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AN INSIGHT INTO THE LEGAL POSITION OF ARBITRATOR'S FEE IN INDIA

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Introduction

The legislative intent behind recognizing arbitration as a dispute settlement mechanism is to remove the burden off the Courts due to the increasing number of litigations and to provide party autonomy in contractual dealings. Initially, arbitration gained widespread attention because it was expeditious, less expensive, fair, efficient, and an effective method for the settlement of disputes compared to time-consuming, complex, and expensive court procedures.

With the introduction of the arbitration law in India, the supervisory role of Courts was minimized and the arbitral award was treated on par with the decree of a Court. The importance of arbitration has grown manifold since 1995 with privatization, liberalization, and globalization. However, during the past few years in India, arbitration has in turn become a 'costly' way of dispute resolution because the 'costs' involved in arbitration include arbitrator's fees and expenses, institutional fees and expenses, advocate charges, witnesses, payment for the venue, hearings etc.

Looking into the etymology, the term 'arbitrator' is derived from the Latin word '*arbiter*' which means 'decision-maker or judge'. Thus, an authority is being conferred by the Parties upon the arbitrator through the arbitration agreement for adjudication of the disputes. In this regard, a question arises as to whether the arbitrator can be the judge for his cause in determining his fee and other related costs involved in the arbitration and the factors involved in fixing the fee. The Hon'ble Supreme Court of India in the case of *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV* ["**ONGC Case**"][7] had clarified the legal position of arbitrators' fees in India. This article discusses the history and concept of the arbitrator's fee, legal provisions of the Arbitration and

[7] *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV* (2022) SCC Online SC 1122.

Conciliation Act, 1996 ["**Arbitration Act**"] and analyses the Order in the *ONGC Case* and its jurisprudential progress regarding the essential factors for fixation of arbitrator fee, comparison of arbitrator's fee in different International Institutional Arbitration Centers.

History & Concept of Arbitrator's Fee

Historically, arbitration was considered as a dispute settlement mechanism in a peaceful manner without resorting to force. One of the earliest arbitrators mentioned in the Bible was King Solomon.[8] Even in 333 BC, King Phillip II acted as an arbitrator for the peace treaty negotiations to resolve territorial disputes.[9] Arbitration was conceived as an institution of peace aimed at maintaining harmony amongst people who are meant to live together.

It must be remembered that the overarching principle of 'arbitration' is the concept of 'party autonomy.'[10] Section 2(6) of the Arbitration Act crystalizes the same. The parties are given the freedom to fix the arbitrator's fee with the mutual consent of the arbitrator. Such agreement which is also known as the 'terms of reference'[11] binds the arbitrators and they cannot enhance their fee contrary to the terms of the agreement between the parties unless there is a proviso to do so. Even if the arbitrators attempt to do so, the same is in violation of the principle of natural justice *'nemo judex in causa sua'* which means no man can be a judge for his own cause.[12]

Law Commission of India Report

Arbitration can be categorized into 'Institutional arbitration' and 'Ad-hoc arbitration'. In the case of institutional arbitration, costs and procedures are stipulated by the rules of such institution; in ad-hoc arbitration, the parties have the choice of drafting their own rules and procedures which accommodate their requirements suitably. As ad-hoc arbitrations were preferred more in India, there were alarming issues with respect to the fee charged by the arbitrators. The Law Commission of India, in its 246th Report, raised a concern and mentioned the fee charges to be 'arbitrary, unilateral and disproportionate.'[13]

The report cited the case of *Union of India v Singh Builders Syndicate*[14] wherein the Hon'ble Supreme Court had observed that if a higher fee is charged by the arbitrator and one party who wants to

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[8] Frank D. Emerson, 'History of Arbitration Practice and Law' (1970) 19(1) Clev St L Rev 155.
[9] DP Rantsane, 'The Origin of Arbitration Law in South Africa' (2020) 23(1), PELJ <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812020000100037> accessed 01 February 2024.
[10] David D, John Sutton Judith Gill and Matthew Gearing, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015).
[11] *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV (2022) SCC Online SC 1122 ¶104.*
[12] Gary B Born, *International Commercial Arbitration* (2nd edn, 2014)
[13] *Law Commission of India, Amendments to the Arbitration and Conciliation Act, 1996 (Law Com No 246, 2014)*
[14] *Union of India v Singh Builders Syndicate* (2009) 4 SCC 523.

object to it may apprehend that it may create bias in favor of the other party who instantly agreed to pay such fee. It was the LCI report that recommended for adoption of a model schedule of fee which was then implemented through the Fourth Schedule of the Arbitration Act in 2015.

Legal Provisions of the Arbitration Act

- Under section 11(14) of the Arbitration Act, after considering the Fourth Schedule of the Act, the High Courts may frame such rules for the determination of fees and the manner of payment of a fee to the arbitral tribunal.
- Section 31 stipulates that 'costs' which include arbitrator's fee, constitute one of the contents of the arbitration award.
- Section 31A deals with the regime for costs relating to the order as to payment of costs by the parties to the arbitration, as decided by the arbitral tribunal.
- The Fourth Schedule of the Arbitration Act deals with the model fee structure for the sum in dispute i.e., claim and counterclaim. It plays a vital role in 'saving arbitration from arbitration costs.'

ONGC Case on Arbitrator's fee

The Hon'ble Supreme Court had clarified various questions relating to the concept and practice involved in arbitrators' fees. The following was laid down in the ONGC Case:[15]

- The Fourth Schedule is not mandatory and it is open to parties by their agreement to specify the fees payable to the arbitrator(s) or the modalities for the determination of an arbitrator's fee. the Fourth Schedule is not applicable to international commercial arbitrations and arbitrations where the parties have agreed that the fees are to be determined in accordance with rules of arbitral institutions. The 'terms of reference' is a tripartite agreement between the arbitral tribunal and the parties to the arbitration, where the fee of the arbitrators along with all necessary components are set out. On the finalisation of such terms of reference, the arbitral tribunal is not open to varying the fee or heads of charges fixed.
- Fees and costs in arbitration play functionally different roles. The expenses incurred that are to be distributed between the parties upon assessment of certain parameters by the Court, or arbitral tribunal, are different from fee which is the payment of remuneration to the arbitrators for their services.

[15] *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV (2022) SCC Online SC 1122.*

- Regarding the arbitrator's fee, the arbitral tribunal cannot issue enforceable or binding orders while passing orders relating to costs in the arbitral award as it violates the cardinal principle of arbitration, which is party autonomy, and one of the principles of natural justice which is no man can be a judge for his own cause.
- A lien for unpaid costs can be exercised by the arbitral tribunal on the arbitral award. But the parties are at liberty to approach the Court in case of such lien for the release of the award and the Court can assess on inquiry if the costs fixed in the arbitration are reasonable or not. This includes the mutually agreed fee of the arbitrators in the arbitration between the parties.
- Under the Arbitration Act, the Fourth Schedule deals with a term called 'sum in dispute'. This means 'sum in dispute' separately to claim and counter-claim and is not cumulative. Thus, arbitrators can charge a separate fee for claim and counter-claim and the Fourth Schedule fee limit of Rupees Thirty Lakhs applies separately to both.
- The maximum ceiling limit of fee payable as per the Fourth Schedule is Rupees Thirty Lakhs. This means that the ceiling applies to the sum of the base amount and variable amount, over and above it.
- The ceiling of Rupees Thirty Lakhs is applicable to each arbitrator and not to the entire tribunal. As per the Fourth Schedule, 25% over and above this amount can be claimed by a sole arbitrator.
- The Union Government was directed to revise the Fourth Schedule fee structure of the Arbitration Act periodically, at least once in three years.

It can be understood that the Order has contributed immensely to bringing more transparency and clarity concerning the law governing arbitrator's fee in India.

In addition to considering the national practices, the practices followed in different international jurisdictions like Germany, Sweden, the UK, and Italy were discussed in detail by the Supreme Court. A common scenario which was observed in these jurisdictions is that the parties to the arbitration fix the fee payable to the arbitrators by a separate agreement or it is fixed by them well before the arbitration. Thus, the arbitrators consequently were bound to accept the fees determined by the Parties. However, in case of no prior agreement between the parties, the liberty is provided to arbitrators to determine their fee subject to review and scrutiny by the Courts.

Essential Factors for Fixation of Arbitrator Fee

Thereafter, in the case of *M/s. EDAC Engineering Ltd. v M/s. Industrial Fans (India) Pvt Ltd* ["**EDAC Case**"][16] the Hon'ble Madras High Court opined that the law relating to payment of the arbitrator's fee had been well settled in the *ONGC Case.* In the instant case, the arbitrator had exercised Lien over the arbitral award[17] as the applicant failed to pay the arbitrator's fee. The applicant alleged that an exorbitant arbitrator's fee was charged by the learned arbitrator who had been appointed by the Hon'ble Madras High Court. The Court held that the Fourth schedule applies only to cases where the Court while appointing the arbitrator had directed the parties to pay the fees as per the Fourth schedule. In the earlier Order passed for appointing the arbitrator, the Court has granted liberty to the arbitrator to fix his fees.

As the applicant had not raised any dispute in the meetings for terms of reference in order to fix the arbitrator's fee, the allegation that the fee was exorbitant shall not arise and the Court dismissed the application stating it to be vexatious. The Court also laid down that the fees payable to an arbitrator have to be necessarily treated as a preferential payment even in cases where Corporate Insolvency Resolution Proceedings ["**CIRP**"] are pending. It is a priority payment and stands on a higher pedestal and the arbitrator cannot be deprived of the fee for the services he had rendered in arbitration.

Further, it was observed that the fixation of fees by an Arbitrator depends upon (a) the complexity of the disputes, (b) the difficulty or novelty of the questions involved, (c) the skill, specialized knowledge, and responsibility of the Arbitral Tribunal, (d) number and importance of documents to be studied, (e) value of the property involved or the amount or the sum in issue and (f) importance of the dispute to the parties.

Arbitrator's Fee in International Arbitral Institutions – A Comparison

International Chamber of Commerce

The arbitrator's fee is fixed by International Chamber of Commerce ["**ICC**"] according to the fee scale based on the sum in dispute, or where the sum is not stated, based on its discretion.[18] The fees of the arbitrator(s) involve factors like the diligence and efficiency of the arbitrator, the time

[16] [2023] SCC OnLine Mad 6010
[17] The Arbitration and Conciliation Act 1996, s. 39(1).
[18] International Chamber of Commerce Rules 2021, app III (Arbitration Costs and Fees), art 2(1).

spent, quickness in proceedings, complexity of the dispute, and the timeliness of the submission of the draft award.

London Court of International Arbitration

The Arbitral Tribunal shall agree in writing upon fee rates conforming to the Schedule of Costs prior to its appointment by the London Court of International Arbitration [“**LCIA**”]. The fee is charged at rates appropriate to particular circumstances of the case, work done including its complexity, and any requirements as to special qualifications of the arbitrators.[19]

Singapore International Arbitration Centre

The fees are fixed by the Registrar of Singapore International Arbitration Centre [“**SIAC**”] in accordance with the Schedule of Fees on the basis of the amount in dispute.[20] The time spent on the matter and the complexity of the dispute are considered for the determination of fees. The parties have the discretion to provide an alternative method of determining the fees prior to the constitution of the arbitral tribunal.

Hong Kong International Arbitration Centre

The parties determine the arbitrator’s fees based on either the sum in dispute or at an hourly rate[21]. For hourly rates, then a co-arbitrator will negotiate and agree on their fees with the nominating party, and a sole or presiding arbitrator will negotiate with parties jointly. If the fees are decided based on the sum in dispute, then the fees will be fixed based on the guidelines and fee table provided in the Rules.

International Centre for Dispute Resolution

The International Centre for Dispute Resolution [“**ICDR**”] case administrator fixes the daily or hourly rate for arbitrator(s). The determination of fees may involve an element of negotiation between the parties and the arbitrator(s). The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances.[22]

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[19] London Court of International Arbitration Rules 2020, Schedule of Arbitration Fee and Costs.
[20] Singapore International Arbitration Centre Rules 2016, r. 36(1).
[21] Hong Kong International Arbitration Centre Rules 2018, art. 10.1.
[22] International Centre for Dispute Resolution Rules 2021, art. 38.

Conclusion

In the case of ad-hoc arbitration, it is evident from the comparative study of international jurisdictions that there is no absolute power for the arbitrators to determine their fee. In the case of institutional arbitrations like ICDR, SIAC, and HKIAC allow a certain level of negotiations between the parties and arbitrator(s) for the determination of fees payable to the arbitrators, upholding the principle of party autonomy. However, none of the international bodies (including arbitral institutions) confer absolute or unilateral power to the arbitrator(s) to decide their fees.

Ad hoc arbitration proceedings take precedence over the institutional arbitration proceedings in India and thereby it was essential to ensure the cost-effectiveness and efficiency of such arbitral process. A rationalized system of fixation of costs and arbitrator fee along with a transparent mode of payment is essential for the success of arbitration. There were several doubts regarding the unilateral power of arbitrators to fix their fees and the legal provisions under the Fourth Schedule of the Arbitration Act. The same was put to rest and the Hon'ble Supreme Court of India has upheld the principle of party autonomy in fixing the arbitrator's fee by providing vital importance to 'terms of reference'. Nevertheless, the arbitrators who spend their valuable time and efforts in settling the disputes under arbitration cannot be deprived of the fee he is entitled to. Therefore, in order to avoid embarrassing allegations and disagreements regarding the payment of the arbitrator's fee later, it is imperative that transparently, the arbitrators should state the fee they would like to charge for the Arbitration during the 'terms of reference' clearly.

Apart from this, guidelines for the conduct of ad hoc arbitrations in India were also laid down by the Hon'ble Supreme Court through the powers vested with it under Article 142 of the Constitution of India. Thus, this article concludes by stating that the Hon'ble Supreme Court vide its Order in the ONGC Case had ensured that arbitration as a dispute settlement mechanism in India is affordable and equitable thereby helping more and more parties to adopt arbitration as their preferred mode of dispute resolution, in turn paving way for an increase in the ease of doing business in India.