III. ASSESSING THE PROSPECTS OF AD-VALOREM CHARGES TO CURB INFLATED AND FRIVOLOUS CLAIMS IN ARBITRATION

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ABSTRACT

The sheer number of frivolous and inflated claims raised in an arbitral proceeding, pose significant challenges. The frivolous and inflated claims affect the credibility of arbitration as an efficient dispute resolution mechanism by causing delay and wastage of parties' resources. Various jurisdictions have evolved multiple mechanisms to curb such claims. However, the complexity in defining what constitutes a 'frivolous and inflated' claim, creates hurdles in developing an effective and efficient mechanism. This article will address this complexity and will evaluate the efficacy of the ad valorem method, along with various other mechanisms, in curbing frivolous and inflated claims. To evaluate the mechanisms in the Indian regime, the article draws comparisons to methods followed by other arbitral institutions.

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I. INTRODUCTION

The challenge posed by frivolous and inflated claims in arbitral proceedings has gained significant traction.[1] It has become habitual for parties to raise frivolous, exorbitant or inflated claims with a *malafide* intention to bleed the other party dry and to delay the process,[2] and this constitutes a serious menace to the administration of justice by consuming time and clogging the infrastructure.[3] Productive resources that could be deployed to handle important causes are dissipated in responding to claims raised merely to maliciously benefit from the delay. In many instances, the process of dispensing justice is misused by the unscrupulous to the detriment of the legitimate. The courts have taken due note of this issue and are of the opinion that "liberal access to justice does not mean access to chaos and indiscipline."[4]

Frivolous claims result in delay by forcing the opposing party to invest time, money and other resources to defend these claims and raise counter claims. On the other hand, inflated claims/counter claims compel the opposing party to appoint experts or employ other means to disprove such claims/counterclaims. Though it is a common practice to bifurcate arbitral

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[1] ICC, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*,(2020),<https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>; Michael McIlwrath, Olga Radnaev & María Viscasillas, *ICC To Name Sitting Arbitrators And Penalize Delay In Issuing Award*,KLUWER ARBITRATION BLOG KLUWER ARBITRATION BLOG (2021), <http://arbitrationblog.kluwerarbitration.com/2016/01/06/icc-to-name-sitting-arbitrators-and-penalize-delay-in-issuing-awards/>.

[2] Cynthia Tang & Gary Seib, *HKIAC and ICC Take Steps to Tackle Costs and Delay*, INTERNATIONAL ARBITRATION GLOBAL ARBITRATION NEWS, (2021), <https://globalarbitrationnews.com/hkiac-and-icc-take-steps-to-tackle-costs-and-delay-in-international-arbitration-2016-03-14/>.

[3] Dnyandeo Sabaji Naik v. Pradnya Prakash Khadekar, (2017) 5 SCC 496.

[4] M/S Icomm Tele Ltd. v. Punjab State Water Supply 2019 SCC 391.

proceedings into jurisdictional and merits phases, frivolous claims often lead to the tribunals trifurcating the arbitral process into jurisdictional, merits and quantum phases.[5] The last phase is often the outcome of parties raising inflated and frivolous claims, which necessitates the determination of the actual quantum of claims. While arbitration has triumphed over litigation as a speedier and less expensive form of dispute resolution,[6] the proliferation of frivolous and inflated claims with an intention to cause delay renders the essence of arbitral proceedings futile.

Justice Bowen specified that "*I have found in my experience that there is one panacea which heals every sore in litigation and that is costs*."[7] This holds true in arbitral proceedings as well. The prevailing costs regime of an arbitral institution has a significant impact on the nature and magnitude of claims brought up by the parties.[8] Therefore, a cost system can be designed to create disincentives against raising frivolous claims and mitigate spiralling.[9] Arbitrators' fees are usually part of the costs award and an *ad valorem* method sets the fees proportionally to the sum of the claims in

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[5] Jeffery Commission & Rahim Moloo, *The Splitting of Issued Separate Determination (Bifurcation/Trifurcation): Procedural Issues in The International Investment Arbitration*, (OUP 2018); ICSID DICTIONARY, *Bifurcation - ICSID Convention Arbitration*, <https://icsid.worldbank.org/services/arbitration/convention/process/bifurcation>

[6] Temitayo Bello, *Why Arbitration Triumphs Litigation*, SSRN (2019) <https://ssrn.com/abstract=3354674>

[7] Copper v. Smith (1884) 26 Ch. D. 700 (CA)

[8] JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION, 210 (2012).

[9] *Id*;*See also* Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust (2012) 1 SCC 455; Bill Michelson, *Costs: An Effective Tool to Address Frivolous Claims* (2021), <https://www.grllp.com/blog/Costs-An-Effective-Tool-to-Address-Frivolous-Claims-19>.

dispute.[10] This would mean that higher the parties' claims, the higher the arbitrator(s) fees. Through this article, the authors evaluate the efficacy of the *ad valorem* method, along with various other mechanisms, in curbing frivolous claims.

In Part A: the article will attempt to define frivolous and inflated claims. It will analyze the various characteristics of frivolous and inflated claims which would aid in the process of developing comprehensive mechanisms to curb them. In Part B: the existing mechanisms in the Indian arbitration regime will be analyzed. The intent of this enquiry is to appraise their characteristics in contrast to the *ad valorem* method. In Part C: the potential of *ad valorem* charges to curb frivolous claims will be evaluated. In Part D: the article will undertake an enquiry on other international mechanisms to curb frivolous claims.

PART A

II. DEFINING FRIVOLOUS AND INFLATED CLAIMS

At the outset, it must be noted that the terms inflated and frivolous claims would be used interchangeably during the course of the article unless an explicit distinction is made. Inflated claims are claims that are overstated beyond actual value.[11] The difficulty lies in developing a standard to distinguish a meritorious claim from a frivolous one. Often, arbitrator(s) would have to act as a gatekeeper by evaluating claims on different degrees

[10] Claudia T. Salomon & Shreya Ramesh, *A Primer on International Arbitration Cost*, (2019), <https://www.lw.com/thoughtLeadership/byline-primer-international-arbitration-costs>.

[11] Burnett, Cathleen. *Frivolous Claims By the Attorney General*, 25(2) SOCIAL JUSTICE184–204. (1988).

of legal merit and identify the distinction.[12] Professor Charles Yablon divided the 'world of claims' into three parts: a) successful claims b) frivolous claims, which shouldn't have been brought up, and c) unfounded claims, which have sufficient merit to be brought up but are not enough to succeed.[13] This categorization can be benefitted from, if we add another layer of differentiation i.e. claims brought up in bad faith with an intention to delay, cause harm to the other party and manipulate a given legal system to get an unwarranted advantage. Professor Yablon's identification of a 'frivolous claim' is similar to that of 'claims manifestly without legal merit' as recognised by the International Centre for Settlement of Investment Disputes (hereinafter referred as "ICSID").[14] Such claims are susceptible to preliminary objections by parties.[15]

Even with these distinctions, it is not an easy exercise to categorize claims in an arbitral proceeding. A claim could be dismissed by the arbitrator(s) but need not be frivolous. This is evident from the fact that there are majority and minority awards in an arbitral proceeding, as there could always be two or more plausible views to determine the 'kind' of claims.[16]

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[12] ANDRÉS RIGO SUREDA, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY56 (2012); *see for example* Diane Desierto, *Arbitral Controls and Policing the Gates to Investment Treaty Claims against States in Transglobal Green Energy v Panama and Philip Morris v Australia*, EJIL (2016), <https://www.ejiltalk.org/arbitral-controls-and-policing-the-gates-to-investment-treaty-claims-against-states-in-transglobal-green-energy-v-panama-and-philip-morris-v-australia/>

[13] C Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule11*, 44 UCLA L REV 65 (1996).

[14] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, ICSID (2006), <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of %20ICSID%20Arbitration.pdf>.

[15] *Id.*

[16] Michele Potestà & Marija Sobat, *Frivolous claims in international adjudication: a study of ICSID Rule 41(5) andof procedures of other courts and tribunals to dismiss claims*

The issue is complicated further when we acknowledge the vaguely drafted standards in arbitration law and the lack of structural features, such as *stare decisis* or appellate body, which could promote certainty in interpretation and application.[17] For instance, the *Fair and Equitable Treatment* standard in investment arbitration is constantly evolving,[18] which makes it arduous for arbitrator(s) to categorize any claims invoking this standard as either 'meritorious' or 'frivolous'. This predicament doesn't arise just in the *prima facie* evaluation for dismissal of a frivolous claim, but also in the award drafting phase when the decision to award costs based on the nature of claims raised is taken. Given this abstract process of categorization, it is important to consider whether an ideal mechanism to curb frivolous claims should be devoid of the need to make such distinctions.

PART B

III. EXISTING MECHANISMS TO CURB FRIVOLOUS CLAIMS

This part will analyse the existing mechanisms to curb frivolous claims in India, available under the Arbitration and Conciliation Act, 1996 (hereinafter "Arbitration Act") and as has been propounded by the courts.

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summarily, (2012), <https://lk-k.com/wp-content/uploads/potesta-sobat-frivolous-claims-jids-2012.pdf>

[17] W. Michael Reisman, *Canute Confronts the Tide: State vs. Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 109 PROCEEDINGS OF THE ASIL ANNUAL MEETING: CAMBRIDGE UNIVERSITY PRESS, 233 (2015); Baetens Freya, *Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms*, 8 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, 230 (2017).

[18] MEG KINNEAR, THE CONTINUING DEVELOPMENT OF THE FAIR AND EQUITABLE TREATMENT STANDARD237 (Andrea Bjorklund, et al. eds.,2009).

A. Exemplary costs:

The imposition of exemplary costs is used as an instrument to weed out and to prevent the deluge of frivolous cases.[19] Section 31A was inserted in the Arbitration Act through the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter, "Arbitration (Amendment) Act 2015"), and is the reflection of Section 6A that was recommended by the Law Commission in its 246th report.[20] The section vests the power with the concerned court or tribunal to award costs in any proceeding, and the court or the arbitral tribunal has the authority to decide: i) which party must pay the cost, ii) quantum of costs to be paid, and iii) timeline for the payment of costs. The explanation attached to Section 31A defines costs as 'reasonable costs' which generally brings under its purview, arbitrator(s) fees, legal fees, and any other fees that may be incurred during the proceeding. Section 31A(2) enumerates the factors to be considered "if (emphasis added) the court or arbitral tribunal decides to make an order as to payment of cost," while Section 31A(3) allows the arbitrator(s)/courts to make an order for payment of costs if the party "had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings*"* and a wider discretion is also bestowed to order costs on the basis of "the conduct of all the parties.*"*

However, the provisions bestow absolute discretion in the hands of the arbitrator(s)/courts to decide whether a particular matter is suitable for

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[19] Valentina Renna, *Report on ArbitrationCosts*, (2012) <https://www.ispramed.com/wp-content/uploads/2012/09/Report-on-Arbitration-Costs1.pdf>; Marianne Stegner, *Costs in Arbitration*, 2 Y.B.INT'L ARB. 85 (2012).

[20] Law commission of India, *Report 246- Amendments to the Arbitration and Conciliation Act 1996* (2014) <https://lawcommissionofindia.nic.in/reports/report246.pdf>; United Nations, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session* (2021) <https://undocs.org/en/A/CN.9/WG.III/WP.206>.

imposing costs. In our view, the discretionary nature of this judicial tool gives rise to concerns over its efficacy in disincentivizing frivolous and inflated claims.

In the case of *State of J&K v. Dev Dutt Pandit*,[21] the Supreme Court opined that parties who inflate their claims out of proportion shouldn't benefit from the costs award, even if they are the successful party.[22] In *Steel Authority of India v. Shyam Sundar Choudhury*,[23] the arbitrator(s) issued Rs. 1.2 lakhs award on costs in favour of the respondent, owing to the delay caused by the claimant. The claimant initially raised a claim for Rs. 23.38 lakhs which was ultimately lowered down to Rs. 1.28 lakhs on principal sum and Rs. 75,000 on account of interest.[24] The costs award was challenged at the Calcutta High Court under Sections 30 and 33 of the Arbitration Act, 1940,[25] and the court issued a fresh costs order amounting to only Rs. 20,000 against the claimant and the arbitrator's cost on the award was set aside.[26] The court noted that there are 'no certain standards' to issue costs.[27] Such lack of standards could give rise to a varied magnitude of costs being issued, as in this case, and lower the capabilities of this mechanism to curb frivolous claims.[28] In *Sheetal Maruti Kurundwade v. Metal Power Analytical Pvt. Ltd and Ors*,[29] an unsubstantiated petition was filed under Section 9, 12(3) and 12(5) of the Arbitration Act and it was contended that the appointment of the arbitrator was in violation of the provisions of the act. The petition was

[21] State of J&K v. Dev Dutt Pandit, AIR 1999 SC 3196.
[22] Mohinder Pal Singh v. Northern Railway (2008), 1 Arb LR 363, 368.
[23] Steel Authority of India v. Shyam Sundar Choudhury, AIR 2005 Cal 305.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

dismissed "wholly without foundation in fact or law."[30] However, the court did not direct the petitioners to bear costs for raising such frivolous claims.[31] Though all the above-discussed cases involved frivolous or inflated claims by parties, the approaches taken up by the courts in issuing costs were non-uniform, which raises concerns on the potential of this mechanism to deter frivolous claims.

The new costs regime was introduced with an intent to deter frivolous claims in arbitral proceedings.[32] However, as noted before, the subsisting wide discretion provided to the arbitrator(s)/courts could result in the identification of frivolous claims in an overly narrow set of circumstances. Further, arbitral proceedings function under the pressure of parties' expectations, and therefore, drastic categorisation and imposition of costs by the arbitrator(s) could impact their future appointments. This could discourage the arbitrator(s) from issuing awards on cost against a claim 'without legal merit'. If the arbitrator(s) don't use their due discretion to provide for costs, then the parties are left only with the recourse to courts under Section 34 of the Arbitration Act. This results in judicialization of the arbitration process, which would in turn raise costs for the parties. As a result, this mechanism is unlikely to generate an *ex-ante* deterrence against

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[29] (2017) 3 AIR Bom R 68.
[30] *Id. See also* Voestalpine Schienen Gmbh v. Delhi Metro Rail, 2017 SCC Online SC 172; Salma Dam Joint venture v. Wapcos Limited, 2019 SCC OnLine SC 1464.
[31] *Id.*
[32] Law Commission of India, s*upra* note 20.

the filing of frivolous claims and thus, future reforms should aim at providing a more predictable framework to address these issues.[33]

B. Pre-deposit requirement:

Though not enumerated under a statute, parties sometimes specify a pre-deposit requirement in the agreements they enter into. Such a requirement mandates the party initiating an arbitration proceeding to deposit in advance a certain sum, proportional to the claims raised.[34] The arbitration clause in *M/s Icomm Tele Ltd. v. Punjab State Water Supply*,[35] required a claimant to deposit 10% of the amount claimed, with the arbitrator before the commencement of the proceeding. The purpose of the 10% deposit, as mentioned in clause 25(vii) of the agreement, was to avoid frivolous claims.[36] However, the court was of the opinion that it is a well-settled principle of Indian law that a frivolous claim could be dismissed with exemplary costs,[37] and held that the requirement to deposit 10% of the claim had no nexus with discouraging frivolous claims as the deposit was to be made for all claims, frivolous or otherwise.[38] The court also emphasized the fact that even if the claimant were to be successful, they still may not be able to claim a refund of the entire deposit.[39] This made the clause not only

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[33] K Polonskaya, F*rivolous Claims in the International Investment Regime: How CETA Expands the Range of Frivolous Claims that May be Curtailed in an Expedient Fashion,* 17 ASPER REV INT'L BUS. & TRADE L 1, (2017).
[34] Lakshya Gupta, *Clauses in an Arbitration Agreement: Are Arbitration Agreements Justiciable?*, KLUWER ARBITRATION BLOG (2019) <http://arbitrationblog.kluwerarbitration.com/2019/06/14/pre-deposit-clauses-in-an-arbitration-agreement-are-arbitration-agreements-justiciable/>
[35] M/s Icomm Tele Ltd v. Punjab State Water Supply, 2019 SCC 391.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

excessive and disproportionate but also arbitrary. It said that often a deposit of 10% of a large claim would be more than the court fees which parties would have incurred if they chose litigation. The Court held that such pre-deposit clauses discourage parties from taking up arbitration and leads to 'clogging' of the court system.[40] The court's decision is significant in bringing up another factor to be kept in mind while formulating mechanisms to curb frivolous and inflated claims, which is ensuring that such a mechanism doesn't affect the essential features of the ADR process.

PART C

IV. AD VALOREM AS MECHANISM TO CURB FRIVOLOUS CLAIMS

Under the *ad valorem* method, the arbitrators' fees are set by reference to the sum of the claims in dispute.[41] In practice, this means that the fees will amount to a percentage of the amount in dispute. The *ad valorem* standard ensures greater transparency and predictability in the determination of arbitration costs. It is because by resorting to a schedule of fees already set out, the parties know beforehand the cost of the proceedings. Many arbitral institutions including the International Chamber of Commerce (hereinafter as "ICC"), the China International Economic and Trade Arbitration Commission, the Arbitration Institute of the Stockholm Chamber

[40] *Id.*
[41] Claudia T. Salomon & Shreya Ramesh, *A Primer on International Arbitration Costs* (2019) <https://www.lw.com/thoughtLeadership/byline-primer-international-arbitration-costs>.

of Commerce and the Cairo Regional Centre for International Commercial Arbitration employ the *ad valorem* method.[42]

Following the recommendation of the Law Commission, the Arbitration (Amendment) Act, 2015 inserted sub-section (14) to Section 11 of the Arbitration Act, which gives High Courts the power to frame rules for determining the fees of an arbitral tribunal. The courts must take into consideration the rates specified in the model schedule of fees for domestic arbitration as set out in Schedule IV of the Arbitration Act.[43] Schedule IV of the Arbitration Act resembles the *ad valorem* method but the model provision is 'not mandatory,'[44] as it is subject to the agreement entered into by the parties.[45] Further, it may not be used in *ad hoc* arbitrations.[46] Though many individuals have argued for mandating Schedule IV for determining arbitrator(s) fee in domestic arbitrations, they are with an intention to mitigate the risks created by the unqualified deference to party autonomy in fixing tribunal fees.[47] The focus of this article, however, would be to evaluate the *ad valorem* merely on its capabilities to act as an efficient and

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[42] Renna, *supra* note 19.
[43] Section 11(14), Arbitration Amendment Act, 2015.
[44] Paschimanchal Vidyut Vitran Nigam Ltd. v. IL&FS Engineering & Construction Company Ltd 2018 SCC OnLine Del 10831; G. S. Developers & Contractors Pvt. Ltd. v. Alpha Corp Development Pvt. Ltd. & Anr, 2019 SCC OnLine Del 8844.
[45] National Highways Authority of India v. Gammon Engineers and Contractor Pvt. Ltd 2019 SCC OnLine SC 906.
[46] *Id.*
[47] Indranil Deshmukh, *Arbitrator Fees in India: In a Fix? India Corporate Law* (2021), CYRIL AMARCHAND BLOGS, <https://corporate.cyrilamarchandblogs.com/2019/10/arbitrator-fees-in india/#:~:text=In%202015%2C%20in%20accordance%20with,rates%20specified%20in%20the%20model>; Devika Sharma & Devika Sharma, *Fee Schedule of Arbitral Tribunal: Focusing on the Sole Arbitrator's Fee,* SCC BLOG (2021) https://www.scconline.com/blog/post/2020/06/11/fee-schedule-of-arbitral-tribunal-focusing-on-the-sole-arbitrators

sufficient mechanism to curb frivolous claims. For the purpose of subsequent analysis, Schedule IV would be used to exemplify a commonly followed *ad valorem* method.

An *ad valorem* mechanism provides clarity and certainty unlike Section 31A of the Arbitration Act as it creates *ex-ante* deterrence. Given the fixed percentage of the fee against the claims raised, it doesn't fall within the discretion of the arbitrator(s). Further, it makes the differentiation of a frivolous or inflated claim from a meritorious one, irrelevant, hence diluting the issues caused by the wide discretion bestowed on the arbitrator(s). As most international institutions follow *ad valorem* charges, it aids in creating uniformity in structural features and progresses India's goal to become an arbitration hub by promoting its acceptance globally.

However, the mechanism also has its deficiencies. As *ad valorem* follows a 'cost follows events model,'[48] the mechanism may not be equipped to penalize the winning party for the harm and distress they caused to the losing party by raising frivolous claims. Through our analysis, it is evident that an efficient mechanism must both, act as a deterrent and provide compensation to the affected party. Though the mechanism meets the first limb of requirement, it doesn't fulfil the latter as *ad valorem* charges pertain to arbitrators' fees which may benefit the arbitrator(s) but not the parties affected by frivolous claims. Further, given that the arbitrator(s) remuneration is directly related to the quantum of claims raised, the arbitrator(s) could be incentivized to unnecessarily elongate the proceedings

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fee/#:~:text=Keeping%20in%20mind%20that%20the,sole%20arbitrator%20INR%2037%2C50%2C000.

[48] Salomon, *supra* note 10.

for private gains. This may compromise the impartiality of arbitrator(s). Even if the arbitrator(s) don't indulge in such activities, it may still cause suspicion of impartiality in the minds of the parties.[49]

It wouldn't be accurate to argue that this mechanism is devoid of uncertainty and ambiguousness, as, for instance, Schedule IV doesn't define 'amount in dispute' against which an *ad valorem* percentage for the arbitrators' fee is charged. In *Delhi State Industrial Infrastructure Development Corporation Ltd. v. Bawana Infra Development (P) Ltd*,[50] the court clarified after an extensive review of the international best practices that the phrase 'sum in dispute' would include the sum-total of both the claims and the counter-claims. However, few arbitral institutions include set-off claims too, in calculating aggregate value and some follow other modes of calculation.[51] Further, the claims submitted at the beginning of the proceedings may be subject to subsequent review (for instance, due to a change in the economic value of the claims submitted by the parties), which may not be taken into consideration by this method.[52] Therefore, this method too is not denuded from uncertainty which challenges its potential to act as an *ex-ante* deterrence against frivolous claims. Contrastingly, the time-based method of calculation of costs, which calculates the arbitrators' fees by reference to an hourly or a daily rate at which the arbitrator(s) will be compensated for time spent working on the case, doesn't require the

[49] Shivani Khandekar & Divyansh Singh, *Independence and Impartiality of Arbitrators: Are We There Yet?*, KLUWER ARBITRATION BLOG,<http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/>

[50] Delhi State Industrial Infrastructure Development Corporation Ltd. v. Bawana Infra Development (P) Ltd.,2018 SCC OnLine Del 9241

[51] Renna, *supra* note 19.

[52] *Id.*

evaluation of 'amount in dispute.'[53] Further, this mechanism may not act as a sufficient deterrence for high profile parties with deep pockets who have a substantial amount of resources at their disposal and would be indifferent to the threat of paying higher arbitrators' fees.

Additionally, as noted in *M/S ICOMM Tele Ltd v. Punjab State Water Supply*,[54] the essential feature of an ADR mechanism includes being economical, which can't be sacrificed for the sake of creating a deterrence against frivolous claims. According to a study conducted by the ICC, the main 'cost driver' in an arbitral proceeding is the arbitrators' fees.[55] Several other studies and statistics have shown that costs were a particularly critical issue, as arbitration is often considered to be more costly than other available alternatives.[56] An exorbitant *ad valorem* rate would discourage parties from availing arbitration. On the other hand, a low *ad valorem* rate may not act as a sufficient deterrent for parties to not raise frivolous claims.

PART D

V. INTERNATIONAL PRACTICES

We will briefly discuss practices adopted by various international institutions, as appreciating and analyzing these mechanisms aids in evolving

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[53] Dawn Chardonnal, *ICC Court releases practices on fees and administrative expenses - ICC - International Chamber of Commerce ICC - International Chamber of Commerce* (2021)ICC<https://iccwbo.org/media-wall/news-speeches/icc-court-releases-practices-on-fees-and-administrative-expenses/>

[54] M/S ICOMM Tele Ltd v. Punjab State Water Supply, 2019 SCC 391.

[55] ICC Arbitration Rules, 2021 <https://iccwbo.org/dispute-resolution-services/arbitration/>.

[56] Renna, *supra* n. 19; Law Commission of India *Supra* n. 20; Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523.

and adapting the best practices and broadens the horizon for Indian legislators.

A. ICC

The ICC uses the *ad valorem* method to calculate the fees of the arbitrator(s).[57] Further, the ICC is also given powers to issue a higher fee than the fixed scale in exceptional circumstances.[58] Article 38 of ICC Rules bestows the institution with powers to make decisions on any costs and order the parties to pay such costs.[59] Further, the rules don't subscribe to the principle of 'cost follow event,' as the arbitral tribunal has the power to issue cost even against the winning party. Article 38 mandates the institution to take into consideration relevant factors, including the conduct of the parties and the extent to which the parties have tried to make the arbitration procedure expeditious and cost-effective.

B. The London Court of International Arbitration

The London Court of International Arbitration (hereinafter, "LCIA") follows an hourly pay scale, in which the costs are determined by the amount of time spent by the arbitrators in a particular proceeding.[60] The hourly fees can't exceed £500 except in special circumstances. Article 28 mandates the arbitrator(s) to issue an award on costs.[61] Though Article 28.4 of the LCIA Rules is based on the 'costs follow the event' rule, and it is also within the

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[57] *Id.*
[58] *Id.*
[59] Article 38, ICC Arbitration Rules, 2021.
[60] LCIA, Rules of Arbitration, <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx>
[61] *Id.*

arbitrator's power to decide the appropriate method of distribution and proportions of costs to every party.

C. Hong Kong International Arbitration Centre

The Hong Kong International Arbitration Centre (hereinafter as "HKIAC") provides the party with the flexibility to choose between the *ad valorem* regime or the hourly regime.[62] However, if the parties fail to choose a method, HKIAC will by default apply an hourly rate. While the forms differ, both the ICC and HKIAC mandate their arbitral institutions to pass an order on costs and the relevant factors to be considered include identification of frivolous and inflated claims by parties.[63]

VI. CONCLUSION

Through our analysis, we have identified various elements that have to present in an efficacious mechanism to curb frivolous claims. *Firstly*, the mechanism should both act as a deterrent, and compensate the affected parties. *Secondly*, it should set out uniform, unambiguous and certain standards for evaluating and categorizing claims. *Thirdly*, it shouldn't be affected by arbitrator's bias or impartiality. *Lastly*, it shouldn't set out cumbersome procedures and in turn result in further delay. The costs regime employed by an arbitral institution is fundamental towards curbing frivolous claims. While Section 31-A of the Arbitration Act empowers the arbitrator(s) or the courts in India to pass orders on costs, it is insufficient as it is merely a discretionary power and not a mandatory order. Schedule IV of the Arbitration Act adopts an *ad valorem* method of determining the arbitrators'

[62] HKIAC,Rules of Arbitration, < https://www.hkiac.org/arbitration/rules-practice-notes>
[63] *Id.*

fees and the article analyzed the advantages and disadvantages of adopting this method to curb frivolous claims.

Taking into consideration the merits and demerits of both these mechanisms, the Indian regime could adopt the *ad valorem* method which follows a reasonable rate and also convert Section 31A of the Arbitration Act into a mandatory provision as opposed to it being discretionary in the hands of the arbitrator(s). Renowned institutions like the ICC, LIAC, HKIAC, follow the *ad valorem* approach and make it mandatory for the arbitrator(s) to pass awards on costs by factoring in the frivolous claims raised by parties. Through an *ad valorem* mechanism, parties will be disincentivized to make frivolous claims *ex-ante.* Furthermore, the mandate on arbitrator(s) to pass awards on costs could fulfil the requirement of compensating the affected party and punishing the unscrupulous party. This practice will also bring the Indian regime in line with international legal practices and could receive global recognition.