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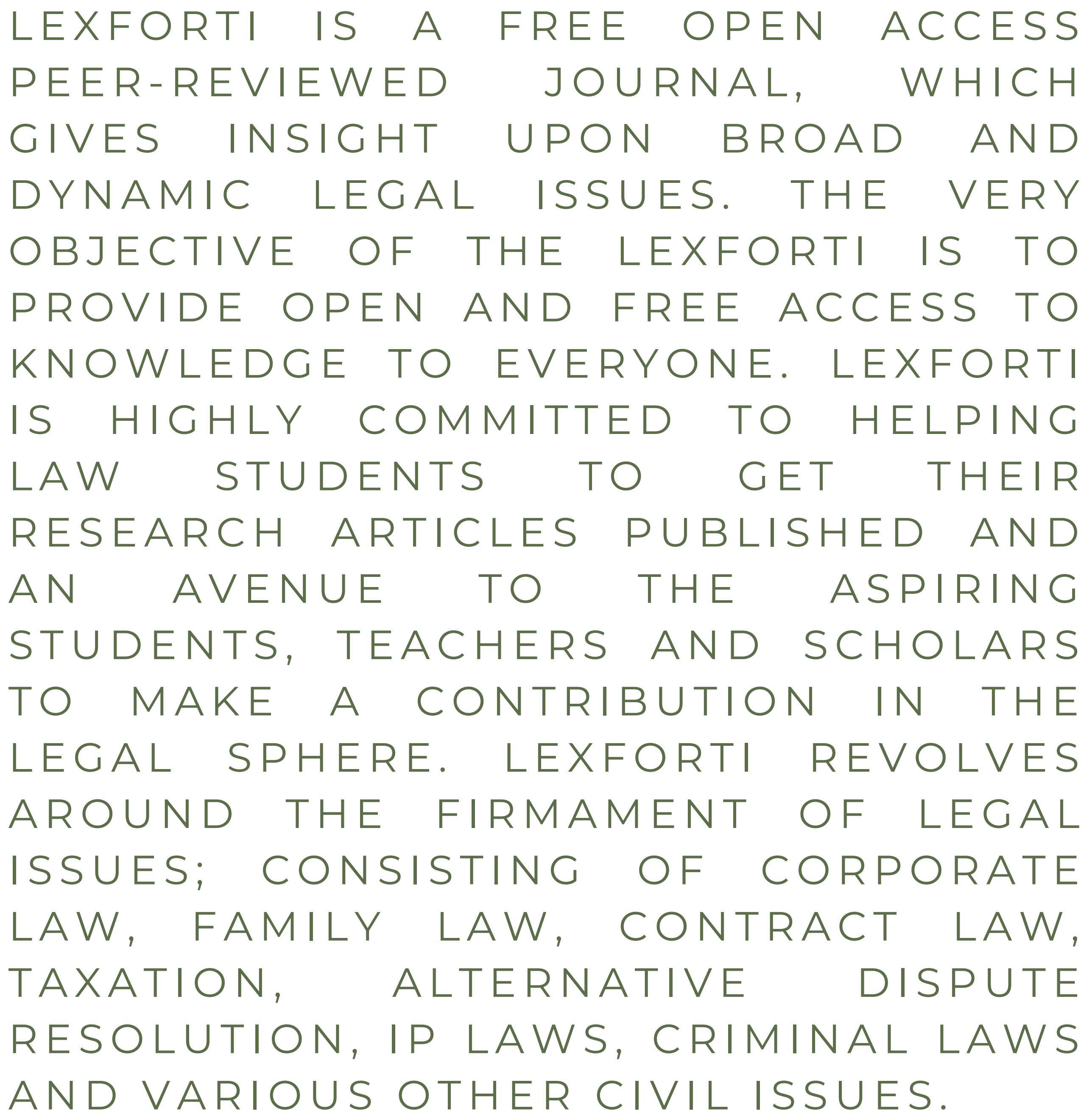

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Ever growing need for a sea changes in Cost Regime in Indian Arbitration Law

Ujjwal Chetan Sheth

ABSTRACT

Cost Regime is a legitimate system which solicits the casualty from a silly lawful continuing to sponsor the expenses of the culprit is crooked and will undoubtedly give motivating forces to progressively pointless procedures. For quite a while, Indian assertion law had been giving such impetuses to involved with settle on paltry issues with the intervention understanding or the arbitral honor. The Law Commission of India tried to change this situation through its 246th report and prescribed certain progressions to the Arbitration and Conciliation Act, ("1996 Act"). In accordance with the suggestions, the Indian governing body established the Arbitration and Conciliation (Amendment) Act, 2015 endeavoring to refresh the law on costs in accordance with the best universal practices.

Ever growing need for a sea changes in Cost Regime in Indian Arbitration Law

- **Ujjwal Sheth**[1]

INTRODUCTION

It is often said that the process of arbitration has become complex and way too much expensive in years in India and at an International level. Corporate counsels and arbitration practitioners complain that arbitration proceedings are nowadays governed by extensive document production requests and dull written witness statements, which have resulted in an overly document-heavy system that runs counter to the fundamental promise of arbitration as an expeditious and cost-efficient way of settling business disputes. One also commonly hears that difficulties to arbitrators seem to be on the increase; jurisdictional disputes are all the more common, and battles over procedure have become a frequent aspect. In these conditions, it is hardly surprising that arbitration is sometimes regarded as a long-drawn-out, costly and highly hostile activity.

There are different viewpoints as to the reasons for such a development. Some argue that current arbitral process is constitutionally flawed; others see the perceived problems merely as a representation of general trends. The latter view is premised on a premise that a substantial part of the complexity and risen expense of modern-day arbitration is a result of a more distinct and interconnected business world, where significant transactions are ever more complicated and document-intensive and where one encounters vastly different traditions and expectations that are difficult to accommodate.

Considering the economic importance of cost allocation for the parties, one may be surprised that institutional arbitration rules provide only little guidance for the arbitral tribunal on how to render a decision on costs. In the context of India, Section 31(8) of the Arbitration and Conciliation Act, 1996 as originally enacted dealt with costs in the arbitration. Precedents that evolved there from led to an unsatisfied state of affairs regarding the regime on costs allocation. The provision was too open-textured that determination of costs by tribunals and courts were not uniform. The complaints about the costs of arbitration were unquestionably common. Accordingly, many arbitral awards rely on a discretionary standard or grant a reasonable or appropriate amount.[2] One very experienced arbitrator even asserts a general lack of analysis with regard to cost allocation. In fact, according to the Queen Mary Survey of 2015, 'cost' is seen as arbitration's worst feature,

[1] 4th Year, B.A.LL.B.(Hons.), The Maharaja Sayajirao University of Baroda

[2] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3094. (2nd ed. 2014)

followed by 'lack of effective sanctions during the arbitral process', 'lack of insight into arbitration's efficiency' and 'lack of speed'.[3] Criticism about costs concerns not only to the absolute level of costs but also to the uncertainty as to what kinds of costs are recoverable in the first place, and the lack of method regarding the allocation of costs among the parties to the arbitration. This state of affairs was incongruent with the best international arbitration practices. After numerous calls for reforms, the Law Commission of India in its 246th Report[4] sought an overhaul of the existing provision on costs. Based on the Report, Section 31(8) stood replaced by a new costs mechanism in Section 31A.

Therefore, this paper here compares the definition of costs and its allocation in different arbitration rule. The paper is divided into two parts primarily, the first parts deals on what are the elements that come within the definition of costs in different arbitration rules and the second part deals on how are the costs allocated. Lastly, I will conclude the paper on where India needs to change in costs allocation.

DEFINITION OF COSTS UNDER INDIAN ARBITRATION LAW

Amended Act contains detailed provisions on costs in Section 31A.[5] Section 31A (1) empowers the court or arbitral tribunal, as the case may be, to award costs in relation to any proceeding under the 1996 Act. The provision states that in awarding the costs: "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, 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 subsection, "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) other expenses incurred in connection with the court proceedings and the arbitral award."

[3] 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.

[4] Law Commission of India, Report No. 246: Amendments to the Arbitration and Conciliation Act 1996 (5th August, 2014), available at www.lawcommissionofindia.nic.in/reports/Report246.pdf (hereinafter "246th Report")

[5] Section 31A of the Act is virtually similar to Section 6A recommended in the 246th Report.

As it can be seen that different institution has a different approach towards the elements that come under the term cost. As can be noted, Article 40(2) (e) UNCITRAL Rules provides that also "legal and other costs incurred by the parties in relation to the arbitration" are considered part of the "costs of the arbitration". Many institutional arbitration rules follow the same pattern. This approach is not universal, though, as some arbitration rules treat party costs differently. For instance, the ICC Rules, the SCC Rules, and the ICSID Rules make a distinction between "costs of the arbitration" and "costs incurred by a party". In practice, however, this distinction has little practical significance, because all of these rules empower the arbitral tribunal to apportion both the "costs of the arbitration" and the "costs incurred by a party" in the final award. As can be seen that usual cost such as the price of arbitrator are covered by all the arbitration rules but there are certain costs which aren't properly sited in the definition but sometimes are awarded.

The definition of costs, as can be seen, covers different elements in all the above-mentioned arbitrational rules. It can be seen under all the rules to have those cost regimes which require, or allow, the arbitral tribunal to apportion the costs of the arbitration (including the parties' legal costs) between the parties; for obvious reasons, it is less relevant when the tribunal is duty-bound, or decides in its discretion, to order each party to bear its own costs and to share the procedural costs equally. In proceedings where the arbitral tribunal is vested with the power to apportion the cost of the arbitration – and called upon to do so by one or more of the parties – the recoverability of certain types of costs is unlikely to raise much controversy. For instance, most arbitrators would readily agree that fees and expenses of external counsel are in principle recoverable (at least insofar as the arbitral tribunal is satisfied that the amount of costs claimed is reasonable).[6] However, let's see how exactly the costs are allocated.

COST ALLOCATION IN INVESTMENT ARBITRATION PRACTICE

The above discussion shows that most of the investment arbitration rules do not provide much guidance on cost allocation.[7] It comes as no surprise then that investor-state tribunals do not follow a uniform approach in allocating costs.[8] In practice, tribunals decide on the issue of costs in different ways and with different objectives. Tribunals may:

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[6] See Article 37(1) ICC Rules; Article 34(d) ICDR Rules; Article 28(3) LCIA Rules; Article 50 SCC Rules; Article 38(e) Swiss Rules; Article 40(2)(e) UNCITRAL Rules (2010)

[7] *Cf.* SCHREUER, *supra* note 8, art. 61, ¶ 17

[8] *Id.* art 61, ¶ 19; HUGUES ARTHUR, *supra* note 2, at 3, 11, 21 et seq. (also discussing current methods and other proposals of cost allocation); *See also* LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award (July 25, 2007), ¶ 112; *see* ICC REPORT, *supra* note 2, ¶¶ 6-7 (Report considers cost decisions in commercial arbitrations, finding ―a lack of clarity as to prevailing [cost allocation] approaches and practices‖)

- Order the parties to share the costs of the arbitration equally.
- Order the losing party to bear all costs of the arbitration;
- Order one party to bear costs as a sanction for procedural misconduct;
- Require the parties to provide security for costs; and
- Require the parties to advance costs.

A. APPROACHES TO COST ALLOCATION

The different approaches to cost allocation discussed below are based on two basic principles: the ―American rule and the ―English rule.[9] Under the American rule, both the claimant and the respondent pay for their own legal costs regardless of which party prevails on the merits of the case. In other words: ―The costs lie where they fall‖. Under the English rule, the losing party must reimburse the prevailing party for (all or part of) its costs. Here, ―the costs follow the event‖. The discussions show the diverse approaches taken in investor- state arbitration with regard to cost allocation.

I. EQUAL SHARING OF COSTS

Under this approach, investor-state tribunals decide that the parties equally share the costs of arbitration. This means that each party is ordered to pay half of the administrative fees as well as half of the arbitrators' fees and expenses. In addition, each party is ordered to pay for its own expenses, including the costs for legal representation.

For example, in Alasdair Ross Anderson v. Costa Rica, the tribunal recognized that ―most ICSID tribunals‖ ordered the equal sharing of costs, while tribunals in commercial arbitrations tended to follow the ―loser pays‖ principle.[10] The tribunal thus ordered equal sharing of costs, because it did not find ―special circumstances that justify a departure from the accepted and rational practice.[11] Similarly, in Noble Ventures v. Romania, the tribunal noted that the ―loser pays‖ principle was neither stated in the ICSID Convention and Arbitration Rules, nor was it common to all national laws and international law; considering the claimant‗s success on certain issues, the tribunal therefore ordered equal sharing of cost.[12]

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[9] For a detailed discussion *see* David P. Riesenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 Duke L. J. 977, 989 (2011)

[10] Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No ARB (AF)/07/3, Award (May 19, 2010), ¶ 62 [*hereinafter*―Alasdair Ross‖]

[11] Alasdair Ross, ICSID Case No ARB(AF)/07/3, Award (May 19, 2010), ¶¶ 62-64 (―no special circumstances that justify a departure from the accepted and rational practice that each party shall bear its own legal costs and expenses and share equally in the costs and charges of the Tribunal and the ICSID Secretariat‖); *but see* Azinian, Davitian and Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), ¶¶ 125-126 (tribunal orders equal sharing of costs despite claims failing entirely, because of special circumstances of the case, including the novelty of the dispute resolution mechanism and Claimants‗ efficient conduct of proceedings)

[12] Noble Ventures, Inc. v. Romania, ICSID Case No ARB/01/11, Award (Oct. 12, 2005), ¶¶ 234-236

While one petitioner complains about a ―general lack of analysis[13] in cost allocation, tribunals which resort to the equal sharing of costs based their decision on the fact that both claimant and respondent prevailed on some issues or that the case was not clear-cut. For example, in Venezuela Holdings v. Venezuela, the respondent won on jurisdictional grounds with regard to one claim, but lost on other substantial claims, resulting in an order of equal sharing of costs.[14] In another recent case, Poštová Banka and Istrokapital v. Greece, the respondent prevailed on jurisdictional grounds, but the tribunal found the issue to be complex with regard to both facts and law and therefore ordered equal sharing of costs.[15]

In many cases, tribunals look at the parties' conduct of the arbitration when deciding how to allocate costs: tribunals ordered equal sharing of costs where they found that the conduct of both parties was appropriate and efficient under the circumstances of the case and did not produce undue delay.[16] Of the arbitration rules analyzed above, only the ICC Rules explicitly mention the ―expeditious and cost-effective‖ conduct of the arbitration as a factor in the cost allocation analysis.[17] In practice, however, tribunals sitting under other rules also employ this analysis. For example, in the ICSID case of Emmis and MEM v. Hungary, the respondent won on jurisdictional grounds, but the tribunal ordered equal sharing of costs, because the claimants prosecuted their claims appropriately and did not – as the respondent had alleged – adopt highly aggressive and dilatory litigation tactics. The tribunal in Poštová Banka and Istrokapital v. Greece reached the same conclusion with regard to cost allocation, holding that ― [e]ach side presented valid arguments in support of its respective case and acted fairly and professionally.[18] In the recent case of PNG Sustainable Development v. Papua New Guinea, the respondent prevailed entirely, but

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[13] BORN, *supra* note 5, at 3094, 3098 (―[I]t is unsatisfactory that awards of legal costs, which can entail millions or tens of millions of dollars or Euro in some cases, be unpredictable and based purely on discretion)

[14] Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. The Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27, Award (Oct. 9, 2014), ¶¶ 403-404; *see, e.g.*, LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Award (July 25, 2007), ¶¶ 112-114; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005), ¶¶ 234-235 (―In particular, [the tribunal] notes that, although all the claims ultimately failed, the Claimant succeeded on certain issues […] ‖); Firemen's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB (AF)/02/01, Award (July 17, 2006), ¶¶ 220-222.

[15] Poštová Banka. And Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award (Apr. 9, 2015), ¶¶ 377-378 [*hereinafter* ―Poštová Banka‖] (―Although the Tribunal has concluded that it lacks jurisdiction rationemateriae and ruled in favour of Respondent, the jurisdictional issue was not clear-cut and involved a complex factual and legal background. Each side presented valid arguments in support of its respective case and acted fairly and professionally. In light of these circumstances, the Tribunal decides that both sides shall bear the costs of arbitration equally, and that each side shall bear its own legal and other costs.

[16] *Cf.* BORN, *supra* note 5, at 3098 et seq. (―Where one of the parties was uncooperative or inefficient, it was less likely to recover its costs.‖); ICC REPORT, *supra* note 2, ¶ 17 (referring to commercial arbitrations).

[17] Rules of Arbitration of the International Chamber of Commerce (Jan. 1, 2012). [*Hereinafter*―ICC Rules‖] art 37(5); *See supra* II.B. *Cf.* BLACKABY, *supra* note 26, ¶ 9.93.

[18] Poštová Banka, ICSID Case No ARB/13/8, Award (Apr. 9, 2015), ¶ 377

had requested equal sharing of costs instead of a ―loser pays‖ cost allocation. The tribunal decided it could not go.

II. LOSER PAYS:

In a growing number of cases, tribunals follow the ―loser pays – or ―costs follow the event – principle, awarding costs against the losing party.[19] In these cases, tribunals rarely decide that the losing party owes full reimbursement of costs to the prevailing party.[20] In ADC v. Hungary, Hungary was ordered to fully reimburse the claimants, even though the claimants' costs were significantly higher. The tribunal held that ― Hungary acted throughout with callous disregard of the Claimants' contractual and financial rights‖ and added to the costs through its conduct of the arbitration.[21]

In determining that the high legal costs incurred by the claimants were reasonable, the tribunal relied on a well-known comment by Judge Howard Holtzmann: A test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers' fees are well-known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexity involved. Where the Tribunal is presented with copies of bills for services or other appropriate evidence, indicating the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the United States and countries of Western Europe, where both claimants and respondents before the Tribunal typically hire their outside counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation while legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably

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[19] *Cf.* SCHREUER, *supra* note 8, art. 61, ¶¶ 19, 34 (―This principle seems to be gaining ground in ICSID practice, but is still far from generally accepted.‖); HUGUES ARTHUR, *supra* note 2, at 5, 12 *et seq.* (―evolution towards shifting the costs to a losing party‖); Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (March 28, 2011), ¶ 380 (―newly established and growing trend‖); ICC REPORT, *supra* note 2, ¶ 13 (It appears that the majority of [commercial] arbitral tribunals broadly adopt that [loser pays] approach as a starting point.‖). *But see* BORN, *supra* note 5, at 3096 *et seq.* (referencing authorities questioning existence of ―loser pays‖ principle).

[20] *See*, *e.g.* Telenor Mobile Communications A.S. v. Hungary, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), ¶107 (―The Tribunal has concluded that […] Telenor should be ordered to pay Hungary's costs. […] In any event, the Tribunal agrees with Hungary's criticisms of Telenor's approach to this case, which has undoubtedly caused difficulties both for Hungary and for the Tribunal and has added substantially to the costs incurred.‖); *see further* SCHREUER, *supra* note 8, art. 61, ¶ 20

[21] ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case No ARB/03/16, Award (Oct. 2, 2006), ¶¶ 525-542.

required nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness.[22]

Most tribunals that follow the ―loser pays principle, however, only award parts of the costs against the losing party. For example, in Hochtief v. Argentina, the tribunal ordered Argentina to reimburse 75% of the claimant‗s costs, holding that the claimant did not prevail on substantial parts of its claim and that―it would not be fair to impose the entire costs upon Respondent.[23] Similarly, in Lemire v. Ukraine, the claimant recovered only parts of the incurred costs because – despite being the overall prevailing party – the claimant had not

―completely prevailed in a single issue‖ and had abandoned some of its initial claims.[24]

In PSEG v. Turkey, the tribunal ordered Turkey to pay 65% of the arbitration costs, because the claimants prevailed on jurisdiction and certain aspects of the claim, and had no other option but to initiate arbitration proceedings to obtain justice.[25] Other tribunals apply a somewhat mitigated ―loser pays principle, awarding only the common costs of the arbitration against the losing party, while ordering both parties to bear their own legal costs (―costs lie where they fall‖). In Impregilo v. Argentina, Argentina‗s application for an annulment of the award was rejected. However, the tribunal noted that the application was not frivolous, and therefore ordered Argentina to bear the administrative and arbitrators' fees and expenses, and each party to bear their own legal costs.[26] In Levy de Levi v. Peru, Peru prevailed on the merits, while both parties lost on their claims for moral damages; the tribunal thus ordered the claimant to bear the administrative and arbitrators' fees and expenses, leaving the legal costs ―where they fell.[27] In the recent case of Philip Morris v. Uruguay, the tribunal acknowledged that both parties had raised ―weighty arguments in support of their case while the parties' conduct in arbitration was not ―such that it should be taken into account when apportioning costs. On this basis, the tribunal decided to follow a mitigated ―loser pays principle: Because the respondent prevailed to a large extent, the tribunal ordered the claimant to

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[22] Separate opinion of Judge Holtzmann, reported in 1985 Iranian Assets Litigation Reporter 10, 860, 10, 863; 8 Iran-US C.T.R. 329, 332-333; *cf.* BLACKABY, *supra* note 26, ¶ 9.96 (finding that most tribunals relied on the criteria advanced by Judge Holtzmann and adopted a ―broad approach in assessing the amount to be paid‖).

[23] Hochtief AG v. Argentine Republic, ICSID Case No ARB/07/31, Decision on Liability (Dec. 29, 2014), ¶ 331

[24] Lemire v. Ukraine, ICSID Case No ARB/06/18, Award (March 28, 2011), ¶ 381

[25] PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretimve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5 Award (Jan. 19, 2007), ¶ 352

[26] Impregilo S.P.A. v. Argentine Republic, ICSID Case No ARB/07/17, Decision of the Ad Hoc Committee on the Application for Annulment (Jan. 24, 2014), ¶ 221

[27] Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No ARB/10/17, Award (Feb. 26, 2014), ¶ 517

bear all administrative and arbitrators' fees and expenses. Further, the claimant was ordered to reimburse the respondent for a major part of its costs in the amount of USD 7 million.[28]

B. COSTS AS SANCTION FOR PROCEDURAL MISCONDUCT AND FAILURE TO MEET EVIDENTIARY STANDARDS

As analyzed above, many tribunals take into account the parties' conduct of the arbitration when allocating costs, and order the equal sharing of costs where that conduct is appropriate under the circumstances of the case.[29] On the other hand, tribunals award costs against a party as a sanction for a particular procedural misconduct. For example, in Phoenix Action v. Czech Republic, claimant was ordered to bear all costs: The tribunal found that not only did the claimant lose on its claim, but also abused the Bilateral Investment Treaty and the ICSID Convention by initiating the arbitration in the first place.[30] In Generation Ukraine v. Ukraine, the tribunal found very blunt words in awarding costs against the losing claimant, holding
that the claimant�658s position was ―notably inconsistent‖ and ―reposed on the flimsiest foundation‖, while the written presentation of the case was ―convoluted, repetitive, and legally incoherent‖ and ―lacked the intellectual rigour and discipline one would expect of a party seeking to establish a cause of action before a [sic] international tribunal.[31]
In the recent case of CEAC v. Montenegro, the tribunal awarded costs against the losing claimant, because the claimant did not meet the evidentiary standards to prove its case.[32]

C. SECURITY FOR COSTS

Although the analyzed arbitration rules do not explicitly provide for security for costs, all of them allow the tribunal to order interim measures, which include such orders for security for costs.[33]

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[28] KENNETH B. REISENFELD AND JOSHUA M. ROBBINS, THE ACHILLES‘ HEEL OF INVESTOR-STATE ARBITRATION AWARDS, LAW360 (Dec. 6, 2016)

[29] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Republic of Uruguay, ICSID Case No ARB/10/7, Award (July 8, 2016), ¶¶ 582-589. Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Republic of Uruguay, ICSID Case No ARB/10/7, Award (July 8, 2016), ¶¶ 582-589. For a critical analysis of the cost decision in this case, *see*, e.g. KENNETH B. REISENFELD AND JOSHUA M. ROBBINS, THE ACHILLES‘ HEEL OF INVESTOR-STATE ARBITRATION AWARDS, LAW360 (Dec. 6, 2016), *available at* https://www.bakerlaw.com/webfiles/Litigation/2016/Articles/12-07-2016- Law360-Robbins-Reisenfeld.pdf (calling the tribunal‘s discussion ―a fairly slender reed on which to rest a multimillion dollar cost-shifting decision, particularly when countervailing factors are considered‖).

[30] Phoenix Action Ltd. v. Czech Republic, ICSID Case No ARB/06/5, Award (Apr. 15, 2009), ¶¶ 151-152 (―The Tribunal has concluded not only that the Claimant‘s claim fails for lack of jurisdiction, but also that <u>the initiation and pursuit of this arbitration is an abuse of the international investment protection regime under the BIT, and consequently, of the ICSID Convention</u>. […] The Respondent has been forced to go through the process and should not be penalized by having to pay for its defence.‖) (emphasis added).

[31] Generation Ukraine, Inc. v. Ukraine, ICSID Case No ARB/00/9 Award (Sept. 16, 2003), ¶¶ 24.2-24.6.

[32] CEAC Holdings Limited v. Montenegro, ICSID Case No ARB/14/8 Award (July 26, 2016), ¶ 221.

[33] UNCITRAL Arbitration Rules Art. 26(2) (c) U.N. Doc. A/RES/31/98

For example, under the UNCITRAL Rules, the tribunal may order a party to — provide a means of preserving assets out of which a subsequent award may be satisfied.[34]

Under exceptional circumstances, tribunals held that the ICSID Rules also allow an order for security for costs.[35] The tribunal must determine that a right in need of protection exists; and the circumstances require that the provisional measures be ordered to preserve such right, which necessitates a showing that the situation is urgent and the requested measures are necessary to prevent irreparable harm to the party‘s right to be protected.

Further, the tribunal must not prejudge the dispute on the merits by ordering security for costs.[36]

In the exceptional case of RSM Production Corporation v. Saint Lucia, the tribunal ordered the claimant to provide security for costs, because the tribunal found that the claimant – which had third-party funding – was unable or unwilling to pay the expenses.

One arbitrator, who concurred in the result with different reasons, was later (unsuccessfully) challenged because he suggested that security for costs should generally be required where one party has third -party funding.[37] Not surprisingly, this view was criticized by the litigation financing industry.[38]

INDIA'S POSITION ON COST ALLOCATION

PRE-AMENDMENT

Section 31(8) of the 1996 Act as originally enacted dealt with costs in arbitration. Section 31(8) was a default rule which meant that the parties could contract around it the manner in which they deemed chose to. In the absence of any agreement to the contrary, Section 31(8) (a) imposed a positive duty on the arbitral tribunal to fix costs. Section 31(8)(b) mandated the tribunal to specify the party entitled to costs, the party which shall pay costs, the quantum or the method of determination of the amount and the manner in which it shall be paid.[39] Section 31(8) (b), like the previous clause, employed the term "shall" to convey that these were mandatory requirements.

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[34] Convention on the Settlement of Investment Disputes Art 47, March 18, 1965, 575 U.N.T.S. 159

[35] RSM Production Corporation v. Saint Lucia, ICSID Case No ARB/12/10, Decision on Saint Lucia‘s Request for Security for Costs (Aug. 13, 2014), ¶ 58.

[36] Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules (2010) Art 45(1)

[37] *Id.* ¶ 18 (Assenting reasons of Gavan Griffith: —My determinative proposition is that once it appears that there is third party funding of an investor‘s claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.

[38] *Cf.*, e.g., Christopher Bogart, *RSM v St Lucia: Why Griffith was Wrong on Security for Costs*, GLOBAL ARB. REV. (Sept.2014), *available at* http://globalarbitrationreview.com/news/article/32964/rsm-v-st-lucia-why-griffith-wrong-security-costs (calling the arbitrator‘s reasoning a —preposterous overreaction).

[39] Indu Malhotra, OP Malhotra the Law & Practice of Arbitration and Conciliation 1179. (3rd ed. 2014)

Section 31(8) also contained an Explanatory Clause which defined "costs" and qualified "costs" as "reasonable" costs.

In practice, arbitral tribunals considered that they were vested with enormous discretion in fixing costs. In practice, courts hearing arbitration related applications and arbitral tribunals failed to exercise their discretion in allocating costs in a manner conducive to preventing frivolous conduct. A perusal of various judgments rendered under the pre-amended 1996

Act reveals two broad categories of practices followed by courts and arbitral tribunals as regards costs allocation. Under the first category, the arbitral tribunals and courts have left the parties to bear their own costs.[40]

In the second category of cases, the courts and the tribunals have awarded costs following the principle of costs follow the event. In these cases, the tribunals have awarded costs on the basis of the principle that the unsuccessful party shall bear the costs. For instance, in Country Club (India) Ltd. v. Choudhury and Choudhury (India) Ltd.,[41] the arbitral tribunal had decided several of the claims in favor of the claimant and awarded one of the counter-claims sought in favor of the respondent. A detailed bill of costs was furnished by the Claimant with supporting documents while a similar bill was submitted by the Respondent but without supporting documents. The arbitrator awarded costs to the tune of Rs. 21 lakhs in favor of the Claimant while it dismissed the claim of costs of the Respondent. The said award was upheld by the Bombay High Court.[42]

It could thus be seen that even prior to the recent amendments, tribunals were empowered to award costs in the manner contemplated by the amendments.[43] Nevertheless, courts have expressed reservations on implementing the law in developed countries of determining and allocating costs legal proceedings, including in arbitration.[44] At times, courts have adopted the same parameter of "reasonableness" in respect of the civil litigation and arbitration thereby creating no distinction between determination of costs in civil litigation and arbitration. But this notion is against the international practice of determination and allocation of costs. Evidence, anecdotal and otherwise, suggests that the courts and the tribunals in India have even been reluctant to follow the principle that costs follow the event.

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[40] Order of the Chief Justice under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis, 1 Indian Journal of Arbitration Law 21-40 (2012). It is also possible that could be some cases under the first category where the court would not have awarded costs for justifiable reasons recorded in the judgments.

[41] MANU/MH/2158/2016

[42] Oil and Natural Gas Corporation Ltd. v. Dolphin Drilling Ltd. MANU/MH/2376/2014

[43] The position as regards costs in arbitration related court proceedings remained unclear under the pre- amended law.

[44] Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust and Ors MANU/SC/1285/2011, para 12 The Court in this case was in favour of awarding "actual reasonable costs" in civil litigation and "reasonable costs" in arbitration thereby suggesting that there should not be any qualitative difference in the principles for quantification of costs in arbitration and civil litigation.

Another problem with the regime on costs was that there was no clarity as regards awarding costs in arbitration related court proceedings. Failure of the courts to award costs in such proceedings has unreasonably penalized the innocent party. In a study conducted by the author of about eighty three judgments which were rendered pursuant to Petitions for Special Leave to Appeal against orders of the Chief Justice of the High Court or his designate under Section 11 of the 1996 Act, it was noticed that the Supreme Court awarded costs only in one of the eighty three petitions surveyed.[45] This constituted about 1.2% of the total petitions that constituted the sample. It was surprising that the court, as a matter of course, did not award costs while deciding those appeals. Parties incur significant costs in such proceedings. Considering that the Supreme Court is empowered to decide finally on several substantive aspects of the dispute, the costs are particularly high as compared to a case where the Supreme Court had to merely appoint an arbitrator without deciding on the substantive aspects. The reason for the relatively high costs is due to the complicated nature of the proceedings. Costs expended in such proceedings generally include cost of engaging senior counsel for hearings, conferences, documentation, travel and stay costs, etc. Despite the magnitude of costs incurred, it is surprising that the Supreme Court did not award costs while deciding those appeals.

It was noted by the author in the said study that although the 1996 Act empowered the arbitral tribunal to award costs, such a power was restricted merely to the costs expended in relation to the arbitration proceedings and not costs incurred prior to the constitution of the arbitral tribunal. Section 31(8) of the 1996 Act empowered the tribunal to fix "costs of arbitration". Proceedings under section 11 and appeal from the order of the Designate were pre-arbitration proceedings. Therefore, Section 31(8), it was noted, did not empower the tribunal to award pre- arbitration costs including costs relating to appeal under Article 136 from orders of the Designate.

Given that the courts did not award costs in such proceedings, an amendment to the statute empowering the courts to do award costs reasonably compensating the "winning party" in all arbitration related court proceedings, including proceedings under Section 11, was required. This dissatisfactory state of the law and its application led to a call for reforms.[46]

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[45] Badrinath Srinivasan, Appeal against the Order of the Chief Justice under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis, 1 Indian Journal of Arbitration Law 21-40 (2012).

[46] Ernst & Young LLP, Emerging trends in arbitration in India: A study by Fraud Investigation & Dispute Services 20 (2015), 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 (accessed on 4 April 2017)(stating that in 90% of the arbitrations, the tribunal orders the parties to bear their own costs)(arguing "*it is more significant than ever for arbitration to follow cost- effective processes that essential amendments are made to current arbitration legislation and a well-set out framework for allocation of costs is put in place through legislation in this regard*").

POSITION ON COSTS ALLOCATION ON POST-AMENDMENT

The amended Act contains detailed provisions on costs in Section 31A. Section 31A (1)[47] empowers the court or arbitral tribunal, as the case may be, to award costs in relation to any proceeding under the 1996 Act. The provision states that in awarding the costs, the court or the tribunal, as the case may be, is empowered to determine: (a) whether costs are payable by one party to another; (b) the amount of such cost; and (c) when such costs are to be paid.

An important aspect of Section 31A (1) is that it clarifies that the power to award costs is independent of the Code of Civil Procedure, 1908. Hence, these issues relating to costs are to be decided notwithstanding provisions in the Code of Civil Procedure, 1908 which may go against Section 31A. As stated previously, there was some confusion on whether the principles relating to costs under the Code of Civil Procedure, 1908 would apply equally to arbitral proceedings.[48] By clarifying that the regime of costs under the 1996 Act shall be notwithstanding the Code of Civil Procedure, 1908, the legislature has, perhaps, adopted the international practice regarding determination and award of costs in arbitral proceedings. This also affords some freedom to the courts and the arbitral tribunal to award costs on an indemnity basis.[49]

In international arbitration, such as the decision of the Victorian (Australia) Court of Appeal in IMC Aviation Solutions Pty Limited v Altain Khuder LLC, 2011 VSCA 248, where it was held in respect of a decision to award costs on indemnity basis: "335. With great respect to his Honor, we can find nothing in the [Victorian Civil Procedure Act, 2010] or in the nature of the proceedings that are available under the Act which of itself warrants costs being awarded against an unsuccessful award debtor on a basis different from that on which they would be awarded against unsuccessful parties to other civil proceedings." It is perhaps against such a possible interpretation that the Legislature has thought it fit that costs in arbitration should be unbound by the Code of Civil Procedure, 1908.

Another significant aspect of Section 31A (1) is the recognition that costs in any arbitration related court proceeding such as an application for appointment of arbitrator, application for interim measures, etc. should be governed by the law of costs as provided in the 1996 Act as opposed to

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[47] Section 31A of the Act is virtually similar to Section 6A recommended in the 246th Report.

[48] Section 31A (1) of the Act reads: "*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, 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.*"

[49] Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust and Ors MANU/SC/1285/2011

any other law such as the Code of Civil Procedure, 1908. To illustrate, costs in relation to a proceeding for appointment of arbitrator under Section 11 can be determined only with respect to Section 31A and not any other law. Therefore, the court must necessarily decide on the quantum and apportionment of costs even in such proceedings due to Section 31A (1) of the 1996 Act.

The wording of Section 31A (2)[50] is a cause for concern because it begins with the phrase "if the Court or arbitral tribunal decides to make an order as to payment of costs" as if to suggest that making an order as to payment of costs is a matter of choice of the Court or the arbitral tribunal, as the case may be. The wordings of Section 31A (1) could be construed to mean that the Court or the tribunal has the option to choose not to pass any order on costs. This construction is incongruent to the purpose for which the new regime on costs was introduced, as noted by the Law Commission.

The structure of Section 31A (2) (as also of Section 6A (2)) also seems to be a cause for concern. The Section 31A (2) begins with the phrase "If the Court or arbitral tribunal decides to make an order as to payment of costs" and the sub-section continues with clause (a) which reads "(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party;" The provision follows up clause (a) with an "or" and goes on to clause (b) giving the impression that the phrase "If the Court or arbitral tribunal decides to make an order as to payment of costs" applies also to clause (b), which reads "the Court of the arbitral tribunal may make a different order for reasons to be recorded in writing." Taken together, these two phrases read: "If the Court or arbitral tribunal decides to make an order as to payment of costs, (b) the Court of the arbitral tribunal may make a different order for reasons to be recorded in writing." Thus, a combined reading of the initial phrase and clause (b) makes little sense in terms of sentence construction. Also, the term "or" between the two clauses (a) and (b) exacerbates the sentence construction problem.

Therefore, it is suggested that Section 31A (2) should be construed by the courts to mean the following:

• The Court or the tribunal shall make an order as to payment of costs.

• The general rule for the tribunal and the Court should be that the unsuccessful party should be ordered to pay costs of the successful party.

• The Court or the tribunal may depart from the general rule for reasons to be recorded in writing.

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[50] Section 31A(2) provides: "*If the Court or arbitral tribunal decides 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.*"

In case the award does not deal with costs at all and no reason is provided for such an order, a party shall be competent to seek clarification or an additional award under Section 33(4) of the 1996 Act. In case a court fails to pass a decision on costs, an interlocutory application could be filed seeking clarifications thereon.

Another aspect that requires the attention of tribunals and courts is that the present amendment does away with the necessity that costs should be awarded only if the conduct of the other party is not proper; rather, the principle now is that costs should be awarded to the winning party, and perhaps, costs at actual (indemnity costs) should be awarded if the conduct is reprehensible.

CONCLUSION

While complaints about arbitration costs are often founded, one ought to recognize that the resolution of large and complex commercial disputes will not and cannot become cheap. Even with the best-managed procedure, a major international arbitration will take time,

require resources and generate costs. It is illusory to think that arbitration could be returned to some (real or imagined) past simplicity where disputes were (allegedly) resolved in cooperative procedures very fast and with minimal costs.

Still, as the costs of arbitration have increased, the question of what costs are recoverable, and how costs should be allocated between the parties – become all the more important. As to the method of allocation of costs, I doubt that the "loser pays all" principle is sufficiently widely accepted so as to serve as a universal starting point even in cases resolved under those arbitration laws and rules which do not provide that the unsuccessful party shall, as a rule, bear the costs of the arbitration in the relationship between the parties.

Since cultural perspectives differ on this issue, one probably should not seek to impose any "one-size-fits-all" approach to cost recovery. The better approach is to leave the arbitral tribunal sufficient discretion when making its award of costs in case, with a view to taking into account all the case-specific circumstances such as the degree of success of each party and the effect of party conduct on the apportionment of costs.

In the context of India, before the amendment India was not on par with the International arbitration rules thus it was known that in order for India to achieve the objective of becoming a prominent global centre for dispute resolution, it is of fundamental importance that courts and the arbitral tribunals allocate costs in accordance with best international practices.

International practice suggests that arbitral tribunals award reasonable costs in favor of the winning party. In some countries, courts award costs on indemnity basis in respect of unsuccessful challenges to arbitration agreements and arbitral awards and also in unsuccessful petitions for

refusal to recognize or enforce awards. Indemnifying the winning party for costs incurred in such cases makes sense. In the words "If the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidizing the losing party's abortive attempt to frustrate enforcement of a valid award. The winning party would only be able to recover about two-thirds of its costs of the challenge and would be out of pocket as to one-third. This is despite the winning party already having successfully gone through arbitration and obtained an award in its favor. The losing party, in contrast, would not be bearing the full consequences of its abortive application."

Unfortunately, Indian courts and tribunals not only fail to award indemnity costs in deserved cases but do not even award reasonable costs in favor of the winning party as provided under the statute book. Hence, courts and tribunals need to implement the changes brought about by the 2015 amendments in awarding costs. Thus, herewith I suggest on how that can be done. A list of issues that an arbitral tribunal may wish to discuss with counsel for the parties at an early stage of the proceedings (preferably already in connection with the first case management conference) includes (but is not necessarily limited to) the following:

(i) What cost items are recoverable, in particular, whether parties may claim reimbursement of their internal legal and management costs;

(ii) What records the arbitral tribunal should require of the parties to substantiate their respective cost claims;

(iii) What method of cost allocation the arbitral tribunal should apply, in particular, how should it assess the relative success of the parties and the effect of their procedural behavior on the apportionment of costs;

(iv) Whether and how the arbitral tribunal should be informed about settlement offers that were better than, or came close to, the amount ultimately awarded by the tribunal and that would have saved significant costs and time had they been accepted;

(v) Whether any of the parties is supported by a third-party funder and, if yes, what implications this may have for the arbitral tribunal's decisions on costs;

(vi) Whether any of the counsel is representing a party on a success fee basis and, if yes, whether any success fees should be recoverable or not;

(vii) The format and timing of the parties' cost submissions.

Addressing cost issues at the outset of the proceedings has various benefits. Most importantly:

(i) It ensures that the parties will be fully informed about the arbitral tribunal's approach to costs. This removes uncertainty and improves predictability.

(ii) Also, the parties will be fully informed about the arbitral tribunal's expectations on submissions relating to costs. This, in turn, will allow the parties to properly record time spent and costs incurred during the arbitration, particularly with respect to internal legal and management costs.
(iii) Finally, knowing that obstructive or otherwise unreasonable behavior is likely to be penalized in the arbitral tribunal's allocation of costs may cause the parties to re-assess their litigation strategies and serves to encourage fair and efficient party conduct throughout the proceedings.
Thus, there are some things that Indian arbitrational tribunal can implement.