

# Dispute Resolution Hotline

July 27, 2020

## DELHI HIGH COURT CLEARS THE AIR ON RETROSPECTIVE APPLICABILITY OF TIME-LINES UNDER SECTION 29A

- Time line of 12 months applicable to all pending arbitrations seated in India as on 30 August 2019 and commenced after 23 October 2015 under the Arbitration and Conciliation Act, 1996.
- No time line of 12 months in international commercial arbitration seated in India.
- Any amendment to substantive laws affecting the rights and liabilities of a party or imposing a disability will be prospective in nature and any amendment to the provisions of statute dealing with procedural laws will be retrospective in nature, unless there exist a contrary intention.

The Delhi High Court in its recent ruling of *ONGC Petro Additions Ltd. v. Ferns Construction Co. Inc.*,<sup>1</sup> held that Section 29A of the Arbitration and Conciliation Act, 1996 (“**Act**”) shall be applicable to all pending arbitrations seated in India as on August 30, 2019 and commenced after 23 October 2015, except international commercial arbitrations. Section 29A of the Act inserted by way of amendment in 2015 (“**2015 Amendment**”) prescribes the time limit for passing an arbitral award. Pursuant to the report of the High-Level Committee to ‘*Review the Institutionalisation of Arbitration Mechanism in India*’ under the chairmanship of Justice B. N. Srikrishna, the Arbitration and Conciliation (Amendment) Act, 2019<sup>2</sup> (“**2019 Amendment**”) introduced further changes to Section 29A.

### Provision prior to 30 August, 2019

Time limit of twelve months for all arbitrations.

### Provision post 30 August, 2019

Time limit of twelve months for all arbitrations other than International Commercial Arbitration.<sup>3</sup>

Time period to be calculated from the date on which the arbitrators have received notice of their appointment.

### BACKGROUND FACTS

Pursuant to an agreement between ONGC Petro Additions Limited (“**Petitioner**”) and FERNAS India Private Ltd (Indian Subsidiary of Ferns Construction Co. Inc. (“**Respondent**”)), disputes arose between the parties. The parties invoked the arbitration clause and an Arbitral Tribunal was constituted to adjudicate the disputes. The Respondent had earlier filed an anti-arbitration injunction against the Petitioner contending that it is not bound by the arbitration clause, which was rejected by the Delhi High Court in April 2019; the Delhi High Court granted the Respondent liberty to raise this issue before the Arbitral Tribunal. The issue of Respondent being a proper party is currently pending for determination before the Arbitral Tribunal.

During the course of arbitration, the Petitioner approached the Delhi High Court seeking extension of time limit under Section 29A of the Act. The Hon’ble Single Judge, in his order dated 25 September 2019 extended the time for the Arbitral Tribunal to complete the proceedings and render the award by 18 months, effective from 24 June, 2019.<sup>4</sup> However, during the pendency of the proceedings, Section 29A of the Act was amended by the 2019 Amendment. Considering the Respondent is a company incorporated under the laws of Turkey, the current arbitration is in the nature of an International Commercial Arbitration under the Act. In light of the 2019 Amendment, the Arbitral Tribunal asked the parties to seek clarifications from the court on its order dated 25 September 2019.

### DEVELOPMENTS ON RETROSPECTIVE APPLICATION OF AMENDMENTS TO ARBITRATION ACT

Section 26 of the 2015 Amendment Act explicitly provided for a prospective application of the amendments and came into force on 23 October 2015. As a result, the 2015 Amendment only applied to arbitrations commenced after 23 October 2015. The Supreme Court in *BCCI v. Kochi*<sup>5</sup> (“**BCCI Judgment**”) interpreted Section 26 of the 2015 Amendment and distinguished arbitral proceedings from court proceedings in relation to arbitral proceedings. The Supreme Court held that 2015 Amendment is applicable to all arbitral proceedings and court proceedings initiated after 23 October 2015, regardless of the fact that such court proceedings stem out of arbitrations initiated before 23 October 2015. However, Section 87 of the Act, inserted *vide* the 2019 Amendment, attempted to disregard the BCCI Judgment and provided for a prospective application of 2015 Amendment only to arbitration and court proceedings commenced after 23 October 2015. Section 87 was however struck down in *Hindustan Construction Company Limited and Ors. v. Union of India and Ors.*<sup>6</sup> essentially reviving the applicability of Section 26, as interpreted by the BCCI Judgment.

In this background, the issue before the present court was if the proceedings before the arbitral tribunal are in nature of an international commercial arbitration, whether the time limit as fixed by this Court *vide* Order dated September

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## CONTENTIONS BY PARTIES

- a. The Petitioner submitted that the changes brought in Section 29A of the Act by the 2019 Amendment will have retrospective effect from 23 October 2015 i.e. the date on which the 2015 Amendment came into force, as Section 29A has been classified a procedural law.
- b. The Petitioner relied on a series of rulings to draw a distinction between substantive law and procedural law.<sup>7</sup> Further, the Petitioner submitted that all procedural laws and amendments to procedural laws, are retrospective in nature, unless the statute expressly states the contrary.<sup>8</sup>
- c. The Petitioner further relied on the BCCI Judgment which classified Section 29A as a procedural law and clarified that the retrospective operation of Section 29A was not given effect only due to the presence of Section 26 in the 2015 Amendment. Since the 2019 Amendment does not have any provision akin to Section 26, the changes brought to Section 29A by way of the 2019 Amendment will have a retrospective effect. Moreover, the changes brought to Section 29A *vide* the 2019 Amendment also do not create any new rights and/or liabilities on a party to any arbitration proceeding. The Petitioner thus concluded that, the new Section 29, having a retrospective effect, applies to the current arbitration proceedings between the parties.
- d. The Petitioner relied on a ruling of the Delhi High Court this year which dealt with the issue of retrospective application of Section 29A of the Act.<sup>9</sup> Interestingly, the Delhi High Court in **MBL Infrastructures Ltd. v. Rites Ltd.** ("MBL Infrastructure") took a view that Section 29A shall only have a prospective application. It was clarified that in MBL Infrastructure, the court did not consider the procedural aspect of Section 29A and solely relied upon a Notification dated August 30, 2019, which did not reveal any legislative intention for the 2019 Amendment.
- e. The Respondent agreed with the Petitioner's contentions and accepted the submissions only to reiterate that a judgment subsequent in time and rendered in ignorance of earlier judgments of the benches of co-equal strength was *per incuriam*.<sup>10</sup>

## JUDGMENT AND ANALYSIS

The Delhi High Court's judgment settles the storm over the applicability of Section 29A on time-line to deliver awards. It clarifies that the said section applies retrospectively.

The Ld. Single Judge held that MBL Infrastructure is *per incuriam* and not binding on the Court.<sup>11</sup> The Ld. Single Judge hailed the decision in *Shapoorji* as a binding decision and held that since the 2019 Amendment is procedural in nature, it shall apply to all pending arbitrations as on the date of amendment, including the current arbitration proceedings. The Delhi High court based its reasoning on the principle laid down by the Supreme Court in *BCCI Judgment*, that Section 29A is a procedural law as it does not create new rights and/or liabilities.

The Court further discussed the scope of the impact on rights and liabilities of the parties by any change to law.

Relying on **Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.**,<sup>12</sup> and the *BCCI Judgment*, the court held that any amendment to substantive laws affecting the rights and liabilities of a party or imposing a disability must be prospective in nature. On the other hand, any amendment to the provisions of statute dealing merely with matters of procedure shall be retrospective in nature, unless there exist a contrary intention of the legislature.<sup>13</sup> The Delhi High Court concluded that Section 29A (1) is applicable to all pending arbitrations seated in India as on 30 August 2019 and commenced after 23 October 2015. For the present case, it was clarified that if the arbitration is adjudicated to be an international commercial arbitration, the arbitral tribunal would not be bound by the time line prescribed *vide* order of the court dated 25 September 2019.

Section 29A places the 12-month clock to start ticking from the date of completion of pleadings in domestic arbitration. Needless to say, completion of pleadings is a subject-matter of interpretation, which can lead to further delay and a larger issue to be dealt with, which will no doubt shine the spotlight on Section 29A again.

– Payel Chatterjee & Sahil Kanuga

You can direct your queries or comments to the authors

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*The authors would like to thank Adimesh Lochan for his contribution.*

<sup>1</sup> OMP(MISC) (COMM) 256/2019, I.A. 4989/2020.

<sup>2</sup> The Arbitration and Conciliation (Amendment) Act, 2019 No. 33 of 2019 [S. 29A enforced on 30 August 2019]

<sup>3</sup> International Commercial Arbitration has been defined under Section 2(1)(f) of the Act to mean arbitrations where one of the parties is (i) an individual residing in a foreign country, or (ii) a company incorporated in a foreign country, or (iii) an association whose management and control is exercised in a foreign country, or (iv) the government of a foreign country.

<sup>4</sup> O.M.P. (MISC.) (COMM.) 256/2019

<sup>5</sup> (2018) 6 SCC 287.

<sup>6</sup> AIR 2020 SC 122

<sup>7</sup> Thirumalai Chemicals Ltd. v. Union of India (2011) 6 SCC 739 and Rajendra Kumar v. Kalyan (D) by Lrs. (2000) 8 SCC 99

<sup>8</sup> Sudhir G. Angur and Ors. v. M. Sanjeev and Ors. (2006) 1 SCC 141

<sup>9</sup> Shapoorji Pallonji and Co. Pvt. Ltd v Jindal India Thermal Power Limited

<sup>10</sup> State of Assam v. Ripa Sharma (2013) 3 SCC 63

<sup>11</sup> National Insurance Co. Ltd. v. Pranay Sethi (2017) 16 SCC 680 and Sandeep Kumar Bafna v. State of Maharashtra and Ors. (2014) 16 SCC 623

<sup>12</sup> (1973) 1 SCC 813

<sup>13</sup> Supra at fn 7

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