

Ad Hoc and Institutional Arbitration

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INTRODUCTION

Arbitration may be defined as the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law¹. Arbitration is an alternative process of solving disputes, and hence, it coexists with the system of litigation. The main objective of having an arbitration proceeding is to provide fair and impartial resolution of disputes without causing unnecessary delay or cost which also has a binding effect, without going to the Court of law and getting engaged in the long-drawn judicial procedure. In India, the alternative method of solving disputes has been present from a long time, since trade and commerce started to grow outside the country.

Parties are entitled to choose the form of arbitration which they deem appropriate in the facts and circumstances of their dispute. This Paper considers the differences between institutional and 'ad hoc' arbitration methods, and the advantages and disadvantages of each.

TYPES OF ARBITRATION

In India, Arbitration as a mode of resolution of disputes came to be adopted from the medieval times when trade and commerce between traders in India and outside started growing.² Arbitration existed in the form of informal agreements where disputing parties would agree to and listen to the decision of a respected elder, whom they trusted implicitly. Even though arbitration was known to Indian legal and business community, only the ad hoc form found credence while the concept of institutional arbitration is relatively new.

There may be differing expectations and possible misunderstandings as parties of different nationalities come together seeking to resolve disputes before an arbitral tribunal of also

¹ Butterworths, Halsbury's Laws of England (4th edition, 1991)

² P.C. Rao & William Sheffield eds, 'Alternate Dispute Resolution', 13 (Universal Law Publishing co. Pvt. Ltd.).

different nationalities. These are the basic two forms of arbitration followed in varying degrees in different nations across the globe.³

- Ad Hoc Arbitration
- Institutional Arbitration

AD HOC ARBITRATION AND ITS KEY FEATURES

Ad hoc Arbitration is a proceeding that is not administered by others and requires parties to make their own arrangements for selection of arbitrators. An ad hoc arbitration is one which is not administered by an institution such as the ICC, LCIA, DIAC or DIFC. The parties will therefore have to determine all aspects of the arbitration themselves. It is infinitely preferable at least to specify the place or 'seat' of the arbitration as well since this will have a significant impact on several vital issues such as the procedural laws governing the arbitration and the enforceability of the award.

An ad hoc arbitration agreement may just provide that: “Disputes between the parties shall be arbitrated in Mauritius”. Such an abbreviated arbitration agreement will only work if the jurisdiction selected has established arbitration law.

The parties then have to determine all aspects of the arbitration like the selection and manner of appointment of the arbitral tribunal, applicable law, procedure for conducting the arbitration and administrative support without assistance from or recourse to an arbitral institution. The arbitral mechanism is therefore structured specifically for the particular agreement or dispute. If the parties cannot agree on such arbitral detail or, in default of agreement, laid down by the arbitral tribunal at a preliminary meeting once the arbitration has begun, it will be resolved by the law of the seat of arbitration.⁴

It is open to the parties to adopt the rules framed by a particular arbitral institution without submitting its disputes to such institution. Parties may when they cannot agree on the arbitral tribunal may agree to designate an arbitral institutional as the appointing authority Parties can also incorporate statutory procedures such as applicable arbitral law or adopt the UNCITRAL Arbitration Rules which are specifically designed for ad hoc arbitral proceedings.

³ Gerald Aksen, ‘Ad hoc Verses Institutional Arbitration’, 2(1) ICC Bulletin (1991): 8-14

⁴ Sundra Rajoo, ‘Institutional and Ad hoc Arbitrations: Advantages and Disadvantages’, The Law Review (2010),

If the parties cooperate and facilitate the arbitration, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. It is a popular choice because the parties do not have to pay administrative fees to the arbitral institution.⁵

It is commonly said that reaching agreement to arbitrate after a dispute has arisen is difficult, but this really depends on whether the mutual needs of the parties to the dispute coincide with the benefits of arbitration, such as having a decision maker with industry experience, privacy, speed, and so on. Sometimes there are benefits to entering into an agreement to arbitrate after the dispute has arisen because arbitration can be conducted under rules tailored to the dispute rather than under what may have been a 'one size fits all' set of rules typically included in a pre-dispute arbitration clause.

INSTITUTIONAL ARBITRATION AND ITS KEY FEATURES:

An institutional arbitration is one in which a specialised institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration, and its own form of administration to assist in the process.⁶

In an institutional arbitration, the arbitration agreement designates an arbitral institution to administer the arbitration. The parties then submit their disputes to the institution that intervenes and administers the arbitral process as provided by the rules of that institution. The institution does not arbitrate the dispute. It is the arbitral panel which arbitrates the dispute.⁷ There are many excellent organizations, world-wide, that have the capability and the know-how to deliver this service. The parties may stipulate, in the arbitration agreement, to refer a dispute between them for resolution to a regional institution, for example, Cairo Regional Centre for International Commercial (CRCICA), Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC) or the Japanese Commercial Arbitration Association (JCAA). Other leading international institutions are the ICC Rules of Arbitration, the Swiss Rules of International Arbitration or ICDR Rules of the American

⁵ Ibid

⁶ Abraham, C, "Importance of Institutional Arbitration in International Commercial Arbitration", Symposium on Need for Speed: International Institutional Arbitration, Federation House, New Delhi, India, November 22, 2008.

⁷ Alan Redfern and Martin Hunter, 'Law and Practice of International Commercial Arbitration', 47(4th ed., 2004)

Arbitration Association. In that case the arbitration is conducted under the auspices of the institution.

COMPARISION OF AD HOC AND INSTITUIONAL ARBITRATION

ADVANTAGES OF AD HOC ARBITRATION:

Suitable for all types of claims

Ad hoc arbitration if properly structured should be less expensive than institutional arbitration. It is suitable for use with for all types of claims, large or small. Bigger corporations may prefer ad hoc arbitration as they often have large and sophisticated in-house legal departments and have accrued experience in managing arbitration proceedings. Ad hoc arbitration may be designed according to the requirements of the parties, particularly where the stakes are large or where a state or government agency is involved. The parties are in a position to devise a procedure fair and suitable to both sides by adopting or adapting to suitable arbitration rules.

Control of the process

Parties are in control of the process. They can write their own rules, set their own timelines and move the arbitration along their own pace. The arbitral tribunal and to a lesser extent the parties have to shoulder the burden of organising and administering the arbitration proceedings.

Agreed procedures

The effectiveness of ad hoc arbitration depends upon the parties' willingness to agree upon procedures at the time when they are already in dispute. If the parties do not cooperate in facilitating the arbitration, there could be loss of time in resolving the issues. There may be repeated recourse to the courts to determine contested interlocutory issues which may delay the arbitration proceedings.⁸

⁸ Arkin, H L, "International Ad Hoc Arbitration: A Practical Alternative", International Business Lawyer, (January 1987)

Flexibility

Ad hoc arbitration is flexible in allowing the parties to cooperate and decide upon the dispute resolution procedure. It is only natural that once a dispute arises, parties tend to disagree even on the most basic of things. For example, parties of different nationalities and jurisdiction may misunderstand each other. They may find it difficult to agree and cooperate, which can delay the arbitration and frustrate the resolution of the dispute.

Ready-made arbitration rules

Parties can avoid such disagreement and avoid delays if they agree to conduct the arbitration under for example, UNCITRAL selected arbitration rules. The result is less time and legal expense spent in determining complex arbitration rules to be used in the arbitration.

Sovereignty issues

State parties may prefer ad hoc arbitration if they are concerned that a submission to institutional arbitration devalues their sovereignty particularly when the disputes involve public interest and large sums of public monies. They would want the flexibility to define issues quickly and also adopt acceptable procedures; for example; they may wish to file simultaneous pleadings as neither party would want to be a respondent as they both believe they have justifiable claims against each other.

Cost-effectiveness

Ad hoc arbitration is less expensive than institutional arbitration. The parties only pay fees of the arbitral tribunal, lawyers or representatives, and the costs incurred for conducting the arbitration, i.e. expenses of the venue charges, etc. They do not have to pay the arbitration institution's administration fees which, if the amount in dispute is considerable, can be prohibitively expensive. The parties also have the flexibility of holding the hearings at any venue. Normally, an institutional arbitration will be held in the institution premises.

Remuneration of arbitral tribunal

In ad hoc arbitrations, the parties will have to agree the scale of remuneration with the arbitral panel and agree fees directly with the arbitral tribunal who will have to collect the money directly from the parties. Although most arbitrators are detached in dealing with these matters, there will inevitably be some degree of distraction which may lead to awkwardness

for all concerned. There is no opportunity for negotiation of the fees in institutional arbitration, which requires the parties pay arbitral tribunal fees as stipulated by the institution.

DISADVANTAGES OF AD HOC ARBITRATION

- Parties in ad hoc arbitrations normally have to rely on their own good judgment as to the identity and quality of the individual arbitrator. This may be particularly difficult, in the context of international arbitration, as a party may not be able to choose a well known arbitrator from his country due to objections of national bias and would have little, or no, knowledge of arbitrators outside his country.
- Only effective when both parties are ready to cooperate with each other as it depends for its full effectiveness upon the spirit of cooperation between the parties and their lawyers backed up an adequate legal system in the place of arbitration.
- Parties when represented by lay persons may lack the necessary knowledge and expertise to set up the arrangements to conduct an ad hoc arbitration. Such parties, especially if of different nationalities, may make misinformed decisions which may affect the arbitration proceedings.

ADVANTAGES OF INSTITUTIONAL ARBITRATION

Reputation

One of the biggest advantages of opting for institutional arbitration is the reputation of the institution. Decisions given under the name of any prestigious institution is easier to enforce as it is accepted by a majority of other bodies.

Efficient Administration

One more advantages of going for institutional arbitration is that such institutes provide trained staff to the parties for administering the whole process. The administrative staff will lay down the rules, ensure that the time limits are being complied to, and the process is going ahead as smoothly as possible.

Clear Rules

In the case of institutional arbitration, the rules of the arbitration are generally fixed by the institution. There is no further dispute between the parties regarding the rules of the procedure, which might happen in the case of ad-hoc arbitration. Also, the rules are framed keeping all eventualities in mind, as these institutions have an experience of going through various arbitration proceedings and know what eventualities may arise. Also, the rules are flexible in nature. There is a mechanism to oppose any part of the process which is not consistent.

Quality of Arbitral Panel

One of the major advantages of institutional arbitration is that they have an extensive panel of experts, who acts as arbitrators. These institutions also have arbitrators who specialize in different areas, so that any type of dispute can be resolved. Big institutions like ICC also have a network of national committee for appointment of arbitrators to ensure that there is no bias based on the country to which the parties belong.

Supervision

Apart from the administration of the arbitral process, some institute also supervises the process, i.e., examine the award or penalty sanctioned ensuring that due process of law has been followed, and proper reasoning has been given to the parties for taking that particular decision.

Remuneration of the Tribunal

In the case of institutional arbitration, the remuneration to be paid to the arbitrators is already fixed. The disputing parties do not have to haggle with the arbitrators to decide the terms and amount of remuneration. The remuneration of the arbitrators in case of institutional arbitration is based on a fixed scale. The money is paid to the arbitrators without involving them directly.

Default Procedure

Many institutional arbitrators expressly provide the rule that the proceedings will continue and not stop in between, even if one of the parties defaults in the course of the proceedings. For instance, Article 21 (2) of the ICC Rules states that if any party fails to appear for the proceeding without giving any valid excuse, even after it has been duly summoned by the institution, the Tribunal will proceed with the proceedings.

DISADVANTAGES OF INSTITUTIONAL ARBITRATION

- There may be situations where the parties need to respond to the institution or pursuant to its rules within unrealistic time frames, though the parties may be able to agree to time frames more appropriate for the situation.
- Some users tend to complain about an overly “bureaucratic” feeling to the process.
- Some institutional fees may be expensive, in particular where they reflect a percentage of the value of a significant amount in dispute.
- Inflexible as it takes away the exclusive autonomy of the parties over arbitration proceeding

WHICH FORM IS ACCEPTABLE IN PRESENT INDIAN SCENARIO

The Indian Arbitration and Conciliation Act, 1996 is the statutory adoption of the UNCITRAL Model Law for international commercial arbitration and the UNCITRAL rules of arbitration, with relevant modifications to fit into its institutional framework. India is also a party to the New York Convention (on enforcement of arbitration awards) allowing arbitral awards to be enforced by the courts in almost any country around the world. The Act provides for party autonomy, maximum judicial support of arbitration and minimal intervention.

Section 89 of Civil Procedure Code, 1908 also supports settlement of disputes outside the court through the methods of Alternate Dispute Resolutions. Among the various forms of ADR, arbitration stands out as the most favourable mode.

It is widely accepted that India prefers Ad Hoc Arbitration over Institutional Arbitration. Though various arbitral institutions have been set up in India, ad hoc arbitration continues to be the preferred mode of arbitration as in the Indian business community, people relied upon and put their faith on the ad hoc form of arbitration, and the concept of institutional arbitration is relatively new to the Indian community. The growth of institutional arbitration

mechanism is inevitable. Also, the support of the Courts to the institutional arbitration mechanism gives it a huge boost. The Arbitration and Conciliation Act, 1996 is based on the UNCITRAL Model, which provides it with a lot of stability and uniformity, and it is at par with international standards of arbitration, which will surely be very beneficial for the institutional arbitration mechanism in the long run.⁹

CONCLUDING REMARKS

International arbitration brings together parties from different countries in an organised manner to resolve disputes before an impartial arbitral tribunal. The parties have a choice between of the type of which suits their purpose and objective. Ad hoc arbitration is suitable if parties want to be masters of the arbitration whereas institutional arbitration is suitable if parties want a proper degree of supervision.

It is said that parties are the masters of arbitration. However this is questionable in institutional arbitration, where the institution effectively acquires the parties' powers to make decisions such as the appointment of arbitrators and can impose their will upon the parties. This seems against the spirit of arbitration. Although ad hoc arbitration may seem preferable in today's modern and commercially complex world, it is really only suitable for smaller claims involving less affluent parties in domestic arbitrations. In the context of international commercial disputes, institutional arbitrations may be more suitable - despite being more expensive, time consuming and rigid. The institutional process provides established and up to date arbitration rules, support, supervision and monitoring of the arbitration, review of the awards and strengthens the awards' credibility.

The particular circumstances of the parties and the nature of the dispute will ultimately determine whether institutional or ad hoc arbitration should prevail.
