

## **Advisability of Specifying Arbitrator Fees in Arbitration Clause**

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### **Abstract**

Arbitration clause is the basis for setting up of an arbitration tribunal and also for regulating the proceedings of the tribunal. An arbitration clause can mention various details. It is open to the contracting parties to specify the arbitrators' fee in the arbitration clause. This research paper examines the law in India related to specifying fees of arbitrators with reference to the law as passed by the Parliament and the case law. A sample clause used by a large public sector undertaking specifying fees payable to arbitrators is also presented.

### **Keywords**

Arbitration, arbitration clause, arbitrator's fees, fee payable to arbitrator, arbitration and conciliation act, Indian arbitration law, arbitration tribunal fees, sample arbitration clause.

### **Introduction**

Arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties but which is regulated and enforced by the state. An arbitration tribunal is free to decide on a number of issues including related to its own jurisdiction. However, when arbitration

tribunals decide about the fees payable to themselves and decide exorbitant amounts, this leads to much heartburn for the parties.

Provisions related to fees payable to arbitrators are contained in sub-section 11(3A) and 11(14) of Arbitration and Conciliation Act, 1996<sup>1</sup> (hereinafter referred to as “**the Act**”) and Fourth Schedule. The legal provisions are limited in scope and are applicable only in case the parties have not agreed on fees payable to arbitrators.

Arbitration clause is the basis on which the exercise of setting up an arbitration tribunal as well as its conduct rests. The clause may be a skeletal one with minimal details or may be a detailed one covering all aspects of the process of arbitration. Of the various details that an arbitration clause should include, fees payable to arbitrators is often ignored.

This paper analyses the law related to specifying fees payable to arbitrators in any arbitration agreement in India. It begins with understanding the relevant provisions applicable to arbitrator fees under the Arbitration and Conciliation Act, 1996<sup>2</sup> and also the relevant judgements of Honourable Supreme Court of India.

### **Methodology**

This research paper is based on doctrinal research on the subject of provisions related to fees payable to arbitrators specified in arbitration clauses in India. As a first step, the provisions related to fees payable to arbitrators in the relevant law passed by Parliament are studied. Subsequently, the researcher has studied the relevant judgements of Honourable Supreme Court of India. In addition, the researcher has also studied arbitration clauses in numerous

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<sup>1</sup> Laws: Arbitration and Conciliation Act, 1996

<sup>2</sup> Ibid

agreements. A sample clause specifying arbitrator fees is also included.

**Provisions under Arbitration and Conciliation Act, 1996**

Sub-section 11(3A) of the Act reads as follows:

*(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 the 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.*

Notably, the provisions of sub-section 11(3A) and the rates of fees given in the Fourth Schedule apply only in case one or more of arbitrators are appointed by the court.

Sub-section 11(14) of the Act and the Explanation annexed thereto is relevant in the context of determination of fees. The sub-section reads as follows:

*(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.*

*Explanation.-- For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where*

*parties have agreed for determination of fees as per the rules of an arbitral institution.*

The explanation clearly enables the parties to include provisions related to fees of arbitrators in the arbitration agreement especially in case of ad-hoc arbitration. This is equally applicable for domestic and international commercial arbitration. It is not important for institutional arbitration since arbitration institutions mostly apply their rules for fixing fees of arbitrators.

### **Supreme Court Judgements**

The issue of fees payable to arbitrators was discussed in great detail by Honourable Supreme Court in the judgement in the case of ONGC vs. Afcons<sup>3</sup>. Extracts from the judgement provide an interesting overview of the subject and are reproduced as follows:

*52 Typically, when an arbitration is conducted under the auspices of an arbitral institution, the fees payable to the arbitrator(s) are fixed by the institution itself.*

*66 Although there are jurisdictional differences, the following broad principles emerge from our discussion above:*

*Typically, the fees payable to arbitrator(s) are determined through an agreement between the parties (of which the arbitrator(s) become aware of when they take up the assignment) or a separate agreement of the parties with the arbitrator(s). The arbitrator(s) then become bound by such contractually agreed fees; and*

*(ii) Certain arbitration legislations give the arbitrator(s) effective power to determine their own fees, typically when there is an absence of agreement between the parties on the subject. However, such determination*

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<sup>3</sup> Domestic Court Judgements: Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV, 2022

of fees is subject to review by the courts who can reduce the fees if they are not reasonable.

67. Thus, arbitrator(s) do not possess an absolute or unilateral power to determine their own fees. Parties are involved in determining the fees of the arbitrator(s) in some form. It could be by: (i) determining the fees at the threshold in the arbitration agreement; or (ii) negotiating with the arbitrators when the dispute arises regarding the fees that are payable; or (iii) by challenging the fees determined by the tribunal before a court.

68 Party autonomy is a cardinal principle of arbitration. The arbitration agreement constitutes the foundation of the arbitral process. The arbitral tribunal is required to conduct the arbitration according to the procedure agreed by the parties. The procedure may stipulate adherence to institutional rules or ad hoc rules or a combination of both.

69 The Arbitration Act recognises the principle of party autonomy in various provisions. It allows the parties to derogate from the provisions of the Act on certain matters.

70 Having spelt out party autonomy as the cardinal principle of arbitration in India, in the sections which follow we analyse how provisions relating to the payment of fees to arbitrators have to be interpreted in light of this principle.

**The Fourth Schedule has to be read along with the provisions of sub-Section (14) of Section 11. In terms of the Explanation to Section 11(14), the Fourth Schedule will not be applicable to international commercial arbitrations. Further, the Fourth Schedule will not be applicable where parties have agreed to the determination of the arbitrators' fees according to the rules of an arbitral institution.** The Fourth Schedule was to serve as a guide for different High Courts to frame rules for determining the fees of arbitrators. The High Courts have been slow, if not tardy, in framing these rules. Apart

from the High Courts of Rajasthan, Kerala and Bombay, other High Courts have not framed rules under Section 11 (14) of the Arbitration Act for the determination of fees. Further the rules framed by High Courts of Bombay and Rajasthan only govern arbitrators appointed by the courts. Thus, the purpose of Section 11(14) for regulating fees in ad hoc arbitrations remains unrealised.

79 Based on the above discussion, we summarise the position as follows:

(i) In terms of the decision of this Court in **Gayatri Jhansi Roadways Ltd** (supra) and the cardinal principle of party autonomy, 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 determination of arbitrators' fees; and

(ii) Since most High Courts have not framed rules for determining arbitrators' fees, taking into consideration Fourth Schedule of the Arbitration Act, the Fourth Schedule is by itself not mandatory on court-appointed arbitrators in the absence of rules framed by the concerned High Court. Moreover, 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 failure of many High Courts to notify the rules has led to a situation where the purpose of introducing the Fourth Schedule and sub-Section (14) to Section 11 has been rendered nugatory, and the court-appointed arbitrator(s) are continuing to impose unilateral and arbitrary fees on parties. As we have discussed in Section C.2.1, such a unilateral fixation of fees goes against the principle of party autonomy which is central to the resolution of disputes through arbitration. Further, there is no enabling provision under the Arbitration Act empowering the arbitrator(s) to unilaterally issue a binding or enforceable order regarding their fees. This

is discussed in Section C.2.3 of this judgement. Hence, this Court would be issuing certain directives for fixing of fees in ad hoc arbitrations where arbitrators are appointed by courts in Section C.2.4 of this judgement.

We believe that the directives proposed by the amicus curiae, with suitable modifications, would be useful in structuring how these preliminary hearings are to be conducted. Exercising our powers conferred under Article 142 of the Constitution, we direct the adoption of the following guidelines for the conduct of ad hoc arbitrations in India:

1. Upon the constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold preliminary hearings with a maximum cap of four hearings amongst themselves to finalise the terms of reference (the “**Terms of Reference**”) of the arbitral tribunal. The arbitral tribunal must set out the components of its fee in the Terms of Reference which would serve as a tripartite agreement between the parties and the arbitral tribunal.

2. In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, the fees payable to the arbitrators would be in accordance with the arbitration agreement. However, if the arbitral tribunal considers that the fee stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee proposed by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.

3. *Once the Terms of Reference have been finalised and issued, it would not be open for the arbitral tribunal to vary either the fee fixed or the heads under which the fee may be charged.*

4. *The parties and the arbitral tribunal may make a carve out in the Terms of Reference during the preliminary hearings that the fee fixed therein may be revised upon completion of a specific number of sittings. The quantum of revision and the stage at which such revision would take place must be clearly specified. The parties and the arbitral tribunal may hold another meeting at the stage specified for revision to ascertain the additional number of sittings that may be required for the final adjudication of the dispute which number may then be incorporated in the Terms of Reference as an additional term.*

5. *In cases where the arbitrator(s) are appointed by the Court, the order of the Court should expressly stipulate the fee that arbitral tribunal would be entitled to charge. However, where the Court leaves this determination to the arbitral tribunal in its appointment order, the arbitral tribunal and the parties should agree upon the Terms of Reference as specified in the manner set out in draft practice direction (1) above.*

6. *There can be no unilateral deviation from the Terms of Reference. The Terms of Reference being a tripartite agreement between the parties and the arbitral tribunal, any amendments, revisions, additions or modifications may only be made to them with the consent of the parties.*

7. *All High Courts shall frame the rules governing arbitrators' fees for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996.*

8. *The Fourth Schedule was lastly revised in the year 2016. The fee structure contained in the Fourth Schedule cannot be static and deserves to be revised periodically. We, therefore, direct the Union of India to suitably*



*modify the fee structure contained in the Fourth Schedule and continue to do so at least once in a period of three years."*

Based on the above judgement and reading of sub-section 11(14)<sup>4</sup> it may be concluded that it is advisable for arbitrator fees to be included in the arbitration agreement. In case the arbitration clause makes no mention of fees payable to arbitrators, the parties may arrive at an agreement regarding arbitrator fees during the initial stages of the arbitration proceedings. It is suggested that a Tripartite agreement about terms of reference may be executed among the parties and the arbitration tribunals.

#### **Sample of Arbitration Clause with Arbitrator Fees**

##### **ONGC and Afcons Gunanusa<sup>5</sup>**

*1.3.2.8 Arbitrators shall be paid fees at the following rates.*

<b><i>Amount of Claims and Counter Claims (excluding interest)</i></b>	<b><i>Lump sum fees (including fees for study of pleadings, case material, writing of the award, secretarial charges etc.) payable to each arbitrator (to be shared equally by the parties)</i></b>
<i>Upto Rs. 50 lac</i>	<i>Rs. 7,500 per meeting subject to a ceiling of Rs. 75,000/-</i>
<i>Above Rs. 50 lac to Rs. 1 Crore</i>	<i>Rs. 90,000/- plus Rs. 1,200/- per lac or a part there of subject to a ceiling of Rs. 1,50,000/-</i>
<i>Above Rs. 1 Crore and upto Rs. 5 Crores</i>	<i>Rs. 1,50,000/- plus Rs. 22,500/- per crore or a part there of subject to a ceiling of Rs. 2,40,000/-</i>
<i>Above Rs. 5 Crores and upto Rs. 10 Crores</i>	<i>Rs. 2,40,000/- plus Rs. 15,000/- per crore or a part there of subject to a ceiling of Rs. 3,15,000/-</i>
<i>Above Rs. 10 Crores</i>	<i>Rs. 3,15,000/- plus Rs. 12,000/- per crore or a part there of subject to a ceiling of Rs. 10,00,000/-</i>

<sup>4</sup> Laws (India): The Arbitration and Conciliation Act, 1996

<sup>5</sup> Domestic Court Judgements: Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV, 2022

*For the disputes above Rs. 50 lacs, the Arbitrators shall be entitled to an additional amount @ 20% of the fee payable as per the above fee structure.*

*1.3.2.9 If after commencement of Arbitration proceedings, the parties agree to settle the dispute mutually or refer the dispute to conciliation, the arbitrators shall put the proceedings in abeyance until such period as requested by the parties. Where the proceedings are put in abeyance or terminated on account of mutual settlement of dispute by the parties, the fees payable to the arbitrators shall be determined as under:*

*I) 25% of the fees if the claimant has not submitted statement of claim.*

*II) 50% of the fees if the award is pending.*

*1.3.2.10 Each party shall pay its share of arbitrator's fee in stages as under:*

*(I) 25% of the fees on filing of reply to the statement of claims.*

*(II) 25% of the fees on the competition of evidence.*

*(III) Balance 50% at the time when award is given to the parties.*

### **Conclusion**

In case the arbitrators are given the freedom to decide the fees payable to themselves, it is most likely that they will decide fees which may appear exorbitant to the parties. In case of court-appointed arbitrators, it is the Fourth Schedule that provides guidance. In case of institutional arbitration, rules of the institution provide fees payable to arbitrators. In case of ad-hoc arbitration, it is most important and advisable that the parties entering into an arbitration agreement clearly specify the fees payable to arbitration. In case the parties omit to include such provisions in the arbitration agreement / clause, it is advisable that the parties settle this with the

arbitration tribunal members at the start of arbitration proceedings. It is not fair for the parties to cry if they fail to safeguard their interests and allow the arbitrators freedom to decide their own fees.

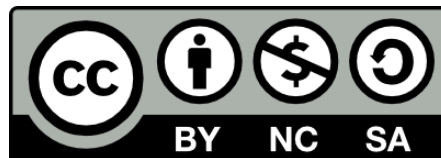
### **Bibliography**

#### **Laws**

- The Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996)

#### **Domestic Court Judgements**

- Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV, MANU 2022 SC 1075.



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