive damages, a tribunal may be able to award such damages in an arbitration with its seat in London.

29)

Section 49 of the 1996 Act.

30)

See Ch. 11, paras 11-46 to 11-50.

31)

Section 56 of the 1996 Act.

32)

This applies equally to ad hoc and institutional arbitration.

33)

C. Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration', 18 *Arbitration International* (2002): 147, 152. See also 'Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association' 17 *Am.Rev.Int'lArb.: 575.*

34)

'Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association' 17 *Am.Rev.Int'lArb.* (2006): 592.

35)

The right of an arbitrator to resign is explicitly acknowledged in both the UNCITRAL Rules (2010) and the 1996 Act. Section 25 of the 1996 Act confers the right of an arbitrator to resign. In the absence of any agreement between the parties, s. 25(4) of the 1996 Act provides a default position that the court can grant relief from any liability to the arbitrator, provided that in all of the circumstances it was reasonable for the arbitrator to resign.

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