



## Advantages and Disadvantages of Arbitration in the Context of International Law: Focus on Commercial and Ad Hoc Arbitration

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<b>Article History</b> Received : 2024-08-17 Revised: 2024-08-19 Published: 2024-09-30  <b>Keywords:</b> <i>Arbitration, International Law, Commercial</i>	Arbitration has become a popular dispute resolution mechanism in international law, especially in the context of commercial and ad hoc arbitration. This study aims to evaluate the advantages and disadvantages of arbitration as an international dispute resolution method. Through literature analysis and case studies, it is found that commercial arbitration offers great flexibility, efficiency and privacy to the disputing parties. However, its high cost and sometimes slow process are significant drawbacks. On the other hand, ad hoc arbitration provides greater freedom in choosing the procedure and arbitrators, but the lack of formal structure may lead to uncertainty and difficulties in enforcement of the award. In conclusion, while arbitration provides an effective solution to international disputes, the choice between commercial and ad hoc arbitration should be carefully considered based on the specific needs of the parties. This study recommends strengthening the international framework to enhance the reliability of ad hoc arbitration processes.

### I. INTRODUCTION

Arbitration has developed into an increasingly popular method of dispute resolution in international law, especially in the commercial sector. This article takes an in-depth look at the advantages and disadvantages of arbitration, particularly in the form of commercial and ad hoc arbitration. With globalization and the increase in international trade, disputes between countries are becoming more frequent. National courts are sometimes deemed less effective or efficient in handling international disputes, making arbitration a more flexible and speedy alternative (Hombokau, 2024).

Some of the advantages of arbitration include its faster process, relatively lower costs compared to litigation, as well as its confidential nature that protects sensitive information of the parties. In addition, arbitral awards are recognized in various countries through the 1958 New York Convention, which provides legal certainty for the parties to the dispute (Sari, 2019).

However, arbitration also has drawbacks, such as limited opportunities to appeal an award, which may raise concerns about fairness. The cost of arbitration can also increase depending on the complexity of the case and the number of parties involved. In addition, the lack of judicial oversight can create problems in the application and

enforcement of arbitral awards. This article distinguishes between two types of arbitration: commercial arbitration which is usually conducted through organized arbitration institutions and ad hoc arbitration which is more flexible. Both have their own characteristics, procedures and challenges that require further analysis (Agustina, 2024).

Through an analysis of the advantages and disadvantages of arbitration in the context of international law, this article aims to provide greater insight into the efficiency, fairness and challenges faced in choosing arbitration as a dispute resolution method. This research is expected to be a source of reference for academics, legal practitioners, and parties involved in international arbitration.

### II. RESEARCH METHODS

This research will use a qualitative approach with a descriptive-analytical method. The purpose of this research is to explore and analyze the advantages and disadvantages of arbitration, both commercial and ad hoc, in the context of international law. By using secondary data, this research will provide a comprehensive understanding of how arbitration mechanisms work, as well as the advantages and

disadvantages associated with each type of arbitration.

### III. RESULTS AND DISCUSSION

This research aims to analyze the advantages and disadvantages of arbitration in the context of international law, with a focus on commercial arbitration and ad hoc arbitration. In the context of international law, arbitration, both commercial and ad hoc, offers a number of advantages that make it a popular mechanism in dispute resolution, especially in the commercial sector. However, there are also some disadvantages that need to be taken into account, particularly regarding flexibility which can potentially lead to uncertainty and high arbitrator fees. Therefore, the choice between institutional or ad hoc arbitration should take into account the specific needs and circumstances of the dispute at hand (Rudy & Mayasari, 2022).

#### A. Definition Of Arbitration In International Law

Arbitration is a mechanism for resolving civil disputes outside the court system, where one or more neutral arbitrators are given the authority to assist the disputing parties in resolving their conflict. The settlement of disputes through arbitration is based on an arbitration agreement or clause, which is written by the parties, either before or after the conflict arises.

Etymologically, the term "arbitration" derives from the Latin word "arbitrarz," meaning wisdom. Therefore, R. Subekti, in his book *Arbitration in Trade*, describes arbitration as a form of dispute resolution where the process involves a third party using their wisdom to help resolve the issue. In Islam, arbitration is referred to as *al-tabkim*, which is part of *al-qadla* (judiciary) (Hakim, 2022).

This definition, when linked to the concept of arbitration, can potentially lead to misunderstandings about the meaning of arbitration itself. This is because it may give the impression that the arbitrator or arbitration tribunal, when examining and deciding a dispute, might disregard legal norms and rely solely on their personal discretion.

R. Subekti defines arbitration as follows: "Arbitration is a method of resolving or deciding a dispute by one or more judges, where the parties agree to abide by the decision given by the judges they have chosen or appointed." (Vahzrianur & Siswajanthi, 2024)

Meanwhile, Frank Alkoury and Eduar Elkoury define arbitration as follows: "This easy and

simple process is voluntarily chosen by the parties who wish their dispute to be resolved by a neutral arbitrator of their choice, where the decision is made based on the arguments in the case. The parties agree from the outset to accept the decision as final and binding." (Winarta, 2022)

From these various definitions, it can be concluded that arbitration is:

- a. A method of resolving disputes outside the court system (non-litigation).
- b. Dispute resolution through arbitration is conducted based on a written agreement made by the parties, either before or after the dispute arises.
- c. In this process, the disputing parties are assisted by a neutral arbitrator.
- d. The arbitrator can be directly chosen by the parties or appointed by the district court or an arbitration institution.
- e. The decision given by the arbitrator is final and binding.

#### B. Types Of Arbitration In International Law

##### 1. Institutional Arbitration

This type of arbitration is conducted through permanent institutions that provide procedures and rules, such as: (MUNIROH, 2021)

- a. Indonesian National Arbitration Board (BANI)
- b. International Chamber of Commerce (ICC)
- c. International Centre for Settlement of Investment Disputes (ICSID)

##### 2. Ad Hoc Arbitration

Ad hoc arbitration is established temporarily after a dispute arises, without a permanent institution, and is often used in the context of customary law or labor disputes. Both institutional and ad hoc arbitration offer faster and cheaper resolution methods compared to traditional litigation (Agustina, 2024).

##### 3. International Commercial Arbitration

International commercial arbitration (ICA) is a method of private dispute resolution conducted outside the court system, involving one or more arbitrators. The process involves parties from different countries engaged in a dispute. ICA can be used to resolve various types of disputes, including contract disputes, intellectual property disputes, investment disputes, and construction disputes. This method is often chosen when the disputing parties have commercial relationships and wish to maintain their working relationship after the dispute is resolved. Some advantages of international commercial arbitration

include the freedom of parties to choose their arbitrators, a faster process, confidentiality of the decision, and the preservation of good relations between the disputing parties. Well-known international arbitration institutions include the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Hong Kong International Arbitration Centre (HKIAC), China International Economic and Trade Arbitration Commission (CIETAC), and Singapore International Arbitration Centre (SIAC) (Hombokau, 2024).

4. Ad Hoc Arbitration According to Article 13 paragraph (2) of Law No. 30 of 1999, ad hoc arbitration is conducted when there is an agreement between the parties to submit a request to the District Court, although this is not a mandatory condition for choosing an arbitrator to resolve the dispute. To determine whether the agreed arbitration is ad hoc, the arbitration clause can be examined to see if it states that the dispute will be resolved through independent arbitration and is not associated with institutional arbitration. In other words, if the clause specifies that the dispute will be handled by independent arbitration, then the agreed form of arbitration is ad hoc. The main characteristic of ad hoc arbitration is the appointment of arbitrators individually. In principle, this arbitration is not tied to any specific arbitration institution. The appointment of arbitrators is done based on the agreement between the involved parties. Therefore, it can be said that this type of arbitration does not follow any specific rules or procedures in the dispute resolution process (Rudy & Mayasari, 2022).

#### **C. Differences Between Commercial Arbitration and Ad Hoc Arbitration**

Commercial arbitration and ad hoc arbitration have several key differences in the dispute resolution process: (Yamin, 2024)

##### **1. Supervisory Institutions**

**Commercial Arbitration:** Arbitration is typically conducted through permanent institutional arbitration bodies, such as national or international arbitration institutions. These institutions have clear rules and procedures and are overseen by authorized legal authorities.

**Ad Hoc Arbitration:** It is not bound by institutional arbitration bodies and is governed by the disputing parties themselves. The process is

more flexible and lacks formal institutional oversight.

##### **2. Appointment of Arbitrators**

**Commercial Arbitration:** Arbitrators are usually selected from a roster of arbitrators provided by the arbitration institution. This selection is generally neutral and based on specific criteria.

**Ad Hoc Arbitration:** Arbitrators are appointed and determined by the parties involved in the dispute, allowing greater flexibility to tailor the resolution process according to their specific needs.

##### **3. Procedures and Costs**

**Commercial Arbitration:** It follows the rules and procedures established by the arbitration institution, which often results in higher administrative costs due to the involvement of the arbitration institution. **Ad Hoc Arbitration:** Arbitrator fees can be negotiated directly by the disputing parties, making it more cost-efficient and flexible in determining procedures.

##### **4. Independence and Flexibility**

**Commercial Arbitration:** It is more bound by clear rules and procedures, which can make it less flexible in dealing with unique cases. **Ad Hoc Arbitration:** It is more independent and flexible, allowing the parties to determine procedural rules and arbitrators according to their specific needs.

Overall, commercial arbitration is more structured and regulated, while ad hoc arbitration is more flexible and independent, though it carries a greater risk of legal uncertainty.

#### **D. Advantages Of Arbitration In The Context Of International Law**

##### **1. Advantages of International Commercial Arbitration**

International arbitration offers several advantages over litigation in court: (Zaryanda, 2023)

##### **a) Speed and Cost Efficiency**

International arbitration is generally faster than court litigation as there are limited legal appeals to the decision. Arbitration costs can also be minimized by hiring lawyers from boutique firms, which typically charge lower fees compared to larger firms.

##### **b) Confidentiality**

Arbitration proceedings are conducted in private, which is beneficial for parties wishing to maintain business relationships or avoid negative publicity.

c) Neutrality

International arbitration offers a neutral forum, avoiding a "home court" advantage that might favor one party. Arbitration awards are made independently, without the influence of judges who may be dependent on the government in certain countries.

d) Independence and Flexibility

The parties have the right to select arbitrators who are experts in the area of dispute. They can design the arbitration procedures best suited to resolve their specific issues.

e) Legal Certainty

International arbitration awards can be enforced in almost all countries worldwide, thanks to the 1958 New York Convention, providing legal certainty.

2. Advantages of Ad Hoc Arbitration

a) Flexibility

Parties can choose procedural rules according to the specific needs and facts of the dispute. This allows them to design the resolution process based on the situation without the oversight of a formal institution.

b) Cost Efficiency

Institutional arbitration administration fees can be avoided. Arbitrator fees can be negotiated directly by the disputing parties.

c) Independence

Ad hoc arbitration provides greater autonomy for countries and state-owned enterprises. It can address public policy and sovereignty issues with customized procedures.

d) Selection of Arbitrators

The parties can choose arbitrators who have expertise in the field related to the dispute. The arbitrators are appointed by the parties involved in the dispute.

3. Flexibility and Speed of Confidential Dispute Resolution

Arbitration offers flexibility and speed in resolving disputes. The parties have the freedom to determine procedures and select arbitrators who fit their needs, making the process more suited to the specific context of the dispute. Additionally, arbitration typically proceeds more quickly than litigation, with a set timeframe for resolution, often within a maximum of 180 days. Confidentiality is also a significant advantage; arbitration proceedings are not made public, thus protecting sensitive information from disclosure. This creates a safe environment for the parties involved to negotiate and resolve issues without

external pressure. Flexibility in arbitration plays a key role in expediting dispute resolution. Several ways in which flexibility enhances the speed of arbitration include: (Situmorang, 2020)

a) Customized Procedures

The parties can tailor arbitration rules and procedures to their needs, making the dispute resolution process more efficient and aligned with the nature and complexity of the dispute. This flexibility allows for adjustments to the specific context of the dispute, thereby speeding up the resolution process.

b) Scheduling of Hearings

The parties involved have the freedom to schedule arbitration hearings at their convenience, avoiding the delays that often occur in traditional court proceedings. Additionally, there is a set deadline for the arbitration resolution, such as a maximum of 180 days after the arbitrator is appointed.

c) Selection of Arbitrators

The parties can choose arbitrators who have expertise and deep knowledge in the field related to the dispute. Selecting the right arbitrator can improve the quality of the decision and ensure that the dispute is resolved efficiently. With the flexibility to customize procedures, schedule hearings, and choose competent arbitrators, the arbitration process can be adapted to resolve disputes more quickly and efficiently than litigation in traditional courts. This makes arbitration an attractive option for resolving global business disputes.

4. Recognition and Enforcement of Arbitration Awards

Arbitration awards have the same legal force as court judgments and can be enforced by courts or other legal authorities. Once the arbitration process is completed, the award is final and binding on the parties. The principle of recognition and enforcement of arbitration awards is internationally recognized through the 1958 New York Convention, which has been ratified by more than 160 countries (Latief et al., 2023).

In Indonesia, the recognition and enforcement of foreign arbitration awards are governed by:

- Presidential Decree No. 34 of 1981 regarding the Ratification of the 1958 New York Convention.
- Supreme Court Regulation (Perma) No. 1 of 1990 to address obstacles in the recognition and enforcement of foreign arbitration awards.

- Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.
- Under Law No. 30/1999, the competent court to recognize and enforce international arbitration awards is the Central Jakarta District Court. Foreign arbitration awards must be registered with this court in the Indonesian language according to the original documents.

However, in practice, requests for the execution of foreign arbitration awards are often rejected by the courts due to the absence of implementing regulations from Presidential Decree No. 34/1981. Therefore, challenges remain in the recognition and enforcement of foreign arbitration awards in Indonesia.

### **E. Disadvantages Of Arbitration In The Context Of International Law**

Arbitration in the context of international law is one of the dispute resolution methods that has gained increasing popularity due to its perceived flexibility, speed, and lower costs compared to court proceedings. This process involves a neutral third party as a mediator, and the decision made is final and binding. However, arbitration also has several drawbacks that make it less suitable in certain situations. This article will discuss some of the disadvantages of arbitration in the context of international law (Muskibah & Hidayah, 2021).

#### **1. Lack of Openness and Transparency**

One of the main drawbacks of international arbitration is the lack of transparency. Unlike public court hearings, arbitration proceedings are often held behind closed doors. This can pose problems, especially in cases involving public interest or state policy. Additionally, the limited public oversight of arbitration processes increases the risk of conflicts of interest or bias. The low level of openness can also affect the trust of the parties involved in the decision (Hombokau, 2024).

For example, the case of Methanex Corporation v. United States under the NAFTA arbitration mechanism was often criticized for its lack of transparency, particularly regarding public access to arbitration documents and hearings. This case serves as an illustration of how arbitration can attract criticism for the secrecy of its proceedings.

#### **2. Absence of an Appeal Mechanism**

Another disadvantage of international arbitration is the absence of an appeal mechanism. Arbitration decisions are final and binding, without offering the opportunity for an appeal based on legal or factual errors. This contrasts

with traditional judicial systems, which typically provide appeal mechanisms to correct errors in decision-making. Although the finality of arbitration is intended to expedite the resolution of disputes, in some cases, this can be detrimental to one party if mistakes or injustices occur in the decision (Hakim, 2022).

#### **3. High Costs**

Although arbitration is often promoted as a more cost-effective mechanism compared to international courts, it can actually be very expensive in some cases. Arbitrator fees, complex document preparation, and the involvement of experts often cause arbitration costs to escalate. This is especially true in international arbitrations involving multinational companies or states. The lengthy arbitration process and the involvement of various legal experts from different jurisdictions also increase the financial burden on the disputing parties (Hakim, 2022).

#### **4. Potential Imbalance of Power**

In some arbitration cases, power imbalances between the disputing parties can become an issue. Parties with greater financial or legal resources often have an advantage in the arbitration process. They can access the best experts and lawyers to defend their interests, which may not always be matched by the weaker party. This raises concerns that international arbitration may not always provide true justice.

#### **5. Issues with Compliance to Arbitration Awards**

Although arbitration decisions are binding, compliance with these decisions is not always guaranteed, particularly in the context of sovereign states. Unlike court judgments that can be enforced through law enforcement agencies, arbitration decisions often require a more prolonged and complex process to be implemented, especially if the losing party refuses to comply with the decision. For example, some countries are reluctant to comply with arbitration decisions that are perceived to violate their sovereignty or do not align with their national laws (Rudy & Mayasari, 2022).

### **F. Comparison Between Commercial Arbitration And Ad Hoc Arbitration**

Arbitration is one of the increasingly utilized dispute resolution methods in international business. Generally, arbitration is divided into two main categories: commercial arbitration and ad hoc arbitration. Both types of arbitration are applied to resolve disputes between parties with contractual or commercial agreements, but there

are significant differences in their implementation, structure, and legal frameworks. This article will discuss the comparison between commercial arbitration and ad hoc arbitration, as well as the advantages and disadvantages of each (Yamin, 2024).

### 1. Definition and Understanding

#### a. Commercial Arbitration

This type of arbitration is conducted under the auspices of formal, experienced arbitration institutions, such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), or the Indonesian National Arbitration Board (BANI). In commercial arbitration, the disputing parties agree to follow the rules and procedures established by the respective institution.

#### b. Ad Hoc Arbitration

This is arbitration that is not bound to a specific arbitration institution. In ad hoc arbitration, the disputing parties independently establish the rules and procedures to be used for resolving the dispute. The involved parties can design the arbitration process according to their needs without any interference from a formal institution.

### 2. Process Structure

a. Commercial Arbitration has a more organized structure because it uses standardized rules set by the chosen arbitration institution. These institutions also provide a list of arbitrators that the disputing parties can select from. Additionally, the institution offers administrative services such as document management, scheduling hearings, and logistical support.

b. Ad Hoc Arbitration, on the other hand, is more flexible but requires more involvement from the disputing parties to determine procedural rules, select arbitrators, and manage the arbitration process. Although this provides flexibility, it often requires additional time and costs to coordinate these aspects without institutional support.

### 3. Appointment of Arbitrators

In commercial arbitration, arbitration institutions typically provide a list of experienced arbitrators, allowing the disputing parties to select the most suitable arbitrator. This selection process is also overseen by the arbitration institution to ensure the integrity and neutrality of the process.

Conversely, ad hoc arbitration gives full freedom to the disputing parties to select their arbitrator. Although this offers flexibility, the process can take longer if the parties do not agree on who should serve as the arbitrator.

### 4. Advantages

#### a. Commercial Arbitration:

**Clear Procedural Standards:** Because it is regulated by arbitration institutions, commercial arbitration follows standardized procedures, providing legal certainty and reducing the risk of procedural errors.

**Administrative Support:** Arbitration institutions provide administrative support, such as offering arbitrators and facilities to expedite the arbitration process.

**International Recognition and Reputation:** Many arbitration institutions have good reputations, and the awards rendered by arbitrators from these institutions are often more easily accepted and recognized internationally.

#### b. Ad Hoc Arbitration:

**Procedural Flexibility:** Disputing parties can freely determine the arbitration rules and procedures and select arbitrators based on their specific needs.

**Lower Costs:** Since there are no arbitration institution fees involved, ad hoc arbitration can be less expensive compared to commercial arbitration.

### 5. Disadvantages

#### a. Commercial Arbitration:

**Higher Costs:** Due to the involvement of arbitration institutions, administrative fees and arbitrator honorariums are often higher than those in ad hoc arbitration.

**Less Flexibility:** Disputing parties must adhere to the rules set by the arbitration institution, which may be less flexible in addressing their specific needs.

#### b. Ad Hoc Arbitration:

**Lack of Administrative Support:** In ad hoc arbitration, there is no institution to provide administrative support, so the disputing parties must handle everything themselves, which can result in additional time and costs.

**Lack of Procedural Standards:** Since the rules and procedures of ad hoc arbitration are often custom-designed by the disputing parties, this can lead to legal uncertainty if not carefully formulated.

## **G. The Role Of Arbitration In International Dispute Resolution**

### **1. The Role of Arbitration in International Dispute Resolution**

Arbitration is one of the alternative dispute resolution methods used to address conflicts between international parties. Below are some of the key roles arbitration plays in the context of international dispute resolution: (Vahzrianur & Siswajanthi, 2024)

- a) **Speed and Efficiency:** Arbitration proceedings are generally faster than litigation in international courts. This allows the disputing parties to reach a resolution more quickly, reducing costs and uncertainty.
- b) **Privacy and Confidentiality:** Arbitration typically takes place in a more private setting compared to public court proceedings. This is crucial for companies and states that wish to protect sensitive information.
- c) **Selection of Arbitrators:** The parties involved in the dispute have the right to choose arbitrators who possess expertise relevant to their dispute. This ensures that decisions are made by a competent individual.
- d) **Procedural Flexibility:** Arbitration offers flexibility in establishing the procedures to be followed, which can be tailored to the needs and preferences of the disputing parties.
- e) **Enforceability of Decisions:** The decisions rendered by arbitrators are binding and can be enforced internationally, in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- f) **Resolution of Investment Disputes:** In the context of disputes between states and investors, arbitration serves as an important mechanism for protecting foreign investments. For instance, arbitration mechanisms outlined in Bilateral Investment Treaties (BITs) provide effective legal protection for foreign investors.
- g) **Resolution of Environmental and Trade Disputes:** Arbitration is also applied in disputes related to environmental and international trade issues, offering a focused and fact-based platform for resolution.

### **2. The Role of International Arbitration Institutions**

International arbitration institutions play a crucial role in resolving commercial and investment disputes on a global scale. Some of the most prominent institutions are the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL). The key roles of these institutions include:

- a) **Provision of Arbitration Rules:** Institutions like the ICC and UNCITRAL provide a set of rules that govern the arbitration process. These rules are designed to offer clarity and legal certainty to the parties involved in a dispute.
- b) **Administration of Arbitration Proceedings:** The ICC and UNCITRAL are responsible for managing the arbitration process, including the appointment of arbitrators, scheduling, costs, and ensuring that all parties adhere to the applicable rules.
- c) **Development of Arbitration Practices:** These institutions contribute to the development of international arbitration practices by offering guidelines and case precedents that help clarify the application of rules and procedures.
- d) **Promotion of Peaceful Dispute Resolution:** Arbitration institutions promote the peaceful and efficient resolution of disputes, supporting efforts to avoid lengthy and expensive litigation in courts.
- e) **Facilitation of Multinational Disputes:** The ICC and UNCITRAL serve as neutral platforms that enable parties from different countries to resolve their disputes effectively, reducing the potential for bias that may arise in certain national legal systems.
- f) **Education and Training:** These institutions also contribute by providing education and training on international arbitration through seminars, workshops, and publications aimed at enhancing the understanding and application of arbitration in various fields.

## **IV. CONCLUSION AND SUGGESTIONS**

### **A. Conclusion**

In the realm of international law, arbitration remains a favored method of dispute resolution due to the flexibility, speed, and final nature of its decisions. However, upon comparing commercial arbitration and ad hoc arbitration, it is seen that

each type has advantages and disadvantages that need to be considered when choosing the right arbitration mechanism.

Commercial arbitration offers a more organized structure and clear standards of procedure, as it falls under the auspices of established arbitral institutions such as the ICC or LCIA. Its advantages lie in the administrative support and reputation of the institution which can increase the confidence of the parties involved. However, higher costs and lack of procedural flexibility are disadvantages.

## B. Suggestion

Based on the discussion of the advantages and disadvantages of commercial and ad hoc arbitration in international law, it is hoped that both commercial and ad hoc arbitration can be further optimized according to the needs of the parties to the dispute, and support the goal of more efficient, fair and binding dispute resolution at the international level.

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