

INTROSPECTING THE SCOPE, AMBIT AND IMPACT OF SECTION 29A OF THE ARBITRATION AND CONCILIATION ACT, 1996 ON THE ARBITRATION LANDSCAPE IN INDIA¹

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Introduction

Arbitration was introduced statutorily as an alternate dispute resolution mechanism for the first time, by way of the Indian Arbitration Act, 1899² [“1899 Act”]. Due to the 1899 Act being inexpedient, it was repealed and the Arbitration Act, 1940 [“1940 Act”] was enacted. The 1940 Act contained a provision for passing the award within four months from the date of the arbitral tribunal entering on the reference. However, this was subject to parties seeking extension of time from the Court. This led to frequent applications in the Courts seeking extension resulting in long delays.

Subsequently, after the economic liberalization of 1991, the Arbitration and Conciliation Act, 1996 [“1996 Act”] was introduced, repealing the 1940 Act. However, the 1996 Act omitted to provide any provision of duration or time limit to pass an award. Such omission resulted in prolonged arbitration.

The 176th Law Commission Report³ in 2001 proposed for enacting a time limit to pass an arbitral award. It proposed to implement the recommendation made in the 76th Law Commission Report on the 1940 Act with the modification that the award must be passed within one year of the arbitral tribunal entering into reference. The parties can, thereafter, extend by consent the period upto one year. Beyond the one-year period extended by the parties, extension may be granted by the Court. The application for extension should be disposed of within one month. It also proposed that the Court may impose cost and also indicate future procedure to be followed by the tribunal while

¹ The Author is grateful for the assistance of his associates, Ms. Annie Mittal and Ms. Suparba Chattaraj, Advocates.

² Arbitration and Conciliation Act 1899.

³ Law Commission of India, 176th Report on Arbitration and Conciliation (Amendment) Bill 2001 (Law Com No 176, 2001) p 122.

granting extension. The Commission proposed introducing a new Section 29A with a retrospective effect for speeding up proceedings and setting time limit for making award.

On the basis of the 176th Law Commission Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced but the same was withdrawn due to insufficiencies. Thereafter, in 2010, the Ministry of Law and Justice issued a consultation paper to look into the provisions of the 1996 Act. This led to the 246th Law Commission Report on amendments to 1996 Act. On the basis of the 246th Report, the 1996 Act was amended by way of the Arbitration and Conciliation (Amendment) Act, 2015⁴ which came in force on 23 October 2015.

However, the 246th Law Commission Report did not contain any recommendations with respect to the time limit for making an award. Nevertheless, Section 29A was introduced in the 2015 Amendment Act, perhaps considering the recommendations contained in the 176th Law Commission Report. Section 29A, as introduced in 2015, mandated for the award to be passed within a period of twelve months from the date of the arbitral tribunal entering upon reference. An additional period of six months was made available for passing the award, with the consent of the parties. Beyond the said period, only the Court had the power to extend the time limit for the award to be made.

In 2017, a High Level Committee (“**HLC**”) was set up to review the institutionalization of arbitration mechanisms and to identify the roadblocks to the development of institutional arbitration. On the basis of HLC report, the Arbitration and Conciliation (Amendment) Bill, 2018 was presented before the Lok Sabha, however, the Bill lapsed with the dissolution of the erstwhile Lok Sabha. The said Bill was updated as the Arbitration and Conciliation (Amendment) Bill, 2019 and was passed by both the Houses, followed by Presidential Assent on 9 August 2019. The 2019 Amendment made further modifications to Section 29A and Section 23 of the 1996 Act, dealing with time limit to pass arbitral award.

Instances of ‘sufficient cause’ for grant of extension of time by the Court

As per Section 29A(5), an application made for seeking extension can be granted by the court only if parties provide ‘sufficient cause’. ‘Sufficient cause’ constitutes as a wide terminology and has not been defined under the Act, leading to interpretation and rulings on a case-to-case basis.

It was held by the High Court of Delhi that the demise of the Presiding Arbitrator and the very technical and voluminous nature of the case to be ‘sufficient cause’ for granting extension of time.⁵ Similarly, the High Court of Delhi considered it to be of sufficient cause for parties seeking extension of time under Section 29A, when they anticipated that additional time would be taken

⁴Arbitration and Conciliation (Amendment) Act 2015.

⁵ *International Trenching Private Limited v Power Grid Corporation of India Limited* 2017 SCC OnLine Del 10801.

for filing amended counterclaims, if amendment of statement of claim is allowed.⁶ Courts have even gone to the extent stating that, since enough time and money was invested into the proceedings, the High Court of Delhi deemed it to be sufficient cause for granting extension under Section 29A.⁷

In a construction dispute, voluminous documents were filed, the same was held to be sufficient cause by the High Court of Himachal Pradesh.⁸ Further, when the parties and the tribunal were both proceeding expeditiously and that no delay was attributed to either of them, the High Court of Delhi found it to be a sufficient cause under Section 29A.⁹ At some instances, courts have deemed it inappropriate to stall arbitration proceedings which were already at the stage of evidence, and hence granted extension.¹⁰ In another instance, the High Court of Patna gave extension to meet the ends of justice when the arbitration was at final stages, at the verge of completion of arguments.¹¹

Similar cases can be found wherein delay was caused due to the time taken to adjudicate an application filed by the respondent. The same was held to be sufficient cause for extension of time under Section 29A, by the High Court of Delhi.¹² Furthermore, the High Court of Delhi also held that the arbitral tribunal is required to consider the submissions made by the parties and any delay due to this would amount to sufficient cause for claiming extension under Section 29A.¹³

The extreme situation created by the COVID-19 pandemic called for a more radical approach from the judiciary. The Courts adopted a more liberal stance towards extension of arbitral timelines. In the landmark judgment of *Patel Engineering Limited v. Himachal Pradesh Power Corporation Limited* 2021 SCC OnLine Del 4334,¹⁴ the High Court of Delhi granted an extension in completion of the arbitration proceedings due to COVID-19 pandemic.

While the Courts have deliberated liberally as to what constitutes a ‘sufficient cause’ based on the typical facts of each case, they have taken a restrictive view towards the scope of the term ‘sufficient cause’. In *NCC Ltd. v Union of India* 2018 SCC OnLine Del 12699, the High Court of Delhi held that “*Section 29A of the Act is intended to sensitize the parties as also the Arbitral Tribunal to aim for culmination of the arbitration proceedings expeditiously. It is with this legislative intent, Section 29A was introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. This provision is not intended for a party to seek substitution of an Arbitrator only because the party has apprehension about the conduct of the arbitration proceedings by the said Arbitrator. The only ground for removal of the Arbitrator under Section 29A*

⁶*ASF Insignia Sez Private Limited v Punj Lloyd Limited*, 2017 SCC OnLine Del 10124.

⁷*Tecnimont SPA & Anr. v National Fertilizers Limited* 2018 SCC OnLine Del 13250.

⁸*Abir Infrastructure Private Limited v Beas Valley Power Corporation* 2018 SCC OnLine HP 1562.

⁹*Puneet Solanki & Anr. v Sapsi Electronic Private Limited & Ors.*, 2018 SCC OnLine Del 10619.

¹⁰*Vil Robtak Jind Highway Private Limited v NHAI* 2018 SCC OnLine Del 12000.

¹¹*Mora Tollways Limited v Bihar State Road Development Corporation Limited & Anr.* 2018 SCC OnLine Pat 2333.

¹²*Bharat Heavy Electricals Limited v M/s Capital Control India Private Limited* (2017) SCC OnLine Del 10854.

¹³*Delhi Tourism and Transportation Development Corporation v Kore Security Services* 2018 SCC OnLine Del 11816.

¹⁴*Patel Engineering Limited v Himachal Pradesh Power Corporation Limited* 2021 SCC OnLine Del 4334.

of the Act can be the failure of the Arbitrator to proceed expeditiously in the adjudication process.” The Court also observed that the allegation of bias on the part of the tribunal would not be a relevant factor while considering Section 29A application.

It appears that while granting extension, the Courts ordinarily refuse to examine the validity of the orders passed by the Tribunal and conduct of arbitration proceedings (except those relating to disposal of proceedings) as it is outside the purview of examination under Section 29A.

On certain instances, Courts scrutinising cases under Section 34 proceedings have also upheld the validity of award passed after the expiry of stipulated time limit. The High Court of Delhi, while upholding an award passed after the expiry of the said period, held that an application under Section 29A seeking extension need not be only in writing, but can also be made orally. The court laid the corners of correct interpretation for sufficient cause as:

“In Hindustan Steel Works Construction Ltd. v. C. Rajasekhar Rao, (1987) 4 SCC 93, the Supreme Court, albeit in the context of the Arbitration Act, 1940, has held that the Court has the power to extend the time even after the Award has been given or after the expiry of the period prescribed for the Award, but the Court has to exercise its discretion in a judicial manner.”¹⁵

Further, the Court also relied on the Supreme Court¹⁶ which held that the amount of time and effort put into making an arbitral award should not be wasted on mere technicalities of the Act.

On the other hand, the Telangana High Court¹⁷ held that in absence of any application under Section 29A, the arbitrator becomes *functus officio* after the expiry of the time prescribed under Section 29A. Therefore, an award passed by the arbitrator, who did not have the mandate to deal with the dispute, would be considered nullity and *void ab initio*.

The interpretation of Section 29A in the aftermath of COVID-19 pandemic

Country-wide lockdown posed a huge impediment in physical arbitration proceedings. To check resolution of disputes from coming to a complete stand still, the Supreme Court took *suo moto* cognizance of the difficulties in meeting the stringent timeframes set under the 1996 Act in the case of *In re, Cognizance for Extension of Limitation*, *Suo Moto Writ Petition (C) No.3 of 2020*. In terms of various Orders passed in the matter, the period from 15 March 2020 till 28 February 2022 shall stand excluded. If the limitation expired during the said period, a limitation of ninety days from 1 March 2022 shall be available. If the actual balance limitation period, w.e.f. 1 March 2022 is greater than ninety days, the longer period shall apply. The said period from 15 March 2020 till 28 February 2022 shall stand excluded in computing period under Sections 23(4) and 29A(4).

¹⁵*Chandok Machineries v S.N. Sunderson & Co.* 2018 SCC OnLine Del 11000.

¹⁶ *State of West Bengal v Sree Sree MA Engineering* (1987) 4 SCC 452.

¹⁷ *Roop Singh Bhatta v M/S. Shriram City Union Finance* 2022 SCC OnLine TS 1049.

In *Sagufa Ahmed v. Upper Assam Plywood Products (P)* (2021) 2 SCC 317, the Supreme Court held that the benefit of extended limitation is only until “the period of limitation” and not the period up to which delay can be condoned in exercise of discretion conferred by the statute. The Court clarified that the Orders in *In re, Cognizance for Extension of Limitation* is intended to be beneficial to the people who are prevented from initiating proceedings within the period of limitation due to the lockdown.

In another decision, the High Court of Delhi¹⁸ held that even the invocation of the arbitration will fall under the expression ‘other proceedings’ used by the Supreme Court in the aforementioned orders and held that “*This Court is of the view that the said question requires to be addressed by examining the plain language of Section 21 of the A&C Act.*”¹⁹ Whereas Section 21 expressly provides that an arbitral proceeding would commence on the date on which the request for the dispute to be referred to arbitration is received by the respondent.

In *NCC Limited v. Union of India* 2021 SCC OnLine Del 2850, the High Court of Delhi has unequivocally held that Section 29A is intended to counter the delay in conclusion of arbitration proceedings alone and cannot be applied for achieving of objectives that are alien to the said purpose.

Though, during the Pandemic, the parties were at ease as the period of the lockdown was excluded, the parties also preferred online platforms like Microsoft Teams, Zoom, etc. for conducting arbitral proceedings. This boosted the ambit of arbitration through the virtual mode. However, the lack of infrastructures related to accessibility of internet services and technology, cybersecurity, privacy and data protection etc. have been common. Nevertheless, the extension was granted uniformly, to both online/hybrid and offline arbitrations.

The time frame envisaged under section 29A(4) for filing for extension “after expiry of the period so specified”

Section 29A(4) allows the Court to extend the period “*either prior to*” or “*after the expiry of the period so specified*”. The provision is silent as to the duration or limitation period for the Court to entertain an application seeking extension after the expiry of the period (twelve or eighteen months). In *Times Internet Limited v Bharat Sanchar Nigam Limited*²⁰, the pleadings were completed before the first Arbitrator, after which he was substituted by a second Arbitrator. The second Arbitrator had eighteen months for passing the award, which was not done. As such, the Court held that the mandate of the Second Arbitrator had expired and a substitute arbitrator was appointed by it under Section 29A. It is important to note that the application for extension of the time limit under Section 29A(5) was made on 11 September 2020 when in fact, the second Arbitrator was appointed

¹⁸*Rajveer Singh v Govt. of NCT of Delhi* 2021 SCC OnLine Del 5161 (“**Rajveer**”).

¹⁹Rajveer (n28).

²⁰ *Times Internet Limited v Bharat Sanchar Nigam Limited* 2022 SCC OnLine Del 817.

on 7 February 2017. The petitioners contended that the application was made well within limitation, which was upheld by the High Court. The Court held that while no time-limit has been set for making an application under Section 29A, “*nevertheless, a party must approach the competent court within a period of three years in terms of Entry No. 137 of the Schedule to the Limitation Act, 1963.*” The limitation period started from one year after second Arbitrator’s appointment, i.e. 7 February 2018.

Interestingly, if the limitation for the application under Section 29A is taken to be three years from the expiry of the stipulated time-frame, the entire objective of this provision would be defeated. The rationale for introducing Section 29A was to ensure the disposal of arbitrations expeditiously. By this judgement, the High Court paved an avenue to the parties an additional period of three years for filing the application under Section 29A for extension of time. In certain instances, the parties may take advantage of the ratio laid down in this judgement causing delay in completion of the arbitration.

The above findings appear to be also contrary to the decision of the Supreme Court in *Bharat Sanchar Nigam Limited & Ors. v Nortel Networks Private Limited*²¹, wherein it was observed that the intent of the legislature behind the enactment of the Arbitration Act and its subsequent amendments was to ensure expeditious disposal and time-bound resolution of arbitrations. The Supreme Court held that even though there is no time limit provided for making an application before the Court under Section 11(6)²² for the appointment of an arbitrator, “*a period of three years would run contrary to the scheme*”. Since both Section 11(6) and Section 29A(5) do not specify a time limit, the spirit of the Supreme Court judgement for Section 11(6) must hold true even for Section 29A.

Considering these factors, a specific time period must be stipulated by the Legislature by way of amendment, for filing the application under Section 29A, as a three years additional period if allowed for filing the same, would defeat the entire purpose of the provision.

Which ‘Court’ to approach under Section 29A(5)?

An application under Section 29A can be filed by parties within a reasonable period from either before or after the expiry of twelve months (in case other party doesn't give consent for extension of the time period) or eighteen months.²³

Another pertinent question that arises is, which Court is competent to adjudicate the application under Section 29A(5)? The term ‘Court’ has been defined under Section 2(1)(e) of the 1996 Act.²⁴ The issue regarding the interpretation of the term ‘Court’ under Section 29A was dealt with by the

²¹ *Bharat Sanchar Nigam Limited & Ors. v Nortel Networks Private Limited* AIR 2021 SC 2849.

²² Arbitration and Conciliation Act 1996, s 11(6).

²³ *FCA India Automobiles Pvt. Ltd. (formerly known as Fiat Group Automobiles India Private Limited) v Torque Motor Cars Pvt. Ltd. & Anr.* 2018 SCC OnLine Bom 4371.

²⁴ The Arbitration Act (n33), s 2(1)(e).

High Court of Delhi,²⁵ wherein the question that arose was whether a petition regarding the extension of the mandate of the tribunal rests with the High Court or the Civil Court of the original jurisdiction as per the definition of the term court in Section 2(1)(e) of the 1996 Act.

It was held that the expression ‘Court’ as used in Section 29A has to be read by taking resort to contextual meaning of the said term as provided in Section 2(1) of the Act, which begins with expression “*in this part unless the context otherwise requires*”. The Court held that when one looks at the provision of Section 29A(4), it is quite plausible to conclude that the power to extend the mandate of the arbitrator would lie with the principal Civil Court. However, on a careful analysis, such an interpretation would lead to complications with regard to the powers of the Court *vis-à-vis* Section 11 of the Act.

It was also observed that Section 29A vests the power to the Court to not just extend the mandate of the arbitrator but also choose to substitute the arbitrator. Therefore, the power of the Court to extend the mandate of an arbitrator is coupled with its power to substitute an arbitrator. The Court referred to the judgements of the High Court of Gujarat in *Nilesh Ramanbhai Patel and Ors. v. Bhanubhai Ramanbhai Patel and Ors.* 2019 (2) GLR 1537 and the High Court of Bombay in *Cabra Instalaciones Y Servicios, S.A. v. Maharashtra State Electricity Distribution Company Ltd.* 2019 SCC Online Bom 1437, and arrived at the conclusion that an application seeking an extension of mandate of the arbitrator under Section 29A, can lie only before the Court which has power to appoint the arbitrator under Section 11 of the 1996 Act, and not with the Civil Court as defined under Section 2(1)(e).

In the above cases, the Court held that it would not be conducive for a Civil Court to entertain an application under Section 29A. The Court clarified the position beyond any doubt that if the arbitrator(s) has been chosen by the High Court, the power to remove such arbitrator(s) or to terminate the mandate of the arbitral tribunal shall remain vested in the respective High Court itself and not in the Civil Court.

Section 29A vis-à-vis the inherent principle of party autonomy

The purpose of introducing Section 29A was to ensure disposal of arbitration proceedings in a speedy manner with the limited Court intervention.²⁶ The language of the section confines party autonomy upto six months. This Section also paves way for intervention by the Court in an arbitration proceeding, which may pose as a concern since arbitration is a mode to resolve disputes with minimal judicial intervention.

²⁵ *DDA v Tara Chand Sumit Construction Co.* 2020 (269) DLT 373.

²⁶ *Indian Farmers Fertilizers v M/S Manish Engineering* 2022 SCC OnLine All 150.

Further, if the Court does not extend the period of limitation under Section 29A, the tribunal loses its mandate, even if the parties are agreeable to extension, which ultimately affects both claims and counterclaims made by the parties.²⁷

Section 29A requires filing of an application before the Court, either before or after the expiry of the specified period.²⁸ Whenever a request for a time extension is made, the Court determines who is responsible for the delay of the proceedings. The person who is responsible for the delay may be required to pay such costs as determined by the Court.²⁹ Since arbitration is confidential in nature, placing on Court records the state of the proceedings may result in lowering the confidentiality of arbitration proceedings.

Additionally, by way of this section, the fees of the arbitrator(s) might also be reduced if the delay is deemed to be attributed to them by the Court. Such provision may result in experienced arbitrators distancing themselves from accepting complicated and voluminous disputes that are likely to exceed eighteen months' period set under Section 29A.

The 1996 Act is majorly based on the UNCITRAL Model Laws, however Section 29A is a deviation created separately for the required judicial intervention. As per UNCITRAL laws, the tribunal is free to determine the time limit for the disposal of arbitration proceedings, without any judicial intervention.

Although it seems that the provision of applying to Court for extension of time encroached upon party autonomy, a sacrosanct principle of dispute resolution through arbitration, one cannot ignore the practical situations of enormous delays prevailing in Indian arbitration, prior to 2015 Amendment. Such delay sometimes compelled the parties to opt out of arbitration and approach traditional court mechanism. Therefore, given the beneficial approach of Section 29A which is derived from a practical perspective and analysis (which can be found way back in the 176th Law Commission Report), an equilibrium had to be maintained by bringing in an affirmative step setting out a strict timeline to conclude the arbitration. Considering this, the criticism of curb on party autonomy through introduction of Section 29A may not completely be justifiable.

Conclusion

Section 29A aims at curtailing the copiously long duration of time to settle the disputes. The intent behind this provision is to prevent the parties from taking unnecessary adjournments and ensure an expeditious resolution, thus, restoring the faith in an alternative dispute resolution mechanism. The interpretation of Section 29A has not only been liberal in its approach but also judicious towards granting extension for concluding arbitration proceedings. The exclusion of the provision

²⁷ *Angelique International Ltd. v SSJV.Projects Pvt. Ltd.* 2018 SCC OnLine Del 8287.

²⁸ *FCA India Automobiles Pvt. Ltd. v Torque Motor Cars Pvt. Ltd.* 2018 SCC OnLine Bom 4371.

²⁹ *Fleming Duty Free Shop Private Ltd. v Airports Authority of India* 2022 SCC OnLine Ker 3459.

in international commercial arbitration by way of 2019 Amendment was a well thought approach to strengthen institutional arbitration in India since the arbitral institutes have their own set of rules in terms of conducting the arbitration.

The provision also provides for additional fees to the tribunal if the arbitration is concluded within six months. This gives an impetus to the arbitrators for concluding it in a timely manner. Hence, it is definitely a commendable step towards speeding up arbitration proceedings.

The Courts grant an extension under Section 29A for passing the award, only on satisfaction of sufficient causes. While the Courts are yet to define the term 'sufficient cause' or prescribe a test for determining the same, they have examined facts of each case for arriving at whether there was sufficient cause for the delay in the arbitration.

The Courts have also settled the issues pertaining to the appropriate Court to approach while filing an application under Section 29A. It is now settled that an application under Section 29A would lie before the Court which has the power to appoint arbitrator(s) in particular case.

Inarguably, party autonomy and limited judicial intervention are the two cornerstones of arbitration. However, Section 29A ensures that the same are protected holistically while balancing the intent of expeditious resolution with which the 2015 and 2019 amendments were introduced. Particularly, the exceptional caution and remarkable astuteness with which the judiciary has approached Section 29A is noteworthy. So far as they could, the judiciary has tried to limit their intervention to a minimum, in consonance with the spirit of alternate dispute resolution, while adjudicating under Section 29A. While it can be safely concluded that Section 29A is speeding up arbitration proceedings with its time-bound nature, constant scrutiny of its interpretation is essential to safeguard the spirit of arbitration.