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Feevolution: The Need to Embrace Contingent Fee Arrangements in the Indian Arbitration Regime

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Most international commercial disputes of moderate-high complexity are expensive. While this may be good for the counsel representing parties, it is less so for the parties. The evolution of alternative fee arrangements ("AFA") allows parties to nonetheless pursue such disputes without compromising their economic viability. Unfortunately, in India, the courts have opposed the more novel means of dispute funding such as third-party funding or AFA for lawyers, citing the doctrines of maintenance and champerty. These primitive principles also extend to lawyers acting on contingency or conditional fees, fearing that such arrangements could compromise judicial integrity. A blanket prohibition on AFAs, originally intended to safeguard against potential abuses and uphold ethical standards, now risks access to justice and the equitable resolution of disputes. As India witnesses a surge in sophisticated commercial disputes, particularly complex arbitrations involving knowledgeable and commercially adept parties, the rationale for retaining archaic provisions prohibiting AFAs has been obviated. The time has come, therefore, to reconsider these restrictive measures, and that they no longer serve the broader interests of fairness and efficiency in modern legal practice, specifically in the context of international commercial arbitration.

More importantly, the Indian legal regime is navigating uncertain terrains pertaining to the permissibility of foreign arbitration practitioners in India, that makes the viability of such AFAs more relevant. In this background and with the help of recent judicial developments and regulations in India, we explore how a promising case for AFAs could be proposed in international commercial arbitrations seated in India.

Understanding Contingent Fee Arrangements

An AFA could take several forms, the most common ones being (1) a Conditional Fee Arrangement under which a lawyer may claim a success fee, as well as an uplift fee, which is often an agreed percentage over and above a base fee; and (2) a Contingent Fee Arrangement, wherein the lawyer's remuneration is contingent upon the successful outcome of the case.

These forms of AFA are common across jurisdictions such as the United States and Canada, but have been historically prohibited within the Indian legal regime under the Indian Advocates Act, 1961 ("Advocates Act") and the Bar Council of India Rules ("BCI Rules"). The Bar Council of

India is a statutory body established by the Indian Parliament under the Advocates Act, and the BCI Rules govern the professional conduct and etiquette of members of the Indian bar. Rule 20 of the BCI Rules prevents an advocate (registered in India) from stipulating a fee contingent on the results of the litigation or from agreeing to share the proceeds thereof. Similarly, Rule 21 of the BCI Rules prohibits an advocate from buying or trafficking in, stipulating, or agreeing to receive any share or interest in an actionable claim.

The issue of viability of AFAs has come before the Indian courts time and again. The issue of conditional fee arrangements was first discussed by the Indian Supreme Court in 1954 in the case of *Re: Mr. 'G', A Senior Advocate Of The Court v. Unknown*, where the Supreme Court prohibited performance-based remuneration for lawyers on the basis that it does not adhere to the legal profession's "professional ethics and norms which includes independence, honesty and objectivity". The courts have since held CFAs to be against public policy under Section 23 of the Indian Contract Act ("ICA") (which states that the consideration or object of an agreement is unlawful if it is fraudulent), as such arrangements have the potential to jeopardize an advocate's ability to remain impartial and detached in its duty as a court official. The courts' reasoning has been that the inclusion of a personal financial stake in a matter's success may cause them to act unprofessionally, including engaging in questionable practices to obtain a favorable decision.

Making a Case for Contingent Fee Arrangements in International Commercial Arbitration

The Indian Supreme Court in the case of *Bar Council of India v. A.K. Balaji* ("AK Balaji") while dealing with the applicability of the Advocates Act and similar restrictions on foreign lawyers conducting international commercial arbitrations, did not conclusively decide the restrictions that apply to foreign lawyers for conducting arbitrations in India, but left it open to the BCI to make rules in this regard. More importantly, the *AK Balaji* judgement recognized the difference between litigation and non-litigation Alternative Dispute Resolution ("ADR") practices, such as arbitration, acknowledging the inherent flexibility in arbitration as a dispute resolution mechanism. Unless specific regulations are issued in this regard, it remains uncertain whether the restrictions applicable to Indian practitioners would extend to foreign firms or lawyers conducting international commercial arbitrations seated in India.

Following this, the regulatory landscape governing foreign lawyers and practitioners has seen substantial evolution concerning international commercial arbitration, marked by recent legislative reforms aimed at fostering a more inclusive environment. The Bar Council of India's 2022 Rules for Registration of Foreign Lawyers and Foreign Law Firms (discussed **here**) represent a pivotal shift, now permitting foreign legal practitioners to engage in non-litigation ADR matters, particularly international arbitration seated within India. Although comprehensive guidelines in this regard are yet to be issued, the authors are hopeful that India would borrow from other common law jurisdictions, such as Singapore, to carve out an exemption for practitioners of international commercial arbitrations that would allow alternate fee arrangements for arbitrations seated in India.

A recent judgement of the Bombay High Court ("BHC") reflects the change in outlook towards AFAs. In the case of *Jayaswal Ashoka Infrastructures Private Limited. v. Pansare Lawad Sallagar*, the BHC directly addressed the validity of CFA arrangements in arbitrations. The case concerned a CFA fee structure between an arbitration consultancy firm and a construction

company, wherein the latter agreed to pay a percentage of its award money as remuneration to the firm.

The BHC noted that the plaintiff, who was a qualified Indian lawyer, represented the defendant in arbitration proceedings as a 'counsel' and not as an 'advocate.' The distinction stemmed from the fact that an appearance before an arbitrator cannot be equated to an appearance before a court. The BHC reaffirmed the position held in *Re: K.L. Gauba v. Unknown*, where it was first laid down that CFAs are unethical or against public policy under Section 23 of ICA, *only* when entered into by "advocates". Section 2(1)(a) of Advocates Act defines an advocate as "an advocate entered into any roll under provisions of the Act". The BHC's reasoning suggests that CFAs could be permissible in arbitrations in which the lawyer is appearing in the capacity of a "counsel" and not an "advocate". This should extend to the acceptance of CFAs in international arbitration, wherein practitioners, including foreign lawyers, cannot be strictly construed to be covered within the ambit of 'advocates' under Indian law.

The Way Forward

India can glean valuable insights from Singapore and Hong Kong's progressive approach toward legal reforms, particularly in embracing CFAs for international arbitration. (discussed **here** and **here**) By adopting a similar regulatory framework and following international arbitration trends, India can bolster its attractiveness as a preferred destination for international arbitrations.

Singapore, which previously had a regime that was more identical to India, made amendments to permit CFAs in international and domestic arbitration and related court proceedings under the **Legal Profession (Amendment) Act 2022**. Under the amended law, Singapore-qualified lawyers can now enter into CFAs with their clients for international and domestic arbitration cases seated in Singapore, as well as related court proceedings, such as under the Singapore International Commercial Court. This legislative amendment represents a departure from the traditional prohibition on CFAs in domestic litigation, aligning Singapore's legal framework more closely with international arbitration practices. A similar regime in India where CFAs could be permitted in a controlled manner for international commercial arbitrations would go a long way in bolstering India's competitiveness as a preferred arbitration "seat".

This change is now more relevant than ever because of the entry of foreign firms and practitioners that bring with them a stronger financial appetite to undertake AFAs in India-seated arbitrations. Moreover, by permitting CFAs, foreign practitioners would be incentivized to share the risk, thereby enhancing their willingness to undertake cases in India which is crucial to lower barriers to entry.

While advocating for the inclusion of AFAs for foreign arbitration practitioners, this proposal does not seek to exempt all arbitrations in India from the restrictions on champerty and maintenance under the Advocates Act. Rather, it is proposed to have a clear exception for international commercial arbitrations involving sophisticated parties, reflecting the approach taken in Singapore, which has implemented a more nuanced and controlled framework for arbitration funding. The revised guidelines in India suggest a more measured approach in the context of international commercial arbitration. This targeted exception acknowledges the unique dynamics and complexities of such disputes, ensuring that while funding is accessible, it remains subject to

specific safeguards that maintain the integrity of the arbitration process. It may be that the Indian legal landscape is not prepared to allow AFAs in a domestic litigation setup, but the recent legal developments make it clear that India could benefit from departing from historical prohibitions on AFAs in international commercial arbitrations.

More recently, the Indian courts have upheld the validity of third-party funding (discussed on the Blog **here**), a positive step in recognizing the need for such funding in commercial cases.

Concluding Remarks

Third-party funding coupled with AFAs make for a formidable combination that would not only bring India on par with other arbitration hubs, but also open doors for clients and lawyers. Third-party funding can democratize access to justice, particularly for smaller businesses and individuals who may lack the financial resources to pursue or defend complex disputes. This is particularly relevant in India, where many commercial entities face financial constraints. By providing a safety net for businesses involved in arbitration, especially in high-stakes international disputes, investors may also feel more confident about entering the Indian market. Jurisdictions such as Singapore have witnessed a surge in arbitration cases and related investments after introducing supportive funding frameworks, highlighting the potential for India to experience similar growth. Statistics from jurisdictions with established third-party funding practices, such as Australia and the UK, indicate that a significant percentage of commercial disputes—up to 30% in some studies—are now financed through third-party funders. This trend would not only accelerate the resolution of disputes but also lead to more efficient allocation of resources, as parties can focus on their core business operations rather than being bogged down by prolonged litigation.

Combining third-party funding with AFAs creates a powerful synergy, positioning India alongside other leading arbitration centres and enhancing opportunities for clients and lawyers alike. This combination not only strengthens India's arbitration ecosystem but also fosters greater accessibility and innovation in legal services.

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