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LCIA India Arbitration Rules – First Impressions

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The recent publication of the LCIA India Arbitration Rules (the 'Rules') has sparked a fair amount of discussion and interest, not in small measure owing to the fact that this is the first instance when an international arbitral institution has published a set of arbitration rules tailored for the Indian scenario. One of the ways it does this is by providing parties with an extremely attractive framework of arbitration costs. This post focuses on this key aspect of costs, and how the Rules have the potential to bring about a change in perception that institutional arbitration is less cost-effective than ad hoc proceedings and which has hitherto deterred a more widespread use of institutional arbitration in India.

One of the most important features of the Rules is that they provide for an hourly rate of compensation for the arbitrators capped at INR 20,000 per hour. This is a departure from the generally prevalent practice in India of a per-sitting fee charged in almost all ad hoc arbitrations (which today by far outnumber institutional arbitrations), and which varies from INR 25,000 to INR 100,000 charged by former High Court judges, and between INR 50,000 and INR 150,000 charged by former Supreme Court judges, depending frequently on the value of the claim/ counterclaim and in some cases also on the complexity of the dispute. A sitting is usually capped by arbitrators at 3 hours; any spillover is treated as a second sitting for the day. Considering that most arbitrators also charge an additional initial 'reading fee', and separate fees for drafting the award, and also that at least a few of the preliminary hearings and hearings on miscellaneous applications tend to last a lot less than 3 hours, the LCIA model should prove attractive to parties.

What would however be interesting to observe is how the arbitrators receive these restrictions on fees, given the current scenario of almost complete arbitrator-autonomy in deciding fees. Not only consensual appointments, but also contested Section 11 appointments [1)] frequently result in the court leaving the Tribunal to decide the terms of its own remuneration. Would this therefore result in established and much sought-after arbitrators having reservations to act under the Rules, or would a widespread acceptance and use of the Rules result in a shift in culture? A related but slightly more complicated scenario may arise in international arbitrations involving three-member tribunals where each party has the right to nominate a member. Would it be possible for an international party to obtain the arbitrator of its choice given the limits on arbitrator fees? Would the other party not invariably refuse to agree to a higher cap given that that would affect its own payout? [2)] Would this lead to a situation where one party is forced by the other to pay grossly more than it is paying for its nominated arbitrator, or would parties entering into international transactions have second thoughts about using the Rules? These and many more interesting

questions will no doubt be answered in the coming months.

The Rules also make pleasant reading to a cost-conscious party due to the fact that LCIA has priced its own administrative charges at what should be an acceptable figure [3] in most commercial disputes barring very small-scale ones. Besides, the Rules mandate the arbitral tribunal to award costs based not only on the outcome of the arbitration, but also on the parties' conduct during the arbitration proceedings, including any undue delays or unnecessary expenses. [4]

Finally, the Rules have brought in a few unique India-specific provisions including an experimental form of the now de rigueur 'Bhatia clause' [5] in international arbitration agreements, which provides for the exclusion of Part I of the Arbitration and Conciliation Act, 1996 where the place (or seat) is outside India. Experimental, because the Rules selectively exclude only the troublesome provisions of Part I (including the right to apply for setting-aside of awards under judicially expanded grounds [6] and appeals from orders on interim measures), while retaining the more useful and sometimes potentially critical provisions, for example, the right to court assistance for interim relief where a Respondent is an Indian entity and has assets in India. Although it may still be possible for the Claimant to obtain relief from the curial court and enforce it as a foreign judgment in India, it would be faster and more effective to obtain urgent relief from the Indian courts. It is author's opinion that the Rules strike the correct balance in this regard, but as with anything new and avant-garde, they remain short of certainty until judicially tested.

These customisations and cost-related advantages in addition to the host of general value additions that an institutionally-administered arbitration brings should herald a new culture of arbitration practice in India, one that goes back to being what arbitration should always have been: a fast, efficient and less expensive alternative to litigation.

References

?1 Appointments made by the courts under Section 11 of the Arbitration and Conciliation Act, 1996 in cases where an agreed tribunal cannot be constituted.

?2 An increase in the arbitrators' fee cap is possible under the Rules only if all the parties agree: Para 3, Article 4(a) of the Schedule of Costs to the Rules.

?3 See Schedule of Costs to the Rules.

?4 See Article 28.4 of the Rules.

?5 In light of the decision of the Supreme Court in Bhatia International v. Bulk Trading SA, (2002) 4 SCC 105, which held that unless excluded by the parties, Part I of the Indian Act would apply even to arbitrations outside India.

?6 See the decision of the Supreme Court in ONGC v. Saw Pipes, (2003) 5 SCC 705, where an award patently illegal or contrary to a fundamental policy of Indian law was held to be against public policy and therefore open to challenge.

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