NATIONAL JUDICIAL ACADEMY

NATIONAL WORKSHOP FOR HIGH COURT JUSTICES ON ARBITRATION INCLUDING INTERNATIONAL ARBITRATION

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PROGRAMME REPORT

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Overview of the Programme

The National Judicial Academy (NJA) organized a two-day online Workshop for High Court Justices on Arbitration including International Arbitration on 16th & 17th April 2022. The workshop deliberated on challenges and contemporary avenues in domestic and international arbitration including the Arbitration & Conciliation Act 1996 (hereinafter referred as the 'Act') required to be addressed for strengthening the dispute resolution process and aligning it with global standards. The workshop facilitated discussion on themes relating 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*. Identification of challenges and evolving optimal solutions/strategies to effectuate qualitative justice delivery were aspects of deliberation during the workshop. The emphasis was on clinical methods/case analyses and interactive sessions through sharing of experiences, skills and resources to enhance the quality of arbitration proceedings in India and improve the enforceability of domestic and foreign awards.

Day 1

Session 1: The Scheme of Arbitration and Conciliation Act: Towards Model Dispute Resolution Regime

[Speaker**: Dr. Birendra Saraf**; Chair:** Justice R.V. Raveendran**]

The session was initiated by highlighting the fundamental importance of arbitration related to economic development and the need for a smooth dispute resolution process to increase investments. It was pointed out that arbitration as an alternative dispute resolution mechanism has been advocated many times. Various advantages of resorting to arbitration instead of court litigation were enlisted such as a speedier process since it avoids technical rules of CPC and Evidence Act, limited option for a challenge in case of arbitration as provided under Sec. 34 of the Act as compared to appeals in court following hierarchy which considerably reduces pendency of dispute, choice of appointing a technical person as arbitrator, cheaper due to no court fees, choice over the venue, timing, control is with the arbitral tribunal and parties, and, non-hostile atmosphere for arriving at settlements. It was opined that the working of the 1996 Act had various shortcomings and therefore, it was exhaustively addressed in the year 2015 and thereafter in 2019 followed by an amendment in 2021 to bring in ease of Arbitration.

The session gave an exhaustive overview of the Act. It was put forth that none of the stakeholders involved in arbitration has acted in the spirit to make the Act a success. It was stated that the Act became one of the most litigated and pronounced upon by the courts in different judgments. It was highlighted that when the UNCITRAL model was drawn, India followed the model in its entirety without moulding it to suit the requirements of the country which led to a great deal of confusion leading to numerous litigation. It was emphasised that the amendments thereafter were brought in to set right the shortcomings, stop the abuse of the entire arbitral process, limit judicial intervention, correct judicial precedents, encourage institutional arbitration and lastly, improve the conduct of arbitration proceedings. It was explained that the Act can be divided into different provisions based on the scheme of judicial intervention in arbitration viz. judicial intervention prior to commencement of arbitration would relate to Sec. 11 pertaining to the appointment of an arbitrator, and Sec. 8 power to refer parties where there is an arbitration agreement; during the course of arbitration the scope of judicial intervention is limited to Sec. 9 in certain situations and; post arbitral proceedings involves a challenge to the award and enforcement (Sections 34, 36 & Sections 45-48).

The session involved a detailed deliberation on various provisions of the Act including Sec. 11 regarding the power to appoint an arbitrator wherein the role of the court was discussed and it was mentioned that this provision was extensively litigated pre 2015 Amendment situation; Sec. 11(6A) and; Sec 11(7). Aspects pertaining to the arbitrability of dispute viz. the judgment in the case of *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1 were elaborated upon. The changes brought in by the 2015 and 2019 Amendments were discussed at length. Whether the appointment of an arbitrator is a judicial function or an administrative function was an area dwelt upon wherein it was mentioned that it is a judicial function as held in the case *SBP & Co. v. Patel Eng. Ltd.* (2005) 8 SCC 618. It was stressed that the scope and meaning of 'existence' of an arbitration agreement have been the subject of much judicial scrutiny wherein the following judgments were referred *Suresh Shah v. Hipad Technology (India) Pvt. Ltd*. (2021) 1 SCC 529, *Pravin Electricals Pvt. Galaxy Infra & Eng.* (2021) 5 SCC 671, and *DLF Home Developers Ltd v. Rajpura Homes Put*. 2021 SCC Online SC 781. Further, it was highlighted that issues such as Article 14 and its instrumentalities are difficult for an arbitrator to take up and should be left to the domain of the court. Some other areas that formed part of the discussion included the existence of an unstamped arbitration agreement, issues pertaining to Sec. 8 and Sec 45, grounds for challenging the award including patent illegality, institutional arbitration, and timelines for arbitration proceedings before and post the 2019 amendment. Lastly, it was pointed out that in

other jurisdictions like Singapore and Australia, there is no intervention by the court once an arbitrator is appointed, however, that is not the case in India. Therefore, it was opined whenever an application under Sec. 11 is made an attempt must be made to find out whether an order passed by a court advances the object of the legislation.

Session 2: Jurisdictional Challenges: Balancing the role of the Court and Arbitral Tribunal

[Speaker**: Mr. Atul Sharma**; Chair:** Justice K.S. Jhaveri**]

The session commenced with a deliberation on the object of the Arbitration & Conciliation Act which is to expedite the proceedings of a commercial nature.

With regard to domestic disputes, it was emphasized that Sec. 16 of the Act which relates to the competence of the arbitral tribunal to rule on its own jurisdiction is flowing from the UNCITRAL model. It was highlighted that Sec. 16 of the Act is analogous to Art. 16 of the UNCITRAL model law adopted in India. It was pointed that when the Tribunal has jurisdiction on a particular matter then the court must not interfere. Further, Sec 2(3) of the Act pertaining to the definition clause was also reflected upon pointing out the bar under the said provision. Sec. 2(3) was read along with Sec. 34(2)(b)(i) highlighting that these are fundamental provisions under India's Arbitration Act which provide for matters specifically reserved for the court, tribunal, and/or other proceedings. It was also stressed that Sec. 16 is subject to exceptions provided under Sec. 2(3) and Sec. 34(2)(b)(i) of the Act. The issue of preference for arbitration over domestic law remedies was an area reflected upon.

On international disputes, it was pointed out that there is an issue with regard to the enforceability of foreign judgments wherein Sec. 44A (1) of the CPC which provides for enforcing of foreign judgments in India was referred which only applies to the reciprocating countries. It was highlighted that to overcome the issue of enforceability the New York Convention and Geneva Convention were brought in which provided that the arbitral award of the contracting state would be enforceable subject to exception in the other state, giving credibility to foreign arbitral award which is not awarded within India. It was underscored that the regime of Sec. 34 of the Act has a much wider scope compared to Sec. 47 of the Act which provides for a challenge to foreign awards. The concept of perversity and injustice built-in Sec. 34 of the Act was also deliberated upon.

It was accentuated that the doctrine of *Kompetenz-kompetenz* runs through different stages of the arbitral proceedings and in interactions between the court and the arbitral tribunal. The principle

having evolved internationally and been recognized by Indian courts in the case of NN *Global Mercantile v. Indo Unique Flame Ltd.,* (2021) 4 SCC 379 was referred to at length. Two issues were reflected upon viz. application of the doctrine of separability in the Act and the underline substantive contract. On this point following judgments were referred viz. *Garware Wall Ropes v. Coastal Marine Constructions and Engineering* (2019) 9 SCC 209, *Vidya Drolia v. Durga Trading Corporation* (2021) 2 SCC 1 (*Vidya Drolia II*). The session included deliberations on unstamped or insufficiently stamped agreements wherein it was highlighted that in *NN Global* the Supreme Court expressly overruled the judgment in *SMS Tea Estate Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd* (2011) 14 SCC 66 and expressed doubts over the correctness of the decision in *Garware Wall Ropes* and *Vidya Drolia II*, holding that an arbitration agreement, having independent existence, would not be rendered "invalid, unenforceable or non-existent", even if the substantive contract is not admissible in evidence or cannot be acted upon on account of non-payment of stamp duty. It was further emphasized that if an agreement is not stamped then still it can be taken up for arbitration, nonpayment of stamp duty will not vitiate or invalidate the arbitration proceedings. It can be validated on payment of inadequate stamp duty on the remaining part of the agreement. Further, exceptions to rule of Sec. 16 as held by Supreme Court in *Vidya Drolia* case wherein circumstances when arbitral tribunal has unfettered jurisdiction and where it has no competence was discussed.

The session also focussed on matters which can and cannot be decided by the arbitral tribunal involving the issue of jurisdiction between court and the tribunal through Supreme Court judgments including *Booz Allen Hamilton v. SBI Finance* (2011) 5 SCC 532 and *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd,* (2020) SCC OnLine SC 656. It was listed that sovereign functions, cooperative housing society cannot be arbitrated, class actions & complex frauds are reserved for courts, a dispute under the trust act, industrial disputes, and consumer protection act matters cannot be dealt with by the tribunal.

An emphasis was also drawn on some other provisions of the Act including Sec. 9 and Sec. 17 on the power of court and tribunal respectively to grant interim relief and Sec. 48 (1)(a). It was opined that there is an overlap in the powers of court and tribunal. The conditions for enforcement of foreign awards were also deliberated upon. Lastly, the following judgments were also referred to during the session namely *Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.*, (2021) SCC OnLine SC 718, *Ultratech Cement v. Rajasthan Rajya Vidyut,* (2018) 15 SCC 210, and *Gemini Bay v. Integrated Sales Services Ltd.*, (2022) 1 SCC 753.

Day 2

Session 3: Recognition & Enforcement of Arbitral Awards

[Speaker**: Justice M. Sundar**]

On the theme of *Recognition and Enforcement of Arbitral Awards*, the deliberation commenced by delineating the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958). It was pointed that the term 'recognition' is not defined in domestic law, however, reference to the same can be found under Articles 3 and 5 of the New York Convention. While dealing with the enforceability of foreign judgments by non-reciprocating countries the case of *Badat and Co. v. East India Trading Co., AIR 1964 SC 538* was discussed wherein it was held that although the Convention does not apply to award of a non-convention country, the awards are still enforceable in India on the same grounds and under the same circumstances in which they are enforceable in England in accordance with the Common Law principles of justice, equity and good conscience. Broadly, it shall be treated as a contract. In *Bharat Aluminium Co. v. Kaiser Aluminium Technial Services Inc. (2012) 9 SCC 552* it was held that merely because the Arbitration Act, 1996 does not cover the non-convention awards it would not amount to a lacuna in the statute. It was stressed that no lacuna can be construed upon consolidating the law contained in three different instruments (the Arbitration Act, 1940 read with the 1961 Act, and the Arbitration (Protocol and Convention) Act, 1937) into a single legislation i.e, Arbitration Act, 1996. It was further held that the scope of 'foreign awards' in Sections 44 and 53 of the Arbitration Act, 1996 has been intentionally limited to awards made in pursuance of an agreement to which the New York Convention, 1958 or the Geneva Protocol, 1923 applies. Therefore, no remedy was provided for the enforcement of the "non-convention awards" under the 1961 Act and the non-convention award cannot be incorporated into the Arbitration Act, 1996 by process of interpretation.

Subsequently, on the issue of public policy, para 30 of *National Ability S.A. v. Tinna Oil & Chemicals Ltd (2008) 3 ALR 37* was cited wherein it was held that the principle of comity of nations requires that the awards of foreign arbitral tribunals must be given due deference and enforced unless exceptional circumstances exist. Thereafter, the case of *Richardson v. Mellish (1824 2 Bing 229)* was highlighted wherein it was held that 'public policy' is an unruly horse which once straddled has the potential to convey unknown dimensions. The case of *Besant v. Wood (1879 12 Ch D 605)* was also referred. In *Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860* it was held that the enforcement of a foreign award would be refused if

such enforcement is deemed contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.' The same proposition was reiterated in *Shri Lal Mahal Ltd. v. Progetto Grano Spa (2014) 2 SCC 433*. In *Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC* it was clarified that fundamental policy of Indian law mentioned in *Renusagar Power Co. Ltd.* must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. Further, it was stressed that 'fundamental policy' refers to the core values of India's public policy as a nation which find expression not only in statutes but are time-honoured, hallowed principles followed by the courts. The case of *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A, AIR 2020 SC 2681* was referred wherein a challenge under Section 48 was upheld on public policy grounds.

Thereafter, on the issue of whether a foreign award was liable for stamp duty under the provisions of the Stamp Act, 1899, *Shriram EPC Ltd. v. Rioglass Solar Sa, (2018) 18 SCC 313* was highlighted wherein it was held that the expression 'award' was never intended to include a foreign award from the very inception. Consequently, a foreign award not being includible in Schedule I to the Indian Stamp Act, 1899, is not liable for stamp duty.

Thereafter, *Government of India v. Vedanta Ltd. (2020) 10 SCC 1* was emhasised wherein the Apex court examined the issue of limitation *qua* enforcement of foreign arbitral awards. The following principles were set out:

a) The application under Sections 47 and 49 for enforcement of the foreign award is a substantive petition filed under the Arbitration Act.

b) Foreign awards are not decrees of an Indian civil court. By a legal fiction, Section 49 provides that a foreign award, after it is granted recognition and enforcement under Section 48 would be deemed to be a decree of "that court" for the limited purpose of enforcement. The phrase "that court" refers to the court which has adjudicated upon the petition filed under Sections 47 and 49 for enforcement of the foreign award.

c) Article 136 of the Limitation Act would not be applicable for the enforcement/execution of a foreign award since it is not a decree of a civil court in India.

(d) The issue of limitation for enforcement of foreign awards being procedural in nature, is subject to the *lex fori* i.e. the law of the forum (State) where the foreign award is sought to be enforced.

(e) The limitation period for filing the enforcement/execution petition for enforcement of a foreign award in India would be governed by Indian law. The Indian Arbitration Act, 1996 does not specify any period of limitation for filing an application for enforcement/execution of a

foreign award. Section 43, however, provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in court.

(f) The period of limitation for filing a petition for enforcement of a foreign award under Sections 47 and 49 would be governed by Article 137 of the Limitation Act, 1963 which prescribes a period of three years from the date on which the right to apply accrues.

g) The application under Section 47 is not an application filed under any of the provisions of Order 21, CPC. The application is filed before the appropriate High Court for enforcement which would take recourse to the provisions of Order 21, CPC only for the purpose of execution of the foreign award as a deemed decree. The bar contained in Section 5 of the Limitation Act, which excludes an application filed under any of the provisions of Order 21 would not be applicable to a substantive petition filed under the Arbitration Act, 1996. Consequently, a party may file an application for condonation of delay, if required in the facts and circumstances of the case.

Furthermore, while dealing with the doctrine of group of companies *Mahanagar Telephone Nigam Limited v. Canara Bank and others (2020) 12 SCC 767* was discussed wherein it was held that where there is a tight group structure with strong organisational and financial links so as to constitute a single economic unit, or a single economic reality, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group.

On the issue of whether an 'award' delivered by an Emergency Arbitrator (EA) under the Arbitration Rules of the Arbitration Rules of the Singapore International Arbitration Centre ("the SIAC Rules") can be said to be an order under Section 17(1) of the Arbitration and Conciliation Act, 1996, *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and others (2022) 1 SCC 209* was deliberated wherein the court held that full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include EA's delivering interim orders described as 'awards'. Such orders are an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties.

Lastly, *Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited (2022) 1 SCC 753* was discussed wherein it was held that when enforcement of a foreign award is resisted, the party who resists it must prove to the Court that its case falls within any of the sub-clauses of sub-section (1) or sub-section (2) of Section 48. The Court while dealing with the expression 'proof' contained in Section 48(1) referred to *Emkay Global Financial Services Ltd.* v. *Girdhar Sondhi (2018) 9 SCC 49* wherein a question arose under the *pari materia* provision contained in Section 34 of the Arbitration Act. After referring to a number of High Court judgments and

amendment made to Section 34 it was held that the expression 'proof' cannot possibly mean the taking of oral evidence as it will otherwise defeat the object of speedy disposal under Section 34 petitions. Given that foreign awards in Convention countries need to be enforced as speedily as possible, the same logic would apply to Section 48 as a result of which the expression 'proof' under Section 48 would only mean 'established on the basis of the record of the arbitral tribunal' and such other matters as are relevant to the grounds contained in Section 48.

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

[Speakers**: Dr. Matthew Secomb and Mr. Tejas Karia**]

On the theme of *Current and Emerging Trends in Domestic and International Arbitration*, the discussion commenced by exhibiting surveys on the proclivity towards international arbitration; what are its shortcomings; preferred seats for international arbitration and the adaptations that would make other seats more viable to parties. It was shown that the three most valuable characteristics for preferring international arbitration are enforceability of awards, avoidance of specific legal systems/national courts and flexibility. The three major shortcomings of international arbitration were outlined to include cost, lack of effective sanctions during the arbitral process and lack of power in relation to third parties. Further, seat of arbitration in order of preference were identified as London, Hong Kong and Singapore respectively. Greater support by local courts, increased neutrality and impartiality of the domestic legal system and better track record in enforcing agreements to arbitrate were touted as the adaptations other seats should make in order to be preferred for arbitration.

Thereafter, evolution of Indian law on seat and venue; choice of foreign seat and foreign law by Indian parties; arbitrability of disputes; and emergency arbitration were discussed in light of precedents. As regards seat of arbitration, in *Union of India v. Vedanta Ltd*., *(2020) 10 SCC 1* it was held that the curial law of arbitration is determined by the seat of arbitration. Parties have the autonomy to determine the law governing the arbitral procedure which is to be referred as the *lex arbitri*, and is expressed in the choice of the seat of arbitration. The curial law governs the procedure of arbitration, commencement of the arbitration, appointment of arbitrator(s) in exercise of the default power by the court, grant of provisional measures, collection of evidence, hearings, and challenge to the award. The court at the seat of arbitration exercise supervisory or "primary" jurisdiction over the arbitral proceedings. On the issue of seat vis-à-vis venue *Union of India v. Hardy Exploration and Production, (2019) 13 SCC 472* was discussed wherein it was

held that venue can become a seat if something else is added to it as a concomitant. It does not *ipso facto* assume the status of seat. In *SC Brahmani River Pellets v. Kamachi Industries, (2020) 5 SCC 462* it was held that courts of the venue and not where the cause of action had arisen, will have exclusive jurisdiction. In *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd., (2020) 5 SCC 399* it was held that expression 'place of arbitration' cannot be the basis to determine the 'seat' of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties. *Imax Corporation v. E-City Entertainment Pvt. Ltd. (2017) 5 SCC 331, Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722, BGS SGS Soma JV* v. *NHPC Limited, (2020) 4 SCC 234* and *Inox Renewables Ltd. v. Jayesh Electricals Ltd*., *(2021) 3 SCC 57* were also referred.

Subsequently, on the issue of choice of foreign seat between Indian parties the decision in *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Ltd, (2021) 7 SCC 1* was highlighted wherein it was held that party autonomy is the guiding spirit of arbitration, and the same empowers two Indian parties to choose a seat other than India. Thereafter, on choice of foreign governing law by Indian parties *Dholi Spintex v. Louis Dreyfus,* 2020 *SCC OnLine Del 1476* was deliberated wherein *Reliance Industries v. Union of India, (2014) 7 SCC 603* was applied and it was held that when there is a foreign element to the transaction, a foreign law may be applicable to the contract. Since, the arbitration agreement is independent of the contract, it may be governed by a separate law.

Further, a number of judgments on arbitrability of disputes was delineated. In *Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors*., *(1993) 2 SCC 507* it was held that the Act does not specify any category of disputes as non-arbitrable. However, Section 34(2)(b)(i) give courts the power to set aside a domestic award that has been challenged if it finds that the subject matter of the dispute is not capable of settlement by arbitration. In *Booz Allen Hamilton v. SBI Home Finance Limited, (2011) 5 SCC 532* it was held that disputes relating to criminal offences, matrimonial disputes, guardianship matters, insolvency and winding-up matters, testamentary matters and eviction or tenancy matters are non-arbitrable disputes. In *Vimal Kishore Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788* it was held that disputes arising out of trust deeds and the Indian Trusts Act, 1882 cannot be referred to arbitration. In *A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386* it was held that allegations of fraud are arbitrable unless they are serious and complex in nature. Similarly, in *Avitel Post Studioz Ltd. v. HSBCPI Holdings (Mauritius), 2021 4 SCC 173* it was held that only "serious allegations of fraud", as opposed to "simple allegations of fraud" are non-arbitrable. It was clarified that serious allegations of fraud occur when: (i) the plea of fraud

permeates the entire contract, particularly the arbitration agreement; or (ii) where the allegations of fraud have an implication on public domain. In *Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1* the four-fold test for determining when the subject matter of a dispute is not arbitrable was enunciated:

- When cause of action and subject matter of the dispute relates to actions *in rem*, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*. In this regard it was pointed that landlord-tenant disputes governed by the Transfer of Property Act, 1882 ("TOPA") are arbitrable as they are not actions *in rem* but pertain to subordinate rights *in personam* that arise from rights *in rem*. Such actions normally would not affect third-party rights or have *erga omnes* affect or require centralised adjudication. An award passed deciding landlord-tenant disputes can be executed and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State. The provisions of the TOPA do not expressly or by necessary implication bar arbitration;

- When cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable;

- When cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

- When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

Thereafter, emergency arbitration was discussed. It was opined that emergency arbitration is a special procedure whereby an EA is appointed to hear applications for urgent interim relief prior to the constitution of the main arbitral tribunal as envisaged by the arbitration agreement. It was asserted that emergency arbitration is meant to be used in cases that cannot await the constitution of the main arbitral tribunal. The cardinal objective of emergency arbitration is to ensure that a party is not permitted to act in bad faith by taking advantage of the delay in the appointment of the main arbitral tribunal. It was stated that EA's are appointed in order to ensure that the purpose and sanctity of arbitration proceedings is kept intact by prohibiting parties from tampering with evidence, disposal of assets, invocation of bank guarantees etc. A sole arbitrator is appointed as

the EA. An EA becomes *functus officio* after the interim order is made. The provisions relating to emergency arbitration do not preclude a party to approach competent judicial authority for interim measures. (LCIA Rules, ICC Rules, SIAC Rules, etc.)

Further, the powers of EA's, the reliefs that can be granted and the enforceability of emergency arbitrators' orders in India was discussed. It was opined that a conjoint reading of the provisions of the Act coupled with emphasis on party autonomy and there being no interdict, either express or by necessary implication against an EA shows that any such order, if provided for under institutional rules would be covered by the Act. It was asserted that the definition of 'arbitration' under Section 2(1)(a) means any arbitration, whether or not administered by a permanent arbitral institution. When read with Sections 2(6) and 2(8), it is clear that even interim orders that are passed by EAs under the rules of a permanent arbitral institution would be included within the ambit of Section 17(1)(a). It was iterated that the term 'arbitral proceedings' in Section 17(1) is not limited by any definition and thus encompass proceedings before an EA. Therefore, an India-seated EA's interim award is enforceable in India as an interim order under Section 17(1). In *Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors. 2022 1 SCC 209* it was held that the arbitral tribunal cannot itself enforce its orders, which can only be done by a court with reference to the Civil Procedure Code, 1908. The court while enforcing an interim order passed under Section 17(1) [including EA's order] proceeds in the same manner as to enforce an interim order made by a court under Section 9(1) of the Act. This means that the EA's order under Section 17(1) can get enforced under Section 17(2) read with the provisions of CPC. Further, Section 37 provides for appeals only from an order granting or refusing to grant any interim measure under Section 17, which in turn would only refer to the grant or non-grant of interim measures under Section 17(1)(i) and 17(1)(ii) of the Act. Therefore, no appeal shall lie under Section 37 of the Act against an order of enforcement of an EA's order made under Section 17(2) of the Act.

Subsequently, on the point of Schedule of Fees it was expounded that Section 11A of the Act empowers the Central Government to amend the Fourth Schedule. Further, certain judgments were amplified on the issue of whether the fees prescribed under the fourth schedule is suggestive or mandatory? In *Paschimanchal Vidyut Vitran Nigam Limited v. IL&FS Engineering & Construction Company Limited, 2018 SCC OnLine Del 10831* it was held that the fees prescribed in the Fourth Schedule is only suggestive. Similarly, in *G. S. Developers & Contractors Pvt. Ltd. v. Alpha Corp Development Pvt. Ltd. & Anr., 2019 SCC OnLine Del 8844* it was held that the Fourth Schedule merely serves as a guiding model. Similar proposition was reiterated in *DSIIDC*

v. Bawana Infra Development (P) Ltd., 2018 SCC OnLine Del 9241 and *M/s. Chandok Machineries v. M/s. S.N. Sunderson & Co., 2018 SCC OnLine Del 11000.* At present, the issue regarding the suggestive or directory nature of the Fourth Schedule (*ONGC v. Afcons*) is pending before the Apex court.

Lastly, time limit under Section 29A was delineated. It was asserted that Section 29A under Part I of the Act applies to arbitrations seated in India. In matters other than international commercial arbitration award shall be made within a period of twelve months from the date of completion of pleadings [Section 29A(1)]. Moreover, award in an international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings [Proviso to Section 29A(1)]. Further, if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive additional fees as the parties may agree [Section 29A(2)]. Subsequently, the effect of the 2019 Amendment on Section 29A was highlighted :-

Prior to the 2019 Amendment	Post the 2019 Amendment
Time limit of twelve months for all arbitrations.	Time limit of twelve months for all arbitrations other than international commercial arbitrations.
Time period to be calculated from the date on which the arbitrators received notice of their appointment.	Time period to be calculated from the date of completion of pleadings.

In *ONGC Petro Additions Limited v. Ferns Construction Co. Inc., 275 (2020) DLT 123* it was held that provision of Section 29A(1) shall be applicable to all pending arbitrations seated in India as on 30th August 2019 and commenced after 23rd October 2015. In *Suryadev Alloys and Power Ltd v. Shri Govindraja Textiles, 2020 SCC OnLine Mad 7858,* it was held that a Court cannot ratify an award *ex post facto* by extending the time period under Section 29A in a Section 34 petition by the aggrieved party.

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