

The logo for LeGal ZeMs features a stylized circular emblem composed of several curved, overlapping lines in shades of green and blue, resembling a globe or a leaf. Below the emblem, the text 'LeGal ZeMs' is written in a bold, sans-serif font, with 'LeGal' in red and 'ZeMs' in blue. Underneath the logo, the tagline 'A Step Towards your Success' is written in a smaller, grey, sans-serif font.

**Evolution of Fourth Schedule Arbitration and
Conciliation Act, 1996**

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INTRODUCTION

According to Section 11(4) of Arbitration and Conciliation Act, 1996 “ The arbitral institution shall determine the fees of the arbitral tribunal subject to the rates specified in the Fourth Schedule ”. Fourth Schedule was introduced in 2015 and was later amended with inclusion of Section 31A in 2019. There has been ambiguity in the application of Fourth Schedule of this act regarding ad hoc and Institutional arbitration since its introduction. This article deals with different Landmark case laws related to this ambiguity. Now, we will understand Arbitral Institution.

A single arbitrator or a panel of arbitrators is referred to as a "arbitral tribunal." An arbitral tribunal is a group of one or more adjudicators who are called together to decide a dispute through arbitration. The tribunal may be composed of a single arbitrator or two or more arbitrators, one of whom may be a chairman or an umpire.

The Arbitration and Conciliation Act of 1996, Part 1, contains provisions regarding arbitration by agreement. The new Act has eliminated the categories of arbitration in litigation and arbitration with the court's intervention. It simplifies the arbitration procedure by limiting it to only one type of arbitration: arbitration under agreements. Statutory arbitration has also been lumped in with this group because the machinery of arbitration is only activated when a contract is signed. The Act's second section addresses the enforcement of some foreign awards. As a result, the first portion can be classified as "domestic arbitrations," albeit it also contains laws relating to international arbitrations.

An agreement gives birth to the Arbitral Tribunal. It is up to the legislature to confer powers on it and specify procedures for it to follow, as long as they are not in violation of the law. The contract must follow the law's requirements. The Arbitral Tribunal must also act in conformity with the general law of the territory and the agreement while making its decision. Section 28 states that where the arbitration takes place in India, the dispute must be resolved in accordance with the substantive law in force in India at the time.

The Tribunal can only deviate from it if the parties expressly agree, in which case the dispute will be settled on the basis of justice and fairness, or what is good according to equity and conscience, rather than technical legal criteria. [Section 28(2)].

This part contains some general provisions and then deals with arbitration agreement, power of the court to refer parties to arbitration, and the interim measures which the court can provide. It also provides for the composition of the Arbitral Tribunal, its jurisdiction, conduct of proceedings, making of awards, termination of proceedings, recourse against award, enforcement of awards and appeals.¹

¹ Avtar Singh, Arbitration and Conciliation (EBC , 11th Edition,2019)

REQUIREMENT FOR FOURTH SCHEDULE IN ARBITRATION AND CONCILIATION ACT

In **Vijya Minerals v Bikash Chadra Deb**, Calcutta High Court held that “If the fees demanded by the Tribunal have been fixed by a written agreement between the applicant and the Tribunal, no application to the court will lie to compel the Tribunal to deliver the award. It is contrary to the quasi-judicial status of an arbitrator that he should bargain unilaterally for his fee with one party”²

In **Kailash Store v Union of India**, It was held that “Where the arbitrator was not appointed by the appointing authority, the High Court appointed a person on whom the parties agreed and fixed his fees at Rs 50,000”³

This uncertainty of fee structure led to introduction of Fourth Schedule in 246th Law Commission Report which addressed the issue of fee of arbitrators in 2014 and suggested a model schedule of fees as a mechanism to rationalize the fee structure. It placed reliance on **Union of India v. Singh Builders Syndicate**, which discussed the absence of ceiling in the fee and the apprehension that refusal to pay an exorbitant fee may prejudice such party’s case.

In **Singh Builders Syndicate** the Supreme court highlighted the problems arising out of the exorbitant amount of fee of the Arbitral Tribunal and gave suggestions to save arbitration from the arbitration cost. In this case “a retired High Court judge was appointed as a sole arbitrator to decide the dispute between the railways and contractor, the court fixed his fee at Rs 10,000 per hearing subject to the maximum of Rs 1,50,000 plus clerkage to be shared equally by the parties.”⁴

Then the suggestive measures were reiterated in **Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust**⁵ where the Court recognised that sometimes arbitration proceedings become disproportionately expensive for the parties and suggested as under,

1. Reasonableness and certainty about costs.
2. Disclosure of the fees structure before the appointment.
3. Institutional arbitration where the arbitrator’s fee is pre-fixed.
4. Each High Court to have a scale of arbitrator’s fee calibrated with reference to the amount involved in the dispute to avoid different designates prescribing different fee structures.⁶

² Vijya Minerals v Bikash Chadra Deb AIR 1996 Cal 67

³ Kailash Store v Union of India

⁴ Union of India v. Singh Builders Syndicate(2009) 4 SCC 523

⁵ Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust 10 August,2011

⁶ Fee Schedule of Arbitral Tribunal: Focusing on the Sole Arbitrator’s Fee, SCC online, available at

One of the most common criticisms levelled against arbitration in India, particularly ad hoc arbitration, is the enormous costs involved, which include 11 arbitrators fixing fees in an arbitrary, unilateral, and unreasonable manner. If arbitration is to become a cost-effective tool for domestic conflict resolution, the Commission considers that there should be some mechanism in place to rationalise the fee structure for arbitrations. In order to provide a practical solution to this difficulty, the Commission has recommended a model schedule of fees and has given the High Court authority to draught appropriate rules for the fixation of fees for arbitrators, which it may use the model schedule of fees as a guide. The model pricing schedule is based on the Delhi High Court International Arbitration Centre's fee schedule, which is over 5 years old and has been adequately amended. The pricing schedule would need to be updated on a regular basis and evaluated every three to four years to ensure that it remains realistic. The Commission points out that international commercial arbitrations involve foreign parties who may have different values and standards for arbitrator fees; similarly, institutional rules may have their own fee schedule, and greater consideration must be given to party autonomy in both circumstances. As a result, the Commission has expressly limited its recommendations to strictly domestic, ad hoc arbitrations.⁷

Sum in Dispute	Model Fees
Upto Rs. 5,00,000	Rs. 45,000
Above Rs. 5,00,000 and upto Rs. 20,00,000	Rs. 45,000 plus 3.5 percent of the claim amount over and above Rs. 5,00,000
Above Rs. 20,00,000 and upto Rs.1,00,00,000	Rs. 97,500 plus 3 percent of the claim amount over and above Rs. 20,00,000
Above Rs. 1,00,00,000 and upto Rs.10,00,00,000	Rs. 3,37,500 plus 1 percent of the claim amount over and above Rs. 1,00,00,000
Above Rs. 10,00,00,000 and upto Rs.20,00,00,000	Rs. 12,37,500 plus .75 percent of the claim amount over and above Rs. 1,00,00,000
Above Rs. 20,00,00,000	Rs. 19,87,500 plus .5 percent of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000

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AFTER INTRODUCTION OF FOURTH SCHEDULE

Even after introduction of fourth schedule there was ambiguity with ad hoc and institutional arbitration. In case of Arbitrator appointed by the Court Delhi High Court in **DSI IDC Ltd. v. Bawana Infra Development (P) Ltd.**, held that even under the amended Act post 2015, the arbitrator is free to fix its fee schedule in an arbitration which is conducted without court intervention. It observed that even if the arbitrator is appointed by the court under Section 11 of

<https://www.scconline.com/blog/post/2020/06/11/fee-schedule-of-arbitral-tribunal-focusing-on-the-sole-arbitrators-fee/> (last visited on 20/02/2022)

⁷ Law Commission of India, "256th Report on Amendments to the Arbitration and Conciliation Act 1996" (August, 2014)

⁸ The Arbitration and Conciliation Act, 1996

the Act, in absence of rules framed by the High Court under Section 11(4), the Fourth Schedule is merely directory in nature.⁹

In contrast, while appointing the arbitrator, the Court in **Kumar & Kumar Associates v. Union of India**, an explicit direction was made that the arbitrator shall abide by Schedule IV.¹⁰

And in case of Arbitrator Appointed by the Parties. The **Delhi High Court in NHAI v. Gayatri Jhansi Roadways Limited**¹¹ where the arbitrator was appointed by the parties, it was unequivocally held that Schedule IV is not mandatory in determining the fee structure where the fee structure has been agreed to in the agreement between the parties.

In **Paschimanchal Vidyut Vitran Nigam Limited v. IL & FS Engineering and Construction Company Limited**, the arbitrator was appointed by the parties. In this background, the Delhi High Court held that the Court would have no role to play in fixing the fees of an Arbitral Tribunal as no such power is vested in the Court at present. Schedule IV was held to be suggestive in view of sub-section (1) of Section 11 which provides that the High Courts concerned should frame rules as may be necessary for determination of fees and the manner of its payment, albeit, after taking into account the rates specified in Schedule IV.¹²

AFTER 2019 AMENDMENT

Subject to the rates stated in the Fourth Schedule, the arbitration institution determines the fees of the Arbitral Tribunal and the manner in which they are paid to the Arbitral Tribunal. Sections 11(11) to (14) do not apply to International Commercial Arbitration or Arbitration (other than International Commercial Arbitration) in which the parties have agreed to have the fees determined by an arbitral institution's rules. The Central Government has not notified Section 2 and 3 of the Arbitration and Conciliation (Amendment) Act, 2019, which inserts Section 2(1)(ca) and amends Section 11, and has not come into effect as of today. The Bombay High Court has framed Rules for establishing the fees of the Arbitral Tribunal based on the rates given in the Fourth Schedule under Section 11(14). The Arbitration and Conciliation (Amendment) Act, 2019 modifies Section 11.

Supreme Court in case of **National Highways Authority of India v/s. Gayatri Jhansi Roadways Limited, 2019 SCC OnLine SC 906**¹³ has held that parties having agreed to pay fees of the Arbitral Tribunal under an agreement, Arbitral Tribunal would be entitled to charge their fees in accordance with the said agreement and not in accordance with the Fourth Schedule to the Arbitration Act. Supreme Court upheld the order passed by Delhi High Court holding that the change in language of Section 31(8) read with Section 31A, which deals only with the costs generally and not with arbitrator's fees. Arbitrator's fees may be a component of costs to be paid

⁹ DSIIDC Ltd. v. Bawana Infra Development (P) Ltd 2018 SCC OnLine Del 9241

¹⁰ Kumar & Kumar Associates v. Union of India 2016 SCC OnLine Pat 9476; MANU/BH/0529/2016

¹¹ Delhi High Court in NHAI v. Gayatri Jhansi Roadways Limited CIVIL APPEAL NO. 5383 OF 2019

¹² Fee Schedule of Arbitral Tribunal: Focusing on the Sole Arbitrator's Fee, SCC online, available at <https://www.sconline.com/blog/post/2020/06/11/fee-schedule-of-arbitral-tribunal-focusing-on-the-sole-arbitrators-fee/> (last visited on 20/02/2022)

¹³ National Highways Authority of India v/s. Gayatri Jhansi Roadways Limited, 2019 SCC OnLine SC 906

but it is a far cry thereafter to state that Section 31(8) and 31A would directly govern contracts in which a fees structure has already been laid down.

Bombay High Court in the case of **Yusuf Khan Vs. Prajita Developers Pvt. Ltd., 2019 SCC OnLine Bom 505** has held that before granting any interim relief by the Arbitral Tribunal, atleast in relation to granting any injunction or securing the claim in the arbitration or for appointing a receiver, the Tribunal has to be satisfied that a prima facie case has been made out for grant of interim relief.¹⁴The Arbitral Tribunal has to examine that there is a serious question to be tried at the hearing and there is a probability that the party seeking the interim relief is entitled to it; that the interference of the Tribunal is necessary to protect the party from that species of injuries which the Tribunal feels are irreparable before its legal rights are established at the trial; and see that the comparative mischief or inconvenience which is likely to arise from withholding the grant of interim relief will be greater than which is likely to arise from granting it.¹⁵

he Rajasthan High Court passed a judgment titled **Doshion (P) Ltd. v. Hindustan Zinc Ltd.**, wherein there was a challenge to fixation of arbitrator's fee at INR 75,00,000. The petitioner based its challenge on two-fold grounds. *First*, that Schedule IV must apply. *Second*, the Notification dated 23.03.2017 by the Rajasthan High Court to follow Schedule IV. The arbitrator granted discount of INR 20,00,000 and fixed the fees at INR 55,00,000, conducted proceedings *ex parte* posting the matter for final arguments.¹⁶ The Court opined that the arbitrator had been rendered *de jure/de facto* unable to perform his functions and terminated his mandate under Section 14(1)(a) of the Arbitration and Conciliation Act, 1996.¹⁷



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¹⁴ Yusuf Khan Vs. Prajita Developers Pvt. Ltd., 2019 SCC OnLine Bom 505

¹⁵ JUSTICE RAMESH D. DHANUKA JUDGE, BOMBAY HIGH COURT, NOTES ON SOME OF THE RELEVANT PROVISIONS OF THE ARBITRATION AND CONCILIATION ACT, 1996 & SOME IMPORTANT CASE LAWS, available at <https://districts.ecourts.gov.in/sites/default/files/Note%20on%20Arbitration%20and%20Conciliation%20Act%281%29.pdf> (last visited on 20/02/2022)

¹⁶ Doshion (P) Ltd. v. Hindustan Zinc Ltd 2019 SCC OnLine Raj 6

¹⁷ Fee Schedule of Arbitral Tribunal: Focusing on the Sole Arbitrator's Fee, SCC online, available at <https://www.sconline.com/blog/post/2020/06/11/fee-schedule-of-arbitral-tribunal-focusing-on-the-sole-arbitrators-fee/> (last visited on 20/02/2022)