

NATIONAL JUDICIAL ACADEMY



WORKSHOP FOR HIGH COURT JUSTICES ON ARBITRATION INCLUDING INTERNATIONAL ARBITRATION

Programme Report [P-1231]

Programme Coordinator

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Workshop for High Court Justices on Arbitration including International Arbitration

(Online) 5th – 6th December, 2020

Resource Persons:

1 Hon'ble Justice S.K. Kaul Judge, Supreme Court of India

2 Hon'ble Justice Indu Malhotra Judge, Supreme Court of India

3 Hon'ble Justice S.C. Dharmadhikari Former Judge, Bombay High Court

4 Mr. Atul Chitale Senior Advocate

5 Mr. D.J. Khambata Senior Advocate

6 Mr. Vikram Nankani Senior Advocate

7 Mr. Nakul Dewan Senior Advocate

8 Mr. Tejas Karia Partner, Shardul Amarchand Mangaldas & Co

The National Judicial Academy conducted a two-day online workshop on Arbitration including International Arbitration for High Court Justices on 5th & 6th December 2020. The programme provided a platform for justices to share experiences, skills and suggestions with a panel of distinguished resource persons from the judicial branch; and other relevant domains.

On the theme *The Scheme of the Arbitration & Conciliation Act: Towards A Model Dispute Resolution Regime*, deliberations were made on 2015 & 2019 amendments to the Arbitration and Conciliation Act, 1996 (Act) and a shift in the regime from *ad hoc* to institutional arbitration in India. The various provisions of the Act and key changes incorporated through the amendments were enumerated and discussed. During the course of session some areas deliberated upon included; nature of power under Sec. 11 of the Act, judicial intervention under Sec. 8 and 11 of the Act, arbitrability of certain type of disputes and the concept of public policy under Sec. 34 and 48 of the Act. Thereafter, a reference was made to Sec. 9 and 13 of the Act and importance of Sec. 27 with regard to foreign seated international arbitration also formed part of the discussion.

On the theme *Jurisdictional Challenges: Balancing the Role of the Court and Arbitral Tribunal*, importance of *Komptenz-Kompetenz* principle was highlighted stating that whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause, primarily depends upon the terms of the clause itself; it is a question of what the Parties intend to provide and what language they employ. A detailed distinction was drawn between Sec. 16 of the UNCITRAL Model Law on International Commercial Arbitration and Sec. 16 of the Act, whereby the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.

During the course of discussion it was also underscored that the jurisdiction of arbitral tribunal can be challenged before a court under two provisions of the Act: Sec. 37(2)(a) - which specifically provides for appeal against an order of the tribunal accepting the plea that i) it does not have jurisdiction or ii) that it is exceeding the scope of its authority; and Sec. 34 & 16(6) which requires a challenge to an arbitral award,

which rejects an objection as to jurisdiction of the tribunal to be made under Sec. 34 of the Act. It was stated that an order for refusing jurisdiction to arbitrate [i.e. “accepting the plea” under Sec. 16(2) or (3)] would be subject to appeal under Sec. 37(2)(a) of the Act.

A reference was made to various landmark judgments such as; *Renusagar v. General Electric Company* – (1984) 4 SCC 679, *Booz Allen & Hamilton Inc v Sebi Home Finance Ltd* (2011) 5 SCC 532, *A. Ayyasamy v. A Paramasivam & Ors* (2016) 10 SCC 386, *National Insurance Co Ltd v. Boghara Polyfab Pvt Ltd* (2009) 1 SCC 267, *Shin-Etsu Chemical Co Ltd v. Aksh Optifibre Ltd & Ors* (2005) 7 SCC 234, and *Hindustan Petroleum Corporation Ltd v. M3nergy Sdn Bhd* (2019) SCC Online Bom 2915 to understand the jurisdictional challenges *vis-à-vis* the role of court and arbitral tribunal.

On the theme *Recognition and Enforcement of Arbitral Awards*, the key points dealt in the 246th Law Commission Report and the 2015 amendments to the Act which have narrowed the grounds to challenge ICA and foreign awards were explained. Further, it was highlighted that if the limitation period for challenging the award under Sec. 34 had lapsed, then the award will be enforced in accordance with the provisions of the CPC as if it were a decree of a court under Sec. 36(1) of the Act. A reference was made to the Arbitration and Conciliation (Amendment), 2020 ordinance whereby, if the court is satisfied that a *prima facie* case is made out that the arbitration agreement or contract exists, which is the basis of the award; or the making of the award, was induced or effected by fraud or corruption, the enforcement of the award can be stayed without any condition of deposit of award amount during the pendency of application to set aside the award. It was also emphasized that enforcement of domestic award can be filed directly before the court within whose jurisdiction the decree can be executed and with regard to foreign awards the High Court exercising original civil jurisdiction over the subject matter.

Various cases were discussed at length including; *M/s Umesh Goel v. Himachal Pradesh Cooperative*, (2016) 11 SCC 313, *Government of India v. Vedanta Limited*, 2020 SCC OnLine 749, *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (US DC, District of Columbia, 1996); *Ssangyong*

Engineering and Construction Co. Ltd. v. National Highways Authority of India (NHAI), 2019 SCC OnLine SC 677.

On the theme *Current and Emerging trends in Domestic and International Arbitration* key areas covered in the session included : seat v. venue of arbitration, qualification of arbitrators, third party funding, arbitrability of disputes, maintainability of writ petitions against tribunal orders, two-tier arbitration and institutionalization of arbitration. The speaker deliberated upon the eighth schedule inserted *vide* the Arbitration and Conciliation (Amendment) Act, 2019 which prescribes the qualifications, experience and norms for accreditation of arbitrators. It was also emphasized that the eighth schedule is severely criticized for over-prescription of qualifications and limiting the choice of arbitrators including exclusion of neutral nationality of arbitrator for international commercial arbitration having seat in India. Thereafter, with regard to third party funding, a reference was made to the case of *Bar Council of India v. AK Balaji and Others*, (2018) 5 SCC 379 where the court stated that “*There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation.*” A few additional cases and case studies were cited and discussed which included *Chiranjilal Shrilal Goenka (Deceased) through Lrs. v. Jasjit Singh and Ors.*, (1993) 2 SCC 507, *Vidya Drolia & Ors. v. Durga Trading Corporation*, 2019 SCC OnLine SC 358, *Avitel Post Studioz Ltd. v. HSBCPI Holdings (Mauritius)*, 2020 SCC OnLine 656. A few concerns with regard to two tier arbitration such as; expiry of time limit, binding nature of award, parallel proceedings, and scope of second arbitration were discussed during the discourse.