

31st October, 2022

Determination of Arbitrators' fees - ONGC vs. Afcons (Case Study)

Introduction

1. A three-judge Bench of the Hon'ble Supreme Court had recently considered the issues pertaining to the fixation of remuneration of the Arbitral Tribunal under the Arbitration and Conciliation Act, 1996 (the said Act).
2. The Bench exhaustively deliberated upon the increases in the fees by the Arbitrator and the consequent denial of the parties to pay the increased fees, which was brought to the fore in the matter of *Oil and Natural Gas Corporation Limited vs. Afcons Gunanusa JV* along with other connected matters by a common judgment dated 30.08.2022. (2022 SCC OnLine SC 1122)

Brief facts

1. The parties, vide the arbitration agreement, determined the fees payable to the Arbitral Tribunal, which also contained the fees structure payable to the Arbitral Tribunal.
2. Subsequently Arbitral Tribunal was appointed and when the arbitration started, the Tribunal revised the fee structure on the basis of the Fourth schedule of the said Act.
3. After a few sittings and when the Arbitration was on-going, the fee structure was again revised on the ground that disputes were complex in nature and required substantial time to be adjudicated.
4. One of the party, i.e., ONGC refused to pay therevised amount and approached the Court seeking the reconstitution of the Arbitral Tribunal, where the following issues were to be decided:
 - a. Whether the arbitral fees can be determined unilaterally by the arbitrators;
 - b. Whether "sum in dispute" under the Fourth Schedule of the said Act would include the claims and counter-claims cumulatively;

Determination of arbitrator's fees

1. The Supreme Court dealt in detail with the position of determination of arbitrators' fees across different international arbitration organisations as also under the different national jurisdictions.
2. In India, the arbitral fees and all aspects of the proceedings are provided for under the said Act.
3. Under Section 11(14) of the said Act when the arbitral fee is determined by the High Court or the rules framed thereunder, it may take into consideration the rates specified in the Fourth Schedule.
4. The Fourth Schedule provides for a model fee structure on the basis of the "sum in dispute" which the parties or the Arbitral Tribunal may take into consideration while determination of the arbitral fees.
5. Section 31(8) provides that the Arbitral Tribunal may fix the cost of arbitration and such cost would include the fees and expenses of the Arbitral Tribunal.

Party Autonomy

1. Party autonomy is the cardinal principle of arbitration. The Indian statutory regime as well the general principles of alternative dispute resolution rest on the pillars of party autonomy.
2. The parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings.
3. In *Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services [(2016) 4 SCC 126]* it was held that party autonomy is the guiding spirit of arbitration.
4. The Court held that the provisions of the said Act have to be interpreted in light of the principle of party autonomy.



Amit Meharia

Managing Partner, MCO Legals

LLB (Hons) King's
College London, Solicitor
(Supreme Court of England & Wales)

Expertise:

Corporate Due Diligence &
Corporate/Commercial Arbitration

✉ amit.m@mcolegals.co.in



Abinash Agarwal

Senior Associate, MCO Legals

LLB., Faculty
of Law, University of Delhi,
B.Com(Hons.) University of Delhi

Expertise:

Civil Litigation,
Commercial Arbitration, Legal Due
Diligence, Legal Compliances

✉ abinash.a@mcolegals.co.in

Fourth schedule

1. In *Union of India vs. Singh Builders [(2009) 4 SCC 523]*, and other cases, courts have observed that unilateral fixation of disproportionately high amount of fees by the arbitrators has made arbitration an expensive proposition for parties.
2. The 2015 amendment to the said Act introduced the Fourth Schedule to regulate the fee structure in arbitral proceedings.
3. The Fourth Schedule is not applicable to international commercial arbitrations or arbitrations that are governed by the rules of the arbitral institutions.
4. Even after the introduction of the Fourth Schedule various disputes arose in relation to whether the fees would be governed by the rates provided in the arbitration agreement or the Fourth Schedule.
5. The Court, relying on *National Highways Authority of India vs. Gayatri Jhansi Roadways Limited [(2020) 17 SCC 626]*, held that in terms of the principle of party autonomy, the Fourth Schedule cannot be held to be mandatory and it would be open to the parties to determine the modalities of the fees structure for the arbitral tribunal.

Costs and fees

1. The Court relied on Sections 31(8) and Section 31A of the said Act which provide for imposition of costs to distinguish between costs and arbitral fees.
2. The Court held that the relationship between the parties and the Arbitral Tribunal is contractual in nature.
3. The fee is the financial remuneration payable in exchange of the adjudicatory service rendered by the Arbitral Tribunal.
4. The fees may be determined by the parties, however, when there is no agreement on the fees, it may lead to a peculiar situation where the Arbitrators may determine the fees unilaterally which is not permissible in various jurisdictions across the world but there is no provision regulating the same in the Indian context.
5. On the other hand, costs are compensation payable by the losing party to the winning party and is based on the “loser pays” principle.
6. Costs may include diverse elements that are payable by the losing party such as the litigation cost and other additional costs incurred. Arbitrators’ fees and expenses are a component of such costs.
7. The Court held that the Arbitral Tribunal cannot issue binding orders on fixation of remuneration while allocation of costs under Sections 31(8) and 31A as that would violate the principle of party autonomy
8. The parties and Arbitrators may decide on the fees payable consensually or the party may approach the courts praying for a review of the fees demanded by the Arbitrator.
9. The court also held that where the parties have not determined the fee structure, the Arbitral Tribunal may fix the fees unilaterally, however such fees must be “fair and reasonable”. Once an agreement has been reached as to be fee amount between the Arbitral Tribunal and the parties, either party, irrespective of the fact whether they can afford the fee or not, should not frustrate the proceedings stating that the fee fixed is not reasonable.

“Sum in dispute”

1. The term “sum in dispute” under the Fourth Schedule has been interpreted by various courts and there is lack of uniformity in views as some argue that it would include the claims and counter-claims taken together while others interpret it to be calculated separately for claims and counter-claims.
2. The Court relied on *Jag Mohan Chawla vs. Dera Radha Swami Satsang [(1996) 4 SCC 699]* which held that claims and counter-claims are independent suits and a counter-claim may arise in respect of a separate cause of action.
3. In *Rajni Rani vs. Khairati Lal [(2015) 2 SCC 682]*, the court held that a counter-claim is a cross- suit which stays alive even after the suit is dismissed.
4. Thus, the Court held that claims and counterclaims are independent and distinct.
5. The term “sum in dispute” under the Fourth Schedule would include the claims and counter-claims taken separately. Thus, Arbitrators are entitled to charge separate fees for claims and counter claims in arbitrations where the Fourth Schedule has been made applicable.

Directives for *ad hoc* arbitrations

1. The Court issued certain directives for fixing of fees in *ad hoc* arbitrations.
 - a. Holding of preliminary meetings to fix the fees and reduce conflicts by arriving a consensus on the issue.
 - b. Fixation of the rates at which the fees may be revised at a later stage if required.
 - c. Ensuring clarity at the preliminary stage as to the expectations of the Arbitral Tribunal and the affordability of the same by the parties.
 - d. In case of court appointed arbitrators, the order must also expressly stipulate the fee.

Conclusion

1. In case of *ad hoc* arbitrations, party autonomy would subsist if the fees have been determined in the arbitration agreement.
2. Otherwise, the fees must be determined by mutual agreement between the parties.
3. The Fourth Schedule is not mandatory; however, the High Courts may frame rules relying on the provisions of the Fourth Schedule
4. In the case of *ONGC vs. Afcons*, the Court found that since there was no consensus between the parties and the Arbitrator on the amount of fees, it was necessary to constitute a new Arbitral Tribunal and accordingly appointed a new Arbitral Tribunal.
5. The much needed clarity on the Fees payable to Arbitrators have been finally provided by the Apex Court and the same shall ensure fair and speedy adjudication of the disputes by bringing the clarity on the aspects of fees.