Regime for Costs under the Arbitration & Conciliation Act, 1996

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Introduction

According to Queen Mary Survey of 2015, "cost' is seen as arbitration's worst feature, followed by 'lack of effective sanctions during the arbitral process', 'lack of insight into arbitration's efficiency' and 'lack of speed'."[1]Criticism about costs is not only about the overall costs but also about the uncertainty as to the types of costs recoverable and allocation of the said costs between parties to an arbitration.

A legal regime which asks an innocent party to cover for the costs of the guilty party is unjust and fails to provide adequate justice to victims of frivolous proceedings. Arbitration was intended to be a cost-effective and speedy mode of dispute resolution. However, costs in arbitration proceeding, which includes arbitration tribunal and administrative expenses as well as parties' counsel fees and other direct expenses is quite substantial. Additionally, prior to the 2105 amendments, the lack of effective provisions in the Arbitration and Conciliation Act 1996 for cost allocation and recovery became another hindrance. This situation was quite unfavourable for successful parties in arbitration who suffered substantial losses in lieu of costs incurred for arbitral proceedings. The need for protecting innocent parties from bearing legal and other costs of unmeritorious claims has been recognized and reforms have been introduced to accommodate the principles of 'winner takes all' and 'loser pays'.

The rationale behind awarding costs has been explained in *ZN (Afghanistan) v Secretary of State* as follows:

'*…a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. If those legal rights had been respected in the first place by the other party, it should never have been necessary to come to court. Accordingly, there*

[1] See the 2015 International Arbitration Survey on Improvements and Innovations in International Arbitration, undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London (with the support of White & Case LLP), p. 5.

will normally be a causal nexus between the fact that costs have been incurred and the underlying merits of the legal claim.'[2]

This paper examines if the new regime on cost allocation is satisfactory, especially in light of objectives of the recent amendments. In this paper we will specifically discuss the different approaches to cost allocation, the practices followed by courts and arbitral tribunals both pre and post amendment and whether the cost allocation practices now adopted are in consonance with the recommendations of the Law Commission and in harmony with best international practice.

Different Approaches to Cost Allocation

While there is a great variety of different approaches or practices for allocating cost, two primary and yet opposing approaches stand out: the rule of 'costs follow the event' (English Rule) and the 'American Rule'. The costs follow the event rule requires the losing party to compensate the winner for its costs, while the American Rule means that each party is to bear its own legal costs (and its own share of arbitration costs).[3]

The pure American Rule is based on the philosophy that each party bears the risk of its decision respecting the scope of investment in attorney's fees.[4] Under the pure English Rule, the "winner" recovers his reasonable costs from the "loser". It is based on the philosophy of indemnity – if I was right to take this action, then I should not be out of pocket for doing so.[5] There are however many modified variations of these rules in practice.

A starting point for any decision on costs is the applicable arbitration rules. They are not identical in this respect. For example, the 2015 CIETAC (China International Economic & Trade Arbitration Commission) Rules, the 2014 LCIA (London Court of International Arbitration) Rules, the 2012 PCA (Permanent Court of Arbitration) Rules and the 2010 UNCITRAL (The United Nations Commission on International Trade Law) Rules all include

[2] (2018) EWCA Civ 1059.
[3] John A. Teynor, Micha Bühler chapter 23: Costs in GAR's *The Guide to Damages in International Arbitration*, 3 (2018), 313, available at https://www.lexology.com/library/detail.aspx?g=0537f158-18da-4fbc-b232-e737f6232ad5 at p 3/18. (accessed on 12 February 2021).
[4] Apoorva Mandhani, *Awarding Costs in Domestic Arbitration in India*, The SCC Online Blog, 2015, available at https://www.scconline.com/blog/post/2015/10/28/awarding-costs-in-domestic-arbitration-in-india/,(accessed on 12 February 2021).
[5] Michael O'Reilly, *Provisions on Costs and Appeals: An assessment from an International Perspective*, BIICL 13th Annual Review of the Arbitration Act 1996, available at https://www.biicl.org/files/4936_biicl_13th_annual_mor.pdf (accessed on 12 February 2021).

an express, rebuttable presumption that the successful party will be entitled to recover its reasonable costs. By contrast, the ICC (International Chamber of Commerce), HKIAC (Hong Kong International Arbitration Centre), ICDR (International Centre for Dispute Resolution), SCC (Stockholm Chamber of Commerce) and SIAC (Singapore International Arbitration Centre) Rules simply authorize the tribunal to make an award apportioning costs but do not contain any presumption on their allocation. In addition, the 2012 ICC Rules and recent 2014 LCIA Rules both refer expressly to the tribunal's discretion to take into account parties' conduct, including whether they conducted the arbitration in an expeditious and cost-effective manner.[6]

The ICC Cost Report records that "despite the fact that the ICC and at least half of the other major institutional rules contain no presumption in favour of the recovery of costs by the successful party, it appears that the majority of arbitral tribunals broadly adopt that approach as a starting point, thereafter adjusting the allocation of costs as considered appropriate.[7] In the sense that where a party is entirely successful in its claims in defending against a claim, the arbitral tribunal is likely to allow it to recover some or all of its reasonable costs from the losing party.[8]

Need for Reform

A study conducted in 2013 had revealed that in India, in 90% of arbitration matters, parties bear their own costs. In 6% of the proceedings, the arbitration tribunal apportions the costs of the proceedings between the parties and in 4% of the cases only costs follow the event.[9] Prior to the amendment, Section 31(8) of the 1996 Act dealt with costs in arbitration. In the absence of any agreement to the contrary, Section 31(8)(a) imposed a positive duty on the arbitral tribunal to specify the party entitled to costs, the party which shall pay costs, the quantum or method of determination of the amount and the manner in which it shall be paid.[10] Arbitral tribunals where thereby granted a wide discretion by virtue of these provisions. However, tribunals failed to exercise their discretion in allocating costs and in

[6] 2015 ICC Report on Decisions on Costs, para 12, available at https://iccwbo.org/publication/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/ (accessed on 13 February 2021).
[7] Supra, para 13.
[8] Jason Fry, Simon Greenberg, Francesca Mazza, The Secretariat's Guide to ICC Arbitration, ICC Publication 729 (Paris, 2012), 3-1488.
[9] See *Emerging trends in arbitration in India, A study by Fraud Investigation & Dispute Services*, Ernst & Young LLP, available at: http://www.ey.com/Publication/vwLUAssets/EY-FIDS-Emerging-trends-in-arbitration-in-India/$FILE/EY-Emerging-trends-in-arbitration-in-India.pdf, pg. 20.
[10] Indu Malhotra, OP Malhotra's the Law & Practice of Arbitration and Conciliation 3rd Edn.(2014) p. 1179.

many cases left the parties to bear their own costs. Even when costs are awarded, ordinarily the same are not realistic and are nominal.[11] On the other hand another category of practices had started being followed by tribunals and courts. Cost allocation was awarded in proportion to the success on merits of the claims. In *Computers Unlimited v Xerox India Ltd*, under Section 34 of the Act, the court modified the costs award and expenses in proportion to the percentage of claims awarded.[12]

Another hindrance in making arbitration a more cost effective means was that for a long time (pre-amendment), costs in arbitration were apportioned on the basis of the principles in the Code of Civil Procedure, consequently, the losing party only paid a fraction of the actual costs incurred by the winning party. The court also observed in one of its judgment that, "*The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the pendency or encourage alternative dispute resolution processes…will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for legislature and the Law Commission of India to revisit the provisions relating to costs and compensatory costs contained in section 35 and 35-A of the Code.*[13] There was a need for a new provision governing the awarding of costs, as the 1996 Act failed to grant tribunals the power to apportion costs between parties on the basis of the success of their claims.

Since many arbitral tribunals were failing to allocate costs adequately, this was resulting in winning party losing a significant amount of money. Therefore, after numerous calls on reform, the Law Commission of India in its 246th Report sought an overhaul of the existing provisions on costs. Based on the said report, Section 31(8) stood replaced by a new costs mechanism in Section 31A.

[11] See Salem advocate Bar Association TN v UOI, (2005) 6 SCC 344.
[12] MANU/DE/0117/2014.
[13] Vinod Seth v Devinder Bajaj, (2010) 8 SCC 1.

Law Commission's Recommendations on Costs

The Law Commission of India realized the need for reform in the cost regime and addressed the issue in its 246th report[14]. The Commission recommended the 'loser-pays rule' and reiterated that it is just to allocate costs in a manner which reflects the parties' relative success and failure in arbitration, except under special circumstances. The Commission reasoned that this would provide *economically effective deterrence against frivolous conduct and furthers compliance with contractual obligations*.[15] Thus the objective of the Commission appears to be to introduce a "cost follows the event" regime, which must be adhered to by Courts and tribunals. Pursuant to this recommendation, a new cost regime was introduced via Section 31A. The arbitral tribunals were given the power to fix arbitration costs in accordance with this new Section. This was a positive step towards awarding costs in a realistic and rational manner.

The Commission has imbibed the spirit of the decision of the Supreme Court in Salem Advocate Bar Association v. Union of India.[16] The Supreme Court noting the trend of Courts to order parties to bear their own costs, referred to Section 35, 35A, 35B of the Code and stated that:

'*Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party… Such practice encourages filing of frivolous suits. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by successful party.'*[17]

[14] Law Commission of India, Report No. 246: Amendments to the Arbitration and Conciliation Act 1996 (5 August 2014), available at www.lawcommissionofindia.nic.in/reports/Report246.pdf (accessed on 11 February 2021) (hereinafter "246th Report").
[15] 246th Report Para 70,71.
[16] AIR 2005 SC 3353.
[17] Supra.

Section 31A of the 1996 Act (As amended in 2015)

- **Section 31A (1) provides that:**

In relation to any arbitration proceedings 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.

- **Section 31A (2) states that:**

If the Court or arbitral tribunal decided to make an order as to payment of costs,—

(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.

This section empowers the courts or arbitral tribunals to award costs in relation to any proceedings under the 1996 Act. The arbitral tribunal is required to make a two-tiered assessment with respect to costs recoverable. On one hand, the tribunal must determine allocation of liability for costs and on the other hand, the types of costs that are recoverable and to what extent.[18] It is also pertinent to mention that Section 31A (1) clarifies that provisions contained in the Code of Civil Procedure, 1908 are not applicable when deciding issues on costs in arbitration proceedings. This gives some discretion to the arbitration tribunals and court to award costs on an indemnity basis, thereby adopting international standards in cost allocation.

[18] John A. Teynor, Micha Bühler chapter 23: Costs in GAR's *The Guide to Damages in International Arbitration,* 3 (2018), 314, available at https://www.lexology.com/library/detail.aspx?g=0537f158-18da-4fbc-b232-e737f6232ad5 at p 3/18 (accessed on 15 February 2021).

‘Discretionary Power’

However, these provisions expressly mention that this power of the courts and tribunals to award costs is ‘discretionary’. Section 31A(1) states that ‘*the Court or arbitral tribunal…shall have the* ***discretion to determine****...”.* Section 31A(2) also begins with the phrase “***If*** *the Court or arbitral tribunal decides to make an order as to payment of costs.”* This is a bit concerning as the language is merely suggestive and not mandatory. This fails to give the Courts and tribunal the needed push to adhere to the ‘cost follows event’ rule as intended by the Law Commission in its 246th report.

With respect to the extent of discretion, it was held that “*The court will not interfere with the arbitrator’s exercise of his discretion, merely because the court would itself have exercised that discretion differently in such a case. But the discretion must be exercised and the arbitral tribunal should not disable itself from exercising that discretion by adopting an invariable rule in relation to certain costs.”*[19]

Even though on the face of it, these provisions confer a wide discretion on the courts and tribunals for cost allocation, they do incline in favour of awarding costs against the unsuccessful party. Any tribunal departing from the general principle of “cost follows the event” is required to state their reasons for doing so.[20] However, there are many reasons why arbitral tribunals may feel reluctant to allocate the costs of the arbitration between the parties even when given the discretion to do so. One such reason being that there is no universal practice of awarding costs on the losing party and “there is a real difficulty in international commercial arbitration in assessing what the level of allowable costs should be.”[21] This view is echoed by Craig, Park and Paulsson, who contend that the arbitral tribunal often will order that each party will be responsible for their own legal costs, perhaps in order to avoid adding insult to injury.”[22]

- **Section 31A (3) provides that: in determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—**
  (a) the conduct of all parties;
  (b) whether a party has succeeded partly in the case;

[19] James Allen (Liverpool) Ltd. v. London Export Corporation Ltd. [1982] 2 Lloyd’s Rep. 632.
[20] See Section 31A(2).
[21] Redfern, Alan – Hunter, Martin, *Law and Practice of International Commercial Arbitration*, Second Edition, Sweet & Maxwell 1991, p. 408
[22] Craig, W. Laurence – Park, William W. – Paulsson, Jan, *International Chamber of Commerce Arbitration*, Third Edition, Oceana Publications, Inc. 2000, p. 395.

(c) whether the party had made a frivolous counter-claim leading to delay in 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.

Against the background of growing concern over costs, the ICC had published a report setting out a host of practical measures that might be adopted by the tribunal to manage costs. Paragraph 85 is notable: *85. The allocation of costs can provide a useful tool to encourage efficient behaviour and discourage unreasonable behaviour. The arbitral tribunal has discretion to award costs in such a manner as it considers appropriate. It may be helpful to specify at the outset of the proceedings that in exercising its discretion in allocating costs the arbitral tribunal will take into account any unreasonable behaviour by a party…*[23] The SCC Cost Report has also mentioned that party conduct is the second most important factor affecting the cost allocation in SCC proceedings, just after the outcome of the merits of the case.[24]

It is worthy of mentioning that even before the adoption of 2012 ICC Rules, ICC arbitral tribunals have not hesitated to award costs against parties acting in bad faith. "*The final award in ICC case No. 7453of 1994 found that the first defendant's conduct… was dilatory from the beginning until the end of the proceedings and the conduct was obstructive…Much extra and unnecessary work was caused thereby for everyone concerned. The first defendant must bear and pay the entire costs of this arbitration…and also the entire legal costs of the claimant and out-of-pocket expenses of the counsel to the claimant…"*[25]

The 2015 Amendment to some extent appears to be congruent with ICC ideals for cost allocation mentioned above. Section 31A (3) provides that in exercising its powers under Section 31A the tribunal must consider certain factors like conduct of parties, relative success of parties etc. Thereby promoting a sense of responsibility on behalf of parties to act reasonably and avoid indulging in frivolous claims and defences.

[23] Techniques for Controlling Time and Costs in Arbitration, Report from the ICC Commission on Arbitration, 2007, available at https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/ (accessed on 12 February 2021).

[24] Salinas Quero, Celeste E., Costs of arbitration and apportionment of costs under the SCC Rules, February 2016, p.18, available at "www.sccinstitute.com/media/93440/costs-of-arbitration _scc-report_2016.pdf" (hereinafter the "SCC Cost Report") (accessed on 22 February 2021).

[25] See Arnaldez, Jean-Jacques – Derains, Yves – Hascher, Dominique, Collection of ICC Arbitral Awards – Recueil des sentences arbitrales de la CCI, 1996-2000, Kluwer Law International 2003, p. 111.

Meaning of 'Costs'

As per the explanation to Section 31A(1), 'costs' include:

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;

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

A distinction has traditionally been drawn between "costs of the reference" and "costs of the award", the former being in broad terms the costs incurred by the parties in putting their respective cases in the arbitration and the latter being the administrative costs of the reference, including the tribunal's fees and expenses.[26] "Costs of the reference" includes legal representation fees, expenses relating to witnesses and other expenses incurred in preparation of their case. Consequently 'costs' should also include other miscellaneous expenses like travel and lodging of counsel and counsel's staff. It is noteworthy that both these categories of costs, in other words all costs incurred in connection with the arbitration are considered to be a part of "costs of arbitration" as per the explanation provided to Section 31A(1).

There are various facets of costs of proceedings like "costs of the reference", "costs of the arbitration proceedings", "costs of the parties". Where the arbitral tribunal awarded the costs of Rs. Five lacs in favour of the winning party was well within the framework of law as per section 31(8). To award the costs, is entirely in the discretion of the court, so also the tribunal. It cannot be claimed as a matter of right… This was in addition to the expenses and/or costs of arbitration which parties agreed to share equally.[27]

There are however, some costs that are rarely accounted for when dealing with costs in arbitration. These hidden costs are the time and effort spent by various professionals in preparing for a case. Ordering a party to bear such costs on their own despite winning a suit is similar to imposing penalty on an innocent party for the wrongs of the guilty party. The winning party should be entitled to recoup not just the arbitral tribunal's expenses, but the entire costs spent by them in lieu of preparation and presentation of their case.

[26] Dr. PC Markanda, *Law Relating to Arbitration and Conciliation*, 10th Edn, p 968.
[27] ONGC Ltd. v. Dolphin Offshore Enterprises (India) Ltd, 2010 SCC OnLine Bom 1598; 2011 (2) Arb LR 273.

‘Reasonable Costs’

It must be noted that under Section 31A (1) only reasonable costs are allowed to be recovered, and not actual costs.

Reasonableness is a standard applied to the allocation of costs under most arbitration rules. However, there is no definition of reasonableness in any of the arbitration rules or national arbitration statutes. The ICC Report on Decisions on Costs in International Arbitration suggests that a common sense approach is to assess whether the costs are reasonable and proportionate to the amount in dispute or value of any property in dispute and/or costs have been proportionately incurred.[28]

This standard of reasonableness in awarding costs has also been approved in a Singapore High Court decision, wherein the Court in Singapore for the first time was considering an application to set aside costs award pursuant to IAA by a party to an international arbitration. The Court acknowledged the applicability of principle of reasonableness and noted that:

“*The Arbitrator did cite authorities relating to assessment of costs in arbitrations (para 19 of the Costs Award) and these appear to indicate that the main test is that of reasonableness based on the time spent and the complexity of the case. The expert witnesses who filed affidavits on costs in these proceedings agreed that the test of reasonableness was the test applicable in assessing costs in an arbitration and that the amount of fees which a party pays its own lawyers is a starting point as to what is reasonable.”*[29]

Therefore, the test of reasonableness must be met and the tribunal must consider the reasonableness of the costs claimed. The factors which may be taken into consideration to determine reasonableness vary and such an assessment is not straightforward. The problems in determining reasonable costs are further compounded by the significant costs imposed on parties by their solicitors and counsel, which, along with the manner of billing, vary.[30] As evident from the above, “reasonableness” is a broad concept that leaves much room for

[28] Id. 8, at 63.
[29] VV and Another v. VW, [2008] SGHC 11, [2008] 2 SLR 929.
[30] Ajay Bhargava, Arvind K. Ray, Vansha S. Suneja, “*Costs Regime under Arbitration and Conciliation Act”,* International Law Office, 2020, available at https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/India/Khaitan-Co/Costs-regime-under-Arbitration-and-Conciliation-Act, (accessed on 22 February, 2021).

interpretation. Still, commentators have stressed that the test of "reasonableness" should not be construed as an invitation to mere subjectivity.[31]

Party agreements for cost allocation:

- **Section 31A (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 of such agreement is made after the dispute in question has arisen.**

This provision allows the parties to pre-meditate the costs by allowing the parties to enter into an agreement after dispute has arisen for apportioning the costs of the arbitration between the parties. Such agreements on allocation of costs will generally be honoured by the arbitration tribunal.

Approach of the Courts and Tribunals towards Costs Allocation in India

Despite being vested with enormous powers to award costs in an arbitration, it has been noted that generally courts and tribunals both have been hesitant in doing so. Even after the establishment of a new cost regime in Section 31A, it does not appear that the courts and tribunals have changed much course in dealing with cost allocation.

In *Steel Authority of India Ltd. (SAIL) v. Primetals Technologies India Pvt. Ltd*[32], the Arbitrator had awarded the entire costs of the arbitration amounting to Rs. 64,57,107 in favour of the respondent. Despite the said award being fully justified and well within the arbitrator's discretionary power laid down in section 31A of the 1996 Act, it was challenged by the petitioner. It is noteworthy that the court too, found it rather unusual and hard to accept such a huge amount being awarded as costs. Ultimately, the Court modified the award and granted 50% of the costs on concession. This highlights that the courts still have a hostile attitude towards enforcing the rights of the innocent party specifically laid down in section 31A of the 1996 Act for recovering costs in arbitration.

In *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd*[33], the petitioner had objected to the procedure for constitution of the Arbitral Tribunal laid down in the contract and applied to the Supreme Court to appoint and constitute the arbitral tribunal. The Supreme

[31] Mike Savola, *Awarding costs in International Commercial Arbitration*, 2017, p.304, available at https://arbitration.fi/wp-content/uploads/sites/22/2017/06/awarding-costssavola.pdf, (accessed on 23 February 2021).
[32] 2020 SCC OnLine Del 1392: (2020) 275 DLT 204.
[33] (2017)4 SCC 665.

Court dismissed the petition, but failed to pass any order as to costs in favour of the winning party. No reasons were provided for the same, the order simply stated "no costs".

In *Steel Authority of India Ltd. v. Shyam Sunder Choudhury*[34], the Calcutta High Court set aside a costs award in favour of the successful party on the reasoning that, substantial part of the claim of claimant rejected and lowered down to below 10% of the claim. Claim of Rs. 23.38 lacs was lowered to Rs. 1.28 lacs on principal sum and 75,000/- on account of interest. It is worthy of mention that in the present case, there were as many as 105 sittings conducted by the arbitrator and yet no party was able to recover any costs. With the exception of a costs award against the petitioner to the tune of Rs 1.2 lacs which was later reduced by the Court to Rs. 20,000 for causing unnecessary delay by raising technical objections in the 106th sitting, when arbitration was nearing completion.

In another case, arbitrator omitted to exercise his power and award any costs to the petitioner even though a separate claim for the same had been made. The award was modified so as to include payment of reasonable costs of the proceedings to the petitioner.[35]

In *ML Lakhanpal v. Darshan Lal*[36], the claimant failed to appear before the tribunal and timely submit their statement of claim despite multiple opportunities, but no award as to costs was ordered. The court held that certain counter claims of the Respondent had also been rejected on grounds of lack of evidence. The Arbitrator, therefore, in his discretion thought it fit to order parties to bear costs of arbitration equally. The court did not interfere with this award.

In *Salma Dam Joint Venture v. Wapcos Limited*[37], the petition was with respect to failure on the part of the respondent to appoint an arbitrator. The court found that the objections of the respondent to the appointment of the arbitrator on their behalf were not tenable. Both parties were represented by senior counsels, this therefore could imply that they had invested huge amounts. Despite this, the court did not order any costs and neither did they give any reasons for doing so. An appeal was subsequently filed against the Court's order and the parties went on to file two SLPs as well. However, no costs were awarded at any stage.

[34] AIR 2005 Cal 305 : 2005 (3) RAJ 572 (Cal).
[35] Mohinder Pal Singh v. Northern Railway (2008) 1 Arb LR 363,368.
[36] 2018 (4) RAJ 122 (Del).
[37] 2017 SCC OnLine Del 7500.

The Courts appear to find it draconian, rather than just to award costs. It is thus often observed that there is an unfavourable sentiment existing particularly for awarding costs relating to parties' counsel fees and such other expenses incurred for preparation of the case. Costs usually when awarded only appear to take into consideration only the Arbitral Tribunal's fees and such other costs of proceedings.

Approach of Courts towards Costs Allocation in the United States

Court costs in American Civil Procedure are generally allocated to the loser ("loser pays") as elsewhere in most of the countries. But, attorneys' fees are not allocated in this way in the United States. They fall on the party that incurs them. This is the American Rule.[38] The legal system of the United States is quite comprehensive and invariably expensive. Their legal system allows parties to discover evidence and have a fair understanding of each side's arguments even before the trial begins. This is done through various processes like depositions and subpoenas. A typical small trial can also end up costing thousands of dollars. Under the "American Rule" itself, promising claims (arguably even excessive ones) are encouraged, or rather not discouraged, by the risk of cost bearing. As justification for the American Rule, it is often advanced that legal costs are properly considered as a normal cost of doing business and that it lowers barriers to access to justice.[39] The only exception where partial or complete costs may be ordered against the losing party is in case of abuse of process, manifest dilatoriness, etc. Thereby abusive or bad-faith conduct even in relation to a meritorious claim or defence in generally to be deterred.[40]

In the United States, the Federal Arbitration Act likewise contains no mention[41] while the Uniform Arbitration Act, Sec. 21(b), provides that absent a party agreement on costs or the same being authorized by law in a civil action, there shall be no tribunal award of costs.[42] In the area of annulment proceedings relating to cost awards, there is both statutory support and

[38] James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure,* available at https://www.jstor.org/stable/20744539?seq=1. (accessed on 12 March 2021).
[39] Supra 3, p 4/18.
[40] Dr. Richard H. Kreindler, Shearman & Sterling LLP – Frankfurt, *Final Rulings on Cost: Loser Pays All?,* ASA Conference – Zurich 2006, 'Best Practices in International Arbitration' available at https://www.shearman.com/~/media/Files/NewsInsights/Publications/2006/07/Final%20Rulings%20on%20Costs%20Loser%20Pays%20All/Files/Publikation/FileAttachment/ASA%20Best%20Practices%20in%20International%20Arbitration.pdf, p 5,6. (accessed on 12 March 2021).
[41] The relevant provisions in the FAA, §§ 9-11, solely make reference to the "Award of arbitrators; confirmation; jurisdiction; procedure ... vacation; grounds; rehearing ... modification or correction; grounds; order." "Costs" are not mentioned in the FAA. "Fees" are mentioned only in § 7, in the context of witnesses.
[42] 35 states of the United States have acceded to the UAA; 14 have enacted similar laws of their own. See Prefatory Note to the 2000 Revisions to the UAA at http://www.law.upenn.edu/bll/ulc- /uarba/arbitrat1213.htm). Statutes such as those involving civil rights, employment discrimination, antitrust, and others, specifically allow courts to order attorney's fees in appropriate cases. See Comments to Section 21 in Uniform Arbitration Act at p 70,71.

case law precedent for the notion that where there is no express prior party agreement to have the arbitral tribunal allocate costs, or no express prior party agreement to have the arbitral tribunal allocate attorney's fees specifically, an arbitral award of such costs can be vacated, even on the uniquely American grounds of "manifest disregard of the law."[43]

In litigation, the "American Rule" was first adopted in 1796 by the United States Supreme Court, which outlined the following justifications for it: (1) First, as the outcome of any litigation is often uncertain, it would be unfair to punish the losing party for merely defending or prosecuting a lawsuit. (2) Second, if the losing party were forced to bear their opponents' costs and fees, "the poor might be unjustly discouraged from instituting actions to vindicate their rights". (3) Third, shifting costs would likely increase "the time, expense and difficulties of proof" in any given case and "would pose substantial burdens for the administration of justice.[44] – In the field of arbitration, one further argument put forth in support of the "American rule" is that "both parties have agreed by contract to create a special forum which is privately financed and that they should in fairness pay in equal measure the costs of setting in motion and operating such a consensual regime."[45]

Conclusion

Parties to an arbitration proceeding are often met with rude surprises when it comes to claims for costs of arbitration. The principle of *cost follows the event* has gained wide acceptance over the years, however it is still not consistently applied in the arbitration practice. This leaves a lot of room for uncertainty, thereby undermining the parties' confidence in arbitration.

The Law Commission in its 246th Report, while proposing amendments to the Arbitration Act, had stated that: "The Commission has, therefore, sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation in Court ... and it is hoped and expected that judges and arbitrators would take advantage of this robust

[43] This concept originates in case law of the U.S. Supreme Court from the 19th Century, e.g., United States v. Farragut, 89 U.S. 406, 420 (1874) ("The award [in arbitration] was also liable, like any other award, to be set aside in the court below, for such reasons as … exceeding the power conferred by the submission, [or] for manifest mistake of law …"); cf. Wilko v. Swan, 346 U.S. 427, 436-37 (1953) ("In unrestricted submissions … the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."); See also Kreindler, Transnational Litigation: A Basic Primer (1998) 294-95. See also Supra 39 at p 7,8.

[44] Gotanda, John Yukio, *Awarding costs and attorneys' fees in international commercial arbitration,* Michigan Journal of International Law, Fall 1999, p. 11. See also: Mika Savola, *Awarding Costs in International Commercial Arbitration,* available at https://arbitration.fi/wp-content/uploads/sites/22/2017/06/awarding-costssavola.pdf, at p. 292.

[45] Welter, J. Gillis – Priem, Chart, *Costs and their allocation in international commercial arbitrations,* American Review of International Arbitration, 1991, p.331. . See also: Mika Savola, *Awarding Costs in International Commercial Arbitration,*available at https://arbitration.fi/wp-content/uploads/sites/22/2017/06/awarding-costssavola.pdf, at p. 292.

provision, and explain the "rules of the game" to the parties early in the litigation so as to avoid frivolous and meritless litigation/arbitration." The Commission here had hinted towards new “rules of the game” which appeared to change the way costs were to be dealt in an arbitration. However, to give a true meaning to these “rules”, they must be enforced strictly. Simultaneously, there is a need for adequate procedural safeguards and sufficient application of mind on a case by case basis. Thus, while “Cost follows event” should become a uniform practice, this principle cannot be a made a ‘one size fits all’ solution to cost recovery. In situations where there is no clear winner, a more nuanced approach would be better suited in awarding costs.

In India, though the 2016 amendments of the Act have embraced the principle of “loser pays”, the arbitral tribunals have had significant power to award such costs even before these amendments. However, courts and tribunals had been and still to some extent are reluctant to use this power, even when given the discretion to do so. Moreover, the structure of the new “cost regime” laid out in Section 31A has left these provisions without teeth by making it optional for the courts and tribunals to award costs.

Thus, even with these amendments, there has not been a marked change in the way costs are being allocated by tribunals. There has been a lack of consistency in awarding costs during an arbitration. Sometimes parties have been able to recover a significant amount of costs, while in other cases tribunals have awarded little or nothing.

Despite the amendment and reforms, there arbitral tribunal’s decision on costs remains largely unpredictable. This has resulted in growing criticism over the tribunal’s lack of acknowledgment of costs being of vital importance to parties. It is necessary that cost issues are not treated as secondary issues in an arbitration, rather are dealt with diligently while deciding the merits of the claim. A more predictable and uniform cost regime, which is in harmony with the best international practices, is needed to curb the dissatisfaction prevailing amongst parties to arbitration.