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S. 29A of the New Indian Arbitration Act: An attempt at slaying Hydra

Sanjeevi Seshadri (National Law University, Delhi) · Tuesday, February 2nd, 2016 · YIAG

The Arbitration and Conciliation (Amendment) Act, 2015 was passed by the Lok Sabha and Rajya Sabha on 17 December 2015 and on 23 December 2015 respectively and received the President's assent on 31 December 2015. It was notified on 1 January 2016 and is deemed to have come into force on the 23 October 2015. The Act repeals the ordinance on the same topic, with the only notable difference being the inclusion of Clause 26, which provides that the amendments would not apply to arbitrations commenced before 23 October 2015 thus laying to rest the debates surrounding the retrospective nature of the amendments.

One noteworthy provision is Section 29A of the Act, which requires that all arbitrations must be completed within 1 year of the arbitral tribunal being constituted. This period is extendable by the parties' agreement by up to 6 months i.e. a total of 18 months. In the event that such an award has not been rendered within 18 months, the parties may approach the appropriate Court which may grant an extension if it is satisfied that the delay is on account of a sufficient cause, failing which the mandate of the arbitrators is terminated. While the Bill was largely based upon the recommendations of the Law Commission in its 246th Report, Section 29A was not an amendment suggested in the Report and seems to be without parallel in any other domestic jurisdiction. A novel provision, and certainly directed at an existing weakness in the present context of extremely slow arbitrations, S. 29A insofar as it arbitrarily restricts party autonomy is fundamentally opposed to a basic premise of arbitration and is likely to cause a variety of problems in implementation.

First, as noted above, Section 29A(1) provides that in all cases, an arbitral award must be rendered within 12 months from the date of entering upon the reference i.e. the effective day on which the tribunal is constituted. Section 29A(3) permits the parties, by agreement, to extend such a period, but only to the extent of 6 months. Article 19 of the UNCITRAL Model Law (on which the Arbitration and Conciliation Act, 1996 ('Act') is based) provides that, subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. The purpose of this party autonomy is to allow the parties to structure the proceedings, composition of the tribunal and procedure keeping in mind the nature and complexity of the dispute. By forcing parties to come to court in the event that a dispute cannot be resolved by arbitration within 18 months, the law has unreasonably restricted parties from deciding between themselves the nature of the arbitration, per their needs and more importantly per the dispute.

Second, the scheme of the Act is to minimize judicial intervention as evinced by the inclusion of

Section 5. However, by forcing parties to approach the Court in order to extend the period beyond 18 months, even if they mutually agree to such an extension, is to foist judicial intervention upon them in contradiction to the scheme and purpose of arbitration. In fact this judicial intervention is likely to cause even further delays in the resolution of the matter. While the Act provides that an application for extension shall be disposed of within a period of sixty days from the date of service of notice on the opposite party, any observer of the Indian judicial system would testify to this being an idle promise, especially considering the experience in S. 11 applications for the appointment of an arbitrator which have been known to take a long time to be decided.

Third, in many cases the fact that an arbitration is ongoing may be protected by a confidentiality agreement between the parties. In a case where the parties are forced to appear before a Court and place on record the state of the arbitration in court documents, they might have to violate their own confidentiality agreements.

Fourth, Section 29A(4) provides that, if the Court finds that the reason of the delay is attributable to the arbitral tribunal, it may order a reduction in their fees. This a curious provision. The principles of natural justice would require that the relevant party be heard, which in this case would be the arbitral tribunal. Yet an adversarial proceeding involving the tribunal itself would scarcely be practical. Moreover, the dynamics of the arbitration could be shot to pieces after such an application is decided. In the event that Party A urged for costs to be imposed on the Arbitral tribunal, and the same was dismissed and extension granted, Party A might even seek the arbitral tribunal's recusal based on the perception of bias on the tribunal's part.

Fifth, Section 29A(5) provides that the Court may only grant an extension of the time under Section 29(4) when it is satisfied that there exists '*sufficient cause*.' The phrase sufficient cause has also been used in Section 5 of the Limitation Act, 1963 which is entitled *EXTENSION OF PRESCRIBED PERIOD IN CERTAIN CASES*. Given the similarity with the proceedings under this sub-section, it is likely that Courts will turn to judicial decisions on S. 5 for guidance. These decisions generally provide that the power must be applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. Thus there has been a very wide discretion created by the use of the words 'may' & 'sufficient cause' granted to the Court in deciding whether or not an arbitration should be extended. This might lead to a scenario wherein lengthy proceedings ensue as parties lead large amounts of evidence and arguments in order to convince the Court of the need for extension or otherwise. Further the decisions of the Courts under this sub section will be judicial decisions and thus open to appeal to the Supreme Court of India under Article 136, a situation which will only further allow parties to delay the proceedings if they so desire.

Thus, Section 29A in its overzealousness to fix the issue of lengthy arbitral proceedings will create more problems than it seeks to solve. One solution to resolve at least some of these problems is to ensure that party autonomy is maintained and that parties can inter se decide to extend the arbitration till whenever is required (i.e. not just for the six months allowed by the Section). Only in the event that parties cannot agree between themselves on whether the time frame should be extended, will they be required to approach the Court. The Courts would have to approach the issue of imposition of costs on the Arbitral Tribunal with a certain amount of finesse, and would have to use their powers under Section 29A(5) and (6), to replace the Tribunal or the offending arbitrator, with great care so as not to disrupt the arbitration unnecessarily. The Section ideally should have had considerable reworking and more thought before being enacted in order for it to be able to actually effect the change it seeks to create in terms of faster arbitrations. In its present

form, the Section is only likely to further lengthen proceedings and allow parties to ditch arbitration proceedings which are ongoing when they believe that the arbitral tribunal is unlikely to rule in their favor.

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