

GUEST EDITORIAL PREFACE

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One of the principal characteristics of international arbitration and mediation is that the parties have the freedom to determine the form and manner by which their dispute shall be resolved. In arbitration and mediation, this freedom of choice has generally led the parties to agree to either have the dispute conducted *ad hoc*, or administered and conducted in accordance with the rules of an established arbitral or mediation institution.

Is either an *ad hoc* or institutional dispute resolution mechanism necessarily a better choice than the other? The answer to this question is not always straightforward. Often, the systematic approach of institutional arbitration and mediation leads to reliable and predictable procedures and proceedings, and the handling of certain procedural tasks by institutions allows the parties to better focus on the merits of the dispute. On the other hand, *ad hoc* systems allow the parties to shape the proceedings to meet any unique requirements of the parties and the facts of the dispute. Which mechanism can better assist in bringing about the desired characteristics of alternative dispute resolution—such as flexibility, neutrality, and respect for party autonomy? In arbitration, for example, while the application of procedural rules can lead to greater efficiency, it may also entail a corresponding reduction of the role of the parties in selecting the arbitrators and in the conduct of the proceedings,¹ leading some authors to raise the question as to whether party autonomy may be threatened by the prevalence of institutional arbitration.

Clearly, the parties' choice of either an *ad hoc* or institutional dispute resolution mechanism is highly significant. It not only shapes the manner

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¹ FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 32 (Emmanuel Gaillard & John Savage eds., 1999).

by which the dispute will be resolved, but in most cases will have far-reaching implications into the substance of the dispute itself. Moreover, the choice between the two mechanisms can give rise to many interesting and potentially difficult legal and ethical questions, a number of which are addressed in this special issue. This special issue will also study some of the recent practical developments in *ad hoc* and institutional arbitration, as well as provide a forward-looking proposal for institutional mediation.

The articles here are presented in what is hoped to be a natural progression from a broad overview of *ad hoc* and institutional arbitration (a macro perspective), to more detailed discussions of some of the significant characteristics of arbitration and mediation, to a number of specific practice-oriented pieces (a micro perspective). In doing so, this special issue strives to present a comprehensive and thought-provoking study of the diverse range of issues facing both *ad hoc* and institutional arbitration and mediation.

We begin with an intriguing article by Prof. Ulrich G. Schroeter, wherein he first defines, and then closely investigates, the distinctions between *ad hoc* and institutional arbitration. Prof. Schroeter challenges the traditional definitions of both *ad hoc* and institutional arbitration and presents a strong argument as to why the distinction between the two matters. He then looks into four “borderline cases”—situations which do not clearly fall into either category, often as a result of the operation of party autonomy. In doing so, Prof. Schroeter also provides us with his extensive study of various institutional rules and practices, i.e., how arbitral institutions and parties to an arbitration have sought to address these borderline, and oftentimes difficult, cases. He closes with a proposed definition of institutional arbitration that reflects the most crucial factors in institutional arbitration, giving a solid analysis of each component of the proposed definition.

Thereafter, two articles in succession discuss the critical importance of arbitral institutions in ensuring two fundamental and desired characteristics of both *ad hoc* and institutional arbitration—the preservation of the integrity of arbitral proceedings and the protection of the parties’ due process rights.

First, Dr. Stephan Wilske deliberates about the power and the duty of arbitral institutions to preserve the integrity of arbitral proceedings by upholding and enforcing ethical minimum standards in international arbitration. He highlights the crucial potential role of arbitral institutions in holding the participants of an arbitration accountable, which can be achieved by their rule-making function. Dr. Wilske argues in favour of the standards by which arbitral institutions must abide in order to maintain minimum ethical standards. In particular, institutions have outcome-determinative roles in the appointment and control of arbitrators, and

prospective roles in the admission and control of counsel, and these roles must not be taken lightly. Second, we have an article on the evolving role of institutional arbitration in preserving parties' due process rights. This article challenges the traditional notion that arbitral institutions undertake merely administrative or supervisory functions in the conduct of the arbitration. The article notes that many of the binding decisions made by an arbitral institution can potentially be outcome-determinative, and argues that institutions have a significant part to play in ensuring that parties' due process rights are protected.

Thereafter, we turn our focus to *ad hoc* and institutional arbitration in a more specific context—in the next article, Prof. Gu Weixia provides an overview of the development of *ad hoc*, institutional, and foreign institutional arbitration in China. Beginning from 1994, Prof. Gu neatly divides the development of arbitration into the three phases, providing insightful analysis on significant court decisions and government issuances. The article is a practical guide for both academics and practitioners who seek a critical understanding of the current state of play of arbitration in China.

The next two articles tackle head on some important issues in international mediation and its further development. In the first article, Prof. Rachael Field provides an insightful look into the ethics of neutrality and impartiality in both *ad hoc* and institutional mediation environments. The result of this critical analysis is a proposal for an alternative ethical paradigm for mediation that is relevant across models of the process, and to both *ad hoc* and institutional mediation environments. Prof. Field thus proposes a contextual ethical method in mediation, which requires the agent to make complex discretionary judgments in response to the particular circumstances of individual cases.

Under our *New Initiative* section, we present a forward-looking concept paper on the creation of a Permanent Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") for state-to-state (or economy-to-economy) disputes, co-authored by a number of academics and practitioners from around the Asia-Pacific—Prof. Chang-fa Lo, Prof. Junji Nakagawa, Prof. Tsai-yu Lin, Prof. Julien Chaise, Prof. Lisa Toohey, Prof. Jaemin Lee, Prof. Tomohiko Kobayashi, Prof. Rajesh Sharma, Prof. R. Rajesh Babu, Mr. Joseph Koesnaldi, and Ms. Anuradha RV. The authors provide a creative solution to what can be deemed to be a lacuna in the Asia-Pacific dispute resolution landscape. In particular, the concept paper takes into account the existence of disputes between and among the states and economies in the Asia-Pacific region, coupled with the absence of a permanent regional dispute settlement mechanism. Thus, the proposed ARMO intends to address the insufficiency of currently available dispute settlement mechanisms, which in many instances may be too broad (e.g.,

not regionally focused, and, hence, some states may be reluctant to internationalise their disputes) or too specific (e.g., covering only trade-related disputes, or arising out of particular FTAs). To address this, the proposed ARMO will be an inter-governmental organisation created specifically to provide mediation facilities for Asia-Pacific countries/economies to help handle their state-to-state (or economy-to-economy) disputes in a friendlier manner. It is designed to resolve disputes exclusively through mediation, focusing on mutually-beneficial rather than exclusively “rule-based” process. The concept paper likewise addresses a number of issues which may be raised in relation to the ARMO, including the choice between a binding and a non-binding mechanism, issues of enforcement, choice of substantive law, the relationship between the ARMO and existing friendly dispute settlement mechanisms in FTAs and BITs, among others.

This special issue is rounded out by a practice note which focuses on the recently released Chinese Arbitration Association, International (CAAI) Arbitration Rules 2017, which became effective on 1 July 2017. The CAAI is a new and separate entity to be established in Hong Kong. Prof. Winnie Jo-Mei Ma presents in a clear and methodical fashion the salient features of the Rules and its correlation with Taiwan’s Arbitration Law, and shows how the Rules are particularly apt for arbitrations seated outside Taiwan. In particular, the Rules include a three-tiered (and semi-bilingual) approach to the language of arbitration; double time limits for the closure of proceedings and award-making; unified criteria for commencing a single arbitration under multiple contracts (at the initial stage) and consolidating arbitrations (at a later stage); and comprehensive provisions for emergency and interim measures.

As mentioned above, this special issue focuses on *ad hoc* and institutional arbitration and mediation. At the same time, a running theme in the articles contained herein also appears to be that of challenge and change: the authors either challenge conventional definitions and distinctions and provide their own insightful proposals, or provide the reader with a roadmap to the significant advancements in their respective areas of dispute resolution, or both. It is hoped that this special issue brings to the fore many more of the “difficult” questions that face both practitioners and academics alike, thereby sparking further discourse and analysis.