Annual Meeting of the International Economic Research Association of the China Law Committee Shanghai 4th and 5th November 2005

Ad hoc arbitration in an IT & IPR dispute

Niall Lawless Chartered Arbitrator and Engineer (www.arbitrari.co.uk and nlawless@arbitrari.co.uk)

1. Introduction

各位， 早上好。我叫 Niall Lawless。我 是 北 爱尔兰 人。 我 是北京对外经济贸易大学法学院的博士生。我的导师是 Shen Sibao。虽然在英国 我 也 学习 汉语，可是 我的汉语水平还很有限，所以，今天我将用英语发言。 谢谢。

Arbitration is particularly valuable in IT & IPR disputes because confidentiality can be preserved. It should be more informal, flexible and cost effective than litigation and arbitrators may be selected for their special skills to suit the particular dispute. Arbitration awards can be enforced across jurisdictional boundaries and there is less opportunity to appeal the decision.

The PRC Arbitration Law 1995 governs both domestic and international arbitration. Whereas the PRC Arbitration Law may have been influenced by the UNCITRAL Model Law, it is different in many important respects. One of which is that the PRC Arbitration Law only permits institutional arbitration and not ad hoc arbitration for arbitrations which take place in China.

CIETAC has recently introduced a new set of its main (foreign related) arbitration rules and the main policy goals it set itself in doing so was :-

- Increasing party autonomy and flexibility in procedure.
- Strengthening the powers of the arbitration tribunal.
- Fostering fairness and transparency.
- Speeding up the arbitral process.

Some argue that the PRC should diversify arbitration modes and that one way of increasing party autonomy and flexibility in procedure is for the PRC Arbitration Law to be updated to provide for ad hoc arbitration; which is said to offer the potential to be more flexible, faster and more economic compared with institutional arbitration.

This paper will outline and contrast ad hoc with institutional arbitration and discuss what is required in a valid ad hoc arbitration agreement. The paper will draw from hands on experience and from among other documents, as a method of presenting what party autonomy actually means in practice in an IT & IPR dispute, I will present an agenda for interlocutory matters to be discussed and decided at a preliminary meeting and also the arbitrator's orders for directions arising there from.

2. What is 'ad hoc' arbitration?

Many countries see International Commercial Arbitration as a dispute resolution mechanism which encourages trade and the flow of foreign capital essential to develop public and private infrastructures and are implementing reform of their Arbitration Law.

Recently, I attended two conferences in Beijing, the World Jurists Association 22nd Congress on the Law of the World in September 2005 and the Trend of Economic Globalization and Construction of the Rule of Law conference organised by the International Association of Legal Scholars and the China Law Society in October 2005. At these conferences some leading Chinese arbitrators and professors of international economic law discussed the development of foreign related arbitration in China.

One possible development is that PRC Arbitration Law will at some time in the future recognise ad hoc arbitration as a system to compliment institutional arbitration. I am sure that the debate in China on this important matter will be informed and meticulous and it is not my intention today to make any recommendation for reform in respect of ad hoc arbitration.

In ad hoc arbitration the arbitrator will have to decide matters which concern the procedures to adopt for the effective management of the arbitration and deal with interlocutory matters arising. Today by way of example, I want to share some practical experience and knowledge of how to act as arbitrator without the support of an arbitration institution. In doing so I will refer to the Arbitration Act 1996 of the United Kingdom, this is not based on the UNCITRAL Model Law.

Ad hoc is a term derived from the Latin 'to this' and is most often used when something is established or formed for a specific purpose. The Chambers dictionary defines the term as 'for one particular purpose, situation, etc, only' and the Osborne's concise law dictionary as 'for this purpose'.

To be precise an 'ad hoc' arbitration agreement is one which concerns matters which are already in contention between the parties and not one which relates to disputes that may arise in the future. However, today the term is generally used to mean arbitration agreements which do not specify the use of an arbitration commission or institution. In ad hoc arbitration the parties generally do not stipulate for the procedural rules of any particular arbitration body to govern the conduct of their arbitration, however the parties may use other procedural rules such as the UNCITRAL rules.

It is possible to adopt the rules of an arbitration institution without submitting the dispute to that institution, but because of the complexity involved this is not to be recommended.

In English Law, it is sufficient for the contract to merely say ‘disputes to be settled by arbitration’ and leave either the arbitrator or the courts to decide arguments arsing from any defects of omission, but of course it is desirable to provide greater detail.

3. Lex Arbitri and ad hoc arbitration agreements

International Commercial Arbitration often involves a system of international law, state systems of law or legal rules. One is the law governing the existence and proceedings of the arbitral tribunal. This is often referred to as the procedural law of the arbitration – the Lex Arbitri. In China this is the PRC Arbitration Law 1995 and in England and Wales or Northern Ireland it is the Arbitration Act 1996 (AA 1996).

In institutional arbitration, the rules of the institution in question will prevail, unless such rules would stand in contradiction to mandatory rules of law which may be contained in the underlying Lex Arbitri applicable at the place of arbitration; such mandatory rules would then override the provisions contained in the institution's arbitration rules. It is, therefore, important for the parties to carefully choose and know the Arbitration Law applicable at the place of arbitration.

Certainly, the efficiency and the effectiveness of the arbitration itself will be strongly influenced by the Lex Arbitri which may provide support for arbitrations in trouble, for example appointment of the tribunal; assurances of neutrality; respect for the intentions and needs of the parties; autonomy of the dispute to remain with the tribunal; empowering the tribunal to carry out its functions; a suitable level of court supervision and protection of the arbitrators.

Although in China the legal framework regulating foreign related arbitration comprises the Arbitration Law (Lex Arbitri), the Contract Law, the Civil Procedure Law, the New York Convention and Supreme Peoples Court Judicial Interpretations concerning foreign related arbitration, it is from the arbitration agreement between the parties that the arbitral tribunal derives its jurisdiction.

Some of the elements that an International Commercial Arbitration agreement might include are :-

- Scope – it must be clear that all disputes are to be arbitrated. As a guideline it is useful not to limit the clause to disputes arising under the contract.
- ADR - if there is an ADR clause stipulating mediation, it should clearly identify the process involved and be time bound.
- Institutional or ad hoc – arbitrations can also be classified as ad hoc or Institutional.
- Seat – international commercial arbitration usually takes place in a country (seat) that is neutral to the parties, in the respect that they choose to use a ‘Lex Arbitri’ distinct from the proper law of the contract to govern the arbitration procedure.

- Strict law and contract or ex aequo et bona – should the arbitrator decide what is fair and just but that which is not necessarily in accordance with the contract.
- Language – the agreement should state what language will be used.
- Number and designation – there should be a mechanism for appointing the arbitrator (s). Institutional rules will normally provide for the selection of the number of arbitrators (usually three or one). In ad hoc arbitration, the parties are free to choose their own tribunal after the dispute has arisen, but this freedom will usually be restricted so that in absence of party agreement the tribunal will be selected by an appointing authority.
- Qualifications – the agreement should detail any special qualifications for the arbitrators and some countries impose restrictions on the choice of arbitrators. Things that might be considered by the parties are professional qualifications, language skills, experience and outlook and education and training.
- Time limits – many agreements which contain an arbitration clause impose some form of time limit. This may be upon the giving of notice to claim; the giving of notice to appoint an arbitrator or the commencement of an arbitration. Non compliance with the time limit may bar the claim itself or the right to assert the claim in arbitration.

The CEITAC Model arbitration clause is simple and straightforward and provides :-
Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

Ad hoc arbitration agreements are by their very nature bespoke and therefore susceptible to sabotage and delay tactics by an un co-operative party, which will not occur in institutional arbitrations as the rules of the appointed arbitration body will apply. In this respect it is important that the Lex Arbitri can help and support arbitration agreements that run into trouble.

Ad hoc arbitration in the UK
It is not possible to accurately indicate the number of ad hoc arbitrations that take place in the UK. Empirical evidence is that the parties most often choose the arbitrator themselves, either because the arbitrator is know to them or they choose from a list provided by one of the professional institutions or trade organisations that maintain lists of suitably qualified individuals.

For example, the Model Form of Contract MF/1 (revision 4) for use in connection with 'Home or overseas contracts for the supply of electrical, electronic or mechanical plant – with erection' recommended by the Institution of Electrical Engineers, the Institution of Mechanical Engineers and the Association of Consulting Engineers Clause provides that :-

'… such question, dispute or difference ….. shall be referred to the arbitration of a person to be agreed upon. Failing agreement of such person within thirty days ….. the arbitration shall be conducted by some person appointed on the application of either party by the President of the Institution of …'.

The parties choose the President of the Institution of Mechanical Engineers or the Institution of Electrical Engineers as the person who absent agreement will appoint the arbitrator. Over the last two years I have been appointed as arbitrator once by the President of the British Computer Society and twice by the President of the Institution of Mechanical Engineers.

In the UK the construction and engineering services industries were two of the biggest sources of disputes which were resolved by ad hoc arbitrations, the number has diminished since the introduction of statutory adjudication in 1996. However, over the last five years (2000 to 2004) the Chartered Institute of Arbitrators has made on average about 155 appointments each year of arbitrators in construction and other ad hoc arbitrations and the Royal Institute of British Architects 39 appointments each year.

The Royal Institute of Chartered Surveyors has in the same period made an average of about 4,900 appointments of arbitrators each year. This is a very high number and is accounted for because 'landlord and tenant rent review' arbitrations are included in the figure.

In the UK there are other professional institutions such as the Chartered Institute of Building or the British Computer Society which routinely appoint arbitrators in ad hoc arbitrations; however I do not have any statistical information to hand from these organisations.

In contrast with these figures the London Court of International Arbitration (LCIA) over the last four years (2001 to 2004) has had about 88 cases per year referred to it to be arbitrated under either the LCIA or the UNCITRAL Rules.

Advantages and disadvantages of ad hoc arbitration

Ad hoc arbitration works with great effect in many jurisdictions across the world, however great care needs to be given to defining the legal frame work for the arbitration in the arbitration agreement so that it does not provide for the impossible. Ad hoc arbitration clauses are often fertile ground for mischief and abuse by a reluctant party.

Ad hoc arbitration does not provide for an institution to set up the arbitral tribunal and administer the proceedings. It is intended to be self executing, but should one party refuse to cooperate, the other party cannot ask for the support of an arbitral institution and must rely upon a court, presumably something which the parties wished to avoid by agreeing to arbitration.

Although institutional arbitration requires payment of a fee to the administering institution, the functions performed by the institution can be critical in ensuring that the arbitration proceeds to a final award with a minimum of disruption.

Advantages of institutional arbitration :-

- Administrative support freeing the tribunal from administrative burden and allowing more time for understanding and deciding the dispute.
- Supervision of the process and conduct of the arbitration.
- Available lists of experienced arbitrators, often indexed by areas of expertise and appointment of arbitrators if requested by the parties.
- Physical infrastructure to support the arbitration.
- Management of the parties and experience of dealing with arbitrations in difficulty.
- Scrutiny of the award before it is given to the parties.

Advantages of ad hoc arbitration :-

- Parties can create their own bespoke procedure and they enjoy greater flexibility.
- Avoid institutional bureaucracy and time limits which may lead to delays and added cost.
- Avoid paying administrative fees. Where these are on an 'ad valorem' basis these can be high as linked to the amount in dispute with out a cap and where small sums are in dispute may be disproportionate.
- Can avoid standardised time deadlines which for the particular dispute are unrealistically short.

If under the Arbitration Law both ad hoc and institutional arbitration is possible, the parties may in the first instance provide for the resolution of the dispute using institutional arbitration and when a dispute arises the parties may then draft a new special ad hoc arbitration provision. In this way the parties can rely upon the institutional clause, but also later enjoy the benefits of ad hoc arbitration, if they so decide.

Acting as arbitrator under an ad hoc arbitration agreement

Under the Arbitration Act 1996 applicable in England and Wales or Northern Ireland it is a fundamental tenet that consistent with any public policy requirements the parties should have the maximum possible freedom to decide how their arbitration should be conducted.

Section one of the AA 1996 introduces general principles which are :-

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) the court should not intervene except as provided …….

For arbitrators section thirty three of the AA 1996 describes the general duty of the arbitral tribunal which is mandatory :-

(1) (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) 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 falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

Section thirty four of the AA 1996 deals with all procedural and evidential matters and it is for the tribunal to decide these, subject to the right of the parties to agree any matter.

Where the parties are not in agreement the arbitrator is very powerful and I always want to be clear as to what the parties have and have not agreed.

Clause 4 of my own terms and conditions for acting as arbitrator provide :-

The parties shall notify the arbitrator of any agreements reached as to the powers of the arbitrator under the Arbitration Act 1996. In the absence of such notification the arbitrator shall proceed on the basis that there are no such agreements and that the arbitrator has the powers as set out in the Act.

By way of example procedural and evidential matters to be dealt with include :-

1. Confirmation of the arbitration agreement.
2. Confirmation of the names of the parties involved and their representatives.
3. Confirmation that the tribunal is properly appointed with terms and conditions agreed.
4. Confirmation of the law applicable to the arbitration.
5. Confirmation of any procedural rules to be adopted.
6. Confirmation of the language to be used in the proceedings and hearings.
7. Confirmation of the seat of the arbitration.
8. Parties' agreement affecting powers under the non-mandatory sections of the Arbitration Act 1996.
9. Reasons, do the parties choose **not** to have a reasoned award?
10. Dispute to be determined on the basis of documents only or with an oral hearing.
11. Confirmation as to how information will be routed.
12. Confirm arrangements for the exchange of written submissions (pleadings or statement of case).
13. Confirmation of points of issue and what relief is sought (brief preliminary description of the dispute, chronology of events and the sums involved).

14. Settlement negotiations; is there anything the arbitrator can do to support the parties in this regard.
15. Disclosure (procedure, exchange, inspection, bundle).
16. Determine how documentary evidence is to be dealt with.
17. Determine how physical evidence is to be dealt with.
18. Establish procedure to deal with witnesses of fact.
19. Establish procedure to deal with expert witnesses.
20. Determine the conduct of hearing (venue, duration, dates, time, procedure).
21. Transcript of hearing.
22. Oath / affirmation.
23. Opening addresses reduced to writing (date of service).
24. Final speeches reduced to writing (to be agreed at hearing).
25. Cost considerations.
26. Any other business (Claimant – Respondent)
27. Date of next meeting (pre hearing review).

In addition to the above I refer you to the following documents accompanying this paper, in the interests of time keeping I will limit my comments on the content of these documents to one point each :-

- Preliminary meeting agenda outlining the interlocutory matters to be discussed and decided dated 22nd June 2004. None of the major sets of institutional arbitration rules mention the concept of a preliminary meeting. However from my perspective, a preliminary meeting is usually important and is an opportunity to establish my authority. This is achieved by demonstrating an understanding of the stated and un-stated expectations of the parities involved in the arbitration. I will always give the parties an opportunity to contribute to and confirm the items to be discussed at this meeting and in that way try to tease out any hidden agendas early.
- Letter from the arbitrator to the parties 'Order for Directions Number One' dealing with matters arising at the preliminary meeting dated 23rd June 2004. Paragraph 17 of the 'Order for Directions Number One' refers to the mechanism for dealing with presentation of documents that may be in the possession of one of the parties. Whether documents are discoverable or not is often an issue that arises, particularly if one party is from a civil law country and the other from a common law country. In this matter, in respect of documents, it was relatively straight forward to get the parties to agree to use the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration. In my view these rules provide a balanced framework but their use here demonstrates that in ad hoc arbitration the arbitrator does not have to craft all the tools to be used, many have already been formed.

- Letter from the arbitrator to the parties dealing with limiting the recoverable costs of the arbitration dated 12th November 2004. Paragraph 18 of the 'Order for Directions Number One' deals with the arbitrator limiting the recoverable costs of the arbitration. It was quickly apparent to me that the Respondent in the dispute, a European equivalent of China Telecom which had instructed one of the 'magic five' law firms to represent them, would quite quickly ramp up their expenditure on costs. As the other party was a relatively small developer of IT solutions expenditure on costs had the potential to become an issue in the conduct of the arbitration. Under English Law costs will almost always 'follow the event'. In due course, when I received the application from the Claimant to limit the recoverable costs to £100,000 (about RMB 1,400,000) (excluding Value Added Tax and my fees) some five months into an eight month arbitration, it was in my view simply to late to do so and I declined to make such an Order. Although without the surrounding exchanges from the parties it is masked, this letter also bites the Claimant in another way. On the face of it they had constructively and unreasonably refused to accept several offers to mediate the dispute and the Respondent asked me to confirm that because of this the Claimant might not recover their costs even if they were successful. I confirmed for the parties that I would follow established legal principles, including those on sealed offers, reasonableness and extravagance.
- Letter from the arbitrator to the parties dealing with jurisdiction of the arbitral tribunal dated 5th May 2005. Section thirty to thirty two of the AA 1996 deals with jurisdiction of the arbitral tribunal and in this arbitration there were three challenges raised as to my jurisdiction to deal with the matter (in a non statutory adjudication I have has as many as seven). The first was that there was a requirement that the Claimant should properly serve a notice prior to commencing arbitration, which they did not; the second was that there was a requirement for the parties to attempt to agree the choice of arbitrator before referring the appointment to the President of the Institution of Mechanical Engineers; the third was that the subject matter of the dispute was through the application of the Limitation Act 1980 time barred. I decided that I did have jurisdiction and the reference proceeded. This is the application of the doctrine of competence competence (kompetenz kompetenz) which is a 'pragmatic fiction' that allows arbitrators to determine their own jurisdiction as a way of minimising the need of support from national court systems.

Although these are real documents used in real arbitrations and are contemporary with the dates indicated, it will of course be understood by you that in the interests of confidentiality the names of the parties and their advisors are fictitious.

Choice of the arbitral tribunal

At present PRC Arbitration Law Article 13 sets out criteria for acting as arbitrator : 1) to have been engaged in arbitration work for at least eight years; 2) to have worked as a lawyer for at least eight years; 3) to have served as a judge for at least eight years; 4) to have been engaged in legal research or legal education, possessing a senior professional title; or 5) to have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional title.

There are some special provisions for arbitration involving foreign elements and in respect of the qualifications for acting as arbitrator Article 67 provides that a foreign related arbitration commission may appoint arbitrators from among foreigners with special knowledge in the fields of law, economy and trade, science and technology, etc.

Chinese Law makes the presumption that in respect of domestic arbitrations the arbitrator is a person with a strong legal background but allows for lay (non lawyer) foreign arbitrators in international arbitration. A logical consequence of this is that there may not be many Chinese lay arbitrators.

Some in China forcefully argue that arbitration is a service industry; if that is so then the question as to whom it serves and what the service requirement might become seems to me an appropriate one.

Chinese businesses have responded to the 'Go Global' 走 出去 (zǒu chúqu) challenge and despite established WTO rules, where commodity products are involved, many countries at present grapple to find an appropriate way to respond to competition from China.

I am not a lawyer but as a businessman and engineer it is easy to imagine a future where China's rise in commodity manufacturing is accompanied with increased prowess in science and technological innovation. By way of example one could point to Lenovo Group Limited's purchase of IBM's personal computer business transforming it into the world third largest PC manufacturer; Huawei Technologies Company Limited and ZTE Corporation competing for and winning substantial international telecommunications contracts and US microprocessor manufacturer AMD agreeing to transfer its core technologies in industrial use micro processors to the Peking University Microprocessor Research and Development Centre.

Such organisations may wish to submit disputes to Chinese lay arbitrators with specific skills and knowledge. If so how will the businesses involved go about this? In principle it is achieved simply by specifying certain qualifications required of the arbitrators.

Where the dispute is a technical one and the arbitrator is technically qualified, it is often possible to reduce the active involvement of lawyers and this is one of the reasons arbitration can be much cheaper than litigation.

'The freedom to choose the tribunal is perhaps the most important single advantage that arbitration has over litigation in domestic arbitration, and one of the most important in international arbitration. It involves the advantages that the parties can take into account the personality, professional qualifications, experience, availability, and cost of possible arbitrators before committing themselves.' [Bernstein, R. Wood, D. (1993) Handbook of Arbitration Practice. Sweet & Maxwell.]

Indeed some Arbitration Rules explicitly specify that arbitrators should be chosen on the basis of the substance of the dispute or their knowledge of business matters. For example the London Court of International Arbitration Rules (LCIA Rules) article 5.5 states that *"In selecting arbitrators, consideration will be given, to the nature of the transaction, the nature and circumstances of the dispute, ...".*

Where disputes revolve around issues of law, lawyers will invariably make the best arbitrators. However, where issues of fact dominate the dispute many businesses prefer to have an arbitrator who is skilled in the particular technology involved. This invites the question should China encourage non lawyers to become arbitrators. If so, how will they be educated in the law of contract, tort and evidence, the law of arbitration and how will they gain theoretical and practical experience of arbitration practice and procedure?

In the UK the Chartered Institute of Arbitrators provides a centre of excellence for the promotion and facilitation of dispute resolution. With more than 11,000 members in over 100 countries the Institute provides and monitors high educational standards and is an international resource centre for those concerned with the cost effective and early settlement of disputes.

In 1999, the Chartered Institute of Arbitrators introduced Chartered status for Arbitrators as a "gold standard" for practitioners. There are at present about 400 Chartered Arbitrators and of these about forty percent are lay arbitrators (non lawyers).

In many countries lay arbitrators become experienced in domestic arbitration and this is normally the training arena that leads some to involvement in international commercial arbitration.

Under current PRC Arbitration Law this does not seem to be possible and may lead to a situation where China is not able to provide its science and technology based businesses with the skilled Chinese arbitrators they deserve and will require. If arbitration is a service industry then China's future business needs and interests may make this demand and the potential needs to be anticipated and catered for with a Chinese solution.

Thank you.

About the speaker

Niall Lawless is an experienced international Chartered Arbitrator, Information Systems Practitioner, Building Services Engineer, Mechanical Engineer and Chartered Builder. Through Arbitrari Limited (www.arbitrari.com) he provides arbitration, mediation and adjudication services, and his commercial and technical expertise is particularly appropriate in both domestic and international technology, engineering and construction disputes.

He has been appointed as arbitrator in ad hoc arbitrations by both the President of the British Computer Society and the Chartered Institution of Mechanical Engineers.

He is a part time PhD student at the Faculty of Law at the University of International Business and Economics in Beijing under the supervision of Professor Shen Sibao.