CLEARING THE FOG: A PERSPECTIVE TOWARDS THE ENFORCEMENT OF PRE-ARBITRAL CLAUSES

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Introduction

Pre-arbitration clauses are the new norm that has seen an upward movement, especially in the realm of international commercial transactions having a complex nature. Comprising of multi-tiered steps, these clauses include different kinds of alternative dispute resolution ["**ADR**"] mechanisms, followed by arbitration in the end. Strategically placing arbitration as the final process for dispute resolution, adopting the ADR mechanism, namely, negotiation, mediation and/or conciliation, expert determination, etc., gives sufficient attempts to the parties to achieve a cost-effective and efficient mode for resolving conflicts. This helps the parties save the cost as well time, which serves as the most important factor in dispute resolution.

Merging the other ADR techniques with arbitration procedures in multi-tiered dispute resolution ["**MTDR**"] clauses provides for a perfect blend of a complete dispute resolution procedure. If the selected ADR mechanism in the pre-arbitration clause fails to settle the dispute, then arbitration is invoked as a final resort. Imbibing the use of such multi-tiered steps in the dispute resolution builds up an escalation that helps the parties to take the dispute to a further level in a steady and stable manner. This maintains an amicable and harmonious environment between the parties, thereby increasing the chances of dispute resolution at an early stage itself. Unless the pre-arbitration clause is satisfied, the arbitration clause cannot be invoked at all, and if invoked it is to be declared premature in nature. Catering the particular needs of each agreement, the pre-arbitral clauses can be tailor-made to fit the best interest of the parties.

However, the adherence to pre-arbitration clauses in itself is a problem at times. Driven by party autonomy and being party-centric, the invocation of such clauses depends upon the will of both the parties, thereby making it problematic when one of the parties does not wish to adhere to such a pre-arbitral clauses. This puts in jeopardy the whole pre-arbitral process and further stirs up the complications. To tackle the same, the present article aims to determine the multi-fold nature of

the MTDR clauses in consonance with the problems that act as a roadblock against the enforceability and effectiveness of such clauses.

Meaning and Significance of MTDR Clauses

MTDR clauses are often regarded as a filter as they funnel out the disputes that can be resolved with consistent and amicable efforts of the parties. It brings out the actual interest of the parties when coupled with an appropriate ADR mechanism depending upon the nature of the agreement or contract. This helps to facilitate the dispute, and reduce the cost and time of the dispute resolution process.[1] MTDR clauses include different modes of resolution as chosen by the parties. These methods may contain two or more processes like arbitration, expert determination, mediation, conciliation and/or negotiation.[2] The idea behind the inclusion of multiple dispute resolution mechanisms is to identify and eliminate the dispute in the early stages itself and promote amicable settlements.

The inclusion of such clauses is usually seen in commercial transactions. The parties particularly aim at a long harmonious relationship and thereby try to resolve the dispute amicably by using ADR mechanisms. This helps them look for various alternate arrangements that can be adopted to minimize the hostility between the parties. Each combination of the dispute resolving mechanism provides a unique approach to the problem and it is up to the parties to select the one that would cater to their needs. A layered and escalated MTDR method is being taken up in most arbitration matters across various industries. For example, the construction industry often includes a multiple step-by-step process of resolving disputes in Engineering, Procurement and Construction contracts. Since such a contract is vast in scope and complex at the same time, possibility of arising disputes is palpable. The dispute resolution process usually starts with consultation amongst the authority and the contractor to arrive at a mutually satisfying agreement (negotiation); followed by the expert's determination who is chosen from a panel of experts, if the conflict involves price fluctuations mechanics, it goes to a financial expert; and if any of the above does not result in a satisfactory result for either of the parties, then arbitration takes its course.

Since the arbitration mechanism involves a lot of technicalities and often the losing party is dissatisfied with the arbitral award, issues with respect to the enforcement arise most often. This

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[1] Nada Abouelseoud, 'A Practical Approach to Multi-Tiered Dispute Resolution Clauses' (*Lexology,* 31 October 2019) <https://www.lexology.com/library/detail.aspx?g=9b1a27f2-1edc-43e7-b119-e6560d90eaf1> accessed 4 July 2021.

[2] Gary B Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (Kluwer Law International 2013) 100.

elongates the process of dispute resolution and becomes frustrating for the parties. The idea of inculcation and adherence to MTDR clauses is to hold and freeze the dispute, thereby invoking the appropriate ADR mechanism to diffuse the situation and reach an amicable settlement.[3]

Arbitration is pre-mature without the prior satisfaction of pre-arbitral process

A definite pre-arbitration method in an agreement forms a pre-requisite of arbitration which must be followed in all circumstances. Adherence to the conditions mentioned in the pre-arbitration clause is a precondition to be satisfied to proceed with the case on merits.[4] Discrepancies or non-compliance with the mentioned pre-arbitral conditions can even deprive the tribunal of its jurisdiction to decide upon the matter.[5] Unless the pre-arbitral condition, prior to the initiation of arbitral proceeding is satisfied, the claim put forth by the parties before the tribunal should be treated as procedurally inadmissible.

In *Tulip Hotel v Trade Links Ltd,*[6] the parties had an MTDR clause having conciliation followed by arbitration. However, the claimant overlooked the conciliation and directly initiated the arbitration proceedings against the respondent. The Hon'ble bench outrightly denied the arbitration application owing to the lack of adherence to the MTDR clause and stated that, merely because the respondents have filed the suit, that itself would not lead to a conclusion that conciliation proceedings in the matter would be of no use or would be without any effective solution. It would be too premature to make any comment in that regard. If an arbitration agreement is coupled with a condition, then the non-fulfilment of such pre-condition made the dispute non-arbitrable.[7] The completion of pre-condition to arbitration is a *sine qua non* for setting in motion the arbitration clause.[8]

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[3] Gregory Trivaini, 'Multi-Tiered Dispute Resolution Clauses, a Friendly Miranda Warning' (*Kluwer Arbitration Blog,* 30 September 2014) <http://arbitrationblog.kluwerarbitration.com/2014/09/30/multi-tiered-dispute-resolution-clauses-a-friendly-miranda-warning/> accessed 4 July 2021.

[4] Dmitry Davydenko, 'Does Noncompliance with Pre-Arbitration Dispute Settlement Procedures Affect Awards Enforceability in Russia?' (*Kluwer Arbitration Blog,* 9 April 2010) <http://arbitrationblog.kluwerarbitration.com/2010/04/09/does-noncompliance-with-pre-arbitration-dispute-settlement-procedures-affect-awards-enforceability-in-russia/> accessed 4 July 2021.

[5] *Emirates Trading Agency LLC v Prime Mineral Exports Pvt Ltd* [2014] EWHC 2104.

[6] *Tulip Hotel v Trade Links Ltd* (2010) 2 Arb LR 286.

[7] *United India Insurance Co Ltd v Hyundai Engineering and Construction Civil* (2018) 17 SCC 607.

[8] *Oriental Insurance Company Ltd v M/S Narbheram Power and Steel Pvt Ltd* (2018) 6 SCC 534.

The parties cannot skip or jump directly to the final step of the MTDR procedure i.e., arbitration. The prescribed mode stated in the agreement between the parties is bound to be followed as it is the parties themselves that have agreed to the MTDR procedure in the first place.[9]

Defining the Parameters: Reinforcing the Position of Pre-Arbitration Clauses

To concretise the enforceability of the pre-arbitration clauses, multiple parameters should be adhered to for avoiding any uncertainties and ambiguities with respect to the clause. A clear and well-defined pre-arbitration clause is necessary to execute a harmonious and amicable settlement of the dispute in the nascent stages itself. To discuss the same, the following are the parameters that should be complied with while drafting a pre-arbitration clause:

Language of MTDR clause

The Hon'ble Bombay High Court in *Quick Heal Technologies Limited v M/S NCS Computech Pvt Ltd*,[10] elaborately dealt on the issue of use of specific words and their rightful interpretation to conclude the intention of the parties to arbitrate. The court held that the interplay of words like 'shall' and 'may' has to be taken into consideration so that the binding nature of the clause can be determined and invalidated the arbitration clause for lack of mandatory language. Such details can make or break the deadlock between the parties who are reluctant to enforce the pre-arbitral clause. The application of the word 'shall' in the Arbitration Clause manifests the clear intention of the parties to turn to a mandatory pre-arbitral process,[11] before the commencement of arbitration proceedings. Unless these steps are followed, the arbitral tribunal shall default upon the jurisdiction to entertain it. When the language of an MTDR clause employs imperative terms, such as 'shall' or 'must', it becomes mandatory for the parties to submit to a pre-arbitration mechanism before submitting the dispute for arbitration.[12] Hence, the language of the pre-arbitration clause is of utmost importance because it gets to decide upon the enforceability of the clause.

Clarity and Specificity of Pre-Arbitration Clauses

Setting out a well-defined structure for the pre-arbitral conditions is necessary to avoid any confusion at a later stage and serves in the best interest of the parties. Reducing the ambiguities to the maximum extent will not only help in making it well-defined but will also strengthen the

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[9] *State of Kerala and Others v Fr William Fernandez Etc* (1999) SCC On Line Ker 149.
[10] *Quick Heal Technologies Limited v M/S.NCS Computech Pvt Ltd* (2020) SCC Online Bom 693.
[11] *Emirates Trading Agency LLC v Prime Mineral Exports Pvt Ltd* [2014] EWHC 2104 (Comm).
[12] cf Born (n 2) 102.

enforceability of the clause. To corroborate the same, in the case of *International Research Corp PLC*,[13] it was held that whenever the pre-conditions prior to arbitration are unambiguous, specific and have sufficient clarity, they are mandatory upon the parties.

The arbitral tribunal can deny its jurisdiction on the ground that the appellant did not comply with certain mandatory requirements when the language of the arbitration clause required prior satisfaction of such conditions. The dispute resolution clause laying a condition to attempt a good faith negotiation to resolve a dispute is considered to be a well-enunciated procedure and thus, is enforceable.[14]

Reason for Lack of Implementation of Pre-Arbitration Clauses

The principal excuse that parties find to evade the pre-arbitral condition is the uncertainty of the process.[15] In both civil and common law courts, specific arrangements to deal with dispute settlements that are necessarily unclear and vague are considered to be null.[16] The courts shall consider in deciding the enforceability of such a conflict settlement process, the interest of parties and the language of the pre-arbitral dispute settlement provision. The wordings of the clause regulate the intention of the parties and the binding structure of the clause. Sometimes it is disregarded for lacking details as to its procedure and the clause functions as just a subordinate.[17] The Supreme Court of India, in *Zhejiang Bonly Elevator*,[18] has indicated that the parties normally prolong the arbitration taking the excuse of the technical defences.

Generally, the courts are reluctant to consider the enforceability of pre-arbitral clauses involving good faith or amicable discussion.[19] Construing the legal interpretation of such phrases, the courts have often held them to be too vague to be given a legal recognition. Phrases like 'good faith', 'amicable negotiation', 'friendly manner', etc., are too open-ended, having the potential of wide interpretation which makes reflecting the rights and obligations difficult to determine.[20] It is advisable to avoid using such phrases while drawing the dispute resolution clause. Therefore, it is

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[13] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55.
[14] *Cable and wireless PLC v IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041.
[15] Chahat Chawla,'The Muddy Waters of Pre-Arbitration Procedures - Are They Enforceable? Answers from an Indian Perspective' *(Kluwer Arbitration Blog,* 9 June 2019) <http://arbitrationblog.kluwerarbitration.com/2019/06/09/the-muddy-waters-of-pre-arbitration-procedures-are-they-enforceable-answers-from-an-indian-perspective/> accessed 23 August 2021.
[16] *Sulamerica CIA Nacional De Seguros SA & Ors v EnesaEngenharia SA & Ors* [2012] Civ 638 (EWCA).
[17] cf Trivaini (n 3).
[18] *Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited v Jade Elevator Components* (2018) 9 SCC 774.
[19] *Tang & Anor v. Grant Thornton International Ltd & Ors* [2012] EWHC 3198 (Ch).
[20] *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).

paramount to draft the pre-arbitral clause carefully giving specific details of the procedure to be adopted and avoiding any uncertainties. [21]

Pre-Arbitration: A Jurisdictional Prerequisite to Arbitration

The Supreme Court of India ["**SCI**"] considered whether awards could be set aside if any "procedural preconditions" were not fulfilled in the case of *MK Shah Engineers.*[22] In this situation, the arbitration provision allowed the parties first to refer disputes to the "Superintendent Engineer." Then, in the event that a party was unhappy with the Superintendent Engineer's decision, it may proceed to arbitration. The principal issue formulated by the SCI was to determine the impact on the beginning of the arbitration procedure if there is no decision by the Superintending Engineer. The SCI concluded that the pre-condition was "essential" to the text of the clause and that it must certainly be complied with.

When the parties have in mind to consider the pre-arbitral as a precedent condition, the arbitral tribunal cannot exercise jurisdiction over it. Either of the parties is then required to meet the requirements of the clause with due consideration. In case of failure of the negotiation mechanism, arbitration may be commenced by either of the parties.

Not considering the pre-arbitral clause as an important pre-requisite can have repercussions at a later stage. It has been asserted that the arbitral award is invalidated by a breach of the negotiation provision. In support of this assertion, the authors argue that the arbitral tribunal which granted the award lacked the competence to do so as the negotiating clause was a prerequisite to arbitration. Thus, its judgement is therefore void from the beginning. In *White v. Kampner,*[23] the court held the parties ought to have participated in the mandatory negotiation sessions before coming to the arbitral tribunal.

SIAC's New Hybrid mechanism

Since mechanisms such as negotiation and mediation often lack proper procedural structure when kept as a pre-condition to arbitration, a new hybrid structure of multi-stage ADR is evolved, often known as "arb-med-arb." In this method, arbitration commences when a dispute arises, however, parties are directed to amicably resolve it by mediation and only if the mediation goes unsuccessful,

[21] Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 6 J. Int. Arb. 27.
[22] *MK Shah Engineers v State of Madhya Pradesh* (1999) 2 SCC 594.
[23] *White v Kampner* 641 A.2d 1381 (Conn 1994).

the arbitral process is continued to get the final award. Often known as the AMA Protocol, it has been welcomingly adopted by the SIAC and SIMC in collaboration.[24] Pursuant to AMA Protocol, once the arbitration pleadings commence and documents are lodged further process of arbitration is put on hold. Thereafter, all the documents and pleadings submitted before the tribunal are sent to SIMC, where the mediation is commenced. After a thorough process of mediation if the disputes still pertain, then such disputes are again remanded to arbitration.[25]

Concluding Remarks

MTDR clauses play a crucial role in weeding out the disputes by bringing the parties to one table for an amicable resolution of the dispute. Jurisdictions across the world have laid down differing opinions and thus, pre-arbitral clauses are held on a pendulum running between the extremes of mandatory on one end to the directory on the other end. However, in evaluating pre-arbitration clauses and their enforcement capacity, the requirements for consistency, specified structure and clear language are beyond all borders which resonate in a similar fashion with the role of pre-arbitration clauses in India. As a matter of caution, it must be kept in mind that the application of the pre-arbitration clause is possible if the performance terms are clearly defined, but not if the clause is limited to generic or inaccurate claims. Several practical and procedural conditions must be sufficiently clear to assess the negotiating efforts of a party meaningfully. Adding time frames to each step in the escalated MTDR process is an effective way to ensure compliance and enforceability.

At the time of conclusion of contract, the parties exercising their autonomy, themselves decide to adopt the multi-tiered process. When one party discredits the agreed procedure, it is a blow on the contractual rights of the other party. Ideally, both parties should respect each other's will within the limits of their autonomy when drafting a valid and binding MTDR clause. The doctrine of party autonomy stands at the highest pedestal when it comes to commercial arbitration. Decision with respect to the process of dispute resolution made at the time of conclusion of contract derives sanctity through this doctrine. Therefore, it is pertinent to note here when at least one of the parties sis still willing to adhere to the pre-arbitral requirement to settle the dispute, such process should

[24] Christopher Boog 'The New SIAC/SIMC AMA Protocol: A Seamless Multi-Tiered Dispute Resolution Process Tailored to the User's Needs' 17 Asian Disp. Rev. 91.
[25] Sharon Lin, Daniel Cheong 'Arb-Med-Arb: Connecting the Dots between Arbitration and Mediation' (*Mondaq.com*, 14 August 2018) <https://www.mondaq.com/arbitration-dispute-resolution/727790/arb-med-arb-connecting-the-dots-between-arbitration-and-mediation> accessed 23 August 2021.

not be neglected. The courts should preferably instruct the parties to devise the protocol for enforcing the pre-arbitral mechanism instead of declaring the pre-condition invalid.