COSTS AND CONSEQUENCES: A SOLUTION FOR INDIA'S ARBITRATOR APPOINTMENT CONUNDRUM

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Abstract

This paper examines the complexities of arbitration-related court proceedings in India, focusing on the neglected aspect of costs. It discusses the evolution of the Arbitration & Conciliation Act of 1996, particularly the introduction of Section 31-A, which established a statutory regime for imposing costs in various arbitration-related matters, including referrals, interim measures, and the enforcement of awards. Despite Section 31-A, the paper highlights the issue of parties exploiting the judicial system, especially those ignoring arbitration agreements, without facing significant penalties. The study points out the anomalies in pre-arbitral court proceedings, emphasizing the delays caused by lengthy procedures. Indian courts inundated with petitions under Section 11 of the Act, often experience undue delays, contrary to the Act's intention for swift dispute resolution. The paper attributes these delays to parties manipulating the system.

Advocating for a stricter approach, the paper urges Indian courts to adhere to Section 31-A, imposing costs to deter delays in arbitration proceedings. Section 31-A is presented as a comprehensive framework to penalize parties for unreasonable delays or non-compliance with agreed procedures. The paper stresses the courts' role in changing litigant and attorney behaviours, given the legislative tools provided by Parliament. The paper includes statistical data on Section 11 petitions and the Supreme Court's reluctance to impose costs. It examines the legislative context of Section 31-A and compares international cost regimes, highlighting Section 31-A's unique role in deterring frivolous actions and promoting contractual compliance. In conclusion, the paper emphasizes the

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need for Indian courts to actively enforce Section 31-A, shifting from "No order as to costs" to enforcing "costs in accordance with Section 31-A." This enforcement is crucial for India to improve its arbitration culture and achieve efficient dispute resolution.

Keywords: section 31-A, arbitrator appointment, costs regime, undue delays, pre-arbitral conduct.

INTRODUCTION

The phrases – "*There shall be no order as to costs*", "*No Costs*", and "*Costs Made Easy*" – are often variously found at the end of every Indian court (Supreme Court of India or a High Court) order deciding an application for constitution of an arbitral tribunal under Section 11 of the Arbitration & Conciliation Act, 1996 ("the Act"). Arbitrator appointment regimes across the world are largely based on Article 11 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 ("the Model Law"), as is the case with India.[2] As of date, the Model Law has been adopted in 85 States across 118 jurisdictions.[3]

The Act has been amended several times since the adoption of the Model Law in 1996, and the last amendment was carried out in 2021. One of the most fundamental shifts in the Act was the establishment of a statutory costs regime by incorporation of Section 31-A under the Arbitration & Conciliation (Amendment) Act, 2015.[4] Costs can be imposed – either in an arbitration or in any other proceeding pertaining to the arbitration under the Act – by the Court

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2 Although some portions of the Model Law were amended in 2006, art. 11 was not.

3 UNCITRAL, *Status of Conventions and Model Laws and the Operation of the Transparency Registry*, ¶8, UNGA. Doc. No. A/CN.9/1097 (May 11, 2022).

4 The provision, brought into force with effect from October 31, 2015, reads as under:

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,

or the arbitral tribunal.[5] Proceedings pertaining to arbitration before a Court, commonly known as court-related arbitration proceedings, under the Act can mean *inter alia* an application to mandatorily refer parties before a court to arbitration where an arbitration agreement is found to exist (§8 of the Act); interim measures before, during or after arbitration (§9 of the Act); appointment of arbitrators in case of party default or deadlock (§11 of the Act); application for setting aside of an award (§34); enforcement of an award (§36 for domestic awards and §49 for foreign awards); appeals from orders of courts (§37 and §50 of the Act). Relevantly, in relation to the appointment of arbitrators, the jurisdiction, in case of a deadlock or failure to appoint is vested with High Courts for domestic arbitrations and with the Supreme Court of India for international commercial arbitration.[6]

The focus of this paper is to address an anomaly in pre-arbitral court proceedings. Courts in India are burdened with petitions under Section 11 of the Act. The nature of the proceedings, although summary in nature – in that they step in to either break a deadlock between parties or arbitrators for appointment of an arbitral tribunal – are often unduly long and dilatory. This delay affects the underlying purpose of arbitration proceedings – speedy resolution of disputes, which is statutorily recognized by the Act, the amendments made to it, as well as the Model Law. This delay is often caused by parties that take advantage of overburdened judicial dockets – especially parties that have failed to act in accordance with an arbitration agreement. Although §31-A of the Act

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(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 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.

(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.

5 Arbitration & Conciliation Act, 1996, §31-A(1).

6 Arbitration & Conciliation Act, 1996, §2(1)(e) r/w §11(6A).

exists and empowers a Court to impose costs for improper conduct, an opposite party's incentives to delay arbitral proceedings remain unchallenged or disfavored in practice. The anomaly addressed in this paper is prescriptive and calls upon Indian Courts to essentially follow the law. The language of §31-A is wide and broad and envisages a situation in which a party who unreasonably delays, fails to act according to the agreed procedure, causes the filing of a §11 petition for appointment of an arbitrator, is disincentivized by the imposition of costs. The leadership for changing litigant and attorney behaviour must be taken by Courts considering an avenue has been provided by the Parliament in enacting §31-A of the Act. The hope is that, by imposing costs, the Courts will change the litigation culture around arbitrator appointment regimes and encourage the salutary principle of speedy resolution of disputes.

As a caveat, it is important to note that the proposal in this paper is limited to *ad hoc* arbitrations and not institutional arbitrations. Institutional arbitration offers a whole host of advantages in cost, time, and efficiency that are absent in ad hoc arbitrations. However, institutional arbitration is still in its infancy in India, *albeit* in terms of adoption, not in terms of awareness.

FILE, DELAY, KEEP PENDING

As of February 27, 2023,[7] the Supreme Court has seen 383 petitions under §11 of the Act (in relation to international commercial arbitrations).[8] Insofar as State High Courts is concerned, no clear data is available except for general non-specific pendency data on respective High Court websites. The National Judicial Data Grid launched by the Department of Justice, Government of India,[9] does not maintain case details specifically for a particular type of case but maintains general statistics based on whether the subject matter of the case is 'civil' or 'criminal' in nature. Additionally, data gathering in this case has been difficult due to different case typologies used for §11 petitions across High Courts – for instance, while in Karnataka, a §11 petition is known as a 'Civil Miscellaneous Petition', in Bombay, it is known as 'Arbitration Application'.

Although a concrete number would have aided the analysis on whether and why Indian courts impose or do not impose costs in deciding §11 petitions under the Act, but the data is insufficient. This paper examines Supreme Court statistics only between January 1, 2016, and February 27, 2023, since §31-A was introduced into the Act with effect from October 31, 2015. Further, a detailed case law search (reported and unreported cases) on Indian legal research databases *Manupatra*, *Indian Kanoon*, and *SCC Online* did not

[7] *Supreme Court of India, Case Status Docket Search*–"Arbitration Petition".
[8] Arbitration & Conciliation Act, 1996, §11.
[9] National Judicial Data Grid.

return any results for examples on whether Indian courts impose §31-A costs in deciding §11 petitions. It is also unclear whether petitioners who are forced to approach the Court seeking appointment of arbitrators under §11 of the Act made a request for imposition of costs against the opposing parties since Indian legal databases do not maintain court dockets or pleadings, unlike in the United States.

Since the introduction of §31-A, the following number of §11 petitions have been filed in the Supreme Court for international commercial arbitrations, and yet, none of them resulted in the imposition of costs on the losing party:

Year of filing/registration	**Number of §11 petitions for appointment of arbitrators**
2016	66
2017	54
2018	30
2019	55
2020	42
2021	55
2022	65
2023 [*up to Feb. 27, 2023*]	16
TOTAL	**383**

THE LAW RELATING TO ARBITRATOR APPOINTMENTS IN INDIA

§11 of the Act mirrors Article 11 of the Model Law, which contains a two-tiered approach to the appointment of arbitrators – (i.) it respects party autonomy in making decisions about the arbitrator who will decide their dispute, and (ii.) it sets out several default rules unless parties agree to something in derogation. These default appointment procedures provide guidance where either parties or arbitrators disagree on the way forward.[10] Article 11 also allows the court, or the competent authority, designated under Article 6 to intervene to resolve deadlocks or disputes during the stage of appointment of arbitral tribunals.[11]

Though the amendments to Section 11 of the Act 1996 have changed the mechanics of arbitrator appointment in India, the overarching mechanism

[10] UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, at 59, U.N. Sales No. E.12.V.9 (2012).

[11] *Id*.

has not entirely steered away from the two-tiered approach recognized in the Model Law.

When deciding a §11 petition, the statute and precedent as it stands today, require the Court to examine summarily and *prima facie* whether an arbitration agreement exists.[12] Accordingly, in most fact-intensive inquiries, whether an arbitration agreement indeed exists, the competence and jurisdiction of the arbitral tribunal, etc. have been held to be outside the remit of the Court exercising powers under §11 of the Act.

Indeed, the statutory intent to ensure speedy disposal of such summary proceedings is incorporated within the provision itself. For instance, §11(13) of the Act provides that petitions for the appointment of arbitrators must be disposed of "*as expeditiously as possible, and an endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.*" However, as a practice, the aspiration of disposal within six months has been followed in breach.[13]

While judicial delays in India are decried as an issue of the inefficiency of systems and bad litigant behaviour, it is important to consider whether the existing legal regime has sufficient tools to address these issues. In relation to §11 petitions, it must be noted that the jurisdiction of the High Courts or the Supreme Court is invoked principally due to silence by the opposing party – i.e. when the opposing party does not honour the arbitration agreement. This is nothing but a breach of the arbitration agreement, which according to the principle of separability, is a separate contract between the parties. The next question to consider, then, is whether the costs regime in the Act and comparative regimes can come to the aid of changing litigant behaviour. In essence, can costs be a deterrent to burdening the Courts' heavy dockets and can it foster respect for arbitration agreements? This is considered below.

COSTS REGIMES – UNCITRAL, COMPARATIVE LAW, AND THEORY

§31-A has no parallel in the UNCITRAL Model Law. The legislative history of the provision offers some reasons as to why the Indian Parliament felt the

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[12] Arbitration & Conciliation Act, 1996, §11(6-A); Duro Felguera SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 (Ind.); Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 (¶¶154.4 and 244).

[13] Sristhi Ojha, "*Arbitration Act - Dispose Sec 11(5) & 11(6) Applications Pending for Over 1 Year within 6 Months: Supreme Court to High Courts*", Live Law, (24 May 2022, 5:03 PM). The issue of delays in disposal of §11 petitions by High Courts was recently noted by the Supreme Court in *Shree Vishnu Constructions* v. *Military Engg. Service*, 2022 LiveLaw (SC) 523. The Supreme Court directed High Courts to decide pending §11 petitions within six months.

need to incorporate it into the Act. The proposal to legislate on costs as a separate regime within the arbitration law of India arose from the Law Commission of India's 246th Report (August 2014) titled "Amendments to the Arbitration and Conciliation Act 1996".[14] The Commission's consideration of the issue is brief and contained in the following paragraphs:

> "*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).*
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> *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.*
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> *72. The Commission has, therefore, sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation in Court by proposing section 6-A to the Act, which expressly empowers arbitral tribunals and courts to award costs based on rational and realistic criterion. This provision furthers the spirit of the decision of the Supreme Court in Salem Advocate Bar Association v Union of India, AIR 2005 SC 3353, and it is hoped and expected that judges and arbitrators would take advantage of this robust provision, and explain the "rules of the game" to the parties early in the litigation so as to avoid frivolous and meritless litigation/arbitration.*" **(Emphasis supplied)**

[14] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*, Report No. 246 (Aug. 2014), at 34.

In the draft statute that accompanied the report, the Law Commission explained that the principle "cost follows the event" contained in the English Civil Procedure Rules (Rule 44) underlies the proposed amendment. The proposed statute found its way, *in toto*, into the Act and came to be legislated as §31-A of the Act. Notably, §31-A of the Act has no parallel in any of the countries where the Model Law has been adopted, and to that extent, it is a *sui generis* regime in Indian arbitration law.

The Law Commission's hope for Courts that are involved in arbitration-related litigation was to enable an economically efficient deterrent to frivolous party conduct as well as to encourage compliance with contractual obligations – i.e., adhering to the arbitration agreement. Even though the legislative history and context in which §31-A of the Act was enacted is so clear, it is not clear why Courts have not felt the impetus to apply and enforce it in §11 petitions. India has, for long, been considered a disfavored seat for conduct of arbitrations, due to its traditional judicial interventionism in arbitrations.[15] Most judgments of the Supreme Court on arbitration law are often categorized into pro- and anti-arbitration, as is the common practice in most jurisdictions. However, commentators such as Gary Born believe that India's reputation as a pro-arbitration jurisdiction is on the upswing due to certain legislative actions and judicial decisions.[16]

There is further recognition by the Indian Parliament of the problem that arose from vesting too much discretion in Courts to decide petitions for the appointment of arbitrators – in 2019,[17] the Indian Parliament stripped Courts of the power to decide petitions relating to the appointment of arbitrators. The power has now been vested in arbitral institutions that are graded by the Supreme Court in case of international commercial arbitrations and the respective High Courts in case of other arbitrations. Although these amendments have already been passed in the Parliament and found their way onto the statute book, they have not yet been implemented or brought into force by the Government of India. Until such time that the government notifies these provisions, the old system of Courts retaining the power to appoint arbitrators will continue to operate.

COSTS RELATING TO PRE-ARBITRAL PROCEDURE

The problem presented in this paper pertains to conduct of parties during pre-arbitral steps – i.e., in the face of an arbitration agreement, parties thereto either breach it by remaining silent or failing to adhere to the procedure

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[15] Gary B. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 76 (6th edn. 2021).

[16] *Id*.

[17] Arbitration and Conciliation (Amendment) Act, 2019, No. 33 (5th Aug. 2019).

contained in it. Commentators who have written about UNCITRAL and (international) commercial arbitration have paid little attention to the issue of imposition of costs factoring pre-arbitral conduct of parties.[18] The other issue of importance is the decisional aspect of imposition of costs for pre-arbitral conduct – should the Court/appointing authority decide, or should this be a point left to the determination by the arbitral tribunal as part of the larger exercise of allocating costs? The answer is not far to seek.

In adjudicating costs during arbitral proceedings, the standards of proof are usually low – i.e., they are determined summarily.[19] Under the 2012 ICC Arbitration Rules, for example, the arbitral tribunal has the discretion to award costs by taking into account a party's pre-arbitration conduct which was motivated by bad faith.[20] Similarly, §31-A of the Act does not prescribe harsh standards to ascertain costs payable by a party. It preserves the discretion of the Court or arbitral tribunal in determining costs and lays down clear guidelines for how such costs must be determined – especially keeping the "costs follow the event" and the "losing party pays" principles intact. In effect, with relatively lower standards requiring summary determination of costs, it is surprising why Courts when deciding §11 petitions have not resorted to awarding costs against the losing party.

Whilst it is true that the reason for filing a §11 petition under the Act may have been occasioned due to a breach of the arbitration agreement by the opposing party, the prerogative to seek imposition of costs rests on the party who claims that breach occurred. Commentators have opined that breach of dispute resolution clauses, forum selection clauses, and arbitration agreements, gives rise to a claim for damages – which can either be determined and awarded by the forum, which was wrongly approached, or the correct forum identified by the agreement between the parties.[21] The other approach taken in jurisdictions that do not have a provision similar to §31-A of the Act is to award costs on an indemnity basis if a party is found to have breached the arbitration agreement.[22]

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[18] *See* Jan Paulsson & Georgios Petrochilos, UNCITRAL Arbitration 387 (2017); Franco Ferrari *et al.*, International Commercial Arbitration: A Comparative Introduction (2021); Gary B. Born, International Commercial Arbitration §23.08 (3rd edn., Updated Aug. 2022); Rahul Donde & Rishabh Raheja, *Chapter 4: Constitution and Establishment of an Arbitral Tribunal*, in Dushyant Dave, Martin Hunter, et al. (eds), Arbitration in India, at 77-88 (2021).

[19] *See* Born, *supra* note 18 at §23.08(C); M. Bühler & T. Webster, Handbook of ICC Arbitration: Commentary and Materials ¶38-46 (5th edn. 2021).

[20] ICC Commission Report, *Decisions on Costs in International Arbitration*, 2015(2) ICC Dispute Resolution Bulletin ¶79.

[21] Deyan Draguiev, Liability for Non-compliance with a Dispute Resolution Agreement, 88(1) Arbitration 135 (2022). *See also*, Albert Dinelli, The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law, 38 Melb. U. L. Rev. 1023 (2015).

[22] *See*, *A v. B (No. 2)*, 2007 Bus LR D 59: 2007 EWHC 54 (Comm)(UK); *See also*, David Kwok, *Breach of Arbitration Agreement and its Costs Consequences*, 34(1) Arb. Intl. 149 (2018).

Nevertheless, §31-A of the Act is agnostic to a party's choice to seek damages or costs arising out of a compelled §11 petition due to a breach of the arbitration agreement.

CONCLUSION

The problem of improper litigant conduct has ailed the Indian legal system for decades, having occupied the attention of lawmakers, courts, the Law Commission of India. What ails the civil litigation system in India, as identified by the 240th Report of the Law Commission of India (titled "Costs in Civil Litigation") in 2012, is true of the arbitration landscape as well. §31-A of the Act has taken a significantly important step to address the ills of the system in a move that is quite unique and unseen in most Model Law jurisdictions. What is needed is impetus by the Courts to actually enforce what is on the law books in this case – a situation that does not present itself often in courts. Court orders should, therefore, move from "No order as to costs", to "costs in accordance with §31-A of the Act". If the law remains unutilized, India's aspiration to improve arbitration culture will remain a pipe dream.