

NATIONAL JUDICIAL ACADEMY



National Workshop for High Court Justices for Commercial Division and Commercial Appellate Division on Commercial Disputes [P-1288]

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Programme Coordinators

Mr. Yogesh Pratap Singh, Research Fellow & Mr. Prasadh Raj Singh, Law Associate, National Judicial Academy

The National Judicial Academy organized a two-day *online* ‘National Workshop for High Court Justices for Commercial Division and Commercial Appellate Division on Commercial Disputes’ on 12 & 13 March 2022. The workshop facilitated deliberations among participant justices on contemporary issues and recent developments in commercial matters. It provided a forum for discussing normative issues pertaining to the Architecture of the Commercial Courts Act and Challenges in the Area of E- Commerce; Distribution and Licensing Agreements: Disputes & Resolution; Interpretation of Construction and Infrastructure Contracts; and Integrated System of Dispute Resolution: Commercial Courts, Arbitration & Mediation. About 27 High Court Justices from different High Courts participated in the workshop.

The session on ‘*Commercial Courts Act, 2015: Architecture and Challenges in the Area of E-Commerce*’ commenced with deliberation on brief legislative history of the enactment of the Commercial Courts Act 2015 (hereinafter the Act) and its objectives viz. to ensure speedy disposal of high value disputes. Referring the judgement, *Ambalal Sarabhai Enterprises v. K.S. Infraspace*¹, the meaning of commercial disputes within the scope of section 2 (1) (C) of the Act was examined & discussed. It was pointed out that the Act adopted an expansive definition of the term ‘commercial dispute’ through an exhaustive list of 22 standard commercial transactions that may form the subject of commercial disputes. Referring a number of High Court’s and Supreme Court decisions², the scope of the definition of commercial disputes and relevant sub-clauses³ of section

¹ LLP (2020) 15 SCC 585

² Qatar Airways Q.C.S.C. v. Airports Authority of India, 2017 SCC Online Del. 8088 54; Havells India Ltd. v. Advertising Standards Council of India, (2016) 227 DLT 719. 55; Ladymoon Towers Pvt Ltd. v. Mahendra Investment Advisors Pvt. Ltd. MANU/WB/0547/2021; Perpetuuti Technosoft Services Pvt. Ltd. v. Sanovi Technologies (India) Pvt. Ltd., 2016 SCC Online Del 6714; Kailash Devi Khanna v. DD Global Capital Ltd. & Ors. 2019 SCC Online Del 9954; Glasswood Realty Pvt. Ltd. v. Chandravilas Kothari 2021 SCC Online Bom. 5032; Blue Nile Developers Pvt. Ltd. v. Movva Chandra Sekhar & Ors. 2021 SCC Online AP 3964

³ Section 2 (1) (C) “commercial dispute” means a dispute arising out of- Sub clauses

(i) Ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;

(iv) arising out of transaction relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;

(vi) construction and infrastructure contracts, including tenders;

(vii) agreements relating to immovable property used exclusively in trade or commerce;

(xvii) intellectual property rights relating to registered and unregistered trademark, copyright, patent, design, domain names, geographical indication;

(xviii) agreements for sale of goods or provision of services

2(1)(C) was further elaborated. Deliberations were also made with respect to handling complex commercial disputes. It was highlighted that many commercial disputes involving multiple parties of individuals or entities are complex because they entail a variety of different interests to satisfy. Nature and certain areas of commercial disputes were discussed. It was stressed that courts should first determine whether a dispute is a commercial dispute within 22 entries under Section 2 (1) (c) or not. Deliberating upon construction and infrastructure contracts, three types of contracts such as fix price, measurement contracts and pay contracts were discussed.

Following kind of claims under different contract were also explained;

- Claim in relation to work executed;
- Claim for escalation;
- Disruption claims;
- Claim for prolongation;
- Claim for loss of profit; and
- Change in law claim.

It was suggested that acquainting self with basic knowledge of financial statements will go a long way in tackling commercial disputes effectively. The session concluded with Q&A and discussion.

The session on '*Distribution Licensing Agreements: Disputes & Resolution*' commenced with outlining the scope of distribution and licensing agreement. Manner & ways in which distribution agreements and outsourcing business take place in India was elaborated. Deliberating upon distribution, the importance, channels and requirement of distribution was discussed. It was pointed out that distribution channels are pathways along which products travel from producers and manufactures to ultimate consumers and a good distribution system is critical for any type of industry or service. Elaborating on distribution requirements, it was highlighted that storage, transportation and licenses are the most important requirement for the distribution business. While pondering over distribution & licensing agreements, it was stressed that licensing agreements are intrinsic to distribution businesses and following elements of licensing agreements were highlighted;

- The scope of the agreement, including exclusivity or territorial restrictions;

- Financial aspects including required advances, royalty rates, and how royalties are calculated;
- Guarantees of minimum sales;
- Time schedules involving ‘to market’ dates, length of contract, and renewal options;
- The licensor’s right of monitoring and quality control, including procedure to be followed;
- Minimum inventories required to be maintained; and
- Returns and allowances.

Structure and clauses of licensing agreement such as identification of the parties, recitals, definitions and grant of licenses were pointed out during the session. Compensation & obligations under licensing agreement were elaborated & discussed. A number of judicial precedents on distribution and licensing agreements were also referred & discussed.⁴ The session concluded with Q&A and discussion.

The session on *Interpretation of Construction and Infrastructure Contracts* threw light on some key points to bring in an effective dispute resolution mechanism to address issues pertaining to construction and infrastructure contracts. It was pointed out that construction and infrastructure demands are intertwined with the economic development of a country wherein Foreign Direct Investment (FDI) is the key factor. The various alternate dispute resolution mechanisms, challenges faced by the private partnerships, issues pertaining to the pre-arbitration mechanism, and the possible ways out formed part of the discussion. The aspect of expert adjudication in matters pertaining to infrastructure contracts was deliberated upon. It was opined that infrastructure contracts are not a normal contractual issue and therefore, there is a need for some understanding of how such contracts operate and their various types. It was deliberated that there

⁴ Gujarat Pottling Co.Ltd. & Ors vs The Coca Cola Co. & Ors 1995 SCC (5) 545; Ozone Spa Private Limited vs Pure Fitness & Ors 2015 SCC OnLine Del 10768; Aircel Cellular Ltd vs Union Of India 2016 SCC OnLine Mad 8463; Engineering Analysis Centre of Excellence Pvt Ltd v the Commissioner of Income Tax & Another 2021 SCC OnLine SC 159; Reliance Industries Limited v. State of UP 2012 194 ECR; Moorcock (1989) 14 PD 64; Liverpool City Council v Irwin [1976] QB 319; BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266; Nabha Power Limited (NPL) v Punjab State Power Corporation Limited (PSPCL) & Anr 2018 11 SCC 508

are no set guidelines for issues pertaining to infrastructure contracts which leaves a lot of room for assumptions.

It was underlined that the risk involved in these infrastructure projects & its document is very high and stay orders on the infrastructure projects cause delay leading to loss. Therefore, it becomes difficult for any global player to invest in infrastructure projects in India. Enforceability of contracts in India is way too bad and the reasons for the same were highlighted. It was pointed out that in India it takes 4.25 years on average to resolve a commercial dispute. It was highlighted that in India there is no statute for projects except in Gujarat, Andhra Pradesh, and Punjab which have an enabling Act have the best infrastructure projects in the country whereas the rest of the country has a policy statement. An important part of an infrastructure project is risk allocation and the fixed term/ fixed price contract. Important legal issues in Public-Private Partnership Contracts (PPP) were explained such as tendering process wherein it was highlighted that courts have held that the judiciary must not enter into business decisions but judiciary's focus must be to ensure that government does not do things patently illegal, irrational or procedural impropriety. In this regard, a reference was made to the case *Reliance Airport Developers Pvt. Ltd. vs. Airport Authority of India & Ors*, (2006) 10 SCC 1. It was emphasized that one major issue in the construction contracts or other contracts is delay. Some other legal issues enlisted and deliberated upon included, the frustration of contract, force majeure; change orders, and, change in law. Following judgments were highlighted during the discussion *Kailash Nath Associates vs. DDA* (2015) 4SCC 136 and *State of Gujarat vs. Kothari Associates* (2016) 14 SCC 761.

Further, some specific legal provisions were reflected upon that come into play with regard to matters pertaining to infrastructure and construction contracts including Sec. 56 (frustration of contract) and Sec. 32 (contingent contract) of the Indian Contract Act. A reference was made to the judgment in *Energy Watchdog vs. CERC*, (2017) 14 SCC 8. It was pointed out that courts have a multifactorial approach while handling matters pertaining to infrastructure contracts. It was pointed out that tariff regulators have played a major role over the past 30 years in construction projects which is one of the factors that come up in infrastructure disputes. It was suggested that when there is frustration of contract following things must be looked into namely whether there is a destruction of property that results in a contract incapable of being performed, is their illegality if the contract is allowed to run in its contracted terms and whether there is a loss of the object of

the contract. Lastly, it was highlighted that the Commercial Court Act 2015 must be re-read regularly including exceptions provided in the Act such as Sec. 8 along with Sec. 35 of the Civil Procedure Code.

The session on *Integrated System of Dispute Resolution: Commercial Courts, Arbitration & Mediation* dwelt upon the alternative dispute resolution mechanism wherein Section 34(2)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as Act) was highlighted. A reference was made to Section 28(3) of the Act, and it was underlined that in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. Various key features of Commercial Court Act viz. strict timeline, pecuniary jurisdiction, stream line process, summary judgment and case management hearing were discussed at length. It was emphasized that IPAB was a specialized forum constituted under the Trade Mark and the Patent Act in order to ensure expeditious disposal of intellectual property matters which is scrapped through the Tribunals Reforms (Rationalization and Condition of service) Ordinance, 2021. Thereafter, large number of cases relating to IPR disputes have been directly transferred to various High Courts. A reference was made to the Delhi High Court Intellectual Property Rights Division Rules, 2022 wherein it was highlighted that the IP division of the Delhi High Court exercises original, appellate and writ jurisdiction over such disputes. It was emphasized that appeals under Trade Marks Act, Copyright Act, Patent Act, Geographical Indications of Goods (Registration and Protection) Act, Protection of Plant Varieties and Farmers Right Act, Semiconductor Integrated Circuits Layout- Design Act, and Information Technology Act would now have to be dealt with by the High Courts. Additionally, Rule 15 and 16 of the Delhi High Court IPR Division Rules which provides for flexibility and modernity in recording of evidence was deliberated upon. The provisions pertaining to the use of videography, transcription technology and hot-tubbing were also highlighted with regard to the recording of evidence. Various innovative rules such as; litigation hold notice, confidentiality club for the preservation and exchange of confidential information, computation of damage, panel of experts and law researchers, and mediation were some areas reflected upon.

During the course of discussion, reference was made to the following judgments; *Dau Dayal v. State of Uttar Pradesh* AIR 1959 SC 433, *Ruppell v. Ponnusami Tevan* 1899 1 LR 22 Mad 488, *Shree Vardhman Rice and General Mills v. Amar Singh Chawalwala* (2009) 10 SCC 257, M.C.

Jayasingh v. Mishra Dhatu Nigam Limited 2014 SCC OnLine Mad 163, *Tata Motor Company Limited v. Baja Auto Limited* 2019 SCC OnLine Mad 33823

The session further threw light upon the emergence of third party funding. Rules 18 and 20 of the Bar Council of India Rules, 1975 were emphasized upon with regard to the standard of professional conduct and etiquette. A reference was made to Order XXV of the Civil Procedure Code, 1908 and Civil Law (Third-party Funding) Regulation 2017 of the Singapore to highlight the emergence of statutory recognition of third party funding.