AD HOC OR INSTITUTIONAL ARBITRATION—A CLEAR-CUT DISTINCTION? A CLOSER LOOK AT BORDERLINE CASES

Ulrich G. Schroeter*

ABSTRACT

It is generally accepted in both theory and practice of arbitration that there are two basic forms of arbitration, ad hoc and institutional. This long established dichotomy has rarely been questioned, and it has mostly worked well in international arbitration practice.

The present contribution investigates the traditional distinction between ad hoc and institutional arbitration in more detail by looking at "borderline cases", i.e. constellations that cannot easily be allocated to one of these two categories. Four groups of borderline cases are discussed: (1) UNCITRAL arbitrations, in particular those administered by arbitral institutions; (2) cases in which the parties have chosen institutional rules, but not the issuing institution (and vice versa), (3) the modification of institutional rules by the parties and the identification of a possible "mandatory" core of institutional rules, and (4) "mix and match" (or "hybrid") arbitrations combining one arbitral institution's rules with the case's administration by a different arbitral institution.

By identifying the factors that were decisive for these borderline cases being regarded as institutional or ad hoc, the article is trying to gain insight into the core characteristics underlying each arbitration category. Drawing on these insights, it develops and explains a novel definition of "institutional arbitration".

* Professor of Law, Faculty of Law, University of Basel (Switzerland). The author can be reached at: mail@ulrichschroeter.com.

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