

**Refresher Course for Commercial Courts: *Online Mode***  
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*Rajesh Suman, Assistant Professor*  
*Shashwat Gupta, Law Associate*

The National Judicial Academy (NJA) organized a two days Online Refresher Course for Commercial Courts from 05<sup>th</sup> to 06<sup>th</sup> December, 2020. The course was conceived to provide a forum to participant judges to deliberate issues relating to commercial disputes at the District Judiciary level. The course focused on themes including the policy framework and operative challenges in commercial courts, commercial courts vis-à-vis arbitration, interpretation of construction and infrastructure contracts and IPR disputes relating to commercial courts. The course facilitated transmission of skills towards better, speedier and quality adjudication in justice delivery.

**Major Highlights and Suggestions from the Course**

**Presentation by e-Committee of the Supreme Court on e-Court Services**

The speaker initiated the discussion by explaining Phase 1 of the E-Courts Project where the digital infrastructure including the video conferencing facility for courts was established in the year 2006. Courts across the country were provided necessary digital infrastructure in this phase of the project. In Phase 2 of the project, a common software i.e. Case Information System was provided to courts. The National Judicial Data Grid [NJDG] was also launched in Phase 2 of the project for real time availability of data regarding cases under process in various courts.

The speaker explained various services offered by the E-Court project including automated Email services and SMS services for communication with advocates and litigants. The speaker then explained District Court Portal. E-Seva Kendra which are established in every court complex to facilitate e-filing was discussed. These E-Seva Kendra serve as E-Reception Centre in every court. National Judicial Data Grid and its various uses were explained by the speaker. The judges can know about the pending cases in their courts from the NJDG. The speaker focused on method of using the data on the NJDG to monitor the progress of cases in courts. For instance the Query Builder format was explained where the causes of delay of cases in courts can be known. The data for delay reasons are required to be filled at the level of courts by the data entry staff. The administrative judges can use this data to know the reasons of delay in courts. The speaker also explained the use of JUSTIS App which can be used by judges for maintaining data of their courts. The handling of traffic cases by virtual court in Delhi was discussed by the speaker.

## **Session 1: Commercial Courts: The Policy Framework and Operative Challenges**

The speakers initiated the session by focusing on the historical background of economic growth in India and the need of fast track courts for expeditious disposal of commercial disputes. The speakers referred to 188<sup>th</sup> Report of the Law Commission of India regarding establishment of commercial division in High Courts. The recommendations of the Law Commission was discussed in the session. The speakers referred to the Report of the Select Committee of Parliament on the Commercial Division of High Courts Bill, 2009. Further the 253<sup>rd</sup> Report of the Law Commission on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill was discussed.

The speakers discussed impact of the Commercial Courts Act, 2015 on the Code of Civil Procedure, 1908 on summary judgement, strict timeline for submission of written statements, procedure for disclosure, discovery and inspection of documents in commercial disputes and manner of submitting written documents. The speakers discussed various operative challenges for commercial courts. One major challenge is shortage of judges who have expertise in handling commercial disputes because there is already very low judges to population ratio. The second major challenge is ensuring adherence to strict timelines of various stages of court proceeding and suggested that as the only way for having better legal culture in courts. The speakers gave the example of operation of commercial courts in Singapore.

The speaker then discussed 2018 amendment to the Act. The change in the reduction of minimum value of commercial disputes to be adjudicated by commercial courts and the rationale behind it was explained to participants. The introduction of mandatory mediation before the filing of a suit was discussed and speaker emphasized that judges should encourage parties for pre institution mediation.

The removal of provision for counter claim where if a counterclaim was filed in a commercial dispute of at least one crore rupees in a civil court, the civil court could transfer the suit to a commercial court or commercial division of high court, was discussed. Queries were asked by participants regarding management of lengthy proceedings in commercial disputes, how to get concise written submissions and deferring case management hearing due to Covid-19 Protocols.

## **Session 2: Commercial Courts vis-à-vis Arbitration**

The speakers initiated the discussion by explaining issues related to commercial arbitration and commercial courts at district and High Court level and referred to Section 10 of the Commercial Court Act. In 5 states where High Courts have original civil jurisdiction, the disputes related to commercial arbitration go to the commercial division of the High Court. In states where there is no High Court with original civil jurisdiction then the commercial arbitration disputes go to commercial court at district level. The speakers referred to judgments to explain the role of commercial court in commercial arbitration disputes including the role of High Court where the

arbitrator has to be replaced and the right of appeal in commercial arbitration. The speakers discussed amendments made in the Arbitration and Conciliation Act, 1996 after the enactment of the Commercial Courts Act, 2015.

The speakers focused on various judgments of the Supreme Court regarding applicability of the Arbitration and Conciliation Act, 1996 on the foreign seated arbitration. Subsequent legislative amendments in the Arbitration and Conciliation Act, 1996 on enhancing the role of Indian courts in foreign seated arbitration and courts' authority for providing interim relief were highlighted. The speakers also discussed amendments to the Arbitration and Conciliation Act, 1996 in 2015 and 2019 on making arbitration fair and expeditious in India, reduction of grounds for which the arbitral award could be challenged, introduction of timeframe for speedy completion of arbitral proceedings, enforcement of foreign arbitral award, the need of consent and disclosure on the part of arbitral tribunal about circumstances affecting impartiality and independence of the arbitral tribunal and reasons for disqualification of arbitrators because of circumstances affecting impartiality and independence.

The speakers then compared the advantage parties can have in getting their disputes resolved through commercial court rather than by arbitral tribunal. In this regard the speakers discussed about fifth schedule dealing with fees payable to the arbitral tribunal. The speakers said that in practice the provisions of fifth schedule is not followed and arbitrator's fees go beyond the ceiling limits fixed under fifth schedule. There is need of legislative clarity on this aspect because the idea behind arbitration is to have faster and cheaper means of dispute settlement. Then the speakers highlighted the rising venue cost related to arbitration proceedings. Stamp duties especially in money claims is also high and raises the cost of arbitration. Such costs are not there in disputes resolved through commercial courts. In situation of expert evidence u/s 26 and other evidences u/s 27 of the Arbitration and Conciliation Act, 1996, the arbitral tribunal has to seek the assistance of the court which can be time consuming. This situation is not there in case of commercial courts because courts are not required to take permission of other courts in such situation. The speakers suggested that High Courts should publish data about cases filed before commercial courts at district and High Court level as required by Section 17 of the Commercial Courts Act, 2015. This will help raising awareness about commercial courts among public and they may like to resolve disputes through commercial courts rather than by arbitral tribunal.

### **Session 3- Interpretation of Construction and Infrastructure Contracts**

The speakers highlighted several areas in which disputes usually arise in a construction and infrastructure contract i.e. scope of arbitration agreement; extension of time; termination of contract; damages; defect liability; force majeure and invocation of bank guarantee. Further, participants were cautioned from scrutinizing the contract on the touchstone of reasonableness since it would result in rewriting the terms of the contract on behalf of the parties. It was stated that the court should ascertain intention of the parties after assessing the terms of the contract and interpret the contract according to the contractual matrix. Thereafter speakers elaborated upon construction and development contracts and provided an overview of the Public Private Partnership (PPP) regime in India. The different modes of revenue generation for the government

granting PPP contract were also discussed along with steps involved in the implementation of a PPP contract. The following different types of PPP models were discussed - Build Operate and Transfer (BOT); Build Own Operate (BOO); Build Own Operate Transfer (BOOT), Build Operate Lease Transfer (BOLT), DBFO (Design, Build, Finance and Operate) and Lease-Develop-Operate (LDO). The speakers also discussed project financing and interplay between financing agreements, construction agreement and concession agreement. It was stated that judges should also understand the scope, nature of the project, respective obligation of parties and operating framework for better appreciation and analysis of the dispute before them.

The unique features of construction and infrastructure projects were also highlighted and it was stated that breach in construction contracts is the rule rather than the exception due to the inherent nature of the activity. The different stakeholders involved in the construction project were discussed and it was stated that a construction contract is framed to address and balance the interests of the parties. It was stated that disputes normally arise due to failure of the contractor to comply with his contractual obligations or to properly administer the contract. The concept of engineering, procurement and construction (EPC) contracts was also discussed in detail. The speakers also elaborated upon FIDIC forms of Contract and focused on three main formats i.e. Red, Yellow and Silver. The judgment of *Ambalal Sarabhai Enterprises Limited v K.S. Infraspace LLP and Another* [(2020) 5 SCC 410] was also discussed during the session.

#### **Session 4- IPR Disputes in Commercial Courts**

The speakers focused on essential requirements of different IPRs like copyright, patent, trademark and design. Thereafter, the procedure for challenging grant of patent and trademark was discussed in detail. It was stated that the Delhi High Court is in the process of finalizing the rules governing patent suits for their expeditious disposal. The speakers also dwelt upon the history of trademark legislation in India and traced the development of the test for deceptive trademark. It was pointed that initially the court focused on reputation of the trademark and actual deception was not necessary. However, now it is necessary that there is actual deception. The various defenses available in a suit for trademark infringement were also focused upon which include delay, concurrent user and acquiescence. The judgments which were highlighted by the speakers were- *Laxmikant V. Patel V. Chetanbhai Shah* [(2002) 3 SCC 65] , *Hindustan Pencils (P) Ltd. vs India Stationery Products Co.* AIR 1990 Delhi 19; *Bengal Waterproof Limited vs. Bombay Waterproof Manufacturing Company and another* [(1997) 1 SCC 99] ; *Kaviraj Pandit Durga Dutt Sharma vs Navratna Pharmaceuticals* (AIR 1965 SC 980).

Thereafter, the salient features of the Commercial Courts Act, 2015 were highlighted including pre-institution mediation; strict timelines; costs; case management hearing and summary judgment by the speakers. Subsequently, the judgment of the Supreme Court in *M/S SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd* [(2019) 12 SCC 210] was highlighted regarding strict timelines under the Commercial Courts Act, 2015. It was stated that existence of strict timelines and the power to impose costs, if exercised judiciously would deter advocates from employing dilatory tactics to prolong the trial. The scope of the term ‘commercial dispute’ was

also discussed by referring to various judicial precedents. The jurisdictional issues in IPR matters arising as a consequence of transaction of business over the internet were discussed, with reliance on various judgements including *Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy & Another* 2010 (42) PTC 361 (Del) ; *World Wrestling Entertainment, Inc. v. M/s Reshma Collection & Ors.* , 2014 (60) PTC 452 (Del); *Millennium & Copthorne Intl, Ltd. v. Aryans Plaza Serv. Pvt. Ltd. & Ors* 2019 (77) PTC 115 (Del). Furthermore, the concept of geo-blocking and dynamic injunction were elaborated upon by the speaker. Lastly, the intellectual property rights disputes with regard to e-commerce websites were discussed along with the liability of intermediaries.

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