Appointment Of Arbitrators In India – Finally Courts Divest Some Power

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Ayushi Singhal (West Bengal National University of Juridical Sciences)

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As on May 1, 2017, 60751 cases were pending in the Indian Supreme Court. Likewise, as per the data available, a total of 41,53,957 cases are pending in the twenty-four High Courts in India. The rate at which these cases are disposed, for various reasons like the vacancies for the position of judges, inefficient procedures, etc., nowhere matches with the pendency. Unlike many countries in the world, in addition to the judicial function of decision-making, the Chief Justice of India (Supreme Court), and the Chief Justices of the various High Courts (collectively 'Chief Justices') are also vested with the performance of administrative functions. These functions include maintenance of roster, allocation of matters to other judges, etc.

Along with these functions, so far as arbitration is concerned, before the 2015 Amendment to the Indian Arbitration and Conciliation Act, 1996, the Chief Justices, where the parties failed to do so, were also required to appoint arbitrators in pursuance of an arbitration agreement for arbitrations seated in India.

Also, this power of appointment of arbitrators on the failure of parties to do so, was characterized as a judicial power, instead of an administrative power, which meant that the scope and nature of this judicial intervention in an arbitration, was broader than it would otherwise be. In other words, the Chief Justices while appointing arbitrators could hold a detailed trial and hear detailed arguments concerning whether the arbitration agreement exists or not (as opposed to making a prima facie determination, and leaving the final determination for the arbitrator). [See, *SBP v Patel Engineering*, (2005) 8 SCC 618; *National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267]

This naturally led to delays in the appointment of arbitrators, sometimes the Section 11 [the concerned provision in the Arbitration Act for the appointment of arbitrators] applications being pending for years, consequently resulting in delay in the making of arbitral awards as well. Even when speedy disposal of the disputes indeed might have been one of the reasons why parties might have opted for arbitration over litigation at the first place.

In this background, the Law Commission of India in its 246th Report recommended that the appointment of arbitrators be made instead by the High Court or the Supreme Court, such power being administrative in nature, and thus delegable to an arbitral institution. The possibility of such a delegation was made explicit in the amended Section 11. Section 11 provides, *inter alia*, "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court" can appoint the arbitrator(s) when a party(s) fails to do so, with the stated purpose of the amendment being to "provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialized, external persons or institutions". The amendment also prescribed a time limit of sixty days from the date of service of notice on the opposite party, within which the court should endeavor to dispose of the application requesting appointment of arbitrators.

The UNCITRAL Model Law also does not disallow for such a possibility, as is evident from a combined reading of Articles 6 and 11, which suggests that any suitable authority as prescribed by the legislature, not necessarily courts, can appoint arbitrators.

Yet, neither the Supreme Court nor any of the High Courts have yet designated an institution/expert to make appointments. Until now, this power was not even exercised on an ad hoc basis. However recently in Arbitration Case no. 33 of 2014, the Supreme Court of India, has by order dated May 3, 2017, directed the Mumbai Centre for International Arbitration (MCIA) to appoint an arbitrator, in an international commercial dispute between Sun Pharmaceutical Industries Ltd., Mumbai and M/s Falma Organics Limited Nigeria. This is the first instance where the Supreme Court has made use of the power under Section 11, and this is indeed a pro-arbitration development in India. It is hoped that this process is systemized whereby the parties can approach designated arbitral institutions directly for such purpose, instead of the court acting as an intermediary for every such appointment.

Indeed this function can be systemized by assigning it to a central arbitral institution like the ICADR (International Centre for Alternative Dispute Resolution), after creating the necessary infrastructure, which would in turn also help in popularizing the Institution, which presently hardly deals with any cases in comparison with its competitors. Regional institutions like the MCIA in Mumbai or the Nani Palkhivala Arbitration Centre (NPAC) in Chennai, etc. can also be designated, depending upon the seat of arbitration, which would also promote institutionalized arbitration in India.

This is also along the lines of how the appointment of arbitrators takes place in Singapore [thanks to Jeet Shroff for making me notice this]. Not only will such delegation leave space for the judiciary to adjudicate other matters, but will also speed up the process of appointment of arbitrators, by reducing one time-taking step from this process.

One issue which however remains to be clarified in this regard is the appealability of the decision of the Court or such arbitral institution, where it decides that the arbitrator should not be appointed. Section 37 of the Arbitration Act, which lists appealable orders does not mention this order, despite recommendation to this effect by Law Commission's 246th Report (which led to the introduction of the

progressive 2015 Amendment to the Act). As against this, where the party resisting arbitration has initiated court proceedings, and the opposite party requests the court to refer the matter to arbitration and the court denies reference, the same can be appealed under Section 37 (orders passed under Section 8 are appealable). This results in an anomaly, whereby a party might be better off waiting for the matter to be referred to arbitration, than in initiating appointment of arbitration, so far as appealability is concerned, though there appears no reason for such difference. This, however, forms the subject of a separate discussion.