MEDIATE OR ARBITRATE?

Singapore High Court compels party to arbitration to engage in mediation

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In the first case of its kind in Singapore, the High Court (Court) has ordered specific performance compelling a party already involved in arbitral proceedings to attend mediation. With no previous caselaw in Singapore ordering performance of mediation as a contractual obligation, *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2023] SGHC 71 will be useful precedent for future disputes involving tiered dispute resolution clauses.

The parties' tiered dispute resolution procedure

Maxx Engineering Works Pte Ltd (**Maxx**) and PQ Builders Pte Ltd (**PQ**) entered into a contract which contained a tiered dispute resolution procedure.

In the event of a dispute arising, clause 54 of the contract required the parties to attempt to negotiate. If negotiations failed, then they were required to refer their dispute to mediation. However, this clause explicitly stated that referral to mediation was *not a condition precedent* to referral to arbitration. Clause 55 went on to require the parties to refer an unresolved dispute to arbitration.[1]

Clause 54

If a dispute arises between the parties … the parties shall endeavor to resolve the dispute through negotiations. If negotiations fail, the parties shall refer the dispute for mediation … For the avoidance of doubt, prior reference of the dispute to mediation under this clause shall not be a condition

1 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2023] SGHC 71 at [4].


"If a dispute arises between the parties ... the parties shall endeavor to resolve the dispute through negotiations."

Party to arbitration to engage in mediation

→ In the first case of its kind in Singapore, the High Court highlighted the trend towards the promotion of amicable dispute resolution as one of the reasons for compelling the parties to attend mediation

precedent for its reference to arbitration by either party nor shall it affect either party's rights to refer the dispute to arbitration under Clause 55 below.

Clause 55

In the event of any dispute between the parties … and such dispute is not resolved by the parties in accordance with Clause 54, the parties shall refer the dispute for arbitration by an arbitrator…

When a dispute did arise between the parties, PQ commenced arbitration without first referring the matter to mediation. PQ refused Maxx's request to mediate. Maxx applied to the High Court requesting an order for specific performance compelling PQ to attend mediation.

The Court identified two key questions for determination, and answered both in the affirmative:

- Did the contract impose a contractual obligation on the parties to mediate?
- If there was such an obligation, should the Court grant the order for specific performance compelling PQ to perform its obligation to mediate?

Issue 1 – Was there a contractual obligation to mediate?

The first issue was whether the terms of Clause 54 and 55 imposed a contractual obligation on the parties to refer their dispute to mediation.

PQ relied on the explicit wording of clause 54 that mediation was not a condition precedent to referral to arbitration, and also argued that clause 54 imposed only an obligation to *consider* mediation.

However, the Court had little difficulty in determining that clauses 54 and 55 imposed an obligation to attend mediation. It rejected PQ's argument that parties need only 'consider' mediation.

The Court referred to the mandatory meaning of the words *the parties shall refer the dispute for mediation* and *shall refer the dispute for arbitration*. The Court agreed with Maxx that the plain meaning of the clauses was that the parties were under an obligation to refer the dispute to *both* mediation and arbitration.

The explicit wording that mediation was not a condition precedent did not mean that mediation was not mandatory. It meant only that mediation was not required *before commencing* arbitration – the parties were still under a mandatory obligation to mediate while their dispute remained unresolved (this referral could be before commencing

arbitration or while arbitration was ongoing).

Issue 2 – Should the Court make an order for specific performance compelling PQ to perform its obligation to mediate?

Having answered the first question in the affirmative, the Court turned to the issue of whether it should make the order for specific performance sought by Maxx, to compel PQ to mediate.

The Court noted there was no existing case law in Singapore ordering specific performance in relation to mediation, and so it set out the factors and considerations behind its decision in detail. The Court applied the leading caselaw principles in relation to specific performance as a remedy generally, that is, whether the order for specific performance was *just and equitable* in the circumstances.[2]

After analysing the four relevant factors set out below, the Court concluded it would be just and equitable in all the circumstances to compel PQ to attend mediation while the arbitral proceedings were ongoing, and granted Maxx's request for an order for specific performance.

Factor 1 – Inadequacy of damages

The first factor the Court considered was whether awarding Maxx damages would be an adequate remedy in the circumstances,[3] instead of compelling PQ to mediate. The Court agreed with Maxx that in this case, damages would not be an adequate substitute for PQ's participation in mediation and the opportunity to reach an agreement without incurring further cost and delay:[4]

> *In the present case, the parties had bargained for an obligation to refer their disputes to mediation… damages for PQ's breach of this obligation would have been an inadequate and unsuitable substitute …*

Factor 2 – No substantial hardship

Secondly, the Court considered whether PQ would suffer any financial hardship by being compelled to mediation, but found no evidence that it would.[5]

Factor 3 – No futility

The third factor for consideration was whether an order compelling PQ to mediate would be futile. The Court rejected PQ's claims that Maxx was insincere in seeking to mediate, and found no evidence that either party was unamenable to mediation.

Factor 3 – No impracticability

The fourth factor was whether it would be impractical to compel the parties to mediate, that is, whether it would be impractical for the court to supervise compliance with such an order. The Court found no impracticability in supervising referral to mediation, and no serious difficulties in determining whether

2 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [53].
3 At [18], applying the 'adequacy of damages' consideration from *Lee Chee Wei,* above n 2, at [53].
4 At [20].
5 At [21], applying 'substantial hardship' consideration from Lee *Chee Wei*, above n 2, at [53].

the parties had complied with this step.

Factor 4 – Other relevant factors

In the final consideration, the Court identified three additional factors which favoured granting the order.

- Mutual benefit to both parties

The Court noted that compulsory mediation as a remedy would not only benefit Maxx as the party seeking the order – the opportunity to reach a mediated settlement, and the potential time and cost savings would be of benefit to *both* parties:[6]

> *..the mediation process would have provided both parties with the opportunity to resolve their dispute without incurring further legal costs or substantial delay.*

- Holding the parties to their contractual bargain

The Court highlighted that by entering the contract with Maxx, PQ had agreed to attempt to resolve disputes by attending mediation, and PQ should be held to that bargain:[7]

> *In the present case, the parties ... agreed that they would resolve their disputes by mediation ... the parties' choice to refer their dispute to mediation should be respected.*

- Promotion of amicable dispute resolution

The final 'other factor' the Court considered was the global trend and value of promoting amicable dispute resolution.

The Court also noted that this has found recent legislative expression in Singapore's Rules of Court 2021 (ROC) which came into effect on 1 April 2022, in particular Order 5, rule 1(1): [8]

> *... the recently enacted Rules of Court 2021 ... provides at O 5 r 1(1) that "[a] party to any proceedings has the duty to consider amicable resolution of the party's dispute before the commencement and during the course of any action or appeal." The ROC also empowers the court to order parties to attempt to resolve the dispute by amicable resolution and to consider any refusals to attempt amicable resolution in determining any issue...*

Conclusion

Mediation is increasingly becoming the preferred dispute resolution method in legal jurisdictions around the world. The objective is to enable and empower parties to negotiate and resolve their dispute promptly, cost effectively and confidentially rather than have a decision imposed upon them by a judge, arbitrator or adjudicator. It enables parties to negotiate flexible and creative solutions which need not conform to strict legal rights or general community standards.

The ADR Centre is a leading provider of commercial mediation services in New Zealand. Visit our website to learn more about the mediation process, our mediation services and a model mediation clause you can incorporate into your contract to provide certainty and structure in the event of a dispute arising.

6 At [27].
7 At [28].
8 At [30].