The New-Found Emphasis on Institutional Arbitration in India

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Arbitration in India has traditionally skewed towards an ad-hoc rather than an institutional set up. Due to a lack of adequate emphasis on institutional arbitration, Indian parties have preferred to conduct their arbitrations with a seat in Singapore and London. In fact, 153 of the 307 cases administered by the Singapore International Arbitration Centre (SIAC) in 2016 involved Indian parties. India has been plagued by factors like the lack of a credible arbitral institution, excessive judicial intervention, absence of a dedicated arbitration bar and lack of clarity on the concept of public policy, making it an unfavourable place of arbitration.

However, as arbitration continues to grow between Indian parties, policy makers and courts of law have taken note of its importance. The recent discussion about a BRICS-centric arbitration centre in New-Delhi and SIAC's tie-up with the Gujarat International Finance Tec-City shows a lot of promise towards making India a more favourable place of arbitration. In this post, we analyse two recent developments to show that institutional arbitration is now probably set to come out of the shadows into the mainstream in India, namely through the developments of new policies and those of the courts.

I. Developments through new policies: The Srikrishna Committee

In December 2016, the Indian Government constituted a High Level Committee under the chairmanship of Justice (Retd.) B.N. Srikrishna (the "Committee") with the mandate to review and reform the institutionalisation of arbitration. The Government's move was preceded by statements from key Indian policy makers on their desire to strengthen the infrastructure of institutional arbitration in India.

The Committee submitted its report on August 3, 2017 and suggested some much-needed reforms to arbitration in India. We analyse some of these key recommendations below.

• Arbitration Promotion Council of India (APCI)
The Committee recommended the creation of the APCI which would be responsible for grading arbitral institutions in India and accrediting arbitrators. APCI appears to be fashioned on the lines of institutions like the Chartered Institute of Arbitrators (CIArb). The motive behind forming the APCI is the training and accreditation of arbitrators as well as the promotion of arbitration in India. Keeping in mind the autonomous structure of institutions like the CIArb, the Committee clarified that they do not intend the APCI to be a Government-run body. It also stated that they do not consider the accreditation by the APCI to be a condition for the recognition and enforcement of awards

administered by that arbitral institution so as to prevent the monopolisation of the accreditation procedure in the hands of the APCI.

• Arbitration Bar and Bench

The Committee recommended the establishment of an arbitration bar and arbitration benches in India. The arbitration bar would comprise of arbitrators who will be trained and accredited by the APCI. The specialist arbitration benches would deal with arbitration disputes before the courts. Judges forming part of this bench would be provided with periodic refresher courses on recent developments in arbitration. This would help reforming arbitration by having lawyers and well informed judges who can promote best practices of international arbitration in India.

• Proposed Changes to the 2015 Amendment Act

The Committee noted that the 2015 amendments to the Arbitration and Conciliation Act, 1996 (the "Act") created undue hardship for its users, for instance, by the delays in the arbitration process caused by the extensive involvement of the courts. This called for a need for certain changes. The recommendations in this regard have been divided into two parts: a) amendments to correct obvious errors and ambiguities in the Act and incorporate international best practices; and b) amendments specifically aimed at promoting institutional arbitration in India. For the purpose of this post, we focus only on part b).

The Committee has sought to limit the involvement of Indian courts in the procedure of appointment of arbitrators: Drawing from the examples of the appointment mechanisms in Singapore, Hong Kong and the UK, it proposed an amendment to Section 11 of the Act. This amendment provided that the appointment of arbitrators shall only be done by arbitral institutions designated by the Supreme Court or the High Court (as opposed to arbitrators being appointed by the Chief Justice of the Supreme Court or the High Courts directly) and without the requirement for courts to determine the existence and validity of the arbitration agreement first. If undertaken, it would bring a remarkable change to the effectiveness of arbitration seated in India, which is often plagued by court related delays.

• National Litigation Policy

The term "National Litigation Policy" (NLP) was first used by the previous Government as a policy aimed at reducing government litigation. By using the same term, the Committee seems to want to promote arbitration in Government contracts to avoid expensive and time-consuming litigation before courts. The Department of Justice has already developed an action plan to reduce Government litigation. In fact, in a meeting in September 2017, the Government asked the Government departments and autonomous bodies to settle disputes through arbitration and provided a list of 13 institutions for assistance. These included, among others, the ASSOCHAM International Council of Alternate Dispute Resolution and the Bangalore International Mediation Centre.

• Declaration of the International Centre for Alternative Dispute Resolution (ICADR) as an institution of national importance

According to the Committee, this change has the potential of making the ICADR a globally competitive institution. The transformation of the ICADR is much needed. Founded in 1995, the ICADR has received only 49 cases until today. This is largely because it has not been able to market itself to prospective parties at the stage of contract formation. Once the ICADR is given the status of an institution of national importance, the Government will actively promote it and give it the backing required to ensure that at least in Government related contracts the ICADR is the arbitral institution of choice.

• Permission to foreign lawyers to represent clients in international arbitrations with seat in India

The Committee envisages allowing foreign lawyers to participate and represent clients in India seated arbitrations coupled with easing restrictions related to, amongst other things, immigration and taxation. Whilst as a matter of practice foreign lawyers are already participating in international arbitrations seated in India, providing easier access to immigration and clarity on taxation will encourage more foreign lawyers to conduct institutional arbitrations in India.

II. Developments from the Courts: Supreme Court refers the appointment of an arbitrator to the Mumbai Centre for International Arbitration (MCIA)

In July 2017, the Supreme Court of India asked the MCIA in an order to appoint an arbitrator in an international arbitration dispute between the drug maker Sun Pharmaceuticals Industries Ltd. and Nigeria-based Falma Organics Ltd. For the first time, the Court applied Section 11 of the 2015 Amendment Act designating an institution to assist with the appointment of an arbitrator. The amended Section 11 empowers the Supreme Court and the High Courts, upon request of a party, to appoint an arbitrator if a party fails to appoint one within 30 days from the receipt of a request to appoint from the other party.

This order marks a milestone towards promoting institutional arbitration in India. As already mentioned, Section 11 as currently in force, requires the court to examine the existence and validity of an arbitration agreement before appointing an arbitrator. This is highly problematic because only the Supreme Court can hear Section 11 applications concerning an international arbitration (and the High Courts concerning domestic arbitration). The immense amount of time taken by these courts to dispose of Section 11 applications along with their insufficient awareness of suitable arbitration practitioners has made the entire process highly inefficient.

This Supreme Court order promotes the pro-arbitration stance of the Indian judiciary and adds credibility to the newly established MCIA. More importantly, it sets a precedent for the High Courts and the Supreme Court to assign the appointment of arbitrators to arbitral institutions, which have greater access to a network of arbitrators and can act more swiftly without causing unnecessary delays.

Conclusion

The current performance of the arbitral institutions can be considered as a modest start. The Delhi International Arbitration Centre has successfully heard over 900 cases since its establishment in 2009 and the Bengaluru Arbitration Centre has heard 175 cases from its establishment in 2012 until September 2014, including six international arbitration matters. The MCIA, though new, has been structured on the pattern of a truly international arbitral institution. Implementing the recommendations of the Committee can be the first step towards ensuring an increase in these numbers and making India a preferred seat of international commercial arbitration. We hope that the above-mentioned changes will promote international best practices in India and make the process of institutional arbitration speedier and more reliable.