GOOD FAITH OR BAD FAITH – ANALYSING THE ENFORCEABILITY OF PRE-ARBITRAL NEGOTIATION CLAUSES

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Court proceedings have always been considered an expensive and time-consuming system of dispute resolution. Whilst arbitral proceedings have been a respite for those inclined to keep their disputes away from Courts, even such adversarial proceedings come with their own set of challenges. This has created a need for other alternatives/supplements. One such supplement, increasingly found tiered in dispute resolution clauses in commercial contracts, is the obligation to amicably negotiate on the disputes in good faith, prior to instituting adversarial proceedings. But how far can one ensure the element of 'good faith' in such negotiations and how far are such clauses enforceable? This article seeks to provide (i) a holistic view of the nature of pre-arbitral negotiation clauses; (ii) a comparative analysis of the judicial approach adopted in various jurisdictions and the role of Courts in enforcing such clauses; and (iii) practical guidelines for drafting enforceable tiered dispute resolution clauses.

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I. INTRODUCTION

Arbitration, as an alternative dispute resolution mechanism, has emerged as a popular choice for parties who desire to settle their disputes outside court. However, *inter alia* its expensive and adversarial nature, which may ultimately drag parties to courts, has created a need for other alternatives/supplements, especially in commercial contracts. Tiered dispute resolution mechanisms have therefore gained much traction, as they offer parties a final opportunity to resolve their disputes, but without having to resort to adversarial proceedings in the first instance. Negotiations, in good faith, with the aim of reaching an amicable settlement is one such pre-arbitral steps that may help parties avoid legal proceedings and provide the parties an opportunity to discuss and settle their disputes and/or claims with a commercial mind. Such pre-arbitral negotiation clauses require the parties to meet and undertake friendly/good faith discussions in order to reach a compromise/settlement. However, the terms 'good faith' or 'friendly' discussions are highly subjective in nature. Despite the informal and inexpensive nature of such a mechanism, the hurdles faced by the parties in enforcing such negotiation clauses, the difficulties faced by the arbitrators or the courts in determining the nature of the parties' obligations thereunder, and the parameters of sufficient compliance; have made parties mindful of inclusion of such clauses in their agreements.

This paper seeks to examine the evolving judicial attitude across several common law jurisdictions towards the enforceability of good-faith negotiation clauses and offers practical guidelines for drafting enforceable tiered dispute resolution clauses. The discussion is divided into seven parts. The first part analyses the concept of tiered dispute resolution clauses, the second and third parts discuss negotiation as a means of settlement of disputes and the element of "good" faith in such negotiations. The fourth part discusses the enforceability of such good faith negotiation clauses. The fifth and the sixth parts of this paper compares the jurisprudence surrounding such clauses across the United Kingdom, Australia, and Singapore and further analyses the position adopted by the Indian courts. Finally, this is followed up with some guidelines that practitioners may consider whilst drafting such clauses.

II. TIERED DISPUTE RESOLUTION CLAUSES

Tiered dispute resolution clauses, also known as 'escalation clauses' or 'filter clauses', comprise of one or more steps involving amicable alternative dispute resolution procedures, before such disputes become the subject matter of adversarial proceedings.[1] Such steps are left to the parties' choice and may include negotiations, mediation, conciliation, and expert determination. These are increasingly popular in commercial contracts as most parties are inclined to amicably settle, in an attempt to safeguard their commercial relationship[2] and prevent legal proceedings, which are both expensive and time-consuming. Such clauses are a preferred choice as they allow resolution of disputes, without the commencement of any formal proceedings which may otherwise irreparably strain their business relationships and

[1] Oliver Krauss, 'The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith under English Law' (2015-2016) 2 McGill J Disp Resol 142.
[2] G. M. Vlavianos, V. F. L. Pappas, 'Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration' (ed. J. William Rowley QC), 20172, Part IV.

commercial trust. In the event such disputes are not resolved, the parties are then referred to adversarial proceedings. Tiered dispute resolution clauses can be drafted in diverse ways depending upon the requirements of the parties. It will be relevant to point out that dispute resolution clauses are not boiler plate clauses. An effective dispute resolution clause must be tailor made based on the nature of the agreement and the intention of the parties. There is no straitjacket formula for drafting these clauses and are best drafted on a case-to-case basis.

The advantages of amicable settlement of disputes are well known and widely accepted, and such procedures are now even mandated by legislation. For example, the Commercial Courts Act, 2015 has made mediation prior to the institution of commercial suits mandatory. Section 12A of the Act states that a suit, which does not contemplate any urgent interim relief, shall not be instituted unless the party instituting the suit exhausts the remedy of pre-institution mediation and such a process shall be completed within a period of three months, which can be extended for a further period of two months with the consent of parties. Thus, parties involved in commercial transactions could be said to be subjected to a tiered dispute resolution process even without having incorporated such a clause in their underlying agreements.

In tiered dispute resolution clauses, each step usually escalates the disputes to higher levels of authority, and different degrees of determination. The number of steps involved prior to resorting to arbitration depends on the requirement of the parties keeping in mind their commercial transaction. The simple clauses often require the parties to negotiate or mediate their disputes in good faith or engage in friendly discussions for a particular period, failing which the disputes are referred to arbitration.[3] The more complex ones often include negotiations in good faith as the first step followed by negotiations between senior representatives of the parties and such other steps, with arbitration as only the last resort for the parties.[4] Essentially, these clauses are pre-conditions or conditions-precedent to arbitration/adversarial action.

The mandatory nature of tiered dispute resolution clauses bars the initiation of arbitral (or other adversarial) proceedings until the initial step of negotiation or mediation (or any other mechanism stipulated in the contract) is satisfied. The step providing for reference of disputes to arbitration is not triggered, unless either of the parties initiates and completes the pre-arbitral step.[5] If parties fail to comply with such pre-arbitral steps, the disputes cannot be referred to arbitration.[6] However, such clauses may be misused by the defaulting party who may refuse to take part in such pre-arbitral steps for the sole purpose of avoiding or delaying submission of disputes to arbitration.[7]

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[3] *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd*. [2014] EWHC 2104 (Comm), [2015] 1 WLR 1145.
[4] *M/s. Conway Exports Pvt. Ltd. v. M/s. Rudra Pharma Distributors Pvt. Ltd.* 2006 SCC OnLine Del 825.
[5] Didem Kayali, '*Enforceability of Multi-Tiered Dispute Resolution Clauses*', (2010) 27 J Int'l Arb 551-577
[6] *HIM Portland LLC v. DeVito Builders Inc* 317 F.3d 41, 42 (1st Cir, 2003).
[7] Katarina Tomic, 'Multi-Tiered Dispute Resolution Clauses: Benefits and Drawbacks' (2017) Harmonius: J Legal & Soc Stud Se Eur 360.

III. GOOD FAITH NEGOTIATIONS AS A PRE-ARBITRAL STEP

Negotiations have always played an important role in the formation of business relationships. Parties entering into commercial transactions *ad nauseum* negotiate the terms that will govern their relationship. Not only at the inception, but even at times when there are disagreements arising out of such transactions, parties seek to engage in negotiations in order to amicably settle such conflicts and to continue with their individual business commitments. Along with alternative dispute resolution mechanisms like mediation and conciliation, negotiation as a form of dispute resolution process has gained much significance. The reasons *inter alia* include long drawn and/or expensive adversarial proceedings, which do not guarantee a favourable outcome, but will, in most cases, sour business relationships and put a halt on commercial transactions. Therefore, there is an obvious commercial sense in such dispute resolution clauses as arbitration can be avoided by friendly discussions to resolve a claim.[8]

Negotiations are an informal process whereby parties attempt to settle their claims without having to commence any legal or institutional proceedings. The approach and intent of the parties in conducting such negotiations should be to reach an agreement that will put an end to their respective *inter se* claims. The aim of the parties should be to resolve a dispute about the existing bargain and its performance. The parties to a negotiation are required to have an honest approach and discuss their claims keeping in mind their commercial transaction. The entire purpose of such clauses providing for negotiation as a pre-arbitral step is to encourage business-like resolution of differences and disputes with a view to avoid the time and expense involved in a legal process.[9]

It cannot be gainsaid that the parties are in the best position to determine their commercial bargain. Negotiations are designed to exclude the role of any third party (including lawyers), so that perspectives are limited to the commercial bargain (as opposed to the purported strength of one's legal case), and the parties are in the best position to reach a settlement. Their familiarity with their commercial goals and the consequences of an untimely break in the business relationship, normally motivates parties to reach a compromise that is best suited for them.

Additionally, the informal nature of such negotiations and the lack of any rigid procedural structure nurtures innovative and practical solutions, and moves parties to amicably resolve their disputes, in the true spirit of such clauses. Parties are guided by commercial considerations and not legal principles (or technicalities) which should enable them to settle their disputes commercially and quickly. Further, during the course of such negotiations, which may be made contractually confidential, the reputation of the parties is not affected (and consequently egos aren't irreparably hurt) and such negotiations (which are inherently and contractually without prejudice) do not prejudice the parties' legal rights. At the same time, unlike adversarial proceedings (which are, at times, initiated with an injunctive order),

[8] *Emirates v. Prime Mineral* (n 4).
[9] *Emirates Trading Agency LLC v. Sociedade De Fomento Industrial Private Ltd*. [2015] EWHC 1452 (Comm), [2016] 1 All ER 517 (Comm).

business remains unhindered while parties negotiate their claims. If parties genuinely comply (in letter and in spirit) with their obligation to negotiate in good faith with a view to amicably reach a settlement, disputes get filtered at an early stage and parties are not constrained to resort to adversarial proceedings.

Having said this, such clauses do have their own tribulations, and parties must be mindful before including negotiations as a pre-arbitral step to their tiered dispute resolution clause. The concept of 'good faith' in negotiations or 'friendly' discussions is often considered too open ended, and fails to provide sufficient meaning or measure as to what such agreements (at the minimum) involve or when can such negotiations be objectively determined to have concluded.[10] The difficulty in ensuring 'good faith' in any negotiations between the parties, accompanied by the difficulty in determining whether the parties have discharged their obligations in 'good faith', usually cause apprehensions of unenforceability of such clauses. Further, the lack of specificity and clarity in the process to be followed in certain tiered dispute resolution clauses involving negotiation, makes such pre-arbitral steps unenforceable in court. Additionally, if strict timelines are not expressly stated in such clauses, such negotiations can be prolonged by the defaulting party which in turn may make such claims time barred. In well drafted pre-arbitration negotiation clauses, a particular time period is stipulated for completing such negotiations, and other checks and balances are put in place to prevent misuse.[11]

The substance of such negotiations, i.e., what is discussed between the parties, has been the topic of much debate and has resulted in contrasting views. Whilst Australian Courts are of the view that such negotiations should be anchored in the parties' assessment of their rights and obligations under their existing bargain,[12] English Courts find such a view to be unrealistically narrow. According to the English Courts, good faith negotiations or friendly and amicable discussions should proceed on the premise that both parties' interests would be served by a compromise which involves future business dealings in light of the changes in the commercial environment irrespective of the party's existing legal rights.[13] This means that amicable resolution of commercial disputes typically involves consideration, not only of the existing contractual rights and obligations which the parties have assumed, but also parties' wider commercial interests which might enable the parties to settle those disputes which otherwise would have been difficult to settle.[14]

IV. THE ELEMENT OF 'GOOD' FAITH IN NEGOTIATIONS

The concept of "negotiations in good faith" has remained a topic of hot debate. The uncertainty that comes with the necessity to negotiate in 'good faith' is what often makes such clauses unenforceable and unworkable.[15] The question then is, what does the requirement of

[10] Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 636 – 942
[11] Krauss (n 1).
[12] *United Group Rail Services Limited v. Rail Corporation New South Wales* (2009) NSWCA 177.
[13] *Emirates v. Sociedade* (n 10).
[14] *Emirates v. Prime Mineral* (n 4).
[15] Leon E. Trakman, Kunal Sharma, 'The Binding Force of Agreements to Negotiate in Good Faith'(2014) 73 The Cambridge Law Journal 598.

negotiating in good faith actually entail? What is the measure for determining whether the parties have negotiated in good faith or have engaged in 'friendly' discussions? Can the parties be expected to negotiate in good faith or have friendly discussions, in the midst of burgeoning disputes? Unless terms such as 'good-faith' and 'friendly-discussions' are given clear, objective, and substantive meaning, clauses requiring the same may end up being an insignificant and empty formality.

The challenge, often faced while interpreting such clauses (those requiring the parties to negotiate in good faith), is the uncertainty and ambiguity arising from bad or inappropriate drafting. Such clauses often require parties to simply negotiate in good faith or engage in friendly discussions to resolve their disputes before such disputes are referred to arbitration, and do not provide any additional constraints or requirements defining what should actually be done, and how it should be done. Such clauses have been held to be nebulous and amorphous, implicating factors that are so indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise.[16] The reason being the difficulty in proving compliance with an agreement to negotiate in 'good faith' with certainty. However, such difficulty does not, *ipso facto* necessarily mean that the pre-arbitral step is vague, illusory, or uncertain. The test of enforceability of such clauses is not whether such agreements to negotiate are validly recognized processes of alternative dispute resolution, but whether the obligations and the negative injunctions that such agreements impose on the parties are sufficiently certain and clear which can be given legal effect to.[17] The phrase 'good faith' or 'friendly' or 'amicable' implies honesty and the observance of reasonable commercial standards of fair dealing.[18] Parties engaging in good faith negotiations must have an honest, genuine and realistic assessment of their rights and obligations. An agreement to negotiate in good faith is a promise to negotiate genuinely with a view to resolve claims to entitlement by reference to a known body of rights and obligations, in a manner that respects each party's contractual rights and gives due allowance for honest and genuinely held views about those pre-existing rights.[19] It requires a bona fide effort and an honest and genuine attempt to resolve differences through discussions. If such discussions are thought to be reasonable and appropriate, the parties should be ready to make a compromise in order show faithfulness and fidelity to existing and future bargains.[20] There is an obligation on the parties to cooperate in order to achieve contractual objects. The yardstick of such negotiations is, therefore, honest, and genuine negotiation within the framework of fidelity to the bargain.[21]

In order to determine whether there has been sufficient compliance with an agreement to negotiate in good faith, it must be seen whether the parties were willing to comply with honest standards of conduct having regard to the interest of the parties. The parties are expected to conduct themselves in a manner that will yield consensus. There must be a willingness to

[16] *Candid Productions v. International Skating Union,* 530 F. Supp. 1330 (S.D.N.Y 1982).
[17] *Tang & Anor v. Grant Thornton International Ltd. & Ors.* [2012] EWHC 3198 (Ch), [2013] 1 All ER 1226 (Comm).
[18] *Emirates v. Prime Mineral* (n 4).
[19] *United Group Rail* (n 13).
[20] ibid. Also see *Emirates v. Prime Mineral* (n 4).
[21] *United Group Rail* (n 13).

consider options for resolution of disputes that maybe put forth by the counter party. Each party is expected to reveal true and accurate information, put forward their best proposal having regard to the commercial interests of both parties and make concessions to the extent possible. If such conduct is deviated from by the parties, arbitrators or courts would not have any difficulty in identifying such conduct. For example, if the defaulting party refuses to discuss their claims, courts will have sufficient grounds to hold such parties in breach of their obligations. Thus, where the parties fail to honour standards of conduct that is expected from parties who have entered into an agreement to negotiate, courts and arbitrators will have no difficulty in recognizing and identifying these failures.[22]

Whilst this hassle-free and informal process of settling disputes by way of good faith negotiations and friendly discussions may be viewed as the simplest and commercially viable method, parties must be mindful of such inclusion in their tiered dispute resolution clauses. It is important to carefully analyse the advantages and drawbacks that accompanies such negotiations and its enforceability in various jurisdictions (discussed later).

V. ENFORCEABILITY OF GOOD FAITH NEGOTIATION CLAUSES

Courts have generally been averse to enforce clauses which require the parties to negotiate in good faith or engage in friendly and amicable discussions. Such pre-arbitral steps are often considered too vague to be given legal effect as an enforceable condition precedent to arbitration.[23] Courts consider it difficult to determine the rights and obligations of the parties that arise from such broadly formulated clauses, and whether such obligations have been sufficiently complied with by the parties.[24] Such clauses have also been equated with 'agreements to agree', which are considered unenforceable in common law.[25] However, recent developments have shown that the courts are willing to look beyond the exact phrases used in such clauses in order to ascertain the real intention of the parties while incorporating such clauses. and the conduct of the parties in negotiations under such clauses.[26]

In the recent past, courts have been found to enforce negotiation clauses. However, they have not generalized the enforceability of such clauses and have dealt with them on a case to case basis. For instance, the England and Wales High Court has held the pre-arbitral step of friendly discussions for a specified period of time as enforceable.[27] Similarly, agreement to enter into mediation following a prescribed procedure as a pre-arbitral step has been held to be capable of giving rise to binding obligations.[28] In order to determine if such clauses are

[22] *Emirates v. Prime Mineral* (n 4).
[23] *Tang* (n 18).
[24] *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd. and Anr.* [1975] 1 WLR 297. Also see *Sun Security Services v. Babasaheb Bhimrao Ambedkar University & Ors.* 2015 (1) ADJ 319; *Sulamerica Cia Nacional de Seguros SA & Ors. v. Enesa Engelharia SA & Ors.* [2012] EWCA Civ 638, [2012] 2 All ER 795 (Comm); *Cable & Wireless plc v. IBM United Kingdom Ltd*. [2002] EWHC 2059 (Comm), [2002] 2 All ER 1041 (Comm)
[25] *Walford & Ors. v. Miles & Anr.* [1992] 2 AC 128, [1992] 1 All ER 453.
[26] Simon Chapman, 'Multi-Tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith' (2010) 27 J Int'l Arb 89.
[27] *Emirates v. Prime Mineral* (n 4).
[28] *Neil Holloway, Samantha Holloway v. Chancery Mead Ltd.* [2007] EWHC 2495 (TCC), [2008] 1 All ER 653 (Comm).

enforceable, it needs to be ascertained whether such clauses are sufficiently certain. If the rights and obligations of the parties are clear and certain,[29] and if what is required of the parties is a genuine and honest approach while negotiating their disputes with the aim of reaching an amicable settlement, there is nothing that is inherently inconsistent with such clauses.[30] However, the omission of any guidance as to the quality or nature of the attempts to be made to resolve disputes or differences have rendered courts unable to determine compliance with pre-arbitral steps.[31]

Along with the nature and phrasing of the clause, the conduct of the parties must also be considered when deciding upon its validity. Where discussions have continued for several months prior to the commencement of arbitration,[32] or where a series of contentious correspondence has been exchanged between the parties prior to invocation of arbitration,[33] it cannot be held that the pre-condition to arbitration has not been sufficiently complied with. If parties have been involved in frequent discussions involving sufficient effort, it cannot be held that the parties demonstrated lack of good faith or that there was absence of a genuine desire or attempt to reach an amicable solution.[34] However, it may not be sufficient for the parties to take part in discussions merely for the purpose of complying with the pre-arbitral step. Courts would normally ascertain whether such discussions or negotiations were entered into between the parties with the objective to settle such disputes. If the correspondence or record of discussions show that there was no scope for amicable settlement due to the rigid and hard stands taken by the defaulting parties, arbitration may be invoked without complying with the pre-condition of amicable settlement of the dispute.[35]

The general global principle that is discernible from various judgements is that while determining the enforceability of such clauses, the intention of the parties while entering into such an agreement is an important factor. When the parties have themselves agreed to a dispute resolution clause which purports to prevent them from launching into an expensive arbitration without first seeking to resolve their disputes through negotiations, courts should normally be inclined towards giving effect to the parties' bargain. The primary reason, being the importance of party autonomy in alternative dispute resolution procedures. In fact, enforcement of such an agreement to negotiate as part of a dispute resolution clause is considered to be in public interest. This is because parties to a commercial transaction expect the courts to enforce obligations which they have freely undertaken and because the object of the agreement is to avoid what might otherwise be an expensive and time-consuming arbitration.[36]

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[29] *Sulamerica* (n 25).
[30] *United Group Rail* (n 13).
[31] *Tang* (n 18).
[32] *Emirates v. Sociedade* (n 10).
[33] *Visa International Ltd. v. Continental Resources (USA) Ltd.* (2009) 2 SCC 55, AIR 2009 SC 1366. Also see *Demerara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd.* (2015) 13 SCC 610, 2014 (4) Arb LR 343 (SC)
[34] *Emirates v. Sociedade* (n 10).
[35] *Visa* (n 34). Also see *Demerara* (n 34).
[36] *Emirates v. Prime Mineral* (n 4).

VI. APPROACH IN FOREIGN JURISDICTIONS

United Kingdom

The concept of agreements to negotiate/discuss prior to reference of disputes to arbitration, has been discussed *ad nauseum* by English Courts. Initially, English Courts were reluctant to enforce such clauses.[37] However, recent judgments have shown that the courts are willing to enforce such clauses if the same are sufficiently certain and have been complied with by the parties.

One of the earliest cases where the courts in United Kingdom dealt with an agreement which had a requirement to negotiate was in the case of *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd. & Another*.[38] In this case, a contract required the defendants to instruct a third party to "negotiate fair and reasonable contract sums". Interpreting the said requirement, the Court of Appeal held that a contract to negotiate, like a contract to enter into a contract, is not known to the law. According to Lord Denning, when there is a fundamental matter undecided and to be a subject of negotiation, there is no contract. This view of the Court of Appeal was relied upon by the Queen's Bench while deciding a case wherein the agreement had a clause which required the parties to settle their disputes amicably before resorting to arbitration. Although *Courtney & Fairbairn* dealt with an agreement to negotiate the terms of a contract as opposed to negotiating a dispute as a condition precedent to arbitration, the Queen's Bench held that such a clause was not a condition precedent.[39]

Another significant ruling by the English Courts in relation to enforceability of agreements to negotiate was in the case of *Walford & Ors. v. Miles & Anr.* [40] In this decision, the House of Lords was dealing with a case wherein the owners of a business undertook to terminate negotiations with a third party for the sale of their business if the other party promised to continue negotiations to buy the business. While holding such clauses to be unenforceable, the House of Lords was of the view that such a duty to negotiate in good faith was unworkable in practice and lacked certainty as it did not provide for a duration of the obligation to negotiate and made no provision for termination of the such negotiations. Therefore, it can be safely assumed that the House of Lords found the agreement in this case to be unenforceable mainly because of a lack of clear process for conducting such negotiations. This judgment can be construed to be a positive step forward insofar as it did not declare agreements to negotiate as being inherently unenforceable.

The aforesaid judgments were relied upon by the Queen's Bench in *Halifax Financial Services Limited v. Intuitive Systems Limited*[41] while dealing with a tiered dispute resolution

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[37] Chapman (n 27).
[38] *Courtney* (n 25).
[39] *Itex Shipping v. China Ocean Shipping* [1989] 4 WLUK 218, [1989] 2 Lloyd's Rep 522. Also see *Paul Smith Ltd. v. H&S International Holding Co. Inc.* [1991] 2 WLUK 211, [1991] 2 Lloyd's Rep 127, wherein the Queen's Bench once again relied on *Courtney & Fairbairn* and *inter alia* held that provisions wherein the parties are required to settle their matters amicably before resorting to arbitration are not enforceable legal obligations.
[40] *Walford* (n 26).
[41] [2000] 2 TCLR 35, [1999] 1 All ER 303 (Comm).

clause that required senior representatives of the parties to meet in good faith and attempt to resolve disputes without resorting to legal proceedings. If the disputes remained unresolved, the parties were required to enter into negotiations with a mediator, and if the parties failed to reach an agreement within forty-five days, the parties could move the court unless the parties agreed to resort to arbitration. Such a dispute resolution clause is slightly unique as there is no definite agreement to arbitrate. But the question was whether the first stage contemplated in the clause i.e., to meet in good faith and settle disputes, was enforceable. Answering in the negative, the Queen's Bench held that such a clause was not a condition precedent to legal proceedings and accepted the submission that courts had consistently declined to compel parties to engage in co-operative processes, particularly in good faith negotiations, because of the practical and legal impossibility of monitoring and enforcing such processes. The most interesting part of this judgment is the distinction made by the Court between determinative and non-determinative procedures. According to the Queen's Bench, the former includes arbitration, binding expert valuations and third-party certifications wherein the parties have agreed to conclusively resolve their disputes by third parties and the latter involved mediation and negotiation wherein there is no obligation on the parties to mandatorily resolve their disputes through such procedures.

A positive approach from the English Courts towards agreements to negotiate in good faith was first seen in the decision of the Queen's Bench in *Cable & Wireless plc v. IBM United Kingdom Ltd.*[42] In this case, the dispute resolution clause required the parties to engage in negotiations in good faith through their senior representatives to settle their disputes. In the event their disputes were not resolved, the parties were required to attempt in good faith to resolve their disputes through an alternative dispute resolution procedure as recommended by the Centre For Dispute Resolution. This second stage of the dispute resolution clause was challenged for not being enforceable due to uncertainty. The Queen's Bench, whilst acknowledging that a mere undertaking to negotiate a contract in good faith or an agreement to settle dispute amicably would be unenforceable due to lack of certainty, held that the dispute resolution clause in the case at hand had, instead of simply agreeing to attempt in good faith to negotiate a settlement, gone a step forward and identified a particular procedure to be followed for settlement of their disputes. This judgment suggested that courts would not reject enforcement of such clauses if they provided for a definite procedure which includes timelines, positive and negative covenants, and the like. However, it must also be noted that there was no specific timeline provided in said clause to make it certain. Despite that the Court found the said clause to be enforceable since it was reasonably certain.

The aforesaid authorities were again reviewed by the Court of Appeal in *Neil Holloway, Samantha Holloway v. Chancery Mead Ltd.*[43] wherein the court dealt with a dispute resolution clause that required the parties to resolve their disputes by way of conciliation before the commencement of arbitration. In this case, the Court identified three requirements for such agreements to be enforceable: (a) the process must be sufficiently certain in that there should not be the need for any further agreement, (b) the administrative processes for selecting a party

[42] *Cable* (n 25).
[43] *Neil Holloway v. Chancery Mead* (n 29).

to resolve such disputes and to pay that person should also be defined, and (c) the process, or at least the model of the process, should be set out so that the detail of the process is sufficiently certain. As the dispute resolution clause in this case had satisfied each of the aforesaid requirements, the Court held that such a clause was a condition precedent to arbitration.[44]

The test laid down by the England and Wales High Court in *Tang & Anor v. Grant Thornton International Ltd. & Ors.*[45], may also serve as a guiding principle for determining enforceability of such clauses. In the said case, the Chancery Division of the England and Wales High Court had to determine the enforceability of a tiered dispute resolution clause which required the parties to refer their disputes and differences to the Chief Executive, who shall attempt to resolve the same in an amicable fashion, before referring such disputes to a panel of board members and finally have the unresolved disputes submitted to arbitration. The said clause even provided for definite timelines within which each of the step had to be completed. However, the Court held that such a dispute resolution clause was too nebulous in terms of the content of the parties' respective obligations to be given legal effect as an enforceable condition precedent to arbitration.[46] In a similar case, wherein the parties were required to have their disputes resolved amicably by mediation, the Court held that such a clause was not enforceable as such a clause did not define the rights and obligations of the parties with sufficient certainty to enable it to be enforced.[47] The test in these cases, therefore, is whether the provision prescribes, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently and clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it, and (ii) when or how the process will be exhausted or properly terminable without breach.[48]

One of the most recent judgments on this issue is the decision of the English High Court in *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited*.[49] The dispute resolution clause in this case required the parties to first seek to resolve the dispute or claim by friendly discussions and, if no solution was arrived at by the parties within a period of four weeks, then the non-defaulting party could invoke arbitration. All the aforesaid authorities were discussed in detail in this decision. Whilst acknowledging the principle laid down in the case of *Walford v. Miles*, the Court held that an agreement to seek to resolve disputes by friendly discussions within a specified period of time is not equivalent to a bare agreement to agree and that such a clause in the agreement is enforceable. In arriving at this conclusion, the Court took note of the discussions held between the parties and held that there had been sufficient compliance with the pre-arbitral step of negotiation. This decision was thereafter followed in the case of *Emirates Trading Agency LLC v. Sociedade De Fomento Industrial*

[44] *Holloway* (n 29).
[45] *Tang* (n 18).
[46] *Tang* (n 18).
[47] *Sulamerica* (n 25).
[48] *Tang* (n 18).
[49] *Emirates v. Prime Mineral* (n 4).

Private Limited.[50] It is interesting to note that the clauses in *Tang & Anor* and *Sulamerica Cia Nacional de Seguros SA & Ors. v. Enesa Engelharia SA& Ors.*[51] which appear to be far more detailed in terms of process as compared to a clause requiring friendly discussions, were held to be unenforceable and the clause in this case was held to be enforceable. This is probably because the Court found sufficient compliance with such a pre-condition.

The aforesaid decision was thereafter followed by England and Wales High Court in *Ohpen Operations UK Ltd. v. Invesco Fund Managers Ltd.*[52] wherein the Court stayed the proceedings in order to enable the parties to comply with the pre-condition of mediation. In this case, the Court was dealing with a dispute resolution clause which required that the parties to first use their respective reasonable efforts to resolve disputes and thereafter refer the unresolved disputes to mediation before approaching the courts. The Court observed that there is a clear and strong policy in favour of enforcing alternative dispute resolution provisions in encouraging the parties to resolve disputes prior to litigation. It held that where a contract contains a valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery and the court will not permit an action to be brought in breach of such agreements. In view of the decision in *Tang & Anor*, the England and Wales High Court laid down the following principles as guiding factors to ensure the enforceability of such clauses:

a. The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.

b. Such an obligation must be clearly expressed to be a condition precedent to arbitration or court proceedings.

c. The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement of any further agreement by the parties.

d. The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.

Australia

The issue of enforceability of 'good' faith negotiations as a condition precedent to arbitration has been discussed in detail by the Supreme Court of New South Wales in the case of *United Group Rail Services Limited v. Rail Corporation New South Wales*[53] which has been referred

[50] *Emirates v. Sociedade* (n 10).
[51] *Sulamerica* (n 25).
[52] [2019] EWHC 2246 (TCC), [2020] 1 All ER 786 (Comm).
[53] *United Group Rail* (n 13).

to and relied upon in several cases across jurisdictions.[54] In this case, the Court was dealing with a contract for design and build of rolling stock which had a dispute resolution clause wherein the parties were required to meet and undertake genuine and good faith negotiations with a view to resolve such disputes failing which the same would be referred to mediation and thereafter arbitration. Carrying out an extensive examination of the English and Australian authorities, the Court held such clauses to be enforceable. The Court held that the phrase 'genuine and good faith' is a composite phrase concerning an obligation to behave in a particular way in the conduct of an essentially self-interested commercial activity *viz*. the negotiation for resolution of a commercial dispute and therefore is enforceable.

Singapore

In 2012, the Singapore Court of Appeal, in the case of *HSBC Institutional Trust Services (Singapore) Ltd. (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte. Ltd*.[55] dealt with a tenancy agreement which required the parties to "*in good faith endeavour to agree"* in respect of a rent review mechanism provided in the said agreement. The Court discussed the findings of *Walford v. Miles*[56] and held that there is no good reason as to why an express agreement between contractual parties should not be upheld as such agreements are not contrary to public policy. The Court also distinguished between pre-contractual negotiations and negotiations as required under a concluded contract and held that parties bound to negotiate under a concluded contract are not free to simply walk away from the negotiating table without any rhyme or reason.

Similarly, in the case of *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte. Ltd. and another*,[57] the Singapore Court of Appeal had the opportunity to deal with tiered dispute resolution clauses wherein it held that such clauses require strict compliance.[58] In this case, disputes arose out of an agreement entered into between the parties which provided that the parties were required to resolve their disputes first by a specified mediation procedure, failing which such disputes would be referred to arbitration. The arbitral tribunal had held that such clauses are unenforceable for uncertainty and are not meant to be obstacles in the way of commencement of arbitration. Upon challenge, the High Court held that all parties were bound by the dispute resolution mechanism specified in the contract entered into between the parties. Upholding the view of the High Court, the Court of Appeal held that where parties had clearly contracted for a specific set of dispute resolution procedures as pre-conditions for arbitration, then in the absence of any waiver, such pre-conditions have to be complied with.[59] Whilst this is a welcome change, one must understand that the disputes resolution clause in this case was well-defined and certain, and did not contemplate mere negotiations between parties in good faith.

[54] *United Group Rail* (n 13).
[55] [2012] SGCA 48.
[56] *Walford* (n 26).
[57] [2013] SGCA 55.
[58] [2013] SGCA 55, [2014] 1 SLR 130.
[59] Amanda Lees, 'The Enforceability of Negotiation and Mediation Clauses in Hong Kong and Singapore' (2015) 17 Asian Disp Rev 16.

VII. THE INDIAN APPROACH

Whilst Indian Courts have often been faced with pre-arbitral negotiation clauses, there isn't much judicial literature on their enforceability and validity. Courts have not explicitly ruled on the enforceability of such clauses, but rulings suggest that such clauses may be valid, and that the conduct of the parties may be used to determine whether such clauses have been sufficiently complied with.

Supreme Court

The Supreme Court in *Visa International Ltd. v. Continental Resources (USA) Ltd.*,[60] while hearing an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") had occasion to deal with an arbitration clause which required the parties to settle such disputes through arbitration which could not have been settled amicably by the parties. The argument before the Court was that the application (under Section 11 of the Arbitration Act) was premature given the fact that pre-condition for amicable settlement of the dispute between the parties had not been complied with. Without delving into the enforceability of such pre-arbitral steps, the Supreme Court, upon a viewing of the conduct of the parties, held that the fact that parties exchanged letters undoubtedly showed that attempts were made for an amicable settlement and since there was not much scope left for such a settlement due to the rigid stands taken by the parties, as was evident from the correspondence between the parties, the parties had no option but to invoke arbitration.[61]

In *Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games, 2010*, the Supreme Court once again analysed the conduct of the parties to observe that considerable efforts were made to resolve the issue without having to take recourse to formal arbitration and it is only when all these efforts failed, that the petitioner communicated to the respondent its intention to commence arbitration.[62] A similar approach was once again taken by the Supreme Court in the case of *Demerara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd.* In this case, the parties raised a contention that the application under Section 11 of the Arbitration Act was pre-mature as the pre-arbitral steps of engaging in mutual discussions and thereafter, mediation, had not been followed. The Court held that elaborate and acrimonious correspondence exchanged by and between the parties indicated that any attempt to resolve disputes through mutual discussions and mediation would be an 'empty formality'.[63]

Delhi High Court

The Delhi High Court has had the opportunity to deal with a detailed set of pre-arbitral steps. In the case of *M/s. Conway Exports Pvt. Ltd. v. M/s. Rudra Pharma Distributors Pvt. Ltd.*, the Delhi High Court, in an application under Section 11 of the Arbitration Act examined a tiered dispute resolution clause which required the parties to attempt in good faith to settle their

[60] *Visa* (n 34).
[61] *Visa* (n 34).
[62] (2014) 6 SCC 677.
[63] *Demerara* (n 34).

disputes.[64] It further provided that if the parties were unable to settle their disputes through good faith negotiations within a period of sixty days, the same was to be attempted to be resolved through senior representatives of the parties within a further period of sixty days, failing which the disputes would be referred to arbitration. The Court held that although there were no formal negotiations that took place under the said clause, the fact that two senior representatives of the parties had met was sufficient to discharge the obligation under the agreement.

This apparent view of the Delhi High Court (that pre-arbitral steps should be followed in their essence and spirit as opposed to a formal and rigid compliance), has changed over the years. In another case, the Delhi High Court held that a dispute resolution clause comprising a prior requirement to be complied with before invoking arbitration was only directory in nature and not mandatory as such an interpretation would protect the parties' rights.[65] In this case, the Court was dealing with an arbitration clause which required the parties to first settle their disputes amicably by mutual discussions. The Court was of the view that if such pre-arbitral steps are held to be mandatory, it can prejudice the parties seeking to invoke arbitration as by the time the parties comply with such pre-arbitral steps, invocation of arbitration might be barred by limitation. However, the Supreme Court has, in *Geo Miller & Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd., inter alia* held that the period during which the parties were *bona* fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration.[66]

In one of the most recent cases on this issue, the Delhi High Court was dealing with a clause whereby the parties had to endeavour to amicably resolve their disputes within thirty days, failing which the parties would refer the disputes to arbitration. The question before the Court was whether such a procedure was followed. Whilst the Court relied on *Visa International* to hold that the correspondence between the parties evidenced that attempts had been made to resolve the dispute prior to invocation of the arbitration clause, it took a step forward to hold that such a clause cannot be held to be mandatory as no specific procedure was prescribed as to how the parties would try and resolve their disputes. Relying upon *Ravindra Kumar*, the Court held that such a clause was directory and no fault could be found in the act of the parties for invoking arbitration.[67]

Bombay High Court

The Bombay High Court has been more proactive in enforcing pre-arbitral steps. In *Tulip Hotels Pvt. Ltd. & Ors. v. Trade Wings Ltd., Mumbai & Ors.*,[68] the Bombay High Court dismissed an application for appointment of arbitrators and held that where the parties had agreed to a specific procedure for settling their disputes through arbitration and had prescribed certain conditions precedent to arbitration, the parties cannot avoid compliance with such pre-

[64] *Conway* (n 5).
[65] *Ravindra Kumar Verma v. M/s. BPTP Ltd. & Anr.* 2014 SCC OnLine Del 6602.
[66] 2019 SCC OnLine SC 1137.
[67] *Siemens Ltd. v. Jindal India Thermal Power Limited* 2018 SCC OnLine Del 7158.
[68] 2009 SCC OnLine Bom 1222.

conditions. However, if such pre-conditions are avoided by an unwilling party, the other party is not rendered a helpless spectator and can commence arbitration. In this case, the Court was dealing with a clause whereby the parties had agreed to settle their disputes through conciliation under Section 62 of the Arbitration Act.

Karnataka High Court

The Karnataka High Court has also, in its recent decision in *Mphasis Limited v. M/s. Strategic Outsourcing Services Private Limited*, followed the reasoning laid down by the Delhi High Court in *Ravindra Kumar* for holding the requirement to engage in negotiations prior to arbitration as directory and not mandatory. In this case, the Court dealt with a dispute resolution clause which required all disputes under the concerned agreement to be settled mutually between the parties through negotiations, and only if the such disputes remained unresolved for a period of sixty days, could the parties refer the disputes to arbitration. The Court held that attempts had been made to initiate negotiations, but no action was taken by the other party. It further held that even if the pre-requirement for invoking arbitration is not complied with, the same cannot prevent reference to arbitration.[69]

From the aforesaid, it appears that whilst Courts in India (i) give primacy to contractual stipulations; (ii) enforce pre-arbitral procedures; (iii) determine compliance of pre-arbitral procedures on the basis of the conduct of the parties and the facts of each case; such clauses are not considered to be a bar to commencement of arbitration. Pertinently, the enforceability of clauses requiring good faith negotiations prior to initiation of arbitration, still needs to be determined on a case-to-case basis due to the subjective nature (and varied wordings) of such clauses.

Rajasthan High Court

In the case of *M/s. Simpark Infrastructure Pvt. Ltd. v. Jaipur Municipal Corporation*,[70] the Rajasthan High Court held that where parties have agreed to an arbitral procedure for dispute resolution, the condition precedent for invoking the arbitration clause is required to be followed before filing an application under Section 11 of the Arbitration Act.

VIII. A PRACTICAL GUIDE

The aforesaid discussion is aimed at giving an insight into the manner in which courts have interpreted such clauses, and the key considerations that need to be kept in mind whilst drafting such clauses. It is imperative for parties to understand the importance of pre-arbitral steps, as failure to comply therewith may entail consequences, including delay in or derailment of proceedings. What is fundamental, is that parties must not choose to ignore agreed contractual procedures. The tendency of the courts is to normally enforce a commercial bargain and the terms of the relationship between the parties.

[69] Judgment dated 8th March, 2019 passed in C.M.P. No. 238/2018 reported as MANU/KA/1267/2019
[70] 2012 SCC OnLine Raj 3833.

In the circumstances, the following aspects may be kept in mind while drafting pre-arbitral negotiation clauses:

1. The language of such clauses should be clear, crisp, and unambiguous.[71] They should be drafted with utmost care and caution to avoid the possibility of such a clause being subjected to two possible interpretations. For instance, an agreement may provide for pre-conditions to arbitration which was intended to be mandatory at the time of entering into the contract. However, due to the vague language of the clause, courts may view such a clause to be directory and not mandatory. Thus, the intention of the parties may be defeated if the clauses are open ended and capable of multiple interpretations.

2. Such clauses must explicitly and unequivocally state what pre-conditions need to be complied with by the parties, prior to invocation of arbitration. The alternative dispute resolution procedure adopted by the parties must be clearly stated in order to leave no room for any ambiguity.[72]

3. The language of such clauses must be drafted in a manner, so as to create enforceable obligations on the parties. Participation in these pre-arbitral steps must not read as a mere formality, but an enforceable obligation.

4. The process to be followed by the parties, for compliance with such pre-arbitral steps, must be clearly determined and incorporated in the agreement.[73] For instance, parties must specify (i) which officials are required to take part in the friendly discussions and good faith negotiations; (ii) whether such negotiations are to take place by way of correspondence or whether the parties need to physically meet and undertake such negotiations; (iii) the place of such meetings and the number of meetings that need to be held; (iv) how the process is to be initiated and how it is to be conducted (including whether by presentation/exchange of claims and counter claims, etc.).

5. Parties should avoid using phrases such as "good-faith", "friendly", "amicable" or "best endeavours". These phrases are subjective in nature and are capable of multiple interpretations which ultimately may lead to its unenforceability. The courts may find it difficult to gauge whether there was any "good faith" involved in such negotiations, or whether the parties were capable of being "friendly" in their discussions once the disputes had already arisen. Instead, such clauses should use alternative phraseology that clearly specifies that the parties must engage in

[71] Julian David Mathew Lew, Loukas A. Mistelis, et al, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 165–185.
[72] Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, (3rd edn, Kluwer Law International 2015) 15-56.
[73] Tomic (n 8).

negotiations with the aim of resolving the disputes arising out of or in connection with the agreement for a particular period.

6. Such clauses should clearly specify each step, and also state that the same is mandatory in nature and accordingly parties cannot move to the second step without complying with the first. The entire objective behind incorporating such clauses is to have a stepwise mechanism to resolve disputes amicably between parties to a commercial transaction. Such an objective is defeated if parties avoid (or can avoid) complying with such pre-arbitral steps.[74]

7. The timeline for each of these pre-arbitral steps is of utmost importance. Such clauses must specify the exact period within which each step needs to be complied with and what is to happen upon expiry of that time period. If the timelines for each of these pre-arbitral steps are not specified, it may be disadvantageous for the party seeking to invoke arbitration, as the opposing party may delay negotiations. Reasonable timelines must be provided for each step so as to enable the parties to achieve the objective behind incorporating such steps in the dispute resolution process.[75]

8. The consequences of non-compliance with such pre-conditions must also be clearly spelt out in such tiered dispute resolution clauses. This is to ensure that the parties mandatorily comply with such pre-conditions. Courts tend to interpret provisions/clauses without negative stipulations/consequences to be directory in nature and not mandatory.[76] Therefore, parties must provide for the consequences for non-compliance at each step.

9. Additionally, tiered dispute resolution clauses should also specify the other conditions when each pre-arbitral step gets triggered, and when each step is said to be sufficiently complied with. This is to enable the parties to understand at what stage each step should be resorted to, thereby, making the dispute resolution mechanism comprehensive. This also helps the courts to better understand the nature of such clauses and whether there have been sufficient compliances.

10. It is preferable not to make pre-arbitral steps dispute specific. For instance, there are some clauses, where parties seek to resolve a particular kind of dispute arising out of the agreement by way of negotiations and another kind of dispute through expert determination. This unnecessarily complicates such clauses and may make them unworkable. Therefore, normally parties should formulate a dispute resolution procedure that will be all encompassing and applicable to all disputes arising out of their agreement.

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[74] ibid.
[75] Born (n 11).
[76] *State of Bihar and Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti* (2018) 9 SCC 472.

11. The tiered dispute resolution clause should be drafted in such a manner so as to clearly and unequivocally specify that only claims which cannot be resolved by the first step may be referred to the second step. For instance, if the parties have chosen negotiations as their pre-arbitral step, the language must specify that neither of the parties can escalate their claims to the arbitrator, unless they have undergone the pre-arbitral step of negotiation. Each and every dispute/claim shall be subjected to negotiations and if they remain unresolved, only then can the same be referred to arbitration.

IX. CONCLUSION

The evolution of the law on this issue, i.e., enforceability of pre-arbitral steps, has evolved from Courts holding pre-arbitral steps to be unenforceable, then directory, and now, to some extent, mandatory. The law, in this regard, will continue to evolve. Whilst we may find solace in the fact that the bargain between the parties has consistently been (and remains likely to be) upheld by courts, the discussion in relation to enforcement of good faith negotiation clauses has not yet been settled. The subjective nature of the phrases 'good faith' and 'friendly discussions' makes a unanimous and universal view on the issue, difficult. However, the recent trend appears to be that parties are required to comply with such steps, whether or not such steps are mandatory or directory, thereby upholding the contractual arrangement/bargain between them. Having said that, a detailed examination of existing authorities (which gives an insight into the courts' disposition), will surely assist in understanding the key considerations that play on the court's mind while dealing with such clauses, which in turn will enable informed parties to draft meaningful and enforceable multi-stage dispute resolution provisions.