National Seminar on Arbitration and Stress Management (P-1320)
(For District Judiciary)

The National Judicial Academy organized a two-day "National Seminar on Arbitration and Stress Management for District Judiciary" on 3rd & 4th December 2022 with the objective to provide a platform to discuss holistically on the rapidly evolving regime of Arbitration in India in both domestic and global contexts alongside the best approaches and techniques for identifying personal and professional reasons for stress in everyday lives of judicial officers. The seminar witnessed deliberations on pertinent topics ranging from the scheme of Arbitration to bottlenecks in implementation of Arbitration proceedings in Indian Courts and then set out to find solutions to enable strengthening of this regime in India. Furthermore, through the interactive discussions the emphasis on techniques for the judicial officers to overcome stress due to demanding circumstances and maintain an optimum work life balance was also undertaken by sharing of practical insights from judges and domain experts.

SESSION 01- Fundamentals and Scheme of Arbitration: Setting the context
Speakers: Justice M Sundar & Justice S. C. Dharmadhikari

The seminar began with tracing the history of arbitration in India beginning from Arbitration Act, 1940 to the amendment in 1996 that accorded an arbitral award the status of a decree of the Court with UNCITRAL Model Law as its basis to the major amendments that were introduced in 2016, 2019 and up to 2021 whereby fraud and corruption were added as proviso to section 36 qua arbitration agreement and award made as a ground for grant of unconditional stay pending section 34 challenge.

Additionally, the key highlights of Arbitration and Conciliation Act in light of recent amendments were also discussed which included: restriction of scope of challenge to an award through codification, fixing of time frame including statement of claim and defense for pre Arbitration as per Section 9 by insertion in Section 23, replacement of term 'Chief Justice' by Supreme Court / High Court, extension of powers to arbitral tribunal to make interim orders vastly expanded on lines of section 9 under Section 17, restriction of scope of section 11 and jettisoning of accreditation of arbitrators qua Eighth Schedule that has been left to regulations.

The scope of section 34 *vis a vis* public policy was also discussed at length in the light of landmark judgements including *inter alia* : *Renusagar Power Co. Ltd. v. General Electric Co.,* (1994 Supp (1) SCC 644) which held that public policy must be construed narrowly, *ONGC Ltd. v. Saw Pipes Ltd.,* (2003 5 SCC 705) wherein patent illegality was added as sub-sect of public policy, *ONGC Ltd. v. Western Geco International Ltd.* (2014 9 SCC 263) whereby the three distinct juristic doctrines were culled out i.e., (a) judicial approach, (b) natural justice principle and (c) irrationality / perversity , *Ssangyong Engg. & Construction Co. Ltd. v. NHAI,* (2019 15 SCC 131), *Booz Allen*

& Hamilton Inc. v. SBI Home Finance Ltd., (2011 5 SCC 532) that enumerated the six categories of matters which are not arbitrable and *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* (2018 9 SCC 472) which held that section 34(5) is directory and not mandatory.

The session concluded with deliberations on the growing emergence of third party funding in the context of Indian Arbitration.

SESSION 02- Bottlenecks in implementation of Arbitration regime in Indian Courts

Speakers: Justice M Sundar & Mr. Tejas Karia

The session commenced with the discussion on setting the boundaries for the extent of intervention by the courts in the light of Section 5 of the Arbitration and Conciliation Act, 1996. It was highlighted that the approach of the court in entertaining an application under Section 9(1) of the Arbitration Act, at the three different stages namely before and during the arbitral proceedings and after the passing of the award but before its enforcement shall not be the same. The scope of judicial review and jurisdiction of the Court under Sections 8 and 11 of the Arbitration Act is identical, but extremely limited and restricted. Abiding by the mandate of Section 11, the Court at this stage cannot enter into a mini trial or elaborate review of the facts and law which would usurp the jurisdiction of the arbitral tribunal. In light of *Vidya Drolia and Others v. Durga Trading Corporation* (2020 SCC OnLine SC 1018) the instances where the court would refer the matter by default were also enlisted.

The session proceeded with deliberation on scope of injunctive relief under Section 9 of the Arbitration Act. Varied aspects such as the need for interim measures, essential conditions for grant of interim relief, instances of non-efficacious remedy before Tribunal under section 17 were discussed at length. It was highlighted that a person not party to an arbitration agreement cannot invoke jurisdiction of the court for interim relief under Section 9 of the Arbitration Act and that relief under Section 9 is granted sparingly, if arbitral tribunal already constituted.

Juxtaposition and interaction of powers between the court and arbitral tribunal in the light of interplay between sections 9 and 17 vis a vis *ArcelorMittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.,* (2021 SCC OnLine SC 718), sections 13 and 14 vis a vis *HRD Corpn. v. GAIL (India) Ltd.*, (2018 12 SCC 471) whilst tracing the pre and post amendment scenarios also formed part of the session.

Confidentiality in arbitration in light of Section 42A of Arbitration Act and its drawbacks were also highlighted. The challenges in recognition and enforcement of foreign arbitral awards in India in the light of section 44, 46, 48 and 49 were elaborated upon. There is a narrow scope of interference with foreign arbitral awards passed in foreign seated arbitrations as envisaged under the New York Convention. The Indian Courts have responded very positively to the post amendment features and that has ensured to change the image and perception of India across the world as a pro-arbitration regime with minimal intervention and full support from the courts in the arbitration process.

The session concluded with identifying problems in judicial process namely: Delay in arbitration highlighting section 29A, Section 34 (3) and (6) of Arbitration Act and Lack of consistency in

judicial decisions on issues such as – Pre instituted mediation, Interplay between Section 9 and Order 38 Rule 5 of CPC, Non-payment of stamp duty and its impact on arbitration agreements, Determination of arbitral tribunal's fees and Emergency arbitration.

SESSION 03- Strengthening Arbitration and its Enforcement in India
Speakers: Justice M Sundar & Mr. Jayant Mehta

The session began with distinctions been drawn between an international commercial arbitration as provided under Section 2 (1) (f) which is party centric and a foreign award as provided under Part 2 sections 44 and 53 which is based on the seat. Two important case laws i.e., *Emkay Global Financial Services Limited vs. Girdhar Sondhi* (2018 9 SCC 49) and *Fiza Developers & Inter-Trade P.Ltd. vs Amci (I) P.Ltd. & Anr.* (2009 17 SCC 796) which have in essence held that the underlying legal drill of Section 34 is a one issue summary procedure whereby the arbitral award being put to challenge is an issue in itself.

Highlighting the ratio of *Canara Nidhi Ltd. v. M. Shashikala*, (2019 9 SCC 462) the speaker asserted that the judges ought to only look at those records that were produced before the arbitral tribunal in a section 34 application. The time frames and the periods of limitation under section 34 were also discussed at length during the session.

With regards the role of subordinate courts in making arbitral institutions into a good seat the speakers pointed out that the term seat stands for the situs of arbitration or place where it is anchored. While divulging attributes of a good seat it was stressed upon that judges as adjudicators of today are arbitrators of tomorrow and therefore, they should approach the matters of enforcement of an arbitral award with a commercial mind. It was reiterated that the role of a section 9 court is greater than that of a section 34 court to ensure that an award is not merely a paper award. As the first instance court the district judiciary must undertake an efficient approach coupled with a quick and sound decision making. The speaker brought forth the fact that the nature of a section 34 application for a district judiciary is a hybrid of a review, an appeal and a revision application but at the same time being none of them. While doing so, if the court finds that a material evidence has been overlooked by arbitral tribunal in its proceedings, the court may set aside such an award.

The session ended with deliberation on the doctrine of kompetenz-kompetenz purely flowing from section 16 wherein an arbitral tribunal has the power to determine its own jurisdiction and also on issue of the severability of the arbitration clause in an agreement from that of the entire agreement.