BETWEEN AUTONOMY AND STRUCTURE: A COMPARATIVE ANALYSIS OF AD HOC AND INSTITUTIONAL ARBITRATION

Sarthak Mishra, School of Law, Christ (Deemed to be University), Bengaluru

ABSTRACT

With an emphasis on the Indian arbitration system, this paper compares institutional and ad hoc arbitration. It examines the development of ad hoc arbitration over time and assesses its continuous applicability in modern dispute settlement procedures. The lack of institutional support, enforcement issues, procedural inefficiencies, lack of precedential value, and increased judicial intervention are just a few of the structural, procedural, and practical issues with ad hoc arbitration that are identified and critically evaluated in this paper. The study delves deeper into the often-overlooked benefits of ad hoc arbitration, highlighting its ability to protect party autonomy, allow for procedural customization, make it easier to appoint arbitrators with technical expertise, and handle disputes involving State parties and public interest issues. The inherent administrative rigidity and standardization of institutional arbitration frameworks are contrasted with these benefits. With a focus on the judiciary's role, Supreme Court rulings, and the recommendations of the Justice B.N. Srikrishna Committee, the paper further examines the evolution of institutional arbitration in India through legislative reforms, judicial interpretation under the Arbitration and Conciliation Act, 1996, and significant policy initiatives. In addition to assessing the ongoing applicability of ad hoc arbitration and the necessity of regulatory action to address its shortcomings, these developments are evaluated in light of India's goal to strengthen contract enforcement, boost investor confidence, and become an arbitration-friendly jurisdiction.

INTRODUCTION

Globalisation has led towards increasing interactions between countries in trade, business, technology and many more. Because of this, legal issues are no longer limited within national borders, since arising of a dispute is an omnipresent conception, it has led to acute development of international legal fields like international trade law and international commercial arbitration[1]. These specific fields help regulating relations between states and private parties' cross borders and have now gained equal vogue in the domestic landscape. If we tend to define arbitration in simple terms, it will mean resolving a business or any type of contractual dispute without going to courts[2], where parties would submit their grievance to a non-government[3] group or individuals known as Arbitrators. Arbitral methods create a decision that must be followed by the parties involved to resolve their dispute through these methods, while also providing both parties with fair access to present their cases[4].

Arbitration mechanism constitutes a part of ADR which means Alternative Dispute Resolution where parties to the dispute instead of going to courts resolves disputes amicably among themselves with the help of a third party. The rise of ADR mechanisms is significant, it's because in an ADR set up disputes are resolved in a seasonable manner with a greater degree of finality, avoiding protracted litigation[5]. The process takes place in a flexible and cooperative environment that prioritises the preferences, convenience, and mutual interests of the parties involved. This party-centric approach, along with speed and certainty of outcomes, makes ADR mechanisms more reliable and effective for resolution of disputes in the recent times.

High levels of confidentiality are a defining characteristic of Alternative Dispute Resolution (ADR) methods because most ADR proceedings occur in private settings and do not allow access to non-parties. Furthermore, ADR is less expensive than traditional litigation because it typically has less strict formal rules governing proceedings, fewer procedural delays, and the absence of the judicial system's time-intensive nature allows for the quickest and thus least

[1] Wuraola O. Durosaro, *The Role of Arbitration in International Commercial Disputes*, 1 Int'l J. Human. Soc. Sci. & Educ. 3 (2014).
[2] The Legal School. (n.d.). *Ad Hoc Arbitration: Meaning, Framework, Advantages & Differences*. Retrieved January 13, 2026, from https://thelegalschool.in/blog/ad-hoc-arbitration.
[3] Mohammad Ali Hasan & Mohammad Inzamul Haque, *'Choosing Institutional Arbitration over Ad-Hoc Method: A Critical Analysis'* (2021) 4 Int'l JL Mgmt & Human 1384.
[4] Gary B. Born, *International Arbitration: Law and Practice* 33 (Wolters Kluwer 2012).
[5] Law Commission of India, Report No. 222 Need for Justice Dispensation Through A.D.R., ¶ 1.32-1.45 (2009).

costly resolution for the parties involved[6].

With specific reference to arbitration as a mechanism for dispute resolution, it is broadly conducted in two forms: first, non-institutional or ad hoc arbitration, and second, institutional arbitration[7]. Starting with the latter, Institutional arbitration refers to a form of arbitration in which the proceedings are administered by an established arbitral institution, whose prescribed rules and regulations govern the conduct of the entire arbitral process[8], Internation Chamber of Commerce in Paris(ICC), Singapore International Arbitration Centre(SIAC), London Court of International Arbitration etc are some examples of Institutions that administers the arbitration process. Coming to the Ad Hoc Arbitration set up, there is absence of such Institutional establishment that would govern the arbitration process. Parties to the dispute in an Ad Hoc Arbitration enjoys replete autonomy over the arbitration process without the involvement of any Institution[9]. To understand the legal recognition and definition of ad hoc arbitration, it is useful to look at international treaties that are applicable to arbitration. For example, Article 2 of the New York Convention does not require arbitration agreements to be submitted to an institution[10]. Therefore, it also includes all forms of arbitral procedures, including those conducted on an ad hoc basis. Article 8 of the UNCITRAL Model Law affirms the enforceability of arbitration agreements by requiring courts to refer parties to arbitration[11], regardless of the type of arbitration procedure followed. Both Article 2 of the New York Convention and Article 8 of the UNCITRAL Model Law support the legal recognition of the existence of ad hoc arbitration without requiring the establishment of a permanent arbitral institution. And a collective definition could be seen in Article 2(a) of the UNCINTARL Model which states as "*"arbitration" means any arbitration whether or not administered by a permanent arbitral institution"* which rules for administration of an arbitration process in a presence of an Institution or in absence of such an Institution per se[12]. In this paper we would critically examine both methods of arbitration, how Institutional arbitration is getting

[6] Gianna Totaro, *Avoid Courts at All Costs*, **Austl. Fin. Rev.** (Nov. 14, 2008), https://www.afr.com/companies/professional-services/avoiding-court-at-all-costs-20081114-j8es2
[7] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008).
[8] *Id* at pg. no 1
[9] Edlira Aliaj, '*Dispute resolution through ad hoc and institutional arbitration'* [2016] 2(2) Academic Journal of Business, Administration, Law and Social Sciences 242.
[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, June 10, 1958, 330 U.N.T.S. 3.
[11] UNCITRAL Model Law on International Commercial Arbitration art. 8, U.N. Doc. A/40/17, annex I (1985), amended by U.N. Doc. A/61/17, annex I (2006).
[12] UNCITRAL Model Law on International Commercial Arbitration art. 2(a), U.N. Doc. A/40/17, annex I (1985), amended by U.N. Doc. A/61/17, annex I (2006).

normative significance, the waning significance of Ad Hoc arbitration and its overlooked edges and hyper focus on the development of Institutional Arbitration. This article would canvass upon how Ad Hoc Arbitration's relevance is constantly critiqued by scholars and eminent legal luminaries, and emphasis towards institutionalisation of the entire arbitration process is becoming a moot goal in the Indian legal scenario. Before undertaking a comparative analysis, it is necessary to briefly examine the historical edifice of ad hoc arbitration.

HISTORICAL FOUNDATIONS OF AD HOC ARBITARION

This method of dispute resolution finds its origins in early Greek and Roman jurisprudence, where arbitration was referred to as 'Diaiteia' in Greek legal nomenclature and as 'Arbitrium' under ancient Roman law. One of the early examples of Ad hoc arbitration was observed in 1619 with the two companies, the English and Dutch East India, settling their dispute regarding which company shall have the right to trade in the East India. As neither trading company had a permanent arbitration institution, the companies agreed to have one arbitrator each from their respective countries. The arbitrators ruled in Favor of the Dutch East India Company, demonstrating the trustworthiness of party appointed adjudicators in early stages of commercial disputes. A similar case of the United States and Great Britain in 1794 on the compensation of the American ships taken by British troops during the American Revolutionary War shows the same propensity for using ad hoc arbitration as an alternative to resolving complicated international and commercial disputes until a permanent means of arbitrating is established[13]. During the greater part of an extended time, ad hoc arbitration was a very popular way of resolving disputes, but it gradually became less significant in the last half of the 20th century with the creation and development of permanent arbitration organizations like the International Chamber of Commerce and the London Court of International Arbitration[14]. With the creation of these organizations came established procedures for conducting cases, support for administering the cases, and standard rules to follow. This led to a gradual increase in party preference for using institutional arbitration to resolve their disputes as opposed to ad hoc arbitration. The growing confidence in institutional mechanisms led to a more organised and regulated approach to international commercial dispute resolution.

[13] Rebecca Sara Verghese, *Ad Hoc Arbitration in India: A Comprehensive Study with Emphasis on Company Law*, 9 Int'l J. Novel Rsch. & Dev. 424 (2024).
[14] 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**.**

Ad hoc arbitration has an extensive history of supporting the development of arbitration as a method of resolving disputes, yet there are some definite challenges regarding the Procedures and the Structures associated with this process that require attention. To fully understand when ad hoc arbitration may not be successful will require a thorough analysis of these processes. Accordingly, a good way to achieve that understanding is through a comparative analysis of the Institutional Model vs. Ad Hoc Arbitration. Through that comparison, we can determine which method is best suited for resolving specific dispute types and ultimately conclude if ad hoc arbitration remains a viable option for modern-day Dispute Resolution Moving Forward.

SYSTEMATIC IMPEDIMENTS TO THE EFFECTTIVENESS OF AD HOC ARBITARTION

A closer examination of ad hoc arbitration reveals the presence of certain inherent challenges; this firstly would include a lack of institutional support, one of the principal challenges associated with ad hoc arbitration is the absence of institutional support. Now many scholars argue that in the lack of an administering authority, the arbitral process may become comparatively less structured and organised, particularly with respect to procedural management and coordination. This absence of formal oversight affects the efficiency and consistency of the dispute resolution process, especially in complex matters requiring systematic administration[15].This also triggers the problem of challenge of securing arbitrators with all the necessary expertise in the respective area of law[16]. In cases involving disputes between parties from different countries (cross-border disputes), ad hoc arbitration could encounter even greater challenges than those involved with domestic arbitration, especially with respect to appointing arbitrators. Since ad hoc arbitration lacks an organizational framework, the parties must shoulder all responsibility for obtaining qualified, independent arbitrators; therefore, the potential for significant delays and deadlocks during an ad hoc arbitration segment exists. Additionally, many of the administrative aspects of the arbitration process cannot be performed without an established institution that typically aids with case-management, procedural-support, or logistical coordination for any type of arbitration process. These challenges could however be tackled with by careful consideration of specific needs of the parties.

[15] *Id* at pg. no 1
[16] *Id* at pg. no 3

Enforcement of arbitral awards is another challenge faced by those who choose to use an ad hoc arbitration process[17]. The absence of institutional guidelines and protocols makes it much more difficult to enforce an award from an ad hoc arbitration proceeding as compared to an award from a standardised, institutionalised process. In addition, when a party to an Arbitration Agreement (AA) chooses to arbitrate their disputes through an institutionalised process, it gives greater credence to the procedures followed and makes them easier to enforce in a domestic jurisdiction. One disadvantage of ad hoc arbitration is that it does not create a precedent or guiding jurisprudence for future disputes[18]. Because all proceedings are separate from one another and do not have a clear connection to any one institution (i.e., they lack the continuity of an institution), the decisions rendered in these cases are rarely collected and published for use as source material. In contrast, the institutional nature of institutional arbitration provides a more coherent structure that allows for the development of consistency in the practice of arbitration. Thus, the possibility of discrepancies in the outcome of cases with similar circumstances being rendered by different arbitral institutions is significantly decreased when arbitration is rendered through an institutional framework.

Another challenge is a lack of co-operation faced by parties participating in ad hoc arbitration. The successful completion of ad hoc proceedings is reliant upon the mutual willingness of parties to comply with the procedures they have previously agreed upon. In cases where this co-operative environment is not provided, it is common for parties to turn to courts for assistance at different points during an arbitration proceeding[19]. As a result of a court's involvement, an increase in delays, court-related expenses, and ultimately undermining of the objective of ad hoc arbitration all occur. As a result, substantial recourse to the courts eliminates ad hoc arbitration's intended objectives to be cost effective and efficient. The appointment of arbitrators in ad hoc arbitration is based more on the parties' consent and mutual trust than the professional qualifications of the arbitrators, and it is no different than an appointed arbitrator's expertise regarding the subject matter. Therefore, a lack of cooperation between the parties may result in the inefficient use of time, will cause even more inefficiencies in the arbitration procedures, and adversely affect the quality of the decision rendered. Further, the parties have full authority to determine the procedural rules and the logistics of the arbitration, which

[17] Michael McIlwrath & John Savage, *International Arbitration and Mediation: A Practical Guide* 63 (Kluwer Law Int'l 2010).
[18] *Id* at pg.no 3
[19] Shikha Sharma Jaipuriar, *Ad Hoc to Institutional Arbitration: A Paradigm Shift in the Arbitration Law in India*, **Manupatra** (July 1, 2021), https://articles.manupatra.com/article-details/Ad-hoc-to-Institutional-Arbitration-A-Paradigm-Shift-in-the-Arbitration-Law-in-India

requires a significant amount of technical and legal expertise[20]. Additionally, it takes a lot of time and resources to develop the procedures and logistics of the arbitration, which further decreases the practical efficiency of the ad hoc arbitration process. And a similar problem associated with this process is the 'Duality Syndrome' as addressed by Retd Justice Hemant Gupta in his Article "An edge of Institution over Ad Hoc Arbitration" where parties bring the case before the court and court appoints arbitrator under section 11(6) of the Arbitration and Conciliation Act 1996[21], since the arbitrators appointed by court also counts as Ad Hoc Arbitration[22] . This practise is still very common in India specially in cases where there is no such mentioning of an arbitration submission in the Agreement between parties. In such cases where arbitrator is appointed by the court, session is based on a seat-by-seat basis without any guidelines. Counsels seek regular adjournments and thus this entire process becomes like a court proceeding which simply negates the entire purpose of Arbitration as a whole. This stands as one the most prominent critiques of Ad Hoc Arbitration.

THE NEGLECTED CONTOURS OF AD HOC ARBITRATION

Having examined the various challenges inherent in ad hoc arbitration, the discussion now turns to an analysis of its overlooked dimensions and nuanced advantages. One of the most ignored edges is that it enables the parties to choose how they resolve their dispute, especially about commercial law disputes which tend to involve some of the most highly regulated and technical areas of practice[23]. When two or more individuals have a commercial law related disagreement, they can choose to use an arbitrator who has expertise in the relevant field. The parties may also create the rules of procedure (such as how documents will be presented) as well as the place the arbitration will take place and whether it will be conducted in English (or any other language) by selecting the arbitrator. When the parties take advantage of this opportunity to create a tailored process to fit their unique situation[24], they will be able to achieve a solution that is acceptable to both in a timely manner[25]. Further benefit that it adds up is that it is more confidential that Institutional Arbitration[26] which is a very subtle need in company law disputes specially in matters involving section 241 and 242 of the Companies

[20] *ibid*
[21] Arbitration and Conciliation Act, No. 26 of 1996, § 11(6) (India).
[22] 2024 SCC OnLine Blog Exp 28
[23] *Id* at pg.no 4
[24] Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration* 73 (Routledge 2016).
[25] A. Kohli, *Ad Hoc Arbitration in India: A Practitioners' Guide* (LexisNexis 2017).
[26] *Id* at pg. no 5

Act 2013[27].

One valuable benefit of Ad Hoc arbitration is to resolve conflicts between State Parties and, consequently, help to ensure the accountability of these Parties using a more flexible method than conventional arbitration. In general, the reluctance of governments or public institutions to agree to resolve a conflict through Institutional Arbitral Agreements can be largely attributed to concerns about losing their sovereign rights during an arbitration process that involves a significant amount of public funds or affects the public's well-being[28]. To the contrary, Ad Hoc arbitration preserves greater sovereign authority because a State retains sufficient authority to appoint the arbitral tribunal and will therefore have a greater influence over how the arbitration process will be conducted. The flexibility offered through Ad Hoc arbitration allows for more expedient resolutions of public disputes while providing stronger assurances that public accountability and perceptions of external or institutional (intimidation) influence will be minimal. Therefore, Ad Hoc arbitration is generally preferred as a method of adjudication within a range of sensitive Public Law — Commercial intersections.

The benefits that are described in this paper are a result of ad hoc arbitration and simply cannot be duplicated by any other type of arbitration that is part of an already established institutional system. In an institutionally based arbitration system, the arbitration takes place under pre-determined rules and regulations set up by the institution; therefore, this limits how much control the parties have over the entire process. Although institutional systems provide predictability and an efficient method of administering disputes through standard rules for everyone to follow, they do not allow any real opportunity for the parties to adjust to their unique needs regarding how the process is conducted, including appointment of arbitrators or procedures utilized in arbitrations. On the other hand, ad hoc arbitration can provide these unique benefits and therefore will provide the greatest amount of flexibility to the parties involved when designing how to resolve their disputes. Thus, an institutional arbitration system would not be able to provide the level of customisation and sovereign discretion to the parties involved that are unique to ad hoc arbitration.

Considering this, it is crucial to assess the status of institutional arbitration's development, especially in countries looking to establish themselves as arbitration-friendly locations. The development of institutional arbitration is indicative of a larger policy-driven endeavor to

[27] *Id* at pg.no 4
[28] Sundra Rajoo, *Institutional and Ad Hoc Arbitrations: Advantages and Disadvantages*, Law Rev. 547 (2010).

improve arbitral mechanisms' effectiveness, legitimacy, and international trust. An evaluation of this trajectory lays the groundwork for a more thorough investigation into whether institutional frameworks have developed enough to meet the real-world needs of contemporary commercial and public-sector disputes. It also offers crucial context for comprehending the relative advantages and disadvantages of institutional arbitration in comparison to ad hoc procedures.

INDIA'S ARBITARTION REGIME: PROGRESS AND PROSPECTS

The fundamental tenet of any arbitration agreement is party autonomy, which supports the consensual character of the arbitral procedure. Due to a strong predilection for party-driven conflict resolution procedures, arbitration practice in India remained essentially synonymous with ad hoc arbitration for a substantial amount of time. However, major reforms have been implemented over the past ten years to strengthen the institutional arbitration environment, acknowledging the structural constraints of an ad hoc-dominated structure and the need to harmonize with global arbitration standards. To make Indian arbitral institutions competitive with their international equivalents, these reforms are intended to improve procedural efficiency, credibility, and consistency[29]. India aims to increase its reputation as an arbitration-friendly country and draw in international investment by promoting institutional arbitration[30].

In the past, when there was no arbitration agreement between the parties, the Indian arbitration system allowed judicial participation in the selection of arbitrators. A court-centric approach to arbitral proceedings was reflected in the Arbitration Act, 1940, which allowed parties to petition civil courts for the appointment of arbitrators. Even though the Arbitration and Conciliation Act, 1996 was primarily based on the UNCITRAL Model Law, a similar process was initially kept in place. The Chief Justice of the High Court and the Chief Justice of the Supreme Court were initially granted the authority to select arbitrators in domestic disputes and international commercial arbitration, respectively, under Section 11[31] of the 1996 Act. But in accordance with the 2015 amendment, this authority was reorganized, replacing the Chief Justice of the Supreme Court with the Supreme Court and the Chief Justice of the High Court

[29] Amitabh Kant, 'View: Effective arbitration process can make India a sought after business destination', The Economic Times (New Delhi, 24 July 2019) https://economictimes.indiatimes.com/news/economy/policy/view how-proper-arbitration-mechanism-can-make-india-a-sought-after business-destination/articleshow/70368747.cms .

[30] *Id* at pg,no 6

[31] Arbitration and Conciliation Act, No. 26 of 1996, § 11 (India).

with the High Court itself. This marked a change in the arbitral appointment process toward institutional and judicial formalization[32].

Through significant rulings, the Supreme Court has established the basis of judicial authority in the selection of arbitrators under Section 11 of the Arbitration and Conciliation Act, 1996. In *Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd*[33]., the Court determined that the Chief Justice's or his designates authority was administrative in character because it was restricted to aiding in the arbitral tribunal's formation. But in *SBP & Co. v. Patel Engineering Ltd*[34]., the Court clearly declared that the authority under Section 11 is judicial, overturning this viewpoint. The Court acknowledged that this authority involves deciding preliminary matters, such as whether an arbitration agreement is legitimate, therefore the final order is a judicial ruling.

Moving further to the last decade the High-Level Committee on the Institutionalization of Arbitration Mechanism in India, led by Justice B.N. Srikrishna[35], found structural flaws that hindered the development of institutional arbitration, such as the absence of reliable arbitral institutions, a lack of professional capacity, poor infrastructure, and widespread misconceptions that favoured ad hoc arbitration. To strengthen institutional arbitration, the Committee recommended a comprehensive reform agenda that included the establishment of a central regulatory body, arbitrators' training and accreditation, model procedural rules for ad hoc arbitration, and increased court support for institutional mechanisms. In response to these suggestions, the government implemented legislative and policy changes, most notably the creation of the New Delhi International Arbitration Center and modifications to the Arbitration and Conciliation Act, indicating a determined effort to move India toward a strong, institution-driven arbitration ecosystem in line with global best practices.

As was previously mentioned, India is currently at a pivotal point in the evolution of institutional arbitration. In his speech during the 6th ICC India Arbitration Day, which took place in New Delhi on December 2, 2023, the Vice President of India reiterated and supported the Chief Justice of India's earlier statements from the New Delhi Arbitration Week. The Vice President emphasized that institutional methods offer a more reliable and organized framework for resolving disputes, highlighting the structural superiority of institutional arbitration over ad

[32] *Id* at pg.no 6.
[33] (2002) 2 SCC 388
[34] (2005) 8 SCC 618
[35] 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

hoc arbitration. To guarantee effectiveness, consistency, and credibility in arbitral procedures, he emphasized the critical necessity to fortify institutional capacities. He outlined India's larger goal to become a global centre for international arbitration by promoting efficient and trustworthy dispute settlement procedures, emphasizing the significance of giving institutional arbitration top priority[36]. India's overall business environment has significantly improved, according to empirical data[37], as shown by the country's notable gain in international rankings. India is now ranked 63rd out of 190 nations overall, but its performance on the metric of "enforcing contracts" is still rather poor, at 163. The "enforcing contracts" indication, which is based on factors including the time and expense needed to settle business disputes as well as the calibre of legal procedures for both men and women, is a crucial standard for evaluating how easy it is to conduct business within a jurisdiction. While India's reform-oriented approach and improving regulatory framework are highlighted by the overall upward movement, systemic challenges in dispute resolution are highlighted by the consistently low ranking in contract enforcement, underscoring the need for effective alternatives like arbitration to bolster legal certainty and commercial confidence.

CONCLUSION

In conclusion, it is critical to acknowledge that ad hoc arbitration continues to play a crucial and indispensable role within the dispute resolution landscape, even though the modern Indian arbitration regime has rightfully placed increased emphasis on the development and strengthening of institutional arbitration to enhance efficiency, credibility, and international confidence. Ad hoc arbitration's flexibility, party autonomy, technical customization, and sovereign sensitivity make it especially useful in some types of disputes that institutional frameworks might not be able to sufficiently handle. Instead of marginalizing ad hoc arbitration, a balanced strategy is needed, one that both advances institutional arbitration and addresses the structural issues related to ad hoc processes through judicial constraint, procedural guidance, and targeted regulatory support. India will be able to leverage the advantages of both models with the help of such a calibrated framework, creating a strong, inclusive, and arbitration-friendly ecosystem that is in line with international best practices.

[36] *Id* at pg.no 6.

[37] World Bank, 'Doing Business: Measuring Business Regulations Enforcing Contracts' (2020) https://www.doingbusiness.org/en/data/exploretopics/enforcing contracts