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Revisiting your multi-tier dispute resolution clauses

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Multi-tiered dispute resolution clauses are increasingly being included in complex commercial contracts. By using such clauses, parties generally intend to leverage off the upsides, and mitigating the downsides, to different dispute resolution mechanisms. We revisit Singapore's position on multi-tiered dispute resolution clauses in this article.

Multi-tiered dispute resolution clauses incorporate two or more forms of dispute resolution mechanisms which the contracting parties are required to comply with in resolving their disputes. They typically require parties to participate in any combination of mediation, negotiations or conciliation processes before the parties may resort to litigation or arbitration.[1]

An International Dispute Resolution Survey conducted by the Singapore International Dispute Resolution Academy (SIDRA)[2] suggested that "Client Users" (ie, corporate executives and in-house counsel) are more open to using such clauses in their contracts than "Legal Users" (ie, lawyers and legal advisers). According to the survey, the most important factor behind the use of such clauses was the "Preservation of business relationship" and "[t]his demonstrates the strong advantages of using hybrid mechanisms, which allows parties to continue their business relationships because of the incorporation of a more conciliatory approach".[3]

In light of the COVID-19 pandemic's adverse impacts on international trade, domestic markets, business and supply chains, a surge in contractual disputes is expected in the near future. It would be an opportune time to revisit the legal position on multi-tiered dispute resolution clauses summarised in the following paragraphs.

1. Where a specific dispute resolution procedure has been prescribed as a pre-condition to arbitration or litigation, that pre-condition must be fulfilled

In *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another*[4], the Singapore Court of Appeal had to determine, amongst other things, whether a tribunal had jurisdiction to determine a dispute between the appellant and the respondent. One of the grounds of objection to the Tribunal's jurisdiction was that the Respondent had not fulfilled the pre-conditions to the commencement of arbitration.

The Court held that the multi-tiered dispute resolution clause in the contract between the parties had set out, in a mandatory fashion, a series of steps they were to comply with before resorting to arbitration.[5] These series of steps were therefore condition precedents to the commencement of arbitration. As the condition precedents had not been complied with, the Court of Appeal held that the arbitral tribunal did not have jurisdiction to determine the dispute between the parties.

2. Where the pre-conditions to arbitration or litigation have not been fulfilled, a party is not entitled to invoke any other dispute resolution mechanism

In *PT Selecta Bestama v. Sin Huat Huat Marine Transportation Pte Ltd*[6], the defendant applied to, amongst other things, stay ongoing Singapore court proceedings in favour of the Courts in Batam, Indonesia. The dispute resolution clause in the relevant contracts required the parties' disputes to be "settled amicably by negotiation", failing which the dispute would be submitted to the exclusive jurisdiction of the Batam Courts.[7] It was undisputed that no negotiations took place before the Singapore court proceedings were commenced.

The Plaintiff argued that the requirement to negotiate was a pre-condition which must first be fulfilled before the exclusive jurisdiction clause could be engaged. It was therefore open to the Plaintiff to commence proceedings in Singapore. The High Court disagreed and held that the Singapore Courts should decline jurisdiction due to the plaintiff's failure to comply with the pre-condition to negotiate.

The Court considered that not only could the Plaintiff commence proceedings at the Batam Courts due to the failure to negotiate, it was implicit that "no other dispute resolution mechanism could be invoked either. It would defy logic and common sense if the parties who were in breach of the conditions precedent in a two-tiered dispute resolution clause could not have recourse to the secondary dispute resolution mechanism mandated by the contract, but could instead proceed with a mode of dispute resolution which was not contractually provided for."[8]

3. A multi-tiered clause, which ultimately requires the parties to arbitrate unresolved disputes, constitutes a valid agreement to arbitrate

In *Ling Kong Henry v. Tanglin Club*[9] (the "Tanglin Club Case"), parties were required to refer their disputes to conciliation, followed by mediation (if conciliation was unsuccessful) and finally by arbitration (if mediation was unsuccessful as well).

The Singapore High Court held that the entire dispute resolution mechanism was an arbitration agreement and disagreed with the notion that the agreement to arbitrate only arose after the preconditions (in this case, conciliation and mediation) were fulfilled.

The implication of this finding is that the International Arbitration Act[10] or the Arbitration Act[11] (as the case may be) applies to the entire multi-tiered dispute resolution clause, and not solely to the tier providing for arbitration. An example of how this may affect the Courts' approach to enforcing the clause is illustrated in Section 4 below.

4. Where parties clearly intend to resolve their disputes through arbitration, the Courts will give effect to this intention even in the presence of technical impediments

Having found that the entire dispute resolution mechanism in the Tanglin Club case constituted an arbitration agreement, the Court considered whether the mechanism was capable of being performed under the Arbitration Act.

While the Court did note "the paucity of details"[12] concerning the rules governing the appointment of conciliators, mediators and arbitrators as well as the procedures for conciliation, mediation and arbitration, it held that dispute resolution mechanism was capable of being performed.

In making this decision, the High Court cited the Court of Appeal's observation in *Insigma Technology Co Ltd v. Alstom Technology Ltd*[13] that "where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars".[14]

Our views

It is clear that the Singapore Courts require the parties to adhere the procedures set out in their respective multi-tier dispute resolution clauses. If the stipulated steps prior to the commencement of litigation or arbitration are drafted in mandatory language, then these steps are condition precedents to litigation or arbitration and must be complied with. A decision to commence litigation or arbitration proceedings in spite of a multi-tier clause should not be taken lightly – such a decision could easily backfire and result in additional expenditure of costs and time.

Notes

1. It is not uncommon for parties to agree to more than two tiers in their dispute resolution clause. For instance, a three-tiered clause could require parties to (1) negotiate a resolution to their dispute; (2) failing a successful outcome from the negotiation, attempt to mediate their differences. It is only when attempts at negotiation and mediation have failed, that the parties may consider the option of litigation or arbitration.
2. SIDRA's International Dispute Resolution Survey 2020 – Final Report may be accessed at here.
3. Section 9.2 of the SIDRA's International Dispute Resolution Survey 2020 – Final Report
4. [2014] 1 SLR 130
5. The multi-tiered dispute resolution clause in this case provided that: "37.2. Any dispute between the Parties relating to or in connection with this Cooperation Agreement or a Statement of Works shall be referred:
   37.2.1. first, to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion; and (if the matter remains unresolved);
   37.2.2. second, to a committee consisting of Datamat's designee and Lufthansa Systems' Director Customer Relations; and (if the matter remains unresolved);
   37.2.3. third, to a committee consisting of Datamat's designee and Lufthansa Systems' Managing Director for resolution by them, and (if the matter remains unresolved);
   37.2.4 fourth, the dispute may be referred to arbitration as specified in Clause 36.3 hereto."
6. [2015] SGHC 295
7. The clause provided that "Save for the matters set out in [the following] paragraph [concerning disputes over the quality of materials or workmanship], all disputes arising in connection with this contract including but not limited to the validity, the interpretation or the execution of this contract shall be settled amicably by negotiation. In case no settlement can be reached the parties hereto agree to submit all such disputes to the Governing Jurisdiction of the Courts Batam [sic] in Batam."
8. [35] of the judgment of *PT Selecta Bestama v. Sin Huat Huat Marine Transportation Pte Ltd* [2015] SGHC 295
9. [2018] 5 SLR 871
10. Cap. 143A
11. Cap.10
12. [53] of the Tanglin Club Case
13. [2009] 3 SLR(R) 396
14. [31] of the judgment. The Court of Appeal did qualify this observation by also stating that the arbitration must be carried out without prejudice to the rights of either party and so long as giving effect to the parties' intention to arbitrate their disputes does not result in an arbitration "that is not within the contemplation of either party".

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