

IMPLICATIONS OF THE NEW SECTION 29A OF THE AMENDED INDIAN ARBITRATION AND CONCILIATION ACT, 1996

It was the best of times, it was the worst of times... it was the time of times

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Abstract

There is a surprising dearth of literature on the potential implications of the new Section 29A of the Indian Arbitration and Conciliation Act, 1996, even though the provision has been in force for approximately a year now, ¹effectively since October 23, 2015.² This can probably be attributed to the lack of judicial decisions to guide such discourse. Once the twelve-month period for making awards stipulated under this Section expires for arbitrations commenced after October 23, 2015, one or more High Courts will probably be approached to extend this time limit. With the help of the decisions that follow, by the time this article is published, we will probably be all the wiser. In the meantime, as a tribute to the lyric, 'whatever will be, will be', the author chooses to seize the silence on the issue and examine what Section 29A could mean for arbitrations, particularly for institutional arbitrations, seated in India.

The article begins by outlining the scope of Section 29A, by comparing it to a similar provision that existed under the previous Arbitration Act of 1940 as well as the jurisprudence that existed before the enactment of the Indian Arbitration and Conciliation (Amendment) Act 2015. It then highlights the uniqueness of Section 29A – its mandatory nature and the restriction it imposes on party autonomy – in comparison to arbitration statutes of some other countries which contain time limits for making the final award. In the penultimate and final sections of the article, the resultant procedural complexities likely to arise for arbitrations seated in India, with a particular emphasis on institutional arbitrations, are discussed. The author ends by recommending that a liberal interpretation of this provision by Indian Courts is the only way to overcome these hurdles.

I. Introduction

Section 29A was introduced into the Arbitration and Conciliation Act, 1996 [the “**Principal Act**”] and, taking into account the amendments in 2015, [the “**Act**”], by way of the Arbitration and Conciliation (Amendment) Act, 2015. It provides, in the relevant part:

29A. (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.—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.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

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¹ This article was finalised on Sept. 30, 2016.

² The Arbitration and Conciliation (Amendment) Act 2015, No. 3 of 2016 (India), §§ 26, 27 (§ 29A was introduced through the Arbitration and Conciliation (Amendment) Ordinance 2015, which came into force on Oct. 23, 2015).

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party. (emphasis added)

In a nutshell, the provision requires an arbitral award to be made within a period of twelve months from the date the arbitral tribunal enters upon the reference, which period is extendable by another six months with the consent of the parties [the initial period of twelve months, without a subsequent extension by the parties, and/or the total period of 18 months, after such extension, is hereinafter referred to as the “**Time Limit**”]. If the arbitral award is not rendered within the Time Limit, the provision stipulates that the mandate of the arbitrators shall terminate, unless an Indian court of competent jurisdiction [the “**Court**”, as defined under Section 2(1)(e) of the Act] grants a further extension.

This provision only applies to arbitral proceedings (including domestic arbitration and international commercial arbitration) commenced on or after October 23, 2015,³ where the place of arbitration is in India.⁴

³ Arbitration and Conciliation (Amendment) Act, No. 37 of 2016 (India) §§ 26, 27 (while there seems some uncertainty as to the application of § 26 of the Amendment Act, in the author’s view the preferred interpretation is that the amendments do not apply where the arbitration has commenced before Oct. 23, 2015); *See* *Electrosteel Castings Limited v. Reacon Engineers*, AP No. 1710/ 2015, Jan.14, 2016 (Calcutta High Court) (India); *Pragat Akshay Urja v. State of MP and Ors.*, Arbitration Case No. 48,53 and 54/2014, June 6, 2016 (Himachal Pradesh High Court) (India); However, some High Courts have interpreted this provision more broadly, *see* *New Tirupur Area Development v. Hindustan Construction Co. Limited*, AP No. 7674/2015, Jan. 27, 2016 (Madras High Court) (India); *BCCI v. Rendezvous Sports World*, AP No. 7674/2015, June 30, 2016 (India).

II. The Past, the Present...

The concept of a time-bound arbitration is not completely alien to Indian law. Under the Arbitration Act, 1940 [the “1940 Act”], which previously governed domestic arbitrations in India, the following provision was deemed included in all arbitration agreements - “*unless a different intention is expressed therein*”:⁵

*3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration or within such extended time as the Court may allow.*⁶ (emphasis added)

A court of competent jurisdiction (as defined under the 1940 Act) was granted the power to extend this time limit, as follows:

*28. (1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.*⁷ (emphasis added)

These provisions were, however, not retained in the Principal Act, which *inter alia* repealed the 1940 Act.⁸ As a consequence, Indian courts viewed themselves as having been “*denuded of the power to enlarge time for making and publishing an award*” stipulated in the arbitration agreement, particularly in cases where such enlargement could be sought through an alternative procedure pursuant to the arbitration agreement and the parties had taken recourse to it.⁹ Thus, where the arbitration agreement included a reference to the LCIA India Rules and stipulated a three-month time limit for concluding the arbitration, the Delhi High Court refused to interfere with a decision of the arbitral tribunal to extend such time limit, viewing this as the proper exercise of the arbitral tribunal’s authority under the applicable arbitral rules, which were ‘*part and parcel*’ of the arbitration agreement.¹⁰ Conversely, in cases where time limits provided under arbitration agreements expired without any extensions pursuant to the mechanism stipulated therein, the Courts held that the mandate of the arbitral tribunal had terminated.¹¹

⁴ Arbitration and Conciliation Act, No. 26 of 1996 (India), §2(2). The applicability of the Principal Act (Part I) to arbitrations seated outside India has been the subject of contradictory decisions of the Supreme Court. The prevailing view is that of *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 S.C.C. 552 (India), ¶¶ 194-196. In this case, the Apex Court held that Part I would have no application to international commercial arbitration held outside India. Accordingly, in a foreign-seated international commercial arbitration, no application for interim relief would be maintainable before Indian Courts (pursuant to § 9 or any other provision). The Court, however, made clear that this decision would apply prospectively, *i.e.* to all the arbitration agreements executed after the decision, *see at* ¶ 197. This position has been slightly altered by the Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India), which adds a proviso to § 2(2) and enables the application of certain provisions (such as, the power of Indian courts to grant interim relief under Section 9) of Part I to international commercial arbitrations even if the arbitration is seated outside India, subject to an agreement to the contrary.

⁵ The Arbitration Act, No. 10 of 1940 (India), § 3.

⁶ *Id.* First Schedule, r. 3.

⁷ *Id.* § 28(1).

⁸ *Id.* § 85 (the Principal Act also repealed the Arbitration Protocol and Convention Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961).

⁹ *NBCC Limited v. J.G. Engineering Private Limited*, (2010) 2 S.C.C. 385 (India), ¶ 22 [*hereinafter* “NBCC Ltd.”].

¹⁰ *Virakaran Awasty v. Hassad Netherland B.V. & Ors.*, OMP (I) (COMM.) No. 18/2015, Feb. 16, 2016 (Delhi High Court) (India) *available at* <http://lobis.nic.in/ddir/dhc/MAN/judgement/18-02-2016/MAN16022016OMPTCOMM182015.pdf>.

¹¹ *Bharat Oman Refineries Ltd. v. Mantech Consultants*, 2012 S.C.C. OnLine Bom 669 (India), ¶ 15 [*hereinafter* “Bharat Oman”].

As discussed in Part IV below, the re-introduction of the Court's exclusive power to extend the Time Limit may create procedural complexities in conflict with the applicable arbitral rules. For the purposes of this Part, however, the enquiry is restricted to the scope of Section 29A as deduced from a comparison with the law as it stood under the 1940 Act and thereafter.

A. “The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference” (Section 29A(1))

The above-quoted clause echoes the wording of the 1940 Act, under which ‘*entering on the reference*’ was one of the milestones to calculate the time limit for making the award.¹² There was, however, no clear indication of the precise date when the arbitral tribunal would enter ‘*on the reference*’ under the 1940 Act, leading courts across the country to different conclusions on the issue.¹³ While it was generally accepted that this was not necessarily the date of the commencement of the arbitration,¹⁴ it was uncertain as to whether it was the point at which the arbitrators accepted office and communicated with each other,¹⁵ or when they applied their mind and did something in furtherance of the execution of the work of arbitration,¹⁶ or when they entered upon the hearing of a particular claim.¹⁷ Noticing these divergent views, the Law Commission of India in 1978 suggested that the relevant date for entering ‘*on the reference*’ should be taken to be the first date fixed by the arbitral tribunal for the appearance of the parties before it for the purposes of the arbitration.¹⁸

The explanation to Section 29A(1) does away with this uncertainty and clearly indicates “*the 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*”. This date may not be difficult to identify in institutional arbitrations, since several prominent institutions have the practice or procedure of informing the arbitral tribunal of its constitution in writing, usually at the time of transmitting the file to the arbitral tribunal.¹⁹ They also have rules for determining the date on which a communication was made or received,²⁰ and whether or not these rules are considered relevant by the Courts when applying Section 29A.

¹² The Arbitration Act, No. 10 of 1940 (India), First Schedule, r. 3.

¹³ LAW COMMISSION OF INDIA, REPORT NO. 76 – ARBITRATION ACT 1940, ¶ 11.17 (1978), available at lawcommissionofindia.nic.in/51-100/report76.pdf.

¹⁴ *Id.*

¹⁵ Bajranglal Laduram v. Ganesh Commercial Co., (1949) S.C.C. OnLine Cal 217 (India), ¶¶ 34-36.

¹⁶ Soneylal Thakur v. Lachhminarain Thakur, A.I.R. 1957 Pat. 395 (India), ¶ 5; Dr. Babubhai Vanmalidas Mehta v. Prabhod Pranshankar Joshi, (1955) S.C.C. OnLine Bom 76 (India), ¶ 19.

¹⁷ Jolly Steel Industries Pvt. Ltd. Poona v. Union of India & Anr., (1978) S.C.C. OnLine Bom 128 (India), ¶¶ 12-13.

¹⁸ LAW COMMISSION OF INDIA, REPORT NO. 76 – ARBITRATION ACT 1940, ¶ 11.23 (1978), available at lawcommissionofindia.nic.in/51-100/report76.pdf.

¹⁹ MAXI SCHERER ET AL., ARBITRATING UNDER THE 2014 LCIA RULE: A USER'S GUIDE 116 (2015); L.C.I.A. Arbitration Rules 2014, arts. 14.1 and 15.2 [*hereinafter* “LCIA Rules 2014”]; Rules of Arbitration of the International Chamber of Commerce 2012, art. 16 [*hereinafter* “ICC Rules 2012”]; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Jan. 1, 2010), art. 18 [*hereinafter* “SCC Rules 2010”]; on the practice and procedure under the LCIA Rules 2014, ICC Rules 2012 and SCC Rules 2010 *see* CONCISE INTERNATIONAL ARBITRATION (Loukas A. Mistelis ed., 2d ed., 2015).

²⁰ LCIA Rules 2014, art. 4; ICC Rules 2012, art. 3; SCC Rules 2010, art. 8.

- B. “[T]he parties may, by consent, extend the period [...] for a further period not exceeding six months” (Section 29A(3))

This is the only stipulation which infuses a certain degree of party autonomy into Section 29A. Unlike the 1940 Act, which applied the four-month time-limit to the making of awards only in the absence of a ‘*different intention*’ expressed in the arbitration agreement,²¹ the application of the twelve-month time limit under Section 29A(1) is not subject to a contrary agreement of the parties. Under Section 29A(3), however, the parties may ‘*by consent*’ extend this time limit by a further period of six months.

It is open to question whether this requirement of consent will be sufficiently met by reference to the mechanism to extend the time limit for rendering a final award under the applicable arbitral rules, if any.²²

Pursuant to Section 2(8) of the Act,²³ the parties have the liberty to agree on arbitral rules to govern the proceedings, which may be considered as “*comprehensive codes [providing for] [...] all the necessary processes and challenges which are preferred during the course of conducting of the arbitration [...]*”.²⁴ Further, under Section 2(6) of the Act, where the parties have the authority to determine certain issues, this will include the right of the parties to authorize any person, including an institution, to determine such issues. These provisions, which implement Articles 2(e) and 2(d) of the UNCITRAL Model Law,²⁵ are designed to prevent an excessively literal interpretation of the parties’ freedom to determine an issue or to their agreement under the Act.²⁶ Against this backdrop, it could be argued that the twelve-month time limit for making an award can be extended by another six months pursuant to the applicable arbitral rules, as part and parcel of the agreement or consent of the parties reflected in the arbitration agreement.

On the other hand, the interpretation suggested above could be considered to stretch the meaning of Sections 2(6) and 2(8) too far: these provisions essentially protect the principal of party autonomy in determining the rules of procedure, provided that such rules supplement or vary the non-mandatory provisions of the Act.²⁷ Though they may be applied to party-determined issues such as the number of arbitrators (Section 10(1)), the challenge procedure

²¹ The Arbitration Act, No. 10 of 1940 (India), § 3.

²² Examples of such mechanisms may be found in the ICC Rules 2012, art. 30(2); SCC Rules 2010, art. 37; Arbitration Rules of the Mumbai Centre for International Arbitration (2016), r. 30.3 [*hereinafter* “MCIA Rules 2016”].

²³ Section 2(8) of the Act (“Where this Part.— (a) refers to the fact that the parties have agreed or that they may agree, or (b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.”)

²⁴ *Transair v. Kuwait Airways*, (2013) S.C.C. OnLine Del 4184 (India), ¶ 42 [*hereinafter* “*Transair*”].

²⁵ United Nations Commission on International Trade Law [UNCITRAL], Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/61/33 [*hereinafter* “UNCITRAL Model Law”].

²⁶ INDU MALHOTRA, O P MALHOTRA ON THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 270-272, 276-277 (3d ed., 2014); UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General* (UN 1985) ¶¶ 15-16. On the relevance of the UNCITRAL Model Law in interpreting the Act *see* Principal Act, Statement of Objects and Reasons; *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 S.C.C. 552 (India), ¶¶ 40, 47, 56-57 [*hereinafter* “*Bharat Aluminium*”]; *Malaysian Airlines Systems BHD (II) v. Stic Travels (P) Ltd.*, (2001) 1 S.C.C. 509 (India), ¶ 17 [*hereinafter* “*Malaysian Airlines*”].

²⁷ UNCITRAL, *2012 Digest of Case Law on the Model Law of International Commercial Arbitration* (UN 2012) 13-14; MALHOTRA, *supra* note 26; *Transair*, (2013) S.C.C. OnLine Del 4184 (India), ¶¶ 40-46.

(Section 13(1)), the rules of procedure (Section 19(2)), the place of arbitration (Section 20) and the language of arbitration (Section 22),²⁸ they may not replace the specific requirement for party ‘consent’ in Section 29A(3). This is particularly because, while phrases such as “*the parties are free to determine*”,²⁹ “*the parties are free to agree on*”³⁰ and “*unless otherwise agreed by the parties*”³¹ have been used several times in Part I of the Act, the term ‘consent’ is only used on one other occasion: when the “*arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person*” (emphasis added).³² As such, on a comprehensive reading of the Act, it is possible that ‘consent’ under Section 29A(3) requires something more than the mere reference to arbitral rules, *i.e.*, the direct involvement of the parties.

In the author’s assessment, however, the latter interpretation would be narrow and counterproductive. Once a dispute has arisen, it is likely that at least one party will not want the arbitration to reach fruition and will probably resort to delaying tactics so that the twelve-month time limit expires without the dispute being decided. In such circumstances, obtaining the consent of this party to an extension of time will be extremely difficult.³³ As such, in a majority of cases, there is a likelihood of the proceedings being disrupted after the expiry of the twelve-month period. This paralysis can be avoided by considering the requirement of consent as satisfied by reference to the applicable arbitral rules (in the arbitration agreement) in cases where such rules provide for a mechanism appropriate to extend the time limit for rendering the final award. In this way, the relevant arbitral institution will be able to ensure the smooth conduct of the arbitration for an extended period of six months before the matter goes to the Court. Given that some institutions estimate that arbitrations can be completed within twelve to eighteen months on an average,³⁴ an eighteen-month time limit for making the award maybe more realistic for the arbitral tribunal to comply with, without having to deal with the pressures of being answerable to the courts. As indicated in Part III below, in other jurisdictions where arbitration statutes contain similar provisions, this liberal interpretation is not uncommon.³⁵

C. ‘[I]f the award is not made within the period specified [...] the mandate of the arbitrator(s) shall terminate [...]’ (Section 29A(4))

This seemingly novel provision, expressly providing for the termination of the mandate of the arbitral tribunal upon expiry of the Time Limit, is in fact reflective of the prevailing jurisprudence in India on the subject. In cases where time limits stipulated in the parties’ agreement or institutional rules expired prior to the rendering of the final award, the arbitral tribunal has been held to have become *functus officio* and *de jure* unable to continue with the

²⁸ *Id.*

²⁹ See Arbitration and Conciliation Act, No. 26 of 1996 (India) (as amended), § 10(1).

³⁰ *Id.* §§ 11(2), 13(1), 19(2), 20(1), 22(1).

³¹ *Id.* §§ 11(1), 14(2), 21, 24(1), 25, 26, 29(1).

³² *Id.* § 6.

³³ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, ¶ 9.164 (6th ed., 2015); Stephan Wilske, *Legal Challenges to Delayed Arbitral Awards*, 6(2) Contemporary Asia Arb. J. 153, 159 (2013).

³⁴ LCIA, ‘LCIA Releases Costs and Duration Data’, available at <http://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx>; SIAC, available at <http://www.siac.org.sg/faqs/71-resources/frequently-asked-questions>, ‘How long do SIAC-administered arbitrations usually.’

³⁵ See, e.g., the position in Belgium, Brazil, Turkey and Romania.

proceedings.³⁶ Such a defect has been considered incurable, such that the parties could not confer jurisdiction through consent thereafter.³⁷ Under the 1940 Act as well, the expiry of the statutory time limit without further extension by the competent court had similar consequences.³⁸

The termination of the arbitral tribunal's mandate, however, does not necessarily bring the arbitration to an end.³⁹

A party by seeking the termination of the mandate of the arbitrator cannot plead that the arbitration proceedings have axiomatically come to an end. The necessary consequence in law for the termination of the mandate of the arbitrator under the provision of Section 14 of the Act is the appointment of the substitute arbitrator under Section 15 of the Act wherein again the appointment procedure is followed.

Therefore, it may be possible to appoint substitute arbitrators pursuant to Sections 14 and 15 of the Act upon termination of the arbitral tribunal's mandate.⁴⁰ Section 29A(6) supports this interpretation and gives an indication that when substitute arbitrators are appointed by the Court, it will not be necessary to begin the proceedings afresh. In institutional arbitrations, this appointment would be done as per the procedure under the applicable arbitral rules.⁴¹

D. '[U]nless the Court has, either prior to or after the expiry of the period so specified, extended the period' (Section 29A(4))

This wording echoes the wording of Section 28 of the 1940 Act (quoted above), under which the competent court could extend the time limit for making an award after its expiry. In such cases, it was held that “*the award factually made may be treated as an award made within the time so extended. To put it differently, if time was not extended by court, the document described as an award would be treated as non est.*”⁴² In the case of *Jatinder Nath v. Chopra Land Developers (P) Ltd. and Anr.*, the Supreme Court noted:

[A] bare failure of an arbitrator to make an award within the time allowed by law will not involve the consequences of it being set aside only on that ground. The court has ample powers in a given case to extend the time and give life to a vitiated award by exercising judicial discretion under Section 28 of the Act. An application to have the award set aside on the ground that it was made beyond time prescribed has to be moved under the Act. No separate suit would lie for that purpose. Further, the power given to the court under Section 28 is so wide that

³⁶ NBCC Ltd., (2010) 2 S.C.C. 385 (India), ¶¶ 17, 27-35; Bharat Oman, 2012 S.C.C. OnLine Bom 669 (India), ¶ 18; Shyam Telecom Ltd. v. ARM Ltd., (2004) 77 D.R.J. 91 (Delhi High Court) (India), ¶¶ 14-17.

³⁷ Bharat Oman, 2012 S.C.C. OnLine Bom 669 (India), ¶ 21.

³⁸ Jolly Steel Industries Pvt. Ltd. Poona v. Union of India & Anr., (1978) S.C.C. OnLine Bom 128 (India), ¶ 5; State of Punjab v. Hardy, (1985) 2 S.C.C. 629 (India), ¶ 13.

³⁹ Transair, (2013) S.C.C. OnLine Del 4184 (India), ¶ 53.

⁴⁰ NBCC Ltd., (2010) 2 S.C.C. 385 (India), ¶¶ 17, 27-35; *But see* Bharat Oman, 2012 S.C.C. OnLine Bom 669 (India), ¶¶ 23, 26 (time limit stipulated in the arbitration agreement expired and the Court held that there was no question of appointing a substitute arbitrator after the expiry of such period, since the arbitration itself had terminated with the efflux of time and a fresh agreement required to settle dispute by arbitration).

⁴¹ Transair, (2013) S.C.C. OnLine Del 4184 (India), ¶¶ 44-47; Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 S.C.C. 52 (India), ¶¶ 12-13; Ghanshyam Sarada v. Gobind Kumar Sarada, (2009) S.C.C. OnLine Cal 1698 (India).

⁴² Hari Shanker Lal v. Shambhu Nath and Ors., (1962) 2 S.C.R. 720 (India), ¶ 7.

*it can extend the time even if the award is made beyond four months from the date of the arbitrator entering upon the reference. The only restriction is that it must be exercised with judicial discretion.*⁴³

This principle could be followed in the application of Section 29A(4),⁴⁴ which authorizes the Court to extend time period ‘either prior to or after the expiry’ thereof.

In effect, the award will be treated as *non-est* and not binding on the parties, unless the Court subsequently extends the Time Limit and “give[s] life to the vitiated award”. In drawing this conclusion, however, one must in keep in mind that under the 1940 Act, an award did not possess any sanctity by itself: it had to be approved by a competent court, which would determine the validity, effect or existence of such award and deliver a judgment in terms thereof.⁴⁵ This is not the position under the Act, which aims to give effect to the UNCITRAL Model Law⁴⁶ and where the Court’s power to review an award is limited.⁴⁷ Although this overarching structural difference may not directly impact the outcome of an expired Time Limit or a subsequent extension, it should not be lost sight of.

i. Analysis

In light of the above, the scope of Section 29A can be summarised as follows:

1. in a clear departure from the uncertainty under the 1940 Act, under Section 29A, the twelve-month time period for making the award starts from the date the arbitral tribunal receives notice in writing of its constitution;
2. it is arguable that this twelve-month time limit can be extended by a further six months through the mechanism provided under the applicable arbitral rules (i.e., referred to in the arbitration agreement) if such a mechanism exists under those rules;
3. if the Time Limit expires and no subsequent extension is granted, the mandate of the arbitral tribunal shall terminate i.e., it will become *functus officio* and *de jure* unable to continue with the proceedings. This does not, however, mean that the arbitration will necessarily come to an end. Substitute arbitrators can be appointed pursuant to the mechanism stipulated under the applicable arbitral rules or Sections 14 and 15 of the Act;
4. the Court may extend the Time Limit pursuant to an application by either party even after its expiry;
5. the expiry of the Time Limit may not mean that an award rendered thereafter will be automatically set aside – an application will have to be moved for this purpose. Even at this stage, the Court may grant an extension of time and bring the award back to life. Until such time, the award will be treated as *non-est*; and,

⁴³ (2007) 11 S.C.C. 453 (India), ¶ 17.

⁴⁴ The distinction between § 8 and § 20 of the 1940 Act is not relevant for the present purposes, and was not retained in the Principal Act; *See* SBP & Co. v. Patel Engineering Ltd. and Anr., (2005) 8 S.C.C. 618 (India), ¶¶ 4-5; Kalpana Kothari v. Sudha Yadav (Smt) and Ors., (2002) 1 S.C.C. 203 (India), ¶¶ 8-9.

⁴⁵ 76th LAW COMMISSION REPORT, *supra* note 13, ¶¶ 1.30, 5.1; *see also* The Arbitration Act, No. 10 of 1940 (India), §§ 17, 30, 33.

⁴⁶ Bharat Aluminium, (2012) 9 S.C.C. 552 (India), ¶¶ 40, 47, 56-57; *see also* Arbitration and Conciliation Act, No. 26 of 1996 (India), Statement of Objects and Reasons.

⁴⁷ Arbitration and Conciliation Act, No. 26 of 1996, § 34 (India) (as amended); UNCITRAL, 2012 *Digest of Case Law on the Model Law of International Commercial Arbitration* (UN 2012) 134-135, ¶¶ 3- 4.

6. therefore, there will be three occasions for the Court to consider an extension of the Time Limit: a) pursuant to an application for a declaration that the mandate of the arbitral tribunal has terminated and for the appointment of substitute arbitrators (under Sections 14, 15 and Section 29A);⁴⁸ b) pursuant to an application for an extension of time by either party (under Section 29A(5)); and, c) pursuant to a petition for setting aside the award (under section 34 of the Act).⁴⁹

III. The Position in Other Countries

In the following section, provisions in the arbitration statutes of some other countries, which stipulate time limits in respect of arbitral awards, have been referred to in order to understand how Section 29A compares with them:

Spain: “Unless otherwise agreed by the [p]arties, the arbitrators shall decide the dispute within six months from the date of the submission of the statement of defence referred in Article 29 or from the expiry of the period to submit it. Unless otherwise agreed by the parties this period may be extended by the arbitrators, for a period not exceeding two months, by means of a reasoned decision. Unless otherwise agreed by the parties, the expiry of the period without the issue of the final award shall not affect the effectiveness of the arbitral agreement, nor the validity of the award, without prejudice to any liability which the arbitrators may have incurred.”⁵⁰ (emphasis added)

Thus, the parties can agree that the arbitrators will automatically lose their jurisdiction once the time period stipulated in the provision has lapsed.⁵¹ However, if there is no such agreement, the arbitrators may render their award after this time period without compromising the effectiveness or validity of the award.⁵² The arbitrators may, however, incur liability for damages caused due to bad faith, recklessness or wilful misconduct.⁵³

Belgium: “The parties may determine the time limit within which the Arbitral Tribunal must render its award, or the terms for setting such a time limit [and, if necessary, its extension][...] Failing this, if the arbitral tribunal is late in rendering its award, and a period of six months has elapsed between the date on which the last arbitrator has been appointed, the President of the Court of First Instance, at the request of one of the parties, may impose a time limit on the arbitral tribunal in accordance with Article 1680, § 3. The mission of the arbitrators ends if the arbitral tribunal has not rendered its award at the expiry of this time limit.”⁵⁴ (emphasis added) The six-month time limit which applies when the parties have not agreed on a time limit is understood to be a non-mandatory provision that sets a target for the arbitral tribunal and opens up an avenue for the courts to speed up the arbitral process.⁵⁵ In practice, however, the parties will typically have determined a time-limit through the applicable arbitral rules or through a procedural

⁴⁸ Transair, (2013) S.C.C. OnLine Del 4184 (India); Shyam Telecom Ltd. v. ARM Ltd., (2004) 77 DRJ 91 (Delhi High Court) (India).

⁴⁹ Bharat Oman, 2012 S.C.C. OnLine Bom 669 (India).

⁵⁰ Law 60/2003 of Dec. 23, 2003, art. 37(2) (as amended by Law 13/2009 of 2 Nov 2009 and Law 11/2011 of 20 May 2011) (Spain).

⁵¹ Laura Lozano Correa, *Spanish Arbitration Act, Article 37 [Time limit, form, content and notification of the arbitral award]*, in THE SPANISH ARBITRATION ACT: A COMMENTARY 225 (Carlos González-Bueno ed., 2016).

⁵² *Id.*

⁵³ Law 60/2003 of 23 December 2003, art. 21 (as amended by Law 13/2009 of 2 Nov 2009 and Law 11/2011 of 20 May 2011) (Spain).

⁵⁴ Judicial Code, Part IV, art. 1713(2) (adopted July 4, 1972, last amended June 24, 2013) (Belg.).

⁵⁵ Maud Piers, *Commentary on Part VI of the Belgian Judicial Code, Chapter VI: Article 1713*, in ARBITRATION IN BELGIUM 428 (Niuscha Bassiri & Maarten Draye eds., 2016).

timetable, as is required by many arbitral rules.⁵⁶ The parties may also agree on subsequent extensions of time or the applicable arbitral rules may provide for the possibility for such extensions.⁵⁷ These agreements will prevail over the above-quoted provision in Article 1713 of the Belgian Judicial Code.⁵⁸

Brazil: *“The arbitration award shall be made within the time frame set up by the parties. If no timing has been determined, the arbitration award shall be made within six months from the date of the commencement of the arbitration or from the date of the substitution of an arbitrator [...] The parties and the arbitrators, by mutual agreement, may extend the timing for the delivery of the final award.”*⁵⁹ (emphasis added) Once again, the stipulated time limit of six months can be modified by the parties in case they agree on a different time limit. It has been argued that such an agreement would also include the application of institutional arbitral rules establishing special time limits.⁶⁰ In case a different time limit is provided by the parties’ agreement or the institutional arbitral rules, such time limit will prevail.⁶¹

Turkey: *“Unless otherwise agreed by the parties, an award shall be rendered within one year, in the case of a sole arbitrator, from the date of his appointment or, in the case where there is an arbitral tribunal, from the date when the minutes of the tribunal’s first meeting are kept [...]. The term of arbitration may be extended, upon agreement of the parties, or, in case of failure, upon a party request, by the civil court of first instance. Upon denial of the request, arbitration shall come to an end at the date of the expiry of the term of arbitration [...]. The court’s decision shall be final.”*⁶² (emphasis added) It is doubtful whether the provision of an arbitration period itself is mandatory or not, or whether it can be opted out of entirely by an agreement of the parties, such that the arbitration is governed by an undetermined time period.⁶³ There is a view that the provision is mandatory in nature and that it should be taken seriously by the arbitral tribunal and the parties because an arbitral award may be set aside where it is not rendered within the arbitration period.⁶⁴ The parties may, however, shorten or extend the arbitration period by agreement,⁶⁵ which is understood to include any time limit provided under the applicable arbitral rules.⁶⁶

Romania: *“(1) If the parties have not provided otherwise, the arbitral tribunal must render the award not later than 6 months from its constitution, under the sanction of lapse of the arbitration [...] (3) Within the time limit specified in paragraph (1), the parties may agree in writing to extend the time limit for the arbitration [...] (4) The arbitral tribunal can decide, for a justifiable reason, to extend the time limit for the arbitration once, for no*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Law no 9.307 of Sept. 23, 1996, art. 23 (as amended by Law no 13.129 of May 26, 2015) (Braz.).

⁶⁰ JOAQUIM T. DE PAIVA MUNIZ & ANA TEREZA PALHARES BASILO, *ARBITRATION LAW OF BRAZIL: PRACTICE AND PROCEDURE*, Appendix C, 48 (2006).

⁶¹ Carlos Nehring Netto, *National Report for Brazil (2011)*, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* 22-23 (Jan Paulsson & Lise Bosman eds., Supp. No. 66, Sept. 2011); MUNIZ & BASILO, *supra* note 60.

⁶² International Arbitration Law, art. 10(B) (Law No. 4686 of 21 June 2001) (Turkey).

⁶³ Bilgehan Yeşilova, *Courts’ Support and Supervision Prior to the Rendering of the Award*, in *ARBITRATION IN TURKEY* 166 (Ismael Esin & Ali Yesilirmak eds., 2015); Musa Aygül & Doğan Gültutan, *Arbitration Procedure*, in *ARBITRATION IN TURKEY* 96 (Ismael Esin & Ali Yesilirmak eds., 2015).

⁶⁴ Aygül & Gültutan, *supra* note 63; International Arbitration Law (Law No. 4686 of June 21, 2001) (Turkey), art. 15(A)(1)(c); Stephan Wilske, *Legal Challenges to Delayed Arbitral Awards*, 6(2) C.A.A.J. 153, 159 (2013).

⁶⁵ Aygül & Gültutan, *supra* note 63.

⁶⁶ Yeşilova, *supra* note 63.

more than 3 months [...]”⁶⁷ (emphasis added) The time limit of six months stipulated in this provision applies only to domestic ad hoc arbitrations, whereas for international arbitrations seated in Romania, it is doubled to twelve months.⁶⁸ The time limit applies only in circumstances where: (i) the parties have not specified a time limit for the arbitral tribunal to render the award; or (ii) the parties did not choose a mechanism for fixing such a deadline either by adopting Romanian procedural law to govern the arbitration or by incorporating arbitration rules in their agreement containing provisions setting out a deadline for the arbitrators to render their award.⁶⁹ The consequences of the lapse of arbitration are twofold: (a) if the time limit expired without the arbitral tribunal rendering an award, the arbitral tribunal will declare the arbitration terminated without affecting either party’s ability to restart proceedings if it so wishes (this consequence follows only if either party has expressly declared in writing at the first hearing, to which both parties have been duly summoned, that it intends to invoke the lapse of the arbitration); and (b) if the time limit expired and the arbitral tribunal nevertheless issued an award after the expiration of the time limit, such award is open for annulment.⁷⁰

Taiwan, Republic of China:⁷¹ *“If no arbitral proceedings were agreed upon by the parties, the arbitral tribunal shall decide the place of arbitration and the time and the date of hearing, and shall notify both parties within ten days from the date of receipt of the notice of appointment as arbitrator. The arbitral tribunal shall render an arbitral award within six months [of commencement of the arbitration]. However, the arbitral tribunal may extend [the decision period] an additional three months if the circumstances so require [...] If an arbitral award has not been rendered by the arbitral tribunal within the above-mentioned time period, either party may, unless compelled to arbitrate, refer the dispute to the court or proceed with a previously initiated legal action. The arbitral proceedings shall be deemed terminated thereafter [...]”*⁷² (emphasis added) There is some authority for the interpretation that the time limit of six months under this provision is subject to the contrary agreement of the parties, based on the opening phrase.⁷³ The arbitral tribunal’s failure to observe this deadline will not jeopardize the ultimate award, but a party is permitted to forgo arbitration and commence or resume litigation after this period of time.⁷⁴ The arbitration will be deemed as being terminated once either party commences or reinstates litigation.⁷⁵

A. Analysis

Section 29A appears to be unique as a result of a combination of factors when compared to the above-cited legislations of other countries which are flexible on at least one of these factors. First, it does not allow parties to contract out of the provision. Secondly, unless the interpretation to Section 29A (3) suggested in Part II above is adopted, an extension of the time limit beyond the

⁶⁷ Civil Procedure Code, Book IV, art. 567 (Law no. 134/2010, entered into force on 15 February 2013) (Romania).

⁶⁸ *Id.* art. 1114(4).

⁶⁹ Matei Purice, *Chapter 3- §3.06 Time Limit for Rendering the Award, in ARBITRATION IN ROMANIA: A PRACTITIONER’S GUIDE* 173-174 (Crenguta Leaua & Flavius-Antoniui Baias eds., 2016).

⁷⁰ *Id.* 177.

⁷¹ Taiwan is not a party to the New York Convention.

⁷² Arbitration Law of the Republic of China 1998, art. 21 (Taiwan).

⁷³ Angela Y. Lin & Nigel N.T. Li, *Arbitration in Taiwan, the Republic of China, in INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA*, ch. 13, H-1 (S. Ali & T. Ginsburg eds., 2013).

⁷⁴ *Id.* citing the Arbitration Law of the Republic of China 1998 (Taiwan), art. 21(3).

⁷⁵ *Id.*; see also, THE BAKER & MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK: 2012-2013 482-483 (Nancy Thevenin ed. 2013) citing Taiwan Supreme Court, Judgments 81-Tai-Shang-Tze No. 2578 (Nov. 6, 1992) and 89-Tai-Shang-Tze No. 2677 (Nov. 24, 2000).

twelve-month period for another six months requires a direct agreement of the parties and cannot be done by reference to the applicable arbitral rules. Thirdly, the parties cannot agree to an extension beyond the combined time limit of eighteen months.

In addition to all of the above, it is possible that the Time Limit will be interpreted by the Courts as mandatory in nature. Although the Act does not make a clear distinction between its mandatory and non-mandatory provisions, unlike its English counter-part,⁷⁶ it has been held that a phrase such as ‘*unless otherwise agreed by the parties*’ precedes most of the non-mandatory provisions of the Act.⁷⁷ Further, the stipulation that ‘*[t]he award shall be made[...]*’⁷⁸ (emphasis added) within the Time Limit and the express consequence that the mandate of the arbitral tribunal shall terminate in the event of non-compliance, lend support to the mandatory character of the Time Limit.

All of the afore-stated factors taken together, particularly the mandatory nature of the Time Limit along with the limited room for manoeuvre by the parties or arbitral institution, are likely to create procedural complications for an arbitration unless managed efficiently by the Courts (discussed in Part-IV below). If one looks at the deliberations that lead up to the enactment of Section 29A (see below), it is clear that the lawmakers were not ignorant of these consequences, but gave precedence to the need to foster time-bound and speedy dispute resolution in India.

IV. ... and the Future: Speedier Resolution of Disputes or Due Process and Other Procedural Concerns (One Step Forward, Two Steps Back)?

In its 176th Report, the Law Commission of India took the position that an omission to provide a time limit for rendering the final award in the Principal Act had resulted in delays in arbitral awards, in some cases ranging from five to fourteen years.⁷⁹ It recommended that a time limit of two years should be provided for this purpose (one year from the arbitrators entering on the reference, extendable by another year with the mutual consent of the parties) and the Courts should be given the power to grant extensions thereafter.⁸⁰ Alive to the possibility that ‘*a termination may indeed result in [sic] waste of time and money for the parties after lot [sic] of evidence is lead*’, it was suggested that an arbitration could instead be suspended after the expiry of the time limit until such time as an extension application was filed with the appropriate Court – at which point the proceedings would revive.⁸¹

⁷⁶ Arbitration Act 1996 (U.K.).

⁷⁷ M/s Choday Sanyasi Rao v. Hindustan Petroleum Corporation Limited, (2002) S.C.C. Online AP 1067 (India), ¶ 15 (this basis of differentiation between mandatory and non-mandatory provisions under the Act is similar to the one adopted under UK Arbitration Act 1996, § 4(2)).

⁷⁸ On the use of the word ‘shall’ as indicative of the mandatory character of a provision see *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Anr.*, (2005) 7 S.C.C. 234 (India), ¶¶ 27-28; *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Ors.*, (2013) 1 S.C.C. 641 (India), ¶69; *Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee*, (2014) 6 S.C.C. 677 (India), ¶¶ 18-19; On the use of the word ‘may’ as opposed to ‘shall’ see *MSA Nederland B.V. v. Larsen & Turbo Ltd.*, (2005) 13 S.C.C. 719 (India), ¶¶ 3-4; *Malaysian Airlines*, (2001) 1 S.C.C. 509 (India), ¶¶ 27-28; *Union of India v. Tolani Bulk Carriers Limited*, (2001) S.C.C. Online 1027 (India), ¶ 12.

⁷⁹ LAW COMMISSION OF INDIA, REPORT NO. 176 –THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001, ¶¶ 2.20.2- 2.21.6 (2001), available at <http://lawcommissionofindia.nic.in/arb.pdf>.

⁸⁰ *Id.* ¶ 2.21.2.

⁸¹ *Id.* ¶ 2.21.5.

In its 246th report, which was submitted after it was asked to take another look at the provisions of the Principal Act based on comments from several interest groups, the Law Commission made no mention of Section 29A at all.⁸² In between the two reports, the Justice Saraf Committee, set up by the Indian government in 2004 to study the implications of the former report (*i.e.* the 176th report),⁸³ gave the following recommendation:

*“neither any time limit should be fixed as contemplated by the proposed section 29A nor should the court be required to supervise and monitor arbitrations with a view to expediting the completion thereof. None of these steps is conducive to the expeditious completion of the arbitral proceedings. Moreover, court control and supervision over arbitration is neither in the interest of growth of arbitration in India nor in tune with the best international practices in the field of arbitration. The Committee is of the opinion that with the proposed amendment the arbitral tribunal will become an organ of the court rather than a party-structured dispute resolution mechanism. The Committee, therefore, recommends the deletion of the proposed section 29A from the Amendment Bill.”*⁸⁴ (emphasis added)

In addition to the drawbacks already highlighted in the above-quoted passages, *i.e.* the wastage of the time and money of the parties if the proceedings are prematurely terminated and the unnecessary intervention by the Courts, the Time Limit may compel an arbitral tribunal to issue an award without giving the defendant adequate opportunity to present its case,⁸⁵ making the award vulnerable to an action for nullity or to a successful defense in enforcement proceedings.⁸⁶ Thus, the successful party may find that, instead of having assisted in a speedy resolution of the dispute, the Time Limit contributed towards an overall delay and ineffectiveness in the arbitral process.⁸⁷

Matters will be further complicated in cases where the applicable arbitral rules already provide for time limits in respect of the final award. This is the case, for instance, with the ICC Rules,⁸⁸ the SCC Rules⁸⁹ and the newly minted MCIA Rules.⁹⁰ On the one hand, after the expiry of the Time Limit under the Act, a party will have to approach the relevant Court, as the sole competent authority, to seek a further extension of time. On the other, when the time limit for the final award under the applicable arbitral rules is set to expire, an extension will be required under those rules pursuant to the mechanism provided thereunder.

⁸² LAW COMMISSION OF INDIA, REPORT NO. 246 –AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996 (2014); *but see* DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE ON PERSONNEL, REPORT NO. 9 – PUBLIC GRIEVANCES, LAW AND JUSTICE, THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2003, Observation 7 (2005) (“[t]he Committee feels that this provision will yield results only if consequences of non-compliance of such a time limit are provided for”).

⁸³ Ministry of Law and Justice, *Proposed Amendments to the Arbitration and Conciliation Act, 1996, A Consultation Paper* 2-3, ¶ 2 (2010).

⁸⁴ *Id.* Annexure IV, 127, citing Justice Saraf Committee Report, *Implications of the Recommendations of the Law Commission in its 176th Report regarding Amendment of the Arbitration and Conciliation Act, 1996 and the Amendments proposed by the Arbitration and Conciliation (Amendment) Bill, 2003 (As introduced in the Rajya Sabha on 22 December 2003) and Suggestions and Recommendations.*

⁸⁵ BLACKABY ET AL., *supra* note 33, ¶¶ 9.165-9.166 (6th ed., 2015).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ ICC Rules 2012, art. 30(1).

⁸⁹ SCC Rules 2010, art. 37.

⁹⁰ MCIA Rules 2016, arts. 30.2 and 30.3.

In effect, a situation may arise where the Time Limit under the Act will expire but the time limit under the applicable arbitral rules will have been extended and may still be subsisting.⁹¹ What is the status of the final award in these circumstances? The parties' agreement to apply arbitral rules arguably overrides only the non-mandatory provisions of the arbitration law of the place of arbitration, while the mandatory provisions continue to regulate the arbitration.⁹² As such, a transgression of the mandatory provisions, even though compliant with the arbitral rules, may result in the award being set aside at the place of arbitration⁹³ which, for the present purpose, is India.

At the same time, an award rendered within the time limit provided by the arbitral rules may still be enforceable in other countries, where courts may give priority to the arbitral procedure agreed between the parties (including the institutional rules) over the law of the arbitral seat (including its mandatory law)⁹⁴ while applying the parameters of Article V(1)(d) of the New York Convention.⁹⁵ Article V(1)(d) expressly affirms the supremacy of the parties' agreement concerning the composition of the arbitral tribunal and arbitral procedure, and provides that the law of the place of arbitration should apply only '*failing such agreement*'.⁹⁶ For instance, a German Court enforced an award rendered in Turkey where the parties had agreed to the rules of the Arbitral Commission of the Istanbul Chamber of Commerce and Industry, and rejected a party's argument that the procedure was not in accordance with the Turkish Code of Civil Procedure.⁹⁷

Based on the above-mentioned principle of supremacy of the parties' agreement, care must be taken that the time limit under the applicable arbitral rules does not expire regardless of the status of the Time Limit or a subsequent extension under the Act. This could lead to the

⁹¹ Bilgehan Yeşilova, *Courts' Support and Supervision Prior to the Rendering of the Award*, in ARBITRATION IN TURKEY 166 (Ismael Esin & Ali Yesilirmak eds., 2015).

⁹² MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 24 (2010); BLACKABY ET AL., *supra* note 33, ch. 1 ¶ 1.78 (6th ed., 2015); BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 633-34 (2d ed. 2015); For Indian jurisprudence on this issue *see* National Thermal Power Corporation v. Singer Company & Ors., (1992) 3 S.C.C. 551 (India), ¶¶ 26-28; Transair, (2013) S.C.C. OnLine Del 4184 (India), ¶¶ 40-46.

⁹³ UNCITRAL Model Law, art. 34(2)(a)(iv); Act, § 34(2)(a)(v); On the impact of statutory or agreed time limits on the setting aside of awards in different jurisdictions *see* UNCITRAL, 2012 *Digest of Case Law on the Model Law of International Commercial Arbitration* (UN 2012) 182, ¶ 85.

⁹⁴ BORN, *supra* note 92, ch. 17 ¶ 38; Albert Jan van den Berg, *Why Are Some Awards Not Enforceable?*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 301-302 (Albert Jan van den Berg ed., ICCA Congress Series 12, 2005). On mandatory provisions of the place of arbitration; *See also*, UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, ch. Introduction ¶ 20 (Emmanuel Gaillard & George Bermann eds., 1958), *available at* http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=624&opac_view=-1 [*hereinafter* "UNCITRAL GUIDE"].

⁹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7 1959, (N.Y.C.) 330 U.N.T.S. 38; Berg, *supra* note 94, 304-306.

⁹⁶ UNCITRAL GUIDE, *supra* note 94, ch. Introduction ¶ 9.

⁹⁷ UNCITRAL GUIDE, *supra* note 94, ch. Introduction ¶ 13.

unwanted result that the arbitrators are viewed as not having the power to render an award,⁹⁸ thereby affecting the potential enforceability of the award in other countries.⁹⁹

Finally, the lapse of either time limit (under the Act or the applicable arbitral rules) could potentially lead to objections by one of the parties to the tribunal's ability to proceed with the arbitration. Such objections, if entertained by arbitral tribunals or Courts, could place the entire arbitration in a state of flux. The time and costs incurred by the parties will also be exacerbated by these disruptions.

A. Analysis

The best solution would be that both the time limits, *i.e.* under the applicable arbitral rules and under the Act, are extended before their expiry, with the extensions under the arbitral rules mirroring the extensions granted by Indian Courts. In fact, Section 29A(9) of the Act encourages the Courts to dispose of applications for extensions of time “*as expeditiously as possible*” and “*within a period of sixty days from the date of service of notice on the opposite party*”. Given the overburdened state of the Indian judiciary¹⁰⁰ however, this solution may be overly simplistic and optimistic.

The only alternative seems to be that any delay in the disposal of extension-applications by the Courts should not be allowed to disrupt the proceedings. Particularly in cases of inordinate delay, the arbitration should be allowed to proceed under the applicable arbitral rules even after the expiry of the Time Limit, with the expectation that when the matter comes up before the Courts they will, save in exceptional cases, grant the appropriate extension. If a final award is rendered before the appropriate extension is granted, the award may be treated as *non-est*, as discussed above, and brought back to life as and when the extension is granted by the Court. It would be counterproductive to the efficiency and integrity of the arbitral process if awards were set aside solely on the ground of being rendered beyond the Time Limit. To the extent possible, and depending on who is responsible for the delay, the options of reducing the fees of the arbitrators or imposing actual or exemplary costs upon the erring parties (provided under Sections 29(4) and (5)) should be used in preference to refusing an extension or setting aside an arbitral award.

Where the Court is minded to deny an extension of time under Section 29A in the circumstances of a case, this decision should be made as soon as possible. The arbitration may be brought to a halt only when the extension has been categorically refused and until substitute arbitrators are appointed, as discussed at Part-II (iii) above. In all other circumstances, the progress of the arbitration under the applicable arbitral rules should not be seen as a transgression of the provisions of the Act.

⁹⁸ Stephen R Bond et al., *ICC Rules of Arbitration, Awards, Article 30 [Time Limit for the Final Award]*, in CONCISE INTERNATIONAL ARBITRATION 417 (Loukas A. Mistelis ed., 2d ed., 2015); HERMAN VERBIST ET AL., ARBITRAL PROCEEDINGS UNDER THE ICC RULES OF ARBITRATION OF 2012 173 (2d ed.); BORN, *supra* note 92, ch. 15 ¶¶ 32-33 (“[T]he consequences of violation of the parties’ agreed time limit vary. In some jurisdictions, such violations may be excused (for example, on the theory that ‘time was not of the essence’), while in other jurisdictions the violation of a time limit will result in the invalidity and potential annulment of the award [...]”)(citations removed).

⁹⁹ UNCITRAL GUIDE, *supra* note 94, ch. Introduction ¶ 13.

¹⁰⁰ LAW COMMISSION OF INDIA, REPORT NO. 245 – ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MANPOWER, (2014), *available at* <http://lawcommissionofindia.nic.in/reports/Report245.pdf>.

V. Conclusion

In summary, while the intention to enhance the timeliness of arbitral awards and encourage the progress of arbitration in India is laudable, Section 29A, construed strictly, has the potential for creating unnecessary procedural complications and impeding the potential enforceability of awards. In the end, any undue interference by Indian courts with a view to enforce the mandate of Section 29A will only harm the perception of India's friendliness to arbitration.

To avoid this result, it is recommended that Section 29A be interpreted liberally so as not to impede the smooth functioning of the arbitral process. In particular:

1. an extension of time granted under the applicable arbitral rules should be considered sufficient to meet the requirement of party consent under Section 29A(3);
2. the progress of the arbitration after the expiry of the Time Limit and pending a subsequent extension by the Courts should not be considered a contravention of Section 29A and, where an award is rendered, should not be the sole reason for setting aside the award; and
3. to the extent possible, the Courts should consider reducing the fees of the arbitrators or imposing costs on the parties, depending on who is responsible for the delay, in preference to setting aside the award. In this manner, they will be able to penalize delays without disrupting the arbitration.

In the absence of these flexibilities, the adverse consequences of a mandatory Time Limit may outweigh the possible benefits of timely awards and affect the overall progress of arbitration in India. The ball is in the Courts' court.