I.

Multi-tier Arbitration Clauses in India: *Analysing the Nature and Standard of Compliance on International Parameters*

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Arbitration agreements frequently use multi-tier dispute settlement clauses imposing certain pre-arbitral procedural requirements that should be complied with before finally commencing arbitration proceedings. The objective of these kinds of clauses is to enhance the efficiency of arbitration process and save unnecessary proceedings and cost. Despite their objective, these pre-conditions have produced frequent and confusing issues of their own. This article critically analyses the divergent and inconsistent judicial interpretations given by Indian Courts while adjudicating upon validity and enforceability of multi-tier arbitration clauses. Certain recommendations based on the judgements of Singapore and English High Courts have been provided in order to bring consistency while adjudicating upon the matters involving pre-arbitral procedural requirements and multi-tier arbitration clauses.

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Arbitration has emerged as one of the most sought after Alternative Dispute Resolution ("**ADR**") mechanisms in the recent times.[2] It has been proven as an efficient, effective and convenient mode for settlement of disputes in commercial matters.[3] In order to choose arbitration as a mode of dispute settlement, the parties have to incorporate an arbitration clause in their contract.[4] As per Section 7 of the Act, the clause has to be in writing and it can either be a separate agreement or a part of the principle agreement between the parties.[5] The fundamental principle of 'Party Autonomy' in arbitration provides the parties with the freedom to choose the jurisdiction and procedure for carrying out arbitration proceedings.[6] Recently, a practise of including certain pre-arbitral procedures in order to finally commence arbitration has been followed in the arbitration clauses.[7] These clauses, known as 'Multi-tiered Dispute Resolution clauses' or 'Multi-tier Arbitration Clauses', set out a sequence of steps that are to be followed in-order invoke arbitration as a final step.[8] These pre-arbitral steps generally consist of procedures such as mediation, conciliation, negotiation and any other form of amicable settlement.[9] However, there have been several issues with respect to validity, nature and enforceability of such clauses.[10] Despite being in recurrent use, there is no certainty with respect to their nature being directory or mandatory.[11] Moreover, the question of standard of compliance, i.e. at what point does the obligation to fulfil a pre-condition in a multi-tier clause can be said to have been fulfilled, is still unanswered. The courts have dealt with these clauses on numerous occasions and have given different

[2] Vivek Vashi and Shreya Ramesh, 'Emergence of Arbitration in India as a robust mechanism of dispute resolution' (*Thomson Reuters Practical Law*, 1 Sept 2015) https://uk.practicallaw.thomsonreuters.com/1-618-5252?__lrTS=20200528020016846&transitionType=Default&contextData=(sc.Default)&firstPage=true, Accessed 27 October 2020.
[3] *Ibid.*
[4] §7, Arbitration and Conciliation Act 1996; *Karam Chand Thapar And Bros. v. Akaljot Singh Sekhon*, 2005 (3) MhLj 797.
[5] *Ibid.*
[6] *State Trading Corporation of India v. Jindal Steel and Power Limited and Ors*, Civil Appeal No. 2747 Of 2020 (Delhi High Court).
[7] G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 101-04 (4th ed. 2013).
[8] G. Born, *International Commercial Arbitration* (2nd Edn, Wolters Kluwer 2014) pg. 278-279.
[9] *Ibid.*
[10] *Ibid* at 918.
[11] Gary Born and Marija Šcekic, 'Pre-Arbitration Procedural Requirements: "A Dismal Swamp" in David D Caron et al (ed), *Practising Virtue Inside International Arbitration* (Oxford University Press 2015) 227.

opinions as to their standard of compliance and nature as directory or mandatory.

This article analyses some major judgements passed by the Supreme Court of India and High Courts in the recent past on this aspect. The first part discusses the divergent views taken by the High Courts in India to treat multi-tier clauses as mandatory or directory. In the second part, the judicial precedents with respect to the standard of compliance necessary to fulfil the requirement of multi-tier clauses, in case they are treated as mandatory by the court is discussed. The third part is a comparative analysis of the stance taken by the English Courts, while dealing with multi-tier clauses, with that of the Indian Courts decisions. Lastly, the fourth part lays down certain recommendations so as to bring uniformity in the treatment of multi-tier clauses in India.

A. Nature Of Multi-Tier Clauses

The nature of multi-tier clauses and enforcing them as mandatory or directory has been aa grey area in Indian Jurisprudence.[12] Though the Apex court has treated pre-arbitral requirements in a multi-tier clause as mandatory[13], High Courts in India have given diverse opinions with regard to their nature and as a result the position still remains quite ambiguous. However, it can be seen that in most of the cases High Courts have rendered multi-tier clauses as directory on two major grounds; *firstly*, lack of specificity of the clause and *secondly*, due to application of the Limitation Act, 1963. Some of the major judgments passed by different High courts are discussed below in order to better understand the prevailing position.

B. Specificity of the Clause

The Delhi High Court in the case of *Ravindra Kumar Verma v. BPTP Ltd.*[14] discussed the issue of enforceability of multi-tier clauses as mandatory or directory in great detail. The court while discussing the ratio in the case of

[12] *Ravindra Kumar Verma v. BPTP Ltd.*,2015(147) CRJ 175; *Saraswati Construction Co. v. Co-operative Group Housing Society Ltd.,* 1994 RLR 458; *S. Kumar Construction Co. and Ors. v. The Municipal Corporation of Greater Bombay and Ors., 2017(6) ABR 215; Sarvesh Security Services Pvt. Ltd. v. Managing Director*, DSIIDC Arb. P. 196 of 2014 (Delhi High Court) (Unreported).
[13] *Visa International Ltd. v. Continental Resources (USA) Ltd., AIR* 2009 SC; *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee*, AIR 2014 SC 3723/.
[14] 2014 (145) DRJ 175.

Saraswati Construction Co. v. Co-operative Group Housing Society Ltd.[15] held that multi- tier clauses are only directory and there is no mandatory requirement to follow such pre-conditions whatsoever. The court highlighted the ratio of *Saraswati Construction Co.* Case where it was held that

> "*the prior requirement as stated for invoking arbitration even if not complied with, the same cannot prevent reference to arbitration, because, the procedure/pre-condition has to be only taken as a directory and not a mandatory requirement.*"[16]

The clause in the case of *Ravindra Kumar Sharma* was as follows:

> "*All and any disputes arising out of or touching upon or in relation to the terms of this application and/or Standard Floor Buyer's Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 ... New Delhi.*"

The Delhi High Court held that the pre-arbitral requirement in such a clause cannot be held to be mandatory as it can result in serious and grave prejudice to a party who is seeking to invoke arbitration because the pre-arbitral procedure can take any amount of time and the time consumed in proceedings before seeking invocation of arbitration is not exempted from limitation under the Limitation Act, 1963[17] which imposes a limitation of 3 years for invoking arbitration from the date[18] (*the issue of application of Limitation Act, 1963 is discussed in detail in the section below*). Further, it is clear from a bare reading that the above clause only vaguely talks about 'amicable settlement' without any specific details as to what will be the mode of this 'amicable settlement'. The clause lacks clarity with respect to neither the method that shall be followed for 'amicable settlement' (mediation/negotiation or any other) nor the time limit within which such settlement shall be carried out.

[15] 1994 RLR 458.
[16] *Ibid.*
[17] Limitation Act 1963, §14.
[18] *Visa International Ltd* (n 12) ¶8.

The court therefore directed that the parties can carry out the pre-arbitral requirements of conciliation or other discussion in a reasonable time bound manner.[19] Having said this, the court emphasised upon the specificity of the procedure, time limit and the manner in which the pre-arbitral requirements should be carried out. It can be said that though the court held the clause in this case to be directory, the first step that can be taken in order to even remotely enforce such clauses is to pay attention to the details and clearly specify the procedure and time limit to fulfil the pre-conditions.

The Bombay High Court in the case of *S. Kumar Construction Co. and Ors. v. The Municipal Corporation of Greater Bombay and Ors*[20] highlighted the importance of specific details that shall be included for carrying out the pre-arbitral procedural requirements in order to enforce them as mandatory.

In the said case, a dispute arose with respect to Clause 96 and Clause 97 of the agreement were the primary question was whether it is necessary to comply with Clause 96 (pre-arbitration condition) of the General Conditions of Contract to invoke arbitration under Clause 97 in the context of the jurisdiction of the Arbitral Tribunal? The said clauses are as follows:

> "*Clause 96:- Any dispute or difference to be referred to Commissioner:- If any doubt, dispute or difference arises or happens between the Engineer or any other officer on the one hand and the Contractor on the other hand, couching or concerning the said works or any of them, or relating to the quantities, qualities description or manner of work done and executed by the Contractor, or ..... or in any way whatsoever relating to the interests of the Municipal Corporation or of the Contractor in the premises, every such doubt, dispute and difference shall from time to time be referred to the Commissioner who shall give his decision within a period of 90 days and if the contractor is not satisfied with the decision of the Commissioner or the Commissioner fails to give the decision within the period of 90 days, such dispute may be referred to arbitration as per condition No. 97.*"
>
> "*Clause 97:- Arbitration:- All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution or maintenance thereof or this contract or the construction, execution, or maintenance thereof or this contract thereof*

[19] *Ibid* ¶11, 12.
[20] 2017 (6) ABR 215.

> *or, to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before or after determination, foreclosure or breach of the contract (other than those in respect of which, the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them specify the nature of such dispute or difference and call for the point or points at issue to be referred to the arbitration*."

The court in this case held that Clause 96 specifically mentions that at first the matter has to be decided by the Commissioner within 90 days. In case the Commissioner fails to give a decision within 90 days or delivers an unsatisfactory decision then the matter can be referred to arbitration under Clause 97. However, clause 97 is widely worded, meaning that the dispute referred to in Clause 96 can only constitute as one of the facets of Clause 97 and not the only facet. The wording of Clause 97 starts with "*All disputes and differences whatsoever*"; and thus, the disputes which are decided under Clause 96 or any other dispute not covered under Clause 96 can also be covered under Clause 97. Therefore, invocation of Clause 96 is not a must for invoking Clause 97 and that a claim for the first time can also be made before the arbitrator by following the procedure laid down in Clause 97.

The court also emphasised that in cases[21] where pre-arbitral procedural requirements were held to be mandatorily complied with, the contracts usually had only one clause which contained or prescribed the pre-requisites or the procedure that was required to be followed before the parties could be referred to arbitration.[22] The court held that even in cases where there was more than one clause the said clauses contained a composite scheme that clearly specified the disputes to be referred to an authority or adjudicator mentioned in the initial clause and thereafter to arbitration in case there is no settlement reached. However, the defining feature of such a scheme contained in a case of multiple clauses was that in the arbitration clause itself a specific reference was made identifying the authority before which the

[21] *Sushil Kumar Bhardwaj v. Union of India*, A.A.389/2006 (Delhi High Court) (Unreported); *Mysore Construction Company v. Karnataka Power Corporation Limited and Ors.*, ILR 2000 KAR 4953; *Concept InfraconPvt. Ltd. v. Himalaya Crest Power Ltd*, 2016 III AD (Delhi) 132; *Municipal Corpn. Jabalpur and others v. Rajesh Construction Co.*, (2007) 5 SCC 344.
[22] *Visa International Ltd* (n12).

parties have to initially try and settle the dispute within the specified time frame and on failure of the dispute or difference being resolved, that the arbitration clause can be invoked.[23]

Thus, emphasising upon the requirement of clarity and a detailed procedure for carrying out such proceedings the court treated multi-tier clauses as a mandatory requirement in abovementioned cases.

C. LIMITATION ON INVOKING ARBITRAL PROCEEDINGS

Another important aspect was highlighted against treating multi-tier clauses as mandatory in the case of *Sarvesh Security Services Pvt. Ltd. v. Managing Director, DSIIDC*[24] was the application of period of limitation. The said case reiterated the judgement of *Ravindra Kumar Verma v. BPTP Ltd*.[25]

The court in the case of *Sarvesh Security Services Pvt. Ltd*. held that if the arbitration clause is read in a mandatory manner with respect to the pre-arbitral requirements to be complied with before finally invoking arbitration, it can result in grave prejudice to a party who is seeking to invoke arbitration. The reason being that there is a time limit of three years within which the arbitration proceedings has to be invoked failing which the parties are supposed to have waived their right to enforce the arbitration clause.[26] In the absence of any time limit specified in the arbitration clause, before seeking invocation of the arbitration proceedings, the time consumed in conciliation is not exempted from limitation under the Limitations Act, 1963.[27] Now, when such time spent is not excluded and the possibility arises where the conciliation proceedings go on for a very long time exceeding the limitation period within which the arbitration has to be invoked, can lead to nullify the arbitration as not capable of being invoked because of the bar of limitation i.e. when proceedings for reference to arbitration are filed in court, the right to seek arbitration may end up being beyond three years 'since the dispute aroused'[28] and hence the petition for reference may be barred by limitation.

The approach taken by the court seems quite justifiable as in the absence of any time limit and procedure given to carry out the pre-arbitral procedure, there is a possibility of the opposite party acting with a mala-fide intention

[23] *Ibid* ¶16.
[24] Arb P 196 of 2014 (Delhi High Court) (Unreported).
[25] *Ravindra Kumar Verma* (n11).
[26] *UOI v. Momin Construction Co*., AIR 1995 SC 1927.
[27] *Ravindra Kumar Verma* (n 11).
[28] Arbitration and Conciliation Act 1996, § 12.

and carry out the pre-arbitral process well beyond the limitation period for filing for arbitration.

Another important aspect highlighted in the case of *Ravindra Kumar Verma* that the court held is the deciding factor while dealing with the question of pre-arbitral proceedings being mandatory or directory is the application of Section 77 of the Act.[29] Section 77 says that:

"*The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.*"

The court held that this section allows the parties to initiate 'judicial or arbitral proceedings which are necessary for preservation of their rights.' The court interpreted that this section renders the pre-arbitral procedural requirements only directory in nature as in case there arises a situation where it becomes important to initiate arbitration proceedings because of expiry of the limitation period the requirement to complete conciliation as a pre-requirement would lead to injustice to the parties as after the limitation period the parties will not be able to initiate any arbitral proceedings under Section 8 or Section 11.[30]

The reasoning of the court with regard to the interpretation of section 77 does not seem adequate. The reason being, the concerned section only talks about conciliation specifically. The court did not talk about the situations involving mediation or negotiation or any other mode of amicable settlement that can be finished within a reasonable timeframe. The court failed to address the situations as to whether the same reasoning will apply to the cases where mediation or negotiation is chosen as pre-arbitral requirements as these methods usually take very less time and there is no threat of violation of rights of the parties due to expiry of limitation period.

Further, the court interpreted the whole section as merely a clause indicating directly at the non-mandatory nature of the pre-arbitral conditions, whereas in originality the language of the clause only contemplates that the proceedings of conciliation can be stopped only and only when the parties feels there is a necessity of doing so for the purpose of preserving their rights. The

[29] Arbitration and Conciliation Act 1996, § 77.
[30] *Ravindra Kumar Verma* (n 11).

invocation of arbitral proceedings before the fulfilment of conciliation is only a kind of an exception and not the rule for which the section is incorporated. The section starts with the "*shall not initiate*"[31] which clearly lays down the intention for which the section is incorporated and that is that the arbitration proceedings cannot be invoked during conciliation in any case except as defined in the later part of the section.

It is clear from the abovementioned judgements of the High Courts that the period of limitation applicable to arbitral proceedings is one of the major factors in deciding the enforceability of multi-tier clauses as mandatory or directory.

D. Standard Of Compliance

The Supreme Court on various occasions has reflected upon the enforcement and legitimacy of multi-tier dispute resolution clause which requires certain pre-arbitral procedures that are to be followed before finally invoking the arbitral proceedings. There are no cases where the clause has been held to be unenforceable[32] *per se* but the problem seems to occur when it comes to interpretation and compliance of pre-arbitral procedures incorporated in such clauses.

In *Visa International Ltd. v. Continental Resources (USA) Ltd.*[33], the arbitration clause was:

> "*Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996*"

The court highlighted that the mandatory requirement for the matter to be referred to arbitration was that the dispute was not capable of being 'settled amicably'. However, the court held that since there were several letters and correspondences, which ranged over a period of month that had been exchanged between the parties, the same would suffice as fulfilment of the pre-arbitral procedure. The court said that the exchange of correspondence clearly established that the parties tried to settle the dispute as agreed and

[31] Arbitration and Conciliation Act 1996 (n 28).
[32] Saurabh Bindal and Gunjan Chhabra, "Tiered Dispute Resolution Clauses: The Indian Picture' (*SCC Online*, 3 Feb 2016) https://blog.scconline.com/post/2016/02/03/tiered-dispute-resolution-clauses-the-indian-picture/ Accessed 12 January 2020.
[33] AIR 2009 SC 1366.

that the matter could not have been settled amicably. Therefore, the matter was fit to be referred to arbitration.

Similarly, the recent case of *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee*[34], dealt with a similar clause. The clause read as follows:

> "*A party seeking to resolve the dispute must notify the existence and nature of the dispute to the other party ("the notification"). Upon receipt of the notification the parties must use their respective reasonable endeavours to negotiate to resolve the dispute by discussions between Delhi 2010 (or a person it nominates) and the service provider (or a person it nominates). If the dispute has not been resolved within 10 business days of receipt of the notification (or such other period as agreed in writing by the parties) then the parties must refer the dispute to the Chairman of Delhi 2010 and the Chief Executive Officer or its equivalent) of the service provider."*[35]

The court, in this case, held that not only the Petitioner but even the ambassadors of the various governments had made considerable efforts to resolve the issue and only after the failure of these negotiations the petitioner resorted to arbitration. Relying on the facts and circumstances of the case the court held that there were reasonable efforts taken by the petitioner to negotiate the dispute and the matter is mature enough to be referred to arbitration.

In the light of the abovementioned judgements of *Visa International*[36] and *Swiss Timing*[37] one problem that doesn't seem to find any satisfactory solution is at what point does the court draw a line with regard to the fulfilment of pre-arbitral proceeding. In other words, how does the court decide that a party subject to a multi-tier clause/(s) has fulfilled its obligation with respect to pre-arbitral mechanism? It is a common practice that when a dispute arises, each party makes its best possible efforts to settle the dispute then and there itself by communicating through mail or by any other means in order to avoid litigation or arbitration. In such cases from where does the

[34] AIR 2014 SC 3723.
[35] *Ibid* ¶14.
[36] *Visa International Ltd* (n 12).
[37] *Swiss Timing* (n 12).

court conclude that the clause has been complied with? Like in the cases similar such as *Swiss Timing*,[38] the clause mandated the party to notify the opposite party as to the exact nature of dispute and within 10 days of such notice the parties have to do their best in order to negotiate the dispute. Whether the court was right in giving go-by to such a pre-condition is a question that finds no solution as per the prevalent law and practice in India. Thus, in a certain class of cases, though there are enforceable multi-tier clauses, there is no strict compliance and minimal efforts made by the parties were held to be the fulfilment of pre-arbitral mechanism.

E. Position In United Kingdom

Courts in UK have usually upheld the legitimacy of agreements to follow certain pre arbitral procedures when there are detailed substantive and procedural guidelines available to measure the parties' efforts to negotiate.[39]

The Courts lay special emphasis on the definiteness of the negotiation or mediation procedures specified in the contract in order to uphold their validity.[40] For instance, in a recent decision of the English High Court it was held that an agreement to resolve a dispute through amicable settlement four weeks prior to referring the same dispute to arbitration is both enforceable and mandatory.[41] The clauses containing specific duration to carry out mediation or negotiations[42] with a pre-defined number of negotiation sessions,[43] or nominated negotiation participants,[44] are more likely to be enforced by the courts rather than the clauses which are open-ended and unstructured.[45]

The above approach is also reflected in many decisions of English High Courts[46], where it was held that in the context of a positive obligation to

[38] *Ibid.*
[39] Gary Born and Marija Šcekic (n 10) 232-233.
[40] Redfern and Hunter on International Arbitration, 'Agreement to Arbitrate' (6thedn, Kluwer Law International; Oxford University Press 2015) (Nigel, Partasides, Redfern, et al.; Sep 2015) pg 101; *Cable & Wireless v IBM United Kingdom* [2002] EWHC 2059 (Comm), [2002] CLC 1319.
[41] *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd*, [2014] WLR(D) 293, [2014] EWHC 2104, para 27 (Comm).
[42] *Fluor Enters v. Solutia*, 147 F Supp 2d 648, 651 (SD Tex 2001).
[43] *White v. Kampner,* 641 A2d 1381, 1382 (Conn 1994).
[44] *Fluor Enters v. Solutia*, 147 F Supp 2d 648, 651 (SD Tex 2001).
[45] *Holloway v. Chancery Mead Ltd*, [2007] EWHC 2495 (TCC).
[46] *Wah (aka Tang) v. Grant Thornton Int'l Ltd*[2012] EWHC 3198, para 57 (Ch) (English High Ct); *Schoffman v Cent States Diversified, Inc*, 69 F3d 215, 221 (8th Cir 1995); *Richie Co LLP v Lyndon Ins Group Inc*, 2001 WL 1640039, paras 1, 3 (D Minn); *Sulamerica CIA Nacional*

attempt to resolve the dispute amicable before referring to arbitration, the test is whether the clause provides for a sufficiently certain and unambiguous commitment to start a process form which each steps the parties are willing to take may be ascertained clearly. Moreover, the clause has to be sufficiently defined to enable the court to objectively determine as to what is the minimum requirement which the parties have to fulfil in order to say that the process has been exhausted or properly terminated without breach.[47]

Going by the above reasoning, the specific pre-arbitral processes which are in the form of mediation before a designated individual or institution, an engineer's assessment or an expert determination are more likely to be held enforceable as mandatory than simple non-specific amicable settlement requirements.[48]

Across jurisdictions, courts are generally reluctant to enforce the agreements to negotiate as pre-arbitral requirement due to their aspirational nature which reflects upon a shared desire to achieve a mutual ground of agreement between the parties, but not an obligation to any particular outcome.[49] Agreements of such nature are treated as enforceable only in limited circumstances where the general freedom of the parties to contract and commercial autonomy is not infringed.[50]

The position of English Courts corresponds to that of the approach taken by the Bombay High Court[51] as discussed in the above section. This approach can be seen to be more objective as it clearly identifies the importance of details in order to bind the parties to fulfil pre-arbitral procedural requirements and enforce them as mandatory.

F. Recommendations

As discussed above in the first section of this article, Indian courts have not emphasised on the standard of compliance required for the fulfilment of pre-

de Seguros SA v EnesaEngenharia SA—Enesa, [2012] EWHC 42, para 27 (Comm) (English High Ct).
[47] *Ibid.*
[48] *HIM Portland LLC v. DeVito Builders Inc*, 317 F3d 41, 42 (1st Cir 2003); See also *AMF Inc v. Brunswick Corp*, 621 F Supp 456 (SDNY 1985).
[49] Gary Born and MarijaŠcekic (n 10) 239.
[50] David D. Caron, Stephan W. Schill, Abby Cohen Smutny, and Epaminontas E. Triantafilou, *Practising Virtue Inside International Arbitration* (Oxford University Press 2015) 234.
[51] *Ravindra Kumar Verma* (n 11).

arbitral procedure and minimum efforts made by the parties were accepted as the fulfilment of the necessary –preconditions.

A better approach to this scenario can be seen in the Singapore High Court Judgement of *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and Another*[52] where the Court held that where the parties have an unambiguous contract specifying a set of dispute resolution procedures to be followed before arbitration then those pre-conditions must be strictly complied with.[53] It could not be said that the parties intended that *some* meetings between *some* people in their respective organisations discussing *some* variety of matters would be sufficient to constitute compliance with the preconditions for arbitration.

Contemplating upon a United States Court of Appeal case[54] the Singapore High Court held that in case where a specific procedure has been prescribed as a condition precedent to arbitration or litigation, then in absence of any waiver, it must be shown to have been complied with.[55]

Mere exchange of some emails, letters or some informal communication like that in *Swiss Timing Ltd*.[56] and *Visa International Ltd*.[57] ought not to be considered as fulfilling the mandatory pre-arbitral procedure. There is always a possibility that the parties in dispute can reach an amicable settlement by appropriately negotiating and mediating among themselves without wasting money and time which is the sole purpose of incorporating multi-tier clauses in a contract. Such sub-standard compliance leads to violation of the terms of the contract causing injustice to the parties which is against the spirit of dispute resolution mechanism of speedy resolution of disputes.

G. For Nature of multi-tier clauses

[52] *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another*, [2013] SGCA 55 Singapore law reports [2014] 1 SLR page 130.
[53] Chahat Chawla, 'The Muddy Waters of Pre-Arbitration Procedures – Are they Enforceable? Answers from an Indian Perspective' (*Kluwer Arbitration Blog*, 9 June 2019) http://arbitrationblog.kluwerarbitration.com/2019/06/09/the-muddy-waters-of-pre-arbitration-procedures-are-they-enforceable-answers-from-an-indian-perspective/ accessed 28 September 2020.
[54] *DeValk Lincoln Mercury, Inc, Harold G DeValkand John M Fitzgerald v. Ford Motor Company and Ford Leasing Development Company*, 811 F 2d 326 (7th Cir, 1987)
[55] *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another*, [2013] SGCA 55 Singapore law reports [2014] 1 SLR page 130, page 160 para 62.
[56] (2014) 6 SCC 677.
[57] (2009) 2 SCC 55.

The limitation period, as discussed in the above,[58] has been treated as an important aspect when it came to identifying the nature of multi-tier clauses and rightly so. However, treating it as a blanket formula for all the cases to adjudge pre-arbitral conditions as mere directory is prejudicial to the cases in which there is a possibility of genuine negotiations.

In the recent case of *Geo Miller and Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.*[59] the Supreme Court upheld that when there is possibility of genuine negotiations or any kind of negotiation efforts are going on between the parties, the period of limitation can be waived off.[60] The court can, after considering the complete history of negotiation between the parties which was placed before it, on the facts of that case, held that the claim would not be barred by limitation as there was a continuing cause of action between the parties.[61]

In this case the court agreed that the period during which the parties were making a bona fide attempt to settle the dispute then that time can be excluded for the purpose of computing the period of limitation.[62] The court laid down an objective scheme to identify the period which can be excluded from limitation and find a 'breaking point' so as to clearly identify the time frames of bona fide and futile negotiation efforts.[63] After a careful consideration of the history of negotiations between the parties the court will identify the 'breaking point' at which a reasonable party would have abandoned the negotiating efforts and would have rather chosen arbitration for the settlement of dispute. That 'breaking point' would then be treated as a date on which the cause of action arises for the purpose of limitation.[64]

This approach can be said to be better suited for the purpose of applying the Limitation Act but it might also backfire as it can lead to unnecessary litigation for determining the 'breaking point' and 'bona fide negotiating efforts', adding to the cost and time consumed.

The more stable and concrete way is the requirement of statutory backing to achieve the successful working of Multi-Tier Dispute Resolution Clauses.

[58] *Ravindra Kumar Verma* (n11).
[59] Civil Appeal No 969 of 2010 (Supreme Court of India).
[60] *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, 2007 (2) AWC 1848 (SC).
[61] *Ibid.*
[62] Civil Appeal No 969 of 2010 (n 58) para 11.
[63] *Ibid.*
[64] *Ibid.*

Detailed legal provisions regarding Pre-Arbitration Procedure setting out time keeping in mind the limitation period, involving Mediation/Conciliation are the need of the hour.

Further, irrespective of the applicable law, care should always be taken when drafting multi-tier clauses to define the ADR procedure clearly (for example stipulating a specific time period, such as thirty days, for negotiations between senior management), along with the parties' respective obligations.[65]

H. CONCLUSION

With an increase in the use of multi-tier clauses in commercial agreements the problem of dealing with pre-arbitral procedural requirements in such clauses has created an issue of its own. Although designed to enhance the efficiency of the arbitral process, these sorts of provisions have frequently produced new disputes of their own, often with material, and undesirable consequences for the arbitral process.

It is clear after analysing various judgements of the Supreme Court and High Courts that there is a lot of ambiguity in interpretation of multi-tier clauses and in many cases pre-arbitral requirements are adjudged as directory. The primary reason appears to be the ambiguity in language of such clauses. Therefore, it is imperative that special attention is given while drafting such clauses in order to enforce them as mandatory. But still even in cases where they are treated as mandatory, their standard of compliance is not given much importance.

Further, the current Covid-19 crises have also led to major change with respect to the clientele. A lot of things have to be considered before invoking the arbitration clause, majorly, the client's financial capacity to cover legal costs including the arbitral tribunal's fees, counsel fees, expert witness costs, etc. In case of the award-debtor, things may be worse as the client may even be on the verge of insolvency. In such a scenario, multi-tier dispute resolution clauses prove to be cost efficient making sure the parties don't face much financial burden.

For India to be one of the fastest growing nations and aspiring to be an arbitration hub in the near future it is important that such a situation is

[65] *Asghar v. Legal Services Commission* [2004] EWHC 1803, [2004] Arb LR 43; *See* also Redfern and Hunter on International Arbitration (6th ed.) (Nigel, Partasides, Redfern, et al.; Sep 2015) pg. 102.

avoided. The recent amendment in the Arbitration and Conciliation Act, 1996[66] aims at making India one of the hotspots for dispute resolution practises. Therefore, it is important that in order to attract foreign players to opt for Indian arbitration laws, such ambiguities in interpretation of clauses are avoided.

[66] Arbitration and Conciliation (Amendment) Act 2019.