ALTERNATIVE DISPUTE RESOLUTION AS PRE-ARBITRAL STEP

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ABSTRACT

In both domestic and international commerce, parties now routinely structure a multi-tiered dispute resolution process, which amalgamates arbitration with alternative dispute resolution (ADR) mechanisms. In such clauses, the parties' agreement to arbitrate is preceded by certain pre-arbitral steps, including that the parties first attempt to resolve their dispute amicably. This poses myriad issues before Indian courts regarding the effect of the parties' pre-arbitral steps on their intent to arbitrate. It is no longer a question of upholding the sanctity of a seemingly sacred arbitration agreement against a recalcitrant party insistent on litigating before municipal courts. Rather, the parties' intention to arbitrate is placed at loggerheads with a competing, and equally sacred, intent to resolve their dispute through ADR mechanisms. The article explores these questions by reference to the inconsistent judicial pronouncements by courts in India on this issue, with a view to identify where should the balance lie.

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The contents of this article reflect the personal views of the authors alone, and not of any organisation they may be affiliated with. The authors reserve their right to depart from these views in future. The authors thank Ms Sanchita Bhat, student at the National Law University, Delhi, and other members of the Editorial team of the CADR Journal for their invaluable assistance in finalising the article.

1. INTRODUCTION

In theory, arbitration is characterised as a mode of alternative dispute resolution ("ADR"); its name often invoked in the same breath as mediation and conciliation. Indeed, Section 89 of the Code of Civil Procedure, 1908 ("CPC"), which requires courts to encourage settlement of disputes through ADR, treats arbitration, conciliation, and mediation alike.[1]

However, this is an uncomfortable proposition. Although all ADR mechanisms, including arbitration, share a common trait – i.e. they facilitate resolution of disputes outside the municipal courts framework - this is where the commonality ends. Specifically, the arbitral process differs from mediation or conciliation in at least two material ways.

Firstly, in essence, both mediation and conciliation denote a negotiation process by which a neutral third-person assists the disputing parties to arrive at an amicable resolution. Ultimately, it is for the parties to resolve their dispute, without any adjudication *per se*. To the contrary, an arbitration requires an arbitral tribunal to adjudicate the dispute between the parties in the same manner as a court would; except with greater procedural flexibility.[2] The tribunal will render its final decision in the form of an award,[3] which shall be final and binding on the parties and persons claiming under them respectively.[4]

Secondly, unlike arbitration, a mediation or conciliation need not result in any enforceable outcome. It is common for the parties to not reach an amicable resolution at all. However, this is not the case with arbitration. If validly commenced, an arbitration must culminate in an award, which decides all issues raised before the tribunal.[5] In fact, an arbitral tribunal is empowered, by law, to continue with the proceedings even if a respondent fails to communicate its statement of defence,[6] or if a party fails to appear at an oral hearing or to produce documentary evidence[7].

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[1] Code of Civil Procedure 1908, s 89.

[2] Arbitration and Conciliation Act 1996, s 24(1) (Arbitration Act).

[3] ibid s 31(1).

[4] ibid s 35.

[5] ibid s 29A(1).

[6] ibid s 25(b).

[7] ibid s 25(c).

The parties' agreement with the contents of the award is neither necessary nor capable of diminishing its finality or binding nature.

Therefore, despite Section 89 of the CPC, it is not entirely correct to characterise arbitration as an ADR mechanism. In fact, conceptually, arbitration is closer to adjudication before municipal courts than to either mediation or conciliation.

This does not mean that the domain of arbitration does not interact with ADR mechanisms. In recent years, the inadequacies of arbitration - such as increasing costs, concerns about lack of independence and impartiality, and delays in making an award – have led transacting parties to look for other novel solutions for resolution of their commercial disputes. These parties are now inclined to structure a multi-tiered dispute resolution process, which amalgamates the remedy of arbitration with ADR mechanisms. In other words, the parties' agreement to arbitrate is routinely preceded by certain pre-arbitral steps, including the requirement that the parties first attempt to resolve their dispute amicably through ADR mechanisms.

In the above context, Indian courts are now frequently asked to determine issues regarding the effect of the parties' contractually stipulated pre-arbitral steps on their arbitration agreement. These include deciphering whether a pre-arbitral step is of mandatory nature, such that a party's consent to arbitration is contingent upon the fulfilment of such step. And these questions pose a novel dilemma. It is no longer a simple question of upholding the sanctity of a seemingly sacred arbitration agreement against a recalcitrant party insistent on litigating before municipal courts.[8] Rather, the parties' intent to arbitrate is now at loggerheads with a competing, and equally sacred, intent to resolve their dispute through ADR mechanisms. Indeed, while it is easier for a court to deny jurisdiction and refer the parties to arbitration, can it reach the same conclusion with equal conviction when the alternative is to mediate or conciliate? The authors endeavour to answer this question by mapping the inconsistent judicial response of Indian courts.

As context for further discussion, Part 2 deciphers the types of pre-arbitral steps commonly noticed in commercial contracts. In this light, Part 3 explores whether non-compliance with pre-arbitral steps can serve as a jurisdictional bar for an arbitral tribunal. Thereafter, Part 4 examines

[8] Arbitration Act, s 8(1), 45(1).

the extent to which pre-arbitral steps involving ADR mechanisms need to be complied with under Indian law. Part 5 concludes.

2. CLASSIFYING PRE-ARBITRAL STEPS

Jane Austen famously wrote that "there are as many forms of love as there are moments in time"[9]. This also holds true for pre-arbitral steps in multi-tiered dispute resolution clauses. Other than the traditional limitations in contract law[10], there are no fetters on the parties' autonomy to precede their arbitration agreement with any requirement that they consider appropriate. After all, party autonomy is the bedrock of arbitration, and the parties are free to express their arbitral intent in any legally permissible manner.

That being said, a scrutiny of judicial pronouncements by Indian courts on the issue allows one to infer the types of pre-arbitral steps commonly noticed in commercial contracts. Broadly, these can be classified as follows: (i) negotiations and consultations for amicable settlement; (ii) ADR mechanisms – Mediation and Conciliation; (iii) pre-arbitral adjudication; and finally, (iv) miscellaneous requirements.

2.1 Negotiations / Discussions for Amicable Settlement

It is common for transacting parties to agree that before commencing arbitration, they will attempt to resolve the dispute amicably by engaging in negotiations / discussions. Even without referring to any specific ADR mechanism, the parties agree to arbitrate only if they are unable to reach an amicable settlement in relation to their dispute.

The parties can agree to incorporate such pre-arbitral step in myriad ways. For instance, in *Haldiram Manufacturing Company Pvt. Ltd. v DLF Commercial Complexes Ltd.*[11], the arbitration clause stipulated as under:

> "All or any disputes arising out or touching upon or in relation to the terms of this application and / or Commercial Space Buyers' Agreement, including the

[9] Jane Austen, Mansfield Park.

[10] Indian Contract Act 1872, s 24 (Indian Contract Act).

[11] *Haldiram Manufacturing Company Pvt Ltd v DLF Commercial Complexes Ltd* 2012 SCC OnLine Del 2139.

> interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicable by mutual discussion, failing which the same shall be settled through arbitration…"[12] (emphasis added)

Likewise, in *Quickheal Technologies Ltd. v NCS Computech Private Ltd.*[13], the parties' arbitration clause provided that:

> "All disputes under this Agreement shall be amicably discussed for resolution by the designated personnel of each party, and if such dispute/s cannot be resolved within 30 days, the same may be referred to arbitration…"[14] (emphasis added)

In the above instances, the parties had used definitive terms, such as "shall", to articulate their pre-arbitral step. However, they may also couch their requirement in less definitive terms. In *Siemens Limited v Jindal India Thermal Power Ltd.*[15], for instance, the arbitration agreement merely provided that "[t]o the best of their ability, the parties hereto shall endeavour to resolve amicably between themselves all disputes"; failing which either party may refer the dispute for settlement by arbitration.[16]

2.2 Mediation and Conciliation

Unlike the above instances, the parties can equally manifest their emphasis on attempting an amicable resolution by reference to a specific ADR mechanism. In other words, instead of merely providing for negotiations or discussions, they can include a pre-arbitral step that requires them to engage in mediation or conciliation process, before commencing arbitration if required.

For instance, in *Tulip Hotels Private Limited v Trade Wings Limited*, the arbitration clause stated as under:

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[12] *Haldiram* (n 11) 17; see also *Ravindra Kumar Verma v M/s BPTP Ltd* 2014 SCC OnLine Del 6602, 4; *Sarvesh Security Services v Managing Director DSIIDC* 2018 SCC OnLine Del 7996, 13.

[13] *Quickheal Technologies Ltd v NCS Computech Private Ltd* 2020 SCC OnLine Bom 687.

[14] ibid 5.

[15] *Siemens Limited v Jindal India Thermal Power Ltd* 2018 SCC OnLine Del 7158.

[16] ibid 10; *JK Technosoft Limited v Ramesh Sambamoorthy* 2017 SCC OnLine Del 10813, 5.

> "All dispute and differences between the parties hereto in respect of any matters and except those relating to the fundamental matters in respect of which the parties have been given affirmative vote, stated in this Agreement shall first be tried to be resolved through the intervention of a conciliator appointed by the parties to the dispute, who shall initiate through conciliation to resolve the dispute. If, however, the dispute is not resolved within one month after the matter of dispute is referred to the conciliator for conciliation, the same shall be referred for arbitration…"[17] (emphasis added)

Finally, the parties also routinely incorporate settlement negotiations and conciliation as two distinct pre-arbitral steps, as was the case in *Rajiv Vyas v. Johnwin*:

> "14.1 Settlement of Disputes through Good Faith Negotiations
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> a) The parties shall endeavour, in the first instance, to resolve any dispute, disagreement or difference arising out of or in connection with this Agreement, including any question regarding its performance, existence, validity, termination and the rights and liabilities of the parties to this Agreement (a "Dispute") through good faith negotiations;
>
> If a settlement is not reached within thirty (30) days after the date of receipt of the Dispute Notice by the non-initiating Party, such Dispute shall be referred for conciliation to one Conciliator in accordance with the provisions of Arbitration & Conciliation Act, 1996.
>
> 14.2 Arbitration
>
> a) If good faith negotiations and conciliation have not been able to resolve a Dispute, such Dispute shall be referred to and be finally resolved by Arbitration in accordance with the Arbitration & Conciliation Act, 1996 and the rules made thereunder…"[18] (emphasis added)

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[17] *Tulip Hotels Private Limited v Trade Wings Limited*, Application for Appointment of Arbitrator No 4 of 2007, Judgment (19 March 2008), 3; *Union of India v M/s Baga Brothers &* Anr 2017 SCC OnLine Del 8989.

[18] *Rajiv Vyas v Johnwin* 2010 (6) MhLJ 483, 3.

I refer to these two categories of pre-arbitral steps as "ADR based pre-arbitral steps".

1.3 Pre-Arbitral Adjudication

Though a common presence in commercial contracts, ADR mechanisms are not the only kind of pre-arbitral steps that the parties incorporate as part of their arbitration agreement. In certain contracts, particularly in the construction sector, the parties often require the parties to submit to a pre-arbitration adjudication mechanism before commencing arbitration, if necessary.

In *Nirman Sindia v Indal Electro-melts Ltd.*[19], the parties had entered into an agreement for the execution of certain construction works. As part of their dispute resolution mechanism, they had agreed to a three-step mechanism, as per which the parties will refer their dispute to an Engineer. If the contractor believed that the Engineer's decision "was either outside the authority given to the Engineer by the contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision."[20] It was only at this juncture that either party could "refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision."[21]

Likewise, in *JIL Aquafil (JV) v. Rajasthan Urban Infrastructure*[22], the parties had agreed to refer a defined category of disputes for a decision by the Project Manager, which the parties could later "revise in an amicable settlement".[23] It is only at this stage that a party may commence arbitration either if it is "dissatisfied with any decision of the Project Manager, of if the Project Manager fails to give notice of his decision on or before 28 (twenty eight) days after the day on which he received the reference".[24]

Another example of a similar dispute resolution framework is noticed in *National Highways Authority of India v. PATI-BEL (JV).*[25] The parties therein had agreed that any dispute between

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[19] *Nirman Sindia v Indal Electro-melts Ltd* 1999 SCC OnLine Ker 149.

[20] ibid 3.

[21] ibid.

[22] *JIL Aquafil (JV) v Rajasthan Urban Infrastructure* 2016 SCC OnLine Raj 3814.

[23] ibid 14.

[24] ibid.

[25] *National Highways Authority of India v PATI-BEL (JV)* 2019 SCC OnLine Del 6793.

them will be "in the first instance", referred to a Dispute Review Board for its "recommendations".[26] Thereafter, in "case a recommendation is made, the aggrieved party has the power to trigger the arbitration agreement" within a defined period.[27] "The Arbitral Tribunal has been given powers under the [arbitration] clause to open up, review and revise any […] recommendation of the" Dispute Review Board.[28] Indeed, as observed by the High Court of Delhi, this "is a typical multi-tier clause, which is found in many domestic and international arbitration agreements."[29]

1.4 Miscellaneous Requirements

Lastly, the parties have the autonomy to incorporate any legally permissible pre-arbitral step as part of their arbitration agreement. This may range from observing a cooling off period during which a party may not commence arbitration even after the notification of a dispute or requiring the payment of a security deposit prior to the constitution of the arbitral tribunal. The latter was indeed the case in *Municipal Corporation, Jabalpur and others v Rajesh Construction Co.*[30], wherein the parties had agreed that "[w]here the party invoking arbitration is the contractor no reference for arbitration shall be maintainable, unless the contractor furnishes a security deposit of a sum" to be determined in accordance with the contract.[31]

The above classification, in addition to highlighting the types of pre-arbitral steps, also assists in determining their effect on the parties' arbitration agreement. This is for two reasons. *Firstly*, the parties' choice of words in drafting a pre-arbitral step is crucial for deciphering their mutual intent; and *secondly*, whether non-compliance with a pre-arbitral step can act as a bar to arbitral jurisdiction will also, in part, depend on the type of pre-arbitral step agreed by the parties.

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[26] *NHAI* (n 25), 10(i)-(v).

[27] ibid, 10 (v)(a).

[28] ibid, 11.

[29] ibid, 35.

[30] *Municipal Corporation, Jabalpur and others v Rajesh Construction Co.*, (2007) 5 SCC 344.

[31] ibid, 6.

As the subsequent section details, courts in India have adopted these two broad parameters to decipher – with many inconsistencies – the circumstances in which non-compliance with a pre-arbitral step can affect the jurisdiction of an arbitral tribunal.

3. PRE-ARBITRAL STEPS AS A BAR TO ARBITRAL JURISDICTION?

It often transpires that a party attempts to commence arbitration with necessarily complying with the contractually stipulated pre-arbitral steps. And while the reasons for this tendency vary depending on the circumstances of each dispute, this tendency nonetheless poses a question – is the failure to comply with pre-arbitral steps fatal to the jurisdiction of an arbitral tribunal?

The answer to this question depends not only on the specific pre-arbitral step contained in a contract, but also the forum where it is raised. Courts in India have answered this same question differently, often taking diametrically opposite approaches.

On the one hand, unless the wording of the contractual stipulation indicates to the contrary, some Indian courts consider compliance with pre-arbitral steps mandatory. Consequently, unless the agreed steps are fulfilled, a party cannot validly commence arbitration. However, on the other hand, some courts consider pre-arbitral steps to be directory in nature, such that a party's failure to comply with them does not deprive an arbitral tribunal of its jurisdiction. As far as ADR based pre-arbitral steps are concerned, the absence of a definitive pronouncement by the Supreme Court of India has allowed the High Courts in India to reach conflicting conclusions in this regard.

3.1 The Mandatory Nature of Pre-Arbitral Steps

A number of courts in India consider the parties' contractually agreed pre-arbitral steps to be mandatory in nature. Despite the odd exception[32], this appears to be the consistent position with respect to pre-arbitral steps that do not make reference to ADR mechanisms, including settlement negotiations or discussions.

[32] *JIL Aquafil* (n 22) 24

For instance, in *Municipal Corporation, Jabalpur and others v Rajesh Construction Co*.[33], where the constitution of the tribunal was preceded by the payment of a security deposit, the Supreme Court of India found the pre-arbitral step to be mandatory.[34] The court explained that "the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties could not arise because of failure of the respondent to furnish security as envisaged in clause 29(d) of the contract."[35] On such premise, the court directed the respondent therein to furnish the requisite security amount if it desired the constitution of an arbitral tribunal.[36]

Likewise, in *Nirman Sindia v Indal Electro-melts Ltd*., where the parties had agreed to refer their disputes to an Engineer and then an Adjudicator before commencing arbitration, the Kerala High Court construed this pre-arbitral step mandatory.[37]

The High Court of Delhi, in *National Highways Authority of India v. PATI-BEL (JV)*, reached the same conclusion while interpreting a pre-arbitral step that required the parties to first refer their dispute to a Dispute Review Board.[38] It explained that "the outcomes reached by DRB are given due weight in the final adjudication proceedings"; thereby, implying that the pre-arbitral step "is mandatory in nature and that the parties cannot opt out from this preliminary step and not have their grievance examined by the [Dispute Review Board] in the first instance."[39]

Consistent with the above understanding, some High Courts in India have reached a similar conclusion while interpreting ADR based pre-arbitral steps. In principle, they regard the parties' intent to arbitrate to be conditional, which fructifies only if the parties successfully comply with the pre-arbitral step. There are a number of decisions supporting this understanding.

In 2008, in *Tulip Hotels Private Limited v Trade Wings Limited*, the High Court of Bombay affirmed, prominently for the first time, the mandatory nature of an ADR based pre-arbitral step. Refusing to appoint an arbitrator for non-compliance with a pre-arbitral step, the Court remarked

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[33] *Rajesh Construction* (n 30).

[34] Ibid, 21.

[35] *Rajesh Construction* (n 30) 21.

[36] ibid 23.

[37] *Nirman Sindia* (n 19) 12.

[38] *NHAI* (n 25) 32-39.

[39] ibid 34.

that "the reference of the matter for conciliation is the prerequisite for the appointment of the arbitrator for the adjudication of dispute by way of arbitration [and that] it is essential for the applicants to plead and establish that the said pre-requisite has been duly complied with…"[40]

In 2012, the High Court of Delhi arrived at an identical conclusion in *Haldiram Manufacturing Company Pvt. Ltd. v DLF Commercial Complexes Ltd.*, while interpreting a pre-arbitral step requiring the parties to first engage in mutual discussion for amicable settlement:

> "…It would be manifest on perusal of the [...] arbitration clause that the disputes arising between the parties at the first instance were to be mandatorily settled amicably by mutual discussion as the word used is shall in the clause and it is only on the failure of any settlement arrived at between the parties after the mutual discussion, the other alternative was the settlement of the disputes through arbitration. Hence, clearly the first step stipulated in the said clause is the settlement of disputes through mutual discussion and second step is the settlement through arbitration. The Forum of Arbitration was, therefore, made dependent on the outcome of the first step that is of mutual settlement."[41]
>
> (emphasis added)

Therefore, since no mutual discussions had taken place between the parties[42], the Court did not make a reference to arbitration on the ground that the "conduct of the defendant clearly [was] contrary to the mandate of the [arbitration] clause"[43].

A few months later, this was promptly followed by the High Court of Rajasthan's judgment in *Simpark Infrastructure Pvt. Ltd. v Jaipur Municipal Corporation*[44], where the Court noted that since "the agreed arbitral procedure [of attempting amicable settlement] has not been followed

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[40] *Tulip Hotels* (n 17) 8.

[41] *Haldiram* (n 11) 20.

[42] ibid 21.

[43] ibid 22.

[44] *Simpark Infrastructure Pvt Ltd v Jaipur Municipal Corporation*, 2013(3) RLW 2133 (Raj).

by the Applicant, […] the arbitration application [for appointment of an arbitrator] is premature."[45]

As recently as June 2020, in *Quickheal Technologies Ltd. V NCS Computech Pvt Ltd. & Anr.*, the High Court of Bombay clarified its understanding of the position of law on this issue. Taking note of the parties' conscious use of the word "shall", the Court affirmed the mandatory nature of the pre-arbitral step in question:

> "… it is clear beyond any doubt that Clause 17 of the Agreement is a Clause which is drafted with proper application of mind. Under sub-clause (a) of Clause 17, the parties have first agreed that all disputes under the Agreement **"shall"** be amicably discussed for resolution by the designated personnel of each party, thereby making it mandatory to refer all disputes to designated personnel for resolution/settlement by amicable discussion. It is thereafter agreed in Sub-Clause (a) of Clause 17 itself, that if such dispute/s cannot be resolved by the designated personnel within 30 days, the same **"may"** be referred to Arbitration, thereby clearly making it optional to refer the disputes to Arbitration, in contrast to the earlier mandatory agreement to refer the disputes for amicable settlement to the designated personnel of each party…"[46]
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> (emphasis original)

Consequently, where the parties have incorporated an ADR based pre-arbitral step by using definitive terms such as "shall", it denotes their intention to treat such step as mandatory. In such cases, a failure to comply with the agreed pre-arbitral step will render any attempt to commence arbitration premature.

3.2 Non-Compliance with Pre-Arbitral Steps not a Jurisdictional Bar

The aforementioned decisions, which regard ADR based pre-arbitral steps as mandatory, are both reasonable and justifiable. Indeed, in each decision, the concerned court is guided by the parties' consciously-drafted contractual provisions to infer their mutual intent. Further, the courts

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[45] ibid 20.

[46] *Quickheal* (n 13) 51.

also appear to implicitly uphold the utility of ADR mechanisms in resolving commercial disputes. At the very least, they proceed on the premise that a party cannot easily discard its self-assumed obligation to attempt to reach an amicable resolution.

Yet, this approach did not find favour with many other Indian courts, or rather, individual judges belonging to a same court.

In 2010, a little more than two years after the judgment in *Tulip Hotels*, a separate judge of the High Court of Bombay was faced with a similar question. In *Rajiv Vyas v. Johnwin*, the High Court of Bombay was again requested to appoint an arbitrator despite the fact that the parties had not complied with the agreed pre-arbitral step of conciliation.[47] However, despite an objection to this effect, the High Court did not deem the non-compliance with the pre-arbitral step as limiting its power to appoint an arbitrator. Instead, adopting a proverbial middle-ground, it reasoned that a court can pass an order appointing an arbitrator but make it "subject to the party first complying with the condition precedent, which in this case is referring the matter to a conciliator"[48]. It added that the "judgment in *Tulip Hotels* does not hold otherwise",[49] before concluding that:

> "In my opinion, the correct procedure which would meet the ends of justice would be to make an order [to appoint an arbitrator] but subject to the parties complying with any conditions precedent thereto including first referring the disputes to a conciliator as provided in the agreement. This course would satisfy all the terms and conditions of the arbitration agreement…"[50]

Unfortunately, the High Court's reasoning is wanting on several grounds.

Firstly, the court's attempt to distinguish the judgment in *Tulip Hotels* is at best, evasive, and at its worst, ignorant. Indeed, the Court therein had categorically refused to appoint an arbitrator on the ground that there was no "proper compliance" of the pre-arbitral step of conciliation "prior to

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[47] *Rajiv Vyas* (n 18) 4.

[48] ibid 7.

[49] ibid.

[50] ibid.

approaching the Court for appointment of an arbitrator,[51] which in turn rendered the request premature and "liable to be rejected".[52] Accordingly, as a matter of law, the Court held the non-compliance with a mandatory pre-arbitral as a clear bar to even the appointment of an arbitrator. Further, its conclusion was based on an interpretation of the parties' contract, and not on the fact that the applicant did not belatedly express an intention to abide by the pre-arbitral step. Thus, contrary to the insistence in *Rajiv Vyas*, the High Court in *Tulip Hotels* did hold otherwise.

Secondly, the judgment in *Rajiv Vyas* also suffers from an inherent contradiction. On the one hand, the court acknowledged that prior conciliation is a "condition precedent" to the arbitration agreement.[53] This implies that the arbitration agreement, which is an independent agreement[54], is akin to a contingent contract[55], which cannot be enforced by law unless the contingent event has happened[56]. In other words, the non-fulfilment of an admitted condition precedent, as a principle of contract law, precludes the arbitration agreement from becoming enforceable, and thus, should serve as a bar to commencement of arbitration.

However, on the other hand, the court proceeded to appoint an arbitrator despite noting that the condition precedent was not fulfilled on the date on which the request to appoint an arbitrator was made. In doing so, the court overlooked that the act of appointing an arbitrator can only be consequent to a valid commencement of arbitration, which as a matter of law, takes place when a respondent receives a request to refer disputes to arbitration.[57] Thus, to appoint an arbitrator in a circumstance where the very commencement of arbitration is contrary to the parties' arbitration agreement is equivalent to placing the cart before the horse.

Thirdly, ostensibly aware of the wobbly legal foundations of its conclusion, the High Court in *Rajiv Vyas* does not base its decision on any identifiable legal principle. It also does not take

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[51] *Tulip Hotels* (n 17) 12.

[52] ibid 14.

[53] *Rajiv Vyas* (n 18) 7.

[54] Arbitration Act, s 16(1)(a).

[55] Indian Contract Act, s 31.

[56] Indian Contract Act, s 32.

[57] Arbitration Act, s 21.

notice of the following observations made in *Tulip Hotels*, citing the Supreme Court of India's judgment in *SBP & Co. v. Patel Engineering Ltd.*[58]:

> "… while considering the application [seeking appointment of an arbitrator], it is also necessary to look into the question as to whether the claim is a dead one or even is barred-one as well as "whether the parties have concluded the transactions by recording satisfaction of their mutual rights and obligations." The decision of the Apex Court [in *Patel Engineering Ltd.*] would disclose that when the parties agree that the arbitration proceedings shall be preceded by conciliation proceedings, it would be necessary for the Court [in proceedings for appointment of an arbitrator] to ascertain as to whether in such conciliation proceedings the parties have recorded satisfaction of their mutual rights and obligations pursuant to the efforts made by the conciliator. In case of such satisfaction having been recorded, the question entertaining the application [for appointment of an arbitrator] would not arise."[59]

Instead of addressing these considerations, the court chose to rely on the ambiguous notion of "ends of justice", and its unsubstantiated perception that referring the parties to conciliation at this stage will be a "cumbersome procedure".[60] Indeed, the correctness of the judgment in *Rajiv Vyas* is cast further into doubt by the fact that in 2020, the High Court of Bombay itself refused to follow the approach laid down therein.[61]

Nonetheless, despite the proposition of law endorsed by the High Court of Bombay, in recent years, the High Court of Delhi has preferred a contrary view. In 2014, a single judge of the High Court of Delhi, in *Ravindra Kumar Verma v. M/s BPTP Ltd* , was asked to decide whether the parties could be referred to arbitration even if they had not complied with a pre-arbitral step requiring them to first engage in mutual discussions.[62] At this time, another single judge of the High Court, in *Haldiram Manufacturing*, had already addressed this issue in 2012. Yet, instead

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[58] *SBP & Co v Patel Engineering Ltd* (2005) 8 SCC 618.

[59] *Tulip Hotels* (n 17) 9.

[60] *Rajiv Vyas* (n 18) 7.

[61] *Quickheal* (n 13) 51.

[62] *Ravindra Kumar Verma v M/s BPTP Ltd* 2014 SCC OnLine Del 6602.

of following the judgment of its coordinate bench in *Haldiram Manufacturing*, the Court questioned "whether the proposition of law laid down in [that] case […] is correct or that the same goes against the earlier judgments of different Single Judges of this Court."[63]

Thereafter, relying on an earlier judgment rendered in the context of the revoked Arbitration Act, 1940,[64] the Court observed 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."[65] In support, it added that the judgment in *Haldiram Manufacturing* "does not refer to the binding provision of Section 77 of the [A&C] Act which provides that existence of conciliation proceedings would not be a bar for filing of proceedings to preserve rights."[66]

For the reasons discussed above, the judgment in *Ravindra Kumar Verma* is vulnerable to both criticism and correction by an appellate court in the future. That being said, the Court's reliance on Section 77 of the A&C Act is particularly problematic for being inconsistent with the very text of the statutory provision. Section 77 provides that:

> "**77. Resort to arbitral or judicial proceedings.—**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."[67]

Evidently, as per Section 77 of the A&C Act, the default rule is that a party "shall not initiate" any arbitral or judicial proceedings during the pendency of a conciliation proceeding. The only exceptional circumstance in which a parallel arbitral or judicial proceeding is permitted is when such proceedings "are necessary for preserving [her] rights". Accordingly, it does not, in any way, support an absolute proposition that the parties' pre-arbitral step of conciliation, even if

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[63] ibid 6.

[64] ibid 7, (citing Saraswati Construction Co v Cooperative Group Housing Society Ltd, 1995 (57) DLT 343)

[65] *Ravindra Kumar Verma* (n 62) 8(i).

[66] *Ravindra Kumar Verma* (n 62) 10.

[67] Arbitration Act, s 77.

drafted in obligatory terms, is "a directory and not a mandatory requirement" in all circumstance. Rather, by giving legitimacy to conciliation proceedings as a default rule, it supports a conclusion to the contrary.

Undeterred, the High Court in *Ravindra Kumar Verma* alluded that the judgment rendered by the co-ordinate bench of the High Court in *Haldiram Manufacturing* may be *per incuriam*.[68] It did so despite the settled position of law that a court remains bound by an earlier decision issued by a co-ordinate bench; and that in case of a disagreement, it cannot arrive at a contrary conclusion, but only make a reference to a larger bench.[69] It is probably for this reason that the Court stopped short of making a definitive finding, and instead attempted to resolve the perceived conflict "by taking the middle path approach".[70] It ultimately held that:

> "… since in many contracts there is an effective need of conciliation etc. in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the [A&C] Act or for any legal proceeding required to be filed for preserving rights of the parties, however before formally starting effective arbitration proceedings parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, and which if they fail the parties can thereafter be held entitled to proceed with the arbitration proceedings…"[71] (emphasis added)

Despite taking a "middle path approach", subsequent judgments of the High Court of Delhi have effectively considered the judgment in *Haldiram Manufacturing* as overruled. Since 2014, the High Court of Delhi has consistently followed the judgment in *Ravindra Kumar Verma*, to re-affirm that a pre-arbitral step requiring the parties to attempt to reach an amicable resolution is

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[68] *Ravindra Kumar Verma* (n 62) 10.

[69] *State of Punjab v Devans Modern Breweries Ltd* (2004) 11 SCC 26; *Central Board of Dawoodi Bohra Community v State of Maharashtra* (2005) 2 SCC 673; *S Kasi v State* 2020 SCC OnLine SC 529.

[70] *Ravindra Kumar Verma* (n 62) 10.

[71] *Ravindra Kumar Verma* (n 62) 11.

directory in nature.[72] And even in case of non-compliance, "no fault can be found in the act of […] invoking the arbitration clause"[73].

In view of the above, if one were to inquire whether non-compliance with an ADR based pre-arbitral step can act as a bar to arbitral jurisdiction, the answer will invariably vary. On the one hand, some High Courts consider such pre-arbitral steps to be mandatory in nature, and therefore need to be complied with. On the other hand, other High Courts, particularly the High Court of Delhi, consistently endorse a contrary view.

4. OF WAIVER AND SUBSTANTIAL COMPLIANCE

In the absence of a definitive pronouncement by the Supreme Court of India on this issue, the inconsistent decisions of High Courts in India have created a legal quagmire. But even in this storm of inconsistency, one can find an Albatross of hope.

It often transpires that prior to commencing arbitration, the parties engage in an extended dialogue for resolving their dispute. As such, despite not strictly engaging in formal negotiations or mediation / conciliation proceedings in a manner contemplated by their arbitration agreement, they nonetheless attempt to reach an amicable resolution. In such circumstance, the question of whether a pre-arbitral step is mandatory or directory is supplanted by a pragmatic question as to whether the parties have, in fact, already complied with their contractual requirement.

Different courts in India have answered this question in a consistent manner, albeit through different routes. In a nutshell, their response has been guided by the following three principles.

Firstly, irrespective of whether they are mandatory or not, a party can, by conduct, waive its right to seek compliance with the pre-arbitral step contained in the arbitration agreement. This will be the case where the party opposing the commencement of arbitration on the basis that the pre-arbitral step has not been complied with has itself contributed to the alleged non-compliance.

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[72] *JK Technosoft* (n 16) 13-15; *Baga Brothers* (n 17) 7-8; *Siemens* (n 15)19; *Sarvesh Security* (n 12)26-28.

[73] *Sarvesh Security* (n 12)28.

In *M K Shah Engineers and Contractors v. State of MP*[74], the Supreme Court of India confirmed the above principle in a situation where the State of MP had itself frustrated compliance with the agreed pre-arbitral step:

> "No one can be permitted to take advantage of one's own wrong […] the fault for non-compliance lies with the respondent-State of M.P. through its officials. The plea of bar, if any, created by the earlier part of Clause 3.3.29 cannot be permitted to be set up by a party which itself has been responsible for frustrating the operation thereof. It will be travesty of justice if the appellants for the fault of the respondents are denied right to have recourse to the remedy of arbitration. A closer scrutiny of Clause 3.3.29 clearly suggests that the parties intended to enter into an arbitration agreement for deciding all questions and disputes arising between them through arbitrator and there-by excluding the jurisdiction of ordinary civil courts. Such reference to arbitration is required to be preceded by a decision of the Superintending Engineer and a challenge to such decision within 28 days by the party feeling aggrieved therewith. The steps preceding the coming into operation of the arbitration clause though essential are capable of being waived and if one party has by its own conduct or the conduct of its officials disabled such preceding steps being taken, it will be deemed that the procedural pre-requisites were waived. The party at fault cannot be permitted to set up the bar of non-performance of pre-requisite obligation so as to exclude the applicability and operation of the arbitration clause."[75] (emphasis added)

Additionally, the Supreme Court noted that "[t]he subsequent conduct of the respondents in voluntarily agreeing to the appointment of the arbitrators […] and not pursuing their objections under Section 33 of the Arbitration Act [1940] amounts to waiver on their part of the plea of non-compliance [and the respondent] has acquiesced in the appointment of arbitrators"[76].

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[74] *M K Shah Engineers and Contractors v State of MP* (1999) 2 SCC 594.

[75] *M K Shah* (n 74) 17.

[76] ibid 18.

Subsequent judgments, such as the High Court of Delhi's judgment in *Hyderabad Pollution Controls Ltd. v. Indure Pvt. Ltd.*, has relied on the Supreme Court's above observations to conclude that a respondent has, only "by its conduct of appointment of the arbitrator, in any case waived the agreed amicable settlement procedure preceding the arbitration."[77]

However, this is neither a fair reading of the Supreme Court's observations nor consistent with the provisions of the A&C Act 1996, which has replaced the Arbitration Act, 1940 that was interpreted in the *M. K. Shah* judgment. Section 16(2) of the A&C Act now clarifies that "a party shall not be precluded from raising such a plea [of lack of jurisdiction [merely because that he has appointed, or participated in the appointment of, an arbitrator."[78] In the same vein, Section 4 of the A&C Act, which codifies the principle of waiver, provides that a party shall be deemed to have waived its right to raise an objection regarding non-compliance of a requirement under the arbitration agreement only if it fails to raise its objection within the "time limit […] provided for stating that objection."[79] In this regard, Section 16(2) allows a party to raise its objection before an arbitral tribunal either at the time of or before the submission of its statement of defence.[80] Thus, until the stage of Section 16(2) is crossed, it is difficult to infer a general principle that by merely appointing an arbitrator, a party has waived its right to raise a jurisdictional objection premised on the non-compliance with a pre-arbitral step.

Secondly, it is sufficient for the parties to "substantially comply" with their ADR based pre-arbitral step, even if not strictly in the same manner as indicated in the arbitration agreement. In other words, where the parties have genuinely attempted (even if unsuccessfully) to arrive at an amicable resolution, such that there is no longer any scope for such a resolution, they would be deemed to have complied with the pre-arbitral stated in their arbitration agreement. In such case, no purpose will be served by referring the parties to any negotiations / discussions / mediation / conciliation process specifically envisaged by their agreement.

This principle is upheld by several Indian courts, including the Supreme Court of India.

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[77] *Hyderabad Pollution Controls Ltd v Indure Pvt Ltd* 2009 SCC OnLine Del 2839, 8.

[78] Arbitration Act, s 16(2).

[79] Arbitration Act, s 4(b).

[80] Arbitration Act, s 16(2).

In 2008, in *Visa International Ltd. v. Continental Resources (USA) Ltd.*, the Supreme Court of India rejected an objection based on a non-compliance with an ADR based pre-arbitral step, and explained as under:

> "It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties […] it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other […] The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke arbitration clause."[81]
>
> (emphasis added)

In 2014, in *Swiss Timing Ltd. v Commonwealth Games 2010 Organising Committee*, the Supreme Court of India again rejected an identical objection, noting that "the correspondence placed on the record […] clearly shows that not only the petitioner but even the ambassadors of the various Governments had made considerable efforts to resolve the issue […] It is only when all these efforts failed, that the petitioner communicated to the respondent its intention to commence arbitration".[82]

In 2014, in *Demerara Distilleries Private Ltd. & Anr v. Demerara Distilleries Ltd.*, the Supreme Court of India reached the same conclusion even when the parties had not yet complied with the pre-arbitral step of mediation.[83] The Court reasoned that this objection "would not merit any serious consideration" in as much as the "elaborate correspondence […] between the parties […] would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality."[84]

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[81] *Visa International Ltd v Continental Resources (USA) Ltd* (2009) 2 SCC 5, 38.

[82] *Swiss Timing Ltd v Commonwealth Games 2010 Organising Committee* 2014 SCC OnLine SC 480, 14.

[83] *Demerara Distilleries Private Ltd & Anr v Demerara Distilleries Ltd* 2014 SCC OnLine SC 953, 8-10.

[84] ibid 5.

In 2018, the High Court of Delhi in *Siemens Limited v. Jindal India Thermal Power Ltd.* affirmed that "the petitioners have complied with the" pre-arbitral step[85] because "even prior to invocation of arbitration clause […] attempts were not made to resolve the disputes between the parties."[86] This was consistent with the High Court of Delhi's conclusion in *JK Technosoft Limited v. Ramesh Sambamoorthy*, where the court proceeded to appoint an arbitrator since it was "clear that attempts to settle by consultation was a non-starter."[87]

Finally, in 2020, the High Court of Bombay in *Quickheal Technologies Ltd. V NCS Computech Pvt Ltd. & another* likewise reviewed the correspondence exchanged between the parties to note the ADR based pre-arbitral step "is in a realistic sense, exhausted"[88]. On the same basis, the court also concluded that "there was no scope for an amicable settlement"[89].

Therefore, notwithstanding the nature of the ADR based pre-arbitral step, the core purpose of the jurisdictional inquiry is to effectively determine two aspects: one, did the parties attempt to reach an amicable resolution in any manner; and if yes, two, is there no longer any scope for amicable settlement? If both of these questions are answered in the affirmative, then the parties would be deemed to have complied with the agreed pre-arbitral step.

Thirdly, notwithstanding the above, it is equally trite that the parties cannot allege that there is no scope for amicable settlement as a matter of routine. Rather, it is for the party opposing the commencement of arbitration to demonstrate this aspect. This was clarified by the High Court of Bombay in *Tulip Hotels Private Limited v Trade Wings Limited*:

> "The contention that the reference of the matter for conciliation at this stage, particularly in view of filing of the suit, is an empty formality, is devoid of substance. Merely because the parties have filed the suit that would not lead to a conclusion that the conciliation proceeding would be an exercise in futility. If the contention is accepted, it would virtually amount to pronouncing section 89

[85] *Siemens* (n 15) 20.

[86] ibid 22.

[87] *JK Technosoft* (n 16) 10.

[88] *Quickheal* (n 13) 47.

[89] ibid.

> of the C.P.C. to be redundant. Section 89 of C.P.C. clearly provides that even after filing the suit, it is the duty of the Court to try to encourage settlement of the matter by adopting one of the procedure enumerated thereunder and such procedure includes the conciliation proceedings as well as mediation. Being so, merely because the respondents have filed the suit that itself would not lead to a conclusion that conciliation proceedings in the matter, which are required to be undertaken in view of the arbitration clause in the agreement between the parties, would be of no use or would be without any effective solution. It is too pre-mature to make any comment in that regard."[90]
>
> (emphasis added)

Accordingly, despite their disagreements as to the nature of ADR based pre-arbitral steps, most courts in India agree on the flexible manner in which these steps can be complied with. This not only allows courts to balance the parties' intent to arbitrate with the need to encourage ADR mechanisms, but critically, to also sidestep the divisive issue of ascertaining if a pre-arbitral step is mandatory or not.

5. CONCLUSION

The aforementioned discussion allows one to derive several conclusions; two of which, are of utmost relevance.

Firstly, on the issue of whether non-compliance with ADR based pre-arbitral steps may bar arbitral jurisdiction, the position of law in India is akin to Schrödinger's cat. Just like Schrödinger's cat may simultaneously be considered as both dead and alive, Indian courts deem a pre-arbitral step to be both mandatory and directory at the same time. As unfortunate as it may seem, a more precise answer to this question will ultimately depend on the forum before which it is raised.

Secondly, despite the above variance, courts in India interpret ADR based pre-arbitral steps with a dose of pragmatism, in line with the parties' eventual objective behind incorporating such a requirement. Where there is no scope for an amicable resolution, the courts deem a pre-arbitral

[90] *Tulip Hotels* (n 17) 13.

step to have been complied with, which then allows the aggrieved party to commence arbitration without further delay.

Ultimately, consistent with Section 89 of the CPC, the existence of an arbitration agreement does not diminish the emphasis on encouraging the parties to resolve their disputes amicably. In this entire exercise, one must ultimately pay respect to both the text and spirit of Section 30(1) of the A&C Act, which provides that "[i]t is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement."[91]

[91] Aribitration Act, s 30(1).