

NATIONAL JUDICIAL ACADEMY



**CONFERENCE FOR HIGH COURT JUSTICES ON ARBITRATION INCLUDING
INTERNATIONAL ARBITRATION**

14th - 16th December, 2018

PROGRAMME REPORT

PROGRAMME COORDINATOR:

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The Arbitration and Conciliation Act: Changing Trends in Legislative Scheme

1. Reference to Arbitration (Section 8)
2. Appointments and Challenges to Arbitrators (Section 12 & 11)
3. Two-Tier Arbitration Clause
4. The Arbitration & Conciliation (Amendment) Bill, 2018

Balancing Conflicting Interests: “Public Policy” vis-à-vis Domestic Arbitration

1. Construction and Interpretation of Applicability Clause
2. Interpreting “Fundamental Policy” Inserted by 2015 Amendment

International Commercial Arbitration: Role of Courts in post BALCO Regime

1. Paradigm Shift and Change in Jurisprudence
2. Territoriality Principle under UNCITRAL Model
3. Exclusion or Inclusion of Part I of the Arbitration Act

Enforcement of Foreign Arbitral Award: Issues and Challenges

1. Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York, 1958)
2. Foreign Judgments from Non- Reciprocating Countries
3. Enforcement of Foreign Award by Third Party

Jurisdictional Issues: Court Intervention vis-à-vis Competence of Arbitral Tribunal

1. Principles of Kompetenz-Kompetenz
2. Doctrine of Separability

Emergency Arbitration and Enforceability of its orders in India

Emergence of Third Party funding in International Commercial Arbitration: A New Scheme

1. Scope and Ambit of Third Party Funding
2. Liability of Funders
3. Third Party Funding in Foreign Jurisdiction

Current and Evolving Issues

1. Time Limit under Section 29A
2. Counter-Claim
3. Schedule of Fees
4. Power to Review Arbitral Award

OUTLINE OF THE PROGRAMME:

The National Judicial Academy organized a three day “Conference for High Court Justices on Arbitration including International Arbitration” from 14th to 16th December, 2018. The conference provided a forum to the participant judges to discuss and exchange views on themes - *The Arbitration and Conciliation Act: Changing Trends in Legislative Scheme, Balancing Conflicting Interests: “Public Policy” vis-à-vis Domestic Arbitration, International Commercial Arbitration: Role of Courts post BALCO Regime, Enforcement of Foreign Arbitral Award: Issues and Challenges, Jurisdictional Issues: Court Intervention vis-à-vis Competence of Arbitral Tribunal, Emergency Arbitration and Enforceability of its orders in India and Emergence of Third Party funding in International Commercial Arbitration: A New Scheme*. The conference was attended by 22 High Court Justices nominated by different High Courts.

Session: 1

Session: The Arbitration and Conciliation Act: Changing Trends in Legislative Scheme

Speakers: Dr. Birendra Saraf & Dr. Nidhi Gupta

The speaker deliberated that adjustments in the Arbitration and Conciliation Act, 1996 (The Act) is set to progress the institutional intervention in India. A reference was made to Sec. 8 of the Act and it was stated that application referred to in Sub-section (1) shall not be entertained unless it is accompanied with original arbitration agreement or a duly certified copy thereof. A reference was also drawn to Sec. 9 of the Act wherein the role of courts is restricted to the stage before constitution of the arbitral tribunal. The provision was discussed in detail.

Further, with regard to the appointment of arbitrator, it was stated that the Supreme Court or, as the case may be, the High Court or any person or institution designated by such court to take the necessary measure, unless the agreement on the appointment procedure provides

other means for securing the appointment. It was highlighted that the word “Chief Justice” was replaced by "Courts" in post 2015 amendment.

During the discussion various key features of Amendment Bill 2018 were discussed at length such as; creation of an Arbitration Council of India, appointment of arbitrators, exclusion of International Commercial Arbitrations from the purview of Sec. 29A, confidentiality in arbitral proceedings and immunity for the Arbitrator.

Session 2

Session: Balancing Conflicting Interests: “Public Policy” vis-à-vis Domestic Arbitration

Speakers: Dr. Birendra Saraf & Dr. Nidhi Gupta

Dr Birendra Saraf, explained with reference to the public policy that among the different reason for putting aside an arbitral award under section 34, "public policy" has not been explicitly characterized and has regularly been left open to legal understanding.

Despite precedent suggesting that “public policy” be construed in a narrow sense, the Supreme Court, in *ONGC v. Saw Pipes* (“Saw Pipes”) interpreted the same in its broadest sense by adding “patent illegality” to the existing grounds. In its conclusion that the arbitral award was legally flawed, the Court held that an award could be challenged on account of contravention of the Act or any other substantive law governing the parties. In addition, an award, which is “so unfair and unreasonable that it shocks the conscience of the court”, could also be set-aside through judicial intervention

Subsequently, a reference was made to *ONGC v. Western Geco International (Western Geco)* where the Apex Court took a retrograde step and intervened to widen the ambit of ‘fundamental policy of India’ holding that while a tribunal or court should follow principles of natural justice as well as *Wednesbury*’s principle of reasonableness, it should not act in an arbitrary or capricious manner or be influenced by extraneous considerations while determining the rights and liabilities of citizens or corporations.

Session 3

Session: *International Commercial Arbitration: Role of Courts in post BALCO Regime*

Speakers: *Dr. Birendra Saraf & Dr. Nidhi Gupta*

The speaker focused upon the importance of Sec. 2(f) of the Act with regard to International Commercial Arbitration and to what extent courts in India have jurisdiction to decide matters relating to arbitration which is conducted outside India. During the course of discussion a reference was made to *BALCO case* where the Apex court addressed the issue of jurisdiction, overruling *Bhatia* and restored the principle of territoriality choice of seat as exclusive jurisdiction clause. Further, the court held that the country where seat of arbitration is located, and the country whose law is chosen by the parties, do not give concurrent jurisdiction over the proceeding. It further held that only the courts of the country where the seat of arbitration is located have jurisdiction to address any matter related to such arbitration.

Session 4

Session: *Enforcement of Foreign Arbitral Award: Issues and Challenges*

Speakers: *Mr. D.J. Khambata & Mr. Jayanth Balakrishna*

It was deliberated that the Indian courts may refuse to enforce the foreign award on satisfactory proof of any of the grounds mentioned in Sec. 48(1) of the Act, by the party resisting the enforcement of the award. The provisions set out in Sec. 48 of the Act are in the nature of defences available to the party resisting the enforcement application. It was emphasized that once an award is found to be enforceable it may be enforced like a decree of that court. However parties would have to be mindful of the various challenges that may arise, such as frivolous objections taken by the opposite party, requirements of filing original/ authenticated copy of the award and the underlying agreement before the court.

It was emphasized that most Arbitral awards are intentionally conformed. The issue happens when one of the party disputes the award and requirement for its enforcement arises. There

have been different cases, where, notwithstanding getting a positive award, the party failed to get it enforced by an equipped court in India. The explanations behind this fizzled enforcement range from one party choose not to take interest in the Arbitral procedures to different circumstances where the party has tested the award on the grounds of expense granted or the jurisdiction of the Arbitration Tribunal.

The speaker further discussed the following grounds to challenge the foreign arbitral award

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- Parties to the case under some incapacity.
- The notice was not given to either party
- Award to the parties is beyond the scope of the arbitration
- Legality of composition or Procedure of Arbitral Tribunal
- Award set aside before its enforcement

Session 5

Session: *Jurisdictional Issues: Court Intervention vis-à-vis Competence of Arbitral Tribunal*

Speakers: *Mr. D.J. Khambata & Mr. Jayanth Balakrishna*

During the session it was emphasized that some jurisdictions such as France and India provide that an arbitral tribunal generally has competence to initially decide virtually all jurisdictional disputes, subject to eventual judicial review. A reference was also made to *Prima Paint Corp v. Flood and Conklin Manufacturing Co.* where the Court decided that, mediation statements can be made 'separable' from the contract in which they are incorporated.

A reference was made to *Olympus Infrastructures Pvt. Ltd. v. Meena Vijay Khetan*, it was observed that under the Arbitration and Conciliation Act, 1996 the arbitral tribunal is vested with powers under section 16(1) to rule in its own jurisdiction including ruling on any objection with respect to its existence or validity of arbitration agreement and for that purpose the arbitration clause which forms part of the contract shall be treated as an agreement independent of any terms of the contract and any decision of the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration

clause. Where the arbitral tribunal takes a decision rejecting the plea, the arbitral tribunal shall continue with the arbitral proceedings and make an arbitral award. A party aggrieved by such an arbitral award may make an application for setting aside such award in accordance with section 34 of the Act.

The conference further discussed about the Principle of "Kompetenz-Kompetenz" where the, confusion and misunderstanding may arise by the very choice of that term. The German importance of this articulation is to some extent not the same as that which has turned out to be broadly acknowledged in the field of international commercial arbitration. In German sense, the expression "Kompetenz-Kompetenz" involves the arbitrator, and only they, are approved to govern individually purview.

Session 6

Session: *Emergency Arbitration and Enforceability of its orders in India*

Speaker: *Mr. D.J. Khambata*

On the theme Emergency Arbitration and Enforceability of its orders in India, it was stated that the role of Emergency Arbitration becomes possibly the most important factor in a circumstance, when there is no arbitral tribunal set up or in a circumstance where adequate time would be squandered in setting up one, contingent on the necessities of an intervention understanding or the institutional principles.

It was discussed that emergency arbitration provisions differ slightly between arbitral institutions, they are all based on the premises that emergency arbitrators are appointed prior to the constitutions of the arbitral tribunal and are only competent to rule on the application for interim relief, not on any substantive issues.

Further it was also deliberated that emergency arbitrator provisions in the rules of arbitral institutions does not affect the power of national court to order interim relief to the constitution of the arbitral tribunal.

Session 7

Session: *Emergence of Third Party funding in International Commercial Arbitration: A New Scheme*

Speaker: *Prof. Lawrence Boo*

On the theme Emergence of Third Party funding in International Commercial Arbitration: A New Scheme, the speaker focused upon the concept of 'third party funding' which is the arrangement whereby an unrelated party provides financial support to a party (normally a plaintiff) in return for a share of the eventual monetary award. A reference was made to *Ram Coomar Coondoo v. Chunder Canto Mookerjee* where the court held that "a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy."

Further, with regard to liability and security for costs relating to third party funding a reference was made to *Yeheshkel Arkin v. Borchard Lines Ltd & Ors* where Lord Philips held that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery to succeed the claim. Overall justice will be better served through this method, rather than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.

Session 8

Session: *Current and Evolving Issues*

Speakers: *Justice Dhanuka & Prof. Lawrence Boo*

During the course of discussion it was also emphasized that the time period of 12 months for completion of arbitral proceedings will begin from the date on which the arbitral tribunal

enters upon reference and can be extended by a further period of 6 months with the consent of both parties. However, if the award is not rendered within the said 12 months or within the additional 6 months thereafter, the mandate of the arbitrator shall terminate unless the time period is extended by the court, on an application by either party, only for sufficient cause and on such terms and conditions as may be imposed by the court – preceding or after the expiry of the period so determined.

The speaker also discussed that Sec. 29-B of the Act is a codification of a procedure that is predominantly featured in prominent arbitral institutions. However, its utility and effectiveness remain to be tested in the Indian scenario, since the time within which an award is to be pronounced in regular arbitral proceedings has already been capped by Sec. 29-A of the Amended Act.