

Navigating the pre-arbitration maze

AVOIDING A LEGAL QUAGMIRE. By clearly defining its nature, businesses can enhance efficiency and minimise docket explosion

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Arbitration agreements across jurisdictions commonly incorporate measures such as conciliation, negotiation and mediation to amicably resolve disputes before formally triggering arbitration. These pre-arbitral steps give rise to significant legal questions. Firstly, are these steps are mandatory or not. Secondly, what happens if a party fails to adhere to the pre-arbitral measures? Can an objection be raised that the invocation of arbitration is premature due to failure of a party to exhaust the preliminary steps completely?

The issue has led to conflicting decisions from various High Courts across India. On the one hand, the Indian courts have asserted the mandatory nature of pre-arbitral steps stipulated in a contract before commencing arbitration proceedings. In *Nirman Sindia vs Indal Elec-*

tromelts, the Kerala High Court emphasised that parties entering a contract with a specified dispute resolution mechanism must strictly adhere to the agreed-upon procedure. The court opined that skipping the initial step and proceeding directly to the second step is impermissible. The Rajasthan High Court, in *Simpark Infrastructure vs Jaipur Municipal Corporation* also agreed on the same. The Delhi High Court, in *Sushil Kumar Bhardwaj vs Union of India*, similarly held that the procedural requirements preceding the invocation of arbitration are not discretionary, but mandatory.

The failure to follow the specified steps renders an arbitration application “premature”. The Bombay High Court, in *Tulip Hotels vs Trade Wings*, dismissed a petition seeking the appointment of an arbitrator when the parties failed to adhere to the prescribed pre-arbitral step of conciliation. It asserted that only after fulfilling these pre-conditions could the parties refer the matter to arbitration. However, the Supreme Court, in *Demerara Distilleries Pvt*



IN A LABYRINTH. Is pre-arbitral a mandatory or discretionary process?

Ltd vs Demerara Distilleries Ltd, ruled that pre-arbitral steps are not mandatory. The apex court appointed an arbitrator, rejecting the objection of prematurity.

In *Ravindra Kumar Verma vs BPTP*, the Delhi High Court held that pre-arbitral steps outlined in an arbitration clause are discretionary, not mandatory. It acknowledged

that parties should attempt to follow the agreed conciliation procedure within a reasonable period before initiating arbitration, but emphasised that arbitration can be triggered if the discretionary pre-arbitral steps fail or become a empty formality. Subsequently, several decisions of the Delhi HC have aligned with the Ravindra Kumar judgment,

stressing the directory nature of pre-arbitral steps.

Then, the question of limitation also comes into play. The SC addressed this aspect in *Geo Miller vs Rajasthan Vidyut Utpadan*, clarifying that the time spent in good faith negotiations for an amicable settlement may be excluded when calculating the limitation period for triggering arbitration under the Arbitration and Conciliation Act.

Thus, there are conflicting judgments and a lot depends on how the dispute resolution clauses are worded. To navigate this ambiguity, enterprises should proactively structure dispute resolution clauses with precision. By incorporating language that clearly defines the mandatory nature of pre-arbitral steps and establishes specific timelines for their completion, businesses can enhance the effectiveness of the dispute resolution process and also minimise docket explosion of the judiciary.

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