I. ARBITRATION IS CHEAPER THAN LITIGATION: AN INDIAN PERSPECTIVE

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ABSTRACT

The recent Expert Level Committee Report on Arbitration has recommended that the Fourth Schedule should be deleted from the Arbitration and Conciliation Act, 1996. This has sparked a debate amongst scholars and jurists as to whether arbitration is a costly affair in India and if yes, whether the Fourth Schedule has been able to solve this problem or not. It is in this background, that this paper compares the arbitrator fee payable as per the Fourth Schedule vis-à-vis the court fee payable when litigating the same dispute and argues that the Fourth Schedule should be retained. The reason for the same is that the Fourth Schedule provides for a ceiling limit for payment of arbitrator fee which is absent in court fee legislations of most states across India. It further dispels the myth that arbitration is a costly affair and opines that arbitration is factually cheaper than litigation in case of high value disputes.

I. INTRODUCTION

High costs have remained a primary concern while opting for arbitration around the globe. India has not been a stranger to this cost problem.[1] The 2014 Report by the Law Commission of India had recognized this problem in the Indian context and had recommended the insertion of the

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[1] Constantine Partasides QC et al, *Redfern and Hunter on International Arbitration* (6th edn OUP Oxford 2015) 36.

Fourth Schedule[2] in the Arbitration and Conciliation Act, 1996 (hereinafter "**Act**").[3] Briefly, the said Fourth Schedule of the Act[4] prescribes an ad valorem arbitrator/arbitral tribunal fee depending on the claim amount involved with a maximum ceiling limit.

In spite of the insertion of the said Schedule, high costs continued to remain a cause of concern for the Indian arbitration landscape. Thereafter, the 2017 High Level Committee Report recommended usage of third-party funding in the Indian arbitration landscape to combat this cost problem.[5] However, recently, the 2024 Expert Committee Report has recommended the deletion of the Fourth Schedule from the Act citing that the Fourth Schedule has not solved the problem of high costs associated with arbitration.[6] Another recent development following the aforementioned report has been a recent office memorandum by the Government of India restricting arbitration to disputes with value less than Rs. 10 crores.[7]

The present paper aims to comment upon the aforementioned recommendation of deletion of the Fourth Schedule from the Act and argues that the Fourth Schedule must be retained in the Act. It is noteworthy to mention that this paper does not criticise the reasoning of the Expert Committee for the said recommendation and instead compares the cost of

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[2] Law Commission of India, "246th Report on Amendments to the Arbitration and Conciliation Act 1996" (August 2014) 10-12.
[3] Arbitration and Conciliation Act, 1996.
[4] ibid sch 4.
[5] Justice B.N. Srikrishna, "Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India" (July 2017) 43-44.
[6] T.K. Viswanathan, "Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to Make it Alternative in the Letter and Spirit" (February 2024) 32.
[7] Ministry of Finance, *Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement* (3 June 2024) <https://doe.gov.in/files/circulars_document/Guidelines_for_Arbitration_and_Mediation_in_Contracts_of_Domestic_Public_Procurement.pdf> accessed 23 August 2024.

resolving a dispute through litigation and arbitration and opines that adoption of arbitration by paying the arbitrator fee as per the Fourth Schedule reduces dispute resolution costs. The aforesaid enquiry would not only be useful for the parties, in-house counsel and dispute resolution advocates (for adopting a suitable course of dispute resolution) but the same would also be relevant for the legislature and the policy maker to decide in which direction the nation's dispute resolution policy needs to be directed. The present paper would also demonstrate that restricting arbitration to low-value claims would actually be counterproductive and in complete ignorance of the cost-benefit of arbitration in case of high-value disputes.

The present paper is divided into five parts. Part I of this paper is the Introduction, which sets out the objective of the present paper and the methodology followed by the authors. Part II of this paper traces the historical background of the Fourth Schedule of the Act, its contemporary usage and the contemporary jurisprudence regarding the same. Part III of this paper lays down the jurisprudence and methodology for payment of court fees that is paid at the time of litigating a dispute in an Indian court. Part IV of this paper lays down the parameters and assumptions and in light of these assumptions compares the cost of litigation and arbitration of a dispute. Part V of the paper analyses the findings arrived in Part IV of the paper and concludes that the Fourth Schedule of the Act results in a scenario wherein in high value monetary claims, arbitration is factually cheaper than litigating the same dispute before an Indian court and hence, it would be beneficial for the Indian dispute resolution landscape that the Fourth Schedule is retained in the Act.

II. CONTEMPORARY JURISPRUDENCE REGARDING THE FOURTH SCHEDULE

As already stated above, the Fourth Schedule came into existence on the recommendation of the Law Commission of India to address the problem of high fees charged by the arbitrators at the contemporaneous time.[8] The said Schedule was to apply to domestic arbitrations. Furthermore, the Commission at the time of recommending the insertion of the Fourth Schedule recommended that the said Schedule should be revised periodically at regular intervals of 3-4 years.[9] However, the said Schedule has not been amended till date.

It is also pertinent to mention that in cases wherein the appointment of the arbitrator was to be made by the High Court, the High Court was empowered to make appropriate rules for determination of fees of the arbitrator so appointed in accordance with the fee schedule prescribed in the Fourth Schedule of the Act.[10] Table 1 depicts the current Fourth Schedule of the Act:

Table 1: Fourth Schedule of the Arbitration and Conciliation Act 1996

Sum in dispute	Model Fee
Upto Rs. 5,00,000	Rs. 45,000

[8] Law Commission of India (n 2).
[9] ibid 11-12.
[10] Arbitration and Conciliation Act 1996, s 11(14).

Above Rs. 5,00,000 and up to Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent of the claim amount over and above Rs. 5,00,000
Above Rs. 20,00,000 and up to Rs. 1,00,00,000	Rs. 97,500 plus 3 per cent of the claim amount over and above Rs. 20,00,000
Above Rs. 1,00,00,000 and up to Rs. 10,00,00,000	Rs. 3,37,500 plus 1 per cent of the claim amount over and above Rs. 1,00,00,000
Above Rs. 10,00,00,000 and up to Rs. 20,00,00,000	Rs. 12,37,500 plus 0.75 per cent of the claim amount over and above Rs. 10,00,00,000
Above Rs. 20,00,00,000	Rs. 19,87,500 plus 0.5 per cent of the claim amount over and above Rs. 20,00,00,000 with a ceiling limit of Rs. 30,00,000

As evident from the aforementioned Table 1, the arbitrator fee is an ad valorem fee based on the sum involved in a dispute. Furthermore, the note to the Fourth Schedule of the Act provides that in case of an arbitral tribunal comprising of a sole arbitrator, he/she shall be entitled to an additional amount of 25 per cent over and above the fee payable as per the Fourth Schedule of the Act.[11] Furthermore, the Supreme Court in *ONGC Ltd. v. Afcons Gunanusa JV*[12] (hereinafter "**Afcons**") has held that in case of more than one arbitrator,

[11] Arbitration and Conciliation Act 1996, sch 4.
[12] ONGC Ltd v. Afcons Gunanusa JV (2024) 4 SCC 481 (SC).

each arbitrator would be payable the fee calculated as per the Fourth Schedule of the Act.[13] In other words, in case of a multi-member arbitral tribunal, every arbitrator would be entitled to the same amount of fee as calculated in accordance with the Fourth Schedule of the Act. After the insertion of the Fourth Schedule of the Act, there are primarily three scenarios in which the said Schedule can be made applicable to a dispute referred to arbitration.

The first scenario is wherein the parties in the arbitration agreement prescribe that the fees of the arbitrator shall be paid as per the Fourth Schedule of the Act. This is in accordance with the observations of the Supreme Court in ***Afcons*** wherein it has been held that the Act upholds party autonomy and hence, the parties can prescribe any fee for the arbitrator before the existence of the dispute or after the existence of the dispute.[14]

The second scenario is that instead of the parties prescribing the fee of the arbitrator, they may appoint an arbitral institution whose rules may prescribe the fee of the arbitrator as per the Fourth Schedule of the Act. In this respect, some Indian arbitral institutions like MCIA,[15] IAMC,[16] NPAC[17] etc. prescribe their fee schedules on the basis of the Fourth Schedule of the Act with certain modifications.

The third scenario is that in a case where the appointment of the arbitrator is made by the High Court under Section 11(6) of the Act,[18] the High

[13] ibid [186].
[14] ibid [91.1].
[15] 'MCIA Schedule of Fees' (*Mumbai Centre for International Arbitration*) <https://mcia.org.in/mcia-schedule-of-fees/> accessed 23 August 2024.
[16] 'Fee Schedule' (*IAMC Hyderabad*) <https://iamch.org.in/arbitration/fees> accessed 23 August 2024.
[17] 'Rules of Arbitration for Nani Palkhivala Arbitration Centre' (*Nani Palkhivala Arbitration Centre*) <https://www.nparbitration.net/Documents/pdf/NPAC-Rules-Book.pdf> accessed 23 August 2024.
[18] Arbitration and Conciliation Act 1996, s 11(6).

Court may prescribe rules under Section 11(14) of the Act[19] for fixation of fees of the arbitrator on the basis of the Fourth Schedule of the Act. In this respect, certain High Courts, like the Bombay High Court, have framed the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 as per which the arbitrators appointed by the Bombay High Court shall be payable as per the prescribed fee as per the Schedule given in the Rules which is basically the Fourth Schedule of the Act.[20] Another important aspect with respect to the third scenario is that in the practical experience of the authors, many High Courts instead of framing specific rules, often state in the appointment order itself that the fees of the arbitrator so appointed shall be in accordance with the Fourth Schedule of the Act.

It is imperative to mention here that no empirical research has been carried till date regarding the popularity and usage of the above three scenarios of prescribing arbitrator fees as per the Fourth Schedule of the Act. However, in the personal experience of the authors, the most common application of the Fourth Schedule is through the High Court rules and orders, followed by institutional arbitration rules and the least used alternative is prescription of arbitrator fees by the parties themselves. Moreover, since ad hoc arbitration is preferred over institutional arbitration in India,[21] most of the arbitrators/arbitral tribunals are appointed by the Court and their fees is prescribed through the Fourth Schedule of the Act.

It is also pertinent to mention herein that the Act does not fix any specific time limit for the payment of arbitrator fee. Section 31(8) of the Act gives the arbitrator power to determine the costs including its own fee.[22]

[19] ibid s 11(14).
[20] Bombay High Court (Fee Payable to Arbitrators) Rules 2018, pt. 4(a).
[21] Justice B.N. Srikrishna (n 5) 3.
[22] Arbitration and Conciliation Act 1996, s 31(8).

However, as per Section 38(1) of the Act, the arbitrator has the power to call for an advance as deposit towards fees and expenses of the arbitrator.[23] Moreover, as per Section 38(2) of the Act, such deposit is to be equally shared by the parties.[24] Practically, it is seen that where the arbitral fee is to be determined as per the Fourth Schedule of the Act, the arbitral tribunal by exercising its power under Section 38 of the Act[25] call for a deposit of their fee at a preliminary stage. However, the proportion of such deposits and the manner of payment depends upon the discretion of the arbitrator.

Hence, from the aforementioned discussion, it can be seen that the Fourth Schedule of the Act forms an important part of the current Indian arbitral landscape as it is the most common way of fixing the arbitrator fee for arbitrations seated in India. With this background, it would be prudent to turn to the payment of court fee in the Indian litigation system for an effective comparison.

III. UNDERSTANDING THE CONCEPT OF COURT FEE IN INDIA

The Court Fees Act, 1870[26] governs the basic principles of payment of court fee in India. Section 6 of the act provides that no documents that are chargeable to fee under the First and the Second Schedule of the Act shall be filed before any court of law unless the proper fee has been paid on such document.[27]

[23] ibid s 38(1).
[24] ibid s 38(2).
[25] ibid s 38.
[26] The Court Fees Act 1870.
[27] ibid s 6.

The First Schedule of the Court Fees Act, 1870 provides for an ad valorem fee whereas the Second Schedule of the Court Fees Act provides for a fixed fee. Since arbitration claims usually involve monetary claims, an ad valorem fee is payable on the same as per Article 1 of the First Schedule[28] if the same are preferred as a suit before an Indian Court.

Before discussing the First Schedule of the Court Fees Act, it is worthwhile to mention herein that the states have powers to amend the schedules of the Court Fees Act.[29] This implies that while the basic principles of the Court Fees Act remain the same across India, the quantum of the court fee payable on a sum in dispute varies from state to state. Therefore, for the purposes of the present paper, the author would be referring to the Schedules of the Rajasthan Court Fees and Suits Valuation Act, 1961 (hereinafter "**Rajasthan Court Fees Act**").[30] Table 2 states the court fee payable on a plaint[31] as per the said Rajasthan Court Fees Act.

Table 2: Court Fee Payable as per the Rajasthan Court Fees and Suits Valuation Act, 1961

Sum in dispute (in INR)	Amount of Court Fee (INR)
Upto 15,000	2.5% of amount involved
Between 15,000-75,000	375 + 7.5% of claim over and above 15,000
Between 75,000-2,50,000	4,875 + 7% of claim over and above 75,000

[28] ibid art 1 sch 1.
[29] Law Commission of India, "189th Report on Revision of Court Fees Structure" (February 2004) 60.
[30] The Rajasthan Court Fees and Suits Valuation Act 1961.
[31] Code of Civil Procedure 1908, s 26(1).

Between 2,50,000-5,00,000	17,125+6.5% of claim over and above 2,50,000
Between 5,00,000-7,50,000	33,375+6% of claim over and above 5,00,000
Between 7,50,000-10,00,000	48,375+5.5% of claim over and above 7,50,000
Between 10,00,000-15,00,000	62,125 + 5% of claim over and above 10,00,000
Between 15,00,000-20,00,000	87,125 + 4.5% of claim over and above 15,00,000
Between 20,00,000-25,00,000	1,09,625 + 4% of claim over and above 20,00,000
Between 25,00,000-30,00,000	1,29,625+ 3.5% of claim over and above 30,00,000
Between 30,00,000-40,00,000	1,47,125+3% of claim over and above 30,00,000
Between 40,00,000-1,00,00,000	1,77,125+ 2.5% of claim over and above 40,00,000
Between 1,00,00,000-1,50,00,000	3,27,125+ 2% of claim over and above 1,00,00,000
Between 1,50,00,000-2,00,00,000	4,27,125+ 1.5% of claim over and above 1,50,00,000

Between 2,00,00,000-3,00,00,000	5,02,125+ 1% of claim over and above 2,00,00,000
Above 3,00,00,000	6,02,125+0.5% of claim over and above 3,00,00,000

The Law Commission of India in its 128th Report observed that the rationale for levy of court fee is that a civil litigant must bear the cost of administration.[32] In other words, while litigating a dispute, the litigant pays the cost that the state bears for creation of a justice administration infrastructure, appointment of judges, support staff etc.

It is also pertinent to mention herein that where there is a deficiency of court fee at the time of presentment of plaint, the Court has the power to reject the plaint,[33] however before rejecting such plaint, the Court usually gives an opportunity to the litigant to pay the deficient court fee before proceeding with the case.[34]

The aforesaid implies that although at the initial stage the plaint may be presented with a deficit court fee, the same has to be eventually rectified and the same is a necessary pre-condition for the adjudication of the dispute raised in such a plaint. As already stated above, non-payment of the requisite court fee would lead to summary rejection of the plaint as it is assumed that the litigant is not bearing the costs of administration and hence, it is not worth the time and efforts of the state dispute resolution machinery (i.e. courts) to adjudicate on such a plaint.

[32] Law Commission of India, "128th Report on Cost of Litigation" (1988) 47-48.
[33] Code of Civil Procedure 1908, order VII rule 11(c).
[34] ibid s 149.

With the aforementioned backdrop of the arbitrator fee and court fee legal landscape in India, the stage is now set to compare the costs that a party may incur while arbitrating a dispute vis-à-vis litigating the same dispute.

IV. COMPARISON OF COSTS PAYABLE IN ARBITRATION VIS-À-VIS LITIGATION

A. Comparing Costs

Before proceeding with the analysis, it would be prudent to lay down the assumptions and parameters for the present analysis. Firstly, the present analysis proceeds on the assumption that the costs of administration of justice i.e. the arbitrator fee (in case of arbitration) and court fee (in case of litigation) are the most significant components of costs of litigation and hence, the same are the subject matter of the present paper. Secondly, it is presumed that the difference in other components of cost of litigation in arbitrating a dispute vis-à-vis litigating the same dispute is negligible. In this, respect, the Law Commission of India had identified various heads of costs of litigation such as travelling expenses, advocate fees etc.[35] By assuming these costs as virtually the same across litigation and arbitration implies that the decision of litigating or arbitrating a dispute would be dependent upon the court fee/arbitrator fee payable on the same. Thirdly, it is assumed that the arbitrator fee is payable as per the Fourth Schedule of the Act since it is the most common way of determining the arbitrator fee in India. Fourthly, it is assumed that the entire arbitrator fee is called at a preliminary stage by the arbitrator under Section 38 of the Act and such deposit is duly paid by both the parties in equal share. Fifthly, only monetary claims are considered in the present paper and non-monetary claims such as injunctions, specific performance etc.

[35] Law Commission of India (n 32) 11.

have not been considered for calculation purposes. Sixthly, it is presumed that there are no set-offs or counterclaims by the counter party for ease of calculation purposes.

To start with the analysis, it is assumed that there is a dispute between A and B arising out of a breach of contract by B. It is further assumed that A has both the options i.e. either refer the dispute to arbitration or litigate the same before the competent court in India. It may further be assumed that the claims of A are genuine and hence, it would be entitled to refund of costs after the adjudication of the claims. Now, the arbitrator fee (in case of sole arbitrator) and the court fee (in case of litigation) would increase with the increase in claim. Therefore, Table 3 shows the comparison of arbitrator fee payable in case of a sole arbitrator vis-à-vis the court fee payable in case of litigation qua an increase in the claims of A against B:

Table 3: Arbitration fee payable in case of a sole arbitrator vis-à-vis court fee payable

Amount of Claim (in INR) **(1)**	**Arbitrator fee payable as per the Fourth Schedule[36]** **(2)**	**A's share of arbitrator fee** **(3)**	**Court fee payable as per the Rajasthan Court Fees and Suits Valuation Act, 1961** **(4)**
5,00,000	56,250	28,125	33,375
20,00,000	1,21,875	60,938	1,09,625

[36] Arbitration and Conciliation Act 1996, 4th Schd.

1,00,00,000	4,21,875	2,10,938	3,27,125
10,00,00,000	15,46,875	7,73,438	9,52,125
20,00,00,000	24,84,375	12,42,188	14,52,125
30,00,00,000	31,09,375	15,54,688	19,52,125
40,00,00,000	37,34,375	18,67,188	24,52,125
50,00,00,000	37,50,000	18,75,000	29,52,125
75,00,00,000	37,50,000	18,75,000	42,02,125
100,00,00,000	37,50,000	18,75,000	54,52,125
150,00,00,000	37,50,000	18,75,000	79,52,125
200,00,00,000	37,50,000	18,75,000	1,04,52,125
250,00,00,000	37,50,000	18,75,000	1,29,52,125

A comparison of column (3) and column (4) of the Table 3 above, shows that irrespective of the amount of claim involved, arbitration is always cheaper than litigation provided that B pays its share of fee. Furthermore, a comparison of column (2) and column (4) of Table 3 shows that even if B does not pay its share of arbitrator fee and the entire burden for payment of arbitrator fee falls on A, arbitration would still be the cheaper option for claims exceeding Rs. 75,00,000 (seventy-five crores rupees). The reason for the same is that after a certain threshold the ceiling limit under the Fourth Schedule of the Act gets triggered freezing the arbitrator fee to Rs. 37,50,000 (thirty-seven lacs fifty thousand rupees) irrespective of the value of claim. However, there is no such ceiling limit under the Rajasthan Court Fees Act making arbitration a cheaper option for high value claims.

Carrying forward with the above simulation, it would also be useful to compare the arbitrator fee vis-à-vis court fee payable in case the arbitral tribunal comprises of three arbitrators instead of a sole arbitrator. Therefore, keeping in mind the same assumptions as had been set out in case of a sole arbitrator, the following Table depicts the comparison of arbitrator fee payable in case of three-member arbitral tribunal vis-à-vis court fee payable on the same dispute:

Table 4: Arbitration fee payable in case of a three-member arbitral tribunal vis-à-vis court fee payable

Amount of Claim (in INR) **(1)**	**Arbitrator fee payable as per the Fourth Schedule**[37] **(2)**	**A's share of arbitrator fee** **(3)**	**Court fee payable as per the Rajasthan Court Fees and Suits Valuation Act, 1961** **(4)**
5,00,000	1,35,000	67,500	33,375
20,00,000	2,92,500	1,46,250	1,09,625
1,00,00,000	10,12,500	5,06,250	3,27,125
10,00,00,000	37,12,500	18,56,250	9,52,125
20,00,00,000	59,62,500	29,81,250	14,52,125

[37] The arbitrator fee has been calculated on the basis of the Fourth Schedule of the Arbitration and Conciliation Act, 1996 and the same has been multiplied by a factor of 3 (three) since the arbitral tribunal consists of three arbitrators.

30,00,00,000	74,62,500	37,31,250	19,52,125
40,00,00,000	89,62,500	44,81,250	24,52,125
50,00,00,000	90,00,000	45,00,000	29,52,125
75,00,00,000	90,00,000	45,00,000	42,02,125
100,00,00,000	90,00,000	45,00,000	54,52,125
150,00,00,000	90,00,000	45,00,000	79,52,125
200,00,00,000	90,00,000	45,00,000	1,04,52,125
250,00,00,000	90,00,000	45,00,000	1,29,52,125

A comparison of column (3) and (4) of Table 4 above shows that adjudication by a three-member arbitral tribunal is certainly more expensive than litigating the same dispute because the arbitrator fee as per the Fourth Schedule of the Act increases three fold. Therefore, arbitration by a three-member arbitral tribunal is not recommended for small and medium value disputes. Furthermore, it is seen that once the value of claim reaches reach Rs. 100,00,00,000 (one hundred crores rupees), arbitration by a three-member arbitral tribunal becomes cheaper than litigation provided that B also pays its share of arbitrator fee. A comparison of column (2) and column (4) of Table 4 above shows that even if B does not pay its share of arbitrator fee and the entire burden of arbitrator fee falls upon A, then arbitration becomes cheaper for claims upwards of Rs. 200,00,00,000 (two hundred crores rupees). It is evident that the reason for arbitration being cheaper than litigation again seems to be the ceiling limit under the Fourth Schedule of the Act which is absent under the Rajasthan Court Fees Act.

Another aspect that needs to be noted here is that while in litigation the entire burden of payment of court fee is to be discharged at the time of presentment of plaint, it is practically seen that some arbitrators also allow for payment of arbitrator fee in instalments which saves the litigant from bearing the entire cost burden at the very inception of the arbitration proceedings. This implies that non-payment of the requisite court fee would effectively stall the litigation until the deficiency is not made good whereas by paying the arbitrator fee in instalments, the arbitration proceedings can continue without any interruptions. Thus, the flexibility in payment of arbitrator fee vis-à-vis payment of court fee at the inception of legal proceedings also makes arbitration a more viable alternative than litigation.

Thus, the above analysis has shown that in case of a sole arbitrator, arbitration will always be cheaper than litigation provided that the costs of arbitration are equally shared by both the parties. It can be further seen that even if the entire burden of cost is borne by the claimant, even then arbitration would be cheaper than litigation for high value claims. Furthermore, the primary reason for arbitration being cheaper than litigation seems to be the presence of a ceiling limit while calculating arbitrator fee which is absent in case of court fee.

B. Addressing Potential Criticisms and Limitations

While the aforementioned analysis gives a general idea as to how and when arbitration is cheaper than litigation, the same is not free from limitations and criticism. The present part of the paper will attempt to address the potential criticisms and identify limitations of the present analysis.

The first criticism could be against the choice of Rajasthan Court Fees and Suits Valuation Act, 1961 as the basis for comparing court fee and

arbitrator fee. In this respect, it is stated that most of the states such as Andhra Pradesh,[38] Delhi,[39] Himachal Pradesh,[40] Tamil Nadu[41] etc. have an ad valorem court fee schedule that do not have a ceiling limit for payment of court fee. This implies that the findings arrived in this paper that arbitration is cheaper than litigation for high value claims equally applies to the aforementioned states though the value of claim when arbitration becomes cheaper than litigation may differ depending upon the court fee schedule of the state concerned. It is also worthwhile to mention herein that during research it was found that court fee schedules of states like Gujarat,[42] West Bengal,[43] Maharashtra[44] etc. provide for an upper ceiling limit while calculating court fee. Thus, the findings of this paper will not apply to such states.

The next criticism that may be made against the present paper is that the arbitrator fee is not always decided as per the Fourth Schedule of the Act. As already discussed in Part II of the present paper, parties by agreement can also prescribe the arbitrator fee of the arbitrator. Thus, theoretically, the parties can agree on any amount or methodology for calculation of the arbitrator fee that may or may not be in consonance with the Fourth Schedule of the Act. In this respect, it is stated that the purpose of taking Fourth Schedule of the Act as the basis of comparison was that both the Fourth Schedule of the Act and the court fees are fixed by the states and hence, a comparison of the same provides an insight into the dispute resolution policy of the state. With that

[38] The Andhra Pradesh Court-Fees and Suits Valuation Act 1956, art 1 sch 1.
[39] The Court Fees Act 1870, art 1 sch 1.
[40] The Himachal Pradesh Court Fees Act 1968, art 1 sch 1.
[41] The Tamil Nadu Court-Fees and Suits Valuation Act 1955, art 1 sch 1.
[42] The Gujarat Court-Fees Act 2004, 1 sch 1.
[43] The West Bengal Court-Fees Act 1970, art 1 sch 1.
[44] The Maharashtra Court-Fees Act 1959, art 1 sch 1.

being said, it is undeniable that the parties do have the right to fix arbitrator fee by agreement.[45]

However, that does not necessarily mean that arbitration would be more expensive than litigation. In fact, logic would dictate that rational parties would always agree for an arbitrator fee which is lower than the court fee payable in order to save costs. In other words, assuming that the parties fix the arbitrator fee by agreement and not by the Fourth Schedule of the Act, still the parties would always agree to a fee which is lower than the court fee otherwise the parties would have preferred to litigate their dispute instead of opting for arbitration.

The next criticism could be that the present analysis does not consider the counterclaims of the opposite party. In this respect, as per ***Afcons*** a counter claim is considered as a separate proceeding for payment of arbitrator fee.[46] Similarly, as per Indian law, court fee is separately payable on counter claim.[47] Therefore, the aforementioned analysis is equally applicable to a counter claim wherein depending upon the value of counter-claim; arbitration would become cheaper than litigation in case of high value counter-claims.

The next criticism can be that the aforementioned analysis assumes that the claims of the claimant are genuine and that it would be entitled to refund of all costs after the adjudication of its claims, which is not always the case. In this respect, it is stated that a prudent litigant would always do a proper analysis of its claims and it is only after doing a cost-benefit analysis would institute arbitration/litigation against another party.

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[45] ONGC Ltd v. Afcons Gunanusa JV (2024) 4 SCC 481, [91.1].
[46] ibid (162-67).
[47] The Court Fees Act 1870, art 1 sch 1.

In light of the aforementioned discussion, it is evident that in states where there is no ceiling limit on court fee; parties should ideally opt for arbitration for high value disputes. Moreover, in an ideal scenario, parties should agree for appointment of sole arbitrator and it is only in extremely high stake and complex disputes should the parties prefer a three-member arbitral tribunal. Moreover, the parties should make use of the flexibility of the Act to persuade the arbitrators or agree amongst themselves that the entire arbitral fee shall not be payable at the very inception of the proceedings and arbitrator fee may be payable in instalments. Such a flexibility also promotes the economic viability of arbitration as a mode of dispute resolution vis-à-vis litigation.

V. CONCLUSION

The above discuss has shown that arbitration being an expensive mode of dispute resolution is a myth and is in fact a cheaper mode of dispute resolution as compared to litigation in India. This finding is in light of the fact that there is a ceiling limit for payment of arbitrator fee which is usually absent in case of court fee payable in various states across India.

It is recognised that the Fourth Schedule of the Act was enacted to standardize payment of arbitrator fee across India and also to address the cost problem associated with arbitrating a dispute in India. It is acknowledged that the Fourth Schedule of the Act seems to be the most common manner of fixing/determining the fee of arbitrator or the arbitral tribunal, as the case may be.

With respect to court fee which is payable at the time of instituting a suit, it was seen that every state has power to determine the court fee payable in that state. It was further seen that the general principle across India is

payment of ad valorem court fee depending upon the value of claim involved in a dispute. Furthermore, it was observed that generally, there seems to be no upper ceiling limit for payment of court fee thereby implying that for high stake disputes, excessive court fee may be payable under the Indian law.

Next, a comparison of arbitrator fee and court fee qua the same dispute revealed that generally, arbitration by a sole arbitrator would be a cheaper option for litigating a dispute provided that both the parties bear the arbitrator fee equally. Even otherwise, it was seen that even if the burden of the entire arbitrator fee falls on the claimant, arbitration would still be the cheaper option for high value disputes because of the ceiling limit provided in the Fourth Schedule of the Act.

It is undeniable that some states do have a ceiling on court fee as well, however, unlike arbitration, the said position is not uniform across India. It is pertinent to mention that the present paper has not advocated for any policy changes or amendments in existing laws. The present paper should be viewed as an eye-opener for litigants to choose the proper forum for dispute resolution while saving costs. The present paper is also an eye-opener for the legislature to take appropriate steps for steering its dispute resolution policy.

At the first instance, this paper has impliedly shown that the Government of India's decision to restrict arbitration to low value disputes (and thereby litigating high value disputes)[48] would actually result in higher costs to the parties rather than cost-saving. In other words, by choosing to arbitrate low value disputes while litigating high value disputes would effectively deny it the cost savings of arbitration.

[48] Office Memorandum (n 7).

Moreover, this paper has sufficiently demonstrated that as the laws stand currently, Fourth Schedule should be retained in the Act and the contrary might be counter-productive for the Indian arbitration landscape. After all, this paper has (to some extent) dispelled the popular myth that arbitration is expensive and has shown that arbitration is indeed cheaper than litigation.