



## MULTI – TIER ARBITRATION

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### INTRODUCTION

Alternative Dispute Resolution (ADR) is the process where parties in a dispute come to a compromise or settle their dispute without going to court with the help of a neutral third party. ADR is also known as external dispute resolution as parties settle their dispute without actually going to courts. The mechanism of ADR provides for an additional forum in settling of a dispute. Certain ADR techniques are well established and frequently used in today but then also ADR has no fixed definition and no jurist is able to give a proper explanation to what actually ADR is. ADR includes a wide range of processes, all with something in common except that each is an alternative to full-blown litigation. The definition of ADR is constantly expanding to include new techniques daily.

ADR is a bouquet that consists of various techniques being utilized to determine disputes involving a structural process with third party intrusion. This process is an alternative to formal justice system purported to be conducted by “real human beings” rather than lawyers. In reality, less than 5% of all lawsuits filed go for trial, the other 95% are settled or otherwise concluded before trial. Thus, it would be more accurate to say that now litigation has become an alternative and ADR is the norm. Back to the year 1980, experts and executives found ADR as a sensible, cost-

effective, and an expeditious way to keep corporations out of court and away from the kind of litigation that devastates winners almost as much as losers because of the delay in the judgements and expenses on the litigation. Now, more than 600 large corporations have adopted the ADR policy statement suggested by the Centre for Public Resources, and many of these companies reported considerable savings in time and money. In other countries, particularly in USA the settlement rate have increased to 94%.

The Law Commission of India in its 14<sup>th</sup> report, suggested devising of ways and means to make sure that justice should be uncomplicated, swift, easy on the pockets of the people, effectual and substantial. In its 77<sup>th</sup> report, Law Commission observed that Indian society is an agrarian society and is not refined enough to comprehend the technical and awkward procedures pursued by the Indian courts. We would like to quote from report prepared by Justice Rankin, in which he said that:

“Unless a Court can start with a reasonably clear slate improvement of methods is likely to tantalize only. The existence of a mass of arrears takes the heart, out of a Presiding Judge. Till such arrears exist, there will be temptation to which many Presiding Officers succumb, to hold back the heavier contested suits and devote their attention to the lighter ones. The turnout of decisions in contested suits is thus maintained somewhere near the figure of institution, while the real difficult work is pushed into the background.”



This report appear to be prepared only yesterday, but in fact it was prepared way back in 1925. The situation has yet not changed over the last 90 years and that is why some non-conventional methods have to be adopted to tackle the huge pendency of cases and one of these methods is ADR. The judicial system of India is bursting out at the seams and may collapse anytime unless the authority takes up an immediate remedial measures are adopted not only by the judiciary but also by the legislature and the executive of the country. ADR was at one point of time considered to be a voluntary act on the part of the parties which has now obtained a statutory recognition in terms of Code of Civil Procedure under section 89, Arbitration and Conciliation Act, 1996, Legal Services Authority Act, 1987 and Legal Services Authority Amendment Act, 2002.

known as arbitrator, which gives a decision which would be binding on the parties in accordance with the agreement. The function of an arbitrator is similar to that of judge who is an expert in his own field who gives a decision in accordance with the certain rules mentioned in the arbitration act.

Arbitration is further classified into two types:

(i) Ad hoc arbitration - It does not include the influence of any institution and holds its proceeding completely on the basis of the rules made by the parties. The terms of the proceeding are completely discretionary.

(ii) Permanent institution arbitration - In this type a permanent institutions organise arbitration, which is more likely to be governed by the rules made by such institutions involved. This type of arbitration is more formal.

**DIFFERENT METHODS UNDER ADR**

In India there are several grades of ADR, some of them are as follows:

When the state came into being, the whole judicial process became very formal and thus consequently the whole adjudicatory machinery was presided over by trained professional judges, but due to exponential increase in the rate of cases in courts, there was decreasing faith of people in judiciary which lead to rise of other mechanisms in the judicial system.

Various mechanisms involved in ADR are [1]:

**1. Arbitration:**

In this mechanism the parties agree to voluntarily participate for the resolution of the conflict through a third impartial party

**2. Mediation:**

In this form of ADR, a neutral third party resolves conflict between two parties which agree voluntarily to reach a settlement. This involves determination of interests which hold importance to the parties involved, if a dispute is settled then an attempt would be made to satisfy the interests of both the parties, which would be acceptable to both. It is a flexible, non-binding procedure, in which parties mutually agree for the settlement of a dispute. The mediators are impartial they help in giving a decision or guidance to the parties involved. The process involves is confidential wherein parties in the mediation are not allowed to expose



information, not even in court or in other legal institution.

Typically, this process is limited to civil cases which can include non-violent criminal acts such as harassment which can be resolved through mediation between the concerned parties.

### 3. Conciliation:

It is a process in which the two conflicting parties are brought to a compromise. This process is similar to mediation, it is flexible, non-binding on the parties. The process involves a neutral third party namely conciliator which asks the parties to make a list of the things they want in sequence with their line of preference. Then the conciliator goes back and forth asking each party to give on the objectives one at a time. The parties rarely have same priority sequence and sometime even some priorities are not mentioned in the list. In this way the conciliator can quickly attain its objectives and build an atmosphere of trust.

Like mediation process, the decision to comply with the settlement is with the parties only. It is not obligatory.

### 4. Negotiation:

Negotiation has been defined as “the process through which the needs of the parties are satisfied while someone else control their wants”. It is a non-binding process which involves interaction of the disputing parties in order to negotiate a settlement between them. This process requires a co-operative attitude, objectivity and willingness among both the parties in order to reach to a consensus. In this process the parties have

choice they can either appoint a team of negotiators or a single negotiator.

These are some methods under ADR which parties can adopt while settling their disputes. Nowadays these methods are more prevalent, and people prefer these more over the actual judicial proceedings.

### MULTI-TIER ARBITERATION

At least two different forms of dispute resolution procedures used, which are called ‘multi-tier’ dispute resolution are the arbitration Clauses. These clauses are envisaged for an escalation of the dispute. They are also known as ‘escalation clauses’ as the dispute escalates in complexity and formality of procedure from one stage to other and ultimately reaches the final stage of arbitration. Multi- tier arbitration clauses are generally of two kinds: parties to an arbitration agreement may decide that, prior to submitting any dispute to arbitration, they want to attempt an amicable settlement of the matter (pre-arbitration clauses) or post arbitration proceedings the clause should provide for second tier of arbitration proceedings (post-arbitration clauses)[2]. It is totally based on parties to the agreement which form of multi- tier arbitration they want to go for.

These include set of conditions which has to be fulfilled by the parties before going to arbitration. This has number of benefits it compels the parties to sit and discuss their point of interests and can prevent adversely consequence coming out of arbitration which can harm their relationship. They are given chances at different stages of arbitration before going to actual courts. The



benefit it beholds is that it would save time and money of the parties arising from indulging in litigation or arbitration if executed properly.

On the other hand a poorly drafted clause can prolong the needed arbitration and increase the cost on such conflict. So it is very important to frame the clauses of arbitration properly.

Conditions necessary for enforceability of pre-arbitral steps in a multi-tiered clause

The enforceability of the pre-arbitral steps in a multi-tiered dispute resolution clause depends on the language of the clause as well as the conduct of the parties to the agreement.

Factors on which it depends are as follows:

**a. Language of the clause**

It is very important for the parties to frame the arbitration clause properly and these clauses should be framed with a proper mechanism. Language used for the clause should be clear and simple and both the parties must agree to it.

In **Sushil Kumar Sharma v. Union of India (AIR 1999 Ker 440)**, it was observed by the Court that “Nature of clause in an agreement has to be seen. If the clause is mandatory with regard to the steps preceding arbitration, then the procedure ought to be followed, no party can go against the mentioned procedure. Without having followed the steps, the Arbitral Tribunal does not have jurisdiction to entertain it.”

**b. Conduct of the parties**

In **Visa International Ltd. v. Continental Resources (USA) Ltd ((2009) 2 SCC 55)**, the Hon’ble Supreme Court of India had the

occasion to reflect upon a clause in the agreement, which contemplated a pre-arbitral step before the invocation of arbitration. The agreement between the parties in this case had a multi-tiered dispute resolution clause which reads as follows, “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 observed that the precondition for referring any dispute to arbitration in the agreement between the parties was that the dispute should not be able to be “settled amicably” and not otherwise. It was contended on behalf of the counsel for the respondent, that in order for a dispute to be endeavoured to be settled amicably, there must be formal conciliation between the parties and that the agreement was contingent upon the failure of such conciliation. He further contended that since the applicant had not formally initiated conciliation proceedings, therefore the application for the appointment of arbitrator was premature and thus it ought to be dismissed according to the clauses of the agreement. The Supreme Court observed that there were several letters and correspondences which had been exchanged between the parties and these correspondences ranged over a period of months. In the view of the Court, these clearly established that the dispute between the parties could not have been amicably settled. In view of the same, the case was ripe for reference to arbitration and thus the request for appointment of arbitrator was duly granted.

From this case, we can conclude that for the multi-tier arbitration conduct of the parties is kept in mind.



### c. Time limits

It should be ensured that the provision allows for the parties to commence litigation and/or arbitration within a specified period of time. For example, an open-ended obligation to resolve the dispute through mediation before the parties are entitled to refer the dispute to arbitration is unlikely to be enforceable.

### MULTI-TIER ARBITRATION IN INDIA

In India the whole system of ADR is not fully matured as in western countries. Due to which the Indian lawyers do not come across to multi-tier arbitration cases, but a rapid change can be seen in this field and courts have also recognised it in cases in the last decade. It can be said that it is one of the contemporary developments in India.

The supreme court of India, after a long drawn dispute has firmly established that multi-tier arbitration clauses in an agreement are valid and not against public policy. If parties to an agreement agree to this form of litigation then judicial institutions are at no lining to stop them from doing so. The landmark judgment in this regard is

#### **Case: Hindustan copper limited vs Centro trade Minerals and Metals (AIR 2005 Cal 133)[3]**

Judgment was given by, the honourable Mr. Justice Ajoy Nath Ray & the honourable Mr. Justice Arun Kumar Mitra

This case has an extensive history and it begun when the parties entered into a

contract for sale of 15,500 DMT copper concentrate and to be delivered at Kandla Port in the State of Gujarat in two separate consignments. The said goods were ultimately required to be used at the Khetri Plant of HCL situated in the State of Rajasthan. The seller as mentioned in the contract was required to submit a quality certificate from an internationally reputed assayer, mutually acceptable to the parties. After the consignments were delivered, the payments therefore had been made. However, a dispute arose between the parties as regard with the dry weight of concentrate copper.

According to the clause 14 of the contract which contains an arbitration agreement which reads as under:

"All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in effect on the date hereof and the results of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction." Respondent invoked the arbitration clause mentioned in the agreement. The Arbitrator appointed by the Indian Council of Arbitration made a NIL award in favour of the respondent. Respondent then invoked the



second part of the said arbitration agreement on 22nd February, 2000. An award was made pursuant thereto.

During pendency of the proceedings HCL, filed a suit in the district court at Khetri in the State of Rajasthan questioning about the initiation of the second arbitration proceeding before International Chamber of Commerce inter alia contending that the provision for second arbitration was void and a nullity. No interim order was passed therein despite having been prayed for, whereupon an appeal was preferred by HCL before the District Judge, which was also dismissed. In a revision filed by HCL, the High Court granted an injunction in favour of plaintiff. In the meanwhile the sole arbitrator had commenced arbitration proceedings. Centro trade filed a special leave application before the Court questioning the said order of injunction passed by the Rajasthan High Court and by an order dated 8th February, 2001, the said order of interim injunction was vacated.

Arbitrator held his sittings in International chamber of commerce, London. HCL, in a series of letters to the International Court of Arbitration and to the Arbitrator, maintained that the arbitration agreement was void and was being opposed to public policy. Despite the same, they, through their attorney, consulted about the procedural aspects of the arbitration and had asked for their submissions in relation to the procedure, progress and substance of the dispute. HCL also received copies of all correspondence passed between Centro trade and the Arbitrator and of all submissions made. They had been given every opportunity to take any point which they wished to take in their defence. Centro trade served their submissions and supporting evidence by the

orders made by the Arbitrator. When no defence submission or supporting evidence was produced by HCL within the prescribed time, fax was sent to them by the learned Arbitrator giving them one last opportunity to inform him by return of any intention on their part to put in a defence and to seek an extension of time for doing so. HCL argued that the arbitration clause is itself invalid and on the ground that the successive arbitrations are not permitted at all in India took the matter to the Apex Court of India. There is no proof that the respondent ever objected to the rules and procedure followed by the arbitrator or that the arbitrator followed a procedure not contemplated in the agreement. Since no reply was made by them so arbitrator gave a time extension of three more weeks, after the time given arbitrator received the supporting evidences. In making the awards however, the Arbitrator considered the submissions made by HCL.

The award passed by the said Arbitrator contains following reliefs:

- (i) The arbitration clause contained in clause 14 of the agreement is neither unlawful nor invalid according to the laws.
  - (ii) The Arbitrator had jurisdiction to decide his own jurisdiction in terms of Article 8.3 of the ICC Rules as also Section 16 of the 1996 Act.
- a. The claim of Centro trade based on the report of Inspectorate was just. The arbitration award dated 15th June, 1999 was wrong. There is no dispute about the actual figure of loss claimed by Centro trade. There is no dispute as to the demurrage owing which, in accordance with Clause 9.2 of the contract, is to be calculated on the basis of a discharging



rate of 1600 MT per WWD of 24 consecutive hours.

- b. Centro trade is entitled to interest as well as costs of the goods.

It was directed that:

"(1) HCL will pay Centro trade the sum of \$152,112.33, inclusive of interest to the date of the award in respect of the purchase price for the first shipment.

(2) HCL will pay Centro trade the sum of \$15,815.59, inclusive of interest to the date of this Award in respect of demurrage due on the first shipment.

(3) HCL will pay Centro trade the sum of \$284,653.53, inclusive of interest to the date of this Award in respect of the purchase price on the second shipment.

(4) HCL will pay Centro trade their legal costs in this arbitration in the sum of \$82,733 and in addition the costs of the International Court of Arbitration, London the Arbitrator's fees and expenses totalling to \$29,000.

(5) HCL will also pay Centro trade compound interest on the above sums from the date of this Award at 6% p.a. with quarterly rests until the date of actual payment."

After the award granted by the arbitrator, HCL filed an application purported to it under Section 48 of the 1996 Act in the Court of District Judge, Alipore, Calcutta. HCL also filed a suit before the Civil Judge, Senior Division, Alipore praying for a declaration that the ICC award is void and a nullity, and also for permanent injunction and damages against the respondent.

In the meanwhile, Centro trade filed an application for enforcement of the said award in the Court of the District Judge,

Alipore. Upon an application made in terms of Clause 13 of the Letters Patents of the Calcutta High Court by Centro trade, the said execution case was transferred to the Calcutta High Court.

A learned Single Judge of the said court by a judgment and order allowed the said execution petition. Aggrieved by and dissatisfied therewith, HCL preferred an appeal which was allowed by reason of the impugned order. Both the parties questioned the correctness of the said judgment.

The Supreme Court records its satisfaction that the foreign award is enforceable, and it shall be deemed to be a decree and also accepted **multi-tier arbitration as an integral part of arbitration in India**, however there will still **remain open loops in this regime**.

### COMPARITIVE ANALYSIS

Multi-tier arbitration is taken differently in different countries. Every country has their own view related to the same. Some countries has accepted this quite earlier but some have till now not accepted it. In this paper, we are comparing the condition of multi-tier dispute resolution clauses by national courts of different countries with India.

#### England

Initially the courts in England were reluctant to encourage the mechanisms involved in multi-tier arbitration, and this could be analysed through the various case decisions like: **Walford v miles**, where a bare agreement to negotiate enough was made and it was considered that such agreement



will be treated as mere agreement to agree and nothing else.

In another case, **Sulamerica CIA Nacional de Seguros v. Enesa Engenharia and Tang Chung v grand Thornton international:**

In which both the parties were to referred to alternate dispute resolution other than arbitration but one of the parties landed up to the tribunals directly without referring to mediation and conciliations respectively, the question involved was whether these resolution were pre conditions before commencement of arbitration the court held that it is not required in order to refer the case to arbitration.

**Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited:**

The multi-tier arbitration clause had a provision of negotiating 4 weeks prior before commencing arbitration as mentioned in the agreement. One of the party went for arbitration without negotiating, the court's decision was found contradicting to that of Sulamerica's case in which it was held the negotiation was one of the conditions required before going on to arbitration but in the above case the facts indicated that parties have sufficiently negotiated before reaching the tribunal for arbitration.

#### **United States**

The prevailing trend in the United States, is that the pre-arbitral steps in multi-tier clauses will not constitute jurisdictional conditions precedent to the commencement of arbitration, unless the multi-tier clause at issue expressly includes language to the contrary of the same[4].

In this view the courts through its decisions said that the matter involved would be

beyond jurisdictional provision only if the clause expressly states in its language to contrary. **BG group v Republic of Argentina:** it was held that not being able to comply with pre arbitration steps by the parties does not deprive the tribunals from providing arbitral remedies.

**Sulamerica CIA Nacional de Seguros v. Enesa Engenharia:**The court held that in the tier clause it was clearly stated that mediation has to be pre condition to arbitration and that it was difficult to imagine a more plain language in which it can be stated. Similar type of outcome was reached in the case of **Ponce Roofing Inc. v. Roume Corp.**

The condition in both the countries are quite similar but in India multi- tier arbitration is accepted quite late and even till now Supreme Court has not given any proper decision nor any legislature has been framed till now.

#### **CONCLUSION**

The arbitrating laws have gone through a drastic change ever since the first legislation on arbitrating was made in India. From time to time there have been a huge shift in the approach with regard to the proceedings of arbitration. The concept of multi-tier arbitration though new for the Judiciary of India but in other countries it is a part in almost every business contract like construction contracts or partnership contracts which constant cooperation between the parties. Even though there is no proper statute related to multi-tier arbitration but still could survive under the 1996 act.

The multi-tier arbitration clauses included in the agreement is to avoid the cost of arbitration and to minimise any upset to the



parties ongoing relationship that would result from escalated proceedings. Despite all these benefits that flow from these clauses, consideration must be given to whether a multi-tier clause warrants inclusion in an agreement, particularly if both parties are sophisticated, and are likely to engage in settlement negotiations irrespective of the presence of a multi-tier clause[5].

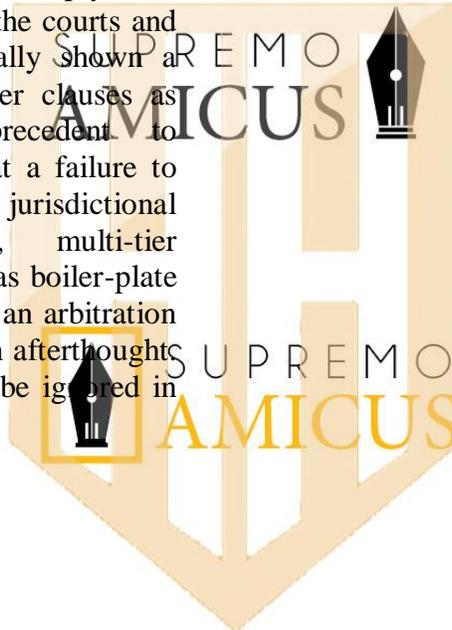
The assessment as to whether the multi-tier clause is to be included in an agreement must be taken into account the risks that may arise from the failure to comply with such a clause. While most of the courts and arbitral tribunals have generally shown a reluctance to finding multi-tier clauses as jurisdictional conditions precedent to arbitration, there is a risk that a failure to comply with them may have jurisdictional consequences. Accordingly, multi-tier clauses should not be treated as boiler-plate provisions whose inclusion in an arbitration agreement can be treated as an afterthought. Nor should multi-tier clauses be ignored in the lead-up to an arbitration[6].

[626/multi-tier-dispute-resolution-clauses-as-jurisdictional-conditions-precedent-to-arbitration](#)

[5] Ibid as 3

[6] Ibid as 3 and 4

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**REFERENCES**

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