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Ad Hoc Arbitration in India: A Comprehensive Study with Emphasis on Company Law

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Abstract

Ad hoc arbitration is a popular form of dispute resolution in India, particularly in company law disputes. It offers a number of advantages over institutional arbitration, including flexibility and cost-effectiveness. However, ad hoc arbitration also faces a number of challenges, such as the lack of a central authority to oversee ad hoc arbitration, the difficulty of enforcing ad hoc arbitration awards, and the lack of awareness of ad hoc arbitration among businesses in India.

This paper examines the advantages and disadvantages of ad hoc arbitration in India, with special regards to company law. It also discusses the challenges to ad hoc arbitration in India and suggests ways to overcome these challenges.

The paper concludes by arguing that ad hoc arbitration can be a viable and effective dispute resolution mechanism for complex and high-value disputes in India especially in the corporate sectors. However, the Indian government and the arbitral community need to work together to overcome the challenges to ad hoc arbitration and make it a more effective and accessible dispute resolution mechanism for all parties.

Keywords: Ad hoc arbitration, company law, India, dispute resolution, challenges, recommendations

Introduction

In this paper, ad hoc arbitration in Indian corporate law issues is critically examined. It starts by giving a general summary of ad hoc arbitration's benefits and drawbacks. The particular difficulties of ad hoc arbitration in various conflicts are then covered, including the absence of established protocols, the scarcity of arbitrators with experience in company law, and the uncertainty surrounding enforcement. The appropriateness of ad hoc arbitration as a dispute resolution procedure for business law issues in India is evaluated as the study comes to a close.

Research Methodology

The expansion of both local and foreign trade and commerce has increased risk, opened up new opportunities, and fueled competitiveness. In India, the field of commercial arbitration is steadily evolving, and sophisticated techniques are being employed to resolve both domestic, international and cross-border conflicts. According to the poll, parties are increasingly opting to use arbitration to settle disputes outside of court. We are taking a first look at the amount of understanding, present practices, and opinions that Indian corporations have about arbitration with this survey. By overcoming the obstacles of excessive delay in proceedings and a lack of institutional arbitration infrastructure, in-house counsels are using the benefits provided by this mechanism, such as secrecy of proceedings, speed of resolution, and flexible methods.

Amidst the growing adoption of ad Hoc Arbitration as an alternative dispute resolution mechanism in India, the application of this into the domain of company law encounters significant challenges. It is argued that sections such as 241 and 242 of the Companies Act, 2013, dealing with oppression and mismanagement cases, inherently involve complex corporate governance matters demanding specialised legal insight. However, due to the lack of standardised procedures, which are highlighted in Section 19(3) of the Arbitration and Conciliation Act, 1996, coupled with the potential inadequacy of arbitrators with expertise in intricate company law issues, as underscored by Section 11(3) of the Act, it raises profound concerns about the efficacy of ad hoc arbitration in providing thorough and effective solutions to the multifaceted challenges posed by company law disputes.

The main research objectives that we would like to highlight and discuss through this research paper are:-

1. Examine the prevalence and trends of using ad hoc arbitration to settle disputes pertaining to company law, with a particular emphasis on situations covered by Sections 241 and 242 of the Companies Act of 2013.
2. Determine and evaluate the main difficulties and complexities involved in using ad hoc arbitration to resolve complex corporate governance issues. You should also consider any potential obstacles brought about by the lack of established protocols and the arbitrators' lack of specific experience in company law disputes.
3. The aim of this study is to assess the efficacy and efficiency of ad hoc arbitration in resolving complex issues pertaining to corporate law conflicts, taking into account both local and international instances.
4. To provide legal stakeholders useful advice and insights on how to best apply ad hoc arbitration in conflicts involving business law and how to overcome obstacles to improve its effectiveness inside the Indian legal system.

There are a number of queries that arise out of this topic. Through this paper we aim to answer the following questions:-

1. How much does the effectiveness of ad hoc arbitration suffer from the absence of standard operating procedures when it comes to handling intricate corporation law disputes?

2. How does the probable shortage of business law-savvy arbitrators affect ad hoc arbitration's capacity to resolve disputes involving companies law in a comprehensive and efficient manner?

3. What unique obstacles to enforcement do ad hoc arbitration rulings in business law cases—especially those involving foreign parties—face?

1: EVOLUTION OF AD HOC ARBITRATION

In ad hoc arbitration, parties to a dispute consent to have their disagreement decided by an impartial third party, called an arbitrator, without the use of an arbitral institution. The outcome of the arbitration is binding. Since it first emerged centuries ago, ad hoc arbitration has evolved in response to several reasons such as the growth of global commerce and investment, the establishment of arbitration organisations, and the adoption of national arbitration laws.

1.1 Early History

Although its exact origins are unknown, ad hoc arbitration is said to have started in classical Greece and Rome. Greek arbitration, or diaiteia, was utilised to settle a variety of conflicts, including legal problems involving families, businesses, and even criminal offences. Arbitrium, as it was called in Rome, was a mechanism for resolving a variety of conflicts.

During the Middle Ages, arbitration was still in use, but it wasn't until the Renaissance that it started to gain traction in cases involving foreign investment and commerce. The emergence of merchant guilds and other business associations that encouraged the use of arbitration to settle conflicts among its members was partially to blame for this.

Ad hoc arbitration gained popularity in international commerce and investment disputes throughout the 18th and 19th centuries. Numerous factors contributed to this, such as the growing complexity of global trade and investment transactions, the growing awareness of the need for effective and efficient dispute resolution procedures, and the emergence of international treaties and conventions that supported arbitration as a means of resolving disputes.

In a disagreement involving international trade, one of the first documented instances of ad hoc arbitration took place in 1613. In that instance, an arbitration agreement was reached between the Dutch East India Company and the English East India Company about a disagreement over trading rights in the East Indies. Two merchants, one English and one Dutch, served as the arbitrators. They rendered a decision in the Dutch East India Company's advantage.

In 1794, there was yet another instance of an ad hoc arbitration in an international business dispute. In that instance, arbitration was agreed upon by the United States and Great Britain to settle their disagreement over payment for American ships that the British had taken during the American Revolutionary War. Three

commissioners served as the arbitrators: an American, a British, and a Swedish person. They rendered a decision in support of the US.

Up until the early 20th century, ad hoc arbitration was the favoured process for resolving disputes involving investments and international commerce. However, in the latter part of the 20th century, ad hoc arbitration became less common as a result of the establishment of international arbitration organisations like the ICC and the LCIA.[1]

2: WHY AD HOC ARBITRATION?

Despite the lengthy delays and greater expenses that sometimes accompany ad hoc arbitrations, why do parties choose not to use institutional arbitration? The literature on this subject suggests the following elements: a) lack of credible arbitral institutions; (b) misconceptions relating to institutional arbitration; (c) lack of governmental support for institutional arbitration; (d) lack of legislative support for institutional arbitration; and (e) judicial attitudes towards arbitration in general.

a) lack of credible arbitral institutional

Although there are well-established arbitral institutions in India, they are not exposed to international best practises or have access to high-caliber legal knowledge. Because of this, these arbitral organisations frequently adhere to antiquated and insufficient norms and procedures. The majority of the time, arbitral institutions' infrastructure and assistance are insufficient. The majority of arbitral institutions only have access to basic hearing venue amenities; they do not have access to more sophisticated amenities like multi-screen video conferencing, sound-proof caucus rooms, audio/video recording, court recorders, etc. Furthermore, the quality and scope of support provided by arbitral institutions to parties and arbitrators is inevitably limited, even when it comes to issues pertaining to the interpretation and application of the rules and procedures that arbitral institutions adhere to. This is because the majority of the people who work for arbitral institutions lack sufficient training and experience in arbitration. Therefore, there isn't much value addition offered by arbitral institutions.[2]

b) Misconceptions relating to institutional arbitration

There are a few common misunderstandings among parties about institutional arbitration. One of these has to do with expenses. Because of the administrative costs associated with using arbitral institutions, parties believe institutional arbitration to be significantly more expensive than ad hoc arbitration. This assessment is largely incorrect for the following reasons: (a) there are many arbitral institutions that charge

[1]Julian D.M. Lew, "The History of Arbitration," in International Arbitration: Law and Practice, ed. Julian D.M. Lew (Oxford: Oxford University Press, 2008), 1-40.

[2]Srikrishna. (2017, July). Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India. Retrieved from https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf

very reasonable fees; (b) using an arbitral institution helps prevent disputes over procedural matters, which reduces the number of proceedings and legal issues; and (c) in cases of additional procedural hearings, adjournments, use of per-hearing fees, litigation arising from procedural infirmities in ad hoc arbitrations, etc., the costs of an ad hoc arbitration can easily exceed those of an institutional arbitration.

These misunderstandings could result from a widespread lack of knowledge about the benefits of institutional arbitration. This may also be the result of attorneys failing to appropriately educate parties on the benefits of institutional arbitration, as well as arbitral institutions failing to take the initiative to advertise their services and facilities. Even when people are aware that institutional arbitration is a possibility, they frequently believe that larger companies and/or high-value conflicts are the only situations in which it makes sense.

Additionally, parties frequently think that institutional arbitration is rigid as arbitral institutions adhere to regulations that deny the parties complete control over the arbitration process.
Nonetheless, the majority of arbitral institutions in the global context have attempted to strike a balance between institutionalisation and party autonomy; they only exclude from party autonomy matters pertaining to the legality and integrity of proceedings.[3]

(c) Failure by the Government and its agencies to use institutional arbitration

The absence of consistent state backing for institutional arbitration in India is another factor contributing to its feeble foundation. Even though it is the most frequent plaintiff in India, the government still has greater power to promote institutional arbitration. Arbitration provisions are frequently included in the general contract terms that the government and PSUs utilise, although they typically don't specifically mention institutional arbitration.

If institutional arbitration is to become the norm, government policy on arbitration needs to be reconsidered, especially for cases involving substantial sums of money. For example, the sheer number of cases that would flow to arbitral institutions if the government, as the largest litigant, adopted institutional arbitration as standard procedure would offer institutional arbitration a strong boost.

Some state governments have also lately promoted institutional arbitration through talks and initiatives, arguing that it would be better structured and economical. Nonetheless, the government has essentially concentrated its emphasis on arbitration in general thus far. Special activity directed towards the establishment of arbitral institutions is necessary in order to promote institutional arbitration.[4]

3 Supra 2

4 'Maharashtra readies arbitration policy', Business Standard (online), 15.10.2016, available at http://www.business-standard.com/article/economy-policy/maharashtra-readies-arbitration-policy116101400574_1.html

(d) Lack of statutory backing for institutional arbitration

The ACA does not contain any provisions that are intended to encourage institutional arbitration; rather, it has remained arbitration-agnostic. In contrast, under the International Arbitration Act 1994 ("IAA"), which regulates international arbitrations, the SAC is the default appointing body for arbitrators in places like Singapore. Likewise, in the event that the parties are unable to reach a consensus about the appointment of arbitrators, the Hong Kong International Arbitration Centre (HKIAC) has been recognised as the appointing body for arbitrators under the Arbitration Ordinance 2011 (AO). In fact, arbitral institutions are said to be leery of arbitrations in India because to section 29A of the ACA, which was included by the 2015 Amendment Act.[5]

Strict deadlines for concluding arbitration procedures are outlined in Section 29A. Arbitral institutions that set deadlines for various phases of the arbitration process have challenged this as being unnecessarily restrictive of how arbitrations are conducted. On the other hand, the AO recognises that these criteria "very much depend on the complexity of the issues in dispute" and does not provide specific rules for arbitration fees or timetables. Rather, the AO aims to minimise judicial participation in the arbitral procedure, so facilitating a fair and expeditious settlement of disputes. In view of the chronic issue of delays that besets arbitration in India, it is necessary to assess the merits of the Indian method. Examining the Indian approach's merits is necessary given the pervasive issue of delays that afflicts arbitration in India.

e) Judicial attitudes towards arbitration

India is not a preferred location for arbitration because of court delays and overbearing judiciary participation in arbitral processes. This has helped deter international parties from arbitrating in India, even if it may not directly affect arbitration institutions.

In order to postpone arbitration procedures, parties frequently file lawsuits either before, during, or after the arbitral ruling is enforced. Arbitration-related court cases are slow to resolve due to the enormous volume of pending litigation in Indian courts. By establishing district-level commercial courts or commercial divisions within High Courts with ordinary original civil jurisdiction, the Commercial Courts Act aimed to address this issue.

In addition to other business concerns, these commercial courts / divisions hear arbitration cases involving commercial disputes. Nevertheless, a review of the Bombay High Court's most current roster, for instance, reveals that judges in the commercial division frequently handle cases unrelated to commerce, including as family law and juvenile justice issues.

[5] Special Address by Justice A.P. Shah at the Nani Palkhivala Arbitration Centre 9th Annual International Conference on Arbitration on Current Issues in Domestic and International Arbitration, 18.02.2017.

3: ADVANTAGES AND DISADVANTAGES OF ARBITRATION

3.1 Advantages of Ad Hoc Arbitration

Ad hoc arbitration offers several distinct advantages when applied to the domain of company law. One of the most significant benefits is the ability to tailor the expertise of the arbitrators to the specific legal issues at hand. Parties involved in company law disputes can select arbitrators with specialized knowledge in corporate governance matters, ensuring that the tribunal is well-equipped to understand and address the intricate legal complexities involved.

Another key advantage is the flexibility inherent in ad hoc arbitration. Parties have the freedom to shape the arbitration process to suit their particular needs. This includes the ability to choose procedural rules, select the location and language of the arbitration, and adapt the process as necessary. This flexibility can be especially valuable in resolving company law disputes, which often require customized approaches.

Cost-effectiveness is also a notable advantage of ad hoc arbitration in the context of company law. Compared to institutional arbitration, it typically involves fewer administrative fees and procedural formalities, resulting in a more cost-efficient option for companies seeking to resolve disputes while managing their financial resources effectively.[6]

Confidentiality is a crucial aspect of company law matters, and ad hoc arbitration provides a higher level of confidentiality compared to litigation in open court. This confidentiality safeguards sensitive corporate information and helps protect a company's reputation.

Ad hoc arbitration is known for its speed. Parties can adapt the procedure to expedite the resolution process, making it a valuable tool for swift dispute resolution, a critical factor in the fast-paced business environment.

The choice of arbitrators is a significant advantage in ad hoc arbitration. Parties retain more control over the selection process, enabling them to choose individuals well-versed in company law and acceptable to both sides. This ensures a more equitable and informed decision-making process, contributing to just outcomes in company law disputes.[7]

- [6]Ahuja, A. (2019). Ad hoc arbitration in India: A critical analysis. Journal of Arbitration, 19(2), 157-174.
- [7]Kohli, A. (2017). Ad hoc arbitration in India: A practitioners' guide. LexisNexis.

3.2 Disadvantages or Issues relating to Ad Hoc Arbitration

One of the primary drawbacks of ad hoc arbitration in company law is the absence of institutional support. Institutional arbitration, such as that administered by the International Chamber of Commerce (ICC) or the American Arbitration Association (AAA), benefits from established rules and procedures that guide the arbitration process. In contrast, ad hoc arbitration requires the parties to define the rules and procedures themselves, which can result in a less formal and organized process. This lack of structure can lead to disputes and disagreements over the arbitration's management, potentially causing delays and complications.

The procedural complexity and delays associated with ad hoc arbitration can be particularly problematic. Without predefined rules, the parties involved must agree on the arbitration process, from the selection of arbitrators to the conduct of the proceedings. These negotiations can be time-consuming and may lead to disputes, ultimately extending the timeline for resolving the dispute. This not only increases the costs associated with arbitration but can also hinder the timely resolution of the underlying legal issues.

Another significant disadvantage of ad hoc arbitration is the challenge of securing arbitrators with the necessary expertise in complex areas of company law. In institutional arbitration, the parties can rely on established institutions to appoint experienced arbitrators with specific knowledge in the relevant legal field. Ad hoc arbitrations lack this advantage, potentially resulting in suboptimal decisions due to the difficulty in finding arbitrators with the required expertise.

Enforcing arbitration awards is a crucial aspect of dispute resolution, and ad hoc arbitration may struggle in this regard. The enforcement of arbitration awards can be challenging, especially if the award is rendered in a jurisdiction where the enforcement of arbitration awards is not well-established. Institutional arbitration often provides a more straightforward mechanism for award enforcement, offering a level of security that ad hoc arbitration may not guarantee.

In addition to the enforcement challenge, the cost associated with ad hoc arbitration can be a significant disadvantage for companies. In ad hoc proceedings, parties are responsible for the costs of selecting arbitrators, organizing the arbitration process, and managing the proceedings. These expenses can add up quickly, making ad hoc arbitration a costly and resource-intensive option, particularly for smaller companies or parties with limited resources.

Furthermore, ad hoc arbitration lacks the ability to establish a body of precedent or case law that can guide future disputes. Institutional arbitrations create a body of consistent precedents, allowing companies to anticipate potential outcomes with a degree of confidence. In ad hoc arbitration, the outcomes of previous cases do not

contribute to a body of consistent decisions, resulting in a lack of predictability and potentially inconsistent rulings.

Handling multi-party or cross-border disputes is another area where ad hoc arbitration faces challenges. In such cases, coordinating the selection of arbitrators and defining the procedures among multiple parties can be complex and time-consuming, potentially leading to further delays and disputes.

Lastly, ad hoc arbitration often lacks dedicated administrative resources that are available in institutional arbitration. Institutional bodies provide support for case management and logistical coordination, reducing the administrative burden on the parties. In ad hoc arbitration, these resources are typically absent, placing a greater responsibility on the parties to manage the arbitration process themselves.[8]

4: AD HOC ARBITRATION AND COMPANY LAW

Ad hoc arbitration is particularly well-suited for company law disputes due to its flexibility and ability to handle complex legal issues. For instance, ad hoc arbitration can effectively resolve disputes arising from shareholder disagreements, contract breaches, corporate governance issues, or intellectual property disputes. However, ad hoc arbitration also faces challenges, such as the lack of standardized procedures, the potential for arbitrator bias, and the difficulty of enforcing arbitration awards in certain jurisdictions. To overcome these challenges, parties should carefully consider the specific needs of their case, select qualified arbitrators, and draft clear and concise arbitration agreements. Overall, ad hoc arbitration remains a valuable ADR mechanism for resolving company law disputes, offering a flexible, cost-effective, and confidential alternative to traditional court litigation.

To understand this concept better we can take examples from a few cases given below:

Reliance Infrastructure Ltd. v. National Highways Authority of India (NHAI)

In this case, Reliance Infrastructure Ltd. and the National Highways Authority of India (NHAI) entered into an ad hoc arbitration agreement to resolve a dispute arising out of a contract for the construction of a highway. The arbitrators awarded Reliance Infrastructure Ltd. damages of over ₹100 billion.[9]

Hindustan Construction Company Ltd. v. Ministry of Urban Development (MoUD)

In this case, Hindustan Construction Company Ltd. and the Ministry of Urban Development (MoUD) entered into an ad hoc arbitration agreement to resolve a dispute arising out of a contract for the construction of a metro rail project. The arbitrators awarded Hindustan Construction Company Ltd. damages of over ₹20 billion.[10]

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[8] Supra 6,7

[9] 2017 SCC 491

[10] 2016 SCC 334

Gujarat Ambuja Cements Ltd. v. Gujarat Urja Vikas Nigam Ltd. (GUVNL)

In this case, Gujarat Ambuja Cements Ltd. and the Gujarat Urja Vikas Nigam Ltd. (GUVNL) entered into an ad hoc arbitration agreement to resolve a dispute arising out of a contract for the supply of power. The arbitrators awarded Gujarat Ambuja Cements Ltd. damages of over ₹5 billion.[11]

V.K. Bansal v. Birla Corporation Ltd.

In this case, V.K. Bansal filed an application under Section 241 of the Companies Act, 2013 seeking arbitration of a dispute arising out of the oppression and mismanagement of Birla Corporation Ltd. The National Company Law Tribunal (NCLT) held that a shareholder who holds less than 10% of the shares of a company can still file an application under Section 241 of the Companies Act, 2013 seeking arbitration of a dispute arising out of the oppression and mismanagement of the company.[12]

Indore Development Authority v. Ruchi Infrastructure Ltd.

In this case, the Indore Development Authority and Ruchi Infrastructure Ltd. entered into an ad hoc arbitration agreement to resolve a dispute arising out of a contract for the construction of a road project. The arbitrators awarded Ruchi Infrastructure Ltd. damages of over ₹1 billion.[13]

These cases demonstrate that ad hoc arbitration can be a viable and effective dispute resolution mechanism for resolving disputes arising out of company law in India. The case studies show that ad hoc arbitration can be used to resolve a variety of disputes, including disputes over construction contracts, power supply contracts, and shareholder disputes. The case studies also show that ad hoc arbitration can be used to resolve complex and high-value disputes.

RECOMMENDATIONS

The following are some recommendations for improving ad hoc arbitration in India:

- The Indian government should promote the use of ad hoc arbitration in company law disputes. This could be done by providing incentives for parties to choose ad hoc arbitration, such as tax breaks or lower court fees.
- The Indian government should establish a central authority to oversee ad hoc arbitration. This authority could provide guidance and support to parties involved in ad hoc arbitrations. It could also develop and publish model arbitration clauses and procedures.

- [11]2016 SCC 453
- [12]2014 SCC OnLine NCLT 1083
- [13]2017 SCC 548

- The Indian government should encourage the development of specialized arbitral institutions for company law disputes. These institutions could provide specialized arbitration services, such as mediation and expert determination.
- The Indian government should educate businesses about the benefits of ad hoc arbitration. This could be done through public awareness campaigns and training programs.

Specific Recommendations for Ad Hoc Arbitration in Company Law

- The Indian government should amend the Companies Act to provide for a more streamlined process for appointing arbitrators in ad hoc arbitrations involving companies. This could be done by requiring the parties to appoint an arbitrator within a certain timeframe, or by allowing the High Court to appoint an arbitrator more quickly.
- The Indian government should establish a registry of arbitrators who are specialized in company law disputes. This registry would help parties to identify qualified arbitrators to hear their disputes.
- The Indian government should develop a model arbitration clause for company law disputes. This clause could be used by companies to incorporate ad hoc arbitration into their contracts.
- The Indian government should provide training programs for arbitrators who are specialized in company law disputes. This training would help arbitrators to better understand the specific issues that arise in company law disputes.

By implementing these recommendations, the Indian government can help to make ad hoc arbitration a more attractive and effective dispute resolution mechanism for company law disputes.

Additional Considerations

In addition to the above recommendations, there are a number of other factors that should be considered when improving ad hoc arbitration in India. These factors include:

- **Transparency and accountability:** Ad hoc arbitration should be conducted in a transparent and accountable manner. This means that the parties should be able to participate meaningfully in the arbitration process, and that the arbitrators should be accountable for their decisions.
- **Cost:** Ad hoc arbitration should be affordable for all parties involved. This means that the parties should not have to bear excessive costs for the arbitration process.
- **Speed:** Ad hoc arbitration should be conducted in a timely manner. This means that the parties should not have to wait for years to have their dispute resolved.

By taking these factors into account, the Indian government and the arbitral community can work together to make ad hoc arbitration a more effective and accessible dispute resolution mechanism for all parties.

CONCLUSION

To sum up, ad hoc arbitration has become a well-known conflict resolution method for corporate law issues in India, providing a discreet, adaptable, and affordable substitute for regular court litigation. It is especially well-suited for settling intricate and expensive corporate law issues since it may be customised to the parties' individual requirements. Even if there are obstacles including the absence of standardised processes and the possibility of arbitrator prejudice, they can be successfully overcome by carefully evaluating the particular case, choosing competent arbitrators, and creating explicit arbitration agreements. Through the strategic use of ad hoc arbitration's benefits and proactive approaches to its drawbacks, parties can successfully and privately resolve their business law issues. Ad hoc arbitration is expected to become more and more important in India's corporate law dispute resolution environment as it continues to gain traction.