

Kluwer Arbitration Blog

Applications for Extension of Time for Passing the Award in India: Which Court to Entertain?

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Section 29A was inserted, by way of amendments to the Indian Arbitration and Conciliation Act (the Act), in the year 2015. With the introduction of this provision, the time-period for passing the award has been fixed at twelve months from the date the arbitral tribunal enters upon reference and is extendable by another six months with the consent of the parties. Any further extensions can only be granted by the concerned court, either prior to or after the expiry of the time period, failing which the mandate of the arbitral tribunal shall terminate.

Recently, however, the time-period of twelve months has been relaxed by way of certain important amendments to Section 29A which were notified on 30 August 2019. While this post does not intend to review the said amendments in detail, it must be mentioned that 'international commercial arbitrations' have now been excluded from the ambit of Section 29A.

The focus of this post will be on an interesting issue concerning the jurisdiction of courts to entertain an application for extension of time under Section 29A, which has also been the subject of a few conflicting decisions by courts in India.

Scheme of Section 29A

Section 29A *inter alia* provides that in case the award is not made within twelve months (or within the extended period as the case maybe), the mandate of the tribunal shall terminate unless it is extended by the 'Court'. The expression 'Court' has, in turn, been defined under Section 2(1)(e) of the Act to mean:

(a) In the case of international commercial arbitrations, the High Court in exercise of its ordinary original civil jurisdiction.

(b) In the case of an arbitration other than an international commercial arbitration, the principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction.

(In India, five High Courts (Bombay, Delhi, Madras, Calcutta and Himachal Pradesh)

have ordinary original civil jurisdiction - i.e., the power to hear a fresh case. All other High Courts have appellate jurisdiction)

The question then is whether, in view of the above, the applications for extension of time for passing the award under Section 29A will lie only with the High Court in the case of international commercial arbitrations and with the principal Civil Court in the case of other arbitrations.

It must be noted that under the provisions of Section 11 of the Act (appointment of arbitrators), the competent court to entertain applications for appointment of an arbitrator is the Supreme Court of India (Supreme Court) in the case of international commercial arbitrations; and the jurisdictional High Court in the case of any other arbitrations.

It also needs to be considered that in addition to extension of time, Section 29A also provides the power to substitute one or all the arbitrators, if required. This is of importance as, in the case of an international commercial arbitration, an arbitral tribunal appointed under Section 11 of the Act by the Supreme Court can be substituted by the High Court. Similarly, an arbitral tribunal appointed by the High Court in the case of any other arbitrations may be substituted by a principal Civil Court. In the latter case, the situation is even more extraordinary since a principal Civil Court does not, in the first place, have the power to appoint an arbitrator in any circumstances.

View Taken By Courts

In the case of *Nilesh Ramanbhai Patel v Bhanubhai Ramanbhai Patel* (Misc. Civil Application (OJ) No. 1 of 2018 in R/Petn. under Arbitration Act No. 56 of 2016), the High Court of Gujarat (Gujarat High Court) considered whether the expression 'Court' in the context of Section 29A can be understood as referred in Section 2(1)(e) of the Act.

The arbitrator was appointed by the Gujarat High Court. However, the proceedings could not be concluded in the prescribed time limit. An application for extension, accordingly, was filed before the Gujarat High Court. However, it was argued that the Gujarat High Court, having appointed the arbitrator, had become '*functus officio*' and the application for extension of time would only lie before the Civil Court.

After examining the scheme of Section 29A, the Gujarat High Court questioned whether it was the intention of the legislature to vest the Civil Court with the power to make appointment of arbitrators by substituting the arbitrators appointed by the High Court under Section 11 of the Act. The Gujarat High Court also observed that the same situation would arise in the case of international commercial arbitrations, where the power to appoint the arbitrator rests exclusively with the Supreme Court. The High Court, thus, concluded that this conflict can be avoided only by understanding the expression "Court" for the purpose of Section 29A as the Court which appointed the arbitrator.

A similar view was taken by the High Court of Bombay in *Cabra Instalaciones Y Servicios, S.A. v Maharashtra State Electricity Distribution Company Limited* (Commercial Arbitration Petition (L) Nos. 814-818 of 2019). The petitioner approached the High Court under Section 29A of the Act and sought an extension of six months for conclusion of the arbitral proceedings and passing the award. The arbitration was an international commercial arbitration and the arbitrator had been appointed by the Supreme Court under Section 11 of the Act.

It appears that this was the second time an extension had been sought from the High Court in this case and the mandate of the arbitral tribunal was already extended by the High Court on a previous occasion.

Notwithstanding the earlier extension, the High Court considered whether it would have the jurisdiction, under Section 29A, to entertain the application for extension of time when the arbitrator had been appointed under Section 11 of the Act by the Supreme Court.

The High Court concluded that in the case of international commercial arbitrations, it did not have the jurisdiction to pass any orders under Section 29A and such power would lie only with the Supreme Court. Noticing that Section 29A also provided for the substitution of the arbitral tribunal by the concerned Court while considering an application for extension of time, the High Court opined that this would be the exclusive power and jurisdiction of the Supreme Court.

The High Court of Kerala has, however, taken a completely different view. In *M/s. URC Construction (Private) Ltd. v M/s. BEML Ltd.* (2017) 4 KLT 1140, the High Court of Kerala held that in view of Section 2(1)(e) of the Act, in the case of domestic arbitrations, the application for extension of time under Section 29A would lie to the principal Civil Court since the High Court of Kerala did not possess original civil jurisdiction.

Recently, in *Tecnimont Spa & Anr. v National Fertilizers Limited* (MA No. 2743/2018 in Arbitration Case (C) No. 24/2016)¹, this issue also came up for consideration before the Supreme Court. As the arbitral proceedings could not be completed within 18 months (1 year plus the extended 6 months), the petitioners filed an application for extension of time before the Delhi High Court. However, as the matter was an international commercial arbitration and the arbitrator had been appointed by the Supreme Court, on seeking fresh advice in the matter, the petitioners approached the Supreme Court for extension of time. The Delhi High Court was duly apprised of these developments and the proceedings before the High Court were, accordingly, disposed of.

When the matter came up before the Supreme Court, it was argued by the petitioners that, since Section 29A also carried with it the power to substitute the arbitral tribunal, it was imperative that the application for extension of time also be heard by the Supreme Court. This request was opposed by the respondents and it was argued that under the Act, the time limit for passing the award in the case of international commercial arbitrations can only be extended by the High Court.

Eventually, however, the occasion for the Supreme Court to conclusively decide the question of law did not arise as the application for extension of time was withdrawn by the petitioners with the request that liberty may be granted to the petitioners to approach the Delhi High Court once again. The request was accepted by the Supreme Court and the matter was restored to the file of the Delhi High Court. Finally, the time limit for passing the arbitral award was extended by the Delhi High Court in view of the order passed by the Supreme Court.

Comment

It is worth considering whether it is proper for the High Court to have the power to substitute an arbitrator appointed by the Supreme Court, particularly when the power to appoint arbitrators is exclusive to the Supreme Court. In the context of international commercial arbitrations, this issue is not likely to arise anymore since, as such arbitrations stand excluded from the ambit of Section 29A pursuant to the recent amendments. It will, however, be interesting to see if this issue continues to remain relevant in so far as ongoing arbitrations are concerned.

Interestingly, in *State of West Bengal v Associated Contractors* (2015) 1 SCC 32, the Supreme Court held that it can, in no circumstances, be the 'Court' for the purpose of Section 2(1)(e) of the Act since the definition of 'Court' under Section 2(1)(e) was exhaustive. It must, however, be noted that this decision was in the context of Section 42 of the Act (Jurisdiction) and the question was whether the jurisdiction of all other Courts stood excluded once the parties had submitted to the jurisdiction of one Court under Section 9 of the Act. Moreover, this decision was delivered prior to the amendments to the Act in 2015, when Section 29A had not even been enacted.

Finally, while the text of Section 29A read with the definition of 'Court' under Section 2(1)(e) appears to be clear, it is difficult to envisage that the legislature intended to vest the power to play a role in the appointment in the principal Civil Court. In these circumstances, there is certainly merit in the argument that the definition of 'Court' in the context of Section 29A cannot be understood as referred to in Section 2(1)(e) of the Act. This is, thus, an aspect which certainly needs to be considered in the context of future amendments to the Act.

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References

- ↑ 1 Khaitan & Co represented Tecnimont SpA and Tecnimont Private Limited, the Petitioners in this case.

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