LH AG ADVOCATES AND SOLICITOR

INSIGHTS

International Arbitration

Crystal Wong Wai Chin
Partner
International Arbitration
E: wwc@lh-ag.com

Soh Zhen Ning
Associate
International Arbitration
E: szn@lh-ag.com

Charissa Wong Joo June
Associate
International Arbitration
E: wjj@lh-ag.com

7 November 2023

Amicable Settlement Process – A Condition Precedent to Arbitration?

In a multi-tiered dispute resolution clause, there are typically certain procedural steps, such as mediation or negotiation, that parties must fulfill before a dispute can be referred to arbitration. However, what happens if a party commences an arbitration without complying with the pre-arbitration procedures stipulated in a contract?

In ***CZQ and another v CZS*** [2023] SGHC(I) 16 ("**CZQ v CZS**"), the Singapore International Commercial Court ("**SICC**") recently ruled that the amicable settlement process stated in a contract is not a condition precedent to the commencement of an arbitration. The SICC carefully examined the language used in the dispute resolution clause and determined that parties were not contractually required to first attempt to "amicably settle" the dispute before commencing the arbitration.

This decision is significant as it reinforces the importance for any condition precedent to the commencement of an arbitration to be expressed in clear and unambiguous terms.

Brief Facts

The respondents in an arbitration applied to the SICC for a determination that the arbitral tribunal has no jurisdiction. The crux of the respondents' case centres on the claimant's failure to comply with the amicable settlement procedure prescribed in the contract, prior to commencing the arbitration.

The relevant extracts of the dispute resolution clause are reproduced as follows:

> ***"20.5 – Amicable Settlement***
> *[FIDIC Sub-Clause 20.5 was deleted and replaced with the following]:*

(a) If any dispute arises out of or in connection with the Contract … then either Party shall notify the other Party that a formal dispute exists. Representatives of the Parties shall, in good faith, meet within 7 days of the date of the notice to attempt to amicably resolve the dispute,

(b) If the representatives of the Parties cannot resolve a dispute within 7 days from the first meeting, 1 or more senior officer(s) from each Party shall meet in person within 14 days from the first meeting of the representatives in an effort to resolve the dispute. If the senior officers of the Parties are unable to resolve the dispute within 7 days from their first meeting, then either Party shall notify the other Party that the dispute will be submitted to arbitration in accordance with Sub-Clause 20.6.

20.6 – Arbitration
[FIDIC Sub-Clause 20.6 was amended to the following]:

Unless settled amicably, any dispute shall be finally settled by international arbitration…"

Decision

The arbitral tribunal ruled that the amicable settlement procedure in Sub-Clause 20.5 was not a condition precedent to the commencement of arbitration under Sub-Clause 20.6.[1] The SICC agreed with the arbitral tribunal's findings. The thrust of Andre Maniam J's judgment can be summarised as follows:

a. There were no clear words in Sub-Clause 20.6 to establish a condition precedent for arbitration. Sub-Clause 20.6 did not refer to either Sub-Clause 20.5, or the amicable settlement procedure outlined in Sub-Clause 20.5;[2]

b. The term "settled amicably" was not specifically defined, leaving room for parties to attempt other methods of settlement which include, but not limited to, the amicable settlement procedure in Sub-Clause 20.5; [3]

c. The clauses in ***Emirates***[4] or ***Ohpen***[5] clearly established a condition precedent by requiring parties to "first" seek to resolve the dispute through a specified procedure before referring the dispute to arbitration. In contrast, Sub-Clause 20.5 differed from ***Emirates*** or ***Ohpen*** as it did not contain any wording to such effect that would clearly evident parties' intention to treat a pre-arbitration or a pre-litigation step as a condition precedent:

---

[1] ***CZQ v CZS***, [3].
[2] ***CZQ v CZS***, [24] – [26].
[3] ***CZQ v CZS***, [22].
[4] ***Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*** [2014] EWHC 2104.
[5] ***Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*** [2019] EWHC 2246 (TCC).

Case	Extracts from Judgment
Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm)	At paragraph [3] of the judgment: "*the Parties shall **first** seek to resolve the dispute or claim by friendly discussion … **If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks, then the non-defaulting party can invoke the arbitration clause** and refer the disputes to arbitration*" [**Our Emphasis**]
Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC)	At paragraph [18] of the judgment: Clause 11.1 provided that "*The Parties will **first** use their respective reasonable efforts to resolve any Dispute that may arise out of or relate to this Agreement or any breach thereof, in accordance with this Clause*"; Followed by Clause 11.2 which provided that, "***If a Dispute is not resolved in accordance with the Dispute Procedure [defined as the procedure for resolving Disputes contained in Clause 11], then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts***" [**Our Emphasis**]

d. Sub-Clause 20.5 did not oblige the parties to initiate the amicable settlement procedure, nor to commence an arbitration, if the parties did not wish to do so.[6]

The SICC therefore concluded that the respondents' contention, that the amicable settlement procedure had not been complied with, failed on the language of the contract.[7]

Key Takeaways & Observations

Our main takeaways from the SICC's decision in **CZQ v CZS** are as follows:

a. The question on whether a pre-arbitration step is a condition precedent to arbitration would turn on the specific language used in the arbitration agreement or the dispute resolution clause in question. There is no hard-and-fast rule – a pre-arbitration step can be either optional or mandatory, depending on the language used in the clause; and

b. It is important for commercial parties to ensure that clear and unambiguous language is used when establishing a condition precedent to arbitration. It is not desirable to be embroiled in disputes over the interpretation of such clauses (i.e., whether such

[6] ***CZQ v CZS***, [33].
[7] ***CZQ v CZS***, [46].

a clause is tantamount to a condition precedent), which could result in wasted time and unnecessary costs.

Although the SICC's decision may seem harsh on the respondents, the SICC also observed (albeit as an *obiter dictum*) that neither party showed any enthusiasm for pursuing negotiations or settlement discussions. Notably, the respondents also admitted there was "almost no enthusiasm" for an amicable settlement meeting.[8] Our observations on the respondent's conduct are as follows:

a. The respondents' jurisdictional challenge appears to be employed as a tactic to frustrate the arbitration proceedings, as they had no intention to "amicably settle" the dispute with the claimant by the time of the jurisdictional hearing. [9]

b. If the approach taken by the judiciary in the United Kingdom[10] and Hong Kong[11] are adopted – a challenge on the failure to fulfil a pre-arbitration step is an admissibility issue, and not a jurisdictional issue – the parties to an arbitration may be deterred from advancing frivolous or unmeritorious jurisdictional challenges before the courts. Notably, a tribunal's jurisdictional rulings can usually be challenged in court,[12] while there is no automatic right to challenge a tribunal's ruling peculiar/specific to the issues of admissibility.[13]

c. As the law currently stands, in Singapore and Malaysia, it remains unclear whether issues relating to compliance with pre-arbitration steps are considered a jurisdictional or an admissibility issue. Therefore, parties involved in arbitration proceedings in these jurisdictions should be vigilant and tread with caution in complying with any pre-arbitration steps, to avoid any unnecessary jurisdictional challenges.

The full grounds of judgment for the SICC's decision in **CZQ v CZS** can be accessed here.

If you have any queries, please contact Associates, **Soh Zhen Ning** (szn@lh-ag.com), and **Charissa Wong Joo June** (wjj@lh-ag.com) or their team Partner, **Crystal Wong Wai Chin** (wwc@lh-ag.com).

[8] ***CZQ v CZS***, [48(a)].
[9] ***CZQ v CZS***, [48(a)].
[10] ***Sierra Leone v SL Mining Limited*** [2021] EWHC 286 (Comm); ***NWA and others v NVF and others*** [2021] EWHC 2666 (Comm).
[11] ***C v D*** [2022] HKCA 729
[12] See, for example, Section 10(3)(a) of the Arbitration Act 1994 in Singapore, and Section 18(8) of the Arbitration Act 2005 in Malaysia.
[13] Challenges to rulings on admissibility can only be pursued if, for example, the tribunal has made them in breach of natural justice (a general ground for challenge that is not confined to rulings of admissibility); which goes to the manner in which the ruling was arrived at, rather than the actual content of the ruling itself.

LH AG ADVOCATES AND SOLICITORS

Head Office
Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office
Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office
51-12-E, Menara BHL Bank,
Jalan Sultan Ahmad Shah,
10050
Penang
Tel: +604 299 9668
Fax: +604 299 9628

Email
enquiry@lh-ag.com

Website
www.lh-ag.com

Published by International Arbitration Practice