NATIONAL JUDICIAL ACADEMY

WORKSHOP ON INTERNATIONAL ARBITRATION FOR HIGH COURT JUDGES
[SE-10]

11TH & 12TH DECEMBER, 2021

PROGRAMME REPORT

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OVERVIEW OF THE PROGRAMME

National Judicial Academy (NJA) organised an online workshop on International Arbitration for High Court Judges on 11th and 12th December 2021. The workshop was organised in collaboration with the Singapore International Arbitration Centre (SIAC). The workshop provided an opportunity to our High Court Judges to interact with experts from Singapore with extensive experience in International Arbitration and to gain insight into the nuances of International Arbitration as an emerging and popular method of dispute resolution. The workshop familiarised the judges with the concept and features of International Commercial Arbitration; differences between *ad hoc* and institutional arbitration; concepts of seat, venue, *lex arbitri* and curial law in arbitration; international law on international arbitration; arbitration at SIAC; and drafting of arbitral awards.

DAY 1

Opening Remarks - Ms. Gloria Lim, CEO, Singapore International Arbitration Centre & Hon'ble Mr. Justice Amreshwar Pratap Sahi, Director, National Judicial Academy

Session 1 - International Commercial Arbitration

Session 2 - International Commercial Arbitration

DAY 2

Session 3 - International Arbitration at Singapore Arbitration Centre

Session 4 – Drafting Arbitral Awards

DAY – 1

The Workshop commenced with opening remarks by Ms. Gloria Lim, CEO, SIAC who provided an overview of the sessions in the workshop. Thereafter, Hon'ble Justice A.P. Sahi, Director, NJA delivered his opening remarks wherein he provided an overview of arbitration as an emerging and self-regulating legal order which secures quick and affordable justice to the parties and the reasons for its popularity as a dispute resolution method.

Session 1

Theme - International Commercial Arbitration

Speaker - Dr. Matthew Secomb

The session commenced with a theoretical overview of the concept of arbitration. The concept of International Commercial Arbitration (ICA) was explained to be a modern form of arbitration that emerged as a consequence of globalisation, the increase in cross border business transactions and the consequent demand for easier and cost-effective methods of cross-border dispute resolution. The reasons for the preference of arbitration over other dispute resolution methods were stated as-

- Neutrality of the arbitrator and in decision making.
- Confidentiality & privacy of the process.
- Autonomy of the parties as the parties retain control over the process.
- Flexibility of the process.
- Efficiency and timely decisions.
- Finality of the decision.

Thereafter, the contemporary international law instruments which regulate ICA *viz.* the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration were discussed.

The New York Convention was stated to be the lynchpin of the ICA system as it is the most successful commercial treaty with 167 parties. The New York Convention was stated to mainly require that domestic courts turn away disputes which are covered by an arbitration clause and enforce foreign arbitral awards. A broad overview of the provisions of the New York Convention

was provided. The UNCITRAL Model Law was stated to be a template for streamlining arbitration process, and it addresses aspects regarding the conduct and management of arbitration. This model law establishes commonality in law and processes across various countries as it is the basis for the many domestic arbitration law including the Indian statute- the Arbitration and Conciliation Act, 1996.

The key features of and distinctions between *Ad Hoc* and Institutional Arbitration were explained. Thereafter, the three types of arbitration – commercial arbitration, investor-state and state to state arbitration were explained. An overview of the main clauses and contents of arbitration agreements was provided. The main validity requirements as prescribed in Article 2(1) of the New York Convention were discussed –

- The agreement must be in writing.
- There must be an agreement to submit disputes to arbitration.
- The agreement must specify the matters that can be arbitrated.
- The matter can legally be arbitrated. (Arbitrability of disputes)
- There must be a valid contractual relationship between the parties.

The problem of vagueness in contract with regard to subject matter that would be subject to arbitration was highlighted as a common problem in arbitration agreements. Choice of law in arbitration in International Commercial Arbitration was discussed and the concept of *lex arbitri* was explained. It was stated that *lex arbitri* is usually the law applicable to the seat of arbitration (i.e. the place where the arbitration legally takes place) rather than venue of arbitration (i.e. the geographical location where the arbitration process is conducted). As regards the choice of law, the applicable law can be is determined by the choice of law is determined by the choice of the parties either expressly or implied. Further, it was stated that the law applicable to the contract is usually stated in the governing clauses of the contract to indicate the express choice of law by the parties.

Session 2

Theme - International Commercial Arbitration

Speaker – Mr. Siraj Omar

The session commenced with posing two pertinent questions i.e., what is soft law? and why is soft law? under International Arbitration. It was explained that soft law comprises of non-binding rules

and guidelines as developed by international organisations viz. International Bar Association (IBA), United Nation Commission on International Trade Law (UNCITRAL) and Chartered Institute of Arbitrators (CIArb) and it was said that it is different from 'hard law' which is found in arbitration statutes and treaties. On use of soft laws in practice, it was emphasised that parties do get agree on using soft law for its greater certainty and familiarity. It was stressed that soft laws can be binding, once parties agree to use particular set of rules and guidelines.

Deliberating upon IBA guidelines on conflict of interest, it was pointed out that there are three list viz. red, orange and green under which the courts and arbitral institutions have adopted the leading standard for assessing arbitrator impartiality and independence. The red list is further divided into two i.e., non-waivable and waivable conflict. Under non-waivable conflict, parties are not permitted to waive conflict and under waivable, parties can expressly waive conflict with full disclosure. The orange list highlights the situations that may give rise to doubts over impartiality and lastly the green list, which put no duty to disclose.

The updated IBA rules, 2020 with respect to taking of evidence were discussed. The view was expressed that the new updates are due to increasing reliance of technology in recent times amid covid-19. Two main sources of taking of evidence such as documentary evidence and witness testimony under different categories viz. voluntary disclosure-compelled disclosure under documentary evidence and witness statements-oral testimony under witness testimony were highlighted in the session. The following key updates were discussed;

- Cyber security and data protection;
- Regulate remote evidentiary hearings; and
- Admissibility and assessment of evidence.

The legal framework of international Arbitration in context of the 'seat' of an arbitration was pondered upon. It was said that the seat of an arbitration is the legal domicile or juridical home of the arbitration. Pointing out its significance in detail, it was explained that it governs a wide range of issues concerning the arbitration viz. procedural law for the conduct of the arbitrations, extent of judicial involvement in arbitration and extent to which parties can select foreign law to govern procedural aspects of the arbitration. A clear distinction between seat and venue was made. It was clarified that seat is a choice of law whereas venue delas with one or more geographical locations

and it is driven by practical considerations. Referring to Section 45: Power of Judicial Authority to refer parties to arbitration, of the Arbitration and Conciliation Act, 1996, various queries with respect to seat of arbitration were made and discussed. Referring to curial law, it was explained that curial law is the law pursuant to which the arbitration is conducted. It was clarified, however, that it is different from the procedure of the arbitration i.e., the rules of the procedure that the parties agree on or the tribunal directs. The session concluded with Q&A and discussion.

DAY – 2

Session 3

Theme - International Arbitration at Singapore Arbitration Centre

Speaker - Mr. Francis Xavier

The session commenced tracing the remarkable history of SIAC since its establishment in 1991. Thereafter, SIAC framework, number of cases and the categories of disputes addressed at SIAC were discussed. Added to this, an overview was provided of the governance structure, registrar and secretariat at SIAC. The details about the SIAC Board of Directors and Court of Arbitration were touched upon. SIAC panel of arbitrators, code of ethics and their rigorous and efficient appointment process including the gender diversity at SIAC was highlighted. Deliberating upon the validity requirements of international arbitration agreements and choice of law, it was stressed that arbitration agreements require only two things *viz.* consent to arbitrate and scope of submission. The process of appointment of arbitrators and duties of the tribunals were discussed.

The views were expressed upon Multi-contract, consolidation, joinder, early dismissal, expedite procedure, emergency arbiter. It was discussed in multi-contract the claimant may file a notice of arbitration in respect of each arbitration agreement to consolidate the arbitrations. In matters of consolidation, where there are claims arising out of more than one contract, the claimant may choose to file a notice of arbitration for each agreement and may file an application to consolidate the arbitrations or file a single notice to all arbitration agreements. It was opined that expedite procedure is a special 'fast-track' procedure that is available in SIAC applications. Where a case is conducted under the expedite procedure, the final award will be issued within six months of the constitution of the tribunal although registrar have the power to extend the time for making the final award. However, it was mentioned that it is the president who determines whether the arbitration proceeding will be conducted in accordance with the expedite procedure.

The emergency arbitrator procedure is a special procedure whereby an emergency arbitrator is appointed to hear applications for urgent interim relief to the constitution of the tribunal. It was mentioned that SIAC was the first Asian arbitration institution to offer this procedure and has received more than 50 applications for the appointment of an emergency arbitrator. Furthermore,

it is pertinent to mention here, any party who is in need of emergency relief may file a notice of arbitration prior to the constitution of the tribunal. Added to this, a party shall notify registrar and all other parties to in writing the nature of relief sought and the reason for such relief is required on an emergency basis.

Lastly, the Arb-Med-Arb protocol was mentioned in detail. It is a process where a dispute is first referred to arbitration before mediation is attempted. It was further clarified that if parties are able to settle their disputes through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award and is enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their disputes through mediation, they may continue with the arbitration proceedings. The session concluded with discussion and Q&A.

Session 4

Theme – Drafting Arbitral Awards

Speaker - Dr. Michael Hwang

The session commenced with iteration of the fundamental purpose of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 commonly known as the New York Convention (hereinafter "the Convention") while emphasizing the pro enforcement nature of the Convention and that it aims at encouraging international commerce and cross border trade by promoting arbitration as an efficient and neutral technique of dispute resolution. However, it was also pointed that the Convention was a product of negotiation and not designed to replace domestic arbitration laws but to supplement and fill in the gaps wherever needed. The Convention is an international treaty and thus part of public international law. It is to be interpreted in accordance with the Vienna Convention on the Law of Treaties, 1969 so as to further the goal of uniform interpretation. In this regard, it was asserted that while India is not a signatory to the Vienna Convention, the Supreme Court recognises it as part of customary international law ***(Ram Jethmalani v. Union of India (2011) 8 SCC 1).*** Further, as an instrument of international law the provisions relating to reciprocity and commercial reservation under Article I (3) of the Convention with special reference to India was briefly touched upon.

The deliberation further explored the contours in enforcement of arbitration agreement by laying down certain basic principles under the Convention's regime: (i) Arbitration agreements are presumed valid; (ii) Parties to a valid arbitration agreement must be referred to arbitration; (iii) 'Referral to arbitration' means either a stay of proceedings or dismissal for lack of jurisdiction; (iv) Arbitrator has jurisdiction to determine their own jurisdiction *(Kompetenz-Kompetenz);* and (v) Severability of arbitration clause. In this context, it was remarked that Article II (3) of the Convention confers an obligation upon the Court of a Contracting State to refer parties to arbitration. Most courts exercise jurisdiction to order interim relief in support of arbitration. Further, the exceptions to the application of Article II (3) were listed:

(a) Where the agreement is "null and void" from the outset on account of fraud, fraudulent inducement, illegality, mistake etc.

(b) Where the agreement has become "inoperative" on account of waiver, revocation, repudiation or termination and has thus ceased to have effect.

(c) Where the agreement is "incapable of being performed" due to legal impediment.

On the subject of recognition and enforcement of arbitral awards the discussion pertained primarily to Article V of the Convention which sets out the limited and exhaustive grounds for denying recognition and enforcement. The various grounds for refusal of enforcement of arbitral awards under Article V (1) are as follows:

(a) Incapacity and Invalidity: It includes mental or physical incompetency of the parties and invalidity of the agreement under the law to which the parties have subjected it.

(b) Lack of Notice and Due Process: It includes lack of notice of appointment of arbitrator or of arbitration proceedings and lack of opportunity to present one's case or to be heard regarding claims, evidence and defences.

(c) Outside or Beyond Scope: It includes award dealing with a difference not contemplated by or not falling within the terms of submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration.

(d) Composition of Tribunal: The composition of the arbitral authority or procedure was not in accordance with arbitration agreement, or in the absence of such agreement was not in accordance with the law of the arbitral seat.

(e) Award not yet Binding/Set Aside: The arbitral award has not yet become binding on the parties or has been set aside or suspended by the competent authority of the country where the award was made.

It was further clarified that the party resisting enforcement bears the burden of proving one of the grounds for refusal of enforcement under Article V (1). The conditions for enforcement of arbitral award as specified in Article IV of the Convention were also discussed. The session concluded with Q&A and discussion.
