

Pre-Arbitral Steps/Preceding Steps: Whether Mandatory or Directory

Arbitration agreements often provide various procedural steps such as conciliation, negotiation, mediation to be resorted to by a party for resolution of disputes before such party can proceed to invoke the arbitration. These steps are commonly known as pre-arbitral steps or preceding steps.

However, an important legal question arises at this stage, whether such steps are mandatory in nature and the consequences, if any, in case a party failed to comply with these pre-arbitral/preceding steps. Further, in the above case, can an objection be raised to the effect that since the party invoking the arbitration had failed to follow the pre-arbitration/ preceding steps, therefore, invocation of arbitration is premature.

There have been conflicting decisions passed by different High Courts on this issue and in this article, such decisions are being discussed.

A. PRE-ARBITRATION STEPS ARE MANDATORY

In many cases, the Courts have held that the pre-arbitral/ preceding steps laid down in a contract to be followed before the initiation of arbitration proceeding, are essential and mandatory in nature.

The Kerala High Court in the matter of **Nirman Sindia v. Indal Electromelts Ltd., Coimbatore**¹ has held that when the parties to a contract agree to any special mode for resolution of the disputes arising out of the agreement, then they are bound to comply with the mode prescribed under the agreement. The party cannot jump into the second step without exhausting the first step provided for the resolution of dispute.

Further, Delhi High Court in the judgment of **Sushil Kumar Bhardwaj and Ors. vs. Union of India (UOI) and Ors.**² while relying upon the above judgment of Kerala High Court, has held that the procedure required before invocation of arbitration is mandatory and not



Abhishek Kumar
Partner

E: abhishek@singhania.in



Aditi Tayal
Associate

E: aditi@singhania.in

¹ 1999 SCC OnLine Ker 149

² 2009 SCC OnLine Del 4355

directory. It was held that before approaching the court seeking appointment of an arbitrator, a party is required to first exhaust the agreed procedure or the procedure prescribed by the law.

The Rajasthan High court in the case of **Simpark Infrastructure Pvt. Ltd. vs Jaipur Municipal Corporation**³ has held that where the parties agreed to a particular procedure for dispute resolution and prescribed condition precedent for invoking the arbitration clause, the same is required to be followed. When the particular steps are not followed by the parties and the aggrieved party file an arbitration application, then the same is premature.

The Bombay High Court in the matter of **Tulip Hotels Private Limited v Trade Wings Limited**⁴ dismissed a petition for the appointment of an arbitrator where the parties had failed to follow the prescribed pre-arbitral step of conciliation. The court held that where the parties agree to a specific procedure and mode for settling their dispute by way of arbitration and prescribe certain pre-conditions for referring the matter to arbitration, they must comply with those pre-conditions and only then can they refer the matter to arbitration.

B. DISCRETIONARY NATURE OF PRE-ARBITRAL STEPS

On the contrary, there have been several judgments wherein, the requirement of following the pre-arbitral steps has been held to be discretionary.

The Supreme Court of India in the case of **Demerara Distilleries (P) Ltd v. Demerara Distilleries Ltd.**⁵, has held that the requirement of pre-arbitral steps is not mandatory. In the said case, an application under Section 11 of the Arbitration and Conciliation Act, 1996, was filed for the appointment of an arbitrator. However, the said application was objected on the ground of being pre-mature by the Opposite Party as the language of the dispute resolution clause provided the parties to engage in mutual discussion, followed by mediation and only in the absence of a resolution, to refer the disputes to arbitration. However, the Supreme Court rejected this contention and held that the objections with regard to the application being premature and thus the disputes not being arbitrable, would not merit any **serious consideration** and proceeded to appoint the arbitrator in the matter.

Further, the Delhi High Court in the matter of **Ravindra Kumar Verma vs. M/S. BPTP Ltd. & Anr**⁶ while relying on its earlier decisions of **M/s. Sikand Construction Co. Vs. State Bank of India**⁷ and **Saraswati Construction Co. Vs. Cooperative Group Housing Society Ltd.**⁸ held that pre-arbitral steps stated in a pre-arbitration clause are directory in nature and not mandatory. The Court, however, in this matter observed that before formally starting effective arbitration proceedings parties should follow the agreed procedure for conciliation as agreed between the parties in a time bound reasonable period, and if the same fails,

³ 2009 SCC OnLine Raj 2738

⁴ 2009 SCC OnLine Bom 1222

⁵ (2015) 13 SCC 610

⁶ 2014 SCC OnLine Del 6602

⁷ 2014 SCC OnLine Del 6602

⁸ 1994 SCC OnLine Del 563

parties can thereafter proceed with the arbitration proceedings. The Court took a middle path in this matter.

Subsequently, different High courts in the matters of **Kunwar Narayan vs. Ozone Overseas Pvt. Ltd. and Ors⁹**, **Siemens Limited vs. Jindal India Thermal Power Limited¹⁰**, **Union of India vs. M/s Baga Brothers¹¹**, **Sarvesh Security Services Pvt. Ltd. vs. Managing Director, DSIIDC¹²**, relied upon the judgement of Ravindra Kumar (*supra*), and reiterated that the pre-Arbitral steps are directory in nature.

However, one important question needs to be addressed here, whether in a case where a party opts for following the pre-arbitral steps and substantial time is lost before such steps are concluded, can an issue of limitation be raised? In such case, it becomes important to examine whether such time can be said to be included or excluded for the purpose of calculation of limitation. This constant debate was resolved by the Supreme Court of India in the matter of **Geo Miller & Co. Pvt. Ltd. Vs Rajasthan Vidyut Utpadan Nigam Ltd¹³** in which it was clarified that the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. Further, Delhi High Court in the matters of **Alstom systems India Pvt. Ltd. Vs. Zillion Infraprojects Pvt. Ltd¹⁴** and **Welspun Enterprises Ltd. v. NCC Ltd.¹⁵**, once again relied upon the above judgment of Geo Miller (*supra*) and held that when the agreement between the parties provides for pre-arbitral steps, the time spent in such process shall be excluded from the period of limitation.

Conclusion

Thus, on the analysis of the above-mentioned judgments, it is clear that the requirement of fulfilling the pre-arbitral steps, is not mandatory before invoking arbitration. However, a party cannot directly jump and skip the requirement of pre-arbitral steps without any cause. 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.

© 2022 All rights reserved. This article is for information purposes only. No part of the article may be reproduced or copied in any form or by any means [graphic, electronic or mechanical, including photocopying, recording, taping or information retrieval systems] or reproduced on any disc, tape, perforated media or other information storage device, etc., without the explicit written permission of Singhania & Partners LLP, Solicitors & Advocates ("The Firm").

Disclaimer: Though every effort has been made to avoid errors or omissions in this article, errors might creep in. Any mistake, error or discrepancy noted by the readers may be brought to the notice of the firm along with evidence of it being incorrect. All such errors shall be corrected at the earliest. It is notified that neither the firm nor any person related with the firm in any manner

⁹ 2021 SCC Online Del 1950

¹⁰ 2018 SCC OnLine Del 7158

¹¹ 2017 SCC OnLine Del 8989

¹² 2018 SCC OnLine Del 7996

¹³ (2020) 14 SCC 643

¹⁴ MANU/DE/0380/2022

¹⁵ MANU/DE/3927/2022

shall be responsible for any damage or loss of action to anyone, of any kind, in any manner, therefrom