ARBITRATOR'S FEES: INCONSISTENCIES IMPINGING ON REMEDIES

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ABSTRACT

Arbitration is the alternative panacea of long-standing litigations. The defining traits and particularities of arbitration include a combination of procedural and substantive laws, with party autonomy forming the basis of such laws and a preferable choice among parties to resolve their dispute amicably. Even as the market of arbitration continues to flourish, the dispute resolution mechanism has a long way to go, owing to the complexities in its present-day implementation, such as the challenges faced in the exorbitant fees of the arbitrators, enforcement of awards, et al.

Repeated efforts have been made by various amendments in the law to make the mechanism more efficient, but lexical inconsistencies have created larger complexities. One such contentious loophole in the present regime is the diverse inferences drawn by arbitral tribunals and courts, which is the detrimental conclusion of fixing the 'Arbitrator's fee', where the fee is not pre-determined in the arbitration agreement. The 1996 Act hardly provides any concrete guidance as to how the arbitral tribunal should determine its fee.

The exorbitant fee charged by the arbitrator(s) on a per-sitting basis without much clarity, has been a major reason for litigants to disregard this mechanism. However, this long drawn debate has been relieved to some extent by the 2015 Amendment with the introduction of the Fourth Schedule. This Schedule lays down a model fee structure for deciding the arbitrator's fee, based on the 'sum in dispute'. Further amendments concerning the arbitrator's fee were made by the 2019 Amendment but the tangible benefits of the amendments are still questionable.

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In light of the issue, this article will present a holistic word picture of the conflicts arising in deciding the arbitral tribunal's fee and the remedies available to the parties, to challenge the fee decided by the arbitral tribunal.

***Keywords*:** Arbitrators' Fee; Fourth Schedule; Challenging Arbitrators' Fee; Arbitration Amendments; Cost of Arbitration; Arbitration Costs; Termination of Arbitrator's Mandate; Remedies for Reducing Arbitration Fees; Arbitration Fee Amendments; Fourth Schedule Mandatory or Directory.

INTRODUCTION

Arbitration as a codified law found its place in the repository of Indian laws in 1899 with the enactment of the Indian Arbitration Act 1899 and after the repeal of two principal enactments and three rounds of major amendments, the Arbitration and Conciliation Act 1996 stands as it is today. Apart from the changes in provisions, arbitration as a mode of dispute resolution, has also witnessed the evolution in the attitudes of the courts as well as litigants. However, the ambiguity that comes with the autonomy of this mechanism has remained constant. Adding to the woes of the litigants over the passing years is the anxiety as to the arbitrators' fee, which has been a cause of obstruction in the popularity of arbitration.

In the words from the renowned Stan Lee - *"With great power comes great responsibility"*; the axiom fits well in the autonomous structure of the arbitration. Parties while exercising their autonomy ('great power') and drafting the arbitration agreement often omit to mention or pre-determine the fee of the arbitrator ('great responsibility'). It is in such situations that parties are subject to the decision of the arbitrator(s) or the court to decide the fee for adjudication of their dispute. Until the enactment of the Arbitration and Conciliation (Amendment) Act 2015 ('the 2015 Amendment'), parties were at the mercy of the Arbitrator to decide a fee, which was often charged on a 'per-hearing/ meeting' basis and thus, costly. The reforms introduced by the 2015 Amendment and further clarifications brought about by the Arbitration and Conciliation (Amendment) Act 2019 ('the 2019 Amendment') not only tend to the parties' rights to efficacious and speedy remedies but also provide relief against disproportionate and despotic arbitration fees to some extent. The amendments, however, have also brought with them some

level of turbulence that has engaged the court's attention and wisdom to absolve the law and the litigants of the newly faced challenges. One such challenge is the fee of the arbitrator(s) that has never ceased to be a controversial issue. This article discusses the many facets associated with the arbitrators' fee, the challenges faced by the parties, and remedies available.

UNDERSTANDING COSTS AND DEPOSITS VIS-À-VIS THE ARBITRATOR'S FEE

The terms 'cost of arbitration' and 'arbitrator's fee' are often mistaken to be synonymous however, the meaning of two terms under the Act is distinct. While the fees of the arbitrator(s) is only a part of the cost, the cost of arbitration denotes- *"(i) the fees and expenses of the arbitrators, Courts and witnesses; (ii) legal fees and expenses; (iii) any administration fees of the institution supervising the arbitration; and (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award."*[i]

Section 38 contains provisions as to 'Deposits'; Subsection (1) of Section 38 allows the arbitral tribunal to direct the payment of a sum as a 'deposit' or 'supplementary deposit' as an advance towards the costs referred to in Section 31 (8) in respect of the claim made by the parties. The proviso to Section 38 (1) provides that, where a counter-claim has been filed, the arbitral tribunal may fix separate amounts as 'deposit', for the claim and the counter-claim, respectively. Section 38 and Section 31 of the Act must be read conjointly.

A perusal of the two provisions shows that 'costs' include other elements apart from the arbitrator's fee. Section 38 only deals with the aspect of determining the quantum of 'deposit' as 'advance for cost' referred to in Section 31(8). Therefore, it follows that the 'costs' insofar as they deal with arbitrator's fees would be governed by the Fourth Schedule, in cases where the fee of the arbitrator has been fixed per the said Schedule. The deposit as advanced for the **costs** cannot disregard the Fourth Schedule or any other provision in accordance with which, the fee is determined.

FEES OF THE ARBITRAL TRIBUNAL: PRIOR AGREEMENT VIS-À-VIS FOURTH SCHEDULE

The parties to the arbitration have a right to expect a reasonable fee to be fixed by the arbitral tribunal that can be borne by the them as per their mutual agreement. In reality, however, this is not the case; parties are usually charged exorbitant fees, which gives rise to a conflict between the parties as well as arbitrators collegially.

The parties are at liberty to pre-determine the fees of the arbitral tribunal and the tribunal so appointed, shall be bound by such fees. However, it is seldom the case that parties determine the fees in their agreement. Such clauses relating to fees are generally found in the standard agreements government contracts that more often than not, have an out-dated and inadequate fee structure which, in turn, may result in slim choices for appointing an experienced arbitrator.

The Law Commission was entrusted to identify the conundrum around the antiquated 1996 Act and make suitable recommendations for its amendment. The Commission in its Report[ii] noted that one of the major problems associated with arbitration is the colossal fee charged by the arbitrators and the Commission identified the trend of charging fees as '*arbitrary, unilateral and disproportionate.*'[iii] To address this concern, the Committee recommended the adoption of a model fee structure based on which, the Courts would frame its own rules.[iv] Accordingly, Section 11 (14) and the Fourth Schedule were introduced by the 2015 Amendment. Under the amended Section 11 (14), the High Courts are given the power to frame rules for fixing the fees of the arbitral tribunal in accordance with the model fee provided in the Fourth Schedule[v], where the High Court appoints the tribunal as per Section 11 of the Act. However, such rules would apply only to ad hoc domestic arbitrations, as foreign parties in International Commercial arbitrations may have different standards for deciding fees, as also is the case with arbitral institutions usually having their own schedule of fees.[vi]

The Commission, however, clarified in a short note that the High Courts were at liberty to frame their own rules and the fee schedule as such, was only indicative. The Commission's recommendations were adopted by the legislature and the said provision and the Schedule were introduced to take a step towards making arbitration a cost-effective process and thereby encouraging this mode of dispute resolution.[vii]

The Supreme Court jointly heard two Special Leave Petitions[viii] wherein deciding the fees of the arbitral tribunal as per the Fourth Schedule, was in issue. One of the appeals arose from the Delhi High Court judgment in *National Highways Authority Of India (NHAI) v. Gayatri Jhansi Roadways Limited,*[ix] wherein the Court terminated the mandate of the arbitrator on the ground that the arbitrator had erred in holding that the Fourth Schedule would override the pre-determined fee clause in the arbitration agreement. The other appeal arose from the Delhi High Court judgment in *National Highway Authority of India v. Gammon Engineers and Contractors Pvt. Ltd,*[x] wherein it was held that deciding the fee per the Fourth Schedule is not mandatory and the tribunal would be bound by the pre-determined fee stated in the arbitration agreement. Putting the issue to rest, the Apex Court confirmed that the Fourth Schedule is not mandatory in nature and the arbitral tribunal shall be bound by the fee stated the arbitration agreement.[xi]

Although the decision of the Supreme Court in the *National Highways Authority's* case (supra) settles the position of law with regards to the application of the Fourth Schedule, the said decision would only apply to cases where a fee is pre-determined by an existing agreement.[xii]

Placing reliance on the amended provisions, the Rajasthan High Court in *Doshion Private Limited v. Hindustan Zinc Limited,*[xiii] held that charging a fee beyond the fee prescribed under the Fourth Schedule is not permitted by law and accordingly, directed the arbitrator to resettle his fee according to the Fourth Schedule. Following suit, the Delhi High Court in *Delhi State Industrial Infrastructure Development Corporation Ltd. (DSIIDC) v. Bawana Infra Development (P) Ltd.*[xiv] observed that the Fourth Schedule was added to reduces costs associated with arbitration and held that the ceiling on fee mentioned therein cannot be allowed to be breached.[xv] However, the same bench of the Delhi High Court[xvi] observed that while appointing the Arbitrator, the Court did not direct fees to be charged in accordance with the newly-introduced model fee and, further observed that the said Schedule being *"merely a guiding model, is not binding on the Arbitrator*…". The Court further observed that, since the model fee did not yet form a part of the Rules of the Court, the arbitrator was at liberty to decide his fee.[xvii]

A High-Level Committee chaired by Justice B.N. Srikrishna, former Judge of the Supreme Court of India was appointed to assess the prevalent setting of institutional arbitration in India

and its potential development. The Committee in its Report[xviii] recommended the strengthening of institutional arbitration in India as it observed that parties tend to lean towards *ad hoc* arbitration or submit to arbitral institutions outside India. The Committee also recommended designating powers to arbitral institutions to reduce the burden on Courts for appointing arbitrators.[xix] Accordingly, the 2019 Amendment further amended the provisions of Section 11 to change the agnostic nature of the principal Act and encourage institutional arbitration. Sub-section 3A[xx] was inserted to Section 11 by the 2019 Amendment which confers power on the Supreme Court and High Court to designate an arbitral institution and in turn, the arbitral institution shall appoint the arbitrator(s) and determine their fee in accordance with the Fourth Schedule.

The 2019 Amendment also added the much-required Sub-section 14 to Section 11, which makes the application of the Fourth Schedule mandatory for fixing the arbitrator(s) fee, unless the parties have agreed otherwise. While, the intention of the legislature reflecting in the 2015 Amendment may have been to only provide a guiding principle, the diverse interpretations of the Fourth Schedule by different High Courts led to ambiguity. The 2019 Amendment[xxi] redeemed the dilemma by making the application of the Fourth Schedule mandatory albeit with exceptions. Having said so, it is unclear whether the Schedule will be resorted owing to the lack of a prior agreement and where the arbitrator is not appointed by the Court.

APPLICABILITY OF FEE CAP: EACH MEMBER V/S. WHOLE ARBITRAL TRIBUNAL

While the Supreme Court decision in the *National Highways Authority' case* (supra) and the subsequent 2019 Amendment has clarified the aspect of the mandatory/ directory nature of the Fourth Schedule, the principal Act is silent on whether the rates mentioned in the said Schedule is to be paid to each arbitrator or includes the fee of the whole tribunal. The Fourth Schedule, however, does provide a small note below the model fee table,[xxii] which provides that appointment of a sole arbitrator, entitles him to an additional amount of 25% on the fee payable as per the Schedule.

Addressing the issue of the exorbitant fees of the arbitral tribunal, the Law Commission in its 246th Report suggested the model fee based on the Delhi International Arbitration Centre (DIAC) Rules.[xxiii] The DIAC Rules[xxiv] provide that the fees mentioned Schedule B (Arbitrators' fees) will be "the fees payable to each arbitrator comprising the Arbitral Tribunal."

The recommendations of the Law Commission are not binding but may be taken into consideration for interpreting the statute, more so when the amendment to the law intends to curb a mischief which was not addressed by the principal enactment. If reliance is placed on the DIAC Rules, it may be incongruous to say that the schedule of fees will apply to the Tribunal as a whole. However, it can well be argued that independent of the Law Commission recommendations, the literal reading of statute justify the contention that the arbitral fees indicated by the Fourth Schedule will apply to the Tribunal as a whole and not to each member, individually.

The Punjab and Haryana High Court[xxv] interpreted the Fourth Schedule and the note concerning the fee of a sole arbitrator. The Court while explaining that the fee listed in the said Schedule is a consolidated fee for the tribunal as a whole, held that *"It cannot thus be interpreted that since sole arbitrator is entitled to 25% additional amount over and above the Schedule it should be construed to mean that other members of the Tribunal would be entitled to the model fee as per the Fourth Schedule with the principal Arbitrator getting 25% additional fee thereto. It means only that in the eventuality of Arbitral Tribunal consisting of a solitary member it could entitle him to additional fee of 25% of the model fee but if it is a multi-member body then they would be entitled to a composite fee as set out in the Schedule."*[xxvi]

This judicial pronouncement of the Punjab and Haryana High Court was not challenged and has thus, attained finality but the stance of other High Courts and the Supreme Court are awaited. As the intention of the legislature was to cork the fee of the arbitrator in order to make the mechanism cost-friendly, it may well be expected that the Supreme Court and other High Courts will concur with the view taken by the Punjab & Haryana High Court. Therefore, if separate fee for each arbitrator were allowed, it would mean exceeding the ceiling amount, thereby defeating the purpose and intention of the lawmakers.

INCLUSION OF COUNTER CLAIM IN 'SUM IN DISPUTE'

The 246th Law Commission Report noted the lament of the Supreme Court in *Union of India v. Singh Builders Syndicate*[xxvii] and the apprehension of potential bias arising from disagreement with the arbitrator's fee and recommended the insertion of model fees payable to the Arbitrators depending on the 'sum in dispute' which came to be added as the Fourth Schedule to the principal Act by the 2015 Amendment Act.

A further reference Law Commission Report elucidates that the model fee prescribed in the Fourth Schedule was adopted from the "Schedule B" to the DIAC Rules, which clearly mentions that the 'sum in dispute' shall include '*any Counter- Claim made by a party.*'[xxviii] While the genesis makes it clear that the 'sum in dispute' shall include amounts of both claim and counter-claim, the term has not been defined or given any connotation in this regard either in the 2015 or 2019 Amendment.

In a decision culminating the debate, the Delhi High Court in *Bawana Infra Development* (supra) held that the 'sum in dispute' shall include the counter claim made by any party. After due consideration, the Court in support of the legislative sanction observed that "*the intent of the legislature and the purpose sought to be achieved clearly points to the conclusion that 'sum in dispute' would be a cumulative value of the claim and counter claim".*[xxix] The Court also underlined that if the legislature intended to have a separate fee, it would have provided so in the Fourth Schedule.[xxx] Therefore, the precedent, in so far as arbitrations seated in Delhi are concerned, sets out that 'sum in dispute' includes counter-claim along with the claim amount.

For ascertaining the inclusivity of counter-claims in the 'sum in dispute', it may be fruitful to trace the rules of various renowned arbitral institutions around the world. The following table[xxxi] gives a summary overview of whether the 'sum in dispute' includes counter claim amount or not.

Table 1: List of Arbitral Institutions and their provisions relating to 'Sum in Dispute'.

Indian Arbitral Institutions		
Institution	**Provision**	**Sum in Dispute**
Indian Council of Arbitration Rules of Domestic Commercial Arbitration	Rule 31 (2)	"Amount of Claim and Counter-Claim"
Mumbai Centre for International Arbitration	Schedule of Fees	"*Amounts in dispute refers to total claim and counter claim"
Construction Industry Arbitration Council	Schedule of Fees	"*Sum in Dispute (Claim + Counter Claim)"
The Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules- 2018	Schedule C	"* Sums in dispute mentioned in the Schedule B and C above shall include any counter-claim made by a party."
Non – India Arbitral Institutions		
Singapore International Arbitration Centre	Estimate Your Fees	(i) "Amount in Dispute refers to Total Claim and Counter Claim amount."
Hong Kong International Arbitration Centre, 2013 Administered Arbitration Rules	Schedule 3, Article 6.3	"Claims and counterclaims are added for the determination of amount in disputes."
Stockholm Chamber of Commerce Arbitration Rules	Appendix IV, Article 2 (3)	"Amount in dispute shall be the aggregate value of all claims counter claims and set-offs."
European Court of Arbitration, Arbitration Rules 2015 Edition	Appendix 3	"For the purposes of the application of the scale range the amount to be taken into account to apply this scale will be the total of the claims made by the parties, i.e. of the claims and counterclaims."

Although the principal Act and the amending Acts do not specifically define the term 'sum in dispute', in view of the judicial pronouncements and institutional rules listed above, it may be

regarded as certain that the intention of the legislature is very clear in terms of deciding the arbitrator's fee relying on the sum in dispute, which includes both, "claim" and "counterclaim".

COUNTER-CLAIM AND THE CODE OF CIVIL PROCEDURE

The Code of Civil Procedure underlines that counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.[xxxii] Therefore, the cross-suit is in the nature of a separate appeal, which requires affixing a separate court fee. Since the counter claim shall be treated as a plaint for all purposes, including in applying the rules applicable to the plaint, and therefore attracts a separate court fee.

With regards to a separate fee on claim and counter-claim, the Supreme Court answered the surrounding conundrum in *Jag Mohan Chawla v. Dera Radha Swami Satsang* [xxxiii] and held that "*The counter-claim expressly is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon."*

It is settled law that the provisions of the Civil Procedure Code do not apply to arbitration notwithstanding that its principles are often referred to and adopted by parties. Therefore, though the counter-claim has a life of its own and is a cross-suit not effected by the claim to which it is a counter to, and hence a distinct claim in itself, the expression 'sum in dispute' will be an aggregate of the two.

REMEDIES AVAILABLE TO THE PARTIES

Arbitrations can be categorized in the following three categories[xxxiv] on the basis of the fee determination:

i. Where parties have pre-determined the fee in the arbitration agreement;

ii. Where a fee is not pre-determined and the Court appoints an arbitrator and directs following the Fourth Schedule; and

iii. Where a fee has not been determined and the Court makes no direction as to following the Fourth Schedule.

In the first case, there is no ambiguity as the parties exercise their autonomy and leave negligible room for dispute in relation to the fees. In pre-determining the fees, the parties may or may not consider the Fourth Schedule, as was recently decided by the Supreme Court.

In the second case, arbitrations in the pre-2019 Amendment period will abide by the Court's directions and in a post-2019 Amendment period where designated arbitral institutions are appointed, the institutions shall decide the fee of the arbitral tribunal subject to the Fourth Schedule, as mandated by Sub-section 14 to Section 11.

The third case poses a complex situation where the Court will have little role to play, the arbitral tribunals may determine the fee as per the Fourth Schedule or in any other manner it deems fit. The decision of the Delhi High Court in *G.S. Developers* (supra) has clarified the unfettered power of the arbitrator(s) to decide its fees, in the absence of the agreement and directions of the Court, while overlooking the legislative intent of the Act. To add to the dismay of the parties, an order of the arbitral tribunal determining the fee is not an appealable order consequently, the parties cannot move the Court under Section 37. Indeed, the Act currently does not contain a provision that provides any straightjacket remedy to challenge the order determining the fee; nevertheless, the following remedies are available at the party's disposal.

a. Application before the Arbitral Tribunal for reconsideration of fee:

The benefit of procedural autonomy of arbitration cannot be emphasized enough. A party aggrieved by the order of the fees decided by the arbitral tribunal may move an application before the tribunal itself for re-consideration of such order. The spirit of giving the tribunal an opportunity to rectify its actions and cure defects is deep-rooted in the Act which can, for instance, be seen in Section 34, whereunder the Courts tend to grant an opportunity to the tribunal for reconsidering its stance and thereby, eliminate grounds on which an award may be set aside, before deciding on the challenge to such an award.

b. Application before the High Court under Section 39 (2):

Section 39 deals with the lien on arbitral award and deposits as to costs.[xxxv] Sub-section (2) provides that if the arbitral tribunal refuses to deliver an award **except** on payment of costs

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demanded by it, then if an application under Section 39 (2) is filed, the Court may direct the costs to be deposited in Court and direct the tribunal to deliver the award. The Court may conduct an inquiry and if it thinks fit, shall order payment of reasonable sum from the money deposited to the tribunal by way of cost and the balance shall be refunded to the applicant.

From a bare perusal of Section 39 (2), it is clear that such lien cannot be exercised before the award is actually written and signed as the provision uses the words 'deliver the arbitral award' as opposed to 'make' the arbitral award. Since a preliminary dispute such as the tribunal's fee is under consideration, it could well be said that Section 39 will not come into play at such an early stage. However, the Delhi High Court has taken a contrary view.

In *Bawana Infra Development Private Limited v. Delhi State Industrial Infrastructure Development Corporation Limited (DSIIDC),*[xxxvi] an Interlocutory Application (IA) was filed in the main Section 11 petition *inter alia* praying that separate fee for the counter claim, demanded by the sole arbitrator, be set aside. While disposing of the application, Justice Vibhu Bakhru held that the relief sought for by the applicant was a substantive one and therefore, could not be a part of the main petition under Section 11. The Court further held that it would be apposite for the applicant to file an application under Section 39 (2) of the Act. When informed by the applicant that the Registry was not accepting such applications, the Court directed the Registry to accept such applications and assign nomenclature of 'OMP (Misc.)' to such applications. This order laid down the precedent for seeking relief under Section 39 (2) for challenging the fee of the arbitrator(s). In another one of its arbitrations[xxxvii] also, *DSIIDC* filed an application under Section 39 (2) seeking the interpretation of the Fourth Schedule in relation to the separate fees charged by the sole arbitrator for adjudicating the counter claim. While the Delhi High Court has progressively laid down its procedural practice, the view of other High Courts in this regard is awaited.

c. Termination of the Arbitrator:

It is trite law that there shall be transparency in the administration of justice as well as quasi-justice, as before the arbitrators.[xxxviii] The *sine qua non* of any arbitration is the impartiality and independence of the arbitrator[xxxix] and the faith and confidence of the

parties in the conduct of the arbitrator. Any occurrence in the conduct of proceedings that raises a doubt in the minds of the parties qua the impartial proceedings would *de facto* render the arbitrator incapable of performing his functions. The Apex Court[xl] observed, *"It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect, which misconduct on the arbitrator's part had in fact, upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; the arbitrator must not do anything which is not in itself fair and impartial*".[xli] Where bias exists or reasonably appears to exist, the arbitrator becomes unable to perform his duties.

In light of this article, it is important to highlight the possibility of bias that may arise on account of the disagreement on the arbitrator's fee i.e. when either or both parties are forced to pay a fee beyond their capacity. A situation like this attracts the provisions of Section 14 (1), which allows the parties to challenge the mandate of the arbitrator(s) on the grounds of *de facto* failure of the arbitrator to perform his/her duties. An alternative recourse can be found in Section 15(1)(b), which allows parties to terminate the mandate of an arbitrator by mutual agreement.

In a case before the Madras High Court**,** [xlii] a petition was filed under Section 14 (1) read with Section 11 (6) *inter alia* seeking the termination of the arbitrator on the grounds that the fees fixed by the arbitrator was beyond the capacity of the petitioner. The Court while allowing the petition, observed that if the mandate of the arbitrator was not terminated, the petitioner would be forced to pay a fee, which he was not capable of paying and if the arbitrator was allowed to continue, the Petitioner may not be in a proper frame of mind to proceed and may even doubt the conduct of the arbitrator which would lead to loss of confidence in the arbitrator. Thus, to avoid such an unpleasant situation and in the interest of the parties, the mandate of the arbitrator was terminated.[xliii] Placing reliance on this aforesaid decision, High Court of Rajasthan in *Doshion* (supra) held the arbitrator guilty of charging arbitrary fees and conducting the proceedings *ex-parte* and posting the matter for

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final arguments. The Court terminated his mandated under Section 14(1)(a) and allowed the parties to appoint a fresh arbitrator.

ANALYSIS

The 2015 and 2019 Amendments to the 1996 Act aim to reduce the "procedural deadlocks" that often occur in fixing the arbitral tribunal's fee. The addition of the Fourth Schedule to the 1996 Act aims to provide clarity in the absence of an agreement fixing the arbitral tribunal's fee.

To circumvent the deadlocks frequently experienced in fixing the arbitrator's fee and to reduce the possible dilatory tactics employed by arbitrator(s), judicial precedents like *National Highways Authority of India v. Gayatri Jhansi Roadways Limited* (supra), *Doshion Pvt. Ltd. v. Hindustan Zinc Limited* (supra), *DSIIDC v. Bawana Infra Development (P) Ltd* (supra) and *Madras Fertilisers Ltd. V. SICGIL India Limited* (supra), have played a significant role. However, there still exist roadblocks before this mechanism of dispute resolution become litigant-friendly.

The intention of the legislature from the amending Acts of 2015 and 2019 was the fixation of fees in accordance statutory ceiling limit as specified in the Fourth Schedule. Therefore, the envisaged ceiling was purported to be an effective way to reduce costs associated with arbitration. However, a rather contrasting view seems to have been taken by the Delhi High Court in *Rail Vikas v. Simplex*[xliv] wherein the issue was whether the maximum ceiling value of Rs. 30,00,000/- includes the base fee of Rs. 19,87,500/- or is it applicable only as a cap on 0.5% above Rs. 20 crores. Referring to the columns of the Fourth Schedule, the Court observed that the variable fee component was 'additional' in nature and was calculated on a percentage basis depending on the sum in dispute. The Court further observed that the percentages decreased with the rise in sum in dispute from Entry Nos. 1 to 6 and the word 'plus' occurring in the Entry Nos. 1 to 5 disjoint the two components of the model fee and the same applied to Entry No. 6. Therefore, the ceiling of Rs. 30,00,000/- shall apply to the variable component, independent of the base fee.

CONCLUSION

The Supreme Court in *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta*[xlv] quoted from Robertson's history that honest men dread arbitration more than lawsuits. While this was not a surprising state in the nascent stages of arbitrations, even after almost three decades, the position is not much different albeit for different reasons, majorly the factum of the mighty fee. Deciding the arbitrator's fee is one of the major concerns of the parties in India. With the enactment of the Fourth Schedule, India aimed to position itself with a uniform practice of fees in arbitration. It is the first step in the Indian arbitration regime to limit the arbitrators' fees with a cap on fees by relying on the sum in dispute value. However, such a carrot and stick approach cannot be adopted in matters where parties do not have a pre-existing agreement.

The Fourth Schedule actively addresses some of the long-standing criticisms raised against exorbitant fees charged by the arbitral tribunal during a proceeding. Therefore, the Schedule aims to strike a (difficult) balance both in terms of having a uniform fee pattern followed in a proceeding and the interests of the parties. However, the fact that the law is not airtight, paves the way for interference and interpretation by the courts thereby, dragging disputes for a longer period of time than anticipated which affects the right of the parties to speedy justice as implicit in Article 21 of the Constitution. Further, the absence of a proper remedy, so to say, to challenge the arbitrator's decision on its fee, cannot be lost sight of as it is *inter alia* inconsistent with the parties' right to an effective remedy. While one High Court[xlvi] has chosen to allowed litigants to seek remedies under Section 39 (2), it is only a matter of time before other High Courts take a different route and thus, give rise to another inconsistency, which in turn will entail long-drawn litigation till the Supreme Court finally settles the issue or the legislature taking cognizance of the same, introduces a suitable amendment.

Irrespective, the question of whether or not, the Fourth Schedule will manage to establish itself, as a uniform viable practice, in the long run, will primarily depend on the judicial precedents.

ENDNOTES

[i] Arbitration and Conciliation Act 1996, No. 26, Acts of Parliament, 1996 (India), Section 31(8) Explanation; Section 31A Explanation.
[ii] Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996* (Report No. 246, Aug. 2014).
[iii] *Id.*
[iv] *Id.*
[v] Arbitration and Conciliation (Amendment) Act 2015, No. 3, Acts of Parliament, 2016 (India), Fourth Schedule –

THE FOURTH SCHEDULE

[See section 11(14)]

Sum in dispute	Model Fee
Up to Rs. 5,00,000	Rs. 45,000
Above Rs. 5,00,000 and up to Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs. 5,00,000
Above Rs. 20,00,000 and up to Rs. 1,00,00,000	Rs. 97,500 plus 3 per cent. of the claim amount over and above Rs. 20,00,000
Above Rs. 1,00,00,000 and up to Rs. 10,00,00,000	Rs. 3,37,500 plus 1 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 10,00,00,000 and up to Rs. 20,00,00,000	Rs. 12,37,500 plus 0.75 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 20,00,00,000	Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000

Note: In the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of twenty-five per cent. on the fee payable as per the table set out above.

[vi] *Supra* Note 2.
[vii] The Arbitration and Conciliation (Amendment) Bill, 2015, No. 252, Bills of Parliament, 2015 (India), Statement of Objects and Reasons.
[viii] National Highways Authority of India (NHAI) v. Gayatri Jhansi Roadways Limited, 2019 SCC Online 906 (India).
[ix] 2017 SCC Online Del 10285.
[x] 2018 SCC Online Del 10183.
[xi] *Supra* Note 8.
[xii] *Id.*
[xiii] AIR 2019 Raj 54.
[xiv] 2018 SCC Online Del 9241.
[xv] *Id.* at 16.
[xvi] G.S. Developers & Contractors Pvt. Ltd. v. Alpha Corp Development Private Limited and Ors. 2019 SCC Online Del 8844 (India).
[xvii] *Id.* at 15.
[xviii] Justice B.N. Srikrishna, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, 30th July 2017.
[xix] *Id.*

[xx] Arbitration and Conciliation (Amendment) Act 2019, No.33, Acts of Parliament, 2019 (India), S. 11 (3A) - "(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act: Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule: Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators."

[xxi] Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2016 (India).

[xxii] *Supra* Note 5.

[xxiii] *Supra* Note.

[xxiv] Delhi International Arbitration Centre (Administrative Cost and Arbitrators Fees) Rules, 2018, Schedule B – Arbitrators' Fees.

[xxv] Punjab State Power Corporation Ltd. v. Union of India, Civil Writ Petition No. 3962 of 2017.

[xxvi] *Id.* at 3.

[xxvii] (2009) 4 SCC 523 (India).

[xxviii] Delhi International Arbitration Centre (Administrative Cost and Arbitrators Fees) Rules, 2018, Schedule B – Arbitrators' Fees – "*Sums in dispute mentioned in the Schedule B and C above shall include any Counter-Claim made by a party."

[xxix] 2018 SCC Online Del 9241 [8].

[xxx] *Id.* at 14.

[xxxi] 2018 SCC Online Del 9241.

[xxxii] Code of Civil Procedure 1908, No. 5, Acts of Parliament, 1908 (India), Order VIII Rule 6A.

[xxxiii] (1996) 4 SCC 699 (India).

[xxxiv] Kartik Seth and Aanchal Kapoor, *Arbitrary Arbitrator Fees and the Law post 2019 Amendment*, Bar & Bench (25th Aug. 2019), https://www.barandbench.com/columns/arbitrary-arbitrator-fees-and-the-law-post-2019-amendment#:~:text=%5B4%5D%20The%20Fourth%20Schedule%20specifies,heard%20by%20a%20sole%20arbitrator.

[xxxv] Arbitration and Conciliation Act 1996, No. 26, Acts of Parliament, 1996 (India), Section 39 - Lien on arbitral award and deposits as to costs.—(1) Subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration. (2) If in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant. (3) An application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal, and the arbitral tribunal shall be entitled to appear and be heard on any such application. (4) The Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

[xxxvi] I.A. 2549 of 2018 in Arbitration Petition 420 of 2016, Delhi High Court.

[xxxvii] 2018 SCC Online Del 9241.

[xxxviii] International Airport Authority of India v. K.D. Bali, (1988) 2 SCC 360 (India).

[xxxix] F. S. Nariman,'*Standards of Behavior of Arbitrators*', *Arbitration International* (Volume 4, Issue 4, 1 Oct. 1988) 311-321.

[xl] *Supra* Note 38.

[xli] *Id.* at 5.

[xlii] Madras Fertilizers Limited v. SICGIL India Limited and Ors., 2010 (2) CTC 357.

[xliii] *Id.*

[xliv] O.M.P. (T) (COMM) 28 of 2020, Delhi High Court.

[xlv] (1993) 4 SCC 338 (India).

[xlvi] *Supra* Note 36.