

Will This 'Made in India' Arbitration Centre Become The Next Global Arbitration Hub?

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In South Mumbai's Nariman Point business district, a 7,000 square feet office offers hope to resolve the knotty issue of judicial pendency in India.

The Mumbai Centre for International Arbitration (MCIA) is headquartered in Express Towers, a stone's throw away from the Bombay High Court, the Mantralaya and the chambers and offices of some of the country's top lawyers.

The MCIA is a not-for-profit organisation headed by Madhukeshwar Desai, who serves as its CEO and also happens to be the National Vice President of the BJP Youth Wing. Although the institution is supported by the government in principle, Desai says it has consciously decided to maintain an arm's length distance from the government. He adds that the MCIA has received no government funding, but instead has received donations from top business houses. Bagging cases should not be tough given Indian companies' penchant for international arbitration.

The Business of Arbitration

Over the years, Indian parties have flocked to arbitration centres in Singapore, London or Hong Kong to settle commercial disputes. According to the Singapore International Arbitration Centre (SIAC), Indian parties have consistently ranked amongst the top five foreign users of the SIAC in the last five years and India was the top foreign user of SIAC in 2013 and 2015. After all, not only is Singapore a commercial hub, but the city-state also offers a neutral seat of arbitration, is a party to the globally recognised New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and has adopted the UNCITRAL Model Law on International

Commercial Arbitration.

The fact that its judicial system is famous for maximum support and minimum interference certainly doesn't hurt its case either. Singapore solved its pendency problem in the early 1990s, but instead developed alternate dispute resolution (ADR) as a means to amicably settle disputes.

However, the situation is very different in India. There are over 2 crore cases pending in courts across India. More than 40 percent of the posts for high court judges are lying vacant. According to data compiled by Bloomberg Businessweek, if all of India's judges attacked their backlog with no breaks for eating or sleeping and closed a whopping 100 cases every hour, it would still take them more than 35 years to catch up.

The other popular international arbitration destination for Indian parties is the London Court of International Arbitration (LCIA). In 2014, three percent of the LCIA's cases included an Indian party, though that figure is down to negligible in 2015.

The International Arbitration Framework in India

Arbitration can be of two types—ad hoc or institutional. In ad hoc arbitrations, parties usually decide who the arbitrator is and which set of rules are to be applied to the case. Institutional arbitrations usually entail parties opting to arbitrate under a particular arbitral institute, like say the SIAC and its rules.

India's Arbitration & Conciliation Act covers domestic arbitration, international commercial arbitration, enforcement of foreign awards and conciliation as well. Although an award passed as a result of an international commercial arbitration is binding on the parties, it can only be enforced by a court of law in India. A party can also challenge the award in court and ask for it to be set aside, but only on a limited list of grounds – for instance, if it violates Indian law.

International arbitration is often a standard clause in contracts between Indian and foreign parties. But it's an expensive one, begging the question – where should Indians go if they require an international arbitration centre that's truly 'Made in India'?

MCIA vs SIAC vs LCIA

MCIA Registrar and Secretary General, Neeti Sachdeva claims that the MCIA is a first-of-its-kind arbitral institution in India, that aims to be India's premier forum for commercial dispute resolution. She adds that its rules are based on international best practices which have been customised specifically for the Indian market. The rules have been drafted by a set of top arbitration experts from around the world and the MCIA has consulted jurists such as Fali Nariman and Justice Srikrishna during the drafting process.

Since the rules have already been published and released, the MCIA can effectively take up its first case. If any two parties, domestic or international, choose to approach the MCIA to settle a dispute, the parties can decide where the seat of arbitration is and which law should apply to the case. Sachdeva also maintains that the MCIA will be a much cheaper alternative to top arbitral institutions like the SIAC or the LCIA. To file a case at the MCIA, a party has to pay Rs.40, 000, which is non-refundable.

To do the same at the SIAC, a non-Singaporean party needs to spend over Rs 1,00,000. At the LCIA, one would

have to spend over Rs.1,50,000 for the same. It's the same story with appointment fees for arbitrators or emergency arbitrators– the MCIA is the most competitively priced of the three.

MCIA's rules, like those of any top international arbitration centre provide for precise timelines for appointment of the tribunal, an upfront schedule of fees, with a cap on the arbitrator's fees. They also include provisions on consolidation of arbitration proceedings, appointment of emergency arbitrator and for scrutiny of awards, features that both SIAC and LCIA may not have.

- The latest SIAC 2016 rules have introduced provisions on consolidation of proceedings; the LCIA has allowed for consolidation in only certain scenarios
- To ensure the soundness of an award before it is sent to the courts for enforcement– the SIAC has a provision for scrutiny of awards, the LCIA does not
- Both, the SIAC and LCIA also have specific rules relating to appointment of emergency arbitrators

While the SIAC publishes an online list of arbitrators that are available for cases around the world, the LCIA has chosen not to make such a database publicly available. Instead, once an arbitration has commenced at the LCIA and if both parties agree, then such a list will be provided to them. Interestingly the MCIA has decided against publishing such a list, since they don't want to restrict the pool of available arbitrators to a specific list, Sachdeva says. The MCIA also plans to offer training programs in the future to build a bigger pool of arbitrators.

In terms of how long an arbitration usually lasts at the SIAC and the LCIA, it is usually concluded within 12-18 months. The MCIA says it will strive to achieve similar timelines for passing of awards but it remains to be seen whether it could manage such a feat in the Indian context.

Will MCIA Succeed?

MCIA already boasts of an illustrious list of 17 Council members from India and abroad which include – Justice Rebello, Justice Nijjar, Cyril Shroff, Pallavi Shroff, David Rivkin and John Beechey, to name a few. The Council will make certain key decisions relating to the appointment of an arbitrator or emergency arbitrator, consolidation of multiple proceedings and for removal of arbitrators as well.

Vyapak Desai of Nishith Desai Associates co-chaired the MCIA's first Draft Rules Committee. He says, "Indian and international experts in the field of law and arbitration will lend tremendous credibility and confidence to the end user about the process and implement of MCIA Rules. This will certainly help the end users in adopting the MCIA Rules in their current contracts which may be providing for ad hoc arbitration and at least adopting the same in the contract entered post the MCIA Rules being effective i.e. from June 15, 2016."

Well known arbitrator and advocate Birendra Saraf says, "One of the main reasons why arbitration in India has not been that effective is that most arbitrations are conducted on an ad hoc basis with no set rules of procedure and a complete absence of any monitoring. In fact, quite a few amendments to the Arbitration Act were necessitated to meet the shortcomings of ad hoc arbitrations. Arbitration under the aegis of a well operated institution can be a game changer. It will streamline arbitrations in India, ensure expeditious disposals and also reduce costs. It can gradually reduce the outflow of arbitrations to institutions outside India. Even in challenge to awards in the Court, institutional arbitration can reduce the scope of interference on grounds of the manner of conduct of arbitration, its

procedure and breach of natural justice.”

It's noteworthy that the MCIA is not the first international arbitration centre in India. The New Delhi based Indian Council of Arbitration boasts of handling over 400 domestic and international arbitration cases, according to data on its website. On the other hand, the LCIA's India chapter shut down after 6 years due to 'insufficient adopters,' the institution said on its website. Even if the MCIA gets its location, cost competitiveness, speed and credibility right, arbitration in India is plagued by an uncommon problem – court interference. The amendments to the Arbitration Act seek to limit that, yet that's no guarantee that international arbitration in India will succeed.

Sachin Mandlik, partner at Khaitan & Co appreciates the efforts of the MCIA in setting up such an institution. However, he warns that although the institution looks good on paper it's too early to pass any judgment.

“ My advice to my clients would be to wait and watch how it is shaping up before experimenting with it at this stage and rather continue with established institutions. SIAC, as an institution for dispute resolution mechanism is seen by Indian Courts as a credible institution. However, with time, in case the MCIA is able to gain credibility as being an impartial, fast and economic arbitral institution which it envisages to be, then we can look at the same.

Sachin Mandlik, Partner at Khaitan & Co

Nishith Desai, top Mumbai lawyer and a director at the SIAC, welcomes the entry of a new institution, but says it may not be a game changer in the arbitration space.

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