MCIA : India is ready?

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International arbitration remains the preferred model of dispute resolution of multinational firms to resolve their disputes. There are several factors that cumulate to develop a country into a desired place for international arbitration. A pro-arbitration judicial attitude, a supportive Arbitration Act, a pool of highly qualified arbitrators, a strong arbitral institution and cost and time efficient procedural rules are the primary considerations in that regard. Historically, the landscape of international arbitration in India has suffered owing to the ambivalent judicial attitude towards arbitration and the preference given to ad-hoc arbitration. However, the recent changes in the legal framework and the judicial support has triggered a pro-arbitration culture in the country. With the establishment of the Mumbai Centre for International Arbitration (MCIA) in 2016, the best international arbitral practices have been incorporated to allow Indian and foreign parties to conduct arbitration in India.

Limitations to India's bid to be a global hub for international

Despite the considerable number of commercial disputes in India, the country has so far not succeeded in establishing the venue as an attractive spot for international arbitration. A substantial number of cases administered by SIAC and LCIA involve Indian parties. India has been affected by factors like excessive delay in completion of proceedings, emphasis on ad-hoc arbitration, excessive judicial intervention and absence of an independent arbitration council, making it an unfavourable place of arbitration. The subjectivity and uncertainty around public policy appeals has led to scepticism around enforcement of domestic and international awards. Recent changes in the arbitration framework which are discussed in this post aim at addressing these concerns.

Establishing a pro-arbitration legislation and jurisprudence in India

In 1996, India made its first move towards establishing a pro-arbitration culture with the enactment of the Arbitration and Conciliation Act 1996. The Act aimed at promoting cost effectiveness and expediency in arbitral proceedings. The intention of the legislation to act as a catalyst for promotion of international arbitration was manifested in the form of Part II of the Act that was applicable to arbitrations conducted outside India. However, the Act was a casualty to factitious legal proceedings and frivolous objections that rendered the cost effective intention of the legislators futile. The

246th Law Commission Report (2015) by the Law Commission of India sought to update the Arbitration Act 1996 in line with the best international practices and recommended certain changes. These recommendations were incorporated by the Indian Legislators in the form of the Arbitration and Conciliation (Amendment) Act 2015. The desire to align arbitral practice in India with the best international institutional practices has further taken shape in the Arbitration and Conciliation (Amendment) Bill 2019. The bill stems from the recommendations of a High Level Committee under the chairmanship of Justice (Retd.) B.N. Srikrishna. It seeks to divert arbitral practice that has been traditionally been aligned towards ad-hoc arbitrations towards institutionalised arbitrations. The Bill focuses on the creation of an Independent Arbitration Council of India (ACI). The ACI will be an independent body and consist of a Chairperson who is either: (i) a Judge of the Supreme Court of India; or (ii) a Judge of a High Court; or (iii) Chief Justice of a High Court; or (iv) an eminent person with expert knowledge in conduct of arbitration. The other members of ACI will include an eminent arbitration practitioner, an academician with experience in arbitration, and government appointees. The amendment enables the ACI to grade and accredit arbitral institutions. Institutions recognised by the ACI shall be empowered to appoint arbitrators, a change that would relieve the parties from approaching the courts in that regard. While the creation of the ACI is a much needed change, government involvement in the same can raise bias concerns in disputes involving the State. Another important change is the insertion of Article 42A that requires the arbitral institutions and arbitrators to maintain confidentiality of all the proceedings except the award. The amendment bill seeks to exclude international arbitration from the 12 month time-frame of completion of arbitral proceedings. The change has been brought to address the problems faced to conclude complex commercial matters within the stipulated time frame. Respecting arbitral discretion with respect to time restrictions is a better way forward.

The recent efforts of the legislators to enable a strong arbitration culture has been backed by the judiciary with pro-arbitration judgements. Recently, the Delhi High Court dismissed two challenges of arbitral awards and stressed its disinclination to interfere in cases wherein the tribunal has taken a plausible view. In 2017, while dealing with an international arbitration case between Sun Pharmaceuticals Industries Ltd. and Nigeria-based Falma Organics Ltd, the Indian Supreme Court assigned the appointment of arbitrators to MCIA. This order of the Apex Court was a pivotal step in promoting institutional arbitration in India and has laid down the basis for the appointment of arbitrators by institutions.

MCIA : Bringing the best international practices to India

Arbitral institutions such as LCIA, ICC, SIAC, SCC, among others, have established themselves as likely institutions for corporations to resolve their disputes. The success of an arbitral institution is contingent on various factors, most importantly, the procedural rules that come with its selection. Parties expect the institutional rules to be comprehensive, expedient and efficient. Existing arbitral institutions in India did not align with the best international practices. As an attempt to address this lacuna, MCIA was launched in 2016 and has been labeled as India's attempt to create a global hub for international arbitration. An expert committee comprising eminent arbitration specialists from around the world have drafted the MCIA rules. The rules have been drafted in consistency with the best international practices and is an important step to provide greater certainty to investors in India. MCIA Rules 2016 has incorporated provisions from other established arbitral rules such as expedition, consolidation, appointment of arbitrators, scrutiny of award and emergency arbitrators. The fee structure adopted by the MCIA is certainly attractive and the costs framework in similar to most established institutions.

With the infrastructure and institutional rules in place, if MCIA can ensure the following, it has good chances to develop into one of the foremost arbitral institutions in the world.

1. *Demonstrate a good track record*

Credibility of an arbitral institution is established over time and with consistency. With only three years into its existence, MCIA must showcase a good track record of producing high quality decisions wherein, there is unrestricted enforcement by the Indian Courts. MCIA must ensure proper scrutiny of arbitral awards before its release to the parties.

2. *Addressing loopholes that are bound to arise*

Flexibility is a hallmark of an arbitral institution and stringent proceedings must not hinder optimum participation of parties in the arbitral proceedings. MCIA must have a constant review mechanism wherein the MCIA council ensures that the rules are up to date and address any problem that arises in due time. Certain absent provisions such as third party funding and preliminary dismissal of arbitrations due to lack of merit or jurisdiction must be addressed by the MCIA council.

3. MCIA council must ensure efficiency in appointing arbitrators

MCIA doesn't maintain a panel of arbitrators and the MCIA council choose arbitrators who are best suited for a particular case based on, among other things, the nature and circumstances of the dispute, the requirements set out in the arbitration agreement and the relevant expertise of the arbitrators. In order to avoid challenges against the arbitrators and ensure efficiency of the proceeding, the arbitrators must be appointed carefully.

4. Build a strong network through events and programmes

International arbitration is an evolving subject and there are several opportunities and challenges that bring scholars and students to discussion forums. Like other established arbitral institutions, MCIA should aim at organising global events and attract global attention through workshops, seminars, moot court competitions, internship programmes, etc. Young MCIA, as an organisation similar to YIAG or other below 40 organisations must invite young practitioners from all around the world to partake in its activities. Such initiatives are instrumental in building a good global image for the institution.

Conclusion

The international perception of MCIA will be closely linked to that of India and the creation of a strong arbitration culture in India is a major factor in MCIA's success. India is motivated to climb further in the global ease of doing business index and that has manifested in the form of several pro-arbitration actions of the legislative and judiciary. In 2019, the Delhi International Arbitration Centre (DIAC) Ordinance was promulgated to establish an autonomous institution for better management of arbitration in India. As the tide is in favour of arbitration, it is the perfect time for domestic and foreign parties to choose MCIA as their preferred institution. The rise of new institutions like MCIA and DIAC, will increase the competition between global arbitral institutions thereby incentivising them to improve the quality of their service.