

REGIME FOR COSTS UNDER SECTION 31A OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2015**I. Section 31 A – Bare Text****a) Under The Arbitration and Conciliation Act, 1996**

“Section 31(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—

 - v. the fees and expenses of the arbitrators and witnesses,*
 - vi. legal fees and expenses.*
 - vii. any administration fees of the institution supervising the arbitration, and*
 - viii. any other expenses incurred in connection with the arbitral proceedings and the arbitral award”.*

b) Under The Arbitration and Conciliation (Amendment) Ordinance, 2015

After section 31 of the principal Act, the following new section shall be inserted, namely:—31A.

- 1) In relation to any arbitration proceeding or 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, 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 will 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 risen.*

II. Introduction

Insertion of new Section 31A of the Arbitration and Conciliation (Amendment) Ordinance, 2015 (for short “**the Ordinance**”) provides the manner in which the costs are payable, amount of costs and timelines of payment for arbitration and arbitration related disputes. A comprehensive regime for costs has been introduced under Section 31A of the Ordinance codifying the “costs follow the event” or “loser pays” principle. Section 31A of the Ordinance is to govern the “cost regime” of the arbitration that would be applicable to both the arbitrators as well as the related litigation in court with the intention of avoiding “frivolous and meritless” litigation.

III. Meaning of the term “Cost” under the said Section

Sub-section (1) provides that in relation to any arbitration proceeding, or arbitration related court proceedings under any of the provisions of this Act i.e. the Arbitration and Conciliation Act, 1996, the Court or the arbitral tribunal shall have the discretion to determine the liability to pay costs, the amount and also the time when such costs are to be paid,

notwithstanding the provisions of the Code of Civil Procedure, 1908 (for short “CPC”). The “costs”¹ for the purposes of this sub-section have been defined vide an Explanation to mean reasonable costs relating to:

- The fees and expenses of the arbitrators, courts and witnesses;
- Legal fees and expenses;
- Any administration fees of the institution supervising the arbitration; and
- Any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

Under this section, Indian courts hearing arbitration related proceedings are expected to award costs on a more robust basis than before. While India has in principle followed the traditional English law rule with respect to costs i.e., that the loser pays the winner the costs of litigation, the 'costs of litigation' are calculated on an antiquated basis (as prescribed in CPC) and the losing party usually ends up having to pay only a fraction of the winning party's actual costs. The absence of the risk of paying large amounts towards the winning party's legal costs incentivized the strategic use of (unmeritorious) court proceedings by recalcitrant parties in international arbitrations – such as applications for arbitrator appointment were set aside². However, the present amendment allows Indian courts to award costs based on the winning party's actual costs and that this should hopefully deter such unmeritorious litigation.

IV. The role of the Court or Arbitral Tribunal while making an order as to payment of costs

By virtue of this section, the Courts and arbitral tribunals will have a clear guide to exercising their discretion in awarding costs, which is completely different from traditional principles under CPC. Following orders can be passed by the Courts or Arbitral Tribunal that a party shall pay:

- A proportion of another party's costs;
- A stated amount in respect of another party's costs;
- Costs from or until a certain date only;
- Costs incurred before the proceedings have begun;
- Costs relating to particular steps taken in the proceedings;
- Costs relating to only a distinct part of the proceedings;
- Interest on costs from or until a certain date.

V. The circumstances to be taken into account while determining the costs

While determining the costs, the Court or arbitral tribunal must consider the following circumstances:

- the conduct of all the parties;
- whether a party has succeeded partly in the case;

¹ Explanation to sub-section 1 of Section 31A of the Ordinance

² Article on “India Overhauls its Arbitration Regime” available at <http://www.whitecase.com/publications/alert/india-overhauls-its-arbitration-regime>

- whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and
- whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

The circumstances provided for in sub-section (3) of the Ordinance are well intended and is in line with the rules of various arbitral institutions. Such a provision will ensure efficient conduct of the proceedings by restraining inequitable or mala fide conduct on the part of either of the parties. This may also result in more disputes being settled, since parties would be forced to take costs of arbitration seriously. It allows Indian courts to take parties' conduct into account when deciding how to award costs, and to use cost sanctions to discourage excessive, dilatory or unreasonable conduct on the part of litigants.

VI. The effect of the said amended Section

Due to insertion of this section, the costs for arbitration for any arbitration/arbitration related proceedings and including the costs provided for in section 31(8) of the Arbitration and Conciliation Act, 1996, shall now be determined in accordance with section 31A of the Ordinance which empowers the Court/ arbitral tribunal to grant the actual costs relating to arbitration incurred by the parties and clarify all the relevant factors that ought to be considered.

Section 31A of the Ordinance lays down various criteria for determining the cost of arbitration. The Act earlier did not prescribe any such criteria for fixing/determining the cost, which was completely left to the discretion of the Tribunal. The Section inserted by way of the Ordinance, lays down a detailed regime for the tribunal/Court to determine costs of arbitration at their discretion. Further, this section also takes into account the costs incurred by the court. Another important amendment is that an agreement specifying the burden of payment of costs by any one of the parties is not valid, unless the said agreement was made after the dispute. The Act did not provide criteria for determination of costs.

VII. Conclusion

Thus, now the manner of determination of costs of arbitration will be as per the provisions of newly inserted Section 31A of the Ordinance. This new Section provides for awarding costs of arbitration and also litigation costs arising out of arbitration by arbitrator or court. As a general rule, the costs will be borne by the unsuccessful party. The new section gives power to Arbitral Tribunal to impose costs and at the same time he is bound to give reasons for deviation from general rule. Thus, the possibility of a litigant who obstructs or delays arbitration process is likely to pay more costs. The new Section 31A of the Ordinance is added for providing comprehensive provisions for costs regime. It is applicable both to arbitrators as well as related litigation in Court. It will avoid frivolous and meritless litigation/arbitration. This provision in a way seeks to encourage parties to settle amicably and avoid unnecessary legal hassles.