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Conciliation Preceding Arbitration: Mandatory or merely a suggestion

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Conciliation Preceding Arbitration: Mandatory or merely a suggestion¹¹

INTRODUCTION

In a recent decision of the [Delhi High Court](#), the Court paved that conciliation is not a condition precedent for arbitration and hence can be passed over. The court also emphasized that conciliation is merely voluntary and suggestive in nature [¶12].

Arbitration is a method of alternative dispute resolution, and most contracts nowadays incorporate an arbitration clause to solve any dispute that might arise without going to Court. Recently, the parties have started incorporating a multi-tiered dispute resolution as a pre-arbitration clause. Such agreements stipulate specific actions that parties must follow before bringing an arbitration clause into play. These procedures often involve time-limited mediation, peaceful settlement through cordial negotiations, and cooling-off periods. Thus, the recent decision stands as a conundrum regarding the applicability of such provisions.

BACKGROUND OF THE CASE

M/s Oasis Projects Ltd. and National Highway and Infrastructure Development Corporation Ltd (NHIDCL) entered a construction contract. The NHIDCL issued a notice for 'intention to Terminate the Contract', which led to the current dispute. The petitioner, M/s Oasis Projects Ltd., filed a petition before the Delhi High Court. This was filed in accordance with the arbitration clause and under [Section 11\(6\)](#) of the Arbitration and Conciliation Act, 1996. Under this Section, an arbitrator is appointed by the Court in case of any dispute between the parties.

This petition for the appointment was challenged by the respondent, NHIDCL, stating that the contract stipulated that the parties will recourse to conciliation before going for arbitration, and hence this petition was in contravention of the clauses of the contract. The petitioners claimed that such pre-arbitration clauses were merely suggestive in nature and not mandatory. These

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clauses did not waive the rights of parties to invoke arbitration. The petitioner also claimed that the petition was filed under Section 11(6) only after other dispute-resolution mechanisms had failed.

CONSEQUENCE OF PRESENT DECISION

Under [Section 77](#) of the Act, the parties may be allowed to initiate arbitral or judicial proceedings only after conciliation or other dispute-resolution mechanisms are completed. The party would be allowed to initiate arbitral or judicial proceedings before the conclusion only when its rights are threatened.

This decision by the Delhi High Court presents a conundrum regarding the steps that are mandatory to be followed in case of dispute resolution and arbitration. The Court in the present case referred to [Ravindra Kumar Verma v. M/s BPTP Ltd. & Anr.](#), where the same High Court in 2014 had ruled that such procedural dispute-resolution clauses provided in the contract can be overlooked in case of urgency. This provides vague discretionary power to the parties that might use this 'urgency clause' to avoid conciliation proceedings and directly jump to arbitration [¶8].

A different position was taken by Dipak Misra, the then-CJI, in the case of [United India Insurance Co. Ltd. v. Hyundai Engineering and Construction Co. Ltd.](#), where it was mandated that fulfilment of conciliation proceeding if directed in the contract, is a condition precedent for moving towards arbitration [¶12]. The Delhi High Court also took a similar position in 2021 in the case of [M/S Sanjay Iron and Steel Limited v. Steel Authority of India](#). The Court clarified that if the terms of the contract clearly and unambiguously state that multi-tiered dispute resolution will be resorted by the parties before going for arbitration, there must be mandatory compliance with the clause agreed upon in the contract. Such an option of conciliation, though not binding, must be exhausted before taking the matter for arbitration [¶26].

GLOBAL STANCE

In [International Research Corp PLC v. Lufthansa Systems](#), the Singapore Court of Appeal held that "if the pre-conditions are provided with sufficient clarity and depth, then they should be

recognized as required in character." The Court emphasized that arbitration should be utilized only when the conciliation proceedings were completed [¶105].

In [Devalk Lincoln Mercury v. Ford Motor Co.](#), the court acknowledged that the requirement of the mediation clause had not been met by the dealer, which was a condition precedent to filing a lawsuit, hence such filing was void. According to the US Court's view, if any mediation or conciliation clause had been entered by the parties in the agreement, it cannot be ignored and must be completed before going to the next stage. The court reaffirmed that a party should not be permitted to break the terms of an ADR agreement by going to court before it has been given a chance to be resolved.

WAY FORWARD

With this decision, the focus is completely shifted towards Section 77, emphasizing arbitral or judicial proceedings and giving no weightage to dispute resolution mechanisms. It also reduces the enforceability of the pre-arbitration dispute resolution clauses, almost making them inefficient. It gives arbitrary and enormous power of leaving the conciliation proceedings or avoiding them completely to the parties. The current Indian position on such clauses provide no concrete jurisprudence.

The very nature of dispute resolution through conciliation, mediation or negotiation is voluntary. So 'mandatory conciliation' itself is an oxymoron. Though it must be encouraged, the parties cannot be forced to refer to these methods against their will. With the spurt of MNCs in India, many companies have started incorporating multi-tiered dispute resolution clauses in the agreements. It is necessary for India to demystify such intricacies as it would help in boosting its Ease of Doing business rankings.