Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL/APPELLATE JURISDICTION

Arbitration Petition (Civil) No. 05 of 2022

Oil and Natural Gas Corporation Ltd. .... Petitioner

Versus

Afcons Gunanusa JV .... Respondent

With

Civil Appeal No 5880 of 2022

With

Civil Appeal No 5879 of 2022

And With

Miscellaneous Application Nos. 1990-1991 of 2019 in Special Leave Petition (Civil) Nos. 10021-10022 of 2017

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

This judgment has been divided into sections to facilitate analysis. They are:

A Factual Background

A.1 Facts of Petition for Arbitration (Civil) No 5 of 2022

1 On 29 May 2009, the petitioner, Oil and Natural Gas Corporation Limited[1], and the respondent, Afcons Gunanusa JV[2], entered into a Lump Sum Turnkey Contract[3] for the construction of an ICP-R Platform. The ICP-R Platform is alleged to have been completed on 31 October 2012.

2 Due to ongoing disputes and differences, Afcons invoked arbitration on 20 July 2015, in accordance with Clause 1.3 of the LSTK Contract. Afcons appointed Justice Mukul Mudgal as their arbitrator.

3 The relevant parts of Clause 1.3 of the contract are extracted below:

> "1.3 **Laws/Arbitration**
>
> […]
>
> 1.3.2 **Arbitration**
>
> Except as otherwise provided elsewhere in the contract, if any dispute, difference question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, Interpretation of the contract or breach thereof which parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder:
>
> 1.3.2.1 A party wishing to commence arbitration proceeding shall Invoke Arbitration Clause by giving 60 days notice to the other party. **The notice Invoking arbitration shall specify** all the points of disputes with **details of the amount claimed** to be referred to arbitration at the time of Invocation of arbitration and not thereafter. **If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the arbitral tribunal.**

[1] "**ONGC**"
[2] "**Afcons**"
[3] "**LSTK Contract**"

1.3.2.2 The number of the arbitrators and the appointing authority will be as under:

Claim amount (excluding claim for Interest and counter claim, if any)	Number of arbitrator	Appointing Authority
Upto Rs. 5 Crore	Sole Arbitrator	ONGC
Above Rs. 5 Crore	3 Arbitrators	One arbitrator by each party and the 3rd arbitrator, who shall be the presiding arbitrator, by the two arbitrators.

1.3.2.3 **The parties agree that they shall appoint only those persons as arbitrators who accept the conditions of this arbitration clause. No person shall be appointed as arbitrator or presiding arbitrator who does not accept the conditions of this arbitration clause.**

[…]

1.3.2.8 Arbitrators shall be paid fees at the following rates.

Amount of Claims and Counter Claims (excluding interest)	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)
Upto Rs. 50 lac	Rs. 7,500 per meeting subject to a ceiling of Rs. 75.000/-
Above Rs. 50 lac to Rs. 1 crore	Rs. 90,000/- plus Rs. 1,200/- per lac or a part there of subject to a ceiling of Rs. 1,50,000/-
Above Rs. 1 Crore and upto Rs. 5 Crores.	Rs. 1,50,000/- plus Rs. 22,500/- per crore or a part there of subject to a ceiling of Rs. 2,40,000/-
Above Rs. 5 Crores and upto Rs. 10 Crores	Rs. 2,40,000/- plus Rs. 15,000/- per crore or a part there of subject to a ceiling of Rs. 3,15,000/-
Above Rs. 10	**Rs. 3,15,000/- plus Rs. 12,000/- per**

Crores	**crore or a part there of subject to a ceiling of Rs. 10,00,000/-**

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 lf 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.

[…]

1.3.2.14 Subject to aforesaid, provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof shall apply to the arbitration proceedings under this clause."

(**emphasis supplied**)

4 On 20 August 2015, ONGC responded by appointing Justice Gyan Sudha Mishra as their arbitrator. The arbitrators appointed Justice GN Ray as the presiding arbitrator, and the arbitral tribunal was constituted.

5 The arbitral tribunal held a preliminary meeting on 25 November 2015 at which the members of the tribunal indicated their view that the fee schedule

prescribed in the contract seemed unrealistic. While Afcons was agreeable to a revision in the fee, ONGC indicated that it may not be agreeable. The arbitral tribunal directed ONGC to consider a revision of the arbitrators' fee. In a letter dated 28 January 2016 addressed to ONGC, the arbitral tribunal noted that the Fourth Schedule to the Arbitration and Conciliation Act 1996[4] recommends the fee for each arbitrator as Rs 30 lakhs, when the amount in dispute exceeds Rs 20 crore (in the present case, it was Rs 900 crores).

6 On 16 April 2016, the arbitral tribunal informed ONGC that it would no longer bargain on the amount if ONGC was agreeable to the schedule provided in the Fourth Schedule to the Arbitration Act, along with a reading fee of Rs 6 lakhs for each arbitrator. However, the letter stated that the ceiling of Rs 30 lakhs provided in the Fourth Schedule was on the 'lower side' for an arbitration with a disputed amount of Rs 900 crores, and should be revised. The letter reads thus:

> "If the appropriate authority of ONGC is inclined to accept the ceiling referred to in the schedule of the amendment of Arbitration and Conciliation Act and offer such remuneration, the Arbitrators do not intend to enter into any bargaining. We may only indicate that remuneration of Rs. 30 Lacs is in the lower side and reasonably deserves upward revision in this case. The arbitrators also expect that considering the composition of the arbitral tribunal and huge claim involved (about Rs. 1000 crore) and extraordinarily voluminous documents to be taken into consideration it may be only appropriate that as special case, a reasonable reading/ perusal fee to the tune of about 6 lacs for each arbitrator may be considered. Such reading fee is prevalent in similar other cases."

7 By its letter dated 22 April 2016, ONGC informed the arbitral tribunal that the proposal for the application of the Fourth Schedule of the Arbitration Act was

[4] "**Arbitration Act**"

under consideration by them but since it did not provide for a reading fee, ONGC could not agree to it.

8 At its second sitting on 4 August 2016, the arbitral tribunal passed a procedural order directing the parties to deposit 25 per cent of the arbitrators' fee, which was recorded as Rs 30 lakhs. On 22 May 2018, the arbitral tribunal passed another procedural order finalising its fee, stating that it had done so after taking into account the pleadings submitted by the parties, the complexity of the issues involved, high value of the claim (Rs 679 crores) and counter-claim (Rs 407 crores), and the voluminous nature of the documents. The tribunal fixed a fee of Rs 1.5 lakhs for each arbitrator for every sitting of a three-hour duration. The tribunal indicated that it may also charge a reading fee or conference fee (for conferences between the members), which would be indicated at a later stage. The procedural order states as follows:

> "The first sitting of this arbitration case was held in November, 2015. The remuneration of the members of the arbitral tribunal could not be finally fixed. The claimant had agreed to pay such remuneration in its share as would be directed by the tribunal. But the respondent had requested the tribunal to fix remuneration later on because appropriate authority was to be considered. The arbitral tribunal was also not in a position to assess the extent of claim and counter claim to be raised by the parties and also the complexity of the arbitration case at that stage. The respondent's representative, however, had suggested for the ceiling fee at Rs. 30.00 lakhs for each of the Arbitrators as mentioned in the fourth schedule of amended Arbitration and Conciliation Act, 1996. It was pointed out by the tribunal that the arbitration case arose prior to amendment of the Act. Therefore, the ceiling fee referred to in the amended Act was not attracted. It was also pointed out to the respondent's representative that the Arbitral Tribunal did not like to assert the remuneration of the members of the tribunal and it would be only appropriate if fair, pragmatic and reasonable remuneration would be fixed at the suggestion of both the parties who were expected to take pragmatic and realistic approach in suggesting the remuneration of the

arbitrators by taking into consideration of the amount of claim and counter claim to be made by the parties, the composition of the arbitral tribunal, the complexities of the issues requiring adjudication and number of sittings likely to take for concluding the arbitration case, in suggesting the remuneration of the arbitrators. However, before finally fixing the remuneration to be paid to the arbitrators by the parties, 25% of Rs. 30.00 lakhs were directed to be deposited by the parties by sharing equally.

After pleadings have been filed by the parties by taking substantially long time, presumably, in view of complex technical issues involved and large number of documents intended to be relied on by the parties, the members of the arbitral tribunal have been able to have a fair idea about the nature and complexities of the issues for determination and the time likely to be required for completing the arbitration case. The arbitral tribunal, therefore, holds that proper remuneration payable to the members of the arbitral tribunal should be indicated to the parties for compliance.

It may be indicated here that the claimant has claimed about Rs. INR 6,79,20,52,999/- crores along with 18% interest per annum on the said sum. The respondent has made a counter claim of about Rs. INR 4,07,12,97,603/- crores and has also claimed interest at 18% per annum on the said sum. Both the parties have informed the arbitral tribunal that both the parties will examine their respective witnesses including expert witnesses. As a matter of fact, the claimant has filed affidavit of evidence of three expert witnesses. Similarly, the respondent also intends to examine witnesses including expert witness. Till date 20 sittings have been held and examination of first witness of the claimant is estimated to be completed by holding 26 sittings.

It is, therefore, quite evident that the hearing of this arbitration case will take fairly long time. Along with the pleadings, both the parties have filed volumes of documents in support of their respective case. By now the claimant has filed 68 volumes of their document. Similarly, the respondent has also filed 24 volumes as its document to be relied on. It is not unlikely that further documents may be relied on by the parties in the hearing process.

Considering the amounts of claim and counter claim, the voluminous documents to be taken into consideration and a very long hearing to conclude the arbitration case and the complex technical issues required to be taken into consideration, the arbitral tribunal has decided that it will be only appropriate, fair and reasonable to fix remuneration of each of the arbitrators at Rs. 1.50 lakhs (Rupees one lakh

> and fifty thousand) per sitting, each sitting confined to three hours or part thereof. Perusal fee and inter se conference amongst the members of the tribunal, may not be indicated now. Such fee may be indicated later or after the case proceeds further thereby enabling the tribunal to assess the extent of exercise called for."

9 On 22 June 2018, ONGC filed an application before the arbitral tribunal for modifying the procedural order dated 22 May 2018 increasing the fee. The arbitral tribunal issued a procedural order dated 25 July 2019 rejecting ONGC's application. The tribunal observed that:

(i) At the first sitting, the tribunal indicated that the fee specified in the contract (Rs 12 lakhs per arbitrator) was unrealistic. While Afcons agreed to a revision of the fee, ONGC was not agreeable. The tribunal granted an opportunity to ONGC to propose a 'reasonable and pragmatic' fee schedule;

(ii) While awaiting ONGC's response, the tribunal proposed the fee schedule in the Fourth Schedule to the Arbitration Act "as an example" while noting that the ceiling of Rs 30 lakhs was also "too low". Since ONGC seemed agreeable, the tribunal directed the parties to deposit the first tranche of fee based on Rs 30 lakhs in the interim;

(iii) Since ONGC did not propose a revised fee schedule, the tribunal, after considering the complexity of the issues involved, the quantum of the amount in dispute and the voluminous nature of the documents, fixed its fee by a procedural order dated 22 May 2018;

(iv) ONGC has not refuted the reasons provided by the tribunal for fixing its fee. It has only contested the revision on the ground that the fee schedule

in the contract was binding. Since ONGC had shown its willingness earlier to accept the schedule of fees in the Fourth Schedule, ONGC's submission was rejected; and

(v) The ceiling of Rs 30 lakhs in the Fourth Schedule is not applicable to the present dispute since it arose before the amendment which added the Schedule.

The tribunal held that the fee was set on the basis of the amount being paid in arbitrations of such nature. However, it agreed to reduce the fee of each arbitrator to Rs 1 lakh per sitting. It noted that the reading fee was kept open, and would be decided at a later stage.

10 By its letter dated 21 August 2020, ONGC informed the arbitral tribunal that the revised fee was not approved by its 'higher' management. Thereafter, ONGC filed a petition[5] under Section 14 read with Section 15 of the Arbitration Act before the Bombay High Court for the termination of the mandate of the arbitral tribunal and the substitution of a fresh set of arbitrators. By its order dated 7 October 2021, the petition was dismissed by the Bombay High Court on the ground of a lack of jurisdiction since the arbitration was an international commercial arbitration within the meaning of Section 2(f) of the Arbitration Act. However, ONGC was granted liberty to approach this Court and all its contentions were kept open. ONGC then filed the present arbitration petition.

[5] Commercial Arbitration Petition (Lodging) No 9590 of 2020

A.2 Facts of Special Leave Petition (Civil) No 13426 of 2021

11 This appeal arises from a final judgement and order dated 6 August 2021 of the High Court of Delhi, by which it dismissed the petition[6] filed by the petitioner, NTPC Limited[7].

12 NTPC and the respondent, Afcons-Shetty and Company Private Limited-JV[8], entered into a contract for the construction of a "desilting arrangement package for Koldam Hydro Electric Power (Package-3) Project". When disputes arose between the parties, Afcons-Shetty invoked arbitration for a claim of about Rs 37 crores. An arbitral tribunal was to be constituted in terms of Clause 67.3 of the contract. Both parties nominated their arbitrators – NTPC nominated Shri Krishna Mohan Singh and Afcons-Shetty nominated Shri Santanu Basu Rai Chaudhuri. When the nominated arbitrators failed to appoint a presiding arbitrator, Afcons-Shetty approached the Delhi High Court under Section 11 of the Arbitration Act[9], which then appointed Justice Manmohan Sarin as the presiding arbitrator on 21 May 2018 with the consent of parties.

13 The arbitral tribunal held its first sitting on 12 July 2018, where it decided that the fees payable to the tribunal shall be in terms of the Fourth Schedule to the Arbitration Act. The Fourth Schedule was subsequently amended on 12 November 2018.

14 NTPC filed its counter-claim of approximately Rs 19 crores. By a procedural order dated 13 July 2019, the arbitral tribunal fixed a separate fee for

[6] OMP (T) (COMM) 37 of 2021
[7] "**NTPC**"
[8] "**Afcons-Shetty**"
[9] Arbitration Petition No 375 of 2018

the claim (Rs 28,64,520 per arbitrator) and counter-claim (Rs 19,13,615 per arbitrator), aggregating to a total fee of Rs 47,78,135 per arbitrator. In support of its position, the tribunal placed reliance upon the proviso to Section 38(1) of the Arbitration Act.

15 On 21 September 2019, NTPC filed an application seeking a modification of the procedural order dated 13 July 2019. By its reply dated 18 October 2019, Afcons-Shetty opposed the application. By its order dated 8 November 2019, the arbitral tribunal dismissed NTPC's application noting that:

> "4. There is merit in Mr. Mukhopadhyay's submission that claims and counter claims being independent of each other for which separate fee is to be fixed the same cannot be combined for purpose of ceiling. Moreover, it cannot also be lost sight of that the Fourth Schedule of the Act can only serve as a guiding principle in the absence any rules being framed by the High Court. In view of the foregoing discussions the order passed by us does not call for any modifications or review. The application is accordingly dismissed."

16 On 15 October 2020, NTPC sought a modification of the tribunal's orders dated 13 July 2019 and 8 November 2019, so that the fee fixed in terms of the Fourth Schedule should include the fee payable for NTPC's counter-claim. By its reply dated 30 October 2020, Afcons-Shetty opposed the application.

17 By its order dated 14 January 2021, the tribunal rejected NTPC's position that the claim and counter-claim have to be cumulated to arrive at the "sum in dispute" for the purposes of the Fourth Schedule. The tribunal held that:

(i) Section 31(8) of the Arbitration Act allows a tribunal to provide for the costs of arbitration. The regime for costs is provided under Section 31A. The

explanation to Section 31A(1) provides that costs include those relating to the fees and expenses of the arbitrators;

(ii) The proviso to Section 38(1) stipulates that separate costs are to be fixed for claims and counter-claims. The position under proviso to Rule 3 of the DIAC (Administrative Cost & Arbitrators' Fees) Rules 2018[10] is also similar; and

(iii) Nothing in the Fourth Schedule or the DIAC Rules imposes a restriction on separate costs (and thus fees) being fixed for claims and counter-claims by the tribunal.

18 Subsequently, by its order dated 19 March 2021, the tribunal held that in case NTPC does not comply with its directions contained in the order dated 14 January 2021 for payment of Rs 2 lakhs per arbitrator, the tribunal would consider whether NTPC's counter-claim should be suspended.

19 NTPC filed a petition under Sections 9 and 14 read with Section 31(8) before the Delhi High Court, seeking a direction that the tribunal charge a combined fee under the Fourth Schedule for adjudicating both the claim and the counter-claim or, in the alternate, for the termination of the mandate of the tribunal. The petition was opposed by Afcons-Shetty.

20 By a judgment dated 6 August 2021, a Single Judge of the Delhi High Court dismissed NTPC's petition. The Single Judge held that the proviso to Section 38(1), Section 31(8) and Section 31A are inextricably linked and on a

[10] "**DIAC Rules**"

combined reading, a tribunal would have the power to fix a separate fee for claims and counter-claims. The Single Judge of the Delhi High Court held thus:

> "43. …the scheme of 1996 Act is such that the provisions of Section 38(1), 31(8) and 31A are inextricably interlinked. These provisions cannot be read in isolation. The proviso to Section 38(1) clearly states that, where there are claims and counter-claims before the arbitral tribunal, the Arbitral Tribunal may fix separate amount of deposits for the claim and counter-claim. Section 38(1) clarifies that the "amount of deposit" is to be directed "as an advance for the costs referred to in sub-section (8) of Section 31". Sub-section (8) of Section 31 requires the Arbitral Tribunal to fix the costs of arbitration in accordance with Section 31A. The explanation to Section 31A(1) clearly states that, for the purposes of Section 31A(1) the expression "costs" means reasonable costs relating to, inter alia, "the fees and expenses of the arbitrators".
>
> […]
>
> 48. The position becomes clear when we view the proviso to Section 38(1), Section 31(8) and the Explanation to Section 31A(1) in juxtaposition. Section 31(8) mandates that the arbitral tribunal fix the costs of arbitration, in accordance with Section 31A. Clause (i) of the Explanation to Section 31A(1) specifically includes the fees and expenses of the arbitrators as an integral part of the "costs". Clearly, therefore, the arbitrator has to fix the fees payable to the arbitral tribunal, with, needless to say, consent of parties. Section 38(1) provides for advance, for such "costs" fixed, by way of "deposit". The expressions "deposit", "costs" and "fees" are, therefore, intertwined by statute, and, as the interpreter thereof, the Court can hardly extricate them from each other. The proviso to Section 38(1) provides that, where the arbitral tribunal is seized of claims and counter-claims, it may fix separate amount of deposit for each. No doubt, the use of the word "may" does involve an element of discretion; but, if the arbitral tribunal does fix separate fees for the claims and counter-claims, it cannot be held that it has acted irregularly, or contrary to the statutory mandate."

A.3 Facts of Special Leave Petition (Civil) No 10358 of 2020

21 The appeal arises from a final judgement and order dated 10 July 2020 by which the High Court of Delhi dismissed the petition[11] filed by the petitioner, Rail Vikas Nigam Limited[12].

22 On 28 December 2010, RVNL awarded a contract for the "construction of a viaduct and related works for a length of 4.748 kms in the Joka-BBD Bag Corridor of Kolkata Metro Railway Line" to the respondent, Simpex Infrastructures Limited[13]. Disputes having arisen between the parties, Simpex invoked arbitration by its letter dated 26 December 2017.

23 The parties could not agree upon the appointment of arbitrators. While Simpex nominated its arbitrator, RVNL contended that Simpex had to nominate its arbitrator from a panel of five names recommended by RVNL. Since RVNL refused to nominate their arbitrator, Simpex approached the Delhi High Court under Section 11 of the Arbitration Act[14]. The High Court, by its order dated 11 December 2018, nominated an arbitrator on behalf of RVNL and ordered that "the Arbitrator[s] shall be paid fee as per Fourth Schedule to the [Arbitration] Act". RVNL's special leave petition[15] against the order of the Delhi High Court was dismissed by this Court on 12 April 2019.

24 Meantime, the arbitrators nominated by the parties appointed a presiding arbitrator. The arbitral tribunal held its preliminary sitting on 15 January 2019, where it recorded that its fee shall be in accordance with the Fourth Schedule to

[11] OMP (T) (COMM) 38 of 2020
[12] "**RVNL**"
[13] "**Simpex**"
[14] ARB P 519 of 2018
[15] SLP

the Arbitration Act. By its order dated 9 January 2020, the arbitral tribunal recorded that, in accordance with Fourth Schedule, the fee of each arbitrator would be Rs 49,87,500.

25 RVNL then filed an application on 27 February 2020 for the recall of the tribunal's order dated 9 January 2020 on the ground that the ceiling on fees for each arbitrator under the Fourth Schedule is Rs 30,00,000.

26 By its order dated 3 March 2020, the arbitral tribunal rejected RVNL's application. It noted that that the limitation of Rs 30,00,000 in the entry at Serial No 6 of the Fourth Schedule does not encompass the entire fee, comprising of the base component of Rs 19,87,500 and the variable component (0.5 per cent of the claim amount above Rs 20 crores) but was only limited to the variable component. Hence, the ceiling on fee according to the tribunal, is Rs 49,87,500, and not Rs 30,00,000.

27 RVNL then filed a petition under Section 14 of the Arbitration Act before the Delhi High Court, praying for the termination of the mandate of the arbitral tribunal.

28 By a judgment dated 10 July 2020, a Single Judge of the Delhi High Court rejected RVNL's petition. The Single Judge held that the ceiling of Rs 30,00,000 is applicable only to the variable component of the entry at Serial No 6 of the Fourth Schedule. It has been held that the use the disjunctive, namely, 'plus' between the fixed base component and the variable component indicates that the ceiling of Rs 30,00,000 applies only to the latter. According to the judgment, such an interpretation arises not only from the English version of the Arbitration Act,

but also its Hindi version. Finally, the court held that while this interpretation was based on the text of the entry at Serial No 6 of the Fourth Schedule, it is also supported by the 246th Report of the Law Commission (which recommended the changes to the Fourth Schedule) and the DIAC Rules Model Fee (on the basis of which the Schedule Four was crafted).

A.4 Facts of Miscellaneous Application Nos 1990-1991 of 2019

29 The miscellaneous application has been filed by the respondent, RVNL, in relation to an order dated 16 January 2018 of a two-Judge Bench of this Court in the main SLP. By its order dated 16 January 2018, this Court appointed Justice Vikramjit Sen as the sole arbitrator with the consent of the parties, to decide their disputes. The order of this Court recognised that "[t]he learned Arbitrator is at liberty to fix his remuneration".

30 By a procedural order dated 24 February 2018, the sole arbitrator, with the consent of the parties, decided that arbitral fee shall be payable in accordance with the Fourth Schedule to the Arbitration Act. On 25 March 2019, the sole arbitrator raised separate invoices for the payment of fee for claims and counter-claims.

31 RVNL filed an application on 18 May 2019 raising an objection to the sole arbitrator raising separate invoices for payment of a fee for claims and counter

claims. By an email dated 20 May 2019, the petitioner HCIL-Adhikarya-Arss (JV)[16], agreed to RVNL's application and for it to be allowed.

32 The sole arbitrator dismissed RVNL's application on 20 May 2019, holding that in terms of the proviso to Section 38(1) of the Arbitration Act and Order VIII Rule 6A of the Civil Procedure Code 1908[17], claims and counter-claims have to be treated separately. Further, the sole arbitrator noted that since he had been appointed by this Court in an *ad hoc* arbitration with liberty to fix his own fee, a separate fee could be charged for the claim (Rs 325,89,48,831) and counter-claim (Rs 21,59,56,092).

33 RVNL has filed a miscellaneous application before this Court, seeking a determination of whether a fee can be charged separately by the arbitral tribunal for the claim and counter-claim and whether the tribunal was justified in doing so after fixing its fee in terms of the Fourth schedule.

B Submissions of Counsel

34 We have heard Mr KK Venugopal the learned Attorney General, and Mr Tushar Mehta, learned Solicitor General, on behalf of the petitioners. Dr Abhishek Manu Singhvi led the arguments on behalf of the respondents. Mr Manu Sheshadri and Mr K. Parmeshwar addressed the court for the intervenors. Mr Huzefa Ahmadi, has rendered objective assistance to this Court as *amicus curiae*.

[16] "**HCIL**"
[17] "**CPC**"

B.1 Submissions on behalf of the petitioners

35 On behalf of the various public sector undertakings that have instituted proceedings before this Court, the following submissions have been made by the Attorney General and the Solicitor General:

(i) The arbitration clause of a contract is binding on the parties and the arbitrators. Once the fee payable to the arbitrators has been specified in the agreement between the parties, the arbitrators must either accept their appointment on the terms agreed in the contract between the parties or refuse the arbitration if they are not agreeable to accept the assignment on the fee which has been fixed by parties in their agreement. In **NHAI** v**. Gayatri Jhansi Roadways Ltd.**[18], this Court has held that the fee fixed in the agreement is binding. In *Russell on Arbitration*[19] (24th Edition) it has been noted that the appointment of arbitrators is a matter of contract subject to the mandatory provisions of the governing law. Arbitrators cannot increase their fees and expenses unless their agreement with the parties entitles them to do so. Gary Born in his treatise titled *International Commercial Arbitration*[20] has observed that arbitrators, in principle, should not be permitted to unilaterally determine their own fee in the absence of any agreement between the parties since that violates the principle that one cannot be the judge of their own cause;

(ii) If either one party or both parties are not willing to pay the fees desired by the arbitrators or if the arbitrators deviate from the fees stipulated under

[18] (2020) 17 SCC 626 ("**Gayatri Jhansi Roadways Ltd**")
[19] David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (24th edition, 2015) ("**Russell on Arbitration**")
[20] Gary B Born, *International Commercial Arbitration* (2nd edition, 2014)

the agreement, the mandate of the arbitral tribunal would have to be terminated in its entirety;

(iii) Section 11(14) of the Arbitration Act provides that the "High Court may frame such rules [for determination of fees] as may be necessary, after taking into consideration the rate specified in the Fourth Schedule". Therefore, the Fourth Schedule should serve as a template or a guide for the High Courts in fixing fees for the arbitrators;

(iv) Sub-Section (3A) of Section 11, inserted by the Arbitration and Conciliation (Amendment) Act 2019[21], also stipulates that the arbitrator appointed by a party shall be entitled to the fees at the rates specified in the Fourth Schedule;

(v) Conflicting views have emerged from the High Courts as regards the nature of the Fourth Schedule to the Arbitration Act. Typically, it is considered suggestive in cases where arbitrators are appointed by parties and mandatory when arbitrators are appointed by the court;

(vi) The entry at Serial No 6 of the Fourth Schedule to the Arbitration Act provides a cap on the fees payable to the arbitral tribunal. There is an apparent mismatch between the English and Hindi versions, since a comma which is present in the Hindi version is absent in the English version, before the phrase "with a ceiling of Rs 30,00,000". The comma disjoins the phrase "with a ceiling of Rs.30,00,000" from the words preceding the comma, "Rs. 19,87,500 plus 0.5 % of the claim amount over and above Rs. 20 Cr." The use of the comma in the Hindi version suggests

[21] "**Arbitration Amendment Act 2019**"

that the ceiling is applicable to the entire clause. Thus, the total fees payable to the arbitrators cannot exceed Rs 30,00,000;

(vii) The omission of the comma in the English version is an inadvertent grammatical mistake. Commas have a crucial role to play in interpretation and due regard must be given to it when multiple interpretations are possible;

(viii) If the comma is not given its due effect, the upper limit on the fees can be interpreted to mean Rs 49,87,500 [19,87,500 + 30,00,000]. Such an interpretation would be contrary to the legislative intent of making arbitration cost-effective and economical;

(ix) The Fourth Schedule is based on the Delhi International Arbitration Centre[22] fees' schedule which contains a comma like the Hindi version, which disjoints the applicable fees and establishes a ceiling of Rs 30,00,000 towards arbitrators' fees. This ceiling applies to the aggregate amount of the claim and counter-claim;

(x) Section 2(9) of the Arbitration Act provides that wherever Part - I of the Arbitration Act refers to a claim, it shall be applicable to a counter-claim and where it refers to defence, it shall include a reference to the defence of a counter-claim;

(xi) The legislative intent behind using the phrase "sum in dispute" in the Fourth Schedule of the Arbitration Act was to refer to the cumulative sum of the claim and counter-claim. If the legislative intent was to charge

[22] "**DIAC**"

separate fees for both the claim and counter-claim, it would have been explicitly stated;

(xii) The plain English meaning of the term "sum" means aggregate and of the term "dispute" means the totality of all the claims and counter-claims. The term "sum" or "dispute" cannot be bifurcated through legal interpretation to refer to claims and counter-claims as separate concepts;

(xiii) The rules of various institutions in India and abroad that conduct arbitration proceedings also fortify the position that the "sum in dispute" includes the claim and counter-claim;

(xiv) In **Union of India** v. **Singh Builders**[23] and **Sanjeev Kumar Jain** v. **RS Charitable Trust**[24], this Court observed that arbitrators are charging exorbitant fees, without any ceilings. The Law Commission of India in its 246th Report[25] identified the above mischief and recommended the introduction of the Fourth Schedule to address this issue;

(xv) It is evident from the **LCI 246th Report** (supra) that the Fourth Schedule was introduced to make arbitration a cost-effective solution for dispute resolution domestically by providing some mechanism to rationalise the fee structure for arbitration. The Law Commission stated that the model schedule of fees recommended by it is based on the fee set by DIAC. The fee schedule set by DIAC specifically provides that the "sum in dispute" includes the counter-claim made by any party. Thus, the interpretation that the "sum in dispute" includes the counter-claim would be in tandem with

[23] (2009) 4 SCC 523 ("**Singh Builders**")
[24] (2012) 1 SCC 455
[25] Law Commission of India, 'Amendments to the Arbitration and Conciliation Act 1996' (246th Report, August 2014) available at <https://lawcommissionofindia.nic.in/reports/report246.pdf> accessed on 29 June 2022 ("**LCI 246th Report**")

the legislative intent and the object that was sought to be achieved with the introduction of the Fourth Schedule;

(xvi) The proviso to Section 38(1) of the Arbitration Act, providing for a separate "deposit" for claim and counter-claim as an advance for the costs referred to in Section 31(8), cannot be construed to include arbitrators' fees because that would negate the requirement of the Fourth Schedule framed either under Section 11(14) or Section 11(3A) of the Arbitration Act, as the case may be. This can be harmoniously reconciled by excluding "fees" from the ambit of "costs";

(xvii) Fees and costs are completely distinct. Fees are a return or consideration for professional services rendered, where there is an element of *quid pro quo*. Fees can be fixed by agreement between the parties in an *ad hoc* arbitration or by rules in an institutional arbitration. On the other hand, costs are expenses incurred in the facilitation of the arbitration, which include expenses for the venue of arbitration, transportations costs and secretarial expenses;

(xviii) Section 31(8) of the Arbitration Act states that the cost of arbitration is fixed by the arbitral tribunal in accordance with Section 31A. There is no involvement of party autonomy in the determination of costs, unlike the concept of fees which is based on party autonomy;

(xix) Sub-Sections (3) and (4) of Section 31A of the Arbitration Act enumerate the circumstances which may be taken into account by the arbitral tribunal to determine costs. None of these circumstances make any references to

arbitrators' fees but refer to expenses incurred in the process of facilitating the arbitration proceedings;

(xx) In **Gayatri Jhansi Roadways Ltd** (supra), this Court held that while arbitrators' fees may be a component of costs to be paid but it is a far cry to state that Section 31(8) and 31A would directly govern contracts in which the fee structure has already been laid down. Section 31(8) read with Section 31A deals with costs generally but not with arbitrator(s) fees;

(xxi) The Explanation to Section 31A(1) of the Arbitration Act states for the purpose of this sub-Section, "costs" means reasonable costs relating to the "fees" and expenses of the arbitrator. The Explanation takes away the effect of the legislative intent enshrined in Sections 11(14) read with the Fourth Schedule and Section 38(1) of the Arbitration Act. In **Dattatraya Govind Mahajan** v. **State of Maharashtra**[26], this Court has held that the intention of the legislature is paramount;

(xxii) Further, the Explanation to Section 31A(1) which provides that costs include the "fees and expenses of arbitrators, Courts and witnesses" has to be read in conjunction with Section 31A(1)(a) which provides that the arbitral tribunal has the discretion to determine "whether costs are payable by one party to another". The implication of the above is that when costs are awarded to the successful party, it would recoup the entirety of the amount that has been spent on arbitration, including fees and expenses of the arbitrators, court and witnesses as compensation for the arbitration which has failed against it. This does not refer to a new determination of

[26] (1977) 2 SCC 54

fees by the arbitrators; they are only entitled to what the agreement states. It would be extraordinary to state that the arbitrators can stipulate a new fee at the final stage of determining costs under Section 31A;

(xxiii) The Fourth Schedule uses the phrase "sum in dispute" and there is no mention of this phrase in the Arbitration Act. On the other hand, Section 38 pertains to deposits and that too at a preliminary stage as an advance for costs as referred to in Section 31(8). These provisions cannot be used to interpret the term "sum in dispute". If the language of the enacting part is ambiguous, then the Schedule should be referred to for understanding the intent of the legislature. Thus, the Fourth Schedule would supersede the provisions of Section 38 on the basis of which, it can be concluded that arbitral fee refers to a cumulative amount of claim and counter-claim;

(xxiv) The Fourth Schedule was introduced by the Arbitration and Conciliation (Amendment) Act 2015[27]. The legislature was aware of the terminology used in Section 38(1) and could have used the terms "costs" or "deposits" but yet it still chose to use the term "sum in dispute"; and

(xxv) Public sector undertakings, unlike private companies, cannot afford the high fees that are charged by the arbitrators. A failure to pay the hefty fees being charged by arbitrators could lead to a situation where the arbitral tribunal forms a bias against such public sector undertakings.

[27] "**Arbitration Amendment Act 2015**"

B.2 Submissions on behalf of the respondents

36 On behalf of the respondents, the following submissions have been urged by Dr Abhishek Manu Singhvi, Senior Counsel:

(i) If the parties have prescribed a fee schedule and the arbitral tribunal agrees to be bound by it unconditionally, without any caveat, then the agreed schedule would apply. However, there is nothing in the Arbitration Act to indicate what is to be done in a circumstance where the parties are unable to agree to a fee schedule. The question then arises if the arbitral tribunal can fix its own fees;

(ii) The issue of fee fixation is dealt with as a part of "costs" under Section 31(8) (prior to the Arbitration Amendment Act 2015) or Section 31(8) read with Section 31A (after the Arbitration Amendment Act 2015);

(iii) Sections 31(8) and 31A are part of Chapter VI titled "Making of Arbitral Award and Termination of Proceedings", which implies that the issue of fees remains open to determination till the award is made. A similar practice is followed under the English Arbitration Act 1996, UNICITRAL Rules and International Chamber of Commerce Rules. Therefore, if there is no agreement between the parties regarding the fees of the arbitrators and the arbitration has proceeded, the arbitral tribunal would be entitled to its right to remuneration, which is crystallized as a part of "reasonable costs" as provided under the Explanation to Section 31A(1);

(iv) It has been suggested that this Court may provide guidelines where three case management hearings can be conducted at the initial stage of

arbitration leading to the fixation of the fee of the arbitrators, which shall not be changed except under extraordinary circumstances;

(v) Arbitrator(s) may demand an increase in fees if there is an undue delay in the completion of the arbitration proceedings;

(vi) The right to remuneration of the arbitrator(s) is secured by empowering the arbitral tribunal to fix an amount of deposit or supplementary deposit in advance under Section 38(1) of the Arbitration Act, which is a part of final accounting upon the termination of arbitral proceedings under Section 38(3). The enforcement of this right is ensured by empowering the arbitral tribunal to exercise a lien on the award under Section 39(1);

(vii) Section 39(1) of the Arbitration Act permits a party to approach the court to resolve the issue of costs (including fees) as the court "may consider reasonable". The arbitral tribunal's right to fix reasonable costs (including its final determination of fee) is judicially reviewable under Section 39 read with Section 31A of the Arbitration Act;

(viii) Section 31(8) of the Arbitration Act provides that the costs of arbitration shall be fixed in terms of Section 31A of the Act. The Explanation to Section 31A(1) provides that "costs" shall mean reasonable costs relating to the fees and expenses of arbitrators;

(ix) The proviso to Section 38(1) of the Arbitration Act in clear and unambiguous terms provides that a separate amount may be fixed for deposit towards the claim and the counter-claim, if any counter-claim is preferred apart from the claim;

(x) The fees of arbitrators are an integral part of the costs to be fixed by the arbitral tribunal under Section 31(8) towards deposits, for which the arbitral tribunal is empowered to fix separate amounts for claims and counter-claims;

(xi) The phrase “sum in dispute” mentioned in the Fourth Schedule has to be interpreted in the above context;

(xii) Any reliance on the inconsistency between the Hindi and English versions of the Arbitration Act with respect to the entry at Serial 6 of the table in the Fourth Schedule is in the teeth of Article 348(1)(b)(ii) of the Constitution, which provides that the Act passed by Parliament in the English language shall be the authoritative text. Further, Article 348(1) begins with a *non-obstante* clause which has an overriding effect over other provisions;

(xiii) If the legislature wanted to indicate that the maximum cap on fees payable to an arbitrator is Rs 30,00,000, it would have simply stated so. There was no need to provide in the entry at Serial 6 that the fixed amount of Rs 19,87,500% + 0.5% of the claim amount over and above Rs 20,00,00,000 with a ceiling of Rs 30,00,000 would be the upper ceiling;

(xiv) Counter-claims arise from a distinct dispute, separate from the dispute pertaining to the claim and mostly in regard to an independent cause of action. Even if the main suit fails, a counter-claim may survive and continue. Thus, a separate court fee (where a suit is filed in a court) is required to be paid on the amount of counter-claim. A counter-claim is different from a set-off, which arises from the same dispute and can be

claimed as an adjustment in the main suit, without requiring the payment of court fees;

(xv) The Arbitration Act refers to claims and counter- claims distinctly in various provisions such as Section 2 (9), Section 23 (2A), Section 31A and Section 38;

(xvi) Section 2(9) of the Arbitration Act, which states any reference to a claim in Part - I also applies to a counter-claim, has to be read in tandem with the proviso to Section 38(1), Section 31A and Section 31(8); and

(xvii) Bias is not an appropriate ground to challenge the increase in fees of arbitrators.

B.3 Submissions on behalf of the *amicus curiae*

37 Mr Huzefa Ahmadi, learned Senior Counsel, assisting this Court as *amicus curiae* made the following submissions:

(i) Party autonomy is the overarching principle of arbitration and is crystallised in Section 2(6) of the Arbitration Act. It allows parties to determine the relevant law and procedure that will govern the arbitration and limits court intervention. The principle of party autonomy extends to parties' freedom to decide the fees payable to the arbitrator(s);

(ii) Prior to the amendment of the Arbitration Act in 2015, the issue of arbitrators' fees would have been a subject of agreement between the parties and the arbitrators. However, this Court in **Singh Builders** (supra) noted that the arbitrators have been unilaterally, arbitrarily and disproportionately fixing their fees. This observation was made in the

context of court-appointed arbitrators where this Court was concerned with the fact that parties were being sent for arbitration by courts and were being forced to pay the fees fixed by such arbitrators. This Court noted that institutional arbitration has already remedied this problem since the arbitral institution fixes the fees and not the arbitrators in terms of the rules of the institution;

(iii) In the above backdrop, the Law Commission recognised that the issue of arbitrator fees in *ad hoc* arbitration must be resolved by the introduction of a mechanism to rationalise the fee structure. A model schedule of fees, the Fourth Schedule, was added to the Arbitration Act through the Arbitration Amendment Act 2015, which was to serve as a guide for High Courts to frame rules governing the fixation of fees payable to the arbitrators. This model schedule of fees was based on the schedule of fees developed by DIAC and was suitably revised;

(iv) The Fourth Schedule is to be read along with provisions for appointment of arbitrators under Section 11. It does not apply to international commercial arbitration and is not applicable when the parties have agreed to the fees in terms of the rules of an arbitral institution;

(v) The High Courts have been slow in framing rules for the determination of fees payable to arbitrator(s);

(vi) Some High Courts have been of the view that the Fourth Schedule is merely suggestive and not mandatory, while others have held that it is mandatory. Thus, there is an uncertainty regarding the nature of the Fourth Schedule. In **Gayatri Jhansi Roadways Ltd** (supra), this Court held that if

the fee schedule is fixed by the parties in an agreement, they would not be bound by the Fourth Schedule. Pursuant to this decision, many High Courts have proceeded to hold that the Fourth Schedule is only applicable to court-appointed arbitrators if stated expressly or if the parties and arbitrators have agreed to its applicability;

(vii) Section 11 has been further amended by the Arbitration Amendment Act 2019. Sub-Section (14) of Section 11 now reads that "[t]he 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". The amended Section 11 has not been brought into force and is subject to two exceptions. Crucially, once the amendment comes into force, the fee of the arbitral tribunal would be fixed by the arbitral institution appointing the arbitrator. This Court's interpretation regarding the nature of the Fourth Schedule would also have an impact on the amended Section 11 when it is brought into force;

(viii) To determine if the term "sum in dispute" refers to both the claim and counter-claim, it has to be considered whether a counter=claim can be treated as an independent claim for which a legal proceeding may be instituted. Section 23 of the Arbitration Act provides the basis on which a counter-claim is to be adjudicated. Section 23 does not stipulate that the counter-claim must be linked or related to the claim; rather it only states that the counter-claim must come within the scope of the arbitration agreement;

(ix) The independent nature of the counter-claim is recognised under Sections 38(1) and 38(2) of the Arbitration Act in the following terms, where the arbitral tribunal is empowered to:

(a) Determine separate amount of deposits on a claim and counter-claim; and

(b) Suspend or terminate the proceedings in respect of the claim or counter-claim, in the event, the deposit directed to be paid by the tribunal is not paid by the parties;

(x) Claims and counter-claims are treated separately under the analogous provisions of Order VIII of the CPC;

(xi) Proceedings relating to a counter-claim can survive even if the proceedings relating to a claim are terminated;

(xii) Section 2(9) only provides that provisions of the Arbitration Act relating to a claim would *mutatis mutandis* apply to a counter-claim. It is not a definition clause but it is intended to apply to only procedural aspects. In fact, it fortifies the argument that the "claim amount" under the Fourth Schedule would *mutatis mutandis* apply to counter-claims and is not an aggregate of claims and counter-claims;

(xiii) An arbitral tribunal is not restrained from deciding its fees under the Fourth Schedule for claims and counter-claims separately;

(xiv) The Fourth Schedule does not explicitly state that the "sum in dispute" includes a counter-claim;

(xv) Until the amendment to Section 11 is notified, the court appointing arbitrators should ensure that the parties are made aware of the terms on

which the appointment is made and specifically whether or not the Fourth Schedule is applicable. The court should also ensure that the parties have clarity on the fees and expenses payable to the arbitrator(s);

(xvi) This Court may recommend that either prior to or at the time of notifying the amendments to Section 11, the rates specified in the Fourth Schedule may be revised to reflect the rates that are realistic in present times;

(xvii) None of the provisions of the Arbitration Act entitle the arbitrators to fix their own fees. The scheme of the Act indicates that the arbitral tribunal is only empowered to apportion costs (including the arbitrators' fee) incurred during the arbitration as between the parties at the time of passing the award;

(xviii) Remuneration of arbitrators is subject to direct negotiation and agreement between the arbitrators and the parties and ought to be determined at the inception of the proceedings. The fee that has been agreed upon between the parties and the arbitrators is apportioned as a part of the costs at the time when the award is passed. This view is supported by the decision of this Court in **Gayatri Jhansi Roadways Ltd** (supra), where it was observed that "…it is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that section 31(8) and 31A would directly govern contracts in which a fee structure has already been laid down";

(xix) Section 39 of the Arbitration Act also empowers the arbitral tribunal to only hold the award from the parties for any unpaid costs of arbitration.

These unpaid costs could include arbitrators' fees previously agreed upon between the parties and not paid;

(xx) Any deviation from the fees agreed between the parties and the arbitrator(s) would require the consent of the parties. It would be unreasonable and unfair to the parties if the arbitral tribunal is allowed to alter its fees at a later stage of the arbitration proceedings. At an advanced stage, parties may be apprehensive to disagree with the arbitral tribunal and may agree to an unreasonable and arbitrary fee sought by it;

(xxi) The fee payable under the Fourth Schedule would be applicable to each member of the arbitral tribunal. It cannot be considered as a lump sum to be split among the members. The Note to the Fourth Schedule provides that where the tribunal consists of a sole arbitrator, they would be entitled to 25 per cent over and above the fee payable under the Fourth Schedule. It would be absurd if the sole arbitrator would be entitled to 25 per cent over and above the stipulated sum under the Fourth Schedule but in the case of an arbitral tribunal consisting of three or more members, the entire fee would have to split;

(xxii) Under Section 10 of the Arbitration Act, parties are free to determine the number of arbitrators. If there is no agreement, then the default rule is of appointing a sole arbitrator. Parties can always appoint a sole arbitrator, but if there are unwilling to derogate from the agreement which provides for appointment of three or more arbitrators, then they would have to bear the costs accordingly;

(xxiii) The ceiling of Rs 30,00,000 in the Fourth Schedule is only applicable to the sum of 0.5% of the claim amount over and above Rs 20 crores. The expression "+" that appears after Rs 19,87,500 is disjunctive; and

(xxiv) The Fourth Schedule was introduced in English while the Hindi version was the translation. Thus, precedence must be given to the English version. A comma is not conclusive for determining the meaning of a statutory provision.

38 Mr Ahmadi also urged the court to issue certain directives for governing *ad hoc* arbitrations in India. These are reproduced below:

> "1. In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, upon constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold a preliminary hearing 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. 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.
>
> 2. The parties and the arbitral tribunal may make a carve out in the Terms of Reference that the fee fixed therein may be analysed upon completion of pleadings. The parties and the arbitral tribunal may hold another meeting to ascertain the number of sittings that may be required for the final adjudication of the dispute which number may then be incorporated the Terms of Reference as an additional term.
>
> 3. In cases where the arbitrator(s) are appointed by the Court, the order of the Court should ideally 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.

> 4. 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 it with the consent of the parties.
>
> 5. All High Courts shall frame the rules for arbitrator fee for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996."

39 On the basis of these submissions, this Court has now been called to determine the following issues in relation to the arbitrators' fees:

(i) Whether the arbitrator(s) are entitled to unilaterally determine their own fees;

(ii) Whether the term "sum in dispute" in the Fourth Schedule to the Arbitration Act means the cumulative total of the amounts of the claim and counter-claim;

(iii) Whether the ceiling of Rs 30,00,000 in the entry at Serial No 6 of the Fourth Schedule of the Arbitration Act is applicable only to the variable amount of the fee or the entire fee amount; and

(iv) Whether the ceiling of Rs 30,00,000 applies as a cumulative fee payable to the arbitral tribunal or it represents the fee payable to each arbitrator.

C Determination of arbitrators' fee

C.1 Comparative outlook

40 The issue whether the remuneration of arbitrators has to be decided by the parties or by the arbitrator(s) on their own has not been exhaustively addressed

in India. People and businesses across the world have increasingly become interconnected with the advent of globalisation. Hence, it will be useful to look at the practices adopted by international organisations and in national jurisdictions on the determination of arbitrators' fees. We must at the outset distinguish between arbitrations administered by institutions and *ad hoc* arbitrations. Typically, when an arbitration is conducted under the aegis of an arbitral institution, the fees payable to the arbitrators is fixed by the institution, sometimes independently or in consultation with the sole or presiding arbitrator. The parties are not involved in negotiations with the arbitrator(s) to decide the fees. However, in *ad hoc* arbitrations, parties enter into their own arrangements with the arbitrators regarding their remuneration[28].

C.1.1 Position of international organisations

(i) United National Commission on International Trade[29]

41 The UNCITRAL adopted a model law on International Commercial Arbitration on 21 June 1985. It was hoped that states would give due consideration to the model law while framing their own domestic legislation. The Arbitration Act has also been enacted taking into account the UNCITRAL Model Law. The Preamble to the Act states:

> "WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International commercial Arbitration in 1985:

[28] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th Edition, 2015), Chapter 4, Paragraph 4.203 ("**Redfern and Hunter on International Arbitration**")
[29] "**UNCITRAL**"

> AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;
>
> AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;
>
> AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;
>
> AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;
>
> AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;
>
> BE it enacted by Parliament in the forty-seventh Year of the Republic of India as follows:-"

42 The UNCITRAL Model Law does not explicitly recognise the right of remuneration of arbitrator(s). However, arbitrators must be compensated for their services. This flows from the contractual relationship between the parties and the arbitrator and customary practice[30].

43 The original UNCITRAL Rules introduced in 1976 could be used to govern a*d hoc* arbitrations as well as arbitrations where an arbitral institution was involved. The 1976 Rules allowed the arbitrator(s) to determine their own fees, which were to be reasonable taking into account the sum in dispute and the complexity of the dispute[31]. The UNCITRAL rules also required the arbitrator(s) to

[30] Gary B Born, *International Commercial Arbitration* (3nd edition, 2021), Chapter 13 ("**Gary Born on Arbitration**")
[31] Article 38(a) read with Article 39(1), UNCITRAL Rules 1976

take into account the schedule of fees that has been issued or provided by an appointing authority, if designated by the parties[32]. In the absence of such a fee schedule, the arbitral tribunal could fix its fees only after consulting with the appointing authority if a party has requested the appointing authority to furnish a statement for determining the fees and the appointing authority has consented to providing such a statement[33]. However, the appointing authority did not have the power to alter the decision of the tribunal regarding remuneration payable to arbitrators. The arbitrators had the final authority to determine their remuneration[34]. Commentators have noted that this was an "unusual approach" for establishing the fees of arbitrators and was subject to criticism because it granted arbitrator(s) undue authority to determine their compensation[35].

44 The UNCITRAL Rules were revised in 2010. The Rules continue to grant a substantial role to the arbitrators in deciding their own fees but the appointing authorities, if designated by the parties, or the Permanent Court of Arbitration[36], have greater control over such determination. Article 40(2)(a) read with Article 41 of the UNCITRAL Rules 2010 empowers the arbitral tribunal to fix their fees subject to the same reasonableness requirement and the other criteria prescribed under the 1976 Rules[37]. The arbitral tribunal is required to inform the parties as to "how it proposes to determine its fees and expenses, including any rates it intends to apply" promptly after its constitution[38]. It is noted that this makes the

[32] Article 39(2)-(3), UNCITRAL Rules 1976
[33] Article 39(3)-(4), UNCITRAL Rules 1976
[34] D Caron and L Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edition, 2013), page 863
[35] *Supra* at note 30
[36] "**PCA**"
[37] Article 41(1) reads: "The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case."
[38] Article 41(3), UNCITRAL Rules 2010

process of determining fees more transparent[39]. The fees set by the arbitrators can be reviewed they are not reasonable. Under Articles 41(3)[40] and 41(4)(b) [41] of the UNCITRAL Rules 2010, within 15 days of receiving the arbitral tribunal's determination of fees, the parties can refer the fees determined by the arbitral tribunal to the appointing authority for review and if no such authority has been designated, then the review will be undertaken by the Secretary-General of the PCA. If the Secretary-General of the PCA or the appointing authority (if designated) finds that the fee proposed to be charged is excessive, then it can make necessary adjustments in terms of Article 41(4)(c)[42]. The fees so revised are binding on the tribunal[43].

(ii) Permanent Court of Arbitration

45 The PCA Rules have been formulated on the basis of the UNCITRAL Rules 2010. A mandatory automatic review of the fees and expenses determined by the arbitral tribunal is carried out by Secretary General of the PCA (as the appointing authority under the PCA Rules) at the conclusion of each case[44]. The process of review of fees set by the arbitral tribunal is not automatic under the

[39] *Supra* at note 34
[40] Article 41(3) reads: "Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal."
[41] Article 41(4)(b) reads: "Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;"
[42] Article 41(4)(c) reads: "If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;"
[43] Articles 41(3), UNCITRAL Rules 2010
[44] Article 41(3)(a), PCA Rules 2010

UNCITRAL Rules 2010. Parties may hesitate to invoke the provisions of review in the fear of upsetting the tribunal or they may raise unjustified requests for review if they are dissatisfied with the award. The PCA Rules avoid these pitfalls. The PCA is also empowered to manage the advances of costs incurred by the arbitrators. Every time a payment is made to an arbitrator out of the deposit, it is subject to review[45]. The PCA rules become relevant since India has signed a Host Country Agreement with the PCA and a PCA facility is in the process of being set up in India.

(iii) London Court of International Arbitration[46]

46 The LCIA's Schedule of Costs of arbitrations governs the fees payable to the arbitrator(s). The arbitral tribunal is required to agree in writing to the rates specified in the schedule. The tribunal's fees are calculated on the basis of the work done by the arbitrator(s) in connection with the arbitration, the complexity of the case and requirements relating to the qualification of the arbitrator(s). The fees are charged on an hourly basis not exceeding £500 unless there are exceptional circumstances[47]. The role of the arbitrator(s) thus is limited to reporting the hours worked which forms the basis of the fees to be paid.

[45] Article 43 of the PCA Rules reads: "[t]he [PCA] shall ensure that any disbursements of arbitral tribunal fees and expenses made prior to the fixing of the costs of arbitration pursuant to article 40 are consistent with the criteria in article 41, paragraph 1 and with the arbitral tribunal's proposal (and any adjustments thereto)…"
[46] "**LCIA**"
[47] Schedule of Arbitration Fees and Costs, LCIA Rules 2020

(iv) International Centre for Dispute Resolution[48]

47 The ICDR case administrator fixes the daily or hourly rate for arbitrator(s)[49]. The determination of fees may involve an element of negotiation between the parties and the arbitrator(s)[50]. Article 38 of the ICDR Rules 2021 provides that the "[t]he 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".

(v) International Chamber of Commerce[51]

48 The ICC Rules 2021 stipulate that the ICC Court will determine the arbitrators' fee[52] according to the fee scale based on the sum in dispute, or where the sum is not stated, based on its discretion[53]. The ICC Court while setting the fees of the arbitrator(s) has to consider various factors like "the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award"[54]. The ICC Court is empowered to increase the fees if the arbitration has

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[48] "**ICDR**"
[49] Article 38(2), ICDR Rules 2021
[50] Article 38(2) of ICDR Rules 2021 provides: "As soon as practicable after the commencement of the arbitration, the Administrator shall designate an appropriate daily or hourly rate of compensation in consultation with the parties and all arbitrators, taking into account the arbitrators' stated rate of compensation and the size and complexity of the case".
[51] "**ICC**"
[52] Article 38(1) of the ICC Rules 2021 provides: "The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration." Article 38(2) provides: "The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case".
[53] Articles 2(1), Appendix III (Arbitration Costs and Fees), ICC Rules 2021
[54] Article 2(2), Appendix III (Arbitration Costs and Fees), ICC Rules 2021

been conducted expeditiously and reduce the fees if there has been a delay in pronouncing the award[55].

(vi) Singapore International Arbitration Centre[56]

49 The fees are fixed by the Registrar in accordance with the Schedule of Fees on basis of the amount in dispute[57]. The time spent on the matter and the complexity of the dispute are considered for the determination of fees[58]. The parties have the discretion to provide an alternative method of determining the fees prior to the constitution of the arbitral tribunal[59].

(vii) Hong Kong International Arbitration Centre[60]

50 The parties determine the arbitrators' fees based on either the sum in dispute or at an hourly rate[61]. If the fees are decided based on the sum in dispute, then the fees will be fixed on the basis of the guidelines and fee table

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[55] Paragraphs 118-22, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (2019)

[56] "**SIAC**"

[57] Rule 36(1) of SIAC Rules 2016 provides: The fees of the Tribunal shall be fixed by the Registrar in accordance with the applicable Schedule of Fees or, if applicable, with the method agreed by the parties pursuant to Rule 34.1, and the stage of the proceedings at which the arbitration concluded. In exceptional circumstances, the Registrar may determine that an additional fee over that prescribed in the applicable Schedule of Fees shall be paid".

[58] *Supra* at note 30

[59] Rule 34(1) of SIAC Rules 2016 provides: "The Tribunal's fees and SIAC's fees shall be ascertained in accordance with the Schedule of Fees in force at the time of commencement of the arbitration. The parties may agree to alternative methods of determining the Tribunal's fees prior to the constitution of the Tribunal".

[60] "**HKIAC**"

[61] Article 10.1 of HKIAC Rules 2018 provides: "The fees and expenses of the arbitral tribunal shall be determined according to either:
(a) an hourly rate in accordance with Schedule 2; or
(b) the schedule of fees based on the sum in dispute in accordance with Schedule 3.
The parties shall agree the method for determining the fees and expenses of the arbitral tribunal, and shall inform HKIAC of the applicable method within 30 days of the date on which the Respondent receives the Notice of Arbitration. If the parties fail to agree on the applicable method, the arbitral tribunal's fees and expenses shall be determined in accordance with Schedule 2".

provided in the Rules. If the fees are to be determined at 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[62].

(viii) International Centre for Settlement of Investment Disputes[63]

51 The Secretary General, with the approval of the Chair (Chairman of the Administrative Council), would determine and publish the fee and *per diem* allowance payable to each arbitrator(s) in terms of the Regulation 14 of the ICSID Administrative and Financial Regulations 2022[64]. The older 2006 version of the Regulations allowed the parties to contract out of the fee structure prescribed by ICSID[65].

(ix) Summary

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

[62] Article 10.2 of HKIAC Rules 2018 provides: "Where the fees of the arbitral tribunal are to be determined in accordance with Schedule 2,
(a) the applicable rate for each co-arbitrator shall be the rate agreed between that co-arbitrator and the designating party;
(b) the applicable rate for a sole or presiding arbitrator designated by the parties or the co-arbitrators, as applicable, shall be the rate agreed between that arbitrator and the parties, subject to paragraphs 9.3 to 9.5 of Schedule 2. Where the rate of an arbitrator is not agreed in accordance with Article 10.2(a) or (b), or where HKIAC appoints an arbitrator, HKIAC shall determine the rate of that arbitrator".

[63] "**ICSID**"

[64] Regulation 14 (2) states: "The Secretary-General, with the approval of the Chair, shall determine and publish the amount of the fee and the per diem allowance referred to in paragraph (1)(a) and (c). Any request by a member for a higher amount shall be made in writing through the Secretary-General, and not directly to the parties. Such a request must be made before the constitution of the Commission, Tribunal or Committee and shall justify the increase requested".

[65] Regulation 14 states: "(1) Unless otherwise agreed pursuant to Article 60(2) of the Convention, and in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of a Commission, a Tribunal or an ad hoc Committee appointed from the Panel of Arbitrators pursuant to Article 52(3) of the Convention (hereinafter referred to as "Committee") shall receive…"

itself. However, some arbitral institutions 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. ICDR allows determination of compensation by the Administrator in consultation with the arbitrator(s) and the parties. SIAC allows the parties to propose an alternative method of calculating fees prior to the constitution of the tribunal. HKIAC enables the parties to choose between remuneration based on the sum in dispute or hourly rates. Interestingly, UNCITRAL Rules 2013 allow greater control to the arbitrator(s) in determining their fees. However, the designated appointing authority or the Secretary General of the PCA can make adjustments to the fees proposed by the arbitrator(s). Thus, none of the international bodies (including arbitral institutions) confer an absolute or unilateral power to the arbitrator(s) to decide their own fees. Gary Born in his treatise on international commercial arbitration has noted that, "[a] number of other institutional rules also minimize the role of arbitrators in fixing the tribunal's fees. These rules typically fix the amount of the arbitrator's fees by reference to the amount in dispute"[66].

C.1.2 Position in other national jurisdictions

53 While it will not be possible to undertake a comprehensive review of all the foreign jurisdictions in respect of the legal regime governing the payment of remuneration to arbitrators, we have discussed a few jurisdictions that either

[66] *Supra* at note 30

have explicitly recognised an arbitrators' entitlement to remuneration and/or have dealt with the issue of arbitrators' power of fixing their own remuneration.

(i) England

54 The English courts have held that the arbitrator's rights and duties result from a conjunction of contract and status[67]. Upon accepting the appointment, the arbitrator becomes a party to the arbitration agreement, giving rise to a trilateral contract between the parties and the arbitrator[68]. However, the English courts acknowledge that certain aspects of the relationship between the arbitrator and parties are also influenced by the quasi-judicial status of the arbitrator, which requires the arbitrator to be independent of the parties[69].

55 Section 28 of the English Arbitration Act 1996[70] recognises the entitlement of an arbitrator to remuneration. This is a mandatory provision which cannot be derogated from[71]. Section 28(1) codifies the common law position[72] that parties are jointly and severally liable to pay reasonable fees and expenses to the arbitrator(s) as is appropriate in the circumstances. In terms of Section 28(5), the arbitrator(s) are entitled to be paid the fees and expenses agreed by them with the parties[73]. However, if there is no such agreement, the arbitral tribunal can

[67] **KS Norjarl AS** v. **Hyundai Heavy Indus. Co.**, [1992] 1 QB 863, 884
[68] **Compagnie Européenne de Céréales SA** v. **Tradax Exp. SA**, [1986] 2 Lloyd's Rep. 301 (QB)
[69] **Jivraj** v. **Hashwani**, [2011] UKSC 40
[70] "**English Arbitration Act**"
[71] Section 4(1) and Schedule 1 of the English Arbitration Act
[72] Loukas A Mistelis (ed), *Concise International Arbitration* (2nd edition, 2015), Chapter 23 ("**Mistelis on Arbitration**")
[73] Section 28(5) provides: "Nothing in this section affects any liability of a party to any other party to pay all or any of the costs of the arbitration (see sections 59 to 65) or any contractual right of an arbitrator to payment of his fees and expenses."

seek payment of such fees and expenses from one, some or all the parties[74]. The parties' liability to pay fees and expenses may be determined by courts. The court may consider factors like the standard fees of the arbitrator(s), the time invested, complexity of the dispute, and whether the procedures adopted by the tribunal were suitable[75].Section 33(1)(b) stipulates that it is the duty of the arbitral tribunal to adopt procedures that are suitable to the circumstances of the case and to avoid unnecessary delays or expenses, to provide a fair means for the resolution of the dispute. The court is also entitled to review the fees[76] determined by the arbitrator(s) or arbitral institution, which has not been contractually agreed to by the parties[77]. However, if the agreement with an arbitrator(s) or an arbitral institution is not clear regarding the terms of the payment, the court can intervene to review the fees, in order to examine if they are reasonable[78]. It is also important to note that where only one party has agreed to the fees and the fees have been held to be unreasonable, then the other party is only jointly and severally liable to pay the amount that the court has determined to be reasonable, but the first party may be liable contractually to pay the contractually agreed amount[79].

[74] *Supra* at note 72
[75] *ibid*
[76] Section 28(2) provides: "Any party may apply to the court (upon notice to the other parties and to the arbitrators) which may order that the amount of the arbitrators' fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct."
[77] **Hussmann (Europe) Ltd** v. **Al Ameen Development & Trade**, [2000] 2 Lloyd's Rep. 83. Queen's Bench Division (Commercial Court)), paragraphs 71-72
[78] *ibid*
[79] *Supra* at note 72

(ii) Italy

56 Article 814 of the Italian Code of Civil Procedure provides that the arbitrators have a right to expenses and the fees for the work done, unless they have waived this right at the time of acceptance or through a subsequent written statement. Article 814 also provides that the parties are jointly and severally liable for paying the fees and expenses of the arbitral proceedings, irrespective of how the arbitration costs are apportioned between them. If one party has made all the payments of the fees and expenses payable to the arbitrator(s), they are entitled to recover this amount from the other party subject to the limits set out in the award.

57 Article 814 also recognises that arbitrator(s) determine their own fees in the award and allocate the responsibility of the payment of such fees. However, such a determination is not binding unless the parties approve the fees proposed by the arbitrator(s). If the fees have not been paid, the arbitrator(s) can approach the President of the court in the district where the arbitration is seated for the determination of the fees. This order is enforceable against the parties[80]. The schedule of fees is provided in the Ministerial Decree issued by the Italian Ministry of Justice for domestic *ad hoc* arbitrations[81].

[80] CMS Expert Guides, "International Arbitration Law and Rules in Italy", available at <https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/italy> accessed on 29 June 2022; *See* also, Italian Code of Civil Procedure, available at <https://www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Italy-Arbitration-Law.pdf> accessed on 29 June 2022

[81] Cecilia Carrara, Stefano Parlatore, Daniele Geronzi et.al, *Arbitration Procedures and Practice in Italy*, available at <https://uk.practicallaw.thomsonreuters.com/6-383-9187?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a719112> accessed on 29 June 2022

(iii) Sweden

58 The arbitral tribunal is empowered to set its own fees unless there is an agreement between the parties[82]. Section 37(1) of the Swedish Arbitration Act[83] provides that the parties are jointly and severally liable to pay reasonable compensation to the arbitrator(s) for work and expenses. The Swedish Supreme Court has interpreted the words "reasonable compensation" to mean an assessment of time spent by the arbitrator(s) and the qualification of the arbitrator(s)[84]. The Swedish Supreme Court has also noted that a disproportionately high cost of arbitration compared to the value of sum in dispute does not necessarily require a reduction in the compensation[85].

59 Section 37 of the Swedish Arbitration Act is applicable "unless otherwise jointly decided by the parties in a manner that is binding upon the arbitrators". Commentators have thus noted that Section 37 is non-mandatory and can be altered or waived off by the parties[86]. However, it is understood that if the arbitrator(s) are not parties to an agreement with respect to their compensation, it becomes binding on the arbitrator(s) only if they are aware and understand the agreement when they accept the appointment[87]. Section 39 of the Swedish Arbitration Act further provides that an agreement regarding compensation to the arbitrator(s) which is not entered jointly by the parties is void.

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[82] Annette Magnusson, Jakob Ragnwaldh and Martin Wallin (eds), *International Arbitration in Sweden: A Practitioner's Guide* (2nd edition, 2021), Chapter 9
[83] The Swedish Arbitration Act (SFS 1999:116), available at <https://sccinstitute.se/media/1773096/the-swedish-arbitration-act_1march2019_eng-2.pdf> accessed on 29 June 2022
[84] *Supra* at note 82
[85] **NEMU Mitt i Sverige AB** v. **Jan H, Gunnar B and Bo N (the arbitrators)**, the Supreme Court, 22 October 1998, NJA 1998 p. 574 (T 105-98)
[86] *Supra* at note 82
[87] *ibid*

60 Section 41 enables a party or an arbitrator to file an application before the District Court regarding the amendment of the award with respect to the payment of compensation to the arbitrator(s). The District Court is empowered to reduce the compensation of the arbitrator(s). The national courts also have the power to revise the fees set by arbitral institutions, if the seat of the arbitration is in Sweden[88]. This is an unusual exception since typically rules of arbitral institutions setting the fees are never subject to judicial review[89].

(iv) Germany

61 The German arbitration law is governed by the Tenth Book of the Code of Civil Procedure (Zivilprozessordnung)[90]. In the absence of an agreement in *ad hoc* arbitrations, the ZPO does not contain any provision regulating the fees payable to arbitrator(s). Fees are then to be charged in terms of the rules of the German Civil Code (Bürgerliches Gesetzbuch)[91] depending on whether the contract between the parties is to be classified as a service contract or contract for work. The provisions of the BGB provide that remuneration for such contracts is deemed to be the fees of the arbitrator(s) in absence of an agreement between the parties[92].

62 However, in Germany, the arbitrator(s) are prohibited from determining their own fees in the absence of an agreement under the doctrine of prohibition of

[88] **Soyak Int'l Constr. & Inv. Inc.** v. **Hobér, Kraus & Melis**, Case No. O 4227-06 (Swedish S.Ct. 2008)
[89] *Supra* at note 30
[90] "**ZPO**"
[91] "**BGB**"
[92] K. Bockstiegel, Stefan Kröll and Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd edition, 2015), Chapter VI

in rem suam decisions, *i.e.*, arbitrators cannot be a judge of their own cause[93]. Earlier, even a decision regarding the sum in dispute by the arbitral tribunal was seen as indirectly determining the amount of fees when fees are calculated as a percentage of the amount at stake and thus, was considered to be a violation of the above doctrine[94]. However, recently, the Federal Court of Justice (Bundesgerichtshof)[95] held that a decision of the tribunal regarding the sum in dispute, even if it influences the fees payable to the arbitrator(s), does not violate the doctrine of prohibition of *in rem suam* decisions[96]*.* The BGH observed that since the ZPO obligates the arbitral tribunal to render a determination on costs, which often includes a determination regarding the sum in dispute, such a determination, even if it indirectly includes a decision on the fees, would not become a decision *in rem suam*[97]*.* The BGH further noted that while a determination of the sum in dispute only binds the parties, it is not actually a decision *in rem suam* from the arbitrators' perspective[98]. In any event, an indirect determination by the arbitrator(s) as to their own fees only forms the basis of an arbitrator's claim against a party and can be enforced only through court action if the party fails to pay the amount. In terms of the BGB, the courts can review such a claim to decide if it's equitable. Thus, the arbitrator(s) cannot determine their fees arbitrarily[99].

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[93] *ibid*
[94] *ibid*
[95] "**BGH**"
[96] BGH 28.03.2012, SchiedsVZ 2012, 154 cited in *supra* at note 30; *See* also, *supra* at note 92
[97] *ibid*
[98] *ibid*
[99] *ibid*

(v) Japan

63 Under Article 47(1) of the Japanese Arbitration Law[100], the fees payable to the arbitrator(s) are to be governed by the agreement between the parties. If there is no agreement, then in terms of Article 47(2), the arbitral tribunal has the power to determine the remuneration of the arbitrator(s). In such cases, the remuneration has to be of an appropriate amount.

(vi) Singapore

64 Section 40(1) of the Arbitration Act 2001[101] provides that the parties are jointly and severally liable to pay reasonable fees and expenses to the arbitrator(s) that are appropriate to the circumstances. Section 40(2) provides that in the absence of a written agreement between the parties as to the fees payable to the arbitrator(s), any party can approach the Registrar of the Supreme Court within the meaning of the Supreme Court of Judicature Act 1969 for the assessment of fees. While Section 41(1) of the Singapore Arbitration Act empowers the arbitral tribunal to refuse to deliver an award if the parties have not made full payment of their fees and expenses, Section 41(2) allows a party to apply to the court to review the fees[102]. This has been understood as the right of the parties to challenge unreasonable fees[103].

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[100] Law No 138 of 2003, available at <https://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf> accessed on 29 June 2022

[101] Available at <https://sso.agc.gov.sg/Act/AA2001#:~:text=1.,is%20the%20Arbitration%20Act%202001.&text=the%20arbitral%20tribunal%20as%20authorised,and%20all%20the%20relevant%20circumstances> accessed on 29 June 2022 ("**Singapore Arbitration Act**")

[102] Section 41(2) reads: "(2) Where subsection (1) applies, a party to the arbitral proceedings may, upon notice to the other parties and the arbitral tribunal, apply to the Court, which may order that —

(vii) United States

65 The United States Federal Arbitration Act 1925[104] does not explicitly make a reference to the rights or duties of the arbitrator(s). The Uniform Arbitration Act, enacted in 1955, is also of relevance. It functions as a model arbitration statute to enable each state to adopt a uniform arbitration law. It was revised in 2000. Section 21(d) of the revised version of the Act provides that "an arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award." The comment to this Section under the Act provides that "Section 21(d)… allows arbitrators, unless the agreement provides to the contrary, to determine in the award payment of expenses, including the arbitrator's expenses and fees"[105]. In the United States, it has been held that it is a violation of public policy if the arbitrator(s) attempt to renegotiate the fees at a later stage once they are appointed, owing to the concern that the parties may be compelled to accede to the demand fearing adverse consequences[106].

(a) the arbitral tribunal must deliver the award upon payment into Court by the applicant of the fees and expenses demanded, or any lesser amount that the Court may specify;
(b) the amount of the fees and expenses demanded are to be assessed by the Registrar of the Supreme Court; and
(c) out of the money paid into Court, the arbitral tribunal must be paid the fees and expenses that may be found to be properly payable and the balance of the money (if any) must be paid out to the applicant".

[103] Bernard Hanotiau and Alexis Mourre (eds), *Players Interaction in International Arbitration* (ICC, 2012), Chapter 12

[104] "**FAA**"

[105] Uniform Arbitration Act (Last Revisions Completed Year 2000), available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8fff228f-9517-f310-36a1-989efa4a826e&forceDialog=0> accessed on 29 June 2022

[106] **Double-M Construction Corp.** v. **Central School District No 1 Town of Highlands Orange County,** (1978) 402 NYS 2d 442 cited in Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Walters Kluwer, 2012)

(viii) Summary

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

(i) 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 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.

C.2 Statutory scheme on payment of fees to arbitrators in India

C.2.1 Party autonomy

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. **Redfern and Hunter on International Commercial Arbitration** (supra) compares arbitration to a ship, highlighting the extent of control parties exercise over arbitral proceedings:

> "In some respects, an international arbitration is like a ship. An arbitration may be said to be 'owned' by the parties, just as a ship is owned by shipowners. But the ship is under the day-to-day command of the captain, to whom the owners hand control. The owners may dismiss the captain if they wish and hire a replacement, but there will always be someone on board who is in command (5) —and, behind the captain, there will always be someone with ultimate control."

The leading treatise on international commercial arbitration further notes that the principle of party autonomy is entrenched in the international and national regimes on arbitration:

> "Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law. The legislative history of the Model Law shows that the principle was adopted without opposition, (7) and Article 19(1) of the Model Law itself provides that: 'Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.' This principle follows Article 2 of the 1923 Geneva Protocol, which provides that '[t]he arbitral procedure, including the

> constitution of the arbitral tribunal, shall be governed by the will of the parties …', and Article V(1)(d) of the New York Convention, under which recognition and enforcement of a foreign arbitral award may be refused if 'the arbitral procedure was not in accordance with the agreement of the parties'."

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. Several provisions of the Arbitration Act explicitly embody the principle of party autonomy. Section 2(6)[107] of the Arbitration Act provides that parties have the freedom to authorise any person, including an arbitral institution, to determine the issue between them. Section 19(2)[108] provides that the parties are free to choose the procedure to be followed for the conduct of arbitral proceedings. Section 11(2)[109] provides that parties are free to decide on the procedure for the appointment of arbitrators. In **Bharat Aluminium Co.** v. **Kaiser Aluminium Technical Services**[110], this Court observed that party autonomy is the "brooding and guiding spirit" of arbitration. In **Centrotrade Minerals & Metal Inc.** v. **Hindustan Copper Ltd**[111], this Court referred to party autonomy as the backbone of arbitration.

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.

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[107] Section 2 (6) of the Arbitration Act states: "Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue".
[108] Section 19(2) of the Arbitration Act states: "Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings".
[109] Section 11(2) of the Arbitration Act states: "Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators".
[110] (2016) 4 SCC 126, paragraph 5
[111] (2017) 2 SCC 228, paragraph 38

C.2.2 Fourth Schedule and regulation of arbitrators' fees

71 Appointment of arbitrator(s) in India may take place either through an agreement between parties or by taking recourse to courts under Sections 11(3) and 11(6) of the Arbitration Act. Prior to the amendment of the Arbitration Act by the Arbitration Amendment Act 2015, a practice emerged, especially in cases of *ad hoc* arbitrations, where arbitrators would unilaterally, and in some cases arbitrarily, fix excessive fees for themselves. In **Singh Builders** (supra), this Court noted that such arbitrary fixation of fees by the arbitrators, specifically court-appointed arbitrators, has made arbitration an expensive proposition, bringing it into disrepute. The Court suggested some possible solutions. This Court observed:

> "22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, which is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party which readily agreed to pay the high fee.
>
> 23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the arbitrators' fees is not fixed by the arbitrators themselves on case-to-case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an arbitrator

> whose fees are in their "range" having regard to the stakes involved.
>
> 24. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such arbitrator. It is unfortunate that delays, high costs, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high costs are two areas where the arbitrators by self-regulation can bring about marked improvement."

72 In **Sanjeev Kumar Jain** v. **Raghubir Saran Charitable Trust and Ors.**[112], this Court in a similar vein observed that arbitrators in *ad hoc* arbitrations in India are charging disproportionately high fees. While interpreting Section 11 of the Arbitration Act, this Court held that the word "appointment" does not merely refer to nominating or designating a person to act as an arbitrator, but it includes the court's power to stipulate the fees that can be charged by an arbitrator appointed by the court. The fees should be stipulated after hearing the parties and, if required, after ascertaining the fees structure from prospective arbitrators. This will avoid a situation where parties have to negotiate the terms of the fees of the arbitrators, after their appointment. Referring to **Singh Builders** (supra), this Court acknowledged the increased complaints against disproportionate fees being charged by the arbitrators and made certain suggestions for the healthy development of arbitration in India. One such remedy suggested by this Court was disclosure of the fee structure prior to the appointment of arbitrators to enable any party to express their unwillingness to bear such expenses. This Court observed thus:

[112] (2012) 1 SCC 455

"41. There is a general feeling among the consumers of arbitration (parties settling disputes by arbitration) that ad hoc arbitrations in India—either international or domestic, are time consuming and disproportionately expensive. Frequent complaints are made about two sessions in a day being treated as two hearings for the purpose of charging fee; or about a session of two hours being treated as full session for purposes of fee; or about non-productive sittings being treated as fully chargeable hearings. It is pointed out that if there is an Arbitral Tribunal with three arbitrators and if the arbitrators are from different cities and the arbitrations are to be held and the arbitrators are accommodated in five star hotels, the cost per hearing (arbitrator's fee, lawyer's fee, cost of travel, cost of accommodation, etc.) may easily run into rupees one million to one-and-half million per sitting. Where the stakes are very high, that kind of expenditure is not commented upon. But if the number of hearings become too many, the cost factor and efficiency/effectiveness factor is commented. That is why this Court in Singh Builders Syndicate [(2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246] observed that the arbitration will have to be saved from the arbitration cost.

42. Though what is stated above about arbitrations in India, may appear rather harsh, or as a universalisation of stray aberrations, we have ventured to refer to these aspects in the interest of ensuring that arbitration survives in India as an effective alternative forum for disputes resolution in India. Examples are not wanting where arbitrations are being shifted to neighbouring Singapore, Kuala Lumpur, etc. on the ground that more professionalised or institutionalised arbitrations, which get concluded expeditiously at a lesser cost, are available there. The remedy for healthy development of arbitration in India is to disclose the fees structure before the appointment of arbitrators so that any party who is unwilling to bear such expenses can express his unwillingness. Another remedy is institutional arbitration where the arbitrator's fee is prefixed. The third is for each High Court to have a scale of arbitrator's fee suitably calibrated with reference to the amount involved in the dispute. This will also avoid different designates prescribing different fee structures. By these methods, there may be a reasonable check on the fees and the cost of arbitration, thereby making arbitration, both national and international, attractive to the litigant public. Reasonableness and certainty about total costs are the key to the development of arbitration. Be that as it may."

73 It was in the above context that the **LCI 246th Report** (supra) proposed reforms for regulating arbitrators' fees in *ad hoc* arbitrations. The Commission recommended that a model schedule of fees should be inserted into the Arbitration Act, which was to serve as a guide for High Courts to frame their own rules governing the fixation of arbitrators' fees. The Commission accepted that different values and standard of fees may be adopted in international commercial arbitrations, which led to the exclusion of the applicability of the Fourth Schedule to the Arbitration Act to international commercial arbitrations. The Commission adversely commented on the practice of charging fees on "per sitting" basis in *ad hoc* arbitrations where sometimes there are 2-3 sittings in a day in the same matter between the same parties. The Commission also noted that costs are further increased by continuation of proceedings for years since dates are given with significant gaps, resulting in the denial of timely delivery of justice to the aggrieved party.

74 The Arbitration Amendment Act 2015 introduced the Fourth Schedule to the Arbitration Act as a model schedule of fees in terms of the recommendations of the **LCI 246th Report** (supra). The Fourth Schedule came into effect on 23 October 2015. Section 11 of the Arbitration Act was also accordingly amended to add sub-Section (14) to Section 11, which reads as follows:

> "**Section 11. Appointment of arbitrators**
>
> […]
>
> (14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

> Explanation: For the removal of doubts, it is hereby clarified that this subsection shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution."

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.

75 A dispute arose before the Delhi High Court regarding the applicability of the Fourth Schedule to the arbitration agreement in a situation where the fee payable to the arbitrator(s) has already been stipulated in the arbitration agreement. In **Gammon Engineers and Contractors Pvt. Ltd.** v. **NHAI**[113], the fee schedule was fixed by the parties in accordance with a policy decision of the National Highways Authority of India dated 31 May 2004. However, the arbitral

[113] 2018 SCC OnLine Del 10183 ("**Gammon**")

tribunal decided that its fees will be regulated in terms of the Fourth Schedule introduced through the Arbitration Amendment Act 2015 by observing that the latest provisions in the amended Act empower it to unilaterally determine its own fees, irrespective of the agreement between the parties. NHAI moved an application under Section 14 of the Arbitration Act to terminate the mandate of the arbitral tribunal since it had wilfully rejected the agreement between the parties. A Single Judge of the Delhi High Court held that since there was an agreement between the parties regarding the fixation of fees, the Fourth Schedule will not be applicable. The Single Judge further held that while Section 31A of the Arbitration Act discusses different aspects of "costs" to be fixed by the arbitral tribunal while passing an award, it is only one of the aspects to be considered by the tribunal for determining costs payable by one party to another. The words "unless otherwise agreed by the parties" were omitted from Section 31(8) of the Arbitration Act (as amended by the Arbitration Amendment Act 2015) to ensure that parties cannot contract out of paying costs and denude the ability of the tribunal to award costs in favour of the successful party. The Single Judge, thus, terminated the mandate of the arbitral tribunal since it wilfully ignored the agreement between the parties. In doing so, the Single Judge disagreed with the view of another Single Judge of the Delhi High Court in **NHAI** v. **Gayatri Jhansi Roadways Ltd.**[114].

76 In **Gayatri Jhansi (Delhi High Court)** (supra), it was held that Section 31(8) and Section 31A of the Arbitration Act govern the determination of fees and since the expression "unless otherwise agreed by the parties" has been removed

[114] 2017 SCC OnLine Del 10285 ("**Gayatri Jhansi (Delhi High Court)**")

from Section 31(8) by the Arbitration Amendment Act 2015, the power of the parties to fix the arbitrators' fees has been specifically taken away except in international commercial arbitrations and arbitrations where parties have agreed that the fees will be fixed under the rules of an arbitral institution. Thus, in **Gayatri Jhansi (Delhi High Court)** (supra), the arbitral tribunal was allowed to fix its fees according to the Fourth Schedule *dehors* the agreement between the parties.

77 The appeals against both the judgements of the Delhi High Court were heard by this Court in **Gayatri Jhansi Roadways Ltd** (supra), where a two-Judge Bench of this Court was called upon to determine the applicability of the Fourth Schedule when the arbitrators' fee has been fixed by an agreement between the parties. This Court held that Section 31(8) read with Section 31A will not be applicable if the fees of the arbitrator(s) have been fixed by an agreement. This Court upheld the observations of the Single Judge of the Delhi High Court in **Gammon** (supra) in this regard. Justice Rohinton F Nariman, speaking for the Bench, observed as follows:

> "14. However, the learned Single Judge's conclusion that the change in language of Section 31(8) read with Section 31-A which deals only with the costs generally and not with arbitrator's fees is correct in law. It is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that Sections 31(8) and 31-A would directly govern contracts in which a fee structure has already been laid down. To this extent, the learned Single Judge is correct. We may also state that the declaration of law by the learned Single Judge in Gayatri Jhansi Roadways Ltd. [NHAI v. Gayatri Jhansi Roadways Ltd., 2017 SCC OnLine Del 10285] is not a correct view of the law."

However, this Court observed that the fee schedule contained in NHAI's circular dated 1 June 2017 would substitute the earlier schedule and the arbitrators would

be entitled to charge their fees in accordance with the updated fee schedule, but not in terms of the Fourth Schedule to the Arbitration Act. This Court further observed that the mandate of the arbitral tribunal in **Gammon** (supra) should not be terminated since the arbitrator(s) had merely followed the law which had been laid down in **Gayatri Jhansi (Delhi High Court)** (supra).

78 The Arbitration Amendment Act 2019 was introduced on the basis of the report of High Level Committee dated 30 July 2017 for promoting institutional arbitration. Sub-Section 11(14) has been subsequently amended by the Arbitration Amendment Act 2019. The amended sub-Section (14) to Section 11 provides thus:

> "**Section 11. Appointment of arbitrators**
>
> […]
>
> (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) in case where parties have agreed for determination of fees as per the rules of an arbitral institution."

Further, sub-Section (3A) has been introduced to Section 11, which stipulates thus:

> "**Section 11. Appointment of arbitrators**
>
> […]
>
> (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."

The amendments introduced to Section 11 by the Arbitration Amendment Act 2019 came into force on 30 August 2019. However, even after a lapse of three years, the Arbitration Council has not been established in accordance with Part IA of the Arbitration Amendment Act 2019. In the absence of the Arbitration Council of India, graded arbitral institutions for the purpose of implementing amendments to Section 11 are yet to come into existence. While several High Courts have taken concerted steps to establish and refer matters to court adjunct arbitration centres, *ad hoc* arbitrations continue to hold the field since the amendments made by the Arbitration Amendment Act 2019 have been non-starters. . However, the amendments indicate the legislative intent that going forward, the fixation of fees of arbitrator(s) would be carried out by an arbitral institution designated for such purpose in terms of sub-Section (14) of Section 11. Further, there is one notable difference between the sub-Section (14) as it stood before the amendment and after, in terms of the applicability of the Fourth Schedule. Earlier, the rates specified in the Fourth Schedule were only to be taken into consideration by the High Court while framing the rules relating to the fixation of fees. However, now the provision reads that, "[t]he 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". There are two exceptions to this – Section 11(14) is not applicable to international commercial arbitrations and to a situation where the parties have agreed to determine fees in terms of the rules of an arbitral institution as stipulated in the Explanation to Section 11(14). It is important to note that the newly introduced Section 11(3A) provides that the Supreme Court and the High Courts shall have the power to designate arbitral institutions from time to time, which have been graded by the Arbitration Council of India under Section 43(1) of the Arbitration Act. The first proviso to sub-Section (3A) to Section 11 provides that in those jurisdictions of High Courts where there are no graded arbitral institutions available, the Chief Justice of the High Court may maintain a panel of arbitrators for discharging the functions and duties of an arbitral institution. In terms of the first proviso, the reference to such an arbitrator would be deemed to be reference to an arbitral institution for the purpose of Section 11 and arbitrator appointed by a party is entitled to such fee at the rate as specified in the Fourth Schedule. A harmonious reading of the first proviso to sub-Section (3A) of Section 11 and sub-Section (14) of Section 11 indicate that the Fourth Schedule shall have a mandatory effect on the stipulation of fees for arbitrator(s) appointed by arbitral institutions designated for such purpose in terms of Section 11 of the Arbitration Act in the absence of an arbitration agreement governing the fee structure.

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.

C.2.3 Costs and fees: Two different paradigms

80 Prior to the Arbitration Amendment Act 2015, Section 31(8) governing the determination of costs of arbitration by the arbitral tribunal read thus:

> "**Section 31. Form and contents of arbitral award**
>
> […]
>
> (8) Unless otherwise agreed by the parties:-
>
> (a) the costs of an arbitration shall be fixed by the arbitral tribunal;
>
> (b) the arbitral tribunal shall specify--
>
> (i) the party entitled to costs,
>
> (ii) the party who shall pay the costs,
>
> (iii) the amount of costs or method of determining that amount, and
>
> (iv) the manner in which the costs shall be paid.
>
> Explanation.---For the purpose of clause (a), "costs" means reasonable costs relating to-
>
> (i) the fees and expenses of the arbitrators 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 proceedings and the arbitral award."

The unamended sub-Section (8) of Section 31 enabled the arbitral tribunal to fix the costs, unless otherwise agreed by the parties. The term "costs" meant "reasonable costs" relating *inter alia* to the fees and expenses payable to the arbitrators and witnesses, in terms of the Explanation to Section 31(8). The **LCI 246th Report** (supra) had recommended the recognition of the "loser pays" principle for costs to reflect the relative success and failure of the parties. The

Law Commission noted that the “loser pays” principle serves as a deterrent against frivolous invocation of disputes and incentivises contractual compliance.

81 Pursuant to the **LCI 246th Report** (supra), the Arbitration Amendment Act 2015 deleted the phrase “unless otherwise agreed by the parties” from sub-Section 31(8) and the arbitral tribunal was given the power to fix costs in terms of Section 31A of the Arbitration Act. The amended Section 31(8) reads thus:

> “**Section 31. Form and contents of arbitral award**
>
> [...]
>
> (8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.”

Section 31A of the Arbitration Act stipulates thus:

> “**31A. Regime for costs**
>
> (1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine--
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of such costs; and
>
> (c) when such costs are to be paid.
>
> Explanation.--For the purpose of this sub-section, "costs" means reasonable costs relating to--
>
> (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.

> (2) If the Court or arbitral tribunal decides to make an order as to payment of costs,--
>
> (a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or
>
> (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.
>
> (3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including--
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded partly in the case;
>
> (c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and
>
> (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.
>
> (4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay--
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only;
>
> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) costs relating only to a distinct part of the proceedings; and
>
> (g) interest on costs from or until a certain date.
>
> (5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen."

Section 31A provides that the arbitral tribunal or the court has the discretion to determine costs of arbitration which includes, *inter alia*, reasonable costs relating to the fees and expenses of the arbitrators, courts and witnesses. Sub-Section (5) of Section 31A specifies that an agreement between parties apportioning

costs is only valid if it is made after the dispute has arisen. The provision has an effect of limiting party autonomy when an agreement regarding apportioning of costs can be entered between the parties. However, it does not completely efface the principle of party autonomy.

82 Section 38 of the Arbitration Act also becomes relevant since it enables the arbitral tribunal to demand an advance for costs in the form of deposits. The provision reads thus:

> "**Section 38 - Deposits**
>
> (1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:
>
> Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.
>
> (2) The deposit referred to in sub-section(1) shall be payable in equal shares by the parties:
>
> Provided that where one party fails to pay his share of the deposit, the other party may pay that share:
>
> Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.
>
> (3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be."

Section 38(1) of the Arbitration Act empowers the arbitral tribunal to determine the deposit that is payable as advance on costs based on its own assessment of what may be incurred as costs for adjudicating the claim and counter-claim (if

any) before it. Section 38(2) also empowers the arbitral tribunal to suspend or terminate the proceedings if the parties fail to pay the deposit.

83 Additionally, Section 39(1) enables the arbitral tribunal to hold a lien on an arbitral award if there are any unpaid costs of arbitration. Section 39 of the Arbitration Act provides thus:

> "**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, in 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."

84 The legal regime on costs under the Arbitration Act has been set out in some detail above because it has been argued on behalf of the respondents that the arbitral tribunal's power to fix costs under Section 31(8) read with 31A entails the power to fix arbitrators' fees, which are also a component of the costs in

terms of the Explanation to Section 31A. According to the respondents, this position is bolstered by the fact that the arbitral tribunal has the power to fix the amount of deposit that is payable as an advance on costs and it can also hold a lien on the arbitral award if such costs remain unpaid.

85 In **Gayatri Jhansi Roadways Ltd** (supra), this Court held:

> "14. However, the learned Single Judge's conclusion that the change in language of section 31(8) read with Section 31A which deals only with the costs generally and not with arbitrator's fees is correct in law. It is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that section 31(8) and 31A **would directly govern contracts in which a fee structure has already been laid down**…"

86 The above interpretation of this Court is in harmony with the observations of the Law Commission in the **LCI 246th Report** (supra) where it had recommended changes to the regime of costs only to provide a statutory recognition to the "loser pays" principle. The Report contained the following observations:

> "70. Arbitration, much like traditional adversarial dispute resolution, can be an expensive proposition. The savings of a party in avoiding payment of court fee, is usually offset by the other costs of arbitration – which include arbitrator's fees and expenses, institutional fees and expenses, fees and expenses in relation to lawyers, witnesses, venue, hearings etc. The potential for racking up significant costs justify a need for predictability and clarity in the rules relating to apportionment and recovery of such costs. The Commission believes that, as a rule, it is just to allocate costs in a manner which reflects the parties' relative success and failure in the arbitration, unless special circumstances warrant an exception or the parties otherwise agree (only after the dispute has arisen between them).
>
> 71.The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a

> particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations."

The Law Commission was seeking to regulate how costs are apportioned and recovered between parties by suggesting amendments to the legal framework on costs. The same **LCI 246th Report** (supra) dealt with redressing the issue of exorbitant fees being charged by arbitrators and recommended the introduction of a model schedule of fees, based on which High Courts could frame rules on fixing fees, to decrease the control arbitrators have over fixing their own fees. Hence, it is evident that the Law Commission understood that the issue of arbitrators' fees is independent of the issue of allocation of costs. The **LCI 246th Report** (supra) was attempting to address the concern of arbitrary and unilateral fixation of fees by the arbitrators. The interpretation suggested by the respondents, that while allocating costs the arbitral tribunal can enter into a fresh and unilateral determination of fees, would be contrary to what the Law Commission sought to achieve by recommending the regulation of fees charged by arbitrators.

87 The concepts of costs and fees in arbitration must be distinguished. Fees constitute compensation or remuneration payable to the arbitrators for their service. Arbitrators are entitled to "financial remuneration by the parties in return for performance of his or her mandate"[115]. While the national laws governing arbitration give a *quasi-judicial* status to arbitrators where they have to be impartial adjudicators, many aspects of the relationship between the parties and

[115] *Supra* at note 30

arbitrators are contractual in nature[116]. Without acknowledging the contractual nature of the relationship, there is no satisfactory explanation for the parties' right to appoint arbitrator(s) (and the corresponding right of the arbitrator(s) to decline such appointment), arbitrators' remuneration, arbitrators' duty to conduct arbitration in terms of the arbitration agreement (independently of the requirement of fairness and equality) and the parties' right to jointly remove arbitrator(s)[117]. In **Voestalpine Schienen GmbH** v. **Delhi Metro Rail Corpn. Ltd.**[118], this Court, while holding that the arbitrator has to act impartially and independently, recognised the contractual nature of the relationship between the parties and arbitrator(s) in the following extract:

> "20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. **It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties**. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

[116] *ibid*
[117] *ibid*
[118] (2017) 4 SCC 665

> "45. … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."
>
> (**emphasis supplied**)

88 The relationship between parties and arbitrator(s) is contractual in nature. Upon that relationship, the law superimposes a duty upon the arbitrator(s) to act as an impartial and independent adjudicator. The principle of party autonomy plays a substantial role in the determination of arbitrators' fees. We have noted in **Section C.1** of this judgement that party autonomy plays a central role in the determination of arbitrators' fees in the rules of international arbitral institutions and domestic legislation of other countries. Aside from institutional arbitration, arbitrators' fees in *ad hoc* arbitration are arrived at through negotiations between the parties and the arbitrator(s)[119]. The primacy of parties' agreement in determination of arbitrators' fees was also reaffirmed by this Court in **Gayatri Jhansi Roadways Ltd** (supra). However, there may be instances where the parties have not entered into any agreement with respect to the fees. In *ad hoc* arbitrations this leads to a peculiar situation where it has to be determined who will fix the fees in such circumstances. While certain foreign jurisdictions enable the arbitral tribunal to fix the fees typically subject to review by courts, there are jurisdictions which continue to give value to parties' consent in determining renumeration for arbitrators. As discussed above in **Section C.1**, in certain jurisdictions like Germany, arbitrators are prohibited from unilaterally fixing their

[119] *Supra* at note 28

fees because it violates the doctrine of the prohibition of *in rem suam* decisions, *i.e.,* arbitrators cannot give an enforceable ruling on their own fees. Austria and Switzerland also do not allow arbitrators to issue binding and enforceable orders regarding fixation of their own fees[120]. In Italy, while the arbitrators can determine fees in absence of an agreement between parties, such fees become binding only once the parties' consent to it. In Singapore, in absence of a written agreement, a party may approach the Registrar of the Supreme Court within the meaning of the Supreme Court of Judicature Act 1969 for the assessment of fees.

89 In contrast, costs are typically compensation payable by the losing party to the winning party for the expenses the latter incurred by participating in the proceedings[121]. In **Salem Advocate Bar Assn. (II)** v. **Union of India**[122], this Court has defined costs in a similar manner in the context of litigation:

> "37. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that **the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording**

[120] Michael Wietzorek, "Chapter II: The Arbitrator and the Arbitration Procedure: May Arbitrators Determine their own Fees?" in Christian Klausegger, Peter Klein, et al (eds), *Austrian Yearbook on International Arbitration 2012, Austrian Yearbook on International Arbitration, Volume 2012* (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung, 2012).

[121] John Y. Gotanda, "Part I: International Commercial Arbitration, Chapter 7: Bringing Efficiency to the Awarding of Fees and Costs in International Arbitrations", in Stefan M. Kröll, Loukas A. Mistelis, et al. (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011)

[122] (2005) 6 SCC 344

> **reasons therefore. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation**. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow."
>
> (**emphasis supplied**)

90 The principle of the payment of "costs" remains the same in litigation and arbitration even though the form of expenses may vary. **Redfern and Hunter on International Commercial Arbitration** (supra) has classified the various components of costs under the following headings[123]:

> "•'costs of the tribunal' (including the charges for administration of the arbitration by any arbitral institution);
>
> •'costs of the arbitration' (including hiring the hearing rooms, interpreters, transcript preparation, among other things); and
>
> •'costs of the parties' (including the costs of legal representation, expert witnesses, witness and other travel-related expenditure, among other things)."

The first category of "costs of the tribunal" includes the fees, travel-related and other expenses, payable to the arbitrators. However, this category also includes fees and expenses relating to the experts appointed by the tribunal, administrative secretary or registrar and other incidental expenses incurred by the tribunal in respect of the case[124]. Fees of arbitrators constitute a component of the diverse elements which make up the costs that are payable by one party to another. The purpose of awarding costs is to "indemnify the winning party". The

[123] *Supra* at note 28, Chapter 9
[124] *ibid*

"loser pays" principle apportions the costs between the parties through the costs follow the event[125] method. The primary purpose of the CFE method is to "make the claimant whole"[126]. The CFE method has been statutorily recognised in some national legislations. The English Arbitration Act provides that "unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that this principle is not appropriate in relation to whole or part of the costs"[127]. Since costs are typically awarded at the conclusion of the proceedings on the basis of the relative success or failure of parties, an award of costs forms a part of the final award. However, interim awards or rulings on costs may also be issued. Most international arbitral institutions give arbitral tribunals the discretion to allocate costs unless there is an agreement between the parties regarding the apportionment of costs. It has been noted that the "loser pays" principle is a common approach[128] followed for awarding costs[129]. The UNCITRAL Rules, while providing that costs of arbitration shall be "borne by the unsuccessful party" as a general principle, allow the arbitral tribunal to take the ultimate decision[130]. The LCIA Rules allow the arbitral tribunal to depart from the general principle "in circumstances (in which) the application of such a general principle would be inappropriate"[131]. The Arbitration Act also provides statutory recognition to the

[125] "**CFE**"
[126] *Supra* at note 121
[127] Section 61(2), English Arbitration Act
[128] There are some institution rules which do not prescribe a general rule and leave the apportionment of the costs to the arbitral tribunal. The ICDR (Art. 34) and HKIAC (34.3) require the tribunal to carry out a reasonable apportionment of costs. The ICC Rules (Art. 38(5) and SIAC Rules (Art. 35) leave the apportionment of costs upto the discretion of the tribunal.
[129] Arif Hyder Ali, Jane Wessel, et al. (eds), *The International Arbitration Rulebook: A Guide to Arbitral Regimes* (Kluwer Law International, 2019), Chapter 8
[130] Article 42(1), UNCITRAL Rules
[131] Article 28(4), LCIA Rules

principle of "loser pays" in Section 31A (2)[132] as the general principle of allocating costs, which can be derogated from at the discretion of the tribunal provided it records its reasons in writing. Further, the Arbitration Act seeks to limit the ability of parties to contractually allocate fees by specifying in Section 31A(5) that such an agreement will only be valid "if such agreement is made after the dispute in question has arisen". The intention of the legislature to limit party autonomy in allocation of costs is also evident from the deletion of the phrase "unless otherwise agreed by the parties" from Section 31(8) through the Amendment Act 2015.

91 We can see that the functional role of costs and fees is different. While fees represent the payment of remuneration to the arbitrators, costs refer to all the expenses incurred in relation to arbitration that are to be allocated between the parties upon the assessment of certain parameters by the arbitral tribunal or the court. Section 31A(3) provides that an arbitral tribunal or the court has to take into account the following factors for determining costs:

> "(a) the conduct of all the parties;
>
> (b) whether a party has succeeded partly in the case;
>
> (c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and
>
> (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party."

[132] Section 31A(2) provides:
"(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,--
(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or
(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing."

This is accompanied by the general rule under Section 31A(2) that the unsuccessful party has to bear the costs of arbitration.

92 Another way to understand the difference between costs and fees is to distinguish between the nature of the claim that both reflect. **Redfern and Hunter on International Commercial Arbitration** (supra) discusses costs in Chapter 9, titled "Awards". It states that "[a] claim in respect of the costs incurred by a party in connection with an international arbitration is, in principle, no different from any other claim, except that it usually cannot be quantified until the end of the arbitral proceedings"[133]. The decision of an arbitral tribunal ordering one party to pay arbitration costs is considered as an "award" within the meaning of the New York Convention and UNCITRAL Model Law since the decision resolves a claim one party has towards another in respect to the entitlement of being repaid by the other party for expenses incurred during arbitration[134]. **Gary Born on Arbitration** (supra) specifically notes the difference between costs and fees, and states that any decision of the arbitral tribunal relating to payment of fees to the members of the tribunal is not considered an award since it does not resolve a claim between the parties; rather it resolves a claim between the arbitrator(s) against the parties[135]. The Swiss Federal Tribunal has observed in this context that[136]:

> "[A]ccording to the majority of legal writing the arbitral tribunal has no authority to issue an enforceable decision as to the fees it may derive from the arbitration agreement (receptum arbitri). This is because claims resulting from the relationship between the arbitral tribunal and the parties do not fall within the arbitration clause; also because this would be an unacceptable decision in one's own case. The decision on

[133] *Supra* at note 123
[134] *Supra* at note 30, Chapter 23
[135] *ibid*
[136] Judgment of 10 November 2010, DFT 136 III 597, 603 cited in *ibid*

> costs in an arbitral award is therefore nothing else as a rendering of account which does not bind the parties or a circumscription of the arbitrators' private law claim based on the arbitration agreement on which in case of dispute the State Court will have to decide."

The German arbitration law also takes the above position, where a portion of the award relating to costs of arbitration was denied enforcement as arbitrators are prohibited from fixing their own fees and costs, except when there is an agreement between the parties and arbitrators[137].

93 Since fees of the arbitrators are not a claim that needs to be quantified at the end of the proceedings based, *inter alia*, on the conduct of parties and outcome of the proceedings, they can be determined at the stage when the arbitral tribunal is being constituted. **Redfern and Hunter on International Commercial Arbitration** (supra) discusses the concept of fees of arbitrators in Chapter 4, titled "Establishment and Organisation of an Arbitral Tribunal", indicating that fees have to be determined much earlier at the inception of the proceedings. In fact, the commentary states that in *ad hoc* arbitrations, "it is necessary for the parties to make their own arrangements with the arbitrators as to their fees. The arbitrators should do this at an early stage in the proceedings, in order to avoid misunderstandings later"[138].

94 It has been argued on behalf of the respondents that the power of arbitrator(s) under Section 38(1) of the Arbitration Act to demand a deposit as an advance on costs "which it expects will be incurred" in relation to the claim and

[137] Judgment of 24 October 2008, XXXIV Y.B. Comm. Arb. 533 (Oberlandesgericht Frankfurt) (2009) cited in *supra* at note 123
[138] *Supra* at note 28

counterclaim (if any) indicates that the tribunal is entitled to determine its own fees. If such a deposit is not paid, the tribunal can suspend or terminate the proceedings under Section 38(2) of the Arbitration Act. It can also hold a lien on the award if the costs of arbitration remain unpaid under Section 39(1) of the Arbitration Act.

95 **Gary Born on Arbitration** (supra) explains the concept of an advance on costs or deposits in the following terms[139]:

> "Once the arbitral tribunal is in place, the parties are generally required to provide security for the fees and costs of the arbitrators. Most institutional arbitration rules contain express provisions for payment by the parties of an advance on costs (or deposit), and arbitrators often have the power under national law to require payment of an advance even absent express provision to that effect in either the arbitration agreement or institutional rules.
>
> The amount of the advance on costs is based upon the expected total amount of fees and expenses of the arbitrators and institutional administrative costs. If the parties do not pay the advance, the arbitration will not go forward; if one party fails to make payment, the other may do so on its behalf, so that the arbitration will proceed, hopefully to conclude with a decision in its favor, in which the prevailing party will be awarded (among other things) reimbursement of the amounts it advanced on behalf of its counter-party."

The above extract and Section 38[140] of the Arbitration Act indicate that the purpose of demanding a deposit is to simply secure the future expenses or the

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[139] *Supra* at note 30, Chapter 15

[140] "**Section 38 - Deposits**
(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:
Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.
(2) The deposit referred to in sub-section(1) shall be payable in equal shares by the parties:
Provided that where one party fails to pay his share of the deposit, the other party may pay that share:
Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

"costs" relating to the arbitration, including arbitrators' fees. The arbitrator(s) may resign or cease their work until such payment is made. This principle cannot be extended to establish that the arbitrator(s) have a unilateral power to fix their own fees while demanding a deposit. The arbitral tribunal can also ask for a supplementary deposit, which indicates that the amount fixed in the deposit is provisional in nature. Upon the termination of the mandate of the arbitral tribunal, it is required to provide an account of the deposits and if the deposits exceed the total amount of costs, the tribunal is required to return the balance. This indicates that the order on deposits is not a binding determination as to costs (including arbitrators' fees). It is a procedural order issued for the purpose of securing payment of future expenses.

96 While the arbitral tribunal can exercise a lien over the arbitral award for any unpaid costs of arbitration under Section 39(1) of the Arbitration Act, a party can also approach the court for the release of the award and the court on inquiry can assess whether the costs demanded are reasonable under Section 39(2). These costs would include the arbitrators' fees that have been previously agreed upon. However, even if there is no agreement between the parties and the arbitrator(s) regarding the fees payable to the arbitrator(s), any determination of costs relating to arbitrators' fees by the tribunal is a non-binding demand that has been raised by the tribunal. As has been discussed above, while costs, in general, are to be decided at the discretion of the tribunal or the court because they involve a claim that one party has against the another relating to resolution of a dispute arising from the arbitration agreement, fees of the arbitrators are not

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be."

a claim to be decided between the parties. Rather, it is an independent claim that the arbitrator(s) have against the parties[141]. It will be for the court to decide whether the claim of the arbitrator(s) regarding their remuneration is reasonable. This also becomes clear from sub-Sections (2) and (3) of Section 39, which provide:

> "**Section 39 - Lien on arbitral award and deposits as to costs**
>
> […]
>
> (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, in 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.
>
> […]"
>
> (**emphasis supplied**)

Sub-Section (2) provides that an application can be made to the court if the arbitral tribunal is refusing to deliver the award, except on payment of costs demanded by it. The court can then order the arbitral tribunal to deliver the award to the applicant on payment of the costs demanded by the tribunal to the court. Crucially, the court can conduct an inquiry to determine if the costs are reasonable and out of the money paid to the court, it can direct the payment of

[141] Paragraphs 91-92 of this judgement

reasonable costs to the tribunal and the balance (if any) to be refunded to the applicant. Sub-Section (3) provides that an application under sub-Section (2) for the delivery of an award withheld by the arbitral tribunal exercising a lien over it, can only be made if the fees demanded have not been fixed by a written agreement by the party and the arbitral tribunal. Section 39 of the Arbitration Act is similar to Section 38 of the now repealed Arbitration Act 1940. Section 38 of the erstwhile legislation provided thus:

> "**38. Disputes as to arbitrator's remuneration or costs:**
>
> (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may. on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees 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 arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.
>
> (2) An application under Sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.
>
> (3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them."

Section 38(1) of the Arbitration Act 1940 enabled an arbitrator or umpire to refuse delivery of an award if the payment of fees demanded by them remained unpaid, and in such cases the court could direct the arbitrator or the umpire to deliver the award upon payment of such fees to the court by the applicant. Thereafter, it could assess the propriety of the fees demanded and out of the amount

deposited in court, it could direct payment to the tribunal and the balance (if any) to be refunded to the applicant. The difference between Section 38(1) of the Arbitration Act 1940 and Section 39(1) of the Arbitration Act is that the former specifically refers to the payment of the arbitrators' fee, while the latter refers to costs demanded by the tribunal. Section 39(1) seems to be wider in scope. However, since the costs under Section 39 are to be payable to the arbitral tribunal, these would typically reflect costs relating to fees of the members of the tribunal and other out-of-pocket expenses payable to the arbitrators that are necessary for the conduct of arbitral proceedings like expenses relating to travel, accommodation and any other allowances.

97 This interpretation of costs under Section 39 as only limited to the costs owed to the arbitral tribunal is also in consonance with the purpose of Section 39, which is that it enables the arbitral tribunal to exercise a lien over the arbitral award. In **Triveni Shankar Saxena** v. **State of UP & Ors**.[142], this Court defined lien as follows:

> "17…The word 'lien' originally means "binding" from the Latin ligamen. Its lexical meaning is "right to retain". The word 'lien' is now variously described and used under different contexts such as 'contractual lien', 'equitable lien', 'specific lien', 'general lien', 'partners lien', etc. etc. in Halsbury's Laws of England, Fourth Edition, Volume 28 at page 221, para 502 it is stated:
>
> "In its primary or legal sense "lien" means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims are satisfied.""

[142] 1992 Suppl. 1 SCC 524

"Lien" has been defined in *P Ramanatha Aiyar: The Major Law Lexicon* as[143]:

> ""Lien" defined. A right by which a person in possession of the property holds and retains it against the other in satisfaction of a demand due to the party retaining it. [O. VIII, R. 6(2), CPC (5 of 1908)and S. 47, margin, (3 of 1930)].
>
> Right of one person to satisfy a claim against another by holding or retaining possession of that other's assets/property. (Finance)
>
> The right to possession of property until such time that an outstanding liability has been repaid. A banker' s lien gives a bank the right to retain or sell the property of a debtor in lieu of payment. (Banking; Insurance & International Accounting)."

The arbitral tribunal can exercise a lien over the arbitral award and refuse to deliver it if there are outstanding payments yet to be made to the tribunal. The principle behind allowing the arbitral tribunal to exercise a lien over the arbitral award is to ensure that the tribunal is not left in the lurch without its expenses being met, while the beneficiary of the award reaps the benefits of it. In **Assam State Weaving and Manufacturing Co. Ltd.** v. **Vinny Engineering Enterprises (P) Ltd.**[144], the Calcutta High Court observed that:

> "Section 39 of the 1996 Act, much like Section 38 of the old Act, recognises an arbitral tribunal's lien over the award. The section conceives of a situation where there may be a dispute between the arbitral tribunal and one or more parties to the reference as to the costs of the arbitration. Upon an arbitral tribunal refusing to deliver its award unless its demand for payment of costs were met by a party, an application may be carried to court for directing the tribunal to deliver the award to the applicant. Sub-section (2) contemplates an applicant thereunder to put into court the costs demanded by the arbitral tribunal. Upon such costs being deposited the court may order the tribunal to deliver the award to the applicant. The court can thereafter inquire into the propriety of the costs demanded and deal with the matter following the inquiry.

[143] *P Ramanatha Aiyar: The Major Law Lexicon* (LexisNexis, 4th edition)
[144] AIR 2010 Cal 52

> Sub-section (3) of Section 39 permits an application under sub-section (2) to be carried by any party to the reference only on condition that the fees demanded were not as fixed by written agreement between the applicant and the arbitral tribunal. The sub-section does not limit an application to be made under sub-section (2) only by a party who has been refused the delivery of the award. The delivery that Section 39 speaks of is the physical delivery of the document embodying the award and not merely the pronouncement of the award. For, it is the physical receipt of the document that would entitle a party to apply for setting aside the award or for implementing it."

98 Hence, sub-Section (2) and (3) of Section 39, read together, govern a situation where the fees and other expenses payable to the arbitrators have not been decided through a written agreement between the party and the arbitral tribunal. While ideally, the parties and the arbitrators should arrive at an arrangement regarding the remuneration of arbitrators, the arbitral tribunal may raise a non-binding invoice regarding the arbitration costs (*i.e.*, fees and expenses payable to arbitrator(s)) and may refuse to deliver the award unless the outstanding payments have been made. The parties are not obligated to pay such costs if they believe that such costs are unreasonable. In such a case, it is the court that determines whether the fees and other expenses demanded by the tribunal are reasonable in terms of Section 39(2).

99 To conclude, the arbitral tribunal while deciding the allocation of costs under Sections 31(8) read with 31A or advance of costs under Section 38 cannot issue any binding or enforceable orders regarding their own remuneration. This would violate the principle of party autonomy and the doctrine of prohibition of *in rem suam* decisions [145], which postulates that the arbitrators cannot be the judge

[145] *Supra* at note 120

of their own claim against parties' regarding their remuneration. The principles of party autonomy and the doctrine of prohibition of *in rem suam* decisions do not restrict the arbitral tribunal from apportioning costs between the parties (including the arbitrator(s) remuneration) since this is merely a reimbursement of the expenses that the successful party has incurred in participating in the arbitral proceedings. Likewise, the arbitral tribunal can also demand deposits and supplementary deposits since these advances on costs are merely provisional in nature. If while fixing costs or deposits, the arbitral tribunal makes any finding relating to arbitrators' fees (in the absence of an agreement), it cannot be enforced in favour of the arbitrators. The party can approach the court to review the fees demanded by the arbitrators.

100 Ideally, in *ad hoc* arbitrations, the fees payable to the arbitrator(s) should be decided through an arrangement between the parties and the arbitrator(s). In the next section, we are issuing certain directives to govern the process of how fees payable to the arbitrator(s) have to be fixed in *ad hoc* arbitrations.

C.2.4 Directives governing fees of arbitrators in *ad hoc* arbitrations

101 Preliminary meetings in arbitration proceedings entail a meeting convened by the arbitral tribunal with the parties to arrive at a common understanding about how the arbitration is to be conducted. It generally takes place at an early stage of the dispute resolution process, prior to the "written phase of the proceedings". Rules of certain international arbitral institutions provide for convening a

preliminary meeting[146] or case-management conference[147]. The fees and expenses are typically addressed at this stage[148]. We propose that this stage of having a preliminary hearing should be adopted in the process of conducting *ad hoc* arbitrations in India as it will provide much needed clarity on how arbitrators are to be paid and reduce conflicts and litigation on this issue.

102 These preliminary hearings should also be conducted when the fees are specified in the arbitration agreement. The arbitration agreement may have been entered into at an earlier point in time, even several years earlier. It is possible that at the time when the disputes between the parties arise, the fees stipulated in the arbitration agreement may have become an unrealistic estimate of the remuneration that is to be offered for the services of the arbitrator due to the passage of time. 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 being demanded 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. Since the relationship between the parties and arbitrator(s) is contractual in nature, specifically with respect to the payment of remuneration, there must be a consensus on the fees to be paid.

103 It is possible that during the preliminary hearings, the parties and the arbitral tribunal may be unsure about the extent of time that needs to be invested by the arbitrator(s) and the complexity of the dispute. It is also possible that the

[146] Rule 19.3, SIAC Rules
[147] Article 24, ICC Rules
[148] *Supra* at note 28

arbitral proceedings may continue for much longer time than was expected. In order to anticipate such contingencies, during the preliminary hearings, the parties and the arbitrator(s) should stipulate that after a certain number of sittings, the fee would stand revised at a specified rate. The number of sittings after which the revision would take place and the quantum of revision must be clearly discussed and determined during the preliminary hearings through the process of negotiation between the parties and the arbitrator(s). There is no unilateral power reserved to the arbitrator(s) to revise the fees on their own terms if they believe that an additional number of sittings would be required to settle the dispute. The fees payable to the arbitral tribunal in an *ad hoc* arbitration must be settled between the arbitral tribunal and the parties at the threshold during the course of the preliminary hearings. Resolution of the fees payable to the arbitral tribunal by mutual agreement during the preliminary hearings is necessary. Failing such an agreement, the arbitrator(s) who decline to accept the fee suggested by the parties (or any of them) are at liberty to decline the assignment. The fixation of arbitral fees at the threshold will obviate the grievance that the arbitrator(s) are arm-twisting parties at an advanced stage of the dispute resolution process. In such a situation, a party who is not agreeable to a unilateral revision of fees demanded by the arbitral tribunal in the midst of the proceedings has a real apprehension that its refusal may result in embarrassing consequences bearing on the substance of the dispute.

104 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."

105 Conscious and aware as we are that (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee, we would like to effectuate the object and purpose behind enacting the model fee schedule. When one or both parties, or the parties and the arbitral tribunal are unable to reach a consensus, it is open to the arbitral tribunal to charge the fee as stipulated in the Fourth Schedule, which we would observe is the model fee schedule and can be treated as binding on all. Consequently, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. It is the default fee, which can be changed by mutual consensus and not otherwise.

D Interpretation of "sum in dispute" in the Fourth Schedule

D.1 Statutory Framework

106 We must begin by looking at the statutory framework of the Arbitration Act. In order to understand the genesis of the competing interpretations, it is important to first consider Sections 31(8), the Explanation to Section 31A(1) and Section 38(1).

107 Section 31(8) of the Arbitration Act reads thus:

> "**31. Form and contents of arbitral award.**—
>
> […]
>
> (8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with Section 31-A."

Sub-Section (8) of Section 31 was amended by the Arbitration Amendment Act 2015, which also added Section 31A to the Arbitration Act.

108 Section 31A(1) is in the following terms:

> "**31-A. Regime for costs.**—(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of such costs; and
>
> (c) when such costs are to be paid.
>
> **Explanation.—For the purpose of this sub-section, "costs" means reasonable costs relating to—**

> **(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.
>
> […]"
>
> (**emphasis supplied**)

Sub-Section (1) of Section 31A provides the court or the arbitral tribunal with the power to determine the following in regard to costs: *(i)* whether they are payable by one party to the other; *(ii)* their amount; and *(iii)* when they are payable. The Explanation to Section 31A(1) defines "costs" to include four components, the first of which is "the fees and expenses of the arbitrators, courts and witnesses".

109 Section 31(8) is also linked to Section 38(1), which is as follows:

> "**38. Deposits.**—(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of Section 31, which it expects will be incurred in respect of the claim submitted to it:
>
> **Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.**"
>
> (**emphasis supplied**)

According to sub-Section (1) of Section 38 of the Arbitration Act, the arbitral tribunal can direct the parties to make a deposit, as an advance, for the costs referred to in Section 31(8). As noted earlier, Section 31(8) states that such costs are to be determined in accordance with Section 31A. Crucially, the proviso to

Section 38(1) provides that the arbitral tribunal may fix a separate amount of deposit for the claim and counter-claim, in an arbitration where a counter-claim has been filed.

110 The inter-connection between Section 31(8), Section 31A and Section 38(1) bears directly on the interpretation of the Fourth Schedule of the Arbitration Act. The Fourth Schedule is extracted below:

"THE FOURTH SCHEDULE

See Section 11(3-A)

Sl. No.	Sum in dispute	Model fee
(1)	(2)	(3)
1.	Up to Rs 5,00,000	Rs 45,000
2.	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.
3.	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.
4.	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.
5.	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 10,00,00,000.
6.	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 above."

The issue before this Court turns on the interpretation of the term "sum in dispute", which is the header of the second column of the Fourth Schedule. This column provides the different categories of the amounts, corresponding to which the third column provides the relevant fee which the arbitrators can charge for that category.

111 On the one hand, it has been argued before us that the expression "sum in dispute" should be the cumulative sum of the claim and counter-claim raised by the parties. If such a position is adopted, the arbitrators will charge one common fee for hearing both the claim and counter-claim, and the ceiling prescribed in the Fourth Schedule will apply to their cumulative total. On the other hand, it is submitted that "sum in dispute" refers to the *individual* sums in dispute in the claim and counter-claim. The consequence of adopting this position would be that the arbitrators will charge different sets of fees for the claim and counter-claim, and hence, separate fee ceilings will apply to both.

D.2 Definition of claim and counter-claim

D.2.1 *In re* arbitration proceedings

(i) Statutory Framework of the Arbitration Act

112 The Arbitration Act does not specifically define either the expression "claim" or "counter-claim". However, these expressions are referred to in numerous instances, which we shall now outline.

113 Part I of the Arbitration Act is titled “Arbitration”. Section 2 is the definitions clause for Part I. Section 2(1) defines the various terms used throughout Part I. Sections 2(2) to 2(5) clarify the scope of the disputes which will be covered by Part I. Section 2(6) notes that where Part I allows parties to determine any issue, it also provides them a right to let any other person or institution determine the issue for them. Section 2(7) notes that awards passed under Part I shall be domestic awards. Section 28(1) clarifies that any reference to an agreement made by the parties (or which may be made), will also include a reference to any arbitration rules referred to in the agreement. Crucially, Section 2(9) states that “[w]here [Part I], other than clause (a) of Section 25 or clause (a) of sub-section (2) of Section 32, refers to a claim, it shall also apply to a counter-claim, and where it refers to a defence, it shall also apply to a defence to that counter-claim”. This corresponds to Article 2(f)[149] of the UNCITRAL Model Law, on which the Arbitration Act is based. Section 25(a) notes that if the claimant fails to communicate his statement of claim in accordance with sub-section (1) of Section 23, the arbitral tribunal shall terminate the proceedings, while Section 32(2)(a) provides that the arbitral tribunal shall issue an order for termination of arbitration proceedings where the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute. Hence, as is evident, other than these specific provisions which refer to only a claim filed by the claimant, the Arbitration Act treats claims and counter-claims at par.

[149] Article 2(f) provides: “(f)where a provision of this Law, other than in Article 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim”.

114 Another reference is then made to counter-claims in sub-Section (2-A) of the Section 23, which provides as follows:

> "**23. Statements of claim and defence.**
>
> […]
>
> (2-A) The respondent, in support of his case, may also submit a counter claim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counter claim or set-off falls within the scope of the arbitration agreement."

Section 23(2-A) clarifies that an arbitral tribunal is under an obligation to also adjudicate upon a counter-claim or set-off filed by a party in an arbitration proceeding, with the limitation that they should fall within the scope of the arbitration agreement. This is in line with the requirements under the UNCITRAL Model Law[150]. If a party files a frivolous counter-claim which leads to a delay in the arbitration proceedings, the arbitral tribunal can take that into account while determining costs in accordance with Section 31A(3)(c).

115 Section 23(2-A) was introduced by the Arbitration Amendment Act 2015, bearing in view the recommendations in the **LCI 246th Report** (supra). The Report had recommended the addition of an explanation to Section 23(1) (instead of a different sub-Section) along with the following comment:

> "Amendment of Section 23
>
> 13.In section 23, after sub-section (1) and before sub-section (2), add the words "*Explanation*: In his defence the respondent may also submit a counter claim or plead a set off, which shall be treated as being within the scope of reference and be adjudicated upon by the arbitral tribunal notwithstanding that it may not fall within the scope of the

[150] Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Walter Kluwers, 1989), page 649

> initial reference to arbitration, but provided it falls within the scope of the arbitration agreement."
>
> [NOTE: This explanation is in order to ensure that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent so long as it falls within the scope of the arbitration agreement, in order to ensure final settlement of disputes between parties and prevent multiplicity of litigation.]"

Thus, the object of taking up a counter-claim along with the claim in the same proceeding is not because the counter-claim arises due to the claim (which it may not) but in order to prevent a multiplicity of proceedings.

116 We have already noted Section 38(1) earlier in this judgment, where the proviso provides the arbitral tribunal with the power to fix a separate amount of deposits (of costs determined under Section 31(8)) in instances where a claim and counter-claim have both been filed in an arbitration proceeding. We must also take note of Section 38(2) of the Arbitration Act, which provides:

> "(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:
>
> Provided that where one party fails to pay his share of the deposit, the other party may pay that share:
>
> Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be."

As a general rule, sub-Section (2) of Section 38 provides that the deposits determined under Section 38(1) have to be shared by both parties. The first proviso notes that if one party fails to pay their share, the other party may step in and pay it. Further, the second proviso notes that if the other party also does not

pay that share, the arbitral tribunal can suspend proceedings. Importantly, it provides that it may terminate proceedings in relation to either the claim or counter-claim or both, depending upon whether the appropriate deposits have been made for one of them or neither of them.

117 Consequently, on the basis of the above analysis, the following principles emerge:

(i) The Arbitration Act treats claims and counter-claims at par, and holds them subject to the same procedural timelines and requirements;

(ii) The Arbitration Act allows the arbitral tribunal to fix a deposit of costs for claims and counter-claims separately, recognizing that they are *distinct* proceedings since: *(a)* the proceeding for adjudicating on the claim is independent of the proceeding for deciding the counter-claim; *(b)* distinct issues may arise before the tribunal while adjudicating on the claim and counter-claim; *(c)* the evidence led in support of the claim may not be dispositive of the material which would be relied on to decide the counter-claim; and *(d)* the decision on the claim does not necessarily conclude the adjudication of the counter-claim; and

(iii) The Arbitration Act considers claims and counter-claims to be *independent* proceedings since the latter is not contingent upon the former. Rather, it protects the right of any respondent to raise a counter-claim in an arbitration proceeding, provided it arises from the arbitration agreement under dispute. Further, in the event of a default in the payment of a deposit either for the claim or counter-claim, it specifically notes that the

proceedings will be terminated only in respect of the claim, or as the case may be, the counter-claim in respect of which the default has occurred;

(iv) Though a counter-claim may arise from similar facts as a claim, the counter-claim is not a set off and is not in the nature of a defence to the claim; and

(v) A counter-claim will survive for independent adjudication even if the claim is dismissed or withdrawn and the respondent to a claim would be entitled to pursue their counter-claim regardless of the pursuit of or the decision on the claim.

(ii) Academic discourse

118 In Justice R S Bachawat's seminal treatise on *Law of Arbitration & Conciliation*, it has been noted that an arbitral tribunal has the jurisdiction to decide any claim and counter-claim arising out of a dispute referred to it, and not deciding the latter would be a ground to set aside the award[151]:

> **"[s 7.44.3] Counter-claim**
>
> When disputes in a pending suit are referred to arbitration, the arbitrator has jurisdiction to decide both the claim and the counterclaim…An award allowing the claim without deciding the counterclaim is liable to be set aside. Where the arbitration agreement permitted reference of all disputes to arbitration, it could not be said that by entertaining a counterclaim, the arbitrator exceeded his jurisdiction."

[151] Anirudh Wadha and Anirudh Krishnan, *Justice R S Bachawat's Law of Arbitration & Conciliation* (6th edition, 2017)

119 Similarly, CR Dutta's treatise on *Law of Arbitration & Conciliation* supports the proposition that the Arbitration Act treats a claim and counter-claim as two separate and independent proceedings[152]:

> "**4. To be paid equally**
>
> The cost amount to be deposited will be in respect of the claim and separately in respect of the counter-claim by the parties in equal shares. If a party does not pay the other party may be asked to pay the shares of both the parties. If the amount directed to be deposited in respect of the claim is not made, then the proceedings in respect of the claim may be suspended or terminated but the proceedings in respect of counter-claim can proceed if the amount in respect thereof has been deposited. For the purposes of deposit of costs and expenses, the claim and counter-claim have been treated as two separate independent proceedings."

120 **Gary Born on Arbitration** (supra) notes that a party is generally not bound by any restriction in regards to its counter-claim, except that it must fall within the scope of the arbitration agreement[153]:

> "In general, there are no limits under national law on the subject matter of a respondent's counterclaims, beyond whatever restrictions may be contained in the parties' arbitration agreement: the respondent may assert any counterclaim that falls within the scope of the arbitration agreement. This general freedom may be limited by the parties' arbitration agreement or applicable institutional rules (which, however, usually do not impose further limits)."

121 Finally, in *Procedure and Evidence in International Arbitration*, a counter-claim is differentiated from a set-off by noting that it is a claim brought by the defendant and is not a defence to the claimant's claim[154]:

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[152] *CR Dutta's Law Of Arbitration And Conciliation* (LexisNexis)
[153] *Supra* at note 30
[154] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Walters Kluwer, 2012)

> "4.4. A counterclaim is usually seen as a claim brought by a respondent in a civil suit against the claimant that is independent of the primary claim although it may be linked to the same facts. The term is used in contradistinction to a set-off that is seen as a defence to the primary claim, albeit one invariably related to different facts. Because it is not simply a defence, a counterclaim leads to a separate judgment that may be in excess of the judgment under the primary claim. Furthermore, the counterclaim remains alive even if the initial claim is withdrawn. Thus, it is truly a reverse claim and not a defence as such."

122 These academic writings a support the conclusion that claims and counter-claims within an arbitration proceeding are *distinct* and *independent* proceedings in themselves.

(iii) Judicial pronouncements

123 Even before the introduction of Section 23(2-A) through the Arbitration Amendment Act 2015, counter-claims were raised by parties in arbitration proceedings. In **Indian Oil Corpn. Ltd.** v. **Amritsar Gas Service**[155], this Court had to decide on the validity of an award under the Arbitration Act 1940 where the appellant's counter-claim had been dismissed by the arbitrator since it was not part of the reference. Speaking for the three-Judge Bench, Justice J S Verma held that when all disputes under an arbitration agreement are referred to arbitration, a party can file its counter-claim before the arbitral tribunal:

> "15. The appellant's grievance regarding non-consideration of its counter-claim for the reason given in the award does appear to have some merit. In view of the fact that reference to arbitrator was made by this Court in an appeal arising out of refusal to stay the suit under Section 34 of the Arbitration Act and the reference was made of all disputes between the parties in the suit, the occasion to make a counter-claim in the written statement could arise only after the order of reference.

[155] (1991) 1 SCC 533 ("**Amritsar Gas Service**")

> The pleadings of the parties were filed before the arbitrator, and the reference covered all disputes between the parties in the suit. Accordingly, the counter-claim could not be made at any earlier stage. Refusal to consider the counter-claim for the only reason given in the award does, therefore, disclose an error of law apparent on the face of the award. However, in the present case, the counter-claim not being pressed at this stage by learned counsel for the appellant, it is unnecessary to examine this matter any further."

124 In **State of Goa** v. **Praveen Enterprises**[156], a two-Judge Bench followed the principle enunciated in **Amritsar Gas Service** (supra) in a case arising under the Arbitration Act. Speaking for the two-Judge Bench, Justice R V Raveendran, in the course of an erudite exposition of the law, highlighted that a respondent to a claim could well seek independent recourse to arbitration for deciding the counter-claim, but raising a counter-claim obviates a multiplicity of litigation:

> "32. A counterclaim by a respondent presupposes the pendency of proceedings relating to the disputes raised by the claimant. The respondent could no doubt raise a dispute (in respect of the subject-matter of the counterclaim) by issuing a notice seeking reference to arbitration and follow it by an application under Section 11 of the Act for appointment of arbitrator, instead of raising a counterclaim in the pending arbitration proceedings. The object of providing for counterclaims is to avoid multiplicity of proceedings and to avoid divergent findings. The position of a respondent in an arbitration proceeding being similar to that of a defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceeding or raise the dispute by way of a counterclaim, in the pending arbitration proceedings."

[156] (2012) 12 SCC 581 ("**Praveen Enterprises**")

Subsequently, in **Voltas Ltd.** v. **Rolta India Ltd.**[157], another two-Judge Bench of this Court followed the reasoning in **Praveen Enterprises** (supra), that counter-claims were independent claim proceedings by the respondent. The Court held that the limitation for a counter-claim would be determined with reference to the date it was instituted before the arbitral tribunal. However, it carved out an exception to this general rule for instances where the respondent had earlier raised the counter-claim as a claim in a notice for arbitration sent to the claimant, but did not subsequently file an application under Section 11 of the Arbitration and raised it directly as a counter-claim. In such instances, the date of limitation would, it was observed, begin from when the notice of arbitration was first received by the claimant.

D.2.2 *In re* civil proceedings

(i) Statutory Framework of CPC

125 Order VIII of the CPC contains provisions pertaining to written statements, set-offs and counter-claims by the defendant. Rule 6 elucidates the particulars of a set-off to be given in a written statement:

> "**6. Particulars of set-off to be given in written statement.**—(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

[157] (2014) 4 SCC 516

> (2) **Effect of set-off.**—The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off, but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.
>
> (3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off."

Rule 6(1) specifies that while filing their written statement, a defendant may mention the particulars of an ascertained sum legally recoverable from the plaintiff. Rule 6(2) notes that the effect of pleading a set-off in a written statement is the same as filing a plaint in a cross-suit. Rule 6(3) then notes that the plaintiff's written statement in respondent to the defendant's set-off claim shall follow the same rules as the defendant's written statement in response to the plaintiff's plaint.

126 On the other hand, a distinct provision is made for a counter-claim under Rule 6-A of Order VIII of the CPC:

> "**6-A. Counter-claim by defendant.**—(1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:
>
> Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.
>
> (2) Such 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.

> (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.
>
> (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

Rule 6-A(1) provides that the defendant's counter-claim is in addition to a claim for set-off under Rule 6. It provides that the defendant may file a counter-claim based on a cause of action accruing to them against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. The proviso notes that the value of the counter-claim cannot exceed the pecuniary jurisdiction of the court where it is being filed. Rule 6-A(2) provides that the counter-claim has the same effect as a cross-suit. Rule 6-A(3) permits a plaintiff to file a written statement against the defendant's counter-claim. Finally, Rule 6-A(4) notes that the counter-claim shall be treated as a plaint and the rules governing plaints will be applicable to it.

127 Rule 6-D of Order VIII is of particular importance, and it provides thus:

> "**6-D. Effect of discontinuance of suit.**—If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, and counter-claim may nevertheless be proceeded with."

Rule 6-D clarifies, in no uncertain terms, that even if the suit which has been instituted by the plaintiff is stayed, discontinued or dismissed, it would not affect the defendant's counter-claim. This highlights, once again, that counter-claims are *distinct* and *independent* from claims. The defendant's counter-claim is equivalent to a plaint. The counter-claim is not being filed as an independent suit

but as a counter-claim within a pre-existing suit so as to avoid a multiplicity of litigation. However, it is not dependant on the outcome of the original suit and is an independent proceeding.

(ii) Academic discourse

128 Mulla's treatise on the *Code of Civil Procedure* notes that a counter-claim is an independent suit which exists within another pre-existing suit, in order to enable the court to pronounce final judgment on the claim and the counter-claim together[158]:

> "The very object of Rule 6A is to treat a counterclaim as an independent suit to be heard together with the plaintiff's suit to enable the court to pronounce final judgement."

129 *Sarkar's Code of Civil Procedure* notes that a counter-claim is an independent action and not a defence to the plaintiff's original claim[159]:

> "The provisions of Rule 6A(1) are in substance similar to those of RSC, 1965 [Rules of the Supreme Court of UK, 1965], Order 15, Rule 2(1). Cf Rule 6(2) with Order 8, Rule 6(2) of the Code and Rule 6A(4) with RSC 1965, Order 18, Rule 18. The effect of this rule is from the point of view of pleading to assimilate a counter-claim with a plaint in a suit and is therefore governed by the same rules of pleading as a plaint. **A counter-claim is substantially a cross-action, not merely a defence to the plaintiff's claim.** It must be of such a nature that the court would have jurisdiction to entertain it as a separate action."
>
> (**emphasis supplied**)

[158] Mulla, *The Code of Civil Procedure*, (Volume 2, 18th edition) page 1925
[159] Sudipto Sarkar and Aditya Swarup, *Sarkar's Code of Civil Procedure* (LexisNexis, 13th edition) ("**Sarkar**")

Sarkar (supra) further notes that this understanding is crystallised in Order VIII Rule 6-D, where the dismissal of a frivolous action by the plaintiff would not affect the defendant's counter-claim:

> "[Rule 6-D] further illustrates the principle that a counter-claim is to be treated as a cross action, and is not affected by anything which relates solely to the plaintiff's claim. Thus, where the plaintiff discontinues action the counter-claim has been served, he cannot prevent the defendant from enforcing against him the causes of action contained in the counter-claim. So if an action is dismissed being frivolous, the counter-claim is not affected and the defendant may be granted the relief which he seeks thereby."

130 The above exposition of a counter-claim is elaborated in *Halsbury's Laws of India (Civil Procedure)*[160]:

> "A "counter-claim" is a claim made by a defendant in a suit against a plaintiff. **It is a claim, independent of and separable from the plaintiff's claim, which can be enforced by a cross-action.** It is a cause of action in favour of the defendant against the plaintiff…"
>
> (**emphasis supplied**)

131 Zuckerman's treatise on *Civil Procedure, Principles of Practice* also observes that counter-claims are an independent proceeding[161]:

> "4.52. A counterclaim is independent of the main claim. It may relate to the same transaction, as where the claimant claims for the price of goods and the defendant counterclaims damages for late delivery or for defects. Equally, a counterclaim can be wholly separate from the claim, as where the defendant sues in respect of entirely different events from those that are raised in the claimant's claim."

[160] *Halsbury's Laws of India (Civil Procedure)* (2nd edition)
[161] *Zuckermann on Civil Procedure* (Sweet & Maxwell, 4th edition)

(iii) Judicial pronouncements

132 In **Jag Mohan Chawla** v. **Dera Radha Swami Satsang**[162], a two-Judge Bench of this Court had to decide whether, under the CPC, a counter-claim can be made on a cause of action different from the primary claim. Speaking for the two-Judge Bench, Justice K Ramaswamy held:

> "5…In sub-rule (1) of Rule 6-A, **the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject-matter of an independent suit.** Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit…**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. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial.** In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit…"
>
> (**emphasis supplied**)

Hence, it was held that since the counter-claim was effectively an entirely independent suit from the claim, it could arise out of any unrelated cause of action.

[162] (1996) 4 SCC 699

133 In **Rajni Rani** v. **Khairati Lal**[163], Justice Dipak Misra (as the learned Chief Justice then was), speaking for a two-Judge Bench of this Court, analysed the provisions of Order VIII and held:

> "9.6…**a counterclaim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counterclaim shall remain alive for adjudication.** For making a counterclaim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counterclaim. The plaintiff is obliged to file a written statement and in case there is default the court can pronounce the judgment against the plaintiff in relation to the counterclaim put forth by the defendant as it has an independent status. **The purpose of the scheme relating to counterclaim is to avoid multiplicity of the proceedings.** When a counterclaim is dismissed on being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6-A(2) the court is required to pronounce a final judgment in the same suit both on the original claim and also on the counterclaim. The...purpose is to avoid piecemeal adjudication…"

134 In **Thomas Mathew** v. **KLDC Ltd.**, another two-Judge Bench of this Court held that a counter-claim is an independent suit and consequently, the period of limitation would be three years from the date of accrual of the cause of action[164].

D.3 Analysis

135 On our analysis of the statutory framework of the Arbitration Act and the CPC, related academic discourse and judicial pronouncements, the following conclusions emerge:

(i) Claims and counter-claims are independent and distinct proceedings;

[163] (2015) 2 SCC 682
[164] (2018) 12 SCC 560

(ii) A counter-claim is not a defence to a claim and its outcome is not contingent on the outcome of the claim;

(iii) Counter-claims are independent claims which could have been raised in separate proceedings but are permitted to be raised in the same proceeding as a claim to avoid a multiplicity of proceedings; and

(iv) The dismissal of proceedings in relation to the original claim does not affect the proceedings in relation to the counter-claim.

136 We must now consider these principles in the context of the inter-connection between Section 31(8), Section 31A and Section 38(1) and the Fourth Schedule of the Arbitration Act. On a combined reading of Section 31(8), Section 31A and Section 38(1), it is clear that: *(i)* separate deposits are to be made for a claim and counter-claim in an arbitration proceeding; and *(ii)* these deposits are in relation to the costs of arbitration, which includes the fee of the arbitrators. Therefore, *prima facie*, the determination of the fee under the Fourth Schedule should also be calculated separately for a claim and counter-claim – *i.e.*, the term "sum in dispute" refers to independent claim amounts for the claim and counter-claim. Such an interpretation is also supported by the definition of claim and counter-claim, and by the fact that the latter constitutes proceedings independent and distinct from the former.

137 If this interpretation were to be discarded in favor of construing "sum in dispute" as a cumulation of the claim amount for the claim and counter-claim, it would have far-reaching consequences in terms of procedural fairness. *First*, under the proviso to Section 38(1), the arbitral tribunal can direct separate deposits for a claim and counter-claim. These are based on the cost of arbitration

defined by a conjoint reading of Sections 31(8) and 31A, which includes the arbitrators' fee. Hence, if the arbitrators were to charge a common fee for both the claim and counter-claim, they would have to then equitably divide that fee while calculating individual deposits for the purpose of the proviso to Section 38(1). *Second*, the second proviso to Section 38(2) provides that if the deposit is not made by both the parties, the arbitral tribunal can dismiss the claim and/or counter-claim, as the case may be. If the claim was to be dismissed in such a manner, it would lead to an absurd situation where the arbitrators' fee would have to be revised in the middle of the arbitration proceedings solely on the basis of the amount of the counter-claim. *Third*, under Section 23(2-A), the only requirement of a counter-claim is that it should arise out of the same arbitration agreement as the claim. However, the cause of action of a counter-claim may be entirely different from the claim and possibly far more complex. Therefore, determining the arbitrators' fee on a combined basis for both the claim and counter-claim would thus not match up to the separate effort they would have to put in for each individual dispute in the claim and counter-claim.

138 In support of the proposition that "sum in dispute" in the Fourth Schedule includes the cumulation of the sums of the claim and counter-claim, we have also been referred to the **LCI 246th Report** (supra). It has been argued that the Law Commission highlighted the problem of arbitrators charging an excessive fee in *ad hoc* arbitrations, which is what led to the introduction of the Fourth Schedule by the Arbitration Amendment Act 2015. Thus, it has been urged that "sum in dispute" in the Fourth Schedule should be interpreted keeping in mind the purpose with which it was introduced. However, we must reject the argument

since it would militate against the statutory framework of the Arbitration Act as it stands today. If Parliament intended that a common fee be charged for a claim and counter-claim, it would have amended the rest of the Arbitration Act as well or introduced a specific clause in the Fourth Schedule. Parliament may in its legislative wisdom still do so. In **Aphali Pharmaceuticals Ltd.** v. **State of Maharashtra**[165], speaking for a two-Judge Bench of this Court, Justice K N Saikia held:

> "31. A Schedule in an Act of Parliament is a mere question of drafting…The Schedule may be used in construing provisions in the body of the Act. It is as much an act of legislature as the Act itself and it must be read together with the Act for all purposes of construction. **Expressions in the Schedule cannot control or prevail against the express enactment and in case of any inconsistency between the Schedule and the enactment, the enactment is to prevail and if any part of the Schedule cannot be made to correspond it must yield to the Act.**"
>
> (**emphasis supplied**)

139 In a final attempt, we have also been referred to the rules of numerous arbitral institutions which provide for the calculation of arbitrators' fees on the cumulation of the sum of the claim and counter-claim – such as the DIAC[166], Mumbai Centre for International Arbitration[167], Indian Council of Arbitration[168], Construction Industry Arbitration Council[169], SIAC, HKIAC[170], Stockholm.

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[165] (1989) 4 SCC 378

[166] Rule 3(ii) of the DIAC Rules provides: "**3. Arbitrators' Fees** - (ii)The fee shall be determined and assessed on the aggregate amount of the claim(s) and counter claim(s)".

[167] Based on its online Fee Calculator available at <https://mcia.org.in/mcia-schedule-of-fees/calculate_fees/#> accessed on 29 June 2022

[168] Rule 31(2) of Rules of Domestic Commercial Arbitration and Conciliation

[169] Schedule of Fees available at <http://www.ciac.in/fee_arbitrator.html> accessed on 29 June 2022

[170] Article 6.3 of Schedule III of HKIAC Administered Arbitration Rules 2013 provides: "6.3 Claims and counterclaims are added for the determination of the amount in dispute. The same rule applies to any set-off defence, unless the arbitral tribunal, after consulting with the parties, concludes that such set-off defence will not require significant additional work".

140 Chamber of Commerce[171] and European Court of Arbitration[172]. This will, however, have no bearing on our judgment. As noted earlier in this judgment, parties have the freedom to opt for institutional arbitration and be bound by the rules of the institution. However, the judgment is currently dealing with instances of *ad hoc* arbitrations where the Fourth Schedule has been made applicable for the calculation of the arbitrators' fee. In such cases, we hold that the "sum in dispute" in the Fourth Schedule of the Arbitration Act shall be considered separately for the claim amount in dispute in the claim and counter-claim. Consequently, the arbitrators' fee will be calculated separately for the claim and counter-claim, and the ceiling on the fee will also be applicable separately to both.

E Fee Ceiling in Fourth Schedule

141 This issue revolves around the interpretation of the sixth entry of the Fourth Schedule. For convenience of the reader, the Fourth Schedule is being extracted again:

"THE FOURTH SCHEDULE

See Section 11(3-A)

Sl. No.	Sum in dispute	Model fee
(1)	(2)	(3)
1.	Up to Rs 5,00,000	Rs 45,000

[171] Article 2 of Appendix IV of 2017 Arbitration Rules provides: "(3) The amount in dispute shall be the aggregate value of all claims, counterclaims and set-offs. Where the amount in dispute cannot be ascertained, the Board shall determine the Fees of the Arbitral Tribunal having regard to all relevant circumstances.".

[172] Appendix 3 of the Arbitration Rules of the European Court of Arbitration – 2021 provides: "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.".

2.	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.
3.	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.
4.	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.
5.	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 10,00,00,000.
6.	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 above."

(**emphasis supplied**)

142 The choice before this Court is between two competing interpretations of the Model Fee where the sum in dispute is above Rs 20,00,00,000. Before we explain the competing interpretations, it is important to note that there is an agreement on the following:

(i) For an arbitration with the sum in dispute is Rs 20,00,00,000, the fee would be Rs 19,87,500. This will be referred to as the base amount;

(ii) For any increase in the sum in dispute over and above Rs 20,00,00,000, 0.5 per cent of the amount *above* Rs 20,00,00,000 will be added to the fee. This will be referred to as the variable amount. For instance, if the sum in

dispute was Rs 21,00,00,000, the amount above Rs 20,00,00,000 is Rs 1,00,00,000. Hence, 0.5 per cent of Rs 1,00,00,000 will be added as the variable amount; and

(iii) There is a ceiling of Rs 30,00,000.

The controversy before this Court is in relation to the third point, namely, to what does the ceiling apply. There are two possible interpretations:

(i) *First*, the ceiling is for the sum of the base amount *and* the variable amount. If this interpretation were to be accepted, the highest possible fee would be Rs 30,00,000; or

(ii) *Second*, the ceiling is for the variable amount only. If this interpretation were to be accepted, the highest possible fee would be Rs 49,87,500.

E.1 Difference between the English and Hindi translations

143 The first submission before us is that there is a difference between the English and Hindi translation of the relevant text. For ready reference, the two versions are being extracted below:

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.	19,87,500 रूपए + 20,00,00,000 रूपए से अधिक की दावा रकम का 0.5 प्रतिशत**,** 30,00,000 रूपए की अधिकतम सीमा सहित।

(**emphasis supplied**)

The difference between the two is the presence of a comma (“,”) in the Hindi translation, which is absent in the English version. It has been submitted that the comma was inadvertently missed from the English version, and hence the Hindi translation should be given preference. In support of this proposition, reliance is also placed upon Article 343(1) of the Constitution which provides that “[t]he official language of the Union shall be Hindi in Devanagari script”.

144 We must reject this submission at the threshold since it is in teeth of Article 348(1)(b)(ii) of the Constitution, which reads thus:

> “**348. Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.**—(1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—
>
> […]
>
> (b) the authoritative texts—
>
> (i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,
>
> […]
>
> shall be in the English language.”

Article 348 begins with a *non-obstante* clause, which clarifies that it shall have precedence over other Articles in Part XVII, including Article 343(1).

145 In **Nityanand Sharma** v. **State of Bihar**[173], a three-Judge Bench of this Court had to decide whether the ‘Lohar’ community would be construed as a Scheduled Tribe since their name appeared in the Schedule in the Hindi

[173] (1996) 3 SCC 576

translation while the English original had the community “Lohra”. Speaking for the Bench, Justice K Ramaswamy held:

> “19. **Article 348(1)(b) of the Constitution provides that notwithstanding anything in Part II (in Chapter II Articles 346 and 347 relate to regional languages) the authoritative text of all Bills to be introduced and amendments thereto to be moved in either House of Parliament … of all ordinances promulgated by the President… and all orders, rules, regulations and bye-laws issued under the Constitution or under any law made by Parliament, shall be in the English language.** By operation of sub-article (3) thereof with a non obstante clause, where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article. **Therefore, the Act and the Schedule thereto are part of the Act, as enacted by Parliament in English language. It is the authoritative text.** When the Schedules were translated into Hindi, the translator wrongly translated Lohara as Lohar omitting the letter ‘a’ while Lohra is written as mentioned in English version. It is also clear when we compare Part XVI of the Second Schedule relating to the State of West Bengal, the word Lohar both in English as well as in the Hindi version was not mentioned. Court would take judicial notice of Acts of Parliament and would interpret the Schedule in the light of the English version being an authoritative text of the Act and the Second Schedule.”
>
> (**emphasis supplied**)

Similarly, in the present case, this Court shall be governed by article 348 (1)(b)(i) while interpreting the entry at Serial No 6 of the Fourth Schedule.

E.2 Exception to literal interpretation

146 There is no comma in the English version of the sixth entry of the Fourth schedule. Hence, there is nothing to suggest conclusively (unlike the Hindi translation) that the ceiling of Rs 30,00,000 applies cumulatively to the sum of the base amount and variable amount.

147 The absence of a comma may be one indicator of the meaning of a provision. However, in his seminal treatise on *Principles of Statutory Interpretation*, Justice GP Singh has observed[174]:

> "In England, before 1850, there was no punctuation in the manuscript copy of any Act which received the Royal assent; therefore, the courts cannot have any regard to punctuation for construing the older Acts. Even as regards more modern Acts, it is very doubtful if punctuation can be looked at for purposes of construction. The opinion on Indian statutes is not very much different."

148 Similarly, Bennion in his treatise on *Statutory Interpretation* notes[175]:

> "16.8. Punctuation is a part of an Act and may be considered in construing a provision. It is usually of little weight, however, since the sense of an Act should be the same with or without its punctuation…Although punctuation may be considered, it will generally be of little use since the sense of an Act should be the same with or without it. Punctuation is a device not for making meaning, but for making meaning plain. Its purpose is to denote the steps that ought to be made in oral reading and to point out the sense. The meaning of a well-crafted legislative proposition should not turn on the presence or absence of a punctuation mark."

149 In **Aswini Kumar Ghose** v. **Arabinda Bose**[176], a Constitution Bench of this Court had to interpret provisions of the Bar Councils Act 1926. A key

[174] Justice GP Singh, *Principles of Statutory Interpretation* (14th edition, LexisNexis)
[175] Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (7th edition, LexisNexis)

submission was in reference to the presence of a comma before the word "or" in the non-obstante provision. Justice B K Mukherjea in his judgment observed:

> "56…Punctuation is after all a minor element in the construction of a statute, and very little attention is paid to it by English courts. Cockburn, C.J. said in Stephenson v. Taylor [(1861) 1 B & S p. 101] : "On the Parliament Roll there is no punctuation and we therefore are not bound by that in the printed copies". It seems, however, that in the Vellum copies printed since 1850 there are some cases of punctuation, and when they occur they can be looked upon as a sort of *contemporanea exposition* [*See* Craies on Statute Law, p. 185]. When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given to the punctuation [Vide Crawford on Statutory Construction, p. 343]. I need not deny that punctuation may have its uses in some cases, but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text [Ibid]."

Thus, Justice Mukherjea chose a middle-path where the learned Judge admitted to the use of punctuation but held that it still cannot be a controlling element in interpreting a provision.

150 Another Constitution Bench of this Court in **Indore Development Authority (LAPSE-5 J.)** v. **Manoharlal**[177], has noted its support of the use of punctuation as a tool of interpretation and cited with approval the following extract from **Taylor** v. **Caribou**[178]:

> "We are aware that it has been repeatedly asserted by courts and jurists that punctuation is no part of a statute, and that it ought not to be regarded in construction. This rule in its origin was founded upon common sense, for in England until 1849 statutes were entrolled upon parchment and enacted without punctuation…Such a rule is not applicable to conditions where, as in this State, a Bill is printed and is on the desk of

[176] 1953 SCR 1
[177] (2020) 8 SCC 129
[178] 102 Me 401 : 67 A 2 (1907)

> every Member of the Legislature, punctuation and all, before its final passage. There is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the case of the interpretation of statutes. "*Cessante ratione legis cessat ipso lex*". Accordingly we find that it has been said that in interpreting a statute punctuation may be resorted to when other means fail…; that it may aid its construction…; that by it the meaning may often be determined; that it is one of the means of discovering the legislative intent…; that it may be of material assistance in determining the legislative intention…"

Indeed, in **Mohd. Shabir** v. **State of Maharashtra**, a two-Judge Bench of this Court held that mere stocking was not an offence under Section 27 of Drugs and Cosmetics Act 1940 due to the absence of a comma after the word "stock"[179].

151 In the present case, the English version of the entry at Serial No 6 of the Fourth Schedule does not have any comma. Due to its absence, it can be construed that the literal meaning of the provision is that the ceiling should only apply to the variable amount. However, *Maxwell on The Interpretation of Statutes* notes that the literal meaning of a provision must be rejected when it goes manifestly against the legislative intent behind the enactment[180]:

> "WHERE the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not

[179] (1979) 1 SCC 568
[180] P St J Langan, *Maxwell on The Interpretation of Statutes* (N M Tripathi Private Ltd, 1976)

> be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

Hence, in the present case, we must aim to ascertain the legislative intent behind the Fourth Schedule.

E.3 Interpretation based on legislative intent

152 The Fourth Schedule was added to the Arbitration Act pursuant to the Arbitration Amendment Act 2015, which in itself was based upon the recommendations in the **LCI 246th Report** (supra). The Report referred to the judgment in **Singh Builders** (supra), which raised the issue of arbitrators charging exorbitant fees:

> "20. Another aspect referred to by the appellant, however requires serious consideration. When the arbitration is by a tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge(s).
>
> 21. When a retired Judge is appointed as arbitrator in place of serving officers, the Government is forced to bear the high cost of arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as arbitrator(s). There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge(s) are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.
>
> 22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high

> or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, which is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party which readily agreed to pay the high fee.
>
> 23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the arbitrators' fees is not fixed by the arbitrators themselves on case-to-case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an arbitrator whose fees are in their "range" having regard to the stakes involved."

153 After noting the judgment in **Singh Builders** (supra), the **LCI 246th Report** (supra) stated as follows:

> "11. In order to provide a workable solution to this problem, the Commission has recommended a model schedule of fees and has empowered the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised. The schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they continue to stay realistic.
>
> 12.The Commission notes that International Commercial arbitrations involve foreign parties who might have different values and standards for fees for arbitrators; similarly, institutional rules might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy. The Commission has, therefore, expressly

> restricted its recommendations in the context of purely domestic, ad hoc, arbitrations."

As a means of controlling the rising fees of arbitrators, the Law Commission proposed a model fee schedule based on the one used by the DIAC. Schedule B of the DIAC Rules provides that when the sum in dispute is above Rs 20,00,00,000, the fees shall be "Rs.19,87,500/- + 0.5% of the claim amount over and above Rs.20 crores, with a ceiling of Rs.30,00,000/-". Evidently, the DIAC Rules have a comma, which would mean that the ceiling would have been applicable to the base amount and the variable amount.

154 In **Mithilesh Kumari** v. **Prem Behari Khare**[181], a two-Judge Bench of this Court held that, depending on the facts and circumstances of each case, law commission reports preceding enactments of statutes can be relied on as an aid in interpretation. Speaking for the Bench, Justice K N Saikia held:

> "15…where a particular enactment or amendment is the result of recommendation of the Law Commission of India, it may be permissible to refer to the relevant report as in this case. What importance can be given to it will depend on the facts and circumstances of each case."

155 The **LCI 246th Report** (supra), indicates that the legislative intent behind the introduction of the Fourth Schedule was to put an end to the practise of arbitrators charging exorbitant fees from the parties taking their services in *ad hoc* arbitrations. Consequently, when we have the option of setting the ceiling of the fees in the Fourth Schedule at either Rs 30,00,000 or Rs 49,87,500, we believe that it would be appropriate to choose the lower amount since it would be

[181] (1989) 2 SCC 95

in keeping with legislative intent. The 2015 Arbitration Amendment Act was clearly enacted with the intent to give effect to the recommendation of the LCI 246th Report on the point. Thus, we hold that the ceiling of Rs 30,00,000 in entry at Serial No 6 of the Fourth Schedule is applicable to the sum of base amount and the variable amount, and not just the variable amount.

F Ceiling applicable to individual arbitrators

156 The final submission made before this Court was that the ceiling of Rs 30,00,000 prescribed in the entry at Serial No 6 of the Fourth Schedule will be applicable to the cumulative fee paid to the entire arbitral tribunal, *i.e.*, in a three-member tribunal, each individual arbitrator would receive a fee of Rs 10,00,000.

157 Such a submission is erroneous, and hence we must reject it. *First*, there is nothing in the language of the Fourth Schedule to support such an interpretation. The header of the third column states “Model Fee” and does not specify it to be in respect of the whole tribunal. *Second*, if such an interpretation were to be adopted, it would lead to absurd consequences. For instance, in an arbitration where the sum in dispute is large enough to trigger the ceiling of Rs 30,00,000 and it were to be adjudicated by a three-member tribunal, the maximum fee would have to be divided amongst the three arbitrators. On the other hand, if the same dispute were to be adjudicated by a sole arbitrator, the sole arbitrator would then receive the whole amount of the maximum fee, *i.e.*, triple of what each individual arbitrator would have received in a three-member tribunal. Such a disparity is inconceivable, regardless of the extra work a sole

arbitrator may have to put in. This is further bolstered by the Note to the Fourth Schedule, which states that "[i]n 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 above". Consequently, the sole arbitrator would not only receive Rs 30,00,000, but an additional 25 per cent over and above it. Indeed, it is clear that the Note was added to the Fourth Schedule to fairly compensate sole arbitrators who arguably would have to do more work than as a member of a larger tribunal; which is why they are allowed payment of 25 per cent of the fee over and above what they would be paid pursuant to the table given in the Fourth Schedule. The corollary of this is that the fee provided in Fourth Schedule is for each individual arbitrator, regardless of whether they are a member of a multi-member tribunal or a sole arbitrator. *Finally*, this interpretation of the Fourth Schedule, that the fee provided therein is applicable for each individual arbitrator and not the whole arbitral tribunal, has also been fairly conceded before this Court by the learned Attorney General.

G Conclusion

G.1 Findings

158 We answer the issues raised in this batch of cases in the following terms:

(i) Arbitrators do not have the power to unilaterally issue binding and enforceable orders determining their own fees. A unilateral determination of fees violates the principles of party autonomy and the doctrine of the prohibition of *in rem suam* decisions, *i.e.*, the arbitrators cannot be a judge

of their own private claim against the parties regarding their remuneration. However, the arbitral tribunal has the discretion to apportion the costs (including arbitrators' fee and expenses) between the parties in terms of Section 31(8) and Section 31A of the Arbitration Act and also demand a deposit (advance on costs) in accordance with Section 38 of the Arbitration Act. If while fixing costs or deposits, the arbitral tribunal makes any finding relating to arbitrators' fees (in the absence of an agreement between the parties and arbitrators), it cannot be enforced in favour of the arbitrators. The arbitral tribunal can only exercise a lien over the delivery of arbitral award if the payment to it remains outstanding under Section 39(1). The party can approach the court to review the fees demanded by the arbitrators if it believes the fees are unreasonable under Section 39(2);

(ii) Since this judgment holds that the fees of the arbitrators must be fixed at the inception to avoid unnecessary litigation and conflicts between the parties and the arbitrators at a later stage, this Court has issued certain directives to govern proceedings in *ad hoc* arbitrations in **Section C.2.4**;

(iii) The term "sum in dispute" in the Fourth Schedule of the Arbitration Act refers to the sum in dispute in a claim and counter-claim separately, and not cumulatively. Consequently, arbitrators shall be entitled to charge a separate fee for the claim and the counter-claim in an *ad hoc* arbitration proceeding, and the fee ceiling contained in the Fourth Schedule will separately apply to both, when the fee structure of the Fourth schedule has been made applicable to the *ad hoc* arbitration;

(iv) The ceiling of Rs 30,00,000 in the entry at Serial No 6 of the Fourth Schedule is applicable to the sum of the base amount (of Rs 19,87,500) and the variable amount over and above it. Consequently, the highest fee payable shall be Rs 30,00,000; and

(v) This ceiling is applicable to each individual arbitrator, and not the arbitral tribunal as a whole, where it consists of three or more arbitrators. Of course, a sole arbitrator shall be paid 25 per cent over and above this amount in accordance with the Note to the Fourth Schedule.

G.2 Directions

159 We issue the following directions in each of the cases before this Court:

(i) In respect of Arbitration Petition (Civil) No 5 of 2022, a fee schedule for the arbitrators was already prescribed in the LSTK contract. However, during the preliminary meeting on 25 November 2015, the arbitral tribunal observed that the fee schedule in the LSTK contract was unrealistic. While Afcons agreed to revise the fees, ONGC expressed its disagreement. The tribunal directed ONGC to consider revising the fees. On 16 April 2016, the arbitral tribunal informed ONGC that it would no longer bargain on the amount of fees if ONGC was agreeable to the fee provided in the Fourth Schedule to the Arbitration Act, along with a reading fee of Rs 6 lakhs for each arbitrator. By its letter dated 22 April 2016, ONGC indicated that it was agreeable to revising the fees in terms of the Fourth Schedule. It only objected to the reading fee. Subsequently, the arbitral tribunal passed a

procedural order dated 4 August 2016 directing the parties to deposit 25 per cent of the arbitrators' fee, which was recorded as Rs 30 lakhs. It seems a ceiling of Rs 30 lakhs was determined following the Fourth Schedule to the Arbitration Act. However, the arbitral tribunal then unilaterally decided to revise the fees and passed a procedural order fixing a fee of Rs 1.5 lakhs for each arbitrator for every sitting of a three-hour duration. The tribunal also indicated it may also charge a reading or conference fee, which would be decided at a later stage. By an order dated 25 July 2019, the arbitral tribunal adjusted its fees to Rs 1 lakh per sitting. Around 54 sittings have been held in terms of the arbitral tribunal's order dated 25 July 2019. In this background, it is evident that there was no consensus between the parties and the arbitrators regarding the fee that is to be paid to the members of the arbitral tribunal. Allowing the continuance of the arbitral tribunal would mean foisting a fee upon the parties and the arbitral tribunal to which they are not agreeable. In view of our directives in Section C.2.4 and the facts noted earlier, we exercise our powers under Article 142 of the Constitution of India and direct the constitution of a new arbitral tribunal in accordance with the arbitration agreement. For this purpose, Arbitration Petition (C) No. 5 of 2022 would be listed for directions before this Court on 21 September 2022. The above directions should not be construed as a finding on the conduct of the arbitration proceedings. These directions are an attempt to ensure that the arbitral proceedings are conducted without rancour which may derail the proceedings. In consonance with our findings, the fee payable to the earlier arbitral tribunal

would be the fee payable in terms of the Fourth Schedule of the Arbitration Act. Though the Fourth Schedule is *per se* not applicable to an international commercial arbitration, since ONGC had indicated (following the suggestion of the arbitral tribunal) that it would be agreeable to pay the fee payable in terms of Schedule, it cannot now take recourse to the arbitration agreement between the parties to pay a lesser fee. We further clarify that if the fee in excess of the amount payable under the Fourth Schedule has been paid to the members of the arbitral tribunal, such amount will not be recovered from them;

(ii) The civil appeal arising out of Special Leave Petition (Civil) No 13426 of 2021 is dismissed and the judgment of the Single Judge of the Delhi High Court dated 6 August 2021 is upheld;

(iii) The civil appeal arising out of Special Leave Petition (Civil) No 10358 of 2020 is allowed and the judgment of the Single Judge of the Delhi High Court dated 10 July 2020 is set aside; and

(iv) Miscellaneous Application Nos 1990-1991 of 2019 are dismissed.

160 Before parting, we would like to place on record our sincere appreciation for the submissions made by the *amicus curiae*, Mr Huzefa Ahmadi who was ably assisted by Ms Anushka Shah.

161 Pending applications, if any, stand disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[Surya Kant]

New Delhi;
August 30, 2022

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 5 OF 2022

OIL AND NATURAL GAS CORPORATION LIMITED ... PETITIONER

VERSUS

AFCONS GUNANUSA JV. ... RESPONDENT

W I T H

SPECIAL LEAVE PETITION (CIVIL) NO. 10358 OF 2020

SPECIAL LEAVE PETITION (CIVIL) NO. 13426 OF 2021

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2022
(DIARY NO. 8494 OF 2022)

A N D

MISCELLANEOUS APPLICATION NOS. 1990-1991 OF 2019
(IN SPECIAL LEAVE PETITION (CIVIL) NOS. 10021-10022 OF 2017)

J U D G M E N T

SANJIV KHANNA, J.

Reason and cause for my separate judgment.

This is an unfortunate litigation wherein one or both parties have questioned the legitimacy and reasonableness of the fee claimed by the arbitral tribunal.

2. While I am entirely in agreement with the considered view expressed by esteemed brother D.Y. Chandrachud, J. that – (a) party autonomy and arbitration agreement are the foundation of the arbitral process, and therefore, when the parties fix the fee payable to the arbitral tribunal, the law does not permit the arbitral tribunal to derogate and ask for additional or higher fee; (b) where the court while appointing an arbitrator fixes the fee, the arbitral tribunal cannot ask for supplementary or higher fee; and (c) in both cases, the fee payable to the arbitral tribunal may be enhanced either by a written agreement between the parties or by a court order. However, I am unable to concur that in the absence of any agreement between the parties, or the parties and the arbitral tribunal, or a court order fixing the fee, the arbitral tribunal is not entitled to fix the fee, as I am of the opinion that by the implied terms of the contract and as per the provisions of the Arbitration and Conciliation Act, 1996[1], an arbitral tribunal can fix a reasonable fee, which an aggrieved party, who is not a signatory to the written agreement, can question under sub-section (3) of Section 39 of the A&C Act during the pendency of the arbitration proceedings, or in case the arbitral tribunal claims lien on the award in terms of sub-

[1] For short, the 'A&C Act'.

section (2) to Section 39 of the A&C Act. At the same time, I respectfully agree with brother D.Y. Chandrachud, J., that when an arbitral tribunal, even in the absence of consent of the parties, fixes the fee in terms of the Fourth Schedule[2], the parties should not be permitted to object the fee fixation. The Fourth Schedule is the default fee, declared by the legislature as fair and reasonable, which can be changed by mutual consensus, and not otherwise. Further, post the enforcement of the Arbitration Amendment Act, 2019 *vide* Act 33 of 2019 on 30th August 2019, and insertion of sub-section (3A) to Section 11, the proviso to the sub-section states that the fee prescribed in the Fourth Schedule is mandatory and applies to all arbitrations including *ad hoc* arbitrations, *albeit* in case of institutional arbitrations, as per sub-section (14) to Section 11 of the A&C Act, the fee fixed by the institution "subject to the rates specified in the Fourth Schedule" would be payable.

3. On interpretation of the Fourth Schedule, I respectfully agree with the view expressed by learned D.Y. Chandrachud J. on interpretation of Serial No.6 and that the fee prescribed is for each member of the arbitral tribunal, with a note providing for an additional amount of twenty five percent in case of a sole/single

[2] The fee schedule fixed under Section 11(14) or Section 11(3A) ,as the case may be, of the A&C Act.

member arbitral tribunal. Even so, on these aspects I would like to give a separate reasoning, as also point anomalies in the Fourth Schedule. However, in my opinion, the expression "sum in dispute" means the sum total of both the claims and counter claims.

Background of the problem of high cost of arbitration, the legislative history and remedial changes in the Arbitration and Conciliation Act, 1996.

4. The issue of skyrocketing costs of arbitration has been a subject of concern and lament in two decisions of this Court in ***Union of India*** v. ***Singh Builders Syndicate***[3] and ***Sanjeev Kumar Jain*** v. ***Raghubir Saran Charitable Trust and Others***.[4] The Court in ***Singh Builders Syndicate*** (supra) judicially noticed the prevalent opinion that the cost of arbitration becomes very high when retired judges are appointed as arbitrators. A large number of sittings, fee being charged on a "per sitting" basis, and several other add-ons without any ceiling contribute to the cost of arbitration approaching or even at times exceeding the amount involved in the dispute or the award amount. When an arbitrator is appointed by the Court without prior fixation of fee, either of the parties might be at a disadvantage as they feel invariably compelled to agree to whatever fee is suggested by the arbitrator, even if it is extravagant

[3] (2009) 4 SCC 523
[4] (2012) 1 SCC 455

and beyond their paying capacity. Secondly, in the event one party agrees to pay such a fee, the other party who is unable to afford or reluctant to pay such a fee is put in an embarrassing position. The party may be disinclined to express reservation or object to the high fee owing to the apprehension that this may prejudice his case or create a bias in favour of the other party. The decision in ***Sanjeev Kumar Jain*** (supra) refers to the statutory provisions of the A&C Act, namely, Section 31(8), as it existed, dealing with costs of arbitration, and the explanation that defines the expression 'costs' to mean reasonable costs relating to (i) the fees and expenses of arbitrators and witnesses, (ii) legal fee and expenses (iii) any administration fee of the institution supervising the arbitration, and (iv) other expenses incurred in connection with the arbitration proceedings and the arbitral award. Interpreting Section 11 of the A&C Act which deals with the appointment of an arbitrator, the Court opined that the word 'appointment' not only means nominating or designating a person who will act as an arbitrator, but is wide enough to encompass stipulating terms on which he is appointed. Therefore, it is open to the Court, at the time of appointment of an arbitrator under Section 11, to stipulate the fees payable to the tribunal. This, the court commended, should be done after hearing the parties, and if necessary, after ascertaining the fee

structure from the prospective arbitrators, to avoid the situation where the parties have to negotiate the terms of the fee after the appointment of the arbitral tribunal. The judgment adverts to institutionalised arbitration as the preferred mode as fixed fee is prescribed by the institution under whose aegis the arbitration is held, viz. *ad hoc* arbitrations, where the arbitrators are appointed by the parties with or without the intervention of the court, *albeit* in the absence of any agreement between the parties on the procedure to be followed, the arbitral tribunal, subject to Part 1 of the A&C Act, conducts the proceedings in the manner it deems appropriate.[5] Referring to the *ad hoc* arbitrations in India, the Court judicially acknowledged that frequent complaints regarding the cost of arbitration, including high fees charged by arbitrators, have adversely affected the efficiency and effectiveness of arbitration. While some of the criticism may be harsh as it would be wrong to state that there is a universalisation of stray aberrations, the court observes that these are still matters of concern and the remedy for healthy development of arbitration in India is to disclose the fee structure before the appointment of the arbitrators so that any party which is unwilling to bear such expenses can express its

[5] The observations on *ad hoc* arbitration are my observations with reference to sub-sections (2) and (3) to Section 19 of the A&C Act, which postulate that the arbitral tribunal, subject to the agreement between the parties, is entitled to conduct the proceedings in the manner it considers appropriate.

unwillingness. Consequently, the judgment ennobles and leans towards institutionalised or *ad hoc* arbitration, where the arbitrator's fee is prefixed. Another remedy that the court suggested is for each High Court to have a scale of arbitrator's fee, suitably calibrated with reference to the amount in dispute. These steps, the Court felt, would make arbitration attractive to the litigant public. Reasonableness and certainty regarding the total costs are the key to the development of arbitration.

5. The 246th Report of the Law Commission of India dated 5th August 2014, under the heading *'Fees of Arbitrators',* highlighted the problem of high costs, especially associated with *ad hoc* arbitrations, and the complaint that several arbitrators arbitrarily and unilaterally fix disproportionate fees. To counter this, the Law Commission suggested a mechanism to rationalise the fee structure for arbitration by recommending a model schedule of fees. The Report nevertheless accepted that different values and standards of fees may be payable in international commercial arbitrations. The Report adversely commented on the 'per sitting' basis on which fee is charged in *ad hoc* arbitrations, sometimes with 2-3 sittings a day in the same matter between the same parties, and that costs further increase by continuation of proceedings for years since the dates are spread over a long period of time. The

Commission suggested the model schedule of fee that should be inserted in the A&C Act.

6. In view of the recommendations made by the Law Commission, the A&C Act was amended effective from 23rd October 2015, *vide* Act No. 3 of 2016, with the insertion of the Fourth Schedule to the A&C Act, exemplifying a schedule of fee payable to the arbitrators. Sub-section (14) to Section 11 was enacted, and read thus:

> "(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration 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) in case where parties have agreed for determination of fees as per the rules of an arbitral institution."

The fee structure in the Fourth Schedule was to serve as a guide for the different High Courts to frame rules determining the fee payable to the arbitral tribunals. However, most of the High Courts did not frame rules under Section 11(14) for the purpose of determination of fee and the manner of payment to the arbitral tribunal.[6] Further, the rules, as framed by the High Courts, except

[6] High Courts of Kerala, Madhya Pradesh, Delhi, Punjab and Haryana, Rajasthan, Karnataka and Madras have framed rules.

for the High Court of Kerala, are applicable when the arbitrators are appointed by the Court or the parties by agreement or mutual consent agree to be governed by the applicable rules. Resultantly, the desired purpose of Section 11(14) has not been met, and remains unrealised.

7. Based on the High Level Committee Report dated 30th July 2017, *vide* Act No. 33 of 2019, a number of significant amendments were made to the A&C Act to promote and establish the culture of institutional arbitration. The relevant amendments, for our purpose, include the amendment to Section 2(1), by inserting clause (ca) which defines the expression "arbitral institution" as "an arbitral institution designated by the Supreme Court or a High Court under this Act". Part IA consisting of Sections 43A to 43M have been inserted for the establishment and incorporation of an Arbitration Council of India, with Section 43D prescribing duties and functions of the said Council, which include framing policies governing gradation of arbitral institutions, recognising professional institutes providing accreditation of arbitrators, review or grading of arbitral institutions or arbitrators, making recommendations to the Central Government on various measures to be adopted and to make provisions for easy resolution of commercial disputes.

Simultaneously, sub-section (3A) to Section 11 has been inserted and reads:

> "(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."

Corresponding substitutions/insertions have been made in sub-sections (4), (5), (6), (8) and (9) to Section 11 to provide for and give effect to the provisions that appointment of an arbitrator shall be made on an application of a party by the arbitral institution designated by the Supreme Court in the case of international commercial arbitration or by the High Court in other cases. Sub-section (11) to (14) to Section 11 as substituted read:

> "(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint.

> (12) Where the matter referred to in sub-sections (4), (5), (6) and (8) arise in an international commercial arbitration or any other arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution designated under sub-section (3A).
>
> (13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.
>
> (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."

8. However, even after the lapse of nearly three years, the Arbitration Council of India has not been fully operationalised, and Part IA, dealing with the Arbitration Council of India, from Sections 43A to 43M, have not been enforced. The substituted provisions of sub-sections (11) to (14) to Section 11[7] of the A&C Act, which came into force on 30th August 2019 *vide* SO No. 3154(E) dated 30th August 2019, have been effectively only partially enforced and implemented. However, on the positive side, I would record that several High Courts have taken concerted steps to establish and refer matters to the court adjunct arbitration centres. Despite these efforts, *ad hoc* arbitrations have continued and hold the field as they were prior to the enactment and enforcement of Act No. 33 of 2019.

[7] Including newly inserted sub-section (3A) to Section 11 of the A&C Act.

Therefore, the amendments made by Act No. 33 of 2019 have been somewhat a non-starter and thus, the shift envisaged by the legislature from *ad hoc* arbitration to institutional arbitration has not been accomplished.

The legal issues required to be adjudicated.

9. The question of quantum of fee payable to the arbitrators can be broadly divided into three categories: (i) institutionalised arbitration where the fee payable to the arbitrator is governed by the prescribed fee schedule. In the present petition/appeals, we are not concerned with such cases[8]; (ii) *ad hoc* arbitrations where (a) the fee is prescribed in the agreement between the parties, (b) where the fee is fixed by the court while appointing the arbitral tribunal, (c) where no fee is prescribed in the agreement between the parties, or where the court while appointing the arbitral tribunal does not fix the fee or permits the arbitral tribunal to fix the fee ; and (iii) where the arbitration fee is prescribed and governed by the Fourth Schedule to the A&C Act.

10. While deciding questions relating to the second category, I would refer to and interpret the statutory provisions pre and post

[8] The legal effect of the substituted sub-section (14) to Section 11 *vide* Act 33 of 2019 requires elucidation for the present decision and has been interpreted.

Amendment Act No.3 of 2016 and Amendment Act No.33 of 2019, and elucidate on the rights of the parties/ litigants in the fee fixation. In the second portion of my judgment, I would examine and interpret the Fourth Schedule.

Who decides the fee payable to the Arbitral Tribunal?

(a) *Where fee payable is fixed by an agreement between the parties, or by a court order*.

11. Arbitration is contract centric and is structured on party autonomy. The parties are free to agree upon the procedure on conduct of the arbitration, which includes the right to fix the fee payable to the arbitrator. While the relationship between the parties and the arbitrator is based on the contract, the arbitrator's status as a *de-jure* adjudicator stems directly from the law. The relationship between the parties and the arbitral tribunal is both contractual and statutory. Consequently, an arbitral tribunal, in addition to the contractual terms, must abide by the rules and procedure that are bare essential pre-requisites of any dispute resolution system.[9] In ***Sanjeev Kumar Jain*** (supra), this court has held that when a court appoints an arbitrator, and also fixes the fee, whether in terms of the Fourth Schedule or otherwise, the fee is binding on the

[9]Julian D.M. Lew , Loukas A. Mistelis , et al., *Comparative International Commercial Arbitration*, 'Chapter 12 Rights and Duties of Arbitrators and Parties', pp. 276 - 277

arbitrator/tribunal. The arbitral tribunal, while accepting an appointment, must accept the remuneration as fixed by the parties or as determined in the court order appointing the tribunal. Russell pertinently observes that the appointment of an arbitrator is a matter of contract, subject to mandatory provisions of the statute. An arbitrator will not be usually entitled to increase his fee and expenses unless his agreement with the parties allows him to do so.[10] The arbitrators should not exceed their authority, either under the terms of the arbitration agreement fixing their fee, or under their powers in law, which does not permit them to rewrite the agreement or ignore the court order fixing the fee. It follows that the arbitral tribunal, during the proceedings, is not entitled to unilaterally increase its fee, unless the agreement on which it is constituted allows it to do so, or all parties voluntarily agree to enhancement. Where fee is fixed by a court order, the arbitral tribunal may approach the court for modification/increase in the fee by giving reasons justifying the same. Unilateral increase is unacceptable, as explained in the judgment by D.Y. Chandrachud J. and in my opi nion this would violate the provisions of the A&C Act. This principle applies to institutional arbitration, as an arbitrator/tribunal so

[10] *Russell on Arbitration* (24th Edition). *Russell* also observes that attempts to increase fee have led to allegation of bias against the arbitrators and of what used to be called 'misconduct', and if pursued unreasonably, would lead to an application for removal of an arbitrator or even challenge to an award made by him because of the breach of duty to avoid unnecessary expense.

appointed is bound by the rules of the institution and must abide by the terms of appointment. Where an arbitral tribunal solicits higher fees, an aggrieved party, in my opinion, as explained below, can approach the court for appropriate orders under sub-sections (2) or (3) to Section 39 of the A&C Act.

(b) Where fee is not fixed by a court order, or an agreement between the parties.

12. There is considerable jurisprudence and legal opinion which accepts that in the absence of an agreement or consensus between the parties, or a court order fixing the fee, the arbitral tribunal is entitled to fix the fee payable for conducting the arbitration, *albeit* the fee so fixed should be fair and reasonable. Robert Merkin[11] states that, where the agreement between the parties or with the arbitrator is silent as to the fee, the arbitrator is nevertheless entitled to reasonable fee based either on an implied term in the agreement, or on the application of the principle of *quantum meruit*. Reasonable fee and expenses appropriate in such circumstances can be determined by the arbitrator. Professor Sundra Rajoo,[12] while accepting that the fee of the arbitrator is an important consideration when the parties contemplate arbitrating a dispute,

[11]Robert Merkin QC, LLD, *"Arbitration Law",* Service Issue No.83, November 2019.
[12] Datuk Professor Sundra Rajoo, *Law, Practice and Procedure of Arbitration (Second Edition),* 2016, at pg. 341 and 346, paragraphs 24.4 and 24.7.

agrees that it is common in *ad hoc* arbitration proceedings for the arbitral tribunal to fix its own fee.[13] He observes that, if the parties cannot agree on the remuneration in advance, the arbitral tribunal is ordinarily entitled to reasonable remuneration on *quantum meruit* basis for the value of the work actually done. Russell, in his work,[14] observes that where there is no express agreement with the arbitrator, the arbitrator may also have the right to payment of reasonable fees under a contract implied by conduct in circumstances where a party participates in the arbitration, even if that party disputes the jurisdiction of the tribunal. Referring to the English Arbitration Act, 1996, he states that the enactment provides that the parties are jointly and severally liable to pay to the arbitrators such reasonable fee and expenses. The level of fee may be agreed directly with the arbitral tribunal, which normally occurs in *ad hoc* arbitration. However, in the absence of any established arrangement, it is desirable that the parties and the tribunal should negotiate and agree on the fee payable beforehand, which must be reasonable. Gary B. Born,[15] referring to the 2010 UNICITRAL Rules, observes that where the parties do not discuss a method of calculation of the arbitrator's remuneration, the arbitrator is entitled

[13] Reference is made to Michael Mcilwrath and John Savage, *International Arbitration and Mediation: A Practical Guide*, (2010) at p.267, para 5-112.
[14] Russell on Arbitration, 24th Edition, pgs. 150 and 152, paragraphs 4-052 and 4-056.
[15] 'International Commercial Arbitration', 2nd Edition, 2914 @ paragraph 13.04.

to a reasonable fee. What is ‘reasonable’ depends on the facts and on what the national systems prescribe. This includes judicial assessment of the appropriate amount,[16] an aspect which I would elucidate subsequently. The model law adopted by the UNCITRAL on International Commercial Arbitration recognises that the arbitrators must be compensated for their services and this flows from the contractual relationship between the parties and the arbitrator, as well as customary practices. The 1976 UNCITRAL Rules had expressly allowed the arbitrators to determine their own fee, which should be reasonable, taking into account the sum in dispute and the complexity of the dispute. Further, the rules require the arbitrators take into account the schedule of the fee that has been issued or provided by an appointing authority, if designated by the parties. The 1976 UNICTRAL rule position was criticised as granting arbitrators undue authority to determine their compensation. The revised rules issued in 2010, while continuing with the substantial role to the arbitrators in deciding the ‘reasonable’ fee, requires the arbitrators to inform the parties as to how it proposes to determine its fee and expenses promptly after its constitution. Thereby the process of determining the fee is made

[16]Julian D.M. Lew , Loukas A. Mistelis , et al., *Comparative International Commercial Arbitration*, 'Chapter 12 Rights and Duties of Arbitrators and Parties', pp. 2167-2173

transparent. The fee set by the arbitrators can be reduced if it is not reasonable and challenged within the prescribed period by the party moving to the appointing/designated authority, and in absence of designated authority, the review is undertaken by the Secretary General of the Permanent Court of Arbitration.

13. I would now turn my attention to the statutory provisions of the A&C Act, and would state that my attention has not been drawn to any provision which expressly or by necessary implication bars an arbitral tribunal from determining its fee, or to infer that the prohibition of *nemo judex in causa sua* (judge in your own cause) applies to arbitrations in India. Section 5[17] of the A&C Act states that in matters governed by Part 1, no judicial authority shall intervene except when provided in Part 1. Therefore, unless a provision in Part 1 of the A&C Act confers jurisdiction on the court in respect of the matter, by inference the subject-matter would fall within the implied jurisdiction of the arbitral tribunal. Section 2(6) of the A&C Act states that where Part 1, except for Section 28, leaves the parties to determine a certain issue, that freedom shall authorise

[17] "**5. Extent of judicial intervention.—**Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

any person, including the arbitral tribunal, to determine that issue[18]. Sub-section (2) to Section 19[19] states that subject to provisions of Part 1, the parties are free to agree on the procedure to be followed by the arbitral tribunal. Sub-section (3) to Section 19[20] states that where the parties fail to reach an agreement, subject to adhering to the provisions of Part 1, the arbitral tribunal is entitled to conduct the proceedings in the manner it considers appropriate. It follows that, where the parties do not agree on the fee, or the court while appointing an arbitral tribunal does not fix the fee, the arbitral tribunal by implication is authorised to fix the fee, which should be reasonable.

14. I would respectfully agree with D.Y. Chandrachud J. that the process of fixation of fee by the arbitral tribunal should be in accordance with public policy underlying arbitration, that is, with agreement and consensus of the parties who bear the cost of arbitration. The arbitral tribunal should be transparent and disclose the fee structure and terms of payment at the preliminary stage, so that an unwilling party can express its unwillingness. No party

[18] Section 2(6) reads: "(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue."
[19] Section 19(2) reads: "(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings."
[20] Section 19(3) reads: "(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate."

should feel compelled to agree and therefore, it is necessary that the consent of the parties in writing should be taken. This exercise undertaken at the initial stage would avoid embarrassing situations and prevent delay and litigation. The suggestion in ***Sanjeev Kumar Jain*** (supra) that the parties before nomination should ascertain the fee structure from the prospective arbitrators is salutary. At the same time, I would accept that fee fixation is a matter of the procedure and relates to conduct of arbitration, and for reasons supra and as held below, is an obligation as well as a right conferred on the arbitral tribunal. Therefore, even in cases where consensus between the parties or with the arbitral tribunal is not possible, the arbitral tribunal is entitled to fix the professional fee payable for adjudication, as without fee fixation, except in cases of *pro bono* arbitration, the arbitral tribunal would be unable to proceed further to decide and adjudicate the disputes. It goes without saying that the fee so fixed should be fair and reasonable.[21]

15. I would now proceed to examine the specific provisions which, according to me, make the legal position clear as they empower an arbitral tribunal to fix its fee. Sub-section (8) to Section 31,[22] as

[21] The term 'reasonable' has been used in the explanation to the pre-amended sub-section (8) to Section 31, and post-amendment Section 31A of the A&C Act, preceding the word 'costs'. Sub-section (2) to Section 39 also provides for costs, by way of a sum that the court may consider 'reasonable', to be paid to the arbitral tribunal if, after necessary inquiry, the court thinks it fit.

[22] "(8) Unless otherwise agreed by the parties,—

originally enacted before its substitution by Act No. 3 of 2016, had stipulated that unless otherwise agreed by the parties, the arbitral tribunal shall fix the cost of arbitration. The explanation to this Section clarified that the expression 'costs', for the purpose of the sub-section, means reasonable costs relating to the fees and expenses of the arbitrator and the witnesses.[23] The sub-section emphasised that the agreement between the parties is paramount and binding. The arbitral tribunal is entitled to fix costs of arbitration, which includes the fee and expenses of the arbitrator, if the agreement between the parties is wordless and silent as to the fee payable to the arbitral tribunal.

16. Post enforcement of Act No. 3 of 2016, sub-section (8) to Section 31 states that the cost of arbitration shall be fixed by the arbitral tribunal in accordance with Section 31A of the A&C Act. Section 31A, as inserted by Act No. 3 of 2016 and applicable with retrospective effect from 23rd October 2015, reads:

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;
(b) the arbitral tribunal shall specify—
(i) the party entitled to costs,
(ii) the party who shall pay the costs,
(iii) the amount of costs or method of determining that amount, and
(iv) the manner in which the costs shall be paid.
Explanation. —For the purpose of clause (a), "costs" means reasonable costs relating to—
(i) the fees and expenses of the arbitrators 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 proceedings and the arbitral award."

[23] See observations in Sanjeev Kumar Jain(supra) referred to in paragraph 4 above.

"31A. Regime for costs.—(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure,1908 (5 of 1908), shall have the discretion to determine—

(a) whether costs are payable by one party to another;

(b) the amount of such costs; and

(c) when such costs are to be paid.

Explanation.—For the purpose of this sub-section, "costs" means reasonable costs relating to—

(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.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,—

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter-claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen."

17. The explanation to sub-section (1) to Section 31A states that, for the purpose of the sub-section, 'costs' means the reasonable costs relating to the fee and expenses of the arbitrator, the court and the witnesses. Further, the regime of costs introduced by the insertion of Section 31A in terms of sub-section (1) is to be given effect

notwithstanding anything contained in the Code of Civil Procedure, 1908.[24] Section 31A gives discretion to the arbitral tribunal to determine – (a) the costs payable by one party to the other; (b) amount of such costs; and (c) when such costs are to be paid. Sub-sections (2), (3) and (4) to Section 31A lay down the rules and principles which the arbitral tribunal should keep in mind while exercising the discretion to apportion and award costs. Significantly, sub-section (5) to Section 31A annuls and abrogates any pre-dispute agreement which has the effect that one party is to pay the whole or part of the costs of arbitration. In other words, an agreement between the parties as to 'payment' of costs would be valid only if such agreement is made after the dispute between the parties has arisen. The object and purpose behind sub-section (5) to Section 31A is to check the malpractice in standard form agreements or unequitable contracts whereby the dominating party could incorporate a clause in the contract or the arbitration agreement, burdening one of the parties to bear the costs of arbitration in whole or part. I would not interpret the mandate of sub-section (5) to Section 31A as an attempt to trample the freedom to contract or autonomy of parties. On the other hand, it is a check on the dominating party from incorporating an unconscionable term

[24] Hereinafter referred to as 'the Code'.

that the costs of arbitration would be paid entirely or in part by one of the parties, and the general rule incorporated in clause (a) to sub-section (2) to Section 31A states that unless there is an agreement between the parties post the disputes, the unsuccessful party shall be ordered to pay costs to the successful party. In other words 'costs follow the event.'

18. What is of importance for the decision and issue raised in the present case is Section 38 of the A&C Act, which reads thus:

> "**38. Deposits.**—(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:
>
> Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.
>
> (2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:
>
> Provided that where one party fails to pay his share of the deposit, the other party may pay that share:
>
> Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.
>
> (3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any

> unexpended balance to the party or parties, as the case may be."

Section 38 has not been substituted or amended vide Act No. 3 of 2016. The reference made in Section 38 to sub-section (8) to Section 31, therefore, cites the said sub-section before its substitution by Act No. 3 of 2016. Be that as it may, I do not think that this would make any substantial difference, as post the substitution, sub-section (8) to Section 31 refers to Section 31A, which was inserted by Act No.3 of 2016. Sub-section (1) to Section 31A, in fact, is substantially *pari materia* to the earlier (pre-substitution) sub-section (8) to Section 31, except for the portion in sub-section (8) to Section 31 which gave absolute primacy to the arbitration agreement. I need not again refer to and interpret sub-sections (1) and (5) to Section 31A of the A&C Act. Sub-section (1) to Section 38 empowers the arbitral tribunal to fix the amount of the deposit or the supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) to Section 31. In other words, the arbitral tribunal can ask the parties to deposit the costs in advance and such deposits towards costs can be directed on more than one occasion. The expression 'costs' in Section 38 would obviously include the fees and expenses of the arbitral tribunal. This position is lucid beyond a doubt in view of the language of the proviso, and *vide* the language and words of sub-

sections (2) and (3) to Section 38. Sub-section (2) states that costs referred to in sub-section (1) shall be payable by the parties in equal shares. However, in case one party fails to pay its share of the deposit, the other party would pay that share. Further, if the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim. The second proviso to sub-section (2) to Section 38 will have limited application where the Fourth Schedule applies to the arbitration proceedings, in which case the fee will be payable not with reference to the claim or counter-claim, but with reference to the "sum in dispute". I will subsequently interpret the expression "sum in dispute" to mean the aggregate or total amount subject matter of the disputes before the arbitral tribunal. The effect of sub-section (2) to Section 38, which has to be read with the limitation incorporated *vide* sub-section (5) to Section 31A, is that as a general rule, the costs, including the fee of the arbitrators, would be payable in advance and shared equally by the parties. It is not the sole responsibility of the party raising the claim or counter-claim. These payments, during the course of the arbitration proceedings, are treated as advance payments and in terms of sub-section (3) to Section 38, the arbitral tribunal, upon termination of the arbitration

proceedings, must render an account to the parties of the deposits received. Any unexpended balance is to be returned to the party or the parties, as the case may be, who had made the payment. The expression “termination of arbitration proceedings” not only refers to the termination of the proceedings which takes place under the second proviso to sub-section (2) to Section 38, but also to the termination of proceedings on pronouncement/making of the award in terms of Section 32, as well as under Sections 14 and 15 of the A&C Act. This is important as we do have cases wherein the arbitrators resign or recuse without pronouncing an award, but thereupon they are bound to render an account of the costs, including the fee paid to them. As per the statutory mandate of sub-section (3) to Section 38, the arbitral tribunal must render an account to the parties of the deposits received upon termination of the arbitration proceedings.[25]

19. Sub-section (5) to Section 31A does not apply so as to override an agreement on the quantum of the fee payable to the arbitrators, as the said provision only applies where an agreement has the effect

[25] Premature termination of arbitrator’s mandate has serious repercussions in form of loss of time, money, as well as repetition of proceedings, and the delay may lead to additional damages and interest. By accepting appointment, an arbitrator undertakes to carry out his responsibilities. Resignations must be for a good cause especially when the proceeding have continued and substantial time and money has been spent. (see - Julian D.M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration*, 'Chapter 12 Rights and Duties of Arbitrators and Parties', pp. 281 – 282)

that a party is to pay whole or part of the cost of the arbitration. Sub-section (5) deals with the discretion of the arbitral tribunal to apportion the costs of arbitration, and does not restrict the authority of the arbitral tribunal to fix the cost of arbitration, including the quantum of fee payable to it. However, any contractual term fixing the fee payable to the arbitral tribunal is binding, and cannot be overridden by the arbitral tribunal.

20. The aforesaid legal exposition is in consonance with the decision of this Court in ***National Highways Authority of India*** v. ***Gayatri Jhansi Roadways Limited***,[26] wherein a Division Bench of this Court has held as under:

> "
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> xx xx xx
>
> 11. We have heard the learned counsel for the both the sides. In our view, Shri Narasimha, learned Senior Counsel, is right in stating that in the facts of this case, the fee schedule was, in fact, fixed by the agreement between the parties. This fee schedule, being based on an earlier circular of 2004, was now liable to be amended from time to time in view of the long passage of time that has ensued between the date of the agreement and the date of the disputes that have arisen under the agreement. We, therefore, hold that the fee schedule that is contained in the Circular dated 1-6-2017, substituting the earlier fee schedule, will now operate and the arbitrators will be entitled to charge their fees in accordance with this schedule and not in

[26] (2020) 17 SCC 626

> accordance with the Fourth Schedule to the Arbitration Act.
>
> 12. We may, however, indicate that the application that was filed before the High Court to remove the arbitrators stating that their mandate must terminate, is wholly disingenuous and would not lie for the simple reason that an arbitrator does not become de jure unable to perform his functions if, by an order passed by such arbitrator(s), all that they have done is to state that, in point of fact, the agreement does govern the arbitral fees to be charged, but that they were bound to follow the Delhi High Court in Gayatri Jhansi Roadways Ltd. case which clearly mandated that the Fourth Schedule and not the agreement would govern.
>
> xx xx xx
>
> 14. However, the learned Single Judge's conclusion that the change in language of Section 31(8) read with Section 31-A which deals only with the costs generally and not with arbitrator's fees is correct in law. It is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that Sections 31(8) and 31-A would directly govern contracts in which a fee structure has already been laid down. To this extent, the learned Single Judge is correct. We may also state that the declaration of law by the learned Single Judge in Gayatri Jhansi Roadways Ltd. is not a correct view of the law."

We would, however, explain the mandate as stated in paragraphs 12 and 14 in this decision.

21. Paragraph 14, as quoted, refers to Section 31(8) read with Section 31A, to state that it deals with costs in general and not with arbitrator's fee. This reasoning has to be read with my interpretation, which refers to and takes into account Section 38 of

the A&C Act. In my opinion, arbitrator's fee, being a component of cost, can be fixed by the arbitral tribunal when it is not already predetermined by way of an agreement between the parties, or by a court order. This is because the arbitral tribunal has the power to fix and direct the parties to make payment of deposits in advance and during the course of the arbitration proceedings, subject to the arbitral tribunal rendering an account on termination of the arbitration proceedings. In ***Gayatri Jhansi Roadways Limited*** (supra), there was an agreement between the parties on the quantum of fee payable to the arbitral tribunal, and in this context the Division Bench has observed that Sections 31(8) and 31A would not directly govern the contracts in which the fee structure has been laid down.

22. Paragraph 12 of the judgment is of utmost significance as it interprets and holds that the dispute as to the payment of fee does not result in termination of proceedings under clause (a) to sub-section (1) to Section 14 of the A&C Act. If one or both the parties fail to deposit the arbitration costs, including the arbitrator's fee, the mandate of the arbitrator is not terminated because he has become *de jure* or *de facto* unable to perform his functions as under Section 14(1)(a). On the other hand, in such situations, the two provisos to sub-section (2) to Section 38 come into play. Where one of the

parties fails to pay its share of the deposit, it is open to the other party to pay that share. However, if the other party also does not pay the share, the arbitral tribunal is entitled to terminate or suspend the arbitration proceedings.[27] This legal position also takes care of the argument raised by some counsels that the arbitration proceedings should be treated as terminated, where in the absence of any written agreement, the fee fixed by the arbitrator is unacceptable to a party on the ground that it is too high or even for the reason that they are unable to pay or bear the financial burden of the said fee, and such cases are to be treated as '*de jure*' impossibility covered under Section 14(1)(a) of the A&C Act. This argument would be contrary to and unacceptable in view of the two provisos to sub-section (2) to Section 38. In all fairness, it must be stated that Mr. K.K. Venugopal, learned Attorney General for India, had accepted this legal position, and I quote… "[t]his of course would indicate that no ground of bias can be raised if the arbitrator directs one party to pay the fee payable by the party, in case the

[27] The International Arbitration Rulebook: A Guide to Arbitral Regimes published by Kluwer Arbitration in Chapter 8: Costs and Fees observes that the arbitrators and arbitration institutions have to be paid for their services and reimbursed for the expenses incurred for fulfilling their duties. Each party is to pay equal proportion of costs in advance. Further the parties are jointly and severally liable, and if one party fails to pay, the other party will be invited to pay that share of costs in addition to its own. If the fees are not paid, as a general matter, it is quite possible that the arbitration may not proceed.

other party is not prepared to pay the fee. No question of bias would arise".[28]

23. The word 'cost', it is argued, is different from the arbitrator's fee and therefore, the arbitral tribunal is not competent or authorised to fix its own fee on the principle of *nemo judex in causa sua*, that is, 'no one should be judge in their own cause'. The principle would apply where the parties have fixed the fee payable to the arbitral tribunal, either as a term in the arbitration agreement or otherwise by an agreement, either before or after the appointment of the arbitral tribunal. This principle will apply equally where the court fixes the fee as a term of appointment. However, this principle will have no application where the parties or the court has left it to the arbitral tribunal to fix its own fee. In other words when the arbitration agreement is silent and the parties have not agreed on the quantum of fee payable to the arbitral tribunal, or the court order does not fix the fee, the arbitral tribunal has the right and power to fix its own fee.

24. The pre-amended sub-section (8) to Section 31 and post-amendment Section 31A and Section 38 of the A&C Act, use the

[28] Petitioner's submission in rejoinder in Arbitration Case (C) No. 5 of 2022 filed by Mr. Gunnam Venkateswara Rao, Advocate.

expression ‘costs’, *albeit* they also refer to fee and expenses of the arbitrator/tribunal. The sections are, therefore, comprehensive and all-embracing provisions that equally empower and authorise the arbitral tribunal to fix the fee in the absence of any agreement between the parties or a court order fixing the fee payable to the arbitral tribunal. Any other interpretation would make the A&C Act unworkable and Sections 31A, 38 and 39 superfluous. These provisions must be given their full intended effect and they are not supererogatory in nature. The sections should not be read as unnecessary when they refer to arbitration fee. Notably, arbitral tribunals, since time immemorial, have been fixing arbitration fee, and the legislature has not intervened or barred them from doing so even by the amendments made *vide* Act No. 3 of 2016. Additionally, there is no provision in the A&C Act which states that the parties can move the court for fixation of fee of the arbitral tribunal when the arbitration agreement is silent or the parties are unable to agree on the quantum of fee or where the court, while making reference, has not fixed the fee and has left it to the arbitral tribunal to decide upon its own fee. To hold to the contrary would create chaos and invalidate a number of orders passed by the High Courts and even this Court, which leave it open for the arbitral tribunal to fix its own fee.

25. 'Redfern and Hunter on International Arbitration',[29] referring to the expression 'costs', has divided the same into three categories, namely: (i) costs of the tribunal, which include charges for administration of arbitration; (ii) costs of arbitration, which includes hiring of rooms, transcript writers, amongst other things; and (iii) costs of the parties, which includes costs of legal representatives and expert witnesses, amongst other things; to observe that all three elements would include the fee of the arbitral tribunal. The expression 'costs', therefore, is comprehensive and broad to include fee and expenses of the arbitral tribunal. Russell[30] observes that the arbitral tribunal may make an order for costs on such basis as it thinks fit. Under the same heading, he observes that normally the tribunal or the appointing authority will determine the tribunal's fee and expenses, which would be recovered in and be a part of the award. However, when there is a question about the fee and expenses of the tribunal being reasonable and appropriate, the court, in terms of Section 28(2) of the English Arbitration Act, 1996, and also while exercising power under Section 63(4) of the aforesaid Act, can examine the said question. The court can also

[29] Redfern and Hunter on International Arbitration, Oxford University Press, 6th Edn., 2015, pg. 532-537.

[30] Russell on Arbitration, 24th Edition, pg. 461, paragraphs 7-217 to 7-222, under the heading 'Determination of the recovery of costs of the arbitration'.

examine the said question on an application by any of the parties under Section 64(2) of the English Arbitration Act, 1996. For our purposes, it is relevant to state that Section 63[31] deals with recovery of costs of arbitration and does not *per se* deal with the fee payable to the arbitral tribunal, nevertheless arbitration fee being a subset and a part of costs, can be made subject-matter of proceedings under Sections 63/64 of the English Arbitration Act,1996.

26. Professor Sundra Rajoo has elaborately examined the question of arbitrator's remuneration to observe that it consists of sums due to him in respect of his professional fee and expenses. Such remuneration is also known as the 'cost of the award', that is, the fee and expenses of the arbitrator or umpire, though the term 'fee' must be distinguished from the cost of the reference, that is, the legal cost incurred by the parties.[32] Reference is made by him to Tackaberry and Marriott[33], who have summarised the ratio in ***K/S Norjarl A/S*** v. ***Hyundai Heavy Industries Co. Ltd.***[34] as under:

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[31] **The recoverable costs of the arbitration.** 63 (1) – xxxx; (2) xxxx; (3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit. If it does so, it shall specify – (a) the basis on which it has acted, and (b) the items of recoverable costs and the amount referable to each; xxxx.

[32] Datuk Professor Sundra Rajoo, *Law, Practice and Procedure of Arbitration (Second Edition)*, 2016. Chapter 24 in the said book refers to Gary Born, *International Commercial Arbitration*.

[33] Tackaberry, and Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4th Edn., 2003) at pg. 2-358

[34] (1991) 3 All ER 211

(1) An arbitrator who accepts appointment with or without any stipulation as to fees thereby enters into a trilateral agreement with the parties.

(2) By that agreement the arbitrator assumes the status of a quasi-judicial adjudicator with all the duties and disabilities inherent in that status.

(3) Amongst those disabilities is an inability to deal unilaterally with one person for a personal benefit.

(4) It follows that an arbitrator who has accepted appointment on a particular basis as to the amount and payment of his fees, which may include a stipulation as to payment in advance or a commitment fee, cannot, thereafter, alter the basis of his remuneration unless all parties agree.

(5) An arbitrator who has accepted appointment without stipulation as to fees is entitled to a reasonable fee to be taxed, by him or by the court, at the conclusion of the arbitration, and cannot thereafter make any special agreement or arrangement about his fees unless all parties to the reference concur in it.

(6) So the arbitrator may not enter into any fee agreement or arrangement with a party to which any other party objects.

(7) These propositions apply to a sole arbitrator, a party-appointed arbitrator, an umpire, a chairman or a third arbitrator.

The points (1) to (5) set out the correct position. However, as far as point (5) is concerned, in the context of the statutory provisions of the A&C Act, it should be understood that where an arbitrator has accepted appointment without any stipulation as to the fee, he is entitled to reasonable fee as an implied term of the contract of appointment or on the principle of *quantum merit.* Point (6) should be read with the mandate of Section 38 of the A&C Act as examined above. In this background, and in the context of statutory provisions of the A&C Act, I believe that the suggestion in ***Sanjeev Kumar Jain*** (supra), and as proposed by Mr. Huzefa Ahmedi, Senior Advocate, who was appointed by this Court as *amicus curiae*, and as held by brother D.Y. Chandrachud J., the arbitral tribunal should, at the very outset or during the preliminary hearings, with mutual consent of the parties and by a written agreement fix the fee, which once fixed should remain binding and should not be revised, has merit. There cannot be any unilateral deviation from the terms of fee as agreed, which terms not only bind the parties, but the arbitral tribunal as well. Any deviation, amendment, or modification can only be by a written agreement with the consent of all parties to the litigation.

27. In the context of the situation where the arbitrator and the parties are unable to agree on the remuneration to be paid to the arbitral tribunal, and the arbitral tribunal fixes the fee payable, I would like to refer to Section 39 of the A&C Act which reads thus:

> "**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."

Section 39 is a part of Chapter X, which is a miscellaneous chapter. Sub-section (1) to Section 39 states that the arbitral tribunal shall have lien over the arbitral award for any unpaid costs of arbitration. This lien is subject to provisions of sub-section (2) to Section 39, which states that where an arbitral tribunal refuses to

deliver an award except on payment of costs demanded by it, the party may make an application to a court for an order that the arbitral tribunal should deliver the arbitral award to the party. The court thereupon is required to conduct an inquiry and may, if it deems proper, direct the party to deposit the costs in the court for delivery of the award to the party. After the inquiry, the court can pass orders for payment of costs to the arbitral tribunal as the court may consider reasonable. In case any deposit has been made by the party, the same would abide by the decision of the court. If extra payment has been made, the same shall be refunded to the party.

28. Sub-section (3) to Section 39 states that an application under sub-section (2) may be made by 'any party' unless the fee[35] demanded has been fixed by a written agreement between him and the arbitral tribunal. Further, the arbitral tribunal is entitled to appear and be heard when an application is made under sub-section (2) to Section 39. In other words, where there is a written agreement between the arbitral tribunal and a party on the aspect of the payable fee, the party cannot file any application under sub-section (3) to Section 39 of the A&C Act. This is significant as it bars and prohibits a party to challenge the fee to be paid to the arbitral tribunal, once it has

[35] Sub-section (3) to Section 39 expressly uses the words "the fees demanded…", which can be contrasted with the word 'cost', which is a more comprehensive and includes fee.

agreed to it in writing. The object and purpose is to impede such party from raising any objection to fixation of fee or costs during the course of the arbitration proceedings or after the award is made. The agreement between the parties or with the arbitral tribunal in writing as to the quantum of fee payable to the arbitral tribunal binds the parties.

29. Sub-section (3) to Section 39 of the A&C Act is ambiguous and requires interpretation to effectuate the legislative object and intent. Sub-sections (1) and (2) to Section 39, as noticed, particularly deal with cases where the arbitral tribunal does not deliver the award and claims a lien for the unpaid costs of arbitration, in which event the aggrieved party can move an application for an order directing the arbitral tribunal to deliver the award to the applicant. Such party is required to make payment into the court of the costs demanded, whereupon the court conducts an inquiry, if any, as it thinks fit and thereupon passes an order as to the money to be paid from the amount deposited with the arbitral tribunal towards costs. The amount determined by the court should be reasonable. Balance money, if any, is to be refunded to the applicant. Sub-section (3), on the other hand, empowers ‘any party’ to move an application before the court under sub-section (2), provided the ‘fee’ demanded has not been fixed under a written agreement between him and the

arbitral tribunal. In my opinion, sub-section (3) to Section 39 of the A&C Act confers a right on 'any party' to move to the court if he has discontent with the 'fee' fixed by the arbitral tribunal, unless he has already agreed to the 'fee' in a written agreement. Sub-section (3) is, therefore, independent and will apply even in situations not covered by sub-section (2), where the arbitral tribunal refuses to deliver the award to the applicant, except on payment of costs as demanded. No doubt, sub-section (3) to Section 39 refers to sub-section (2) thereof, but the said reference is in the context of the inquiry which the court has to conduct to determine the reasonable quantum of the 'fee' that should be paid/is payable to the arbitral tribunal. In terms of sub-section (3) to Section 39, the arbitral tribunal, in such event, is entitled to appear and be heard on such application. The above interpretation should be accepted for two reasons: (a) sub-section (3) to Section 39 is an independent provision and cannot be treated as a superfluous or redundant provision applicable in circumstances where sub-sections (1) and (2) to Section 39 are applicable; and (b) it would effectuate the legislative intent and object to ensure that any party can approach the court in case there is a dispute with regard to fixation of 'fee' by the arbitral tribunal before an award is made. I do not find any good ground and reason to hold that the legislative intent is to prevent a

party from approaching the court on 'fee fixation' by the arbitrator/tribunal till an award is made. This power/right of any party to approach the court against the 'fee fixation' by the arbitral tribunal is notwithstanding Section 38 of the A&C Act, for the simple reason that a party may feel aggrieved and may not want to participate in the arbitration proceedings for want of high costs which it can ill-afford to pay or would be compelled to pay in spite of its weak financial condition, as failure to pay the 'fee' to the arbitral tribunal may have negative consequences.

30. Sub-section (4) to Section 39 empowers the court to make such orders as it thinks fit respecting the costs of arbitration where a question arises respecting such costs and the arbitral award contains no sufficient provision concerning them. The power conferred under sub-section (4) to Section 39 is, therefore, wide and can even apply post the award, when the award itself contains no sufficient direction concerning the costs. Thus, in my opinion, sub-sections (2) and (3) to Section 39 are independent provisions, and the latter sub-section can be invoked whenever a party does not agree to the 'fee' fixed by the arbitral tribunal in a situation where the 'fee' is not fixed by a written agreement. Section 39(3) applies when both parties or one of the parties does not agree to the 'fee' fixed by the arbitral tribunal.

What is 'fair and reasonable fee'?

31. I have held that in the absence of any agreement or court order, the arbitral tribunal is entitled to fix 'fair and reasonable remuneration'. Fixation of fee by an arbitrator is a delicate matter as he is then determining the fee which he is entitled to command having regard to: (i) complexity of the disputes; (ii) difficulty or novelty of the questions involved; (iii) the skill, specialized knowledge and responsibility of the arbitral tribunal; (iv) number and importance of documents to be studied; (v) value of the property involved or the amount or the sum in issue; and (vi) importance of the dispute to the parties.[36] Professor Sundra Rajoo[37] has observed that experienced and qualified arbitrators are accustomed to receiving fees at least equivalent to the upper end of the fee charged for their profession in their home jurisdiction. If the fee structure is too low, it may be difficult to procure the services of appropriately qualified arbitrators. Even if they do, they may not be willing to dictate the amount of time required to resolve the case. Therefore, the arbitrators must openly, and in a transparent manner, state the fee that they would like to charge so as to avoid embarrassing allegations and disagreements. This should be done before

[36] Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, (2nd Edn., 1989) at p.236.
[37] Datuk Professor Sundra Rajoo, *Law, Practice and Procedure of Arbitration (Second Edition)*, 2016.

acceptance of appointment or at the very commencement of the arbitration process. The arbitrators are conscious of the role they perform as adjudicators, which is very different from and cannot be equated with advocates. While it is possible to choose and change an advocate keeping in view one's pocket, an arbitrator once appointed stands on a different footing. When an arbitral tribunal has been duly constituted, either party, irrespective of the fact whether they can afford the fee or not, is unlikely to displease the arbitral tribunal stating that the fee fixed is not reasonable.[38] At the same-time, any challenge to the arbitrator's fee by those who are willingly paying similar professional fee to those who argue for them before the arbitrator would be discordant.[39] To avoid any controversy and litigation, the fee structure fixed in the Fourth Schedule, or by the respective High Courts, when adopted by the arbitral tribunal, in my opinion should be considered as 'fair and reasonable'. The court would not permit a party to question the fee if it is in terms of the Fourth Schedule, or the rules framed by the High Court. I, therefore, *albeit* for different grounds and reasons,

[38] The high fee charged by senior advocates has been the subject matter of several articles, including the write-up *'India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization'*, by Marc Galanter and Nick Robinson, published by the Harvard Law School, and *'Litigation Expenses: High Cost of Justice'*, by Usha Rani Das. The latter article, in fact, refers to several quotations by leading advocates who have acknowledged the problem.

[39] High cost of litigation has grave implications and consequences, a concern which must engage the attention of the senior members of the Bar.

concur with the observations made in paragraph 105 by my brother D.Y. Chandrachud, J.

Situation post enforcement of Act No. 33 of 2019: Effect of the proviso to sub-section (3A) to Section 11 of the Arbitration and Conciliation Act, 1996.

32. Sub-section (3A) to Section 11 states that the Supreme Court and the High Courts shall have the power to designate arbitral institutions from time to time, which institutions have been graded by the Council under Section 43-I of the A&C Act. In the absence of any designation and gradation, the sub-section (3A) to Section 11 is not effectively and *de-facto* enforced. However, the first proviso would be applicable as it applies in respect of those High Courts' jurisdiction where no graded arbitral institution is available. In such cases, the Chief Justice of the concerned High Court may maintain a panel of arbitrators in discharging the functions and duties of an arbitral institution. Further, reference to the arbitrator is deemed to be an arbitral institution for the purpose of Section 11 and the arbitrator is entitled to such fee as the rates specify in the Fourth Schedule. In other words, the Fourth Schedule is binding. Sub-section (14) to Section 11 states that the arbitral institution shall determine the fee of the arbitral tribunal and the manner of payment to the arbitral tribunal, subject to the rates specified in the Fourth Schedule. When we read the first proviso to sub-section

(3A) to Section 11 and sub-section (14) to Section 11 together and in a harmonious manner, it is lucid that the rate of fee specified in the Fourth Schedule is obligatory. The expression 'the rate' specified in the Fourth Schedule refers to the fee mentioned in the Forth Schedule and Section 11(14), when it uses the expression "subject to the Fourth Schedule", it requires that the fee cannot exceed the fee fixed in the schedule, *albeit* may be lower than the figure mentioned in the schedule.

33. Therefore, post enforcement of Act No. 33 of 2019 in terms of the proviso to sub-section (3A) to Section 11, which applies to *ad hoc* arbitrations, the fee structure fixed by the Fourth Schedule is imperative and binding. In the case of institutional arbitrations, the fee structure should be fixed in terms of the Fourth Schedule. However, both sub-sections (3A) and (14) to Section 11 of the A&C Act do not bar the arbitral tribunal, or the arbitral institution, from fixing fee which is lower than the Fourth Schedule.

Power of the arbitral tribunal to direct advance deposit of costs, including supplementary costs, under Section 38 of the Arbitration and Conciliation Act, 1996:

34. I am conscious that the aforesaid determination on the remuneration/ fee payable to the arbitral tribunal may lead to difficulty, especially in cases where one party deliberately delays

and prolongs the proceedings, as a result of which, a number of hearings are required to be held. In such situations, the arbitral tribunal is entitled to take recourse to Section 38 of the A&C Act and call upon the party to make supplementary deposits in the form of costs of arbitration, which, while not including any 'supplementary' fee payable to the arbitral tribunal, would mean the 'cost incurred by the parties' payable in terms of Section 31A of the A&C Act. Of course, the deposit would finally abide by the directions given in the award on payment of costs. The power and authority given to the arbitral tribunal to direct the parties or a party to make advance deposit of costs, including supplementary costs, remains, and has not been limited or obliterated by Act No. 33 of 2019.

Summary

35. It will now be appropriate to summarize the legal position as under:

(a) The arbitral tribunal is bound by the fee or remuneration fixed by the parties in the arbitration agreement, or by mutual consent, whether before or after the disputes have arisen.

(b) Where the court refers disputes to an arbitral tribunal, in the absence of any agreement between the parties fixing the fee payable to the arbitral tribunal, it should fix the fee so payable. The fee fixed by the court is binding on the arbitral tribunal.

(c) It is desirable that the parties/court should ascertain the fee structure from the prospective arbitrators before an arbitrator is nominated/appointed.

(d) In the absence of a written agreement or a court order fixing the fee of the arbitral tribunal, the arbitral tribunal is entitled to 'fair and reasonable fee', which should be done in a transparent manner and in consultation with the parties. This exercise should be undertaken at the initial/preliminary stage. However, lack of consensus, would not bar an arbitral tribunal from fixing 'fair and reasonable fee'. An aggrieved party would be entitled to question the fee fixed by the arbitral tribunal in terms of Section 39 of the A&C Act. On a challenge being raised, the court would examine the question of reasonableness of fee with reference to the factors stated above and in particular with reference to the Fourth Schedule of the A&C Act. The fee structure mentioned in the Fourth Schedule or by the respective High Courts would be *per se* treated and regarded as 'fair and reasonable fee'.

(e) Fee once fixed cannot be increased or enhanced except with the consent of all the parties or by an order of the court.

(f) Post the enactment and enforcement of Act No. 33 of 2019, and in terms of the first proviso to sub-section (3A) of Section

11 of the A&C Act, the arbitral tribunal is entitled to the fee at the rate specified in the Fourth Schedule. Consequently, the arbitral tribunal is not entitled to deviate and fix a higher fee. Similarly, arbitral institutions, in terms of Section 11(14), are bound to follow the fee structure mentioned in the Fourth Schedule. However, sub-sections (3A) and (14) of Section 11 do not bar or prohibit the *ad hoc* arbitral tribunal or the arbitral institution to charge arbitration fee which is less or lower than what is stipulated in the Fourth Schedule. Sub-sections (3A) and (14) of Section 11 are binding on the parties and the arbitral tribunal.

Interpretation of the Fourth Schedule

36. The Fourth Schedule was introduced vide Act No. 3 of 2016 with retrospective effect from 23rd October 2015 and reads:

"

THE FOURTH SCHEDULE
[*See section 11(3A)*]

Sl. No. **(1)**	**Sum in dispute** **(2)**	**Model fee** **(3)**
1.	Upto Rs. 5,00,000	Rs. 45,000
2.	Above Rs. 5,00,000 and upto Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs. 5,00,000
3.	Above Rs. 20,00,000 and upto Rs. 1,00,00,000	Rs. 97,500 plus 3 per cent. of the claim amount over and above Rs. 20,00,000

4.	Above Rs. 1,00,00,000 and upto 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
5.	Above Rs. 10,00,00,000 and upto 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
6.	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

The Fourth Schedule, post substitution by Act No. 33 of 2019, refers to Section 11(3A), instead Section 11(14) of the A&C Act.

37. The three aspects of the Fourth Schedule which require interpretation are: (a) whether the expression 'sum in dispute' refers to the aggregate of the claim and the counter-claim, or the fee payable as per the schedule has to be separately computed for the claim(s) and counter-claim(s) without aggregating them; (b) do the words in Serial No.6 - *"Rs.19,87,500/- plus 0.5% of the claim amount over and above Rs.20,00,000/- with the ceiling of Rs.30,00,000/-"* mean Rs.19,87,500/- plus 0.5% of the total claims, subject to the ceiling of Rs.30,00,000/-, or the maximum fee payable is Rs.30,00,000/- plus Rs.19,87,500/-, that is, Rs.49,87,500/-; and (c) whether the fee prescribed in the Fourth Schedule is cumulative for the three-member arbitral tribunal, to be shared/divided between the three members, or the fee prescribed is for each individual member of the three member arbitral tribunal.

Interpretation of the expression "sum in dispute"

38. The expression "sum in dispute" does not refer to a claim or a counter-claim. The word 'sum' means the whole, aggregate or the total amount. Thus, the legislature has deliberately and consciously avoided a separate reference to the amounts stated either in the claim or the counter-claim. The "sum in dispute" refers to the total amount subject matter before the arbitral tribunal, which is to be adjudicated upon. Thus, it would be correct to state that the language and the words "sum in dispute" are an intended and a calculated departure, as the words 'claim' and 'counter-claim' do find specific mention in Section 23(2A), which states that the respondent in support of his case may also submit a counter-claim or plead a set-off which shall be adjudicated by the arbitral tribunal if such counter-claim or set-off falls within the scope of the arbitration agreement.[40] Similarly, Section 2(9) states that for the purpose of Part 1, except in the case of Section 25(a) and Section 32(2)(a), reference to a claim shall also apply to a counter-claim, and where it refers to defence, it shall also apply to defence to that

[40] Inserted vide Act No. 3 of 2016 with retrospective effect from 23rd October 2015. Even before the insertion, the position in law was the same.

counter-claim. Likewise, proviso to Section 38(1)[41] states that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix a separate amount of deposit for the claim or the counter-claim. Notwithstanding the provisions, the legislature, while enacting the Fourth Schedule, though cognizant of the difference between claim and counter claim/set-off, eschewed any separate reference to the amount prayed in the claim(s) or counter-claim(s)/set-off. The Fourth Schedule does not treat them as separate for computing the fee payable to the arbitral tribunal. On the other hand, the expression "sum in dispute" before the arbitral tribunal has been made the basis for computation of fee.

39. The legislature is presumed to know the prior construction of the terms in the original act, and an amendment substituting the new term or phrase for the one previously construed indicates that the judicial or executive construction of the former terms or phrases did not correspond with the legislative intent and a different interpretation must be given to the new term or phrase. Thus, in

[41] **38. Deposits.–** (1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, where it expects will be incurred in respect of the claim submitted to it;

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

xx xx xx

interpreting an amendatory act, there is a presumption of change in legal rights. A change in phraseology creates a presumption that the legislature intended a change in meaning. Conversely, when words used in the original statute are used in the re-enacted/amendatory act, they should be presumed to be used in the same sense in the new statute or amendatory act.[42]

40. Further, while interpreting a provision in an amendatory act, an additional principle of construction is to examine the object of the amendatory act to determine the legislative intent. For this purpose, the court should give effect to every word, and in case of ambiguity, refer to the surrounding circumstances in the form of legislative proceedings and reports of the legislative committees concerning the amendments.[43] Statutes in *pari materia* may also be resorted to for assistance.[44]

41. In the context of the Fourth Schedule, for clarification and affirmation, it would be most appropriate if reference is made to the 246th Report of the Law Commission of India. The Law Commission, while recommending a model schedule of fee[45], had

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[42] Earl T. Crawford, The Construction of Statutes, 3rd Edition, pp. 617 and 619

[43] J. G. Sutherland, Statutes and Statutory Construction, 3rd Edition, Vol.3, pp. 410-412

[44] Earl T. Crawford, The Construction of Statutes, 3rd Edition, pp. 616-617

[45]

> "10. One of the main complaints against arbitration in India, especially *ad hoc* arbitration, is the high costs associated with the same – including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The commission

stated that the schedule was based on the fee schedule set by the Delhi High Court International Arbitration Centre. The schedule in the Delhi International Arbitration Centre (Administrative Cost & Arbitrators' Fees) Rules uses the identical expression, "sum in dispute", and provides cumulative fee of both the claim and the counter-claim. Accordingly, the expression "sum in dispute" borrowed from the Delhi High Court International Arbitration Centre, should be given an identical construction as referring to the entire amount or the sum total of the disputes which are subject matter of the arbitration, that is, the disputes raised in the claim petition as well as the counter-claim. Separate fee for the claim and counter-claim/ set off is not envisaged and postulated.

42. One of the objectives of the A&C Act is to ensure cohesion of the remedy. Sections 2(9) and 23(2-A) incorporate the rule against fragmentation of remedies and nothing more. This is a marked and deliberate departure from the earlier Arbitration Act, 1940 wherein

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believes that if arbitration is really to become a cost-effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalize the fee structure for arbitrations.

11. In order to provide a workable solution to this problem, the Commission has recommended a model schedule of fees and has empowered the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. *The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised*. The schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they continue to stay realistic."

an arbitrator's jurisdiction was confined to the disputes referred to him by way of an order of reference. The arbitrator could not enlarge the scope of reference and entertain fresh claims or even a counter-claim/set-off without a fresh order of reference.[46]

43. The argument that a counter-claim and set-off should be treated as separate, as adjudication of the claim and counter-claim are distinct and treated differently under the A&C Act and the Code, and entail separate adjudication, though an attractive argument at the first blush, overlooks the legal position that the counter-claim and set-off raised before an arbitral tribunal must fall within the scope of the arbitration agreement, which is the subject matter and basis of any claim in the arbitration proceedings. A counter-claim can only be filed before an arbitral tribunal, if it is covered and governed by the arbitration agreement relied upon by the claimant, and not in respect of the cause of action not covered by the subject matter of the arbitration agreement. Necessarily, therefore, there would be a connect between the claim and the counter-claim/set-off. A set-off is a defence to the action and claims made by the claimant, which may be both legal and equitable. Equitable set-offs are not recognised under Order VIII Rule 6 of the Code but are permitted

[46] See Section 20 of the Arbitration Act, 1940. Refer to *Orissa Mining Corporation Ltd.* v. *Prannath*, (1997) 3 SCC 535.

to be raised by the defendant as the Code is not exhaustive. However, equitable set-offs must arise out of the same transaction or one that is so connected that they may be looked upon as part of the same transaction. Counter-claim, on the other hand, is regarded as a cross-action. When a counter-claim is not connected with the claim in the suit, the Court, in exercise of power under Rule 6(c) to Order VIII of the Code, can direct that such counter-claim may be excluded and tried as an independent suit.

44. Arbitral tribunal derives its jurisdiction from Section 7 of the A&C Act, which extends to "all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not". As stated above, the A&C Act does not contemplate separate jurisdictions for arbitral tribunal on the basis of number or nature of claims, and, therefore, does not afford to the tribunal the liberty to treat claim and counter-claim separately. Commentary on the UNCITRAL Model Law on International Commercial Arbitration[47] observes that when two or more parties have entered into an agreement to arbitrate, any of them normally has a power to commence arbitral proceedings. It is a common practice that more than one party put forth their claims

[47] Authored by Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez and Michael Polkinghorne; published by the Cambridge University Press.

in same arbitration. The labels that are appended to these claims presented by opposing parties, namely, the claim or counter-claim, are nothing more than an acknowledgement of the chronological order in which actions have been brought in the arbitration, and they do not entail any type of structural differentiation. It is for this reason that clarification is offered by Article 2(f) of the UNCITRAL Model Law which states that claim also applies to counter-claim and whenever it refers to defence, it also applies to a defence to a counter-claim. As noticed above, these facets of the UNCITRAL Model Law have been incorporated in the A&C Act. A reading of the rules published by the High Courts of Delhi, Bombay, Madhya Pradesh, Karnataka, Rajasthan and Madras indicate that they, in unison, have stated that the sum in dispute or the arbitrator's fee shall be calculated on the aggregate of the claim and the counter-claim. The fee is not to be calculated independently, first with reference to the claim and then the counter-claim. This is also postulated in the rules framed by the Indian Council of Arbitration Rules of Domestic Commercial Arbitration, Mumbai Centre for International Arbitration, and Construction Industry Arbitration Council. Our attention has also been drawn to the rules framed by the Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, Stockholm Chamber of Commerce

Arbitration, and European Court of Arbitration, which stipulate that for the purpose of fee, the amount in dispute would be the total of the claim and the counter-claim, that is, the aggregate value of all the claims, counter-claims and set-offs. If we have to accept the contra-stand, the rules framed by the several High Courts, as noted above, would have to be re-drawn, and the unsettlement would cause confusion, especially in pending matters. This must be avoided.

45. We have interpreted Section 38 of the A&C Act. Suffice at this stage is to again observe that the proviso to sub-section (1) to Section 38 applies only when the arbitral tribunal is entitled to a separate fee for the claim and counter-claim. It would not apply where the Fourth Schedule applies, in which event the arbitral tribunal is entitled to the fee as per the schedule, which is the cumulative figure on adding the claims and the counter-claims. Notably, sub-section (2) to Section 38 states that the deposit in terms of sub-section (1) shall be payable in equal share by the parties. Section 38 is a part of the original enactment, whereas the Fourth Schedule was inserted *vide* Act No. 3 of 2016. While we have to harmoniously construe Section 38 with the Fourth Schedule, we must give effect to the legislative intent in furtherance of the object and purpose of introducing the Fourth Schedule, an aspect I have adverted to earlier. This Court

in ***Aphali Pharmaceuticals Ltd.*** v. ***State of Maharashtra & Ors.***[48] had referred to the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and observed that a schedule is a mere question of drafting and can be used to construe the provisions in the body of the Act, *albeit* the expressions in the schedule cannot control or prevail against the express enactment, and in case of any inconsistency between the schedule and the enactment, the enactment shall prevail. These observations would not be applicable in the context of the present case, as the Fourth Schedule is not in conflict with the express enactment. The Fourth Schedule prescribes the quantum/scale of fee, whereas Section 38 does not prescribe the quantum or the formula for computing the fee. Section 38 and the Fourth Schedule can be construed harmoniously without one contradicting or being inconsistent with the other. A statute must be read as a whole and a schedule is as much a part of the statute as any other provision.

46. High cost of arbitration is one of the prime reasons for the reluctance of the litigants to accept arbitration as an alternative to court litigation. Arbitration, as a process of justice delivery, is substitutional in character, would remain unattractive unless it is

[48] (1989) 4 SCC 378

affordable and a lower cost alternative to litigation. This being the objective of the scheme of the provisions of the A&C Act in general, and Sections 2(1)(d), 2(9), 7, 8, 9, 11, 17 and 23, it would be appropriate to hold that arbitral tribunal, as statutorily conceived, is to examine and adjudicate all disputes arising from the contract and, therefore, as observed earlier, the Fourth Schedule mindfully uses the expression “sum in dispute”. Any contrary interpretation conceiving separate fee for claim and counter-claim, which, it is apparent, would substantially enhance the cost of arbitration, and dissuade the litigants from resorting to arbitration. Enhancement in cost of arbitration would be across the board even for small cases, when claims/counter-claims are less than Rs.5,00,000/-, in which case the fee payable to the arbitrator may, in a given case, double; to big amount arbitrations with claims and counter-claims of over Rs.20,00,00,000/-, in which case the highest fee payable to the arbitral tribunal under Serial No. 6 could increase from Rs.90,00,000/- to Rs.1,80,00,000/- in case of three member tribunal, and from Rs.40,00,000/- to Rs.80,00,000/- in case of a sole member tribunal. This, according to me, is not postulated and the legislative intent in enacting the Fourth Schedule. Serial No. 6 in the Fourth Schedule is a compromise between *ad valorem* method, where the arbitrators’ fee is assessed as a percentage of the total

amount in dispute, including any counter-claim, and the fixed fee method, as it prescribes the fee-cap when the amounts of the claim and the counter-claim exceed Rs.20,00,00,000/- (rupees twenty crores only).[49]

47. For the reasons aforesaid, I would hold that the heading "sum in dispute" will mean the aggregate of all the amounts in dispute without any bifurcation and separate application of the fee schedule with reference to the amount subject matter of the claim(s), and the amount subject matter of the counter-claim(s).

48. The aforesaid dictum would not apply in cases where there is an umbrella arbitration clause, which applies to different/distinct contracts, in which case each contract would be treated as a separate arbitration proceeding viz. the claim, counter-claim and set-off relating to that contract.

Interpretation of Serial No. 6 of the Fourth Schedule

49. Serial No. 6 of the Fourth Schedule has been interpreted as having incorporated a cap or ceiling of Rs.30,00,000/-. However, in some cases, it has been held that the fee specified of Rs.19,87,500/- plus 0.5% of the claim amount, over and above Rs.20,00,00,000/- with

[49] Professor Sundra Rajoo, *Law, Practice and Procedure of Arbitration (Second Edition),* 2016, has referred to four different types of remuneration agreements, namely, fixed fee method, time spent method, brief fee and daily refresher method, and *ad valorem* fee method.

a ceiling fee of Rs.30,00,000/-, means that the ceiling of Rs.30,00,000/- is not the cumulative ceiling. In other words, Serial No. 6 specifies the ceiling of Rs.19,87,500/- plus Rs.30,00,000/-, which comes to Rs.49,87,500/-.

50. A perusal of the graded scale manifest from the serial numbers mentioned in the Fourth Schedule, along with the model fee prescribed therein, exposits the legislative intent. The scales prescribed in the schedule have to be read in entirety and serial no. 6 cannot be read in isolation. The Serial Numbers 1 to 5, which have reference to the sum in dispute, specify the model fee which in respect of serial numbers 2, 3, 4 and 5, refers to the highest amount payable in respect of the preceding serial number and then states the additional (plus) amount payable by the specific percentage of the claim amount over and above the amount specified in the earlier serial number. For claims between Rs.10,00,00,000/- to Rs.20,00,00,000/-, which is applicable to Serial Number 5, an arbitral tribunal is entitled to an arbitral fee of Rs.12,35,500/- plus 0.75% over and above Rs.10,00,00,000/-. This means the maximum fee payable under Serial Number 5, that is, when the sum in dispute is below Rs.20,00,00,000/-, is Rs.19,87,500/-. Serial No. 6 deals with sum in dispute above Rs.20,00,00,000/- without any higher or upper limit stipulation. It

stipulates that arbitral tribunal is entitled to the fee of Rs. 19,87,500/- which is the highest fee payable in Serial No.5, plus 0.5% when the amount in dispute exceeds Rs.20,00,00,000/-. If this is so, and undoubtedly it is so, then the reasoning predicated on the legislative intent, is that, there is an overall ceiling of Rs.30,00,000/-. Contrary contention that the ceiling stipulated is Rs.19,87,500/- plus Rs.30,00,000/- must be rejected. The legislature was clearly aware that Serial No. 6 would apply to all arbitrations where the sum in dispute exceeds Rs.20,00,00,000/-. Serial No. 6, in its plain and simple language, which when read as it states and speaks, specifies that for claims above Rs.20,00,00,000/-, in addition to Rs.19,87,500/-, the arbitral tribunal will be entitled to fee at the rate of 0.5% of the claim amount above Rs.20,00,00,000/-, but the total fee is subject to ceiling of Rs.30,00,000/-. The expression “with the ceiling of Rs.30,00,000/-” would apply when claims are above Rs.20,00,00,000/-. The ceiling of Rs.30,00,000/- is not with reference to 0.5% of the claim amount over and above Rs.20,00,00,000/-. To read it otherwise would be overstretching the language of Serial No.6 and adding words to it.

51. Before us, reference was made to the absence of the punctuation mark in the form of a comma after Rs.20,00,00,000/- which is to be found in the Hindi language notification. Absence of the comma in

the English language version would not make any difference as the intent of the legislature, in my opinion, is to put a ceiling of Rs.30,00,000/-. The intent is not to fix ceiling of Rs.30,00,000/- in addition to the fee of Rs.19,87,500/-.

Whether the Fourth Schedule prescribes fee for individual members or the whole tribunal?

52. The last aspect relating to the interpretation of the Fourth Schedule is debatable as both views are plausible. The expression 'arbitral tribunal', as defined in Section 2(1)(d) means a sole arbitrator or a panel of arbitrators. Section 10 of the A&C Act states that the parties are free to determine the number of arbitrators, provided the number shall not be an even number. Failing such determination, the arbitral tribunal shall consist of the sole member. Thus, by default, the expression 'arbitral tribunal' refers to a sole member. Section 11, which relates to appointment of arbitrators, *vide* sub-section (2), states that the parties are free to agree on a procedure for appointment of an arbitrator or arbitrators. As per sub-section (3), failing such an agreement in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the third arbitrator, who shall act as the presiding arbitrator. If we accept Section 10 as the default rule, it is possible to interpret that the model fee prescribed in the Fourth

Schedule is for one-member arbitral tribunal. This interpretation, however, seems to be at variance with the wordings of the appended Note to the Fourth Schedule which applies in the event the arbitral tribunal is a sole arbitrator. Wordings in the note-'sole arbitrator shall be entitled to additional amount of twenty-five per cent on the fee payable as per above', can also be read to make the other interpretation more acceptable. As the expression 'arbitral tribunal' can refer to a three member or sole member arbitral tribunal, the Note, it can be argued, affirms the interpretation that the amounts mentioned in the Fourth Schedule refer to the fee payable to each member of the three member arbitral tribunal, and not cumulative fee which is to be divided amongst the three member arbitral tribunal.

53. I would respectfully prefer the interpretation placed by D.Y. Chandrachud J. In other words, the model fee mentioned in the third column of the Fourth Schedule would be the fee payable to each member of the arbitral tribunal, and in cases where the arbitral tribunal consists of a sole arbitrator, he shall be entitled to an additional amount of 25% above the amount specified in the model fee. It is apparent that this interpretation has been accepted and followed by several arbitral tribunals since introduction of the Fourth Schedule. This interpretation has gained acceptance. To interpret

it differently would lead to confusion and chaos which must be avoided, even if the other interpretation is plausible.

54. However, in view of the above interpretation, the Fourth Schedule does require modification and moderation. For example, where the sum in dispute is Rs.5,00,000/-, in case of the sole arbitrator, the amount payable to him would be Rs.56,250/-, that is, Rs.45,000/- plus 25% (Rs.11,250) of Rs.45,000/-. In case of an arbitral tribunal of three arbitrators, the fee payable would be Rs.1,50,000/-. This fee is too high and would be unacceptable to most of the litigants as they would be liable to pay minimum arbitration fee of nearly 11% in case of sole arbitrator and nearly 30% in case of an arbitral tribunal consisting of three members. Similar may be the situation in case of claims falling under Serial Nos. 2 and 3. A high fee pay-out at serial numbers 1 to 3 as framed by the legislature makes arbitration unaffordable and beyond reach for a common litigant. Public perception that arbitration is costly and for moneyed litigants must be dispelled, if arbitration is to gain mass acceptance as the preferred alternative. High fee structure denies access to arbitration. In fact, the above figures would suggest that the fee specified in the Fourth Schedule is the cumulative fee to be divided between the three-member arbitral tribunal. Nevertheless, for the sake of certainty and to avoid confusion, it may not be advisable to

overturn the settled and accepted position. For example, the fee schedule of the Delhi High Court International Arbitration Center, as amended with effect from 1st July 2018, clearly states that the schedule of fee mentioned in the table is for each arbitrator in a three-member tribunal, and not the cumulative fee to be divided amongst the three-member arbitral tribunal.

55. Section 11A states that the Central Government, when satisfied that it is necessary or expedient, can amend the Fourth Schedule from time to time, which exercise has not been undertaken.[50]

Final directions

56. I respectfully agree with the findings recorded by brother D.Y. Chandrachud, J. under the Heading G-2 Directions, in paragraph 158(i), in respect of Arbitration Petition (Civil) No. 5 of 2022, whereby in exercise of the power under Article 142 of the Constitution of India, direction for constitution of a new arbitral tribunal in accordance with the arbitration agreement have been issued to ensure that the arbitration proceedings are conducted without any discomfort and rancour, which could derail the proceedings.

[50] Periodical updation, without repeated legislation or notifications, can be achieved by yearly increase based or indexed on appropriate price index, as in case of Dearness Allowance.

57. In view of my findings on the first aspect, it will be appropriate and proper in other cases to hear the learned counsel for the parties individually to examine-whether or not interference is required in terms of sub-section (3) to Section 39 of the A&C Act. In a given matter, an order of remit may be required for fresh decision by the High Court. Accordingly, I would list each appeal/petition for hearing and appropriate orders and decision.

.....J.
(SANJIV KHANNA)

NEW DELHI;
AUGUST 30, 2022.