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Etymology of a multi-tier dispute resolution clause: A reflection on ethics and economic efficiency

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A multi-tier dispute resolution clause is a multi-step procedure to amicably resolve the dispute (negotiation/mediation/conciliation) before entering into the arbitration. These clauses diffuse the dispute, allowing only complex disputes into the arbitration. The aim is to streamline and re-tune the speed of the arbitration process by clearing the congestion. There is not an iota of doubt that these clauses appear to be very attractive alternate in theory and comes with irresistible economic benefits. However, in practicality, they have their limitations. In this paper, I am focusing on the ethical and economical aspects of these clauses.

ETHICAL DILEMMA

For emphasizing the ethical issues, I will be taking the example of a med-arb. Med-arb is a very unique ADR clause and can be performed in two ways. In the first procedure, the mediator acts as an arbitrator, provided the mediation fails, whereas, in the second procedure, the role of mediator ends if the mediation fails and parties submit their dispute to the separate tribunal.[1]Despite the flexibility and efficiency, it raises serious concerns to the ethics on accord of the arbitrator and the parties.

In the first scenario, where the arbitrator would step in the shoes of the mediator, s/he would be exposed to sensitive and confidential information, which the parties would otherwise have not disclosed to an arbitrator. The reason behind such disclosure is to enable parties to express themselves freely through admissions or concessions to achieve the settlement, being aware of the fact that even if the settlement is not accomplished, disclosures made by the parties would not cause any prejudice to them.[2] The clause is a perfect example of procedural efficiency if the settlement is achieved. On the contrary, if mediation fails, there is no guarantee that once the mediator switches the role as an arbitrator, information provided to him/her during the course of the mediation would not affect the outcome of the award. There is a strong possibility that the pre-existing knowledge may offend the test of biasness and may raise concerns regarding natural justice principles.

Article 4(d) of the IBA Guidelines on conflict of interest protects the arbitrator from any challenge questioning his/her impartiality or independence at instances where the ADR mechanism fails and

[1]Nigel Blackaby ET AL., International Arbitration 637, Oxford University Press, 6th ed (2015), 41.
[2]Clark Sargent, "How to ensure information disclosed in a mediation remains confidential", (25 April 2017); Gowling WLG, https://gowlingwlg.com/en/insights-resources/articles/2017/how-to-ensure-information-disclosed-in-a-mediation/, accessed on 9 July 2020.

the arbitrator resumes arbitration. Only the arbitrator has the discretion to resign from his/her position, if s/he considers themselves to be biased/inclined towards any party. Article 4(d) renderers the parties with discretion to provide a waiver. However, while providing the waiver, parties do not always apprehend the scenario, where they might face repercussions. At times, parties are rather affirmative in settling. Nonetheless, during the settlement talks, there may be a shift in circumstances that might expose the arbitrator to information, which parties have not anticipated. The dilemma is despite facing the apprehension of biasness, the parties do not have the discretion of revoking the waiver. The only recourse available for protecting the sanctity is that the arbitrator must think similarly to the parties and voluntarily resign from the position. In the cases, where the arbitrator does not take any measures to resign, chances are the losing party might feel itself to be at a disadvantageous position, as law fails to provide the right to appeal. This might raise serious ethical concerns on the arbitrator.

In the second scenario, where the mediator and arbitrator are two independent people, the ethics are questioned on accord of the parties. As parties along with the mediator are exposed to sensitive and confidential details. Although there is a mandate of confidentiality, in case the settlement fails. Nevertheless, these obligations, failure of settlement can make parties hostile towards each other, which would affect the power-play dynamic between the parties during the arbitration. Under these circumstances, the authenticity of the arbitration procedure can only be preserved if the parties respect the obligation to act ethically, as ethics works only on the principle of mutual respect and not upon sanctions.

The above-mentioned scenarios highlight the ethical constraints into the system, as the standard to determine ethics is very subjective.

ECONOMICAL-CONSIDERATIONS

Multi-tier clauses can swing both ways when talked in terms of economical perspective. On one hand, it is an efficient alternative, as the arbitration process can be very expensive and time-consuming. At times, during complex disputes, the parties may find themselves stuck into a daunting process for years. It may happen because either the arbitrator is ensuring due process at every step or the party is resorting to delaying tactics. Effective and successful use of the multi-tier clause can prove to be efficient (cost and time). It can also preserve the longevity of the business relationship(s) and the reputation of the parties. Most importantly, it also ensures that the

nuances of the commercial business remain confidential that would otherwise be public after enforcement, if the parties enter arbitration. Multi-tier clauses, if the settlement is achieved can ensure maximum efficiency with minimum resources.

Ordinarily, these clauses work well in terms of economic consideration, yet a lot is dependent upon parties' intentions. If the parties that do not intend to negotiate, but are forced to enter into negotiation as a prerequisite to arbitration, such participation is solely to exhaust the time and not for settlement. In aforesaid cases, instead of attaining economic efficiency, parties end up incurring additional costs and allocating additional time that compromises the efficiency.

CONCLUSION

Apart from the legal pros and cons of multi-tier dispute resolution clauses, there are various other features, which are beyond the four corners of the law. These are the ethical and economical attributes of multi-tier dispute resolution clauses. Ethical duties are subjective in nature and are often less predictable, their outcome may vary based on circumstances. In any proceedings, both the disputed party and the independent third party bears the onus of the duty to act ethically. Whereas on the economic front, outcomes are more streamlined, it's either cost-effective or cost inducing.