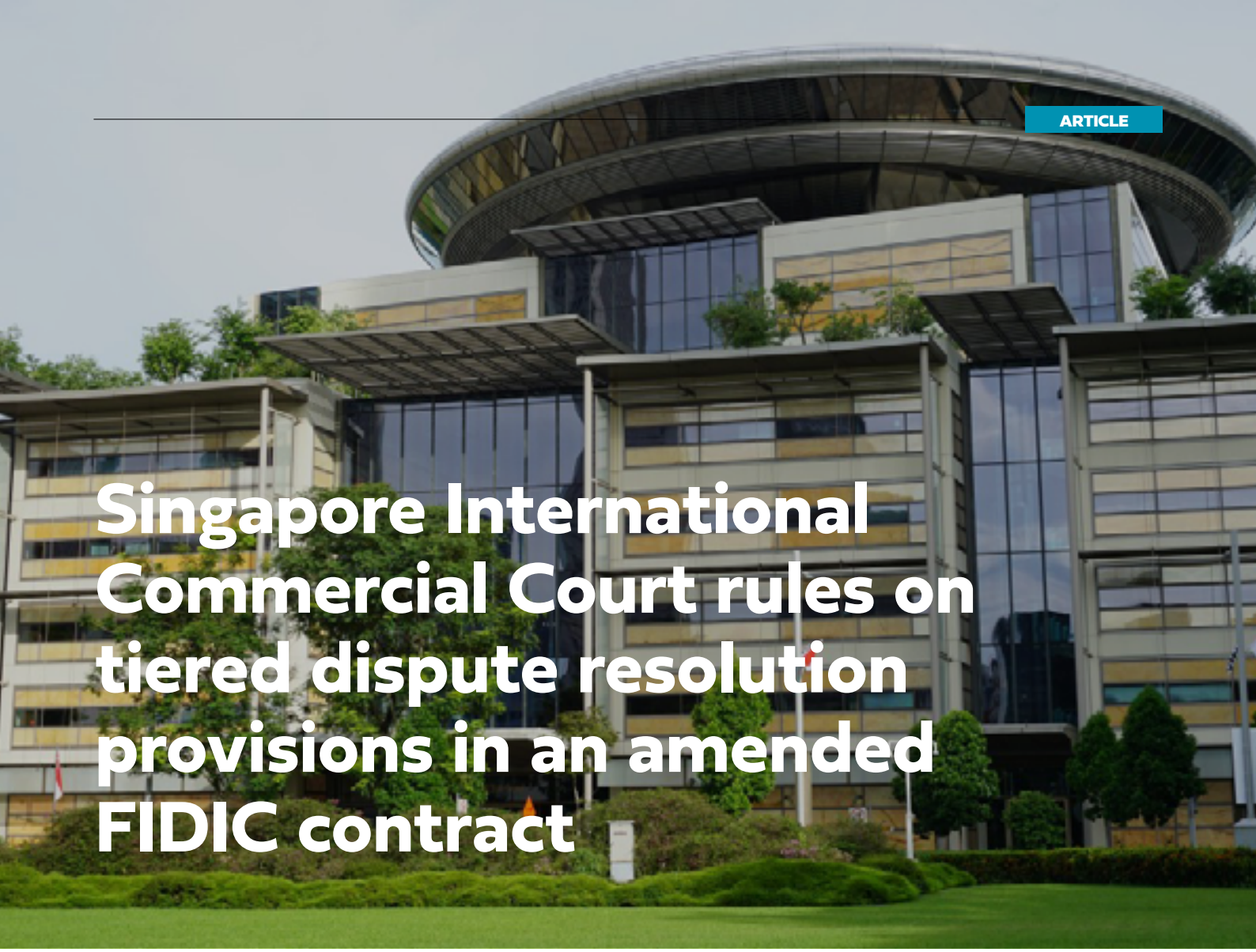

Singapore International Commercial Court rules on tiered dispute resolution provisions in an amended FIDIC contract

WRITTEN BY
EDWARD SHAW &
APOORVAA PARANJPE

Introduction

Multi-tiered dispute resolution clauses are a common feature of construction and infrastructure contracts. These clauses require the parties to undertake certain agreed steps prior to a final method of dispute resolution (usually arbitration or litigation – depending on the nature and location of the project and the parties involved). These clauses, which are intended to assist parties to reach an amicable settlement, can become the subject of protracted legal proceedings regarding the consequences of a party's failure to comply with the initial steps.

The issue of whether pre-arbitration steps in a multi-tiered dispute resolution clause constitute jurisdictional conditions precedent to arbitration is answered differently in various jurisdictions. In this article we consider the position in Singapore, compared to England and Wales and Hong Kong, by reference to recent cases.

In *CZQ and CZR v CZS* (2023) SGHC 16, the Singapore International Commercial Court held that the amicable settlement procedure contained in the contract was not a condition precedent to the commencement of arbitration.

The court reached its conclusion based on the interpretation of the language of the contract, which was based on the dispute resolution provisions in the 1999 FIDIC Yellow Book, with bespoke amendments. In doing so, the court also gave its guidance on the dispute resolution provisions in the 1999 FIDIC Yellow Book.

Brief facts

The respondents in an arbitration applied to the court for a determination that the arbitral tribunal had no jurisdiction because the procedure for amicable settlement prescribed in the contract had not been followed. The tribunal ruled, as a preliminary issue, that it did have jurisdiction. The respondents applied to the court for a determination to the contrary.

The relevant extracts of the contract, which was based on Sub-Clause 20 of the 1999 FIDIC Yellow Book as amended by the Particular Conditions are as follows:

> **"CLAUSE 20 CLAIMS, DISPUTE AND ARBITRATION**
> **20.2 – Appointment of Dispute Adjudication Board**
> (FIDIC Sub-Clause 20.2 was deleted and replaced with the following)
> All references to the Dispute Adjudication Board will not apply and all disputes will be dealt with under Sub-Clause 20.5.
> **20.5 – Amicable Settlement**
> (FIDIC Sub-Clause 20.5 was deleted and replaced with the following)

- If any dispute arises out of or in connection with the Contract, or the execution of Works, including any dispute as to certification, determination, instruction, opinion or valuation of the Engineer, 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.
- 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 court agreed with the tribunal's findings that the amicable settlement procedure in Sub-Clause 20.5 was not a condition precedent to the commencement of arbitration under Clause 20.6.

The court held that as a matter of general principle, clear words are necessary to create a condition precedent to the commencement of arbitration. Analysing the wording of Sub-Clause 20 there were no clear words establishing a condition precedent to the commencement of arbitration.

Clause 20.6

The only restriction on the commencement of arbitration in Sub-Clause 20.6 was the phrase "(u)nless settled amicably" which the court held was not specific enough to refer to the procedure in Sub-Clause 20.5.

In particular, Sub-Clause 20.6 was quite unlike Sub-Clause 37.2 in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* (2014) 1 SLR 130 which specifically provided for the reference of disputes to mediation. Sub-Clause 37.3 then referred to Clause 37.2 in providing for the arbitration of disputes "which cannot be settled by mediation pursuant to Clause 37.2".

Clause 20.5

Sub-Clause 20.5 did not restrict the parties to settling disputes only through the amicable settlement procedure, and the parties were free to attempt other methods of settlement. This differed from the clauses in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* (2014) EWHC 2104 (Emirates) and *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* (2019) EWHC 2246 (Ohpen) which stipulated that the parties should "first" seek to

resolve disputes in accordance with a stated procedure, before resorting to arbitration.

Nor did Sub-Clause 20.5 contain language addressing the right to commence arbitration or litigation.

Clause 20.2

Sub-Clause 20.2 stated that "all disputes will be dealt with under Sub-Clause 20.5". This did not progress the respondents' case as the question still remained whether compliance with the Sub-Clause 20.5 procedure was a condition precedent to commencing arbitration.

The court concluded that the respondents' contention, that failure to comply with the amicable settlement procedure in Sub-Clause 20.5 was a barrier to the commencement of arbitration, failed on the language of the contract.

The court also commented on the wording of the multi-tiered dispute resolution procedure in the 1999 FIDIC Yellow Book, observing that it presented some barriers to the commencement of arbitration. Whilst on the terms of the standard form, attempting amicable settlement is not itself a condition precedent to arbitration (paragraph 44 of the judgment), Sub-Clause 20.5 provides for a 56-day waiting period during which arbitration may not be commenced and Sub-Clause 20.4 provides that, with certain exceptions, a party cannot commence an arbitration unless a notice of dissatisfaction has been served. As these provisions were deleted from the parties' contract, this was an obiter observation, but one that will be of interest to construction practitioners.

Position in other jurisdictions

England and Wales

Absent language or evidence to the contrary, non-compliance with procedural preconditions to arbitration is considered an issue of admissibility of claims rather than one of the tribunal's jurisdiction. The distinction is important, as a challenge to a tribunal's jurisdiction will be determined by the court whereas a decision on admissibility by the tribunal does not usually merit curial intervention by the courts and will not prevent the tribunal from re-hearing the case once the relevant preconditions have been complied with.

In *Republic of Sierra Leone v SL Mining* (2021) EWHC 286 (Comm) (Sierra Leone), the English High Court declined to set aside an arbitral award, despite the defendant's alleged failure to comply with certain pre-conditions to arbitration contained in a multi-tiered dispute resolution clause. The court said that the alleged non-compliance was a question of admissibility of the claim before the tribunal and not of the tribunal's jurisdiction. The matter was best determined by the arbitrators, and the award was not amenable to challenge.

Sierra Leone was affirmed in *NWA and another v NVF and others* (2021) EWHC 2666 (Comm), where the court found that it was for the tribunal to decide the consequences of parties' failure to abide by a mediation procedure. The court held that it would not make business common sense to deprive oneself of a right to refer a dispute to arbitration because of failure to comply with a pre-arbitration requirement.

Hong Kong

In *C v D* (2023) HKCFA 16, the Hong Kong Court of Final Appeal held that the question of non-compliance with a condition precedent to arbitrate went to admissibility of the claim and not to the jurisdiction of the tribunal.

For clarity, pre-arbitration requirements being regarded as going to admissibility and not jurisdiction does not mean that they are denied contractual force or rendered unenforceable. Rather, it means that the questions regarding construction and fulfilment of pre-arbitration conditions should be decided by the tribunal, rather than being considered *de novo* by the courts.

Singapore

The position in Singapore is unclear.

In *International Research Corp PLC v Lufthansa Systems Asia Pacific* (2014) 1 SLR 130 (IRC), the Singapore Court of Appeal held that a failure to comply with a pre-arbitration requirement was to be treated as a potential jurisdictional defect on the part of the tribunal. The court did not distinguish between jurisdiction and admissibility, focusing instead on whether the pre-arbitration requirements

constituted conditions precedent that were sufficiently certain to be enforceable, and if so, whether they had been complied with.

Two subsequent Singapore Court of Appeal cases (*BBA and others v BAZ and another appeal* (2020) 2 SLR 453 (BBA) and *BTN and another v BTP and another* (2021) 1 SLR 276 (BTN) endorsed the "admissibility/ jurisdiction" dichotomy but did so in matters unrelated to arbitration. Those cases dealt with issues of *res judicata* and statutory time bars, and the court found both related to admissibility and not jurisdiction. In neither case did the court refer to or reconcile the IRC decision.

The court in the present case referred to and relied on the IRC decision and made no reference to the "admissibility/ jurisdiction" dichotomy or the BBA and BTN decisions, leaving Singapore's position unclear.

Takeaways

- Be mindful that respondents can make jurisdictional challenges (even unmeritorious ones) as a tactical tool to frustrate or delay arbitration proceedings. Consider carefully whether you need to include pre-arbitration conditions, and if so, ensure that you comply with these conditions to the extent possible.
- Disputes over interpretation could derail arbitration proceedings. Multi-tiered dispute resolution clauses are enforceable provided they are drafted with sufficient certainty. If you are incorporating a multi-tiered dispute resolution clause, always use clear and unambiguous language to establish a condition precedent to arbitration.
- The issue of whether failure to comply with a pre-arbitration step relates to an admissibility issue or a jurisdiction issue will depend on the approach of the national court in question.
- If amending the FIDIC standard form, parties should consider expressly stating whether the ADR process is a condition precedent to arbitration or whether the parties retain the right to go to arbitration after a certain period of time.

About the authors

Edward Shaw

Edward has over 20 years' experience of advising on construction, engineering and infrastructure disputes. He is an experienced litigator and international arbitration lawyer – having acted for contractors, sub-contractors, employers, owners and financiers in in complex, high value, multi-party disputes. He has extensive experience of handling arbitrations subject to ICC, LCIA and SIAC institutional rules; as well as on an ad hoc basis. He is also familiar with adjudication, litigation, mediation, and other types of dispute resolution – in the UK and internationally.

Edward has advised on major projects in the infrastructure and transport, power and energy, water and heavy engineering sectors. He has particular experience in working for and advising Chinese and Korean clients and has acted on disputes arising from projects in Africa, across Asia, in the Caribbean, across Eastern Europe, Pakistan, Turkey as well as the UK.

Edward was listed in the "Construction – Future Leaders – Partners" chapter of WWL: Construction for 4 years in succession. In the 2021 edition he was listed amongst the most highly regarded partners globally, described as "one of those fantastic lawyers that gets involved in all phases of a claim and manages to create the expected output even when the dispute becomes complicated". *Who's Who Legal's* 2022 Construction report ranked Edward as a Global Leader.

Apoorvaa Paranjpe

Apoorvaa Paranjpe is a triple qualified dispute resolution lawyer focussing on international arbitrations arising from infrastructure, construction, real estate and financial services sectors and general commercial disputes.

Apoorvaa also has experience with commercial litigations before the High Court of England and Wales, the Supreme Court of India and the Bombay High Court.