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(P-1275)

NATIONAL JUDICIAL ACADEMY

National Workshop for High Court Justices on Arbitration Including International Arbitration

18th and 19th December, 2021

PROGRAMME REPORT

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The National Judicial Academy, Bhopal organized a two day online ***National Workshop for High Court Justices on Arbitration Including International Arbitration*** on 18th and 19th December, 2021. The conference was designed to facilitate discussions on issues related to "The Arbitration and Conciliation Act: Towards a Model Dispute Resolution Regime, Jurisdictional Challenges: Balancing the role of the Court and Arbitral Tribunal, Recognition & Enforcement of Arbitral Award, and Current and Emerging trends in Domestic and International Arbitration. The objective of the conference was to provide a platform, for justices to share experiences, insights and suggestions with a panel of distinguished resource persons from the judicial branch; and other relevant domains.

The session 1 was on *The Scheme of the Arbitration & Conciliation Act: Towards A Model Dispute Resolution Regime.* It was emphasized that due to global players and cross boarder investments across the globe nobody seems interested in court processes. The reasons could be time constraints, lack of expertise or limitation of resources. These concerns are responsible for enhanced use of arbitration processes. Five core principles in the arbitration process were highlighted including flexibility, fair resolution, impartial tribunal, unnecessary delay in expenses and minimum court interference. It was pointed out that speedy adjudication is one of the most important component of arbitration process. The major aim behind the establishment of the arbitration mechanism was to reduce the burden of courts and settle disputes without the interventions of court. However, arbitration is not a regular judicial process. It was suggested that once an award is passed in deserving and genuine cases it should be enforceable.

The session further discussed and emphasized upon the The Arbitration and Conciliation (Amendment) Act, 2021. One of its primary object is to address the issue of corrupt practices in securing contracts or arbitral awards. It was underscored that a need was felt to ensure that all

stakeholder parties get an opportunity to seek unconditional stay of enforcement of arbitral awards, where the underlying arbitration agreement or contract or making of the arbitral award is induced by fraud or corruption, and second to promote India as a hub of international commercial arbitration by attracting eminent arbitrators to the country.

The 246th report of Law Commission of India was discussed during the discourse. It was emphasised that with reference to enforcement where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2) of Section 36, such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court. It was stated that where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-Section (3) of Section 36, on a separate application made for that purpose.

Arbitration Council of India & its composition, relaxation of time limits & completion of written submissions and confidentiality of proceedings also formed the part of discussion. The modalities of the insertion of Section 42A in reference to the Arbitration & Conciliation (Amendment) Act, 2019 was discussed.

Pre-2015 position with regard to the problems with automatic suspension of execution on filing Section 34 petition were underlined. In this reference the Supreme Court judgement in *National Aluminium Company Ltd v. Pressteel & Fabrications Pvt. Ltd* (2004) 1 SCC 540 and *Afcons Infrastructure v. Board of Trustees Port of Mumbai* 2013 SCC Online Bom. 960 were referred. Grounds available to set aside an arbitral award under Section 34 of the Arbitration & Conciliation Act, 1996 (Arbitration Act) were discussed. It was underscored that Section 34 is a

summary procedure where the Court cannot record new evidence and cannot re-appreciate evidence to take differing view. It was highlighted that fraud in the making of the contract / arbitration agreement is a factual determination, therefore ought to be raised before the arbitral tribunal.

The qualifications, experience and norms for accreditation of arbitrators was emphasized upon. The report of the BN Srikrishna Committee to review institutionalization of arbitration mechanism was also discussed. The composition of Arbitration Council of India (ACI) under Section 43 C of the Arbitration Act was discussed. It was stated that the composition of ACI is at variance from the recommendations made by the BN Shrikrishna Committee for the Arbitration Promotion Council of India.

Judgments including *Pam Developers Pvt. Ltd. v. State of West Bengal,* (2019) 8 SCC 112, *Ecopack India Paper Cup Pvt. Ltd. v. Sphere International,* 2018 SCC Online Bom 540., *Venture Global Engineering v. Satyam Computer Services Ltd.,* (2010) 8 SCC 660 and *Air Corporation Employees Union v. DV Vyas,* 1962 (64) BLJR 1 and *State of Maharashtra v. Jaykumar Pulchand Arora,* 2021 SCC Online Bom. 2194, *India Automobiles Pvt. Ltd. v. Torque Motor Cars Pvt. Ltd.,* 2018 SCCOnline Bom. 4371 *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.,* (2021) SCC OnLine 13, *Amway India Enterprises (P) Ltd. v. Ravindranath Rao Sindhia,* (2021) SCC OnLine SC 171, *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.,* (2021) SCC OnLine SC 572, *BSNL v. Nortel Networks India (P) Ltd.,* (2021) 5 SCC 738 and *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.,* (2020) 2 SCC 455 were also form the part of the discourse.

The session 2 was on *Jurisdictional Challenges: Balancing the role of the Court and Arbitral Tribunal.*

The independence of arbitration agreement, doctrine of severability, arbitrators to rule on its own jurisdiction i.e. principle of "*Kompetenze - Kompetenze*"of arbitral tribunal, interplay of Section 16 and Section 34 of Arbitration Act and interplay of powers between the courts and the arbitral tribunals was discussed. It was emphasized that on tracing the history, the doctrine of arbitration agreement was expounded in judgment of *Heyman v. Darwins Ltd.*, (1942) A C 356 with regard to arbitration in the formation and constitution of the Arbitration Act. The concepts and the principles of domestic arbitration, international commercial arbitration and the enforcement of the foreign awards were emphasized.

Independence of arbitration agreement based on three principles *viz.* severability of arbitration agreement from the main contract, the doctrine of competence which is statutory recognized under Section 16 (1) of the Arbitration and Conciliation Act, 1996. Section 7 of the Arbitration Act that talks about the arbitration agreement was explained. *Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman* 2019 8 SCC 714 was referred upon and it was highlighted that position of law that prevails after the insertion of Section 11(6- A) is that Supreme Court or, as the case may be, the High Court, while considering any application under 11 (4) to 11(6) is to confine itself to examination of existence of arbitration agreement, nothing more, nothing less, and leave all other preliminary issues to be decided by arbitrator.

Scope of Section 9 of the Arbitration Act was discussed, and it was stated Section 9 empower the court to grant interim measures of protection and is one of the most important and widely invoked provisions under the Arbitration Act. Such measures become necessary to prevent damage or loss of, the subject matter of the dispute in the interim period, i.e. before the final adjudication of the dispute by an arbitral tribunal. Under Section 9, the court has wide powers to grant interim measures of protection as may appear to the court to be just and convenient, including for preservation, interim custody or sale of goods which are the subject matter of arbitration, for

securing the amount in dispute, interim injunction, appointment of a receiver or guardian, etc. It was opined that as a matter of strategy, Section 9 relief is often considered critical to get a head start, and very often, half the fight is won with such a relief being granted by the court. Insertion of Sections 9(2) & 9(3) of the Arbitration Act was underscored. It was delineated that Sections 9 and section 17of the Arbitration Act safeguards the interests of one Party over another, by granting interim protection to the former if the latter's actions are unbecoming in terms of equity, fair play or natural justice, or they inherently violate the underlying agreement. Any contracting Party is at liberty to file an application for interim measures during or before the arbitration proceedings. Under Section 9, a Party is at liberty to file an application before the court for claiming interim reliefs whereas under Section 17 a Party is at liberty to file an application before the arbitral tribunal for claiming interim reliefs.

It was underscored that before the constitution of the tribunal and after the passing of the award, the power to grant interim protection lies only with the court. The words "or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36" were omitted from Section 17 by the 2019 amendment. Once the arbitral tribunal has been constituted, as per Section 9(3), the court ‘shall not’ entertain an application under sub-section (1), unless it finds that circumstances exist which may not render the remedy provided under Section 17 ‘efficacious’. Lastly, while under section 9 of the Arbitration Act, it is settled that the court has the power to pass direction against third parties, the power of the tribunal to pass directions against a third party is not clear. Therefore, it was suggested that in cases where interim relief is also sought against a third party, it may be preferable to approach the court under Section 9.

The scope of Section 16 of the Arbitration Act was discussed and it was delineated that Section 16 has been framed in accordance with Article 16 of the UNCITRAL Model law, which embodies elemental jurisprudential doctrine i.e., "*Kompetenze - Kompetenze*". This doctrine empowers the

court or an arbitral tribunal to rule upon its 'own' jurisdiction, brought forth by one of the parties to the dispute. *Kompetenz-kompetenz* is the jurisdictional principle to empower an adjudicating body to exercise on the issues on its own jurisdiction submitted before it, i.e., it can decide on the pleas challenging its own jurisdiction submitted before it. It was highlighted that curiously, several rulings of the Supreme Court of India ("SCI") on the scope of jurisdiction under Section 16 of the Arbitration Act stand divided and appears to be contradictory.

Some of the judgments highlighted and discussed include *Arcelor Mittal v. Essar Bulk*, 2021 SCC Online SC 718, *PASL Wind Solutions v. GE Power Conversion India*, (2021) 7 SCC 1, *Ashwani Minda and M/S Jay Ushin Limited v. U-Shin Ltd and M/S Minebea Mitsumi Inc*, FAO(OS)(COMM) 65/2020 (Ashwani Minda), *Hero Wind Energy v. Inox Renewables Ltd.*, FAO (OS) (COMM) 60/2020 (Hero Wind Energy), *Big Charter Pvt Ltd v. Ezen Aviation Pty Ltd.*, 2020 SCC OnLine Del 1713, *Olympus Supertructures Pvt. Ltd. v. Meena Vijay Khetan & Ors*, [(1999) 5 SCC 651] and *Vidya Drolia v. Durga Trading*, 2021 (2) SCC 1.

Session 3: Recognition & Enforcement of Arbitral Awards

The session commenced by emphasizing the importance of time in an arbitral proceeding and reference was made to Section 29A of the Arbitration Act. It was accentuated that an award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23 which is considered to be a progressive step toward pro arbitration regime. It was highlighted that party autonomy and legitimate expectation must be fulfilled, since both the parties have agreed to resolve the dispute through arbitration. A reference was made to Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA) and, International Chamber of Commerce, Paris (ICC) with regard to time bound completion of arbitral proceedings. It was underscored that once an award is passed it should not be delayed at the stage

of recognition and enforcement. It was pointed out that an award automatically becomes a degree in case of domestic arbitration, wherein, the case of international arbitration the recognition is precondition followed by enforcement. It was highlighted that the enforcement and execution of India - seated arbitral award would be governed by the provisions of Part I of the Arbitration Act whereas, enforcement of foreign - seated awards would be governed by the provisions of Part II of the Arbitration Act. It was stressed that arbitration is a hybrid system projecting the interplay between courts and tribunal. A reference was made to Section 27 and Order 21 of the Civil Procedure Code [hereinafter referred as "CPC"]. The session involved discussion on the role of court in arbitral proceeding viz.; appointment of arbitrator under Section 11, interim measure under Section 9 and, recognition and enforcement of award. It was deliberated that with regard to summoning of witnesses and in contempt cases, a reference to the court for passing an appropriate order is essential, since such powers are not vested with the arbitral tribunals. A reference was also made to Sections (s) 34 and 48 of the Act on the enforcement of domestic and international arbitral awards.

During the course of discussion a reference was made to Geneva Protocol (1923), New York Convention (1958), Arbitration Protocol and Convention Act, and Foreign Award (Recognition & Enforcement) 1961. The session highlighted the framework for non-reciprocating countries while referring the case *Badat and Co. vs. East India Trading Co.,* AIR 1964 SC 538, wherein the court held that the convention does not apply to award of a non-convention country, the awards are still enforceable in India on the same grounds and in the same circumstances on which they are enforceable in England under the Common Law on grounds of justice, equity and good conscience. The case of *Bharat Aluminium Co. v. Kaiser Aluminium Technial Services Inc.*, (2012) 9 SCC 552, was referred wherein it was emphasized that the definition of "foreign awards" in Sections 44 and 53 of the Arbitration Act intentionally limits it to awards made in pursuance of an agreement to

which the New York Convention, 1958 or the Geneva Protocol, 1923 applies. Further, the case highlighted that no remedy is provided for the enforcement of the "non-Convention awards" under the 1961 Act. Therefore, it was stressed that the non-convention award cannot be incorporated into the Arbitration Act by process of interpretation.

The session included a deliberation on Section 48 of the New York Convention & Section 57 of the Geneva Protocol, and pointed out that those provision are mirror image of Sec. 34 except patent illegality. The difference between Sections 48 and 57 of the Arbitration Act was dwelt upon. It was emphasized that arbitral process is purely private and consensual arising out of the contract. The terms recognition, enforcement and execution were discussed with regard to foreign arbitration award. It was emphasized that the Arbitration Act operates on recognizing and concluding the arbitral award. While the execution part is covered by CPC. A reference was further made to the provisions of appeal under Section 37 (domestic arbitration) and Section 50 (international commercial arbitration).

The session dwelt upon the scope of public policy, whereby a reference was made to Section 23 of the Indian Contract Act, 1872. It was highlighted that the term "public policy" is easy to describe and difficult to define. It was underscored that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of a Indian law; or (ii) the interests of India; or (iii) justice or morality. It was pointed out that the term "public policy" is not defined under the New York Convention. Various landmark judgments with regard to recognition and enforcement of arbitral award formed part of the discussion *viz. Richardson v. Mellish*, [1824 2 Bing 229]; *Renusagar Power Co. Ltd. v. General Electric Co.i,* [1994 Supp (1) SCC 644]; *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* [(2014) 2 SCC 433]; *Vijay Karia v. Prysmian Cavi E Sistemi SRL,* [(2020) 11 SCC 1]; *Shriram EPC Ltd. v. Rioglass Solar Sa*, [(2018) 18 SCC 313], *Government of India v. Vedanta Ltd.*, [(2020)

10 SCC 1], *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.*, [(2020) SCC OnLine SC 381], *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131; *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228; *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705; and, *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263.

Session 4: Current and Emerging trends in Domestic and International Arbitration

The session commenced by throwing light upon the developments in emergency arbitration across the globe, and its recognition by various arbitral institutions. The session dwelt upon the nature of emergency arbitration [hereinafter referred as "EA"] orders such as :

- EA decisions are interim and thus not "award" on the substance in dispute
- EA decisions may be reversed, revised or continued by the tribunal once appointed
- EA decisions are not "awards" enforceable under the New York Convention

Reference was made to various judgments with regard to enforcement of EA orders by way of judicial process such as; *Sharp Corporation and Sharp Electronics Corporation v. Hisense* (Civil Action No. 17-1648 (JEB), *HSBC Pl Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd.*, (Arbitration Petition No. 1062/2012), *Alka Chandewar v. Shamshul Ishrar Khan*, 2017 SCC OnLine SC 75 and, *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd*., (2021) SCC OnLine SC 557. It was highlighted that in Singapore there is specific legislation for enforcing emergency arbitrator's decisions and interim orders.

During the course of discussion, the 246th Report of the Law Commission and proposed amendment to Section 2 (d) of the Act to include emergency arbitration was referred. However, the proposed amendment was not incorporated under the Indian law. On this point the case of *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*, (2021) SCC OnLine SC 557 was

referred which stated that a recommendation of the Law Commission Report not followed by the Indian Parliament, would not necessarily lead to the conclusion that the suggestion of the Law Commission can never form part of the interpretation of the statue.

It was accentuated that the provisions on emergency arbitration is well recognized by various arbitration centers such as; Delhi International Arbitration Centre, Court of Arbitration of the International Chamber of Commerce India, and Mumbai Centre of International Arbitration. It was stressed that Parties can approach for emergency arbitration instead of interim relief under Section 9 of the Act. The case of *Ashwini Minda v. U-Shin Ltd*., 2020 VAD (Delhi) 156 was referred wherein, the High Court clarified that it will not pass an order contrary to the emergency arbitrator simply because a Party has failed to obtain such reliefs from the emergency arbitrator and that there is no change in the circumstances from the time emergency award was passed.

The session threw light upon the importance of expert evidence which is a new phenomenon in the field of arbitration. It was stressed that many disciplines involve expert opinion such as; disputes in engineering issues, oil and gas, root cause analysis, product defects, and expropriated foreign investments. The speaker dwelt upon the expert investigation and mode in which it is undertaken with the help of model theory and probabilities. A reference was also made to artificial intelligence with regard to arbitration, and how it can be utilized by courts and arbitral tribunals considering the high degree of probability in civil litigation. The appointment of experts such as; party-appointed and tribunal-appointed expert was touched upon during the course of discussion. The session involved deliberations on witness conferencing of experts in international commercial arbitration by way of cross-examination done by the arbitral tribunal to avoid any impartiality as compared to party-appointed experts.

The concept of “Specific Clause” expressly barring the payment of interest was discussed in light of Sec. 31(7) (a) of the Arbitration Act. It was emphasized that reasonable interest can be awarded

by the arbitral tribunal. It was underscored that if the contract prohibits pre-reference and *pendente lite* interest then the arbitrator cannot award interest for the said period. On this point the case of *Garg Builders v. Bharat Heavy Electricals Limited.*, AIR 2021 SC 4751 was referred wherein the apex court categorically stated that when there is express statutory permission for the Parties to contract out of receiving interest and they have done so with free consent, it is not open for the arbitrator to grant *pendente lite* interest.

The discourse also included deliberation on extension of limitation orders in the arbitration and, the applicability of the Limitation Act 1963. Limitations for claims and limitations in the arbitral proceeding were some areas touched upon by the speaker. A reference was made to *Maharashtra (Water Resources Department) v. M/s Borse brothers Engineers & Contractors Pvt. Ltd*., (2021) 6 SCC 460 to point out the issue of whether the appellate court could condone the delay in filing the appeal under Section 37 of the Act.

Deliberation on the concept of "Third Party Funding" (TPF) also formed part of the session and it was highlighted that TPF involves funding the arbitration proceeding in exchange for a profit return out of the court decree or award. A reference was made to *B. Sunitha v. State of Telangana*, (2018) 1 SCC 638 where the court held that personal interest in the outcome of proceedings by the advocate is unacceptable and unequivocally precluded in all jurisdictions, and the agreements on a contingency fee are prohibited in law where an advocate is a Party. It was emphasized that third-party funding is neither expressly permitted nor expressly barred. It was accentuated that third-party funding can be found in the CPC Order 25 Rule 1 (as amended by Maharashtra, Gujarat, Madhya Pradesh, and Uttar Pradesh) provides that courts have the power to secure costs for litigation by asking the financier to become a Party and depositing the costs in court.

The discussion elaborated on the provision of "Counter Claim" referring to Order 8 Rule 6A of CPC. It was mentioned that in arbitration, mostly counterclaims are filed along with the statement

of defense by the respondent or even later. A reference was made to *State of Goa v. Praveen Enterprises*, AIR 3011 SC 3814 with regard to the limitation on counterclaims.

The session also dwelt upon the "Schedule of Fees" and the case of *Gammon Engineering Contractors Ltd v. NHAI*, 2019 (203) AIC 96, was highlighted wherein, it was stated that when Parties have agreed to a fee schedule in a contract, the provision of Schedule IV will not apply to the fees of the tribunal and the provisions of the contract will govern the tribunal's fee, thus reaffirming party autonomy in this regard. Lastly, the session included deliberation on the concept of "Two-Tier Arbitration" and "Expert Witness" at length.

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