The Muddy Waters of Pre-Arbitration Procedures – Are they Enforceable? Answers from an Indian Perspective

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Chahat Chawla (SIAC)

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Modern day arbitration agreements usually contain provisions that require parties to take certain steps before the commencement of arbitration. Such clauses, often described as "multi-tiered" clauses, set out a sequence for invoking the arbitration agreement. Typically, pre-arbitration steps include procedures such as time-bound mediations, amicable settlements, cooling-off periods, and other forms of non-binding determinations.

Despite being a recurrent feature in dispute resolution clauses, the legal character of pre-arbitration procedures in India is unclear. An overview of the judgments shows that the courts have addressed this issue on numerous occasions, often rendering conflicting decisions. Broadly, the courts have taken two views. A majority of the courts have given effect to the plain meaning of the arbitration clause (on a case-by-case review) and have held that pre-arbitration procedures are mandatory and go to the jurisdiction of tribunals. Other courts (the minority view) have characterized (as a matter of general principle) pre-arbitration steps as optional and non-mandatory.

The majority view – mandatory and jurisdictional nature of pre-arbitration procedures

Supreme Court

In *M.K. Shah Engineers*, the Supreme Court of India (SCI) considered whether an award could be set aside if certain "*procedural pre-requisites*" were not achieved. The arbitration clause in this case required the parties to initially submit their disputes to the "*Superintending Engineer*", and thereafter to arbitration in the event a party was dissatisfied with the decision of the Superintending Engineer. The SCI formulated the issue in the following terms: "*[t]he principle issue for decision is what is the effect of absence of decision by the Superintending Engineer proceeding the demand for reference and commencement of the arbitration proceedings*". Giving effect to the text of the clause, the SCI held that such conditions were "*essential*" and necessarily had to be observed. However, eventually it was found that the parties had, by conduct, waived this procedural pre-condition.

A similar view was taken by the SCI in *S.K. Jain*.[fn]Also see decision of the SCI in *Rajesh Construction*.[/fn]In this case, the tribunal refused to assume jurisdiction on the basis that the appellant had not complied with certain "*mandatory requirements*". The petition against the tribunal's

decision was dismissed on the basis that the language of the arbitration clause required prior satisfaction of certain conditions.

Recently, in *Oriental Insurance Company* and in *United India Insurance Co. Ltd*., the SCI took the view that arbitration clauses must be construed "*strictly*", therefore requiring completion of the "*pre-conditions*" to arbitration. In these cases, the disputes arose out of certain insurance claims. The arbitration clauses stipulated that disputes could not be referred to arbitration if the insurance company disputed its liability under the applicable policy. The SCI *in United India Insurance Co. Ltd*., found that the arbitration agreement was "*hedged with a conditionality*" and the non-fulfilment of the "*pre-condition*" rendered the dispute "*non-arbitrable*". However, even though the existence of an arbitration agreement was not disputed, the SCI found that the arbitration agreement could be "*activated*" or "*kindled*" upon the competition of the pre-conditions, and the same was "*sine qua non for triggering the arbitration clause*".

The appointing authority in *Demerara Distilleries* took a different approach. In this case, the language of the clause required parties to engage in mutual discussions, followed by mediation. In the absence of a resolution, the parties had the option of referring their disputes to arbitration. In the circumstances, the SCI found that objections relating to the appointment application being "*pre-mature*" did not merit "*any serious consideration*". It was held that various correspondence between the parties indicated that any mutual discussions or mediation would be an "*empty formality*".

It appears that in some situations (like in *Demerara Distilleries*), the SCI, other than being guided by the parties' intentions (*i.e.,* by the language of the arbitration clause), may also consider the likelihood of success of pre-arbitration procedures. Interestingly, in disputes involving the Indian state or its entities, the courts may also test the constitutional validly of the prescribed pre-conditions. For instance, the SCI in *Icomm Tele Ltd* struck down a pre-condition requiring a deposit of 10% of the claimed amount as it found this obligation to be "*arbitrary*", making the process "*ineffective*" and "*expensive*".

Bombay High Court

A full bench of the Bombay High Court in *S Kumar Construction* had to decide whether prior compliance with pre-arbitration procedures was mandatory. After reviewing previous decisions on this issue, the Court answered this question in the negative. The Bombay High Court found that the cases which held such procedures to be compulsory were decided on the basis of a differently worded arbitration clause, and thus could be distinguished on facts. Importantly, the Bombay High Court did not pronounce that as a general rule all pre-arbitration procedures are optional. Instead, it was held that such procedures could be mandatory and go to the jurisdiction of the tribunal depending on the language of the arbitration clause. Similarly, the Bombay High Court in *Atlanta Infrastructure* declined to set aside an award on the ground of violations of pre-arbitral steps as it found that the satisfaction of such procedures was not mandatory under the dispute resolution clause.[fn]Similar view was taken by the Bombay High Court in *Johnwin Manavalan*.[/fn]

The other view – Delhi High Court

In contrast, the Delhi High Court has adopted a distinct position. In *Ravindra Kumar Verma*, the Court held that prior requirements before referring a dispute to arbitration are "*only directory and not mandatory*". The *Ravindra Kumar Verma* Court followed earlier decisions of the Delhi High Court in *Sikand Construction* and *Saraswati Construction Company* which held that "*the procedure/pre-condition has to be only taken as a directory and not a mandatory requirement*".

Following *Ravindra Kumar Verma*, the Delhi High Court in *Baga Brothers*, *Siemens Limited*, and *Sarvesh Security Services* has reaffirmed that pre-arbitration procedures are not mandatory.

Comment

In view of the above, it is difficult to ascertain with certainty whether pre-arbitration procedures are enforceable. However, a reasonable approach is to proceed on the basis (with the exception of the Delhi High Court decisions) that courts in India are likely to interpret arbitration clauses strictly and give effect to the language of clause. The courts however have not expressly examined this question (of pre-conditions to arbitration) as a matter of "admissibility" or "jurisdiction" or "procedure". The distinction between these concepts has been discussed in Professor Jan Paulsson's article here, and Professor Gary Born's article here.

The proper forum to determine if pre-arbitration steps have been satisfied and the consequences

It is also noteworthy that the 2015 Amendments have considerably limited the extent of court intervention whilst making arbitrator appointments. Previously, Indian courts exercised wide jurisdiction at the appointment stage and could decide on a host of issues at this juncture which lead to considerable delays. Accordingly, the amended arbitration act introduced a statutory limitation on the scope of a court's enquiry at the appointment stage to the "*examination of the existence of an arbitration agreement*". The legislative intent behind the amendments was to confine the court's jurisdiction, and to make the arbitral tribunal the appropriate forum for the determination of such controversies. Accordingly, the SCI in *Duro Felguera*, held that at the appointment stage, the courts can only "*see whether an arbitration agreement exists – nothing more, nothing less*". However, despite these legislative reforms, and the decision in *Duro Felguera*, a larger Bench of the SCI (three-judge bench in *United India Insurance Co. Ltd.*) went into the question of whether arbitration "*pre-conditions*" were met at the pre-constitution stage. With respect, this decision may be inconsistent with the recent legislative effort to designate the arbitral tribunal as the proper forum to determine such questions. Further, there is little clarity regarding the standard of judicial review to be applied whilst making these determinations.

Suggested approach

As a middle path, the Indian courts could consider adopting a similar approach taken by the Singapore Court of Appeal in *International Research Corp PLC v Lufthansa Systems* where the Court took the view that if the pre-conditions are defined with sufficient clarity and specificity, they are mandatory in nature whereas if they are vague and general in nature, they cannot be mandatorily enforced.

Further, the courts could offer clarity on the standard of compliance needed to satisfy the pre-arbitration conditions. Similar to the ruling in *International Research Corp PLC*, the Indian courts could also require "actual compliance" (or strict compliance) of the pre-conditions as opposed to "substantial compliance". These determinations could be made on a case-by-case basis and with an underlying objective to uphold the parties' intentions.

A clear statement of law would also enable parties to achieve a greater understanding on their pre-

arbitration obligations and prompt them to make *bona fide* efforts to comply with the same. This could result in successful settlements in some cases and truly achieve the rationale behind pre-arbitration mechanisms, which is to save time and costs by voluntary settlement.

Finally, legal certainly would be particularly useful in the Indian context where the respondents routinely resist applications for the appointment of arbitrators and raise jurisdictional objections on the basis that certain “pre-conditions” (such as mediation) have not taken place. Clarity on this subject would discourage respondents from advancing unmeritorious objections thereby accelerating arbitrator appointments and the arbitration process as a whole.