

# **National Judicial Academy, Bhopal**



## **REPORT**

### ***Refresher Course for Commercial Courts***

**[P-1249]**

**17<sup>th</sup> & 18<sup>th</sup> April, 2021**

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National Judicial Academy, Bhopal

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## **PROGRAMME REPORT**

**Programme Coordinators –Sumit Bhattacharya & Dr. Sonam Jain, Research Fellow,  
National Judicial Academy, Bhopal**

A two day “Refresher Course for Commercial Courts” was organised at the Academy on a virtual platform. The online course sought to sensitize the participating judges dealing in commercial courts pan India on the key aspects and contours of the functioning of the commercial courts in India. The essence of the refresher course was schematically subsumed in four sessions accreting to a deeper understanding of the underlying policy framework through the pragmatic and operational challenges faced in adjudication in the domain. An enabling capsule of best practices evolved through the case law jurisprudence formed part of discourse. The pedagogy and the discourse stimulated intense discussions on commercial courts *vis-à-vis* arbitration & interpretation of contracts under the principle legislations commercial disputes. A designated session dealing with interstices in IPR disputes under the Commercial Courts Act, 2015 formed part of the course.

The discourse was kindly guided and navigated by Hon’ble Justice Rajiv S. Endlaw (judge Delhi High Court); Mr. Jaideep Gupta (Sr. Advocate, Supreme Court of India); Mr. Sujit Ghosh (Advocate Supreme Court of India); Dr. Amit George (Advocate Delhi High Court); Hon’ble Justice Moushumi Bhattacharya (judge Calcutta High Court); Mr. Tejas Karia (Head & Partner arbitration practice & dispute resolution practice at Shardul Amarchand Mangaldas) and Mr. Somasekhar Sundaresan (Sr. Advocate, Bombay High Court).

### Session-wise Programme Schedule

#### Day-1

Special Session - Presentation by e-Committee, Supreme Court of India on e-Court Services

Session 1 - Commercial Courts: The Policy Framework and Operative Challenges.

Session 2 - Evolution through Case Law Jurisprudence: Capsule for Judges’ Best Practice.

#### Day-2

Session 3 - Commercial Courts *vis-à-vis* Arbitration & Interpretation of Contracts under the Act.

Session 4 - IPR Disputes Under Commercial Courts.

## Session-1

### Theme - Commercial Courts: The Policy Framework and Operative Challenges

#### Proposed areas for discussion

- ✓ *Impact on CPC, 1908*
- ✓ *Impact on the executing stakeholders (judges, advocates etc.)*
- ✓ *Impact of the recent amendment*
- ✓ *Interaction with other parallel redressal systems viz. Consumer Courts; RERA etc.*
- ✓ *Mandatory compliances under the Act: Processes & timelines*
- ✓ *Impact on judges; existing courts (case load & docket explosion)*
- ✓ *SWOT Analysis*

*Speaker: Jus. Rajiv S. Endlaw & Mr. Jaideep Gupta*

The session initiated by laying down an overview on the objective reasons necessitating the genesis of the code i.e. Commercial Courts Act, 2015 (*hereinafter* CCA). It was examined to contemplate, as to whether the legislation is merely ornamental, or drives a model for structural changes in commercial adjudication in the country and hence is of substantive importance. It was also juxtaposed against the argument that CCA is an experiment antithetical to the concepts of “tribunalisation”, as against having a sovereign and centralized court system. On the other hand the dislocation and dismantling of the existing tribunals on account of their inability to meet the expectations and benchmarks were contested. The session underscored the desirable and novel approaches to be adopted by the judges to deal effectively with CCA, rendering it to be impactful. CCA is the institutionalization of the best practices adopted by judiciary (during its historic absence), and is a code holding generalized and standardized normative and procedural prescriptions and guidelines. The importance of Order 37 Code of Civil Procedure, 1908 (*hereinafter* CPC) was discussed. *Neebha Kapoor v. Jayantilal Khandwala*, (2008) 3 SCC 770 was cited wherein, the jurisprudence of public policy behind Order 37 prescribing a time-frame while dealing with commercial suits (enabling expeditious disposal) was emphasized. It was reiterated that expeditious and summary disposal are the two cardinal footholds for the CCA edifice. It was reiterated that extension of time must operate as an exception rather than general rule. On dealing with “Written Statement” (*hereinafter* WS) it was advised, that if the WS is examined on the very date of its filing, various related issues manifesting into festering and unnecessary delays can be nipped in the bud. Moreover, the 30 to 90 days discretion with the judge was suggested to be exercised judicially with reasonableness. Framing of issues by the judge rather than leaving the scope with counsel was flagged, as the exercise offers the judge an opportunity to optimize an oft stumbled impediment of uncontrolled navigation, leading to poor case management. The bypass from conventional quagmire of procedural complexity to simplicity, by supplanting with the tools *viz.* mandatory mediation (pre-trial stage), summary procedure insistence (i.e. short circuiting the detailed evidentiary thickets, discovery, disclosure, inspection, limitation of number of expert witness etc. only if essential),

single stage appeal (except appeal to apex court) etc., were discussed as tools to effectively implement CCA.

## Session-2

### Theme - Evolution through Case Law Jurisprudence: Capsule for Judges' Best Practice

#### Proposed areas for discussion

- ✓ Conflict of law (international contracts)
- ✓ Autonomy of choosing *Lex fori*, *Lex loci* & *Lex cause*
- ✓ Law relating to and scope of appealable order
- ✓ Jurisprudence on mandate of timelines
- ✓ Examination of statutory mandates viz. S. 34 Arbitration & Conciliation Act, 1996 etc.

Speaker: Mr. Sujit Ghosh & Dr. Amit George

The session surfed the contours of two major areas (amongst several others) through the evolution of case law jurisprudence, namely: i) Conflict of laws & Party Autonomy; and ii) Jurisprudence on mandate of timelines. The evolution of the first concept was traced in the light of *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1. Wherein, the apex court explained the scope and meaning of “Conflict of Law” (also popular as “Private International Law” PIL) to adjudicate w.r.t. transactions or personal status involving a foreign element. The conceptual transition of operational domain of PIL from personal laws (family, succession, citizenship, etc.) to the realms of international contracts (especially with the advent of globalization) was discussed. The 3 key asserting areas of “Conflict of laws” viz. i) Choice of law – governing law of the contract; ii) Jurisdiction of the Courts – appropriate courts to hear the disputes; and iii) Recognition and enforcement of foreign judgments – performance of the contracts were discussed citing appropriate case law jurisprudence including: *NTPC v. Singer*, (1992) 3 SCC 551; *Delhi Cloth and General Mills v. Harnam Singh*, 1955 SCR (2) 502; *ABC Laminart Pvt. Ltd. v. A.P. Agencies*, (1989) 2 SCC 163; *Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd.*, (2003) 4 SCC 341 w.r.t. party autonomy to choose a neutral third country; *Man Roland Druckmaschinen Ag v. Multicolour Offset Ltd.*, 2004 (7) SCC 447 w.r.t. carving out the exception to the general principle of “party autonomy” etc. The session dilated on the importance of the rider of “public policy” by citing *Richardson v. Mellish*, [1824] 2 Bligh 242; *Renusagar Power Co. Ltd. v. General Electric Co.*, (1994) SCC Suppl (1) 644 for Indian jurisprudence on the subject matter. Moreover, *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705; and *ONGC v. Western Geco*, (2014) 9 SCC 263 were also referred. Regarding the second area i.e. “jurisprudence on mandate of timelines” (referred above), the directory guidelines envisaged under Order 8 Rule 1 CPC stipulating the defendant to file WS in 30 days (extendable to max. 90 days) from service of summons was discussed. The directory nature of interpretation as held in *Salem Advocate Bar Assn. (II) v. Union of India*, (2005) 6 SCC 344 at 364 was discussed. Proper planning & adherence to “time-lines” was reiterated citing

*Ramrameshwari Devi v. Nirmala Devi*, (2011) 8 SCC 249. The changing contours on the mandate and expectations on “time-line” in cases of commercial disputes were delved into, in the light of *SCG Contracts India Pvt. Ltd. v. KS Chamankar*, (2019) 12 SCC 210.

### Session-3

#### Theme - Commercial Courts vis-à-vis Arbitration & Interpretation of Contracts under the Act

##### Proposed areas for discussion

- ✓ Impact on Cross border dispute resolution: Party autonomy for choice of forum; *lex situs*
- ✓ Impact on Infrastructure and Construction Contracts
- ✓ Impact of newly amended Section 20 of Specific Relief Act, 1963 (w.r.t 2018 Amendment)
- ✓ New York Convention on the Enforcement of Foreign Arbitral Awards, 1958
- ✓ Issues of costs and lack of sanctions during the arbitral process

*Speakers: Justice Moushumi Bhattacharya; & Mr. Tejas Karia*

The session rolled out by setting the six areas to be discussed *viz.* i) Interplay of CCA with Arbitration and Conciliation Act, 1996 (*hereinafter* ACA); ii) The impact on cross-border dispute resolution w.r.t. “party autonomy” and “choice of forum”; iii) Impact on infrastructure and construction contracts; iv) Issues relating to costs and lack of sanctions during arbitral process; v) Interplay of amendment to Section 20 of the Specific Relief Act, 1963 (*Hereinafter* SRA) on CCA; and vi) New York Convention on the enforcement of foreign arbitral awards, 1958 (*hereinafter* NYC) on the CCA. While discussing the interplay and correlations between the application of the provisions of ACA and CCA various issues relating to jurisdiction was clarified *viz.* i) “jurisdiction of filing an application or appeal” under provisions of ACA arising out of an international and/or national commercial arbitration, in a commercial dispute was discretely discussed w.r.t. Section 10 of CCA; ii) “Choice of proper court having jurisdiction for enforcement of domestic awards” i.e. Section 2(1)(e)(ii) of the ACA read with Section 10 of CCA (for domestic awards in International Commercial Arbitration (*hereinafter* ICA) seated in India), Section 2(1)(e)(i) of the Arbitration Act r/w Section 10 of Commercial Courts Act (for domestic award not in ICA) etc. Issues arising out of appeals and its scope under Section 13(1) of CCA and Section 50 of ACA were explicated. *Kandla Export Corporation v. M/s OCI Corporation*, (2018) 14 SCC 715 was discussed wherein the apex court held that Supreme Court held that an appeal in cases of foreign awards would only apply on the grounds set out in Section 50 of the ACA and specifically no appeal will proceed to the Commercial Appellate Division if it is against an order rejecting the objections to enforcement. Moreover, the court clarified that, Section 13(1) of the CCA being a general provision *vis-à-vis* arbitration relating to appeals arising out of commercial disputes, would not apply to cases unless they are expressly covered under Section 50 of the ACA since the same is a complete code in itself. *Prasar Bharti v. M/S Stracon India Limited*, 2020 SCC OnLine Del 737 was cited to examine

whether an interlocutory order passed by Commercial Court under Section 36 of the ACA is appealable under Section 13 of the CCA? The High Court of Delhi observed that Section 8 of the CCA places a bar on any revision application or petition against an interlocutory order of the Commercial Court. Further the Court referring *Kandla Export Case*, held that under Section 37 of the ACA, no appeal is maintainable from any order passed under Section 36 of the ACA which in addition it does not attract the provisions of CPC as the statute (ACA) does not provides for an appeal against order passed under Section 36. Therefore any such appeal will not be maintainable. Similarly, case law jurisprudence establishing denial of appeal of an arbitral award were discussed including *Kakade Construction Co. Ltd. v. Vistra ITCL (India) Ltd.*, 2019 SCC OnLine Bom 152; to the query as to whether an order passed under Section 9 of the ACA is appealable under Section 13(1) of CCA? was explained in negation by citing *Pranathmaka Ayurvedics v. Cocosath Health Products*, 2020 SCC OnLine Ker 5476, with the holding that, the Section 13 states in its heading “Appeals from decrees of Commercial Courts and Commercial Divisions”, and therefore, an appeal under Section 13(1) of the CCA would lie only from a decree or a final judgment passed by a Commercial Court and not from an order. Moreover, *Shailendra Bhadauria v. Matrix Partners India*, 2018 SCC OnLine Bom 13804; *SDMC v. Tech Mahindra*, 2019 SCC OnLine Del 11863 were also discussed on the point. On the point as to whether, Commercial Court will have power to extend time under Section 29A, if the appointment of the arbitrator has been made by the High Court under Section 11 (6) of the ACA? *Nilesh Ramanbhai Patel v. Bhanubhai Ramanbhai Patel Misc. Civil Application (O.J.) No.1 of 2018 in IAAP. No.56 of 2016*; and *DDA v. Tara Chand Sumit Construction Co.*, OMP (Misc.)(Comm.) 236 of 2019 were leveraged. Discourse also elaborated on the authority determining the seat of arbitration, and distinguished between concepts of “Seat” versus “Venue” by citing several relevant case law. While discussing impact on infrastructure and construction contracts, the relevant amendments to the Specific Relief Act, 1963 as amended by Specific Relief (Amendment) Act, 2018 were discussed which *inter alia* inclusion of Section(s) 20A, 20B, 20C, and 41(ha). Finally the “New York Convention on the Enforcement of Foreign Arbitral Awards, 1958” was contextually discussed.

#### Session-4

#### Theme - IPR Disputes Under Commercial Courts

##### Proposed areas for discussion

- ✓ Choice of jurisdiction by Parties: Original or Pecuniary
- ✓ Culture of “Interim Relief”: scope & impact assessment
- ✓ Procedural rigors and timeline compliance
- ✓ Impact of pre-trial mediation & scope of arbitration
- ✓ Transfer of suits u/s 7 of Comm. Courts Act.

*Speakers: Justice Senthilkumar Ramamoorthy & Mr. Somasekhar Sundaresan*

It was heralded that the CCA which primarily deals with “commercial disputes” of 22 types (including arbitration disputes) as legislated under definition clause [Section 2(1)(c)] appears

to be exhaustive per language of the provision using the word “means”. However, in context to IPR [Section 2(1)(c)(vii)] the words of the provision seems to be expansive and much wider due to the use of the expression “IPR relating to...”. It was compared with the language of the IP legislations viz. Trade Marks Act, 1999, wherein Section 134 specifies under clause (a), (b), & (c) a rather limited scope of institution of a *lis* of infringement. Similarly under Section 62 of the Copyright Act, 1957 and Section 104 of the Patents Act, 1970. The above inconsistency in the scope on jurisdiction between and amongst CCA and IP enactments makes the later susceptible to issues beyond its provisional scopes. It was also highlighted that the text of Section 6 of CCA while indicating “specified value” (as one of the prerequisites) does not makes any special consideration for IPR disputes (especially w.r.t. the amended value of “specified value” being brought down from Rs. 1 Crore to not less than 3 lakhs). In view of the above it was argued that the transfer of cases to the commercial courts or commercial division of the High Courts from the court of institution (original jurisdiction) might find impediments. Discussions relating to the practice and culture of interim relief w.r.t. commercial disputes, underscored the importance of having a paradigm shift in the litigation model that demands to be oriented towards the end, ensuring final disposal as the rule. One of the important area assuming paramount importance while dealing with IP related commercial matters was considered to be the generic approach to, and the prevalent culture of, allowing interim injunctions. It was categorically cautioned that since the cardinal tests while granting an interim injunction includes evaluating “irreparable damage”, and considering the tipping of the “balance of convenience”, it was suggested that while dealing with IPR issues (specifically), courts should be extra sensitive and careful in granting injunction. It was reiterated that since particularly in patent cases, almost invariably an application contesting the validity of patent is filed by the defendant (against the infringement suit originally filed by the plaintiff), courts must be cautious in awarding interim injunctions with the drop of the hat. Rather a more viable and equitable solution suggested could be that of ordering the defendants to maintain “accounts of profit” in lieu of. It was suggested that such orders may be accompanied by appointment of a receiver by the court (to whom a sufficiently detailed account may be submitted), in order to mitigate partisan distrusts. These small but relevant and conscious departures and improvements would go a long way to demolish the deep rooted culture of interlocutory injunctions, which are often seen to be used as murky tools, and at times travels to the extent of cannibalizing a worthy trial. On issues relating to time-lines, the journey from directory to mandatory norms was highlighted. In the pre-CCA era the jurisprudence developed by the Supreme Court of India in *Salem Advocate Bar Assn. Case*, that the 90 days’ time line to file a written statement is only directory and not mandatory (thereby allowing a spectacle of unabated applications to condonation for delay on the relevant CPC provision), with the advent of CCA not only a time-limit has been prescribed, but the same is augmented with the sequitur of non-compliance has been specified to the extent of forfeiture of the right to file a written statement. It is because of the same that the apex court in case of commercial disputes has clearly settled the law with the absolute nature of the time-limit of 120 days for filing written statement. However, there are other related areas where (as a general principle in civil matters) the statute provides for judges’ discretion. It was emphasized that it is on these occasions (while exercising discretion) there needs to be a systemic attitudinal change roped in, to ensure that the procedural elasticity is not misused or abused, or rather a stricter and diligent rigor is maintained to enable the objective of CCA rather than diluting its efficacy. It was underscored

that to ascertain expeditious disposal of commercial cases (especially w.r.t. IP cases) in addition to the mandatory time-lines what catalyses the success of the CCA Code is the meticulous and precisely measured use of discretions, wherever a case so demands. Session ended with participants seeking clarifications on certain operational and procedural issues with the erudite resource persons.