
COSTS IN ARBITRATION

Hiya Gandhi & Priya Choudhary, SVKM's Narsee Monjee Institute of Management Studies, School of Law, Indore

ABSTRACT

With the rise of arbitration as a popular alternative conflict resolution method, parties now have a quick and adaptable way to settle their differences without resorting to the courts. While courts play a critical role in supporting and preserving the integrity of arbitration proceedings, arbitration is largely a private and voluntary procedure. The important roles and interactions of courts within the arbitration system are highlighted in this abstract, which gives a broad picture of the connection between courts and arbitration. In this paper, we have discussed the primary requirement for cost allocation along with discussing the most under-rated difference between costs and fees to support which we have added a few case laws and a very famous Survey.

Keywords: Costs, Arbitration, Fees

Introduction

One of the important and famous methods of alternative dispute resolution called arbitration requires the parties to a legal dispute to consent to having their case decided by an arbitrator or panel of arbitrators. The fees involved with arbitration are an important factor to take into account to understand its relevance. It is crucial for parties to have a thorough understanding of the various expenses associated with arbitration in order to make wise choices and efficiently allocate their resources during the proceedings.¹

Fees for Filing: In order to begin an arbitration, parties are normally required to pay filing fees to the arbitrator's office or the arbitration institution. The filing fee amount varies according to the arbitration rules, the amount at stake, and the institution or arbitrator of choice.

Administrative Fees: To offset the costs of running the arbitration procedures, arbitration organizations frequently levy administrative fees. These costs may cover case management, arbitrator selection, and other administrative services. The administrative costs are often determined using the dispute's worth or a set fee schedule.²

Arbitrator Fees: In exchange for their knowledge and time, arbitrators, who act as impartial judges, are compensated. Depending on the intricacy of the case, the arbitrator's reputation, experience, and costs might vary widely. Arbitrator costs are often calculated according to an hourly rate or a set fee schedule.

Legal Representation: When participating in arbitration, parties frequently decide to have attorneys represent them. The cost of legal counsel may differ depending on the difficulty and length of the arbitration processes, the lawyer's qualifications, and the hourly rates of the law firm. Before initiating arbitration, it is essential to go through and agree on the conditions of legal representation and related fees.

Expert Witnesses: In some circumstances, it may be necessary for parties to retain experts to offer specialized expertise or opinions pertinent to the dispute. The cost of an expert witness

¹ Ng'etich Raphael, 'The Current Trend of Costs in Arbitration: Implications on Access to Justice and the Attractiveness of Arbitration' (*SSRN*, 13th July, 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644333> accessed 15th May, 2023

² Miglani&Punj Anhad & shaurya , 'Saving Arbitration from Arbitration Costs: The Case of Arbitrators' Fees' (*SCC Online*, 10th August, 2020) <<https://www.sconline.com/blog/post/2020/08/10/saving-arbitration-from-arbitration-costs-the-case-of-arbitrators-fees/>> accessed 22th May, 2023

can vary greatly based on their area of expertise and level of engagement.³

Hearing expenses: If a formal hearing is held, there can be extra expenses related to the location, facilities, and any required equipment. If there are many languages involved, these expenses may also include the renting of a hearing room, video equipment, transcribing services, and interpretation services.

Costs associated with document production and discovery processes, such as obtaining, examining, and producing pertinent documents, may be incurred by parties. These expenses may include things like photocopying, translating, managing electronic material, and using litigation support services.⁴

Travel and lodging: If parties or their representatives are required to travel for the arbitration procedures, there may be related charges for travel, lodging, meals, and other incidentals. These expenses may be substantial, especially if the arbitration is held in another country.

It is significant to remember that the distribution of expenses in arbitration might change based on the applicable arbitration rules, the parties' agreement to arbitrate, and the arbitrator's or arbitration institution's judgements. Before starting an arbitration, parties should carefully analyse and debate the cost implications to make sure they are aware of the potential financial obligations involved.⁵

Difference between costs and fees

Costs and fees are distinguished in the context of arbitration. Let us examine each phrase in turn:

Costs: In arbitration, "costs" often refers to the out-of-pocket fees that are incurred during the arbitration. These costs may include administrative charges, arbitrator fees, attorney fees,

³ - -, 'Queen Mary and PwC Release Study of Damages in ICC Arbitral Awards' (*ArbitrationQMUL*, 10th December, 2020) <<https://arbitration.qmul.ac.uk/news/2020/queen-mary-and-pwc-release-study-of-damages-in-icc-arbitral-awards.html>> accessed 20th May, 2023

⁴ Shukla&Bajpai rakshita & priyanka , 'Cost Award regime in Indian Arbitration Law: Are we there yet?' (*Manupatra*, 23rd April, 2023) <<https://articles.manupatra.com/article-details/Cost-Award-regime-in-Indian-Arbitration-Law-Are-we-there-yet>> accessed 18, June 2023

⁵ Christopher Drahozal, 'Arbitration Costs and Forum Accessibility: Empirical Evidence ' (*University of Michigan Journal of Law Reform*, 2008) <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1299&context=mjlr>> accessed 15th May, 2023

expert witness fees, costs associated with producing documents, hearing location costs, costs associated with translation or interpreting, as well as any other reasonable and necessary expenditures directly associated with the arbitration procedures.

Usually, the arbitral panel will decide how to divide the expenses of the arbitration in its final award or judgement. The tribunal has the power to determine how the expenses will be divided between the parties, including whether one party will be responsible for paying all costs or whether the costs will be divided in a certain ratio. When deciding on expenses, the tribunal may take into account elements including the verdict of the case, the behaviour of the parties, and any other pertinent facts.

Fees: In arbitration, "fees" often refers to the costs for the arbitrators' and arbitration institution's services. The expenses incurred throughout the arbitration procedure are different from these fees.

To administer the arbitration, provide support services, choose the arbitrators, and oversee the entire process, arbitration institutions typically collect fees. The cost of these costs is usually determined by a schedule or price structure offered by the arbitration institution, and it might change dependent on the institution and the significance of the case.

In contrast, the fees paid to individual arbitrators for their services and knowledge in settling the dispute are known as arbitration fees. The fees for the arbitrators are agreed upon or chosen in accordance with their qualifications, standing, and the difficulty of the dispute. Although the arrangement might be agreed upon by the parties, typically speaking, the parties engaged in the arbitration share responsibility for paying the arbitrators' fees.⁶

How is the Cost Allocated

Usually, the arbitral panel will decide how to divide the expenses of the arbitration in its final award or judgment. The tribunal has the power to determine how the expenses for the arbitration will be divided among the parties. Depending on the specifics of each case, the tribunal may choose to allocate expenses differently, and this decision is at its discretion. Here

⁶ - -, 'Arbitration Costs and Fees – What to Expect' (*Expert Evidence*, 17th December, 2016) <<https://expert-evidence.com/arbitration-costs-and-fees-what-to-expect/>> accessed 21st May, 2023

are a few typical methods for cost allocation:

"Loser pays" concept: The "loser pays" idea is frequently used in arbitration in various jurisdictions, including India. This rule states that the party who loses the arbitration, or loses it by a significant margin, is often responsible for paying the arbitration's costs, including the other party's legal fees and expenses. This strategy tries to discourage frivolous or weak arguments and encourage parties to thoroughly evaluate their claims or defenses.

Costs may be distributed proportionately by the tribunal depending on how well or poorly each party's claims or defenses were successful. The expenses may be split, for instance, if one party prevails on 70% of its claims and the other side prevails on 30% of its counterclaims.

Equal cost sharing: Depending on the circumstances and the arbitration's result, the tribunal may choose to divide the expenses equally between the parties. When it is difficult to pick a clear winner or when both sides are deemed to have had some success, this strategy is frequently adopted.

Cost allocation based on issues or conduct: The tribunal may divide the costs according to certain issues or conduct during the arbitration. For instance, the tribunal may compel one party to pay a greater portion of the costs incurred by such conduct if it created unneeded delays or expenses.

It's necessary to remember that the precise cost distribution in each arbitration case is left to the tribunal's discretion and may be impacted by factors including the relevant legislation, the arbitration rules, the conduct of the parties, and the particulars of the case. The final award or verdict usually includes the tribunal's cost allocation determination, which is binding on the parties.⁷

Landmark Judgments

The following cases have influenced how expenses are allocated and calculated in arbitration:

***Saw Pipes Ltd. v. ONGC Ltd. (2003)*:** In this instance, the question of whether the arbitrator might award the expenses of the arbitration procedures came up. According to the Supreme

⁷ Badrinath Srinivasan, 'Costs Allocation Under the Amended Indian Arbitration Law: A Critique' (SSRN, 23rd May, 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971999> accessed 17th May, 2023

Court of India, unless expressly stated otherwise in the arbitration agreement, arbitrators have the authority to impose expenses, including legal fees.⁸

Raja Transport (P) Ltd. v. Indian Oil Corporation Ltd. (2009): In this decision, the Supreme Court of India declared that arbitrators have the authority to award costs to the victorious party, and that these costs may include both the party's legal costs, such as attorney fees, as well as the arbitrators' fees.

In ***S.B.P. and Co. v. Patel Engineering Ltd. and Anr. (2005)***⁹, the issue of whether courts might overrule an arbitral tribunal's decision on expenses was raised. The Supreme Court ruled that unless the tribunal's cost determination is proved to be arbitrary or irrational, courts shouldn't get involved.

Singh Builders Syndicate v. Union of India (2009)¹⁰: This judgement made it clear that although courts have the authority to annul or change arbitral awards, they should employ this authority sparingly in respect to costs since the arbitral tribunal is the appropriate party to determine expenses.

Boghara Polyfab Private Limited v. National Insurance Company Limited (2009)¹¹: The Supreme Court ruled that the tribunal must exercise its discretion when deciding whether to award costs, keeping in mind the behavior of the parties, the verdict of the case, and other important considerations. It's crucial to keep in mind that arbitration law and precedents are always changing, and there are more decisions and developments affecting arbitration expenses in India which might have occurred post this research.¹²

Survey by Price Waterhouse Cooper and International School of Arbitration

Although corporations continue to affirm the benefits of arbitration in the resolution of transnational disputes, concerns over costs and delays in proceedings persist, and in-house counsel are increasingly focused on getting value from the arbitration, according to a

⁸ ONGC v Saw Pipes Ltd AIR 2003 SC 2629

⁹ S.B.P. and Co. v. Patel Engineering Ltd. and Anr. (2005), 2006 (1) UJ 156 (SC) [FB]

¹⁰ Singh Builders Syndicate v. Union of India (2009), (2009) 4 SCC 523

¹¹ Boghara Polyfab Private Limited v. National Insurance Company Limited (2009), CIVIL APPEAL NO. 5733 OF 2008 (Arising out of SLP [C] No.12056 of 2007)

¹² Bikram Chaudhri, 'Cost Control in Ad Hoc Arbitration in India - Thoughts and Observations' (SSRN, 17th September, 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838232> accessed 16th May, 2023

PricewaterhouseCoopers and Queen Mary University of London School of International Arbitration survey on the industry perspectives in corporate choices in international arbitration conducted in 2013. Despite ongoing worries about the costs of arbitration, the findings on the choice of dispute resolution processes showed that corporations still choose arbitration over litigation in the event of global conflicts.

The choice and role of outside counsel is affected. The results show that businesses are increasingly using in-house counsel to manage cases, in part because of a "desire to control costs better." In order to improve their in-house skills, corporations are now engaging attorneys with knowledge and experience in conflict resolution. This does not, however, imply that expenses have no bearing on the choice of whether to arbitrate.¹³

Suggestions

With the developments and changes in the existing laws and regulations regarding the issue, we suggest few options can be looked into while making an attempt to reduce the cost in arbitration which can be as follows:

1. Opting for a Sole Arbitrator

Using a sole arbitrator instead of three can cut arbitrator fees by approximately two-thirds. While arbitrators represent only a small portion of overall international arbitration costs, appointing three is unnecessary for non-complex cases.

2. Choose Cost-Effective and Experienced Lawyers

Surveys indicate that legal fees account for 74% of party costs in arbitration. Since these fees form the bulk of arbitration expenses, hiring experienced and cost-effective legal counsel can significantly reduce costs. Clients should compare legal services from different firms and insist on a maximum cap on fees, including stage-wise caps. It's essential to choose lawyers with substantial arbitration experience, as procedures differ from court litigation. Specialized firms like Aceris Law, which offer competitive rates, can further lower costs.

¹³ - -, 'Corporate choices in International Arbitration Industry perspectives' (PWC, 2013) <<https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>> accessed 24th May, 2023

3. Use Fast-Track Arbitration for Smaller Contracts

For contracts valued at \$500,000 or less, fast-track arbitration clauses are advisable. These clauses limit the time and procedural mechanisms, ensuring quicker resolution. While it's easier to include such provisions before a dispute arises, parties can still agree to fast-track arbitration later, though this is more challenging.

4. Keep Arbitration Clauses Simple

To avoid unnecessary jurisdictional battles, arbitration clauses should be drafted as simply and concisely as possible. Complex clauses can lead to avoidable complications, so in-house counsel should prioritize simplicity.

5. Avoid Ad Hoc Arbitration

Though ad hoc arbitration, like UNCITRAL, is acceptable, it's usually better to have a well-known arbitration institution oversee the process. These institutions ensure proceedings stay on track, and their administrative fees are a small percentage of the total costs, often enhancing cost-effectiveness.

6. Leverage Videoconferencing for Meetings

Whenever possible, request meetings via videoconference. Many lawyers and arbitrators now have access to videoconferencing tools, and even free solutions can be used. Although rare, final hearings in smaller disputes can also be conducted through videoconference, saving time and money.

Conclusion

The concept of a cost regime in arbitration law, which effectively serves to pay the loser of a pointless case, is still in the early stages of development. According to the Act of 1996, the earlier regime allowed the interpretation of the provision open to a larger range, therefore the provision did not result in the cost regime's effectiveness in the Indian legal system.

The issue was acknowledged in the 246th law commission report, which also emphasised the significance of awarding costs and noted that the loser-pays principle-based cost award regime

will not only assist the winning party with respect to the costs incurred by it in the arbitral proceedings but will also serve as a deterrent against the parties bringing unwarranted claims to arbitration. Despite being based on the study, the change in the form of section 31A under the Act of 2015 did not resolve the problem. According to how the law was interpreted, it was entirely up to the tribunals and courts to decide whether or not to award expenses.

The recent instance in which the provision was put into practice has demonstrated that the amendment is ineffective and fully depends on the decision of the authorities as to whether or not to award costs or even address the problem at all. It is reasonable to state that the cost regime in India has not arrived yet after a protracted process of arbitration and revisions.

These amendments draw attention to several potential elements that, in the present, may have an effect on how arbitral costs are calculated. It is important to be aware, however, that the cost computation may also be impacted by the particulars of each case, the relevant laws, and the chosen arbitration rules.