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IMPOSING TIME LIMIT: AN ATTEMPT TO MAKE INDIA AN ARBITRATION HUB

ABSTRACT

When it comes to Arbitration and Conciliation Act, 1996, it has become one of those Acts which is demanding the changes time and again. The Act is making a persistent attempt to evolve in order to be more concise, clear, certain and realistic. The dispute resolution mechanism always has great impact on the Indian economy because it leads to ease in doing business. After Arbitration and Conciliation Act, 1996, the 246th law commission report recommended the Amendment Act of 2015 to eliminate loopholes of the Act. On 23rd October 2015, the Amendment Act of 2015 came into force. Later, based on recommendations of high-level committee headed by Justice B. N Srikrishna Committee the Amendment Act 2019 was notified on 9th August 2019 and some provision came into force on 30th August 2019. One of the important amendments was related to timelines due to which section 29 A was inserted in the Arbitration and Conciliation Act, 1996. The author has tried to put light on the evolution of Section 29A, procedural aspects in section 29A of the 2015 Act. The given below article covers the concept of the delayed award which can be considered one of the purposes of imposing a time limit in arbitral proceedings. There are court clarifications and interpretations also regarding the applicability of the Act as it was Amended in 2019 again. The author has also tried to highlight some challenges which can come through the way of dealing with the arbitral proceedings in the future. The current scenario where COVID-19 has impacted on several businesses, the challenge for execution of provisions of timeline has increased. As India is focusing on making India an arbitration hub, it would be interesting to see how the arbitration is going to tackle the current situation to build confidence in the legal system of a country.

KEYWORDS: Delayed award -Evolution of Section 29A- insertion of section 29A- applicability of 'Act', prospective or retrospective- upcoming challenges with respect to section 29A (1)-arbitration hub.

INTRODUCTION

Arbitration is a process where two or more parties settle their dispute by referring it to a third person i.e. an arbitrator, who has been vested authority by the parties to resolve the dispute by applying law and to pass a judgment which is termed as arbitral award which also includes an interim award, this award shall be binding on the parties. Under Section 89 where it appears to the Court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind to opt for one or the other of the four ADR methods mentioned in the Section.¹ The presence of arbitration in India can be traced back then in the Arbitration Act, 1940 the Hon'ble supreme court of India in the case of Guru Nanak Foundation v Rattan Singh and sons,² held that the proceedings under the Arbitration Act of 1940 have become highly technical and indicated the need for comprehensive new legislation to remove the deficiencies and to make arbitration an effective ADR mechanism, which was then consolidated and replaced by Arbitration and Conciliation Act, 1996. While adopting the new act it neither rendered power to the court nor to the arbitral tribunal to fix a time limit for the passing of the arbitral award which resulted in a delayed award, leaving the parties with no option but to approach the court which would make the purpose ineffective. This position not only affect the parties but also India's economy and global perception of doing business. India's score on the quality of judicial process index is 2 on 18.³ Further in the article the author would try to show the difference and the features of time bound arbitration.

DELAYED AWARD

The concept of the delayed award deals with such an award which had not seen the dawn for several years, as no time limit was introduced until 2015. These delays affect either one or both the parties to the arbitration which would certain to cause an illegitimate claim by one party up on the other. Prior to the 2015 amendment the provisions of 'Act',⁴ 1996 has evidently imposed a time limit on the procedural aspect such as the appointment of the arbitrator which shall be made within thirty days by the parties, where the interim order has

¹ Salem Advocate Bar Association, Tamil Nadu v. Union of India AIR 2005 SC 3353

² (1981) AIR 1981 SC 2075

³ Bibek Debroy and Suparna Jain, 'Strengthening Arbitration and its Enforcement in India– Resolve in India' http://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf accessed 27 September 2020

⁴ Referred as Arbitration and Conciliation Act,1996

been passed by the court the arbitral proceedings shall be commenced within a period of ninety days, challenging the appointment of the arbitrator and so on. The rights have also been conferred to the tribunal to determine the statement of claim and defences.⁵ This clearly reflects the persuasive approach of the act to ensure speedy redressal of the dispute. But unfortunately, the Act of 1996 did not expressly address the time limit for the arbitral award which is one of the probable reasons to prevent delayed award. The cognizance of the same had been taken in the case Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd⁶ where the court decided the legal position of delayed awards and held that “It is true that under the Act, there is no provision similar to Sections 23 and 28 of the Arbitration Act, 1940, which specifically provided that the arbitrator shall pass an award within a reasonable time as fixed by the Court.”

To understand the concept it is imperative to go through the case which had a significant relevance such as Harji Engineering Works v. Bharat Heavy Electricals Ltd.,⁷ which is also considered as one of the first decision which dealt with the issue of setting aside of delayed award, here the award in question was made on 21.2.2006, 3 years after the last effective hearing was held, the Delhi High Court held that “An award which is passed after a period of three years from the date of last effective hearing, without satisfactory explanation for the delay, will be contrary to justice and would defeat justice. It defeats the very purpose and the fundamental basis for alternative dispute redressal”. There are also some more instances where delay in passing the award was encountered in Union of India v Niko Resources & Anr and Peak Chemical Corporation v. National Aluminium which was 4 years⁸ and 4.5 years⁹ respectively. Such delay weakens the concept of ADR mechanism.

EVOLUTION OF SECTION 29A

In order to ameliorate the award making process, the 176th Law commission report had recommended section 29A, this section is proposed to fix time limits for the passing of the award and also for speeding up the arbitral process, which would be no more than twelve months after commencement of the arbitration. But Justice Saraf Committee in the year 2004 suggested for deletion for proposed section 29A by giving a contradictory remark where on

⁵ Arbitration and Conciliation Act, 1940 s.23(1)

⁶ (2003) A.I.R. 2003 S.C. 2629

⁷ (2008) 4 Arb LR 199 (Del)

⁸ Union of India v. Niko Resources Ltd., OMP NO. 192/2010

⁹ Peak Chemical Corporation v. National Aluminium (2012) MANU/DE/0356/2012

one hand it said “the steps is not conducive to the expeditious completion of the arbitral proceedings” and on the other hand it believed “court control and supervision over arbitration is neither in the interest of the growth of arbitration in India nor in tune with the best international practices in the field of arbitration”¹⁰

Whereas comparing on the same lines the approach of institutional arbitration i.e. Indian Council of Arbitration was different which mention, under Rule 63¹¹ that the tribunal shall make the award expeditiously as possible i.e. minimum of six months to maximum twelve months from the date of reference. This somewhere imposes a time frame for making the award as compared to ad-hoc arbitration.

Though Section 29A was never recommended in the 246th law Commission report finds its way in the 2015 Amendment act. The inserted provision imposes time limitation to the arbitral award, and such award shall be dealt in twelve months from the date the arbitral tribunal enters upon the reference.¹²

GLIMMERS OF AMENDMENT ACT 2015: TO EXPEDITE THE PROCESS OF ARBITRAL AWARD

TIME LIMIT OF ARBITRAL AWARD:

The Arbitral award shall be made within 12 months from the date the arbitral tribunal enters upon the reference. If the award is formed within 6 months then the arbitrator is entitled to additional fees as the parties may agree. The parties may extend to an extra period of maximum 6 months by the consent of the parties, failing which mandates the arbitrator to terminate unless the Court extends it for sufficient cause or on such other terms it deems fit. While extending the said period, the Court may order a reduction of fees of an arbitrator by up to five percent for every month of such delay, for reasons due to the arbitrator. The court can impose actual or exemplary costs on either of the parties.¹³

¹⁰Ministry of law and justice, Government of India: *Proposed Amendments to Arbitration and Conciliation Act, 1996* (Consultation paper-2010) Annexure IV p.no127
<https://www.legallyindia.com/images/stories/docs/Arbitration-Act-LawMin-ConsultationPaper-on-Arb-Act-April2010-1.pdf> accessed 27 September 2020

¹¹ ICA Rules of Domestic Commercial Arbitration and Conciliation (April 2016) r.63

¹² Arbitration and Conciliation (Amendment) Act, 2015 s. 29A (1)

¹³ Arbitration and Conciliation (Amendment) Act, 2015 s.29A (1), (2), (3), (4), (5), (8)

SUBSTITUTION OF ARBITRATOR

While extending the time limit of the arbitral award an Application can also be filed by the parties to substitute the arbitrator.¹⁴ The parties to the arbitration have a remedy to substitute one or all the arbitrator by filing an application, which shall be dealt in sixty days from the date of service of notice to the opposite part.¹⁵ The court has been also empowered to substitute the arbitrators if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay.¹⁶ While doing so the arbitral proceeding shall be continuing without causing any harm from the stage where it was already reached. The substituted arbitrator is deemed to received evidence and material on record. This ensures the proceeding is not put a halt and continues so that it can be completed within the stipulated time.

UNREASONABLE ADJOURNMENT

One of the common reasons to delay the arbitral proceeding is adjournment, it has been observed by the 176th report that in India, parties or those who represent them agree for adjournments for no good reason.¹⁷ Therefore with the intent to ensure expeditious arbitral proceeding and to avoid unnecessary adjournment, the 2015 amendment added the para which suggests the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on a day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.¹⁸

TRANSITION OF SECTION 29A

As per Arbitration and Conciliation (Amendment) Act, 2015 S. 29A (1) states that the “*The award shall be made within a period of 12 months from the date the arbitral tribunal enters upon the reference.*”

¹⁴ Arbitration and Conciliation (Amendment) Act, 2015 s.29A (6)

¹⁵ Arbitration and Conciliation (Amendment) Act, 2015 s. 29A (9)

¹⁶ Arbitration and Conciliation (Amendment) Act, 2015 (inserted the word “substituted”) s.14 (a)

¹⁷ Ministry of law and justice, Government of India: ‘*Proposed Amendments to Arbitration and Conciliation Act, 1996* (Consultation paper 2010) Annexure II p.no 61

<https://www.legallyindia.com/images/stories/docs/Arbitration-Act-LawMin-ConsultationPaper-on-Arb-Act-April2010-1.pdf> accessed 27 September 2020

¹⁸ Arbitration and Conciliation (Amendment) Act, 2015 s.24 (1)

ENTERS UPON REFERENCE: For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.¹⁹

Whereas the amendment made in 2019 explains S 29A (1) *The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:*

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.’’;

And section 23(4) states that the statement of claim and defence shall be completed within 6 months from the date of appointment of arbitrator(s).²⁰

Here the term completion of pleadings means filing the statement of claim and statement of defence.

The 2019 Amendment Act relaxes the rigid time period for completion of arbitral proceedings as compare to the 2015 Amendment Act. The 2019 Amendment Act liberates International Commercial Arbitration from a pre-determined time-period. In Ongc Petro Additions Limited vs Fernas Construction Co. Inc.2020,²¹ The High Court held that ***International commercial arbitral proceedings would not be bound by the mandatory timeline mentioned in Section 29A (1) and, would fall outside the scope of section 29A (1) of the Arbitration Act.***

Despite of the above fact, the Amendment Act 2019 is keeping a sincere hope for the same to complete proceedings within 12 months from the date of completion of pleadings. In the case of domestic arbitration, the time period of 12 months for termination of proceedings shall be computed from the date of completion of pleadings instead of from the date of appointment of arbitrators or constitution of the arbitral tribunal as the case may be.

¹⁹ Arbitration and Conciliation (Amendment) Act, 2015 Explanation to s.29A(1)

²⁰ Arbitration and Conciliation (Amendment) Act,2019 s.23(4)

²¹ (2020) MANU/DE/1396/2020

In relation to extension of time: Amendment Act 2019 inserted proviso in 29A (4) which states that where an application for extension of time is pending, the mandate of the arbitrator will continue till the disposal of said application. Which is contrary to the 2015 amendment which suggests for termination of the arbitrator at the courts discretion.

In relation to reduction of fees of the arbitrator: The 2015 Amendment Act states if proceedings have been delayed, the court may order for the reduction of fees of the arbitrator, in addition to it Amendment Act 2019 mention ‘opportunity of being heard’ must be given to arbitrator before the reduction of fees.

Thus, in order to make India as a competitive market in the commercial sector and preferred seat for Arbitral proceedings the Amendment Act, 2019 attempted to relax some stringent provisions.

Hence, Section 29A (1) of Amendment Act 2019 would provide sufficient time to accept the statements of both the parties, record evidence, hear arguments, and make the award within 12 months after completion of pleadings. This would result in a reduction of cases approaching the court for an extension of time and thus may lead to less judicial intervention to a certain extent.

CHALLENGE FACED POST 2019 AMENDMENT ACT: PROSPECTIVE OR RETROSPECTIVE?

The issue has been elucidated by Delhi High Court in Ongc Petro Additions Limited vs Fernas Construction Co. Inc.²² a dispute arose between the parties and thus Arbitral tribunal was constituted to resolve the dispute. The Petitioner approach court for an extension of the time limit and the court- ordered an extension of the time limit under section 29A of The Arbitration and Conciliation Act,1996 to complete the proceeding and make an award within 18 months. During the pendency of arbitral proceedings, section 29A was amended in Amendment Act 2019. Thus, parties seek clarification of court concerning to time limit.

The Issue raised before the High Court of Delhi: Whether the amendment to section 29A (1) of the Act as notified on August 30, 2019, is applied retrospectively or prospectively? Further,

²²(2020) MANU/DE/1396/2020

the court referred to the case of Pallonji and Co. Pvt Ltd v Jindal India Thermal Power Limited,²³ which was decided on January 23, 2020, where it was held that the effect of the amendment to section 29A as per Amendment Act of 2019 to be retrospective in operation and thus it will apply to pending arbitration being procedural. While the order latter in MBL Infrastructures Ltd. v. Rites Ltd²⁴, decided on February 10, 2020, held that the applicability of amended section 29A to be prospective. The prescription of time limit by Amendment Act of 2015 had not conferred any rights or liabilities on a party rather it was a procedural law establishing a mechanism for the Arbitral Tribunal to render the award, which determines the rights and liabilities of parties in twelve months and surely the removal thereof also does not confer/affect rights of any party to be given effect prospectively. Moving forward the court referred Supreme Court's decision in the case of **BCCI v. Kochi Cricket Pvt Ltd., (2018)**²⁵ **where the court interpreted the distinction between a court proceeding and arbitral proceeding and held amendment act 2015 will be applicable on all pending proceedings and arbitral proceedings initiated on or after 23rd October 2015 will be applicable.**

Thus, Delhi High Court relied on Supreme Court's decision in BCCI Case, and on the principle that Any change/amendment to substantive laws affecting the rights and liabilities of a party or imposing a disability thereof will be prospective in nature and any change/amendment to the provisions of the statute dealing merely with matters of procedure or procedural laws will be retrospective, unless there exists a contrary intention of the legislature and concluded that the provisions of section 29A (1) *shall apply to all pending arbitrations seated in India as on August 30, 2019, and commenced after October 23, 2015.*

FURTHER CHALLENGES RELATED TO SECTION 29A (1)

Prior to the 2019 amendment, the arbitral tribunal had to abide by the twelve months limit failing which, at the option of the parties the extension of six months can be granted, this would also include filing of the statement of claims and statement of defences. But on the other hand, the 2019 amendment categorically distributes the time and construed by dividing the proceeding into two parts, the first half would deal with the filing of statement and defences after which the parties are permitted to proceed for the second half. Failing at the second half w.r.t. time limit the parties have the option extend the time limit, but such extension would not

²³ (2020) O.M.P.(MISC.) (COMM.) 512/2019

²⁴ O.M.P.(MISC)(COMM) 56/2020

²⁵ (2018) 6 SCC 287

consider the first half. This could give rise to the issues where parties fail to complete the filing process, would they get an extension for the same? It is a debatable issue at this juncture.

The Impact of Covid-19 on Arbitral proceedings is also adversely affected. The Situation of complete lockdown has prevented the conduct of Arbitral proceedings. Proceedings which has not started after/before completion of pleadings has its own set of problems. Despite strict time-bound provisions the parties or Arbitral tribunal or Arbitrators get an opportunity to seek an extension of time from the Court which leads to again delay in proceedings. the Supreme court took *Suo moto* cognizance Concerning problems faced by all litigants in the country. The order was passed dated March 23, 2020,²⁶ which held that period of limitation of all proceedings shall in any court or tribunal shall stand extended till further notice. This pandemic has become a source in the failure of the execution of the Amendment Act, 2019 is concerned with section 29A.

Now the whole things depend on Arbitrators/Arbitral Tribunal and parties how they accept the virtual hearings to resolve the arbitral proceedings. Technological intervention can be a boon or curse to Arbitration in the present scenario.

CONCLUSION

The Law Commission of India is trying to make the arbitration Act certain, flexible, and more realistic. However, the Apex Court has expressed the necessity with respect to interpretations and had suggested amendments as and when needed. The intent of the legislation for introducing sections 29A and 29B in Amendment Act 2015 was to provide for an easy, time-bound mechanism for dispute resolution which would avoid delays and continuous litigation. Evidences, documents, witnesses and complexity of issues should be taken into consideration while deciding the time limit. Various guidance policies should be framed with respect to the time limit of the arbitral award. Judicial intervention should be less to redress disputes quickly. After the Arbitration and Conciliation Act, 1996, the 'Act' was amended in 2015 and further in 2019. It is pertinent to note that even Central Government is showing its interest and willingness to deal with the issues, accept the challenges, and make necessary alteration in Act. The 2019 Act will expand the scope of Arbitration and will make India preferred choice for arbitration though some provisions of it are yet to be notified. These amendments will definitely

²⁶ In Re: Cognizance for Extension of Limitation (2020), writ petition (civil) no 3/2020 SC

play role in making India an arbitration hub provided how maturely the parties and Arbitrators/Arbitral tribunal accept the amendments. The Landscape of the whole Arbitration and Conciliation Act,1996 has been changing positively which is beneficial to create India an Arbitration.