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MCIA, India's best foot forward

Girish Deepak (The National University of Advanced Legal Studies) · Friday, August 5th, 2016

The beckoning call for an Institutional Arbitration Centre for the Country with one of the highest number of commercial disputes has finally been answered with the formation of the new Mumbai Centre for Institutional Arbitration ("**MCIA"**). This move, a furtherance of the Governments recent initiative to boost investment is a natural advancement after the recent pro-arbitration Amendment in 2016. This institution is an attempt to combine and bring forth the experience of some of the best minds in Indian Arbitration (including the Managing Partners of several Major Law Firms as well as eminent jurists such as Mr. Harish Salve and Mr. Fali. S. Nariman) with help from experienced practitioners in the ICC and the SIAC.

Following its incorporation, the Institution recently released its Rules on 15th June 2016, which has already created quite a flurry amongst the practitioners both inside and outside India. While the rules are yet to be vetted through cases, with the official inauguration of the institution set for 8th October 2016, the Institution already seems to be a marked improvement from India's previous attempt in the form of the Nani Palkhivala Arbitration Centre ("**NPAC**"). The NPAC, though initially successful failed miserably due to the lack of definite rules and a strict panel of arbitrators, both situations sought to be remedied in this new Institution. The NPAC lacked several provisions which have become essential in the commercial arbitration context, such as, provisions regulating appointment of arbitrators to reduce challenges on conflict and provisions to regulate multi-contract and multi-party arbitrations through a joinder or consolidation of claims.

Indeed, the newly made MCIA Rules have brought the institution at par with most other leading institutions by incorporating only the best of the rules and borrowing from previous mistakes and experiences. With these newly formed rules, India has sought to catch up with institutional best practices by drawing inspiration from investor-state arbitration as well as other institutional rules to tailor what are fundamentally new mechanisms and applying the same to in the context of commercial arbitration.

The new rules have made arbitral procedure definitive and precise in terms of Rule 3 and Rule 4 which lay down the procedure for submission of arbitral request accompanied by a specified list of documents in Rule 3.1, which include the request for arbitration accompanied by a statement in support of the claim and proof of filing fee being submitted. This is followed by a response by the opposing party either accepting or contesting claims along with a statement in support of the Respondent's version of the claims and any counterclaims and certain additional procedural details.

The next stage of procedure includes that for appointment of arbitrators, challenges and removal of arbitrators, governed by Rule 6 to 11, which is exceedingly similar to the SIAC procedure and follows the same pattern for appointment of arbitrators as specified under Rule 9 to 17 of the SIAC Rules 2016. However, Rule 9.4 of the MCIA rules may pose a problem in smooth arbitrations as Indian parties are unfamiliar with the concept of Council appointed arbitrators and may be reticent as this procedure is in contrast to provisions of Sec. 11 of the Arbitration and Conciliation Act, 2016. This is especially so in cases of standard arbitration clauses which allow parties to nominate one arbitrator each and these arbitrators decide the presiding arbitrator, which has expressly been overruled by this rule which mandates that regardless of the agreed procedure only the MCIA Council will elect the presiding arbitrator.

One significant improvement on the previous Indian Arbitration landscape is the proposed matching of best practices by reducing all time periods relating to notices and appointments to 14 days. This will help reduce the inordinate delays, which has been India's bane since the 1996 Act was first introduced.

Consolidation Mechanism

This MCIA approach to consolidation will finally address the procedural uncertainty that has long concerned parties arbitrating in India with claims arising out of a series of transactions based on the same contract. This is a completely new concept in the Indian context and will help untie the exceedingly complex multi-party scenarios that are now a part of everyday arbitrations. The newly introduced provisions are however inadequate to address the problems arising in multi-contract and multi-party arbitrations. The rules have taken a single window view on an issue where actually a three point approach is required. The only provision under the MCIA Rules is Rule 5 which deals with the issues of consolidation of arbitrations, while joinder of parties and multi contract arbitrations are conspicuously absent.

Rule 5 requires satisfaction of only two criteria in contrast to the updated SIAC Rules, 2016 (for further on the SIAC Rules 2016 see here). The consolidation depends on (i) all parties agreeing to consolidation; and (ii) all the claims being made under the same arbitration agreement. A significantly absent provision is that relating to joinder of parties and joinder of arbitrations from multiple contracts. These provisions would have added as a supplement to the provision for consolidation and helped make multi-party arbitrations possible. The provisions as they stand would only allow for joinder of multiple arbitrations undertaken by the same parties under the same clause. This provision has an exceedingly limited scope as compared to its SIAC counterpart which allows far greater consolidation, including joinder of multiple parties as well as joinder of claims under similar cause of action, even which arise from separate contracts.

Emergency Arbitrator and Expedited Procedures

Another introduction necessitated by modern arbitration quandaries is the expedited procedure. This allows parties to apply for the expedited formation of the arbitral tribunal as well as shortened time period for deciding the dispute (6 month period), in line with the introduction of Sec. 29A in the new Arbitration Act. This request is subject to a maximum disputed amount of Rs. 10 Crore, in excess of which these provisions cannot be availed.

The provision for emergency arbitrators is an additional supplement to the power to grant interim measures. While in cases, where the tribunal is already constituted it is a simple matter to grant

interim measures if necessary, emergency arbitrators are born out of the need of parties where no tribunal has been constituted yet. The provisions of Rule 14 lay down a comprehensive procedure which includes submission of documents and a statement showcasing an urgent need as well as proof of intimation to all concerned parties. The decision on this application is rendered by the Chairman of MCIA within a single business day. If this is accepted, then the arbitrator is given the powers of a Tribunal to decide the interim measure application.

Fee Structure

The rules also lay down a comprehensive fee structure which pegs the case filing fees at Rs. 40,000/- (roughly 600 USD). In addition to this there are prescribed fees for administrative expenses which begin with fixed component of Rs. 50,000/- for arbitrations with the disputed amount less than Rs. 100,000 and consistently increase depending on the quantum at dispute. Similarly, the arbitrator's fee structure also varies with the sum in dispute, with an exception for the arbitrator's appointment fees which is fixed at Rs. 50,000/- for one arbitrator, Rs. 65,000/- for two arbitrators and Rs. 80,000/- for three arbitrators.

The MCIA also contains other procedural rules to deal with Witnesses, Evidence, Statement of Claim and Defence, Pleadings, Jurisdiction, Confidentiality, etc. which are all quite akin to the rules prevalent in major Institutional Arbitration Centres, following standard arbitral procedure. While the MCIA Rules comprehensively deal with these standard procedural issues certain provisions are conspicuously absent. These include regulation of third party funding (provided for by the HKIAC), preliminary dismissal of arbitrations due to lack of merit or jurisdiction (provided for by the SIAC). These loopholes may end up hurting the Institutions ability to adjust to cases, unless it learns its lessons quickly and amends the rules suitably time and again.

While this is only the beginning of Indian Institutional arbitration, the true tests lie ahead and the Arbitral rules must be prepared for the scrutiny of parties and counsels from all across the world as they attempt to find loopholes to avoid successful dispute resolution if they are on the side of the losing party. Thus, while this is definitely a big step forward, it is not yet a giant leap for Indian Institutional Arbitration.

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