Chapter VI- Making of Arbitral Award and Termination of Proceedings (Sections 28-33)

LECTURE AT NALSAR UNIVERSITY

March 9th, 2024

By

Abhishek Kumar

Partner

Assisted by

Twinkle Kataria

Senior Associate

SINGHANIA & PARTNERS LLP

SOLICITORS AND ADVOCATES

Section 28: Rules applicable to substance of dispute

(1) Where the **place** of arbitration **is situated in India**,—

a. In an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the **substantive law for the time being in force in India**;

b. in **international commercial arbitration** —

(i) the arbitral tribunal shall decide the dispute in accordance with the **rules of law designated by the parties** as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its **conflict of laws rules;**

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute. [**Instead of (a) it should be (i)**]

Thus, Section 28(1)(a) applies to domestic arbitrations while section 28(1)(b) applies to International Commercial Arbitrations with seat in India.

Section 28(1)

- **Substantive Law** means, the law which determines the rights and obligations of parties and are enforceable by the legal system of a Country.

- Whereas **Procedural Law or Curial Law** is the law which provides the procedure for implementation of the Substantive Law of a Country.

- In case of an international arbitration, there is another aspect called 'Law Governing the Arbitration Agreement'.

- Section 28 of the 1996 Act, which is based on UNCITRAL Model Law, is only applicable when the **place of arbitration is in India**. If the place is in a country other than India, then Part I would be inapplicable.

- The Supreme Court in **BGS SGS Soma vs NHPC - [2020 (4) SCC 234],** has held that wherever there is an express designation of a "**venue**" and no designation of any alternative place as the "**seat**", combined with a supranational body of rules governing the arbitration, and **no other significant contrary** indicia, the conclusion is that the stated "**venue**" or "**place**" would be the juridical seat of arbitration. **(Para 64 & 82)**

- Section 28 is mandatory in nature in view of Section 2(6) and hence, parties cannot derogate from Section 28.

Conflict of Laws

- Conflict of law rules definition, which is also known as private international law are those laws that are specifically national (meaning that they are specific to a particular nation) and not within the scope of international law.

- The expression '**rules of law**' used in Section 28(1)(b)(i) is again in consonance with the fundamental principle of arbitration i.e., **"Party Autonomy",** wherein parties have the discretion to choose the law governing the contract, law governing the arbitration agreement as well as law governing the arbitration.

- In cases where parties have designated/chosen a particular law, then such designation of law applicable in a country, has to be interpreted as the Substantive Law of that country and not to its conflict of laws rules.

- This implies that the tribunal shall directly apply the substantive law or the rules of law specified by the parties without having to determine any applicable conflict of law rules first.

Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552

In this landmark judgment, the Supreme Court of India held the following:

- As per Section 28, AT has to identify the Rules that would be applicable to 'substance of dispute'.

- Section 28(1)(a) makes it clear that in a domestic arbitration, under Part I, there is no choice for the Tribunal but to decide 'the dispute' by applying the Indian 'substantive law applicable to the contract'. **(Para 118)**

- This is to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to international commercial arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. **(Para 118)**

- Whereas, in an international arbitration under Part I within Section 2(1)(f), the parties would be free to agree to any other 'substantive law' and if not so agreed, the applicable 'substantive law' would be as determined by the Tribunal. The Section merely shows that the legislature has segregated the domestic and international arbitration. **(Para 118)**

- This section is inapplicable where the seat is outside India. In that event, the conflict of law Rules of the country in which the arbitration takes place would have to be applied. **(Para 118)**

PASL Wind Solutions Private Limited vs. GE Power Conversion India Private Limited (2021) 7 SCC 1

The Supreme Court of India in the paras **79, 80 and 81** observed the following:

- Two Indian Parties can choose a foreign seat as the seat of arbitration, since the Act is party-centric Act and gives full autonomy to the Parties to choose (i) the law governing the contract, (ii) the law governing the arbitration agreement, and (iii) the law governing the arbitration proceedings which is known as "***curial law***".

- The Court observed that any dispute between two Indian nationals, where one is habitual resident of a foreign country and one is a resident of India, would attract the provisions of Section 2(1)(f)(i) and consequently, the parties would be entitled to have their disputes decided in India as per Section 28(1)(b) of the Arbitration Act, in accordance with their chosen law.

- Court observed that Section 28(1)(a), makes no reference to an arbitration being conducted between two Indian parties outside India, therefore, it cannot be concluded that two Indian parties are interdicted from resolving their disputes at a neutral forum. The award obtained in such arbitration would be a 'foreign award' and will be enforceable under the provisions contained in part-II of the Act.

- The Court also observed that in such cases, the arbitrator, depending upon the law of the country where the arbitration is being held may choose to apply conflict of law rules, applicable in such country.

Section 28(2)

- The arbitral tribunal shall decide ***ex aequo et bono*** or as ***amiable compositeur*** only if the parties have expressly authorized it to do so.

- The term '**amiable compositeur**' means an unbiased third party. In other words, an arbitrator, who has been expressly authorized by the parties, is not bound by the strict rules of law and may give effect to general considerations of equity and fair play on an award, and thus, acts as an unbiased third party.

- The expression '**ex aequo et bono**' means '**according to the right and good**' or '**from equity and conscience**'.

Section 28(3)

- While deciding and making an award, the arbitral tribunal shall, in all cases, **take into account** the **terms of the contract** and trade usages applicable to the transaction.

- Prior to 2015, the powers of an arbitrator to apply his own mind were very limited, and he was strictly bound by the terms of the contract. This amendment was introduced to remove the difficulties created by the judgment of *Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd*.

- The Hon'ble Supreme Court in **HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471** has held that the 246th Law Commission Report brought in amendments to the Act, thereby, narrowing the grounds of challenge, and therefore, the court must be careful in preserving the independence, impartiality and neutrality of arbitrators. **(Para 18)**

- Section 28(3) has also been amended to make it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a plausible one.

Section 29: Decision making by panel of Arbitrators

(1) Unless otherwise agreed by the parties, in an arbitral proceeding with more than one arbitrator, any decision shall be made by the majority of its members.

- The Supreme Court in the matter of ***Common Cause v Union of India*** **(2004) 5 SCC 222** held that "the view taken by the minority cannot be cited as the law laid down by the Constitution Bench nor can it be followed in the face of the opinion of the majority to the contrary. **(Para 5)**

- However, in the case of **Ssangyong Engg. & Construction Co. Ltd. v. NHAI - (2019) 15 SCC 131**, Supreme Court invoked Article 142 of the Constitution of India to uphold the minority award. Article 142 states about the jurisdiction of the Supreme Court to pass such decrees/orders as necessary for complete justice. **(Para 77)**

(2) Notwithstanding sub-section (1), if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

- This Section is akin to Article 29 of **UNCITRAL Model Law,** and a similar provision has also been embodied in Article 32 of **ICC Rules.**

Section-29A Time limit for Arbitral Award

- Section 29A(1) provides that an Arbitral Tribunal shall make the award within a period of **twelve months** from the date of completion of pleadings under 23(4).

- However, the above is mandatory only in respect of a domestic arbitration.

- The time period for completion of pleadings is **6 months**, from the date of receipt of notice of appointment by the arbitrator.

- Section 29A(3) further provides that the parties may, by consent, extend the period of twelve months for a further period **not exceeding six months**.

- On expiry of the above period, the mandate of the arbitral tribunal would terminate, and it would be unable to proceed further. However, it can be extended by the Court on an application filed by either of the parties.

Section 29A Contd.

- Court may direct for reduction of fee of the arbitrator not exceeding five percent for each month of delay, if in the opinion of the Court, delay is attributable to the arbitrator. However, a reasonable opportunity of hearing would be given to the arbitrator.

- During the pendency of the application for extension of time, the mandate of the arbitrator shall continue.

- While extending the period, the Court may substitute one or all the arbitrators and in such case, the arbitral proceedings shall continue from the stage already reached and on the basis of evidence and material already on record.

- The Court can also impose **actual or exemplary costs** upon any of the parties in its discretion.

- An application for extension shall be disposed of by the Court expeditiously and endeavour shall be made to dispose of the matter within a period of sixty days. However, the above period is not mandatory.

Section 29A – Contd.

- The amendment providing for 6 months for completion of pleadings (introduced in 2019) is applicable retrospectively.

- In **ONGC Petro Additions Ltd. v. Ferns Construction Co. Inc., 275 (2020) DLT 123**, it was held that Section 29A of the Arbitration and Conciliation Act, 1996 ("Act") shall be applicable to all pending arbitrations seated in India as on August 30, 2019 and commenced after 23 October 2015, except international commercial arbitrations. **(Para 26)**

DDA v. Tara Chand Sumit Construction Company, 269 (2020) DLT 373

- The Delhi High Court in the instant case, interpreted the term "**court**" enumerated under Section 29A(4) of Arbitration Act in **paras 30 and 32**.

- The court observed that in case an application under Section 29A of the Arbitration Act is filed before the **Principal Civil Court** for extension of mandate and the occasion for his substitution arises, the same would lead to a situation where a conflict would arise between the **power of High Court** to appoint arbitrators under **Section 11** of the Act, since, under Section 11 only high court of Supreme Court has the power of appointment of arbitrators.

- The court thus, held that an application under Section 29A of the Arbitration would lie only before High Court and not before the principal civil court.

Suryadev Alloys and Power Private Limited v. Shri Govindraja Textiles Private Limited, (2020) 6 CTC 881

- A question arose for consideration before the Madras High Court with regard to the validity of an arbitral award which was passed **a year after the period fixed by the court had lapsed**.

- The Court did a comparative analysis of Section 28(1) under the 1940 Act and the Section 29A of 1996 Act and held that Section 28(1) of the 1940 Act gave wide powers to the court to enlarge the time for making an award even after the expiry of the time for making the award or even after the award has been made; whereas the 1996 Act has curtailed these powers and restricted the extension only within the provisions of Section 29A(3) and 29A(4). **(Para No. 13)**

- Hence, the Madras High Court held that even the court cannot ratify an award *ex post facto* by extending the period for making the award in a petition filed under Section 34 of the Arbitration Act by an aggrieved party. Further, the court also enumerated that the language of Section 29A(4) of the Arbitration Act clearly stipulates that if the award is not made within the stipulated period or the extended period then the mandate of the arbitrator stands terminated unless extended by the court. **(Para 15)**

29B. Fast track procedure

- The parties to an arbitration agreement, may, at any **stage either <u>before</u> or <u>at the time of appointment</u>** of the arbitral tribunal, agree in **writing** to have their dispute resolved by fast track procedure.

- The award under this section shall be made within **a period of six months** from the date the arbitral tribunal enters upon the reference.

- If the award is not made within six months, parties can extend the same by agreement for a further period of six months. Any further extension can only be granted by the Court.

- The fees payable to the arbitrator and the mode shall be as may be agreed between the arbitrator and the parties.

- Similar provisions for Fast-Track Arbitration are also envisaged in ICC Rules (Article 30), LCIA (Rule 9A) and SIAC (Rule 5).

- Even in India various institutions such as **ICA** (Rule 44), DIAC (Rule 12), MCIA (Rules 12 & 13) have also incorporated the principle of fast-track arbitration.

Section 29B Contd.

Number of Arbitrator

Section 29B(2) provides that the parties to the arbitration agreement, while agreeing for resolution of dispute by fast-track procedure, **may agree** that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

Procedure to be adopted

Sub-section 3 states that the arbitral tribunal shall follow the following procedure

a. The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties **without any oral hearing**;

b. The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

a. An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

b. The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

Section 30 - Settlement

1. It is not incompatible for an arbitral tribunal to encourage settlement of the dispute with agreement of the parties. The arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

2. If, during the pendency of arbitration, parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

3. An arbitral award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral award.

4. An arbitral award on agreed terms shall have the same status and effect as any other **arbitral award** on the **substance of the dispute**.

Section 30 Contd.

- In case parties arrive at a settlement or express intention to settle the dispute, the AT is bound to encourage the said settlement and if need arises, then the AT has to act as Mediator/ Conciliator in order to settle the dispute between the parties. After the settlement has reached, the AT can pass an arbitral award in terms of the settlement.

- An arbitral award passed in terms of settlement is akin to an arbitral award passed on the merits of the dispute and the same shall be enforceable as a decree of the court as provided under Section 36 of Arbitration and Conciliation Act, 1996.

- Section 30(3) states that the award shall be made in accordance with Section 31 of the Act.

Section 31: Form and contents of arbitral award

- An arbitral award shall be made in **writing** and shall be **signed** by the members of the arbitral tribunal.

- The signatures of the majority of all the members of the arbitral tribunal shall be **sufficient** so long as the reason for any **omitted** signature is **stated**.

- When no reason is provided for non-signature of an arbitrator then the majority award is an incomplete award and hence liable to be set aside under Section 34(2)(a)(v). **(MTNL v. Siemens Public Communication Network Ltd. 118 (2005) DLT 293)**

- It is mandatory for an arbitrator to state reasons in the award. However, it has two exceptions:

  (a) the parties have agreed that no reasons are to be given, or

  (b) the award is an arbitral award on agreed terms under section 30

- If the arbitrator omits to give reasons for the award, then such award is liable to be set aside. It is essential to prevent unconscious, unfairness, and/or arbitrariness. (***State of Uttar Pradesh & Ors. V. Combined Chemicals Pvt. Ltd. (2011) 2 SCC 151***).

Section 31 Contd.

- An arbitral award shall contain date and the place of arbitration and the award shall be deemed to have been made at that place.

- Another important requirement is that after the arbitral award is made, **a signed copy** shall be delivered to each party.

- In the matter of **Benarsi Krishna Committee v. Karmyogi Shelters Pvt. Ltd (2012) 9 SCC 496** the question arose whether the word “party” would mean to include an **advocate** of the party. The Supreme Court held that the expression **“party”,** as defined in Section 2(h) of the 1996 Act, clearly indicates a person who is a party to an arbitration agreement and is not qualified in any way to include the agent or advocate of the party. **(Para 15)**

- The requirement of delivery of signed award is not merely a formality but a matter of substance. **(Union of India v. Tecco Trichy Engineers and Contractors [(2005) 4 SCC 239].**

- In **Dakshin Haryana Bijli Vitran Nigam Ltd v. M/s Navigant Technologies Pvt (2021) 7 SCC 657**, Supreme Court held that the limitation period of **three months** for challenging the arbitral award, commences from the **date of receipt of the signed copy of the arbitral award by parties. (Para No. 46 and 47)**

Section 31(6): Interim Award

- The arbitral tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award. Meaning thereby, the AT can pass an interim award during the arbitral proceedings on the issues which it deem final and/ or settled.

- The definition of arbitral award under Section 2(1)(c) states that the arbitral award includes interim award. Therefore, an application under Section 34 for setting aside of an interim award is maintainable.

- An arbitrator may pass an interim award on admissions made by a party, in a similar manner as provided under Order XII Rule 6 of the Code of Civil Procedure, 1908. **[Uttam Singh Duggal Co. Ltd. vs. United Bank of India Ltd & Ors. (2000) 7 SCC 120)]**

- The Supreme Court, in **Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products (2018) 2 SCC 534**, has held that an award on the issue of limitation under Section 16 of the Act, is an interim award, that can be challenged separately and independently under Section 34 of the Act.

  (Paras 15, 23-25, 30)

- The Court also clarified that the issue of limitation cannot be said to be an issue of jurisdiction.

Section 31(7)(a): Pre-Award Interest

i. The AT can grant interest at such rate as it deems reasonable, on any part of claim or entire claim, between the period of ***when the cause of action arose and the date on which the award is made.***

- The above is also settled in the recent judgement of ***Punjab State Civil Supplies Corporation Limited (PUNSUP) v. Ganpati Rice Mills; SLP (C) 36655 of 2016. It was also held that*** a court cannot reduce the rate of interest on its own, without giving proper reasoning to the said effect." The Supreme Court in ***Garg Builders Vs Bharat Heavy Electricals Limited AIR 2021 SC 4751***, observed that an arbitrator cannot grant pendente lite interest if the contract contains a specific clause barring such payment.

- However, in case the parties to a contract have agreed for a specific rate of interest, then the AT is bound by such agreement. However, the Tribunal has the discretion to award future interest at any rate it feels appropriate.

- The Delhi High Court in ***Turner Morrison Limited v. Rani Parvati Devi;*** **(2020) 4 Arb LR 194 (Del)** has held that the arbitral tribunal is bound by the terms of the agreement with respect to pre-award interest, and if the agreement had stipulated interest at the rate of 36% p.a., the arbitral tribunal had no authority to alter this rate.

Section 31(7)(a): Contd.

- In case the parties have contracted that no interest shall be paid on any amount due and payable, then the AT cannot grant or allow any claim for interest on the claim amount.

- The Supreme Court in **Jai Prakash Associates vs THDC Ltd. - (2019) 17 SCC 786** has held that the AT cannot grant or allow any claim of interest if there is a specific bar for awarding interest in the contract. The Court further held that the difference between pre-reference and *pendente lite* interest have been done away with and both have been merged together and has been recognized as one.

Section 31(7)(b): Post-Award Interest

Section 31(7)(b): Granting of Interest in case of ***post-award interest*** *unless the award otherwise directs*.

- It is stipulated in the Act that in case award is silent on the rate of interest, the awarded amount shall carry interest @2% higher than the "current rate of interest" from the date of award till the date of payment.

- The definition of current rate of interest is same as the definition under Section 2 of the Interest Act, 1978, which provides that the current rate of interest means the maximum rate of interest on which the interest is paid on different classes of deposits.

Principles governing Post Award Interest

- The rules in respect to award of post-award interest were crystallized by the Supreme Court in ***Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd*** **(2019) 11 SCC 465**.
- The Court held that in an international commercial arbitration seated in India, in the absence of an agreement between the parties on interest, the rate of interest would be governed by the Act.
- It was further held that the arbitral tribunal while granting interest must take into consideration factors such as:
  - the '*loss of use*' of the principal sum;
  - the types of sums to which the interest must apply;
  - the time period over which interest should be awarded;
  - the internationally prevailing rates of interest;
  - whether simple or compound rate of interest is to be applied;
- The Supreme Court further held that courts may reduce the interest rate awarded by an arbitral tribunal where such interest rate does not reflect the prevailing economic conditions, or when it is found to be unreasonable.

Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa (2015) 2 SCC 189

- The Supreme Court, by a majority of 2:1, held that the word "*sum*" used in Section 31(7) of the Act refers to the principal sum claimed along with pre-award interest, if any, granted or allowed by the Tribunal. Therefore, after passing of the award, the sum claimed, and pre-award interest become part of the awarded amount.

- The Court further held that awarding post award interest on the awarded amount is not granting "**Interest on Interest**", since the pre-award interest becomes part and parcel of the awarded amount.

- The Supreme Court overruled the judgment in *State of Haryana and Others. v. S.L. Arora & Co* ("***S.L. Arora***"), which had ruled that post-award interest could only be charged on the principal sum and not on pre-award interest.

UHL Power Company Ltd. vs. State of Himachal Pradesh (2022 SCC OnLine SC 19)

- The Supreme Court observed that post-award interest can be awarded by an Arbitrator on the interest amount as well.

- The Apex Court noted that the Division Bench had relied on State of Haryana v. S.L. Arora and Co. (2010) 3 SCC 690 which has been overruled in **Hyder Consulting (UK) Ltd. v. Governor, State of Orissa (2015) 2 SCC 189**.

Section 31A. Regime for costs.

- Section 31(8) of the Act empowers an arbitrator to fix the cost of an arbitration in terms of Section 31(A).

- **Section 31A** provides that notwithstanding anything contained in CPC, Arbitrator has 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

“costs” means reasonable costs relating to—

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administrative fee of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award

Rules Regarding Costs

- It is further provided that if the Court or arbitral tribunal decides to make an order for payment of costs,

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

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

- While 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 counterclaim 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.

Section 31A Contd.

- The following amounts can be awarded as cost —

  (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.

- Sub-section (5) provides that an agreement which has the effect that a party is to pay the whole or part of the costs in any event shall be **valid only** if such agreement is made **after** the dispute in question has arisen.

FEE OF ARBITRATORS

- The Supreme Court in the judgment of ***NHAI vs. Gayatri Jhansi Raodways* Limited** - **2019 SCC OnLine SC 906** has held that Section 31(8) and 31A of the Act will not apply to arbitral fee if a fee structure has already been laid down in the agreement between parties. The Court overruled Delhi High Court's decision in **NHAI vs. Gayathri Jhansi Roadways Ltd. MANU/DE/5376/2017,** which held that arbitral fee will be governed by 4th Schedule of the Act superseding the fee fixed by the agreement. The bench approved the dictum of the Delhi High Court in **NHAI vs Gammon Engineers and Contractors Pvt Ltd MANU/DE/2635/2018** that 4th Schedule of the Act was not mandatory in determining fees and that the arbitral tribunal will be bound by the fees fixed by agreement.'

- The Delhi High Court in the matter of **Jivanlal Joitaram Patel vs. NHAI-MANU/DE/0765/2022** held that where the fees has been fixed by the Court in terms of 4th Schedule to the Act, Sections 38(1), 31(8) and Section 31A would have no application. The term "sum in dispute" provided in the 4th Schedule to the Act has to be interpreted so as to include the aggregate value of the claims as well as counter claims.

- ***NTPC Limited v. Afcons R.N. Shetty and Co. Pvt. Ltd*** **MANU/DE/1574/2021**, the High Court of Delhi held that the arbitrator is entitled to charge fees separately for claims and counter-claims. The court further held that there is no requirement under the law to consolidate both the amounts in determining the ceiling price. On a conjoint reading of Section 31(8), 31A and 38(1) of the Act, the court observed that separate fee is payable for claim and counter-claims. The above judgment has been challenged before Supreme Court and is pending adjudication in SLP (C) No. 13426/2021.

FEE OF ARBITRATORS

- In the recent judgment of **ONGC vs. AFCONS GUNANUSA JV Arbitration 2022 SCC OnLine SC 1122,** the Hon'ble Supreme Court had resolved various issues circling around the Arbitrators' fee.

- Parties are free to agree on fee and an arbitrator cannot unilaterally determine his fee, emphasizing the importance of party autonomy.

- 4^{th} Schedule was found to be not mandatory, however, parties may agree to the same. A party can approach the Court u/s 39(2) for review of fee.

- The distinction between "costs" and "fees" was elucidated, highlighting that an arbitral tribunal cannot pass binding orders on its own remuneration while deciding on costs.

- Specific directives for ad hoc arbitrations were established, emphasizing transparency and requiring preliminary hearings to finalize terms and fee.

- The interpretation of "sum in dispute" in the 4^{th} Schedule was clarified, affirming that separate fee shall be payable for claim and counter-claim. However, in case some different rules are provided by any institution, such rules shall apply.

- The ceiling of ₹30,00,000 in the 4^{th} Schedule was held to apply to both the base and variable amounts. Maximum payable fee is ₹30,00,000/- only.

- The conclusion affirmed that the ceiling of ₹30,00,000/- applies individually to each arbitrator, and not to the entire tribunal.

Section 32 Termination of proceedings

The arbitral proceedings shall be terminated in one of the following ways:

a. by passing the final arbitral award
b. If the Claimant withdraws his claim, unless the Respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute,
c. the parties mutually agree on the termination of the proceedings, or
d. the arbitral tribunal finds that the continuation of the proceeding has for any other reason becomes unnecessary or impossible.

- The mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings and the same cannot be revived in any manner.

- The Supreme Court in the matter of ***Sai Babu vs. Clariya Steels Pvt. Ltd.*** **2019 (5) SCJ 503** observed that the termination of Arbitration proceedings by the Arbitrator under Section 32(2) (c) of the Arbitration and Conciliation Act cannot be recalled.

- Proceeding can also be terminated for non-payment of fee. – Section 38(2)
- In **SREI Infrastructure Finance Ltd. Vs TUFF Drilling Pvt. Ltd. – (2018) 11SCC470** – It was held that in case of termination of proceeding due to non-filing of SOC, the mandate can be restored by the arbitrator, on sufficient cause being shown by the Claimant.

Section 33 - Correction and Interpretation of Award/ Additional Award

- **Clerical Error -** Section 33(1)(a) of the Arbitration Act allows parties to the arbitration proceedings to request the arbitral tribunal to correct *inter alia* any computation, technical or typographical errors in arbitral award within **30 days from the receipt of such arbitral award**. However, a notice in this regard must necessarily be sent to the other party while making such a request for correction.

  The scope of the term 'clerical error' was explained by the High Court of *in* ***Instrumentation Ltd. vs. V.E. Kuttapan*** **(1992) 1 KLJ 24***,* as an error that can be explained only by considering it as a slip or mistake on the part of the arbitral tribunal. It is a mistake or error relating to a peripheral matter and not relating to the merits of the contents of a document or an error in regard to substance of the matter.

- **Interpretation -** Section 33(1)(b) of the Act allows parties to seek interpretation of a specific point or part of the arbitral award from the arbitral tribunal. The notice must necessarily be sent to the other party and **their consent be taken while seeking interpretation**.

Section 33- Correction and Interpretation of Award/ Additional award

- Application under Section 33(1)(b) of Act could not be moved without consent of all parties concerned. Arbitrator has no jurisdiction to entertain and deal with Respondent's application under Section 33(1)(b) of the Act as Petitioner had expressly denied consent to vest jurisdiction in Tribunal to entertain Respondent's application to grant clarification/interpretation in respect of award [**Sushil Pandit and Ors. vs. Adsert Web Solutions Pvt. Ltd. and Ors. 2011 (4) Arb LR 43 (Delhi)]**

- Further, it is important to note here that a party under Section 33 of the Act cannot seek review or recall of the award made by the arbitral tribunal. **(State of Arunachal Pradesh vs. Damani Construction Co. (2007) 10 SCC 742)**

- Section 33(2) provides that an arbitrator within **30 days** from the receipt of the abovementioned request shall make correction and interpretation.

- By virtue of Section 33 (3) of the Arbitration Act, the arbitral tribunal is entitled to correct any such error as mentioned under Section 33(1)(a) of the Arbitration Act on its own initiative **within 30 (thirty) days)** from the date of making the arbitral award.

Section 33- Correction and Interpretation of Award/ Additional award

- In **Gyan Prakash Arya vs Titan Industries Limited AIR 2022 SC 625**, Supreme Court observed that an Arbitrator cannot modify an Arbitration award on an application filed under Section 33 of the Act. Only in a case of arithmetical and/or clerical error, the award can be modified and only such errors can be corrected.

- **Ved Prakash Mithal v. Union of India; (2018) SCC Online 3181** The Supreme Court has made it clear that the limitation period to make application to set aside arbitral award would start running from the date of disposal of the application seeking correction of the award, irrespective of whether such an application is allowed or dismissed.

Additional Award

- Under Section 33 (4) of the Act, parties are allowed to request the arbitral tribunal to make an **additional award** for claims presented during the arbitral proceedings but omitted from the arbitral award provided it fulfils **the notice requirement** to the other party. Subsequently the AT may pass such orders **within 60 days** from the receipt of such request.

- The Supreme Court of India in **McDermott International Inc. vs. Burn Standard Co Ltd (2006) 11 SCC 181**, was considering a challenge to an additional award made by the Respondent under Section 34 of the Arbitration Act. In this case, the SC held that Section 33 (4) of the Arbitration Act empowers the arbitral tribunal to make an additional arbitral award in respect of claims already presented to the tribunal in the arbitral proceedings but omitted by the arbitral tribunal subject to conditions *inter alia* that there is no contrary agreement between the parties to the reference.

- The Delhi High Court in the matter of **NHAI v. Prakash Atlanta JV 2011 SCC OnLine Del 5390** applied Heydon's rule/mischief rule in the interpretation of section 34(3) of the 1996 Act and held that an application for setting aside of an **additional award** has to be made from the date on which the party making that application had **received** the additional award and not from the date on which that request **had been disposed of** by the arbitral tribunal as envisaged in section 34(3) of the Act. This judgment removes the legal anomaly appearing in Section 34(3) in respect of order passed under Section 33.

Section 33 Contd.

- Section 33(6): The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

- Section 33(7): Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section

- Section 33 of the Act is similar to Section 152 of the Code of Civil Procedure, 1908 (CPC) . The later provision also talks of correction of judgments or decrees or orders on account of clerical or arithmetical mistakes or errors arising from accidental slip or omission.

THANK YOU!

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