# ***THE PRE-ARBITRATION PROCEDURES - INDIA- UK – SINGAPORE***
# ***OPTIONAL Vs MANDATORY***

## *INTRODUCTION*

Alternate Dispute Resolution has been the most sought-after means for resolving disputes, especially in a world of transactions. Modern-day arbitration agreements have seen a great influx of parties incorporating provisions that require them to take certain steps before resorting to the adjudicatory process 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.

Nonetheless, despite being a recurrent feature in dispute resolution clauses, the legality of pre-arbitration procedures in India is unclear and an overview of the judgments shows that the courts have often rendered 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, while other courts (the minority view) have characterized (as a matter of general principle) pre-arbitration steps as optional and non-mandatory.

This article shall deal with these perplexities that envelop a contract with a dispute resolution clause setting out pre-arbitration procedures as a condition precedent and addressing the effectiveness of such a clause.

## *PRE-ARBITRATION PROCEDURES*

Pre-arbitration procedures are colloquially known as escalation clauses or "ADR first" clauses. Parties opting for the incorporation of such clauses have an understanding that, if an issue arises, they shall use this process-based approach, which may include negotiation, mediation, or conciliation, before resorting to arbitration. These preliminary procedures are designed to help both parties to resolve any disputes before taking the subject to arbitration. The adjudicatory process of Arbitration is the final tier of these clauses to fasten the resolution of disputes, and it is employed only if the initial stages have failed.

The inclusion of such clauses in transactional documentation is governed by recognition of the understanding that all disputes do not require to undergo the rigorous of the adversarial dispute resolution process and scripting a pre-arbitration procedure is intended to nudge parties to seek alternative modes of dispute resolution before moving towards the more cumbersome and judicial process of arbitration. But it's of prime importance to understand the jurisdictional acceptability of such clauses both on the domestic and international front to scope out their effectiveness for one's consideration.

## *THE JURISDICTIONAL APPROACH TO PRE-ARBITRATION PROCEDURES*

### *INDIA*

In India, the courts have taken a unique approach while dealing with pre-arbitration procedures. Pre-arbitration procedures are in customary practice obligatory in nature. A plethora of cases iterating the nature of clauses as mandatory or directory in nature such as M.K. Shah Engineers,[1] Demerara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd,[2] S. Kumar Construction Co. v. Municipal Corp. of Greater Bombay[3], Siemens Ltd. v. Jindal India Thermal Power Ltd.,[4] and Geo Miller & Co. Pvt. Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.,[5] exist reiterating this position.

However, some exceptions were determined by the Indian courts from time to time:

a) Language of the pre-arbitration procedure is clear.
b) Prospect of a dispute getting resolved through such pre-arbitral procedures is grim.
c) The ability to resolve the dispute within a reasonable time, before reaching the breaking point.
d) The party objecting to non-compliance with the pre-arbitration procedure has, through its conduct, waived the pre-arbitral procedures.

Thus, the nature of a pre-arbitration procedure is determined only on a case-to-case basis, making India a jurisdiction that is flexible and amenable to a pre-arbitration procedure.

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[1] (1999) 2 SCC 594.
[2] (2015) 13 SCC 610
[3] 2017 SCC OnLine Bom 130.
[4] 2018 SCC OnLine Del 7158.
[5] 2019 SCC OnLine SC 1137

## *UNITED KINGDOM*

The English courts in the past have been hesitant to rule that pre-arbitral procedures in dispute settlement agreements are jurisdictional prerequisites to arbitration, especially in the absence of explicit wording to that effect. These decisions stem largely from the House of Lords's decision in Walford v. Miles,[6] in which it was held that a bare agreement to negotiate was unenforceable as a mere 'agreement to agree'.

The English courts have historically adopted a strict stance, as seen in the case of Sulamerica CIA Nacional De Seguros S.A. v. Enesa Engenharia S. A[7] and others. It was held in the above case that "*An enforceable agreement to mediate must sufficiently outline the parties' rights and responsibilities"* and that in the absence of the same, such an agreement is not enforceable and won't constitute a condition precedent to the right to refer the case to arbitration.

In 2014, the English High Court released a decision in Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited,[8] which is a direct contradiction to the standing in Sulamerica and Tang, where the High Court held that negotiation was a 'condition precedent to the right to refer an arbitration claim'.

However, ultimately, the decision of the High Court in Emirates Trading was overruled in 2021 by the High Court itself in the Republic of Sierra Leone v. SL Mining Ltd.[9] It was held that failure to comply with pre-arbitration steps in a dispute resolution clause might not result in the dismissal of claims for lack of jurisdiction, however, such a failure could still result in the dismissal of claims for lack of admissibility. Thus, reflecting the current standing of pre-arbitration procedures in India.

## *SINGAPORE*

In Singapore, pre-arbitration agreements to negotiate or mediate are typically enforceable, and courts are likely to respect the parties' choice of dispute resolution mechanism and give effect

[6] [1992] 1 All ER, at 460
[7] [2012] EWHC 42 (Comm); [2012] EWCA Civ 638
[8] [2014] EWHC 2014 (Comm)
[9] [2021] EWHC 286 (Comm).

to such agreements without being particularly concerned about the law's inability to compel parties to negotiate in good faith.

The Singaporean courts 2019 moved away from its previous position of attaching jurisdictional consequences to any failure to satisfy the pre-arbitral requirements of a dispute resolution clause. The Singapore Court of Appeal in their 2013 decision in International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another,[10] ruled that strict compliance with pre-arbitral procedures in dispute resolution clauses was a binding precondition to arbitration, the non-compliance with which could deprive a tribunal of its jurisdiction.

However, the Singapore Court of Appeal in their 2020 judgment in the case of BTN v. BTP[11] dismissed the case on the grounds that the question of *res judicata* was one of admissibility, not jurisdiction, and that the court lacked the authority to invalidate the arbitral decision. According to the Court of Appeal, "tribunals' decisions on objections regarding preconditions to arbitration, such as time limits, the fulfilment of conditions precedent, such as conciliation provisions before arbitration may be pursued, mootness and ripeness are matters of admissibility, not jurisdiction."

The Singaporean Courts now akin to their colleagues in the UK, interpret pre-arbitration procedures in dispute settlement clauses as prerequisites to claim admission rather than as a jurisdictional requirement antecedent to arbitration, this was cited with approval by the English High Court in the case of the Republic of Sierra Leone v. SL Mining Ltd.[12] But this, however, does not imply that claims will be dismissed if pre-arbitration procedures are not followed, instead, it merely implies that claims might be rejected based on inadmissibility. It also further reinforces the opinion of an arbitral tribunal being the appropriate body to evaluate the repercussions if any, that may arise because of the failure to comply with pre-arbitral procedures in a multi-tier dispute resolution clause.

## *ARBITRAL TRIBUNAL AND PRE-ARBITRATION PROCEDURE*

Arbitral tribunals have traditionally demonstrated a general reluctance to choose a course of action that would bar the commencement of arbitration or deprive a tribunal of the jurisdiction

[10] [2013] SGCA 55
[11] [2020] SGCA 105
[12] [2021] EWHC 286 (Comm)

where a party has failed to fulfil the pre-arbitral steps in a pre-arbitration procedure. The ICC Arbitral Tribunal has further gone and held that little purpose would be served by dismissing the arbitration for lack of jurisdiction, other than to cause wasted time and expense for non-compliance with pre-arbitration procedures.

It is based on a slew of cases, such as Ethyl Corporation v. Canada,[13] and Salini Costruttori v. Morocco[14] among others, that the arbitral tribunals are by and large reluctant to find that pre-arbitral steps in pre-arbitration procedures are jurisdictional conditions precedent to the commencement of arbitration, particularly where doing so would have the effect of terminating an arbitration or otherwise depriving a tribunal of jurisdiction. Arbitral tribunals being the harbingers of arbitration endorse only those concepts that promote arbitration as the forerunner of dispute resolution and not those that may hinder its use and value.

## *CONCLUSION*

A party cannot directly jump and skip the requirement of pre-arbitral steps without any cause, especially when the courts in India and across the globe have shared varied standpoints, the status quo while dealing with pre-arbitral steps supports mandatory compliance when they are written precisely. All a party is required to do is to at least make a bonafide attempt to exhaust the remedy of pre-arbitral steps and if that is not viable and it appears that the other party is not trying to settle the matter amicably and is just prolonging the same for the sake of escaping its liability, then such pre-conditions hold no bar for the parties to invoke the arbitration and take the necessary steps for the appointment of an arbitrator for the adjudication of their disputes.

That said, a majority of courts and scholars across the world agree that non-compliance with the pre-conditions is a matter of admissibility – and not the tribunal's jurisdiction.

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[13] [1998] 38 Int'l Legal Mat 708
[14] [2001] ICSID Case No. ARB/00/4