

A Party's Insistence On Complying With Pre-Arbitral Steps Would Be Meaningless If It Fails To Respond To The Counter-Party's Notice Invoking Arbitration: Delhi High Court

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Introduction

In a recent decision in ***Akhil Gupta v. Hindustan Unilever Ltd.***¹, the Delhi High Court, while deciding upon a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), opined that the requirement of engaging in pre-arbitral steps could be dispensed with if the same is rendered meaningless and would only delay the matter further. In this article, we briefly navigate through the facts and findings in the above-mentioned case.

Brief Facts

The applicant/ petitioner ("**Petitioner**") filed a petition under Section 11 of the Arbitration Act seeking the appointment of a sole arbitrator to adjudicate certain disputes that had arisen between the parties. As per the Petitioner, he had entered into what is termed as a Redistribution Stockist Agreement dated 14.07.2021 ("**Agreement**") with Hindustan Unilever Ltd. – the respondent ("**Respondent**"). In terms of the Agreement, the Petitioner was purportedly appointed as a Redistribution Stockist of the Respondent, which is engaged in, amongst other things, the business of marketing and sale of consumer and healthcare products.

Pursuant to disputes having arisen between the parties, the Petitioner alleged that the Agreement came to be terminated by the Respondent on 14.02.2022. In this regard, the Petitioner claimed to have various monetary claims to the tune of INR 55,00,000, which were raised by the Petitioner against the Respondent. With respect to such claims, the Petitioner issued a notice to the Respondent under Section 21 of the Arbitration Act invoking arbitration on 06.03.2023. However, the Petitioner received no response from the Respondent.

When the matter came up for hearing before the High Court, the Respondent confirmed that no response was issued to the Petitioner's notice invoking arbitration under Section 21 of the Arbitration Act. However, the Respondent argued that the arbitration and the dispute resolution clauses in the Agreement contemplated the appointment of an "ombudsman" if disputes could not be resolved amongst the parties within a period of two months since they arose. As this pre-arbitral step never came to be followed, the Respondent submitted that the arbitration was invoked prematurely and the petition under Section 11 was not maintainable.

Findings

The High Court observed that in the present matter, the notice invoking arbitration under Section 21 of the Arbitration Act was sent way back on 06.03.2023. Further, it was clear that the disputes had ensued between the parties and had not been resolved for more than a

¹ *Akhil Gupta v. Hindustan Unilever Ltd.*, 2024 DHC 2657.

year. In fact, admittedly, the Respondent did not even respond to the notice dated 06.03.2023.

The High Court opined that, in the above circumstances, the fact that the dispute resolution clause contemplates a specific multi-tier procedure for resolving disputes would have no meaning. The High Court arrived at this finding since the Petitioner issued a notice invoking arbitration, but the Respondent failed to take any steps in this regard. Accordingly, the High Court opined that the relegation of parties to an ombudsman at such a stage is clearly a step which would further delay the matter. The High Court then proceeded to appoint a sole arbitrator in the matter.

Comments

Arbitration agreements often include pre-arbitral procedural steps like conciliation, negotiation, and mediation, that parties are required to pursue before initiating arbitration to resolve disputes amicably. These pre-arbitral procedures raise important legal inquiries. First, is compliance with these steps obligatory? Second, what are the consequences if a party neglects these preliminary measures? Third, can an argument be made during arbitration initiation that arbitration invocation is premature because a party failed to complete the pre-arbitral steps?

The issue has resulted in contradictory rulings from various High Courts across India. While some Indian Courts have affirmed the indispensable and obligatory nature of pre-arbitral procedures outlined in a contract, others have taken a different stance.

In the case of *Nirman Sindia v. Indal Electromelts Ltd.*², the Kerala High Court stressed that parties bound by a contract with a designated dispute resolution mechanism must strictly follow the agreed-upon procedure. The Kerala High Court opined that bypassing the initial dispute resolution step and proceeding directly to the second step would be impermissible. Similarly, the Delhi High Court, in *Sushil Kumar Bhardwaj v. Union of India*³, echoed a similar interpretation, asserting that the procedural conditions preceding invocation of arbitration are not discretionary but compulsory.

In *Simpark Infrastructure Pvt. Ltd. v. Jaipur Municipal Corporation*⁴, the Rajasthan High Court also highlighted the necessity for parties to adhere to the agreed-upon dispute resolution procedure and meet the specified conditions before triggering the arbitration clause. Failure to adhere to the designated steps renders an arbitration application "premature". Likewise, the Bombay High Court, in *Tulip Hotels Pvt. Ltd. v. Trade Wings Ltd.*⁵, rejected a petition seeking the appointment of an arbitrator when the parties neglected the prescribed pre-arbitral conciliation step. The Bombay High Court affirmed that only after fulfilling these prerequisites could the parties legitimately resort to arbitration.

On the other side, there are rulings where the necessity to adhere to pre-arbitral measures is considered optional. In the case of *Ravindra Kumar Verma v. BPTP Ltd.*⁶, the Delhi High Court ruled that the pre-arbitral procedures specified in an arbitration clause are only

² 1999 SCC OnLine Ker 149.

³ 2009 SCC OnLine Del 4355.

⁴ 2012 SCC OnLine Raj 2738.

⁵ 2009 SCC OnLine Bom 1222.

⁶ 2014 SCC OnLine Del 6602.

directory rather than being mandatory. It was recognised that parties should strive to follow the agreed-upon conciliation process within a reasonable timeframe before initiating arbitration. However, arbitration can still be initiated if these discretionary pre-arbitral steps prove ineffective or become merely a formality. Following the *Ravindra Kumar*⁷ judgment, subsequent decisions⁸ of Delhi High Court have affirmed this view, highlighting the suggestive nature of pre-arbitral measures.

In *Demerara Distilleries P. Ltd v. Demerara Distilleries Ltd.*⁹, the Supreme Court of India determined that pre-arbitral procedures are not obligatory. Despite the arbitration clause requiring mutual discussion and mediation before arbitration, the Supreme Court appointed an arbitrator in a case where an application for appointment was challenged as being "premature".

Conclusion

The intricacies surrounding the obligatory or discretionary nature of pre-arbitral procedures, as highlighted in various Court decisions, emphasise the importance of proper drafting of dispute resolution clauses. As evidenced by conflicting rulings, there is no uniformity in the legal landscape regarding whether parties are obligated to strictly adhere to pre-arbitral measures before initiating arbitration or if such steps are optional. The wording of dispute resolution clauses plays a pivotal role in this regard.

To navigate this uncertainty, businesses should proactively craft dispute resolution clauses with precision. By incorporating language that unambiguously defines the obligatory nature of pre-arbitral steps and sets forth specific timelines for their completion, enterprises can bolster the effectiveness of the dispute resolution process.

By clearly outlining pre-arbitral steps along with specific timelines, businesses can not only streamline the arbitration process but also significantly improve cost, administrative, and logistical efficiency. This strategic approach not only enables businesses to concentrate on their core growth objectives but also helps mitigate the risks associated with prolonged litigation at the arbitration stage.

⁷ 2014 SCC OnLine Del 6602.

⁸ *Kunwar Narayan v. MS Ozone Overseas (P) Ltd.*, 2021 SCC OnLine Del 1950; *Siemens Ltd. v. Jindal India Thermal Power Ltd.*, 2018 SCC OnLine Del 7158; *Union of India v. Baga Bros.*, 2017 SCC OnLine Del 8989; *Sarvesh Security Services (P) Ltd. v. DSIIDC*, 2018 SCC OnLine Del 7996.

⁹ (2015) 13 SCC 610.

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