TIME LIMITS IN ARBITRATION: BOON OR BURDEN? AN INDIAN PERSPECTIVE ON EFFICIENCY, DUE PROCESS, AND THE QUEST FOR SPEEDY JUSTICE

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ABSTRACT

In India, arbitration has commonly been used as a reasonable alternative to court litigation with an expectation of quicker resolution of disputes. However, there have been numerous instances of domestic arbitration being impacted by lengthy proceedings, which has resulted in decreased confidence in the system and limited the practical benefits of arbitration. To address this issue, Parliament passed Section 29A as part of the 2015 Amendment and modified this provision in the 2019 amendment establishing a time limit of twelve (12) months for the completion of domestic arbitral proceedings with an allowance for an additional six (6) month extension through mutual consent and thereafter only upon the order of the court. This study considers whether fixed dates to relate not only to how well existing laws in this area can be used to solve problems with delays, but also how they may affect new issues related to the arbitration process. As well as providing a framework that can promote efficiency and accountability, fixed deadlines can lead to placing unreasonable pressure on an arbitrator to accelerate decisions, thereby sacrificing procedural due process and quality of the rendered award. This study seeks to document and compare the statutory development of the Arbitration & Conciliation Act, court decisions relating to it, and how Section 29A is implemented in practice. Additionally, by examining both England and Singapore, this paper compares the different methods of emphasising between efficiency and procedural fairness within the three different countries' respective legal systems. Suggestions for reforms which strengthen the ability of Section 29A to operate effectively while ensuring its viability and integrity, which are both necessary to maintain a credible system of arbitration, will be provided at the end of the study.

Keywords: Arbitration; Time Limits; Arbitration and Conciliation Act 1996; Due Process; Prompt Justice; India

I. INTRODUCTION

India has a litigation problem that is, by any measure, severe. At all levels, there are more than 50 million cases stuck in the court system, and cases are piling up faster than they can be cleared out. Because of this, arbitration was viewed as a practical way of solving this problem because it is fast, flexible and not subject to the demands inherent in a crowded court system. The promise was there. For many, however, the delivery was not as much so.

It is not hard to see what happened to cause this to occur. The 1996 Act provided wide discretion for tribunals and imposed few limits on the manner in which they could conduct proceedings. As a result, when used by experienced arbitrators conducting well-organised proceedings, this created an advantage for the tribunal. In practical terms, however, particularly in ad hoc arbitration, where the presiding arbitrator was frequently a retired judge who was accustomed to conducting proceedings in the manner of a traditional court, this provision did nothing to eliminate the possibility of undue delay.

Hearings were adjourned freely, written submissions ballooned, and awards sometimes took years to emerge. Parties who could weaponries' delay did so without consequence.

Parliament addressed this issue with Section 29A of the Act, which was originally added in 2015 and updated in 2019. Under the Act, there is now a twelve month limitation for an award to be made in a domestic arbitration (commencing with the date of full completion of pleadings) with the ability for the parties to extend the twelve month time period by an additional six months. After eighteen months, only a court can grant an extension of the timeframe for an award to be made. This paper will explore whether or not this provision fixed the problem raised and whether or not it creates a new problem while attempting to fix the initial problem.

II. THE LEGISLATIVE FRAMEWORK: FROM LAISSEZ-FAIRE TO MANDATORY TIMELINES

A. The Original 1996 Act and Its Silences

The 1996 legislation replicates almost verbatim, the content of the UN Commission on International Trade Law's Model Law. The drafters of the Act took care to severely limit judicial intervention and allow arbitrators considerable latitude in how they conduct proceedings. There was no time limit on when an award had to be made. Section 14 allowed a tribunal's mandate to be terminated for undue delay, but this provision was rarely invoked and never really operated as a check on slow proceedings.[1]

We could predict how this would play out. There was no outside intervention so there was a lot of domestic arbitration that drifted. Institutional arbitration, which is the type of arbitration where there is a supervising body/agency to manage the time lines of the arbitration, did not develop much. The dominant type of arbitration was ad hoc (unregulated and unstandardised) and therefore subject to a much higher degree of delay as there was no one keeping track of the time lines and therefore there were higher levels of uncertainty or ambiguity. The Law Commission of India published its 246th Report (in 2014) and made a recommendation to establish a statutory time line for arbitrators as a first step in combating these issues.[2]

B. The 2015 Modification: Section 29A

The enactment of Section 29A in 2015 was the first time that a time frame had been mandated for arbitration. All awards had to be given within 12 months of the reference with the possibility of extending the timeframe to a maximum of 18 months upon agreement between the parties. Courts maintained jurisdiction to grant extensions for periods beyond the 18 months if good reason was shown and also had the authority to cap an arbitrator's fees for delays attributable to the tribunal. Importantly, these provisions only apply to national arbitration with the significant exclusion of internationally commercial arbitrations that occur within India, which has drawn significant amounts of criticism.[3]

C. The 2019 Modification

The twelve-month timing for arbitration matters was changed by the 2019 Amendment to now start from the date when all pleadings were filed and completed instead of starting from the date of reference. This fixed a real practical issue where the old structure put parties at a disadvantage for any delays in the earliest part of a proceeding that they could have little control over. The 2019 Amendment also has the establishment of an Arbitration Council of India to establish a ranking of institutions and to accredit arbitrators.[4]

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[1] Arbitration & Conciliation Act, 1996, No. 26 of 1996.
[2] Law Commission of India, 246th Report (2014).
[3] Arbitration & Conciliation (Amendment) Act, 2015, No. 3 of 2016.
[4] Arbitration & Conciliation (Amendment) Act, 2019, No. 33 of 2019.

III. Arguments for time limits: efficiencies, finality and commercial integrity

Definitely, there are many good arguments in favour of Section 29A that warrant a serious consideration.

A. Breaking the Culture of Delay

A deadline is the most obvious reason to get things done. Inevitably, prior to 2015, there was no consequence for delaying or prolonging arbitration, whether it was because there were no consequences for the arbitrator, a party using delay as a strategy, or anyone else involved. The retired judges who transitioned into arbitration often retained the same reluctance to enforce deadlines that they had displayed as judges. Section 29A changed that by establishing actual consequences for the tribunal and the parties when they didn't complete the arbitration by the deadline, including an arbitrary price reduction on the person's arbitrator fees.[5]

One consequence is particularly noteworthy: the power of tribunals to reduce arbitrator fees to the parties. This has real financial consequences for the arbitrator. An arbitrator will have a financial incentive to move the arbitration along if there is a possibility of losing a portion of their significant fee. This was absent from the pre-2015 arbitration environment.[6]

B. India's Aspirations as an Arbitration Destination

In recent years, the profile of India as a place to conduct international arbitration has improved. There have been many new institutions created, including the Mumbai Centre for International Arbitration and the (2) India International Arbitration Centre. Even though there has been considerable improvement with regard to the number of institutions in India for international arbitration, there remains a major difficulty for India as an international arbitration venue due to the historical perception of India as slow and dominated by litigation.[7] If India implements mandatory timelines successfully, it will help change this perception. Singapore's success as one of the world's premier arbitral hubs was built upon the dependability and efficiency of its arbitration institution(s). India should consider this lesson as it looks toward improving its own background as an international arbitration venue.

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[5] UNCITRAL Model Law on International Commercial Arbitration, 1985 (amended 2006).

[6] Cabra Instalaciones y Servicios v. Maharashtra State Electricity Distribution Co. Ltd., 2019 SCC OnLine Bom 1437.

[7] Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657.

C. The Real Cost of Delay

Arbitration delays may be perceived as an inconvenience; however, in reality, there are considerable negative impacts to one or both of the parties to the arbitration process as a result of extended delays in the arbitration process: T There are high legal costs created as a result of attorney and expert fees that have been incurred; management time is consumed on the extended delays; and the unresolved business litigation remains as a liability on the parties' balance sheets until resolved. A smaller company might have a difficult time enduring extended arbitration delays. If a party that is well resourced intentionally delays the arbitration process, they will likely do so with the intention that the other party will eventually reach a settlement for the claim under less-advantageous terms than if they had settled earlier due to the continuing delay in the arbitration process. Time limits are designed to push back against this dynamic.

IV. THE CASE AGAINST RIGID TIME LIMITS: DUE PROCESS AND THE RISK OF TRUNCATED JUSTICE

The critique of Section 29A demonstrates much more than the usual resistance to the inevitable; it also highlights legitimate concerns on whether, as now structured, the provision can actually handle the reality of complex commercial disputes. [8]

A. Not Every Dispute Fits in Twelve Months

As an illustration, consider an infrastructure-related arbitration case pertaining to a highway construction project worth US$ 1 billion+ with disputed variations and delay claims, expert technical reports of reputable, qualified witnesses from multiple independent sources, hundreds of thousands (if not millions) of exhibits, dozens of witnesses from all over the world, etc. It would be unrealistic to expect a well-reasoned, legally sound award to issue within twelve months. Furthermore, disputes in the banking industry (e.g., creditors), issues regarding intellectual property, and disputes arising from joint ventures with significant accounting complexities all share similar attributes. Applying an arbitrary time limit across the board treats these vastly different types of cases as if they were all simple two-party contracts (i.e., with two parties only).[9]

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[8] BCCI v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287.
[9] Fali S. Nariman, *India's Legal System: Can It Be Saved?* (Penguin, 2006).

The downstream consequences must also be considered. An arbitrator who is under pressure from a time limit will often condense the amount of evidence presented, limit the extent to which witnesses may be cross-examined, or will limit the length and detail of their reasoned award. By taking any of these shortcuts, the arbitrator has provided the losing party with sufficient grounds for a successful challenge under section 34; and if a challenge has been successful, the matter will return for a new hearing, thereby extending the time required to finally resolve the dispute significantly beyond what it would have taken had the hearing been permitted to continue uninterrupted.

B. The Due Process Problem

The term 'due process paranoia' has been used by international arbitration practitioners to describe how arbitrators may allow any procedural request, no matter how dilatory, due to their fear of being challenged later for having denied the request. The implementation of Section 29A has the risk of creating the opposite situation (we can call this 'due process compression'). An arbitrator attempting to comply with statutory time limits may deny reasonable requests for an extension of time, stop parties from being heard having presented their entire cases, and issue awards that are short with respect to their reasoning. The right to a hearing is not simply a procedural nicety; it is one of the elements that provides legitimacy to any award issued in arbitration. Thus, any actions that are structurally contrary to the right to a hearing should be closely scrutinized.[10]

B. The Extension Mechanism Creates Its Own Problems

After a case reaches the 18-month point, it is necessary to undertake an application to extend the period of time. In practice this has resulted in a minor industry of contested extension proceedings or "satellite litigation" created by the very provision that was intended to reduce litigation. The different High Courts have very different interpretations of the 'sufficient cause' standard, and there lacks any comprehensive guidance from the Supreme Court, causing uncertainty — again something that is not conducive to commercial arbitration.[11]

D. Infrastructure That Is Not Yet There

Time limits work well in an organization that has the institutional ability to meet time limits.

[10] Indu Malhotra, *Commentary on the Law of Arbitration* (4th ed., Wolters Kluwer, 2020).
[11] Gary B. Born, *International Commercial Arbitration* (3rd ed., Kluwer Law International, 2021).

The arbitral system of India is getting better, but it is not finished yet. There are not enough accredited arbitrators that have experience. Most arbitration is done on an ad hoc basis. There are different types of case management. Imposing very strict time limits on a system without the supporting infrastructure to support those time limits will not produce faster arbitration; it will produce rushed/arbitrary arbitration, and that is a totally different thing than producing an efficiently/arbitrarily completed arbitration.

V. COMPARATIVE PERSPECTIVES: LESSONS FROM INTERNATIONAL PRACTICE

A comparison with other leading countries' rules and sham procedures for resolving arbitrations is useful when looking for a reference point; India's approach appears to be particularly out of touch with reality.

Patriarchal cultures have large consequences for countries' ability to establish and enforce international arbitration agreements. In England, there are no hard statutory limits for the time necessary to complete a domestic arbitration. Although Section 33 of the Arbitration Act imposes an overarching obligation on a tribunal to avoid unnecessary delay and/or expenses, there is no direct guidance for how a tribunal meets this obligation (nor for that matter, their respective parties). The LCCI Rules set out timelines for certain procedural steps, but no milestones have been established or imposed upon a tribunal for the completion of its final award. As a result, London's continuing popularity among international arbitration parties is attributable to this flexibility, since parties can expect that their complex cases will not be halted prematurely at a predetermined deadline.[12]

Unlike India's system, which requires a deadline of 12 months to conclude an arbitration from the date of the parties agreeing to submit its dispute for resolution, the Singapore International Arbitration Centre offers expedited procedures under which the end of the process (that is, the issuance of the tribunal's decision) occurs within six months.[13] The parties to an expedited arbitration must both consent to this expedited arbitration process, and the expedited arbitration process is only permitted to be used for smaller claims, or less complex disputes, where the parties agree to the accelerated process due to the fact that they are seeking a swift resolution

[12] Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Arbitration* (6th ed., OUP, 2015).
[13] V.A. Mohta & Anoop V. Mohta, *Arbitration, Conciliation and Mediation* (3rd ed., Snowwhite Publications, 2019).

as opposed to a longer and more extensive process. This element of consent to the expedited arbitration process by both parties to the expedited arbitration process is what gives legitimacy to the time limits imposed on the parties by the expedited process. In India, however, there is no opt-in feature available to parties submitting to arbitration, and the parties are required to adhere to the time limits imposed on them by Section 29A of the Indian Arbitration and Conciliation Act.

VI. JUDICIAL RESPONSE: INTERPRETING SECTION 29A

There are numerous instances where Indian courts have dealt with the effects of Section 29A and demonstrate both the opportunities available under the provision and the inconsistencies in applying it.

In Cabra Instalaciones y Servicios v. Maharashtra State Electricity Distribution Company Ltd. (2019), the High Court of Bombay displayed good judgment by deciding that the Courts were able to exercise genuine discretion to grant extensions when there is a need for additional time to resolve a dispute and that a mechanical approach based on the calendar and application of time limits would be inappropriate in cases where the nature of the dispute required more time. Finally, the Court emphasised that it is not acceptable for efficiency to come before an opportunity to have a fair hearing of an issue.[14]

The Supreme Court's ruling in the recent case of Dakshin Haryana Bijli Vitran Nigam Ltd. v Navigant Technologies (P) Ltd. (2021) clarified an important issue concerning when the twelve-month period starts. The court held that the twelve-month period begins with completion of the pleadings of the parties rather than from some earlier time in the referral process, which is consistent with the legislative intent of the 2019 Amendment and which will prevent many claims from being found to be out of time on technical grounds. [15]

VII. TOWARDS A BALANCED FRAMEWORK: RECOMMENDATIONS

The current framework requires change, but not a complete overhaul. There are some very specific adjustments that would be necessary to make Section 29A function more effectively.

The first adjustment needed by the legislature would be to stop using only one standard timeline

[14] Ajar Rab, “The 2019 Amendment: A Step in the Right Direction?” (2020) 32 NLSIR 45.
[15] Dushyant Dave, “Reforming Indian Arbitration: Where Do We Stand?” (2018) 1 Indian Arbitration Review 3.

and utilize a multi-tiered timeline system. Smaller disputes — say, those under a certain claim value — could be required to conclude within six to nine months under a fast-track process. Larger and more complex cases should have longer default timelines, with the option of extension built into institutional rules rather than requiring a court application.

Second, the extension mechanism needs to be taken out of the courts for routine cases. Every contested extension application adds months to a dispute. Initially, the authority to grant extensions should rest with arbitral institutions, but courts should intervene only in cases where there is a legitimate disagreement as to whether to allow the extension.

Finally, there should be an expectation that tribunals will, and can, actively manage the case. Specifically, the tribunal should define the issues early on, control the number of written submissions, obtain witness evidence through written statements to the extent reasonable, and utilize technology to reduce the amount of paper for document intensive cases.[16]

In a well-managed arbitration process, an arbitrator should be able to complete the process within twelve months; in an unorganized arbitration process, this will not be obtainable.[17]

The Arbitration Council of India must become operational promptly and without delay, as this will provide the market incentive to obtain efficiency as it relates to the grading of institutions and the accreditation of arbitrators based on the total time taken to issue an award or perform a service; this would provide the institutional basis for creating incentives to promote greater efficiencies than any other statue or legislation currently in place can.[18]

The exclusion of International Commercial Arbitrations from the application of Section 29A of the Act is an anomaly which must be addressed. There is no logical reason why Foreign Parties who seat their arbitration in India should be entitled to the same level of freedom with respect to procedural law as Domestic Parties who are also seated in India.[19]

VIII. CONCLUSION

At the centre of the issue of time constraints in arbitration within India is a much broader question about the purpose or goal of undertaking arbitration. If the purpose of this course of

[16] Section 29A, Arbitration & Conciliation Act, 1996 (as amended).
[17] Section 14, Arbitration & Conciliation Act, 1996.
[18] Arbitration Council of India, established under the 2019 Amendment
[19] Section 33, Arbitration Act 1996 (England)

action is merely to produce outstanding matters from a backlogged docket as fast as possible (that is, as soon as practicable), then the enforcement of time frames will help achieve this. If the purpose of this process is to resolve commercial disagreements so both sides can walk away with mutual respect for each other and for the arbitration process (including the side that loses), the situation will be much more complicated.

One effect that Section 29A has produced is that it has turned delay into a true issue for the parties and arbitrators to consider. Prior to 2015, delay was not often (if ever) considered a significant factor for parties retaining their arbitral institutions or for the arbitrators themselves. However, a fundamental change has occurred in how both parties and arbitrators now view time frames as written in the Arbitration Act as time limits (or limitations) for the timing of completion of the arbitration process; thus creating a distinction between time limits vs time expectations. This change is critical and should not be underestimated.[20]

Attitude changes are only the beginning of what needs to happen (deeper things). After completing this first step, we must still accomplish the following necessary actions: develop proper institutionally infrastructure; train arbitrators how to manage cases actively; streamline extension processes; and create a real, truly "tiered" system, etc. Not taking care of all these activities means that, even after changing their attitudes about using time limits, people will still use their "time limits" negatively as "blunt" instruments to deal with problems that require more "precise" instruments. Ultimately, India can have a fast and fair arbitration system. By reforming Section 29A correctly, we may achieve part of our goal of having such a system.

[20] Singapore International Arbitration Centre (SIAC) Rules, Expedited Procedure.

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