A FREEWAY TO DISPUTE RESOLUTION: PRE-ARBITRATION RESOLUTION CLAUSE?

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1. INTRODUCTION

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. Arbitration is not the first step that comes into play when a dispute is to be resolved. Certain "pre-conditions" need to be fulfilled before invoking arbitration when the parties have agreed to such conditions in their contract. This is done by employing a pre-arbitration clause in the agreement. When such pre-conditions are met, and even then, the dispute cannot be resolved, a case may be brought before the Arbitral Tribunal for arbitration.

A pre-arbitration clause can be understood as an agreement entered by the parties before the contract's commencement. In any dispute, the parties will recourse to a dispute resolution mechanism, not litigation. This mechanism consists of a multi-forked approach, including negotiation, mediation and conciliation. Such an approach provides a more amicable and efficient solution to a dispute. This mechanism is divided into different layers, and is also known as a multi-tiered dispute resolution, often referred to as MTDRC. Only after the failure of the amicable resolution do the parties approach the courts for litigation.

It is standard procedure to include a multi-tiered dispute resolution

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clause in an arbitration agreement.[1] 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.

In some instances, the parties may present the case for arbitration without meeting the pre-conditions as mentioned in the terms of the contract. Then a question arises about the admissibility of the dispute and the jurisdiction of the tribunal so constituted. The global view of this issue has been of admissibility and not jurisdiction.

The remedy which the parties enjoy by way of invoking the arbitration clause is restricted due to the existence of the limitation period, which allows the parties to file for arbitration within a stipulated period of time. If the parties fail to file the case for arbitration during that time, the dispute will not be entertained by virtue of being barred by limitation. But this raises the question of whether the time spent trying to solve the dispute by way of alternate measures is included in the limitation period.

2. CURRENT JURISPRUDENCE: A LEGAL QUANDARY

Even though they are frequently included in dispute resolution agreements, pre-arbitration processes in India lack defined legal recognition. The validity of a multi-tiered clause is a topic of intense discussion in India. Regarding the legality and enforceability of such pre-arbitral dispute settlement agreements, courts have adopted a variety of positions. Pre-arbitration actions have been deemed voluntary and non-mandatory by some courts, despite the fact that the majority of courts have rendered them necessary in

[1] Kumar A, "Multi-Tier Dispute Resolution Clause", (*SCC Online*, 21 February, 2022) <https://www.scconline.com/blog/post/2022/02/21/multi-tier-dispute-resolution-clause/> accessed 9 February 2023.

nature.[2]

Reviewing the rulings reveal that the courts have addressed this matter several times, frequently coming to contradictory conclusions. The courts have generally accepted two positions. Pre-arbitration procedures are required and fall under the jurisdiction of tribunals, according to the majority of courts that have given respect to the arbitration clause's plain meaning (based on a case-by-case examination). As a matter of general principle, other courts (the minority view) have described pre-arbitration processes as voluntary and non-mandatory.[3]

In particular, the court held that arbitration under Clause 17(b)[4] under the agreement between the parties in *Quick Heal Technologies Limited* v. *NCS Computech Private Limited and Ors.* refers to a situation where under Clause 17(a), parties have agreed, through a new contract, to guide their disputes to arbitration after the amicable settlement process has failed, rejecting the petitioner's argument that clauses 17(a) and 17(b) of the agreement talk about separate procedures.[5] Therefore, if both parties did not agree to submit their problems to arbitration under Clause 17, Clause 17(b) cannot work independently and cannot be utilised to begin an arbitration

[2] Busar A and Sharma K, "Discussing the Validity of Pre-Conditions for Invocation of Arbitration" (*Koinos* December 13, 2022) <https://indian arbitrationlaw.com/2022/12/13/discussing-the-validity-of-pre-conditions-for-invocation-of-arbitration-proceedings/> accessed 9 February 2023.

[3] Chawla C, "The Muddy Waters of Pre-Arbitration Procedures – Are They Enforceable? Answers from an Indian Perspective" (*Kluwer Arbitration Blog* June 9, 2019) <https://arbitrationblog.kluwerarbitration.com/2019/06/09/the-muddy-waters-of-pre-arbitration-procedures-are-they-enforceable-answers-from-an-indian-perspective/> accessed 9 February 2023.

[4] *Quick Heal Technologies Limited v. NCS Computech Private Limited and Ors.,* Arbitration Petition No. 43 of 2018 [4].

[5] Kashyap D, "The Mandatory Nature Of Pre-Arbitration Clauses And Whether An Arbitration Clause Which Provides Discretion To Parties To Invoke Arbitration, Would Qualify As An Arbitration Clause: Bombay High Court Discusses" (*Mondaq Ltd*, August 5, 2020) <https://www.mondaq.com/india/arbitration--dispute-resolution/972816/the-mandatory-nature-of-pre-arbitration-clauses-and-whether-an-arbitration-clause-which-provides-discretion-to-parties-to-invoke-arbitration-would-qualify-as-an-arbitration-clause-bombay-high-court-discusses> accessed 9 February 2023.

proceeding under Clause 17(a).[6]

Another conundrum that presents itself regarding the pre-arbitration dispute resolution clause is the validity of the jurisdiction of the arbitral tribunals, which the parties often challenge. It might be argued that a jurisdictional flaw that prevents a party from legitimately beginning arbitral proceedings is the failure to comply with statutory pre-arbitration procedural procedures. Despite this, most jurists and academics believe that failure to meet the prerequisites is an issue of admission rather than the jurisdiction of the tribunal.[7] This stance has been elaborated through the cases provided in the present paper.

In recent years, most courts outside of India have hesitated to view pre-conditions as jurisdictional obstacles to the arbitral tribunal. In *The Republic of Sierra Leone* v. *SL Mining Ltd.*[8], the English High Court unequivocally stated that any alleged multi-tiered dispute resolution clause violation is to be regarded as the sole issue of admissibility for the arbitral tribunal instead of jurisdiction.

In Indian Courts, the stance is still unclear as to whether the admissibility, as well as the jurisdiction of the Arbitral Tribunal, can be challenged or not. The Supreme Court, while allowing objection petitions filed under Section 16 of the Arbitration and Conciliation Act,[9] concluded that at any stage, arbitrators could not assume jurisdiction to proceed with the arbitration.[10]

The parties agree to resolve a dispute by adhering to the sub-clauses put up in the arbitration clause (which includes solving the dispute through pre-arbitral procedures) of the agreement they enter into.

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[6] *Quick Heal Technologies Limited v NCS Computech Private Limited and Ors,* Arbitration Petition No. 43 of 2018.

[7] Shrivastava P, "Escalation Clauses - Directory or Mandatory? Dissecting the Position under Indian Law" (*IRCCL* March 1, 2022) <https://www.irccl.in/post/escalation-clauses-directory-or-mandatory-dissecting-the-position-under-indian-law> accessed 9 February 2023.

[8] *Republic of Sierra Leone v SL Mining Ltd,* [2021] EWHC 286 (Comm).

[9] The Arbitration and Conciliation Act, 1996, (Act 26 of 1996).

[10] *SK Jain v State of Haryana & Anr,* (2009) 4 SCC 357.

But the nature and applicability of these clauses can be diluted by the language and structure of the clauses when the parties feel that the possibility of solving a dispute through such arbitral procedures is slim or the dispute cannot be settled through such pre-arbitral procedures within a reasonable time.

3. GLOBAL PERSPECTIVE: A DIFFERENT APPROACH

The pre-conditions mentioned in the agreements aid in amicably resolving a dispute. However, these pre-conditions may even hamper the right to refer the dispute to the arbitral tribunal for its resolution. These proposed, seemingly simple solutions have affected the efficacy of arbitration proceedings.

The non-compliance to the clauses has been used by the parties to challenge the legality of the arbitral tribunal, and in sporadic cases, even the award passed by these tribunals has been annulled.

An attempt at characterising the pre-arbitral conditions and determining whether the same is a matter of jurisdiction or admissibility will help further assess the effect of non-compliance with these requirements. There are two different stances taken when the pre-conditions are not met, one, where it is argued that non-compliance means no jurisdiction of the arbitral tribunal, and if they are complied with, the arbitral tribunal enjoys jurisdiction over the matter. In the second, where no jurisdictional issue is raised. The dispute is admissible even when the preconditions are not complied with.

Still, it only provides for the adjudication of material claims once the subject of adherence to the pre-conditions has been complied with. The award passed by an arbitral tribunal is usually challenged on the grounds of the jurisdiction of the arbitral tribunal.

The US Supreme Court attempted to delineate the issues of admissibility and jurisdiction in the case of *BG Group v. Republic of Argentina* where an arbitral award was challenged on the ground

that the mandatory pre-conditions had not been complied with.[11] The court held that the question of whether an arbitration clause binds the parties is for the courts to decide until there is a provision to the contrary in the arbitration agreement and the constituted arbitral tribunal determines the meaning and import of the pre-conditions, which includes their non-compliance.

The Hong Kong Court of First Instance has made it clear that the issue of compliance with the pre-conditions is of admissibility and not jurisdiction. This stance was upheld in the case of *C v. D* where it was stated that considering pre-conditions as a subject matter of admissibility rather than jurisdiction would be prudent.[12]

It is also a settled position under English Law that this non-compliance issue is of admissibility rather than jurisdiction. This was the position in the case of *Sierra Leone v. SL Mining Limited* where the arbitral award passed by the tribunal was challenged on the ground of jurisdiction. [13]

The relevant text from the judgement is as follows:

> […] if there were no jurisdiction, there would be no jurisdiction to stay or adjourn: a claim should simply be rejected as outside the jurisdiction of the arbitrators (*pro tem*). The Arbitrators concluded in the Award that it was a matter of admissibility and ruled that it was admissible.

Another case endorsing the dispute of whether arbitration is a matter of jurisdiction or admissibility is that of *NWA and others* v. *NVF and others*.[14] In this case, the parties have agreed to settle the dispute through an LCIA mediation before commencing the LCIA arbitration. Still, the claimants here filed for arbitration without resolving the dispute through mediation. The question before the court was to decide whether non-compliance with the pre-condition challenges the admissibility or the jurisdiction of the

[11] *BG Group v Republic of Argentina,* (2014) 134 S.CT. 1198.
[12] *C v D,* [2021] HKCFI 1474.
[13] *Sierra Leone v SL Mining Limited,* [2021] EWHC 286 (COMM).
[14] *NWA & Anor v NVF & Ors*, [2021] EWCH 2666.

tribunal. The court delved into the wording of the arbitration agreement and held that the parties had agreed to solve the dispute through mediation and then through arbitration. The court rejected the defendant's contention that non-compliance is one of jurisdiction. The claimants, in contrast, argued that the failure to invoke mediation before referring the dispute for arbitration affects the tribunal's admissibility. However, the consequence of allowing the above argument would be that in case one of the parties refuse to mediate, the tribunal would never gain jurisdiction, even when the parties have agreed to arbitration.

One of the most criticised decisions in the case of *Emirates Trading Agency LLC* v. *Prime Mineral Exports Ltd*.,[15] which has suggested that these pre-conditions are relevant to the tribunal's jurisdiction, has been distinguished by the courts from that of *Sierra Leone* and *NWA* by stating that the issue of admissibility and jurisdiction was never really considered by the court. But now, the position seems to be settled by the courts.

However, failing to comply with the pre-conditions does not necessarily mean that the arbitral tribunal will never gain jurisdiction. As per the court's observation in *NWA*, the construction of the agreement determines the outcome of the case, and this could be further explained by the case of *Laker Vent Engineering v. Jacobs*,[16] where it was explicitly provided in the arbitration agreement that the failure of the parties to agree to an arbitrator within a specified time frame would allow the dispute to be settled by court proceedings. In such circumstances, where there is a clear intention for the change of forum, the arbitration agreement is deemed to be inoperative.

[15] *Emirate Trading Agency LLC v Prime Mineral Exports*, [2015] 1 WLR 1145.
[16] *Laker Vent Engineering Ltd v Jacobs E&C Ltd,* [2014] EWCH 1058.

4. INDIAN JURISPRUDENCE: A METHODICAL ANALYSIS

The Indian courts have taken varied stances regarding the applicability and adherence to the pre-arbitration dispute resolution clause. Through this discussion, the various views of different Indian courts have been analysed.

Majority View

Even though courts in India and throughout the world have held a variety of opinions, the general consensus favours obligatory adherence to the pre-arbitral stages when they are carefully stipulated. Every term in a contract must be interpreted, if feasible, to give effect to all of its provisions and refrain from rejecting any of them. The courts have given varied opinions in multiple instances but generally concluded that, if the terms of the contract are unambiguous and clearly stated, then, courts often have minimal power to alter its applicability.[17]

The Supreme Court's ruling in *United India Insurance Co. Ltd.* v. *Hyundai Engineering and Construction Co. Ltd.*,[18] comes into play in this situation. According to the applicable arbitration agreement between the parties, no issue was to be submitted to arbitration if the insurance provider contested its liability. The Court determined that failure to comply with this requirement rendered the matter inadmissible to arbitration. The fulfilment of the clauses is a prerequisite to invoking the arbitration provision.[19]

The Rajasthan High Court ruled that in cases where a dispute resolution process has been stipulated in the contract's language,

[17] Jain A and Joshi T, " The Ambiguous State Of Pre-Arbitration Procedures In Multi-Tiered Dispute Resolution Clauses" (*Mondaq Ltd*, November 19, 2021) <https://www.mondaq.com/india/arbitration--dispute-resolution/1132672/the-ambiguous-state-of-pre-arbitration-procedures-in-multi-tiered-dispute-resolution-clauses> accessed 9 February 2023.
[18] *United India Insurance Co Ltd v Hyundai Engineering and Construction Co. Ltd.*, Appeal (Civil), 8146 of 2018.
[19] ibid.

proper implementation of the arbitration provision demands that the parties adhere to it contractually.[20] According to the Court, when the agreement is taken as a whole, the pre-conditions must be strictly adhered to.[21] According to the Supreme Court, the literal interpretation of the provisions was mandatory. It was to be followed unless they had been waived or the person intending to prove them had somehow prevented himself from doing so.

The clauses of the contract for resolution for arbitration also become binding when the word 'shall' is incorporated in the clauses, and the parties are under obligation to resort to dispute resolution in a realistic and genuine manner.[22]

Various countries, including Singapore and England, have also supported this position internationally. The courts acknowledged that if the parties in the contract have stipulated a condition for invoking arbitration in case any dispute arises, it is rendered mandatory. It has been held that these pre-conditions are not merely optional but require pure adherence if stipulated in agreements, and must be complied with.[23]

According to the Singapore Court of Appeal's ruling in *International Research Corp PLC* v. *Lufthansa Systems*,[24] "if the pre-conditions are established with sufficient clarity and detail, then they should be considered as necessary in character." They cannot, however, be mandated to be followed if they are ambiguous or broad in scope.

Minority View

The majority view, however, has been criticised by some of the

[20] *M/s Simpark Infrastructure Pvt Ltd v Jaipur Municipal Corporation* (2012) SCC OnLine Raj 2738.
[21] *M.K Shah Engineers & Contractors v State Of M.P,* (1999 (1) JT (SC) 315.
[22] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd,* [2014] EWHC 2104 (Comm).
[23] Kumar A, "Multi-Tier Dispute Resolution Clause" (*SCC Blog*, February 21, 2022) <https://www.scconline.com/blog/post/2022/02/21/multi-tier-dispute-resolution-clause/> accessed 9 February 2023.
[24] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55.

courts. The Supreme Court of India[25] ruled that the possibility of the preconditions to arbitration being successful must be taken into account, particularly where they are open-ended and do not offer concrete results, and so the preconditions' attempt to be fulfilled might just be almost null. The court concluded that such discussions and mediations might be reduced to empty formality, thus offering no solution.

In *Ravindra Kumar Verma* v. *BPTP Ltd.*,[26] the Hon'ble Delhi High Court delivered a significant decision that crystallised the idea that pre-arbitral proceedings under dispute resolution clauses are purely directory. For the same, the Court offered a two-pronged justification. First of all, because the time spent in pre-arbitral procedures is not exempt from restriction under the Limitation Act of 1963, doing so might seriously and gravely damage the party seeking to initiate arbitration. Because of this, the arbitration clause may not be enforced until after the deadline for initiating the arbitration has passed. Then, the court provides an example and states that in case there is pre-condition of 'mutual discussion' before invoking the arbitration clause and a notice has been served on the last day of the limitation period, no discussion could be completed and arbitral proceedings could begin on the same day. Thus, if pre-conditions are considered mandatory, then in case the above (or similar) situation arises, the parties would never get a chance to get the dispute resolved through arbitration.[27]

5. LIMITATION PERIOD: AN IMPEDIMENT?

In case the dispute between the parties fails to be solved employing alternate dispute settlement procedures, then the parties may wish to file the suit before the arbitral tribunals for adjudication. The question then revolves around whether there's a particular period within which the dispute has to be filed before the tribunal, and if

[25] *Demerara Distilleries Pvt Ltd v Demerara Distillers Ltd., (*2015) AIR(SCW) 153.
[26] *Ravindra Kumar Verma v M/S BPTP Ltd,* (2015) 147 DRJ 175.
[27] ibid [8(ii)].

there is, what if the parties fail to file the suit within the required time frame?

In most contracts, the limitation time that must pass before a disagreement may be submitted for resolution is mentioned; if it does, the dispute will not be taken into consideration.

A remedy is not available for an infinite duration. There is a specific duration or limit of time within which the remedy could be sought. If the remedy is not sought during this period, the remedy exhausts and thus cannot be availed. The period during which the remedy is available and could be sought is called the limitation period.

The law of limitation is essentially a statute in the civil law system, which prescribes a maximum period, after the happening of an event, in which legal action can be commenced. The occurrence of this event is often called the cause of action, which refers to the bundle of facts that constitute to establish the infringement of a right. In India, the law of limitation is governed by the Limitation Act, 1963 ("Limitation Act"), and Section 3 of the Act bars the remedy of filing of suits, appeals and applications after the prescribed period. Thus, an action cannot be initiated by a party if the prescribed time has passed after the accrual of the cause of action based on which the action has been undertaken (*see* fn. 26).

Arbitration is not an exception to this principle, and the law of limitation also applies to it. Section 43(1) of the Arbitration and Conciliation Act, 1996 states that "*the Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court*".

In complex commercial transactions and arrangements, it is quite common to incorporate a clause in the contract to engage in good faith negotiations and mediations to solve any dispute. Given the nature of the dispute, the stakes involved and the multitude of relationships, a considerable amount of time is spent in these dispute resolution mechanisms. Therefore, the issue arises

regarding whether the time spent in these alternate, amicable dispute-resolution mechanisms falls within the ambit of the limitation period.

The constitution of the arbitral tribunals can be challenged by arguing that the period within which the dispute had to be filed for arbitration has lapsed. In this case, the time has been consumed in settling the dispute through alternative means, and if the limitation period does include the time spent in alternate settlement mechanisms, then the conflict would never be referred to the arbitral tribunal for adjudication.

For the first time, in the *Geo Miller & Co. Pvt. Ltd.* v. *Rajasthan Vidyut Utpadan Nigam Ltd.*[28], the Supreme Court held that the time spent in good faith negotiations might be excluded while computing the limitation period for reference of the dispute for arbitration.[29] The Court held that:

> Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, 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 under the 1996 Act. However, in such cases, the entire negotiation history between the parties must be specifically pleaded and placed on the record. Upon careful consideration of such history, the Court must find out the 'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment.[30]

[28] *Geo Miller & Co Pvt Ltd v Rajasthan Vidyut Utpadan Nigam Ltd* (2019) SCC Online SC 1137.
[29] Deshmukh I, Unnikrishnan V and Bhansali V, "Exclusion of Time Spent in Pre-Arbitration Negotiations/Settlement Discussions: A Much Needed Carve Out" (*India Corporate Law* January 25, 2022) <https://corporate.cyrilamarchandblogs.com/2019/12/exclusion-time-spent-prearbitration-negotiations-settlement-discussions/> accessed 9 February 2023.
[30] *Geo Miller, supra* note 28 [29].

Following the stance taken by the Supreme Court, the latest judgement of the Delhi High Court held that the limitation period began only after internal dispute resolution mechanisms failed.

In the case of *Welspun Enterprises Ltd.* v. *NCC Ltd.*,[31] the bench of Justices Vibhu Bakhru and Amit Mahajan held that if the pre-arbitration dispute resolution mechanisms are provided in the agreement, arbitration cannot be invoked before exhausting the alternative means. Thus, the limitation period cannot start prior to that.

The court's observations included that the parties are required to make endeavours to resolve differences by mutual negotiations as per the dispute resolution clause in the agreement. The parties in the present case have agreed that if they could not solve the dispute within a month from the date it arose, they would refer it to their respective chief executives. When the chief executives fail to resolve it, only then would the dispute be referred to arbitration. It was held that the parties have agreed to solve the dispute by way of alternate dispute-solving mechanisms. Thus, the period of limitation for referring the dispute for arbitration can only begin sometime after the exhaustion of these mechanisms.

Earlier, the court had taken a different stand with regard to the period of limitation. As per its earlier decision in *Ravinder Kumar Verma* v. *M/S. Bptp Ltd. & Anr.*,[32] the limitation period could not be stopped merely because the conciliation/mediation proceedings are pending between the parties. But the position is evidently settled now.

Notably, the position of law in the countries such as Canada, Austria, Poland, and Hungary were considered to arrive at the current status. The pre-arbitration conditions are excluded from

[31] *Welspun Enterprises Ltd v NCC Ltd.*, (2022) SCC OnLine Del 3296.
[32] *Ravinder Kumar Verma v M/S Bptp Ltd & Anr*, (2015) 147 DRJ 175.

the limitation period in the countries as mentioned earlier.[33] The UK's courts have been empowered to extend the limitation period where the parties contemplate amicable dispute resolution before going for arbitration. It is safe to say that the limitation period begins when alternate measures to settle disputes have been exhausted, and it's time to refer the dispute to the arbitral tribunal. Here, a limit will apply, which is the "limitation period" during which the conflict could be referred and owing to the exhaustion of that limit, no dispute could be referred.

6. CONCLUSION

Procedures like time-limited mediations, amicable settlements, cooling-off periods, and other kinds of non-binding rulings are advantages of pre-arbitration measures for big businesses and companies. But the failure to solve disputes by these alternate means allows for invoking of the arbitration clause to solve the dispute. When one of the parties to a dispute is not satisfied with the award passed by the arbitral tribunal constituted for resolving the dispute, the ground they take to challenge the validity of the award is that since the pre-conditions were not complied with, the jurisdiction of the tribunal does not arise.

But it is a settled position that the issue of non-compliance is that of admissibility and not that of jurisdiction, which means that the tribunal has been empowered to decide the nature of the terms and then to determine whether their non-compliance has any repercussions. Additionally, the use of the arbitration provision is contested on the basis that it is time-barred. However, it is now widely accepted that the time spent seeking to resolve problems by alternative means is beyond the ambit of limitation.

[33] Ayyub A, "Period of Limitation for Referring the Dispute to Arbitration Commences Only after the Failure of Pre-Arbitration Mechanism: Delhi High Court" (*Live Law* October 16, 2022). <https://livelaw-nlul.refread.com/news-updates/delhi-high-court-period-of-limitation-for-referring-the-dispute-to-arbitration-commences-only-after-the-failure-of-pre-arbitration-mechanism-211725>accessed 9 February 2023.

Regardless, it can be asserted that the nature of the pre-arbitration resolution clauses in India is still evolving, and whether they are mandatory or merely suggestive on a case-by-case basis must be decided. It will be fascinating to observe this endeavour of bringing a definitive legislation regarding such clauses by the Supreme Court.