Institutional and *Ad Hoc* Commercial Arbitration

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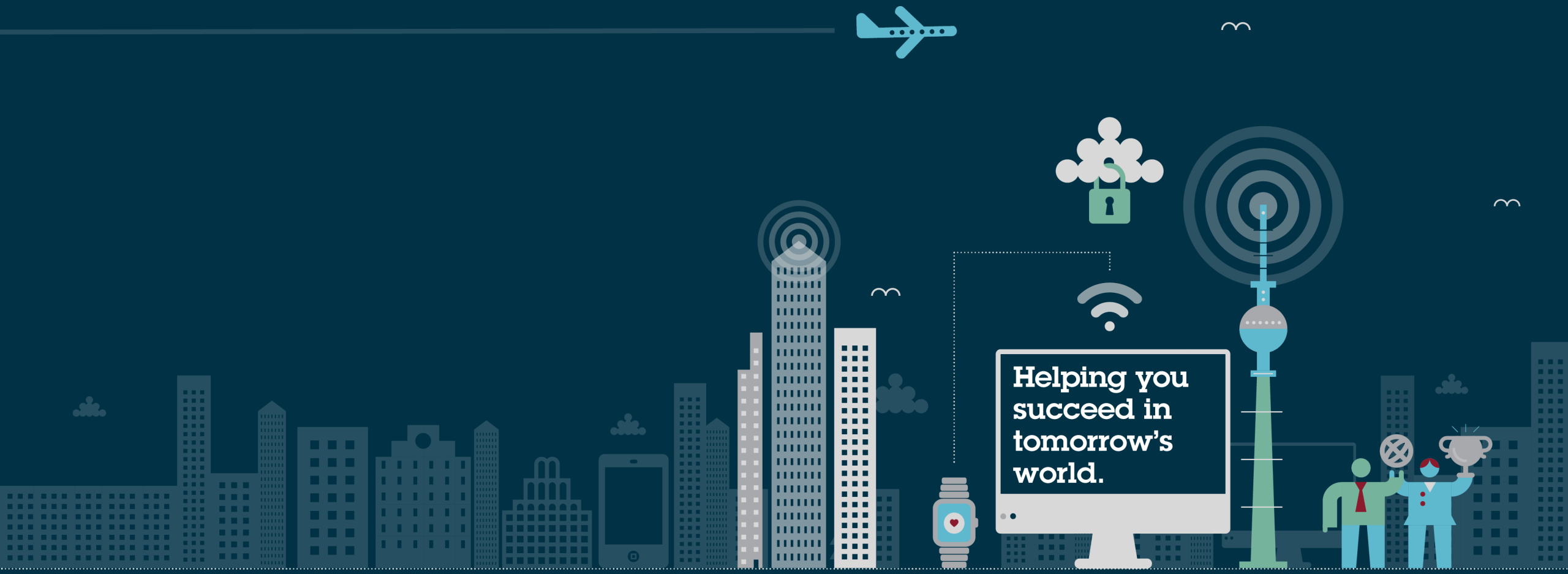


01

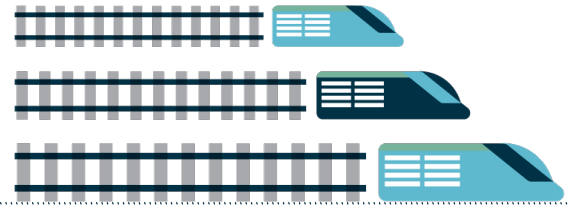
In the beginning, there was simply arbitration…

The origins of arbitration: what does history tell us?

- References to arbitration in Ancient Greek and Roman texts amongst others
- Here in England, traced to a fragment of an award dated 14 March 114 AD
- Widely used by medieval merchants: gradual development in case law and legislation
- One of the forms of resolution of **state-to-state** disputes from Ancient Greece to the Jay's Treaty between Great Britain and the United States of 19 November 1794

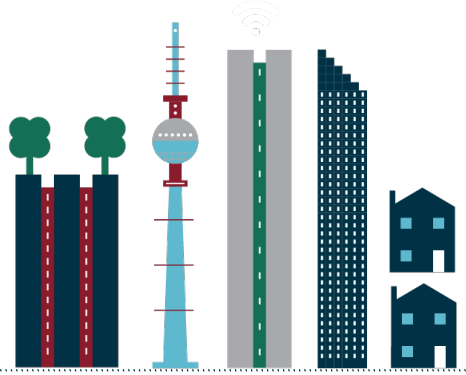
Reasons for choosing arbitration:

- Throughout history, the most often cited reasons for choosing arbitration remain the same.
- Arbitration is said (rightly or wrongly) to be a way to mitigate:
    - Expense;
    - Delays;
    - Procedural 'rigidity'; and
    - Potential bias of national courts.



XIX and XX Century Developments

- 1889 Treaty Concerning the Union of South American States in Respect of Procedural Law ("Montevideo Convention"): first modern international commercial arbitration treaty
- 1899 Hague Convention for the Pacific Settlement of Disputes / 1907 Hague Convention for the Pacific Settlement of International Disputes: settlement of inter-state disputes by arbitration
    - Establishment of the first arbitral institution - **Permanent Court of Arbitration** ("**PCA**") in 1899. Originally used for disputes between states, PCA now administers both commercial and inter-state disputes under its own rules and *ad hoc* disputes, particularly under the UNCITRAL rules;
- 1923 Geneva Protocol on Arbitration Clauses in Commercial Matters: first international treaty to recognise the enforceability of international arbitration agreements and awards. Contracting states obliged to recognise and enforce awards made within their territory.
- 1927 Geneva Convention for the Execution of Foreign Arbitral Awards: enabled recognition of foreign awards within all contracting states.
- 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"): one of the most widely used instruments in international arbitration. 172 state parties.

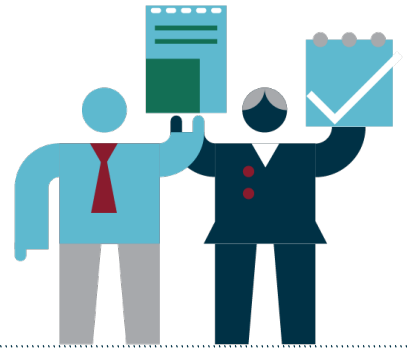


02 Defining our terms

What is Ad Hoc Arbitration?

Common definitions of Ad Hoc arbitration:

- A form of arbitration where the parties and the arbitrators *determine the procedure* themselves, without the involvement of an arbitral institution.
- Arbitrations which are *not conducted under the auspices or supervision of an arbitral institution*. Parties simply agree to arbitrate, without designating any institution to administer or otherwise support their arbitration.
- These are sometimes seen as 'negative' definitions (or definitions which point to an 'absence' of institutional features). Some 'bias' towards institutional arbitration?



What is Institutional Arbitration?

An institutional arbitration is often described as one that is:

- **administered** by a specialist arbitral institution (e.g., the LCIA, ICC, SIAC, DIS, SCC, ICSID, PCA etc.); and

- conducted by the Tribunal and the parties under **the institution's own rules of arbitration.**

The administrative authority (e.g. the ICC or LCIA 'Courts' assisted by their secretariats) might have responsibility for a large range of administrative / procedural matters, e.g. (i) constituting the arbitral tribunal; (ii) fixing the arbitrators' compensation; (iii) deciding on challenges to the arbitrators and (iv) 'checking' that awards have been drafted in accordance with the applicable rules.

It (generally) starts with an arbitration clause

Ad hoc example

Any dispute, controversy or claim arising out of or relating to this agreement, including any question regarding its breach, existence, validity or termination or the legal relationships established by this agreement or any non-contractual claims (whether in tort or otherwise), shall be referred to and finally determined by arbitration [*under [the UNCITRAL Arbitration Rules*] in force at the date of this agreement]. *The number of arbitrators shall be three. The seat of the arbitration shall be Singapore. The language of the arbitration shall be English*.

Institutional example

All disputes arising out of or in connection with the present contract shall be finally settled *under the Rules of Arbitration of the International Chamber of Commerce* in accordance with the said Rules. *The number of arbitrators shall be three. The legal place of the arbitration shall be Singapore. The language of the arbitration shall be English*.

But do not forget the 'compromis'…

03 *Ad hoc* Arbitration

Ad hoc procedure: the basics

- Governed by the parties' arbitration agreement and the law of the seat
- Parties free to choose any procedure they wish. In the absence of choice, parties default to provisions of the law of the seat. In England, **default provisions** specified in the Arbitration Act 1996.
- Helpful things to include in the arbitration agreement to avoid the application of default provisions and/or delays/disputes:
    - **Procedure for appointment and the number of arbitrators**. If the parties have failed to include this in the arbitration agreement, default rules of the seat will apply. In England, the default rule is a sole arbitrator (s 15(3) of the Arbitration Act 1996)
    - **Place and language of arbitration**;
    - **Applicable law**;
    - **Procedural rules to be followed** (e.g. UNCITRAL, GAFTA, FOSFA); and
    - **Confidentiality**: provisions required?

Considerations in choosing *ad hoc* arbitration

- What is **accepted practice** in the particular sector / market: think of maritime disputes, commodities (metals, foods etc.), professional disputes?
- **Procedural flexibility** – how much is helpful to the parties? Do you really want to come up with your own procedure from scratch?
- **Costs** – will it be more / less expensive than institutional arbitration? Why?
- The need for a **Secretary to the Tribunal**?
- **Speed** – where might the delays creep in?
- **Lack of predictability/delays** in agreeing rules of procedure: who could this benefit / prejudice?
- **Issues with appointing a tribunal**: what happens if a party does not participate?
- Could there be a **lack of international recognition**?
- **Need for co-operation between the parties** at a stage when the parties are less likely to be co-operative?
- Lack of access to **emergency arbitration procedures**, which are available under some institutional rules? But could go to court?

UNCITRAL Rules

- First adopted in 1976, revised in 2010, 2013 and in 2021.
- Designed specifically for use in *ad hoc* arbitrations.
- Contain rules on *inter alia*:
    - Filing and responding to the notice of arbitration;
    - Composition of the arbitral tribunal, including procedure for when a respondent fails to appoint an arbitrator. PCA can designate the appointing authority (Article 6.2);
    - Conduct of the arbitral proceedings;
    - Interim measures, e.g. security for costs, available from the tribunal but not before its constitution;
    - Issue and content of awards; and
    - Allocation of costs.
- Arbitrations under the UNCITRAL Rules can be administered by an institution. This has led to considerable debate as to whether UNCITRAL Arbitration is effectively a **hybrid** form of arbitration, neither fully ad hoc nor institutional.

UNCITRAL Rules (cont'd)

Pieter Sanders, the principal drafter of the UNCITRAL Rules, emphasised that the UNCITRAL Rules:

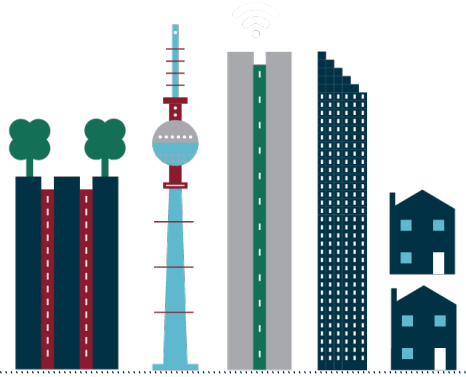
"*do not compete with institutional arbitration since, unlike the arbitration rules of every arbitral institution, the UNCITRAL Rules do not provide for the administration of the arbitration*"

and that as a result

"*arbitration under the UNCITRAL Arbitration Rules* ***cannot*** *be regarded as institutional, administered arbitration*" (emphasis added)

A true *ad hoc* story: the compromis

- Began negotiating arbitration agreement – 28 June (**Day 1**)
- Information gathering by Claimant commences – 30 June – and continues until the day of the hearing…(**Day 3**)
- Arbitration agreement signed – 5 July (**Day 8**)
- Claimant's first submission (two witness statements) – 6 July (**Day 9**)
- Sole arbitrator appointed – 13 July (candidates proposed by LCIA, parties each vetoed one) (**Day 16**)
- Respondent's Defence (plus two witness statements) – 14 July (**Day 17**)
- Telephone CMC – 18 July (**Day 18**)
- Claimant's Reply (two witness statements) – midday 19 July (**Day 22**)
- Respondent's Response (three witness statements) – 20 July (**Day 23**)



A true ad hoc story: the compromis *(continued)*

- Hearing – Friday 22 July (4 hours) (**Day 25**)
- Costs submissions – Wednesday 27 July (**Day 25**)
- Replies to costs submissions – 12.30 Friday 29 July (**Day 32**)
- Award available – 13:05 3 August (8 working days from hearing) (**Day 37**)

- ***Key takeaway points from the case study***:
  - **Speed**
  - **Moving from court to arbitration**
  - **Procedural flexibility**
  - **Finality**
  - **Importance of the agreement of the parties and their desire for speedy resolution**

04 Institutional Arbitration

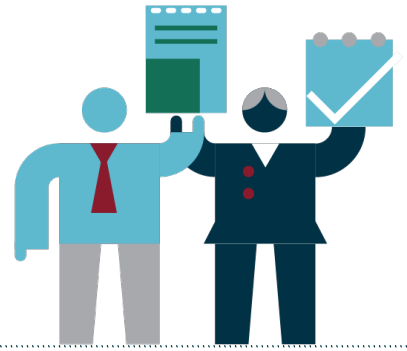
The Rise of the Arbitral Institution: exponential growth

"[…] ***the growth of the number of institutions has been exponential. Before 1940 only ten percent of the institutions around today existed. Seventy percent of the institutions have been created in the last thirty years; fifty percent in the last twenty and twenty percent in the last ten years***".

Guy Pendell, 'The Rise and Rise of the Arbitration Institution' (2011)

Major Arbitral Institutions

- **International Chamber of Commerce International Court of Arbitration ("ICC")**
  - The most popular and one of the oldest institutions. **Established in 1923;**
  - Headquartered in Paris. Also has locations in New York, Hong Kong, Singapore, São Paulo and Abu Dhabi;
  - Administers cases seated anywhere in the world;
  - Constantly growing case load: total of 890 cases registered in 2023;
  - Maintains a secretariat consisting of over 40 legal and administrative professionals to support arbitral proceedings; and
  - Average case duration is 26 months (median = 22 months).



Major Arbitral Institutions (*continued)*

- **London Court of International Arbitration ("LCIA")**
  - Origins traced to late XIX century;
  - 377 referrals received in 2023, including 327 arbitrations;
  - Most LCIA arbitrations are seated in London. In the absence of agreement between the Parties the default position under the LCIA Rules 2020 (Article 16.2) is that the seat of arbitration will be London;
  - Maintains a database of arbitrators and is able to match them to specific cases based on the nature of the dispute, sector, language, etc.;
  - Median duration of cases is 16 months and average cost is USD 97,000.

Major Arbitral Institutions (*continued)*

- **Stockholm Chamber of Commerce Arbitration Institute ("SCC")**
  - Established in 1917;
  - Registered a total of 175 new cases in 2021;
  - Median case duration is 13.5 months (expedited arbitrations are all concluded within 6 months). Median costs for sole arbitrator cases are EUR 33,096 and for three-arbitrator tribunals – EUR 167,021.
- **Singapore International Arbitration Centre ("SIAC")**
  - Established in 1991;
  - Fastest growing arbitral institution in the world with 663 new cases handled in 2021;
  - Median duration of cases is 11.7 months and average cost is USD 80,337.

Factors in choosing institutional arbitration

- **Confidentiality**?
- **Transparency and procedural predictability**? There will be rules on constituting the tribunal, getting the arbitration started, procedure during the arbitration (pleadings, witness statements, expert reports, other evidence etc.).
- **'Set meal'** (institutional arbitration) as opposed to dining à la carte (*ad hoc* arbitration).
- **Recognition and reputation** (who does this matter to?)
- **Access to emergency and expedited procedures**
- **Institutional support** – what is this worth and to whom? 'Institutional expertise', including expertise in conducting remote hearings, particularly relevant in the post-Covid world
- Assistance / checking the award: **scrutiny**.
- **Costs**: payment of institution's fees in addition to arbitrators' fees

Institutional Rules: Comparison

	ICC Rules 2021	LCIA Rules 2020	SCC Rules 2023	SIAC Rules 2016
Tribunal Formation	In the absence of agreement, a sole arbitrator will be appointed by the ICC Court except in cases where the appointment of three arbitrators is warranted (Article 12).	Sole arbitrator appointed in the absence of agreement to the contrary by the LCIA Court (Article 5.8)	In the absence of agreement between the parties, the SCC board decides on the number of arbitrators based on the complexity, amount in dispute and other relevant circumstances (Article 16.2).	Sole arbitrator appointed in the absence of agreement to the contrary (Rule 9.1).
Costs	Calculated based on the amount in dispute and adjusted to take account of the complexity of the matter. **Ad valorem.**	Fees and charges calculated on **hourly basis** regardless of the amount in dispute.	Fees calculated by reference to the amount in dispute. **Ad valorem.**	Fees and administrative charges calculated on an **ad valorem** basis based on the amount in dispute.
Confidentiality	The work of the court is confidential (Article 8).	Parties to keep proceedings confidential (Article 30).	Arbitration and the award are confidential unless the parties agree otherwise (Article 3).	The arbitral proceedings and the award are confidential but SIAC may publish awards in redacted form (Rule 39).
Transparency	Existence of third party funding and the identity of the funder must be disclosed (Article 11(7)).	No specific transparency requirements on the parties. Arbitrators to disclose conflicts.	No requirement to disclose third party funding in the rules but a policy encouraging disclosure exists.	No specific transparency requirements on the parties. Arbitrators to disclose conflicts.

Institutional Rules: Comparison (*continued*)

	ICC Rules 2021	LCIA Rules 2020	SCC Rules 2023	SIAC Rules 2016
Interim Measures (Emergency Arbitrator)	Possibility of seeking urgent interim measures before the formation of the tribunal (Article 29) and after from the tribunal (Article 28).	Appointment of emergency arbitrator available (Article 9B) together with the possibility of seeking interim measures after the formation of the tribunal (Article 25).	Parties may appoint an emergency arbitrator before the constitution of the tribunal (Appendix II) and may seek interim measures from the tribunal after its formation (Article 37).	Possible to seek interim relief from the tribunal and the appointment of an emergency arbitrator (Rule 30 and Schedule 1).
Expedited Procedure	Available (Article 30) where amount in dispute does not exceed US$2 million or US$3 million depending on the date of the arbitration agreement.	Not available but any party may apply for an early formation of tribunal in case of extreme urgency (Article 9A).	Summary procedure available (Article 39).	Available for disputes not exceeding SGD 6 million, or if the parties agree, or in cases of exceptional urgency (Rule 5).
Scrutiny	Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form (Article 34).	No scrutiny, although there is some review of the award available.	No scrutiny.	Before making any award, the tribunal shall submit such award in draft form to the registrar. No Award shall be made by the Tribunal until it has been approved by the Registrar as to its form (Rule 32.3).

05 Recent Trends

Institutional innovations: the 'emergency arbitrator'

- **When relevant? Before an arbitral tribunal has been constituted.**
- Major institutions now support emergency arbitrator appointments, e.g.
  - Article 29 of the ICC Rules 2021
  - Article 9B of the LCIA Rules 2020
  - Appendix II of the SCC Rules 2023
  - Rule 30 and Schedule 1 of the 2016 SIAC Rules
- Issues that commonly arise:
  - Costs of the emergency arbitrator
  - Speed, in comparison with a national court giving injunctive relief before a Tribunal is constituted
  - Timing: who will be available? Will they be of the same standard as a national court judge?
- No emergency arbitrator appointments possible in *ad hoc* proceedings

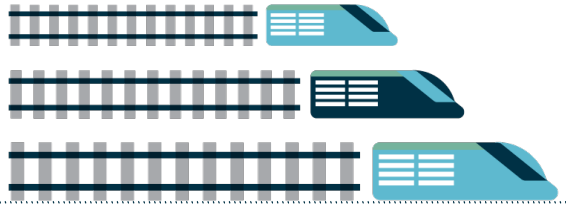
Institutional innovations: Expedited Proceedings Illustrative example of the ICC Rules

Application

- From 1 March 2017 – but new rules came into force on 1 January 2021
- Applies automatically to any dispute up to USD2 million – this increased to USD3 million under the new 2021 rules (parties can opt out)

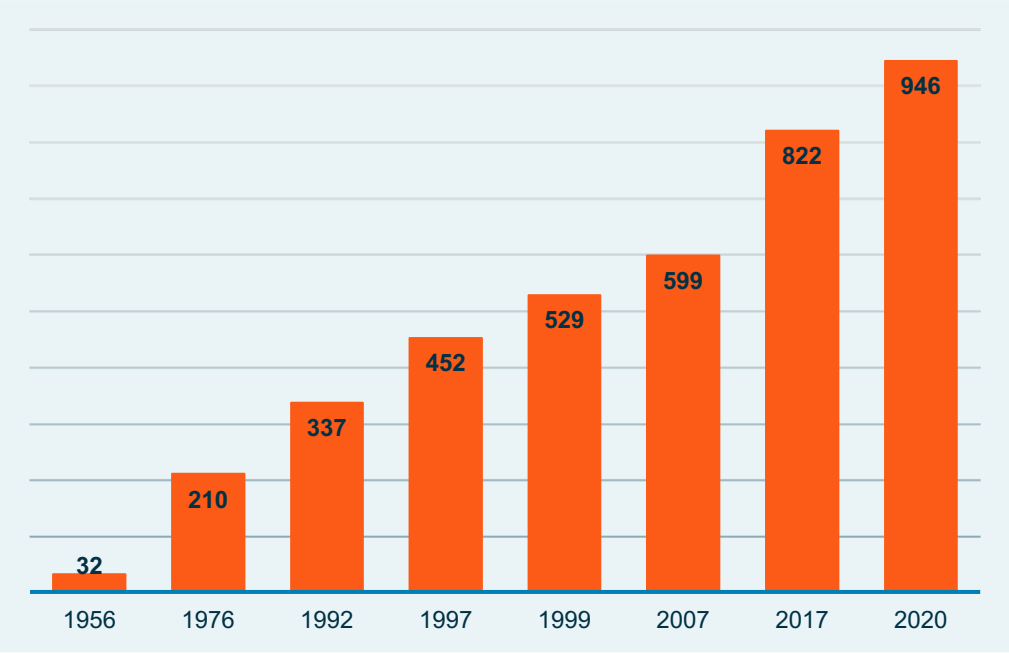
The Procedure:

- Sole arbitrator (appointed by ICC Court but parties may nominate), regardless of arbitration agreement
- CMC within 15 days of the arbitrator receiving the file
- Parties may not raise new claims without the arbitrator's authorisation
- No Terms of Reference
- Broad discretion of arbitrator on procedure (e.g. restricted disclosure and evidence, dispense with oral hearing)
- Awards must be rendered within six months of the CMC



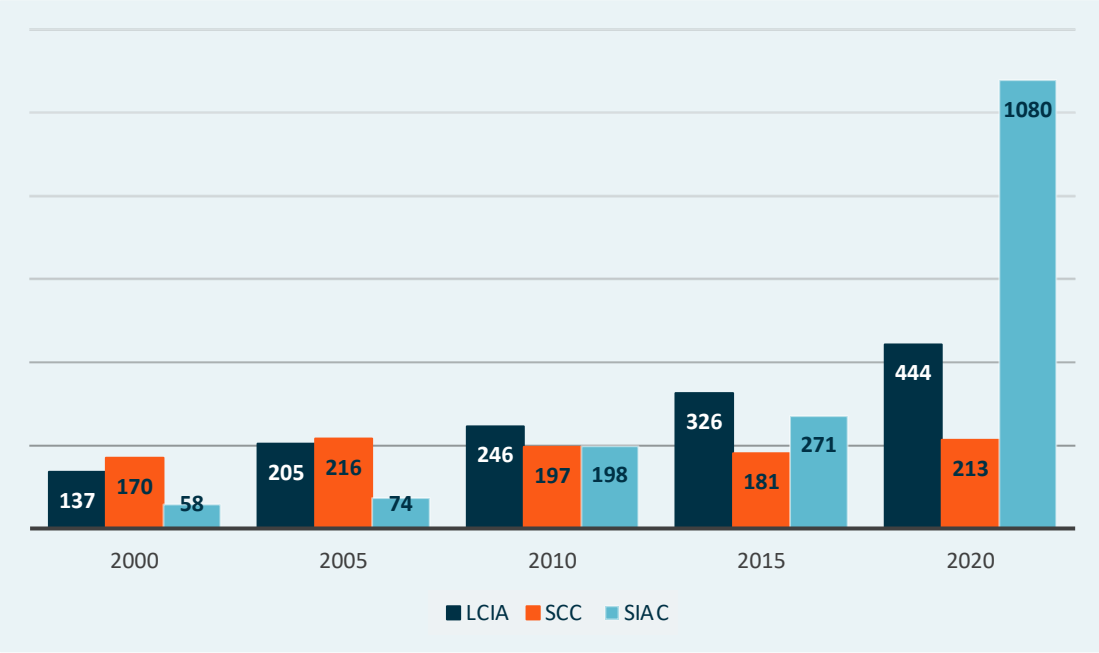
Growth of Institutional Arbitration

ICC Caseload 1956 – 2020



Number of new cases initiated

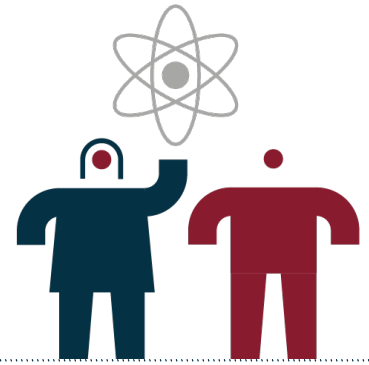
Caseloads of other major institutions



Number of new cases initiated

Ad Hoc Cases Statistics

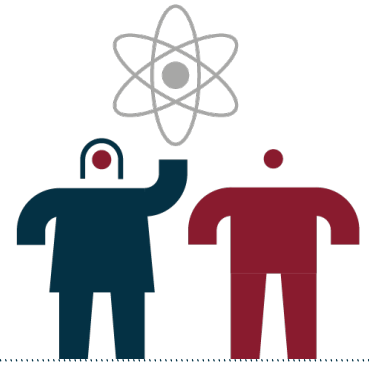
- Data for *ad hoc* arbitrations is poor.
- In 2021 the London Maritime Arbitrators Associations ("LMAA"), an *ad hoc* body, reported receiving an estimated 1,657 references. A slightly lower number than the 1,775 new arbitrations registered in 2020 but still showing an overall growth trajectory.
- The number of new cases is significantly higher than that recorded by any of the prominent institutions listed above.
- *Ad hoc* arbitration remains popular in:
    - Shipping
    - Construction
    - Commodities
    - Small domestic arbitrations



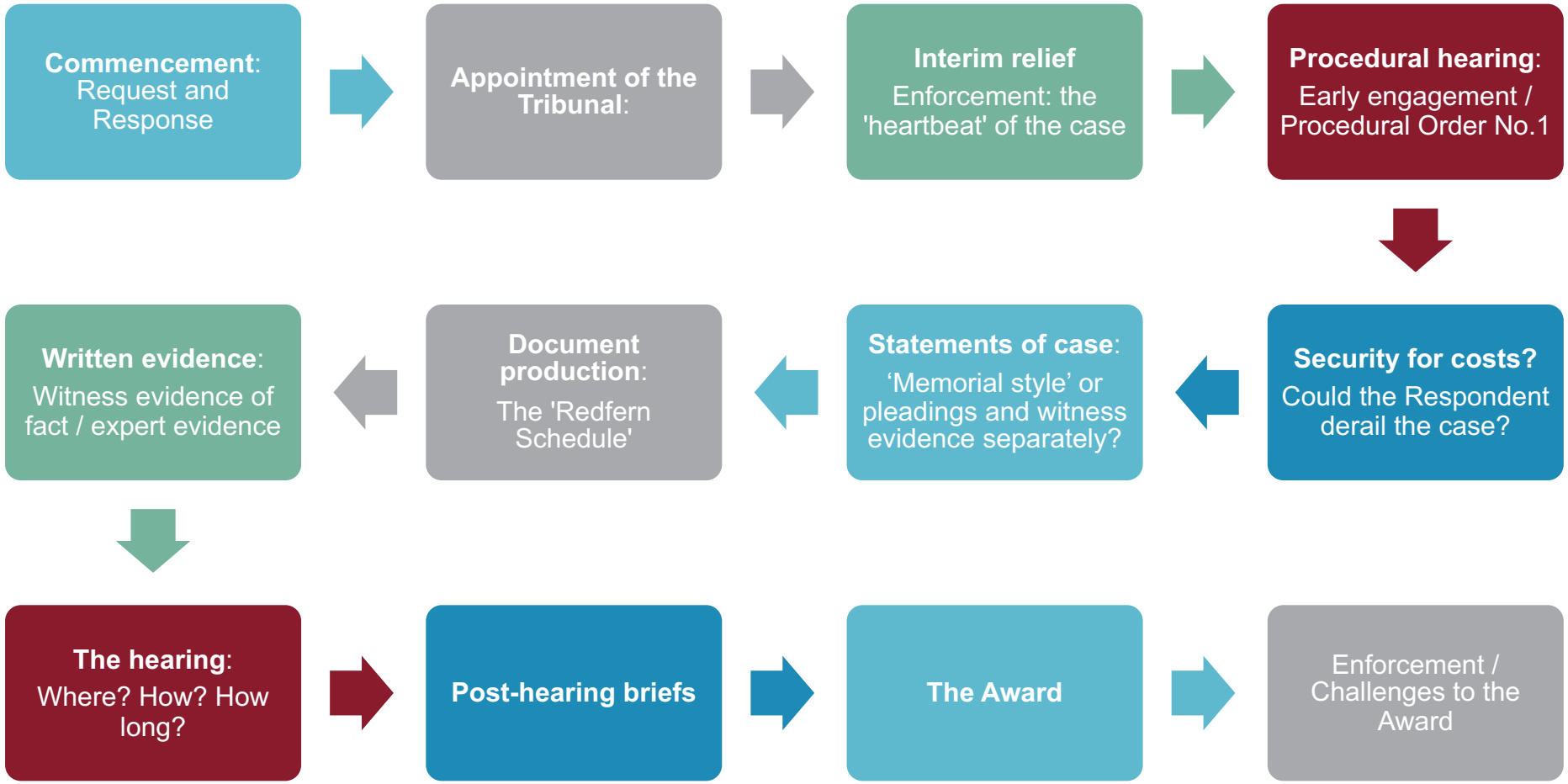
06 Arbitral Process: how different are *ad Hoc* and institutional processes?

Ad Hoc v Institutional Arbitration: how different in practice?

- **Innovation required.** There will be examples of disputes where a 'true' ad hoc procedure is precisely what is required: see our example from earlier. Innovative / one off procedure.
- Some others **'hybrid'?**
- **Enforcement in principle should be the same in New York Convention states.** Article I(2) of the 1958 New York Convention,40 which provides that "*[t]he term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted*."
- **There is now a significant amount of 'homogeneity' in procedural practice.** Why is this?
  - May have the same counsel and arbitrators
  - Administrative services from an institution even in ad hoc arbitration
  - Use in International Arbitration of the UNCITRAL Rules
  - Influence of other soft-law instruments, in particular the IBA Rules on the Taking of Evidence in International Arbitration



An increasingly standardised process in both forms of arbitration?



Institutional Rules vs *Ad Hoc* Rules: Comparison

	UNCITRAL Rules 2021	ICC Rules 2021	LCIA Rules 2020
Tribunal Formation	In the absence of agreement between the parties, three arbitrators to be appointed (Article 7). Provisions for an Appointing authority (Article 6).	In the absence of agreement, a sole arbitrator will be appointed except in cases where the appointment of three arbitrators is warranted (Article 12).	Sole arbitrator appointed in the absence of agreement to the contrary (Article 5.8)
Costs	Tribunal has discretion on how to calculate its fees but they need to be reasonable and take into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case (Article 41).	Calculated based on the amount in dispute and adjusted to take account of the complexity of the matter.	Fees and charges calculated on hourly basis regardless of the amount in dispute.
Confidentiality	No specific provisions on confidentiality.	The work of the court is confidential (Article 8).	Parties to keep proceedings confidential (Article 30).
Transparency	Transparency requirements added in 2013 but only for investor-state arbitrations under treaties concluded on or after 1 April 2014.	Existence of third party funding and the identity of the funder must be disclosed (Article 11(7)).	No specific transparency requirements on the parties. Arbitrators to disclose conflicts.

Institutional Rules vs *Ad Hoc* Rules: Comparison (*continued*)

	UNCITRAL Rules 2021	ICC Rules 2021	LCIA Rules 2020
Interim Measures (Emergency Arbitrator)	No emergency arbitrator available. Parties can apply for interim measures after the formation of the tribunal (Article 26).	Possibility of seeking urgent interim measures before the formation of the tribunal (Article 29) and after (Article 28).	Appointment of emergency arbitrator available (Article 9B) together with the possibility of seeking interim measures after the formation of the tribunal (Article 25).
Expedited Procedure	Available by agreement of the parties (Article 1.5).	Available (Article 30).	Not available but any party may apply for an early formation of tribunal in case of extreme urgency (Article 9A).
Scrutiny	No scrutiny.	Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form (Article 34).	No scrutiny, although there is some review of the award available.

Biography

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Greg is the Head of the International Arbitration Group at Osborne Clarke. He has acted in international disputes across the world, including acting as counsel in hearings in the US, Luxembourg, France, Germany and the UK. He has particular experience of energy and financial services disputes. As well as oil and gas disputes, Greg has acted on renewables disputes including in relation to solar and hydroelectric power projects.

Greg was recently recognised as a Global Leader by the respected directory Who's Who Legal, which has said that his "*ability to come up with quick solutions for complex problems is extremely impressive*". He was praised as "*superb under pressure*" and "*very well liked and respected by both his clients and colleagues*".

Greg has acted as counsel and advocate in both international commercial and bilateral investment treaty arbitrations. He has conducted both ad hoc and institutional arbitrations to final award, including under the LCIA, ICC, ICSID and UNCITRAL rules. He has also sat as arbitrator.

Together with Julian D.M. Lew QC and others, Greg is an editor of the practitioner text on arbitration law and practice, *Arbitration in England* (2013). He is also the lead editor of a collection of essays by leading practitioners, *International Arbitration in England: Perspectives in Times of Change* (2022).

Thank you