

Kluwer Arbitration Blog

Arbitrators' Fees: Standards, Review, and Regulating Mechanisms

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The Supreme Court of India in *Oil and Natural Gas Corporation Ltd. vs Afcons Gunanusa JV* ruled that the unilateral determination of arbitrators' fees contradicts the fundamental principle of party autonomy. Decisions such as this one raise important questions such as: What is a reasonable fee for an arbitrator? How should these fees be determined and by whom? Can these fees be revised in the course of proceedings?

To respond to the above questions, the authors of this post surveyed the provisions governing fees in 73 national arbitration laws and procedural rules of arbitral institutions (“**Surveyed Rules**”)¹ This post briefly outlines the findings of that survey.

Standards in Determination of Arbitrators' Fees

This section addresses: (i) how arbitrators' fees are determined; (ii) who makes this determination; and (iii) at what stage the fees are determined.

How are arbitrators' fees determined?

A quick examination of the Surveyed Rules reveals four major approaches to determining an arbitrator's fees.

First is the *ad valorem* approach whereby the fees are determined by reference to the sum in dispute. This approach is significant as it ensures that the fees are proportionate to the amount in dispute, helping parties determine at an early stage whether arbitration is of benefit, especially if the amount in dispute is low.

Another model for determining fees is based on an hourly rate where fees are determined by reference to the work done and time spent by an arbitrator on a matter. This approach could be beneficial in ensuring that arbitrators are compensated based on the actual work done. A downside to this approach is the difficulty in ascertaining the accuracy of time actually reported by an arbitrator – although, the complexity of the dispute in question and time reported by other arbitrators in a multi-arbitrator tribunal could play a critical role on this matter.

The hybrid approach, which is a blend of both the *ad valorem* and hourly rate models, considers the amount in dispute, but also looks to the work done by each arbitrator to determine their fees.

This approach inherits the inherent advantages and disadvantages in each combination.

The final method that was observed provides more of a free rein to the tribunal in determining its fees. However, this does not translate to freedom to decide arbitrarily. Instead, the tribunal remains confined to a direction of reasonability, as will be seen shortly. Overall, understanding the different approaches and which approach to apply, depending on the applicable arbitration law and rules, is essential to following due process and preventing an arbitrary determination of fees which would infract party autonomy.

Under the Surveyed Rules, 32 Rules provide for an *ad valorem* schedule for arbitrators' fees. These include, *inter alia*, the Rules of the [CAM-CCBC](#) and the [Vienna International Arbitration Centre](#).

By contrast, eight of the Surveyed Rules propose an hourly rate for arbitrators' fees. Institutional rules that adopt hourly rates include those of the LCIA and the ICSID. Further, two of the Surveyed Rules employ a hybrid approach. For example, Article 93 of the [Japan Commercial Arbitration Association Rules](#) provides that the amount of an arbitrator's remuneration is based on an hourly rate and Article 94 sets a cap on the fees that can be charged by a sole arbitrator based on the economic value of the claim.

Notably, 31 of the Surveyed Rules either contain no express provision regarding the determination of arbitrators' fees or leave the question to the tribunal while stipulating a threshold of reasonability based on specific factors. For example, Article 41(1) of the [UNCITRAL Arbitration Rules 2010/2013/2021](#) provides that "the fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case." The considerations set out in the UNCITRAL Rules also reflect the *ad valorem* and hourly rate standards insofar as the sum in dispute and the time spent by the arbitrator are relevant to determining fees.

Who determines arbitrators' fees?

The question of who determines arbitrators' fees concerns who is imbued with the power to determine arbitrators' fees. Studying this issue is interesting because it reveals whom the stakeholders in the field trust to ensure that their arbitration is cost effective.

Looking at the Surveyed Rules, the determination of arbitrators' fees appears to be an area of shared responsibility. 37 of the Surveyed Rules place the responsibility of determining arbitrators' fees with a wing or a committee of an arbitral institution. For example, Articles 41(1) and (2) of the [Istanbul International Arbitration Centre Rules](#) state that arbitrators' fees would be determined by the Istanbul Arbitration Centre National Board of Arbitration and International Board of Arbitration, and fixed by the tribunal in its award.

By contrast, where the tribunal is responsible for fixing its fees, as is the case under 27 of the Surveyed Rules, it is still a shared responsibility since the tribunal may either have to determine the fees based on an objective *ad valorem* schedule set by an institution or on an hourly basis to which the parties must consent. For instance, Article 41(3) of the [Arbitration Rules of Asia Pacific Centre for Arbitration and Mediation](#) provides that, promptly after its constitution, the tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply.

Notably, six of the Surveyed Rules (such as the [Hungary Arbitration Act](#) and the [Japan Arbitration Act](#)) do not address the question of who determines fees at all, while three of the Surveyed Rules provide a hierarchical system to determine the fees, giving the parties the first say as to fees and making alternate provisions to fill any lacuna. A good example is Section 40(2) of the [Singapore Arbitration Act 2001](#) which provides: “Unless the fees of the arbitral tribunal have been fixed by written agreement or such agreement has provided for determination of the fees by a person or institution agreed to by the parties, any party to the arbitration may require that the fees be assessed by the Registrar of the Supreme Court within the meaning of the Supreme Court of Judicature Act 1969.”

At what stage are arbitrators’ fees determined?

The question of when arbitrators’ fees are determined has momentous implications. For example, a determination at the outset of the arbitration, prior to or during the constitution of the tribunal, provides the parties with a fair clue as to what to expect going forward, which could in turn help them make a more informed decision on how to proceed. By contrast, a determination at the end of the arbitration may be more accurate as it would permit consideration of all the work that has actually gone into the arbitration.

There is significant variation amongst the Surveyed Rules on when arbitrators’ fees must be determined. 17 of the Surveyed Rules require arbitrators’ fees to be determined prior to or during the constitution of the tribunal. For instance, Article 5(2) of the First Schedule of the [Nairobi Centre for International Arbitration Rules](#) provides that “the Arbitral Tribunal shall agree in writing upon fee rates conforming to [its] Schedule of Fees and Costs prior to its appointment by the Centre.” 18 of the Surveyed Rules require the determination of the tribunal’s fees prior to delivery of or in the final award (such as the Rules of the Vancouver International Arbitration Centre and the Africa Institute of Mediation and Arbitration).

In the remaining 38 Surveyed Rules, a timeline is not expressly stated or the determination of fees occurs at different intervals within the arbitration process. Rule 58(a) of the [AAA Commercial Arbitration Rules and Mediation Procedure](#) provides for payment of initial deposits to cover the fees, while the final amount is set at a later stage. Even where the Surveyed Rules provide that fees are to be determined in the final award (such as the [UNCITRAL Arbitration Rules 2010/2013/2021](#)), they may require that some guidance on fees be established at the outset of proceedings to grant parties greater certainty.

Review of Arbitrators’ Fees

While most of the Surveyed Rules do not expressly provide for any form of appeal, some contain mechanisms for the review of arbitrators’ fees. Such review mechanisms are important because, on the one hand, they give parties re-assurance that arbitration costs will not be excessive, and on the other, they give arbitrators the opportunity to revise their fees if circumstances warrant it.

The review of arbitrators’ fees may be conducted by the arbitrators (either *suo motu* or on the application of a party) or in some cases, by a third party, such as the appointing authority under the institutional rules or the courts of the seat.

For example, under paragraph 9.4 of Schedule 2 of the [Hong Kong International Arbitration Centre Administered Arbitration Rules 2018](#), “an arbitrator may review and increase his or her agreed hourly rate by no more than 10% each anniversary of his or her confirmation or appointment.” This

mechanism seems to seek to ensure that an arbitrator is remunerated in line with market standards in long-running arbitrations.

Under Article 41 of the [UNCITRAL Arbitration Rules 2010/2013/2021](#), the parties may refer the proposal of arbitrators' fees to the appointing authority for review. This happens promptly after the constitution of the tribunal and an arbitrator has informed the parties of their fee proposal. The review of fees would give due consideration to the reasonableness of the amount to be charged, taking into account the complexity of the case and other circumstances, such as the time an arbitrator spent on a case.

Arbitrators' Fees as a Regulating Mechanism

Fees are the financial incentive for arbitrators to accept a nomination. Therefore, arbitrators' fees have vast potential to be used in arbitration rules and legislation as a tool to regulate the conduct of arbitrators and encourage efficiency.

Article 25 of the [English Arbitration Act](#) provides that, in the event an arbitrator resigns, she can apply to the competent Court to obtain an order in respect of the entitlement to fees (or reimbursement), unless otherwise agreed by the parties. If that Court is not satisfied that such resignation is reasonable, it can refuse to make an order in respect of that arbitrator's fees (Article 25(4)).

Some of the Surveyed Rules link the payment of arbitrators' fees to the timing of the award, thereby encouraging arbitrators to render their rulings without delay. For instance, Rule 59 of the [Court of Arbitration for Sport](#) provides that payment of arbitrators' fees may be reduced in case of non-compliance with the time limit in delivering the operative part of an award. Similarly, Article 53(1) of the [Arbitration Rules of the Madrid International Arbitration Centre](#) allows the arbitral institution to set the fees, taking into account "any delays in the rendering of an award." Article 2(2) of Appendix III of the [International Chamber of Commerce Arbitration Rules](#) allows the ICC Court of Arbitration to set the fee, "tak[ing] into consideration of the diligence and efficiency of the arbitrator, the time spent, [...] and the timeliness of the submission of the draft award."

Article 57(2) of the [Act LX of 2017 on arbitration](#) in Hungary states that "[i]f an arbitral award is annulled, the arbitral proceedings terminated by the annulled award shall be free of arbitrator's fees, and the tribunal that made the annulled award shall not be entitled to a fee." This provision may encourage arbitrators to render high-quality decisions that are not prone to be set aside. On the flip side, it could be argued that such provisions are too stringent (indeed, judges in lower courts are not deprived of their salaries when their decisions are overturned on appeal), and may ultimately deter arbitrators from taking on appointments.

Conclusion

The more expensive arbitration becomes, the less favourable it appears as a meaningful alternative to court litigation. Understanding how arbitrators' fees are determined and regulated is therefore an important subject.

The survey discussed in this post highlights existing approaches to fee determination and review. Approximately 42% of the Surveyed Rules favour the *ad valorem* schedule for arbitrators' fees, while the rest defer the determination to the tribunal or entail a hybrid of both approaches. In about half of the Surveyed Rules, the fee is set by arbitral institutions, while in the other half, the fee is

determined by the tribunal. The survey therefore demonstrates a diversity of approaches offered by various arbitral rules which parties may select. Shedding light on this important topic of arbitrators' fees may play an important role in encouraging efficiency and the issuance of timely and high-quality awards.

While the survey has encompassed the major arbitral rules used by parties in arbitration generally and is broad-based, the authors do not consider their work in this piece to be comprehensive and hope that this post serves as a starting point for further, more in-depth research on arbitrators' fees.

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References

The list of the Surveyed Rules includes (1) the institutional arbitration rules of: Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (“CAM-CCBC”); Arbitration Centre for the American Chamber of Sao Paulo; Hong Kong International Arbitration Centre; Kigali International Arbitration Centre; Cairo Regional Centre for International Commercial Arbitration; Court of Arbitration for Sport; Lagos Chamber of Commerce International Arbitration Centre; Vancouver International Arbitration Centre; Mauritius International Arbitration Centre; Asia Pacific Centre for Arbitration and Mediation; UNCITRAL 2010/2013; Nairobi Centre for International Arbitration; Centro De Arbitraje De Mexico; Africa Institute of Mediation and Arbitration; Istanbul International Arbitration Centre; Vienna International Arbitration Centre; Jamaica International Arbitration Centre; PCA Arbitration Rules; International Centre for Settlement of Investment Disputes (“ICSID”); London Court of International Arbitration (“LCIA”); Dubai International Arbitration Centre; American Arbitration Association; Japan Commercial Arbitration Association; CIAM-MIAC; Africa-China Joint Arbitration Centre Johannesburg; Lagos Court of Arbitration; International Centre for Arbitration & Mediation in Kampala; Korean Commercial Arbitration Board; Canada Commercial Arbitration Centre; Asian International Arbitration Centre; Mumbai Center for International Arbitration; Centre for Conciliation Mediation and Arbitration of the Algerian Chamber of Commerce and Industry; Arbitration Institution at the Chamber of Commerce and Industry of Armenia; Centro de Mediacion y Arbitraje Comercial de la Camara Argentina de Comercio; Santiago Arbitration and Mediation Centre; Costa Rica Centro De Resolucion De Conflictos; Rules of Arbitration of the Arbitration Center of Uruguay; Australian Centre for International Commercial Arbitration; New Zealand International Arbitration Centre; Barbados Arbitration and Mediation Court of the Caribbean; Casablanca International Mediation and Arbitration Centre; International Chamber of Commerce; Singapore International Arbitration Centre; China International Economic and Trade Arbitration Commission; Stockholm Chamber of Commerce; International Centre for Dispute Resolution; German Arbitration Institute (“DIS”); Milan Chamber of Commerce; Center for Arbitration and Conciliation, Bogotá Chamber of Commerce (“CCB”); and (2) Arbitration laws: English Arbitration Act 1996; Hong Kong Arbitration Ordinance 2011; Brunei Arbitration Act 1994; Moroccan Dahir No. 1-07-169; Danish Arbitration Act 2005; Tanzania Arbitration Act 2020; Title VII of Book IV of the Italian Code of Civil Procedure; Kenya Arbitration Act 2009; Cambodia Commercial Arbitration Act; Brazilian Law No. 9.307/96; Bolivian Law 708; Colombian Law 1593 of 2012; Japan Arbitration Act 2003; Indonesia Arbitration and Alternative Dispute Resolution Act; Paraguay law 1870/02; Zambia 2000 Arbitration Act; Nigeria Arbitration and Conciliation Act; Australia International Arbitration Act 1974; Hungary Arbitration Act; Netherlands Code of Civil Procedure; Canada Commercial Arbitration Act RSC 1995 c. 17 (2d supplement); USA LII Federal Arbitration Act; Indian Arbitration Act; Singapore Arbitration Act 2001; Mexico Title VI Book V Commercial Code.

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