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Arbitration clauses: A weapon to combat pocket burning costs

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Abstract
Due to its various benefits and adaptability, arbitration is becoming a preferred method of resolving disputes. Escalation clauses, often referred to as step clauses or multi-tier arbitration clauses, are currently being added to agreements and contracts as a result of the expanding usage of arbitration in legal agreements across the globe. Multi-tier arbitration agreements require the parties to first attempt to resolve any disputes, if any, through several alternative dispute resolution procedures.
In a time of significant investment, exchange, and cross-border trade, modern commercial contracts often contain arbitration clauses as an effective means of resolving conflicts swiftly. Arbitration can be expensive and is not a cost-effective solution to settle minor disputes, despite its benefits. As a result, clauses that mandate the parties file an arbitration request are appearing in more and more contracts. These prerequisites are expressed as "multitiered" and "escalation" clauses, which often ask for compromise and economically advantageous alternatives to zero-sum arbitration before proceeding with it.
This tragedy has not only exacerbated existing issues but also brought about new ones that undermine the efficiency of arbitrary procedures. Instead, the lack of compliance with these rules is used by the parties to contest the arbitration, and in a few rare instances, internal courts have improperly interfered with awards. They do. This article's goal is to define the arbitration's procedural requirements and assess whether or not they are a matter of jurisdiction (an arbitration agreement is not enforceable until the necessary formalities are completed, the statute of the court is void, and the court cannot deal. with it). Until the subject of the fulfilment of the prior conditions is satisfied, when it is transferred to the centre of its authority).

Keywords: Arbitration, ADR, international law

Introduction
Parties to a disagreement agree to be bound by the outcome of the proceeding when they refer it to one or more individuals (the "arbitrators," "arbiters," or "arbitral tribunal") for a ruling (the "award"). Alternative dispute resolution (ADR), which is a procedure for settling conflicts outside of the courts, includes arbitration. It is a procedure for resolving conflicts in which a neutral third party reviews the evidence and renders a decision that is enforceable and binding on both parties. Expert non-binding resolution and mediation, a form of settlement discussion facilitated by an impartial third party, are two further forms of ADR.
Arbitration is becoming more and more well-liked as a conflict resolution strategy because of its many advantages and adaptability. Escalation clauses, also known as step clauses or multi-tier arbitration clauses, are now being included to agreements and contracts as a result of the growing use of arbitration in legal agreements all over the world.
If a dispute emerges, the parties must first attempt to settle it through a variety of alternative dispute resolution processes, according to multi-tier arbitration agreements. In accordance with these provisions, a dispute shall be resolved by the use of at least two different dispute resolution procedures, and, in the event that any such procedure proves to be ineffective, such dispute shall be resolved by the use of a different technique or procedure, until arbitration is finally used as a last resort. Arbitration is an expensive and time-consuming process.
The Pre-Arbitration Clauses in the Contract give the parties the option to try and settle their differences without resorting to arbitration, which, if successful, might save a significant amount of money and time. If the attempt fails, the parties will have ample time to prepare for the future arbitration processes. Additionally, if one side tries to resolve a dispute through negotiation or mediation before turning to legal action, the other side will likely perceive that as weak and unconvincing.

Pre-Arbitration Clauses provide the legal framework for dispute resolution processes without expressing these ideas. These clauses are perfect for parties who want to work together again after the dispute has been resolved.

Pre-Arbitration Clauses, which compel parties to try to settle a dispute amicably before bringing it to arbitration, and Post-Arbitration Clauses, which allow for a second tier of arbitration procedures, either in an Appellate capacity or for new adjudication, are the two categories under which multi-tier arbitration clauses fall.

A pre-dispute arbitration provision is an arbitration agreement that is put in place before a disagreement occurs. It is often one clause in a contract or agreement since it anticipates potential problems with a transaction or arrangement. Because arbitration is optional and both parties must choose to participate before the process can begin, the pre-dispute arbitration clause may automatically lead to arbitration services.

Pre-Arbitral clauses as per Indian arbitration act

Since the aforementioned issue has not yet been raised in Indian court, it is currently impossible to determine where Indian law stands on it. It is vital to analyse the judicial declarations produced by Indian courts that distinguish between "jurisdiction" and "admissibility" issues before delving into the collection of international legal precedents that have unambiguously stated an opinion on the aforementioned subject.

In general, when reading a contract, every word must have sense, and unless it is illegal, no part of the agreement or phrase utilised therein cannot be deemed redundant. The basic interpretation of a clause should, to the extent practicable, give effect to all of its provisions and avoid excluding any of them. 2 The court has very little power to change the applicability of a contract's clauses if they are obvious in the majority of circumstances. 3 This is true when arbitration is involved especially.

The pre-arbitral "conflict resolution procedures" of MTDRCs, which are generally referred to as "pre-arbitral procedures," have undergone many distinct treatments based on various factors. The general norm of required applicability of the pre-arbitral processes does not necessarily apply to MTDRCs. When deciding whether pre-arbitration procedures under MTDRCs are necessary or voluntary before arbitration proceedings can start, the courts have taken into account a number of issues.

In light of this, it is important to draw attention to the case of “BSNL v. Nortel Networks (India) (P) Ltd” [1], in order to find whether the issue of a legislative time bar related to jurisdiction or admissibility, the Apex Court used the "tribunal versus claim test." “The tribunal versus claim test, to put it simply, determines whether the objection or issue is directed at the tribunal or the claim (in the sense that the claim should not be arbitrated due to a flaw in or failure to consent to arbitration) (in that the claim itself is defective and should not be raised at all)”. Since the limiting issue in this case concerns admission rather than the Tribunal's authority, the Court decided to treat it as one dealing to admission.

Similar to this, “The Rajasthan High Court held in Simpark Infrastructure Pvt. Ltd. v. Jaipur Municipal Corporation” [6] that the parties shall comply with any dispute resolution procedure specified in the language of the Contract in order to be entitled to the benefit of the arbitration provision. The Hon'ble Apex Court specifically addressed MTDRCs in “M. K. Shah Engineers & Contractors v. State of Madhya Pradesh” [7], stating that the parties had to consult with the "Superintendent Engineer" before enforcing the “arbitration clause”. The Court determined that in order for the agreement to be legal, all of the prerequisites had to be met.

Another significant decision by the Apex Court was “United India Insurance Co. Ltd. v. Hyundai Engg. And Construction Co. Ltd”. [2], in which it was stated that, “in cases where the amount under the car insurance must be admitted as a requirement of bringing the claim in arbitration, the aforementioned condition must be satisfied before arbitration can be invoked because only the admitted amount can be made a part of the dispute to be decided by the Tribunal.” Consequently, if the party that appears to be in default admitted duty for the automobile coverage as a condition of default, the "arbitration clause" would be activated.

In “Demerara Distilleries (P) Ltd. v. Demerara Distillers Ltd”. [3], The Honourable Apex Court of India responded to an application for the appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996, by stating that correspondence between the parties indicated that any attempt to resolve the issues through mutual discussions and mediation would be a "empty formality" (the "Act").Even though there was an MTDRC, the Court approved the petition and ordered the parties to arbitrate the dispute.

The Apex Court took a completely different approach with regard to the evaluation of the criteria and declared that one must also take into account whether such prerequisites have been satisfied by the parties' communications as well as the possibility of success, especially when the requirements are ambiguous and lack clear-cut criteria by which to evaluate an effort to meet the requirements.

The Court inferred from the correspondence exchanged that the attempts to reconcile disputes through mutual discourse and mediation as a prerequisite in the current case are only a pointless formality and are not needed. It is crucial to emphasise that when the Court made its ruling, it did not consider whether the Arbitral Tribunal had the required jurisdiction to reach the same conclusion.

Although the Apex Court held in “S.K. Jain v. State of Haryana” [4] that adherence to prerequisites was required by the arbitration clause's text, the Apex Court's ruling was made after the Arbitral Tribunal had been established, and the said Tribunal ruled that it could not exercise jurisdiction because the mandatory prerequisites had not been met. Whether or whether a party's refusal to abide by an arbitral precondition is a problem that affects the Tribunal's jurisdiction or whether or not it impacts their ability to submit evidence in court has not been conclusively addressed by the Indian courts. In light of the inconsistent and inconclusive Indian legal precedent on the topic, it is crucial to examine recent international judgements that have unambiguously commented on the notion of preconditions.

Aspects of International Law

In the “US Apex Court” case "BG Group Plc v. Republic of Argentina" [5], “The first attempt to separate the questions of admissibility and jurisdiction may have been in a case where a challenge to an arbitral ruling was dismissed because the claim was based on the assumption that mandatory arbitration prerequisites had not been satisfied. The

requirement was outlined in a bilateral investment treaty (BIT) between the UK and Argentina, which stipulated that the claimant had to use up all domestic legal options in Argentina's domestic courts for a period of 18 months before submitting a claim in arbitration."

The "US Apex Court" further ruled that, absent a provision to the contrary in the arbitration agreement, it is up to the arbitral tribunal that has been appointed to determine the significance and meaning of procedural preconditions, including their non-compliance. "Questions regarding whether the parties are bound by an arbitration clause are left up to the courts, according to the US Apex Court."

"The Hong Kong Court of First Instance (HKCFI) recently ruled in T v. B" [6] "that any issue involving the compliance or non-compliance of arbitral preconditions is a question of admissibility and not jurisdiction, despite the fact that the parties and arbitrator in the current case referred to it as a jurisdictional challenge."

This Court concurred and upheld the justification in "C v. D" [7] and noted that it is appropriate to treat essential prerequisites as an issue of admissibility rather than jurisdiction as the same would be in agreement with the general trend of judicial restraint in meddling with the arbitration processes and would promote speedy resolution of cases rather than repealing rulings after a time-consuming and costly process on the basis of non-fulfilment of prerequisites.

The basic interpretation of a clause should, to the extent practicable, give effect to all of its provisions and avoid excluding any of them. The court has very little power to change the applicability of a contract's clauses if they are obvious in the majority of circumstances. This is true when arbitration is involved especially.

In "Kinli Civil Engineering v. Geotech Engg." [9], which dealt with a dispute stemming from a contract with an arbitration clause allowing a party to do so, the aforementioned case of "C v. D" [8] was also upheld. According to the Court, it lacks the authority to determine whether the requirements for the right to arbitrate have been met, so it issued a stay of proceedings in favour of the arbitration.

In "Republic of Sierra Leone v. SL Mining Ltd" [10], the English High Court adopted a similar attitude and stated expressly that any purported non-compliance with preconditions is to be viewed as a question of admissibility, notwithstanding the fact that the defendant in the current instance did not adhere to the preconditions to arbitration. It further asserted that the majority of well-known commentators and authorities advocated making the eligibility of parties to arbitrate the necessary conditions rather than the jurisdictional matter.

A consensus among domestic courts all over the world utilising a similar line of reasoning reveals that this justification and reasoning clearly understands the distinction between issues of admissibility and those of jurisdiction, so defining an international commercial arbitration norm.

Conclusion

Arbitration is becoming more popular as a conflict resolution approach due to its numerous benefits and adaptability. Escalation clauses, often referred to as step clauses or multi-tier arbitration clauses, are currently being added to agreements and contracts as a result of the expanding usage of arbitration in legal agreements across the globe. An arbitration clause that is established before a dispute arises is known as a pre-dispute arbitration provision. Since it foresees future issues with a transaction or arrangement, it is frequently one clause in a contract or agreement. The pre-dispute arbitration clause may automatically result in arbitration services because arbitration is optional and both parties must choose to participate before the process can begin.

"The best approach is to presume, absent contrary evidence, that pre-arbitration procedural requirements are not jurisdictional, but matters better determined by the arbitrators."

Although it would appear to be against the parties' contractual intent to begin arbitration before the preconditions have been satisfied, the method explained above casts question on how supple the preconditions really are. A disagreement will arise between the parties if certain contract requirements are not met, and if the contract has an arbitration clause, the dispute will be sent to arbitration. It would be foolish to characterise the failure to comply with preconditions as a matter for the courts to consider if the parties had intended for all disputes and issues between the parties to be resolved by arbitration. This is because the courts would ultimately treat preconditions as a question of jurisdiction rather than that of admissibility.

It is important to make it clear that a party is still required to comply with the arbitration requirements even if they are referred to as an issue of admission. The arbitrator shall have the power to arbitrate and resolve any controversy arising under or relating to the Contract and shall have the ability to determine whether the foregoing requirements are required or merely suggestive. For example, if a prerequisite utilises the word "must" rather than the word "may," it should be taken as necessary. If the arbitrator believes that the preconditions must be met in order for the party in dispute to proceed, he may compel the parties to do so instead or impose a cost penalty on the party who does not comply.

Prerequisites itself serves as a moratorium period during which the parties may come to an agreement on some or all of their issues, and preconditioned procedures frequently entail the interpretation of the parties' intentions, which support this concept. Due to the temporary nature of these arbitration rules, any claims that are filed before the arbitral tribunal but are not covered by them will be rejected as being untimely.

"Reference the Oxford Handbook of International Arbitration (OUP 2020) at Paras 6-7":

"The jurisdictional issue relates to the Tribunal's authority. The question of admissibility concerns the claim rather than the Tribunal and inquires as to whether or not this is a claim that can be submitted in the appropriate manner. It specifically takes into account the issue of whether there are any requirements for using the right to arbitrate that have not been met. These restrictions could include things like a deadline for initiating arbitration proceedings or a demand that mediation and/or negotiation take place first before any arbitration procedures can begin."

If the Tribunal judges a claim to be premature and, as a result, inadmissible under specific circumstances, the parties must form a new tribunal. Preconditions are unquestionably established to be by their very nature a matter of admissibility, and it is preferable to leave these

determinations to the Tribunal rather than the domestic courts because to do otherwise would be against the spirit of arbitration.

When one of the following conditions occurs:

(a) the MTDRC expressly declares that such pre-arbitral processes are mandatory;
(b) it is unlikely that the dispute will be settled through such pre-arbitral procedures;
(c) the court judges that the dispute cannot be settled in "reasonable time" (or prior to the deadline to invoke the arbitration provision) by such processes;or
(d) the party opposing the pre-arbitral procedures loses its mandatory nature and becomes merely voluntary (as observed in M.K. Shah Engineers).

However, it cannot be argued that MTDRCs in India have a predetermined nature; rather, it must be decided on a case-by-case basis. The fact that Indian courts have not decided whether to treat preconditions as issues of admissibility or jurisdiction may be both fortunate and unfortunate because it gives them the opportunity to develop a thorough set of guidelines and legal standards that address prerequisites for arbitration as questions of admissibility and are consistent with the practises of international arbitration. Domestic courts are not allowed to interfere if the arbitral preconditions are determined to be admissibility-related.

However, if the aforementioned need were to be seen as a jurisdictional issue, it would encourage a rush of needless lawsuits and fill the already overburdened Indian courts with pointless attempts to set aside the judgement for trivial reasons like failing to meet the arbitral preconditions.

References

1. The idea of arbitration by J Paulsson; c2013.
2. Arbitration and Mediation in the Long Eighteenth Century, by Derek Roebuck, Francis Boorman and Rhiannon Markless, published by Holo Books, The Arbitration TG Nelson; c2020.
3. India Satisfies Its Jones for Arbitration: New Arbitration Law in India TS Work Transnat'l Law; c1997
4. Arbitration Law in India–an Overview by S Jaiswal; c2020.
5. International Commercial Arbitration in India: Challenges and Opportunities by IN LAW; c2021.
6. Arbitration Reforms in India-The Case for Third Party Funding of Arbitral Claims by SR Garimella; c2018.
7. Investment Arbitration in India by K Pandey, A Das; c2021.
8. India's parliament introduces Bill to alter Arbitration Law: attempt to put an end to fraudulent practices. By G Anand, S Anand; c2021.