

**An arbitration clause which says disputes “may” be referred to arbitration is not a binding arbitration agreement; the pre-arbitral mechanism of discussion need not be followed when it is clear that parties do not intend any settlement (Bombay High Court)**

*Update by Nayanikaa Shukla*

Published on 22 June 2020

---

**Quick Heal v. NCS Computers and another**

**Court:** Bombay High Court | **Case Number:** Arbitration Petition No. 43 of 2018 | **Citation:** 2020 SCC OnLine Bom 687 | **Judge:** SK Kathawalla J | **Date:** 05 June 2020

---

**A. The arbitration clause stated that the dispute may be referred to arbitration. There was also a pre-arbitral mechanism of dispute resolution**

Quick Heal, an antivirus software manufacturer, had a distribution agreement with NCS. The case revolves around Clause 17 of this agreement.

Clause 17 (a) provided that all disputes “shall be amicably discussed for resolution by the designated personnel of each party, and if such dispute/s cannot be resolved within 30 days, the same *may be* referred to arbitration as stated below” (emphasis added).

Then, Clause 17 (b) stated that “disputes under this Agreement *shall be* referred to arbitration as per the Arbitration and Conciliation Act, 1996 ...” (emphasis added).

Lastly, Clause 17 (c) provided that “subject to the provisions of this Clause, the courts in Pune ... shall have exclusive jurisdiction and the parties may pursue any remedy available to them at law or equity.”

**B. Appointment of arbitrator was resisted saying that arbitration was not mandatory, and the pre-arbitral mechanism was not exhausted**

Disputes arose, and Quick Heal applied under Section 11 for the appointment of an arbitrator. NCS objected to the request. The court considered the following two objections as a preliminary matter: -

- (a) First, NCS argued that there was no mandatory arbitration agreement. The phrase “may be referred to arbitration,” it said, suggested that arbitration could be conducted if both parties agreed or they entered into another agreement to refer the dispute to arbitration.
- (b) In any event, NCS said, the petition was premature because the pre-arbitral mechanism was not exhausted – that is, a discussion between designated personnel of each party had not taken place.

**C. The court’s conclusion**

**C1. Was the binding pre-arbitral mechanism followed?**

The court referred to *Visa International Limited v. Continental Resorts (USA) Ltd.*, (2009) 2 SCC 55 and noted its conclusion that if correspondence shows that the parties do not wish any settlement, a pre-

condition will not be in the way of a further dispute resolution process.<sup>1</sup>

Then, Kathawalla J examined the correspondence and found that the parties could not even agree upon the venue of the meeting for discussions. He noted that the communications were of 2013, and the application under Section 11 ACA had been filed in 2018. In the meantime, NCS had filed a suit against Quick Heal in Kolkata levelling several allegations and claiming an amount of rupees 1610 crores. Therefore, he concluded that there was no scope for an amicable settlement.

## **C2. Was there a binding arbitration agreement?**

First, Kathawalla J addressed a 3-judge bench decision of the Supreme Court of India in *Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components*, (2018) 9 SCC 774. Quick Heal had cited this to say that where the arbitration clause contains an option between arbitration and court, the matter should be referred to arbitration if a party chooses to invoke arbitration.<sup>2</sup>

He said that in *Zhejiang*, the clause had provided that the dispute “should be” settled by arbitration or through the court. But here, unlike, *Zhejiang*, there is no pre-existing agreement between the parties that they “should” or they “will” refer the dispute to arbitration or the court.

Then, the court said it is clear beyond any doubt that the clause was drafted “with proper application of mind” because:-

- (a) The parties first agreed that the disputes “shall” be amicably discussed for resolution, thereby making discussions mandatory.
- (b) Then, they used the expression “may be referred to arbitration as stated below”, indicating that it was optional to refer the disputes to arbitration. If referred it had to be as per the ACA.

The court, therefore, concluded that there was no binding agreement.

The court also rejected the argument that the types of dispute contemplated by Clause 17(a) were independent of Clause 17(b). It said that “all disputes” were covered by Clause 17(a).

---

<sup>1</sup> In *Visa*, there was an application for appointment of arbitrator before the designated judge B Sudershan Reddy J. He noted that “from the correspondence exchanged between the parties ... it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other.” Further, “...the exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke the arbitration clause.” *Visa* was cited by UCS for the proposition that following the pre-arbitral mechanism is mandatory. Kathawalla J found that the above-stated proposition contained in the case was in NCS’s favour.

<sup>2</sup> The arbitration clause had provided as follows: “15. Dispute handling. – Common processing contract disputes, the parties *should be* settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court” (emphasis added).